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CONNECTICUT REPORTS

Vol. 330

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

CARVAUGHN JOHNSON *v.* COMMISSIONER OF CORRECTION (SC 19856)

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

Syllabus

The petitioner, who had been convicted of murder and carrying a pistol without a permit, sought a writ of habeas corpus, claiming, inter alia, that his criminal trial counsel, S and B, had rendered ineffective assistance. The petitioner's first criminal trial resulted in a mistrial when the jury was unable to reach a verdict. At that trial, a witness, F, testified that he had been with the victim on the night of the murder. F also testified consistent with a statement he had made to the police that, on the night of the murder, he heard a gunshot and then saw the petitioner running from the crime scene while carrying a gun. At the petitioner's second criminal trial, after which the petitioner was convicted, F recanted his statement to the police and his testimony at the first trial, and his prior inconsistent statements from the first trial were admitted into evidence. In the habeas court, the petitioner claimed that S and B were ineffective insofar as they failed to present an alibi defense through the testimony of the petitioner's sister, J, and the petitioner's friend, A, which allegedly would have shown that the petitioner was at home with J and her children and was speaking with A on the telephone at the time of the murder. The petitioner also claimed that S and B were ineffective insofar as they failed to present a third-party culpability defense through the testimony of H, whom the petitioner claimed would have testified that he had seen F with a gun that was similar to the murder weapon a few days before the murder. The habeas court granted the habeas petition, concluding that the failure of S and B to present both defenses was deficient and that the petitioner was prejudiced by such deficient performance. The habeas court determined that it was not reasonable trial strategy for S and B not to have presented the testimony of J and A, as they had testified credibly at the habeas trial as to the petitioner's whereabouts on the night of the shooting and their testimony would have been helpful to the petitioner's alibi that he was home at the time of the shooting. The habeas court also concluded that H's testimony was relevant and admissible as third-party culpability evidence and that it was reasonably likely that the trial court would have allowed H's testimony, even if H had invoked his privilege against self-incrimination. On the granting of certification, the respondent, the Commissioner of Correction, appealed to the Appellate Court, which reversed the judgment of the habeas court insofar as the habeas court concluded that S and B had rendered ineffective assistance as a result of their failure to present an alibi defense and a third-party culpability

defense, and remanded the case to the habeas court with direction to deny the habeas petition with respect to those claims. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court incorrectly determined that the petitioner failed to preserve for review his claim that S and B rendered ineffective assistance by inadequately investigating J and A as alibi witnesses on the ground that the petitioner had framed his claim as a failure to present an alibi defense rather than one of inadequate investigation, and this court's review of that claim did not prejudice the respondent: both parties and the habeas court were aware that the petitioner's claim that S and B rendered ineffective assistance by failing to present an alibi defense included the claim that they allegedly had undertaken an inadequate investigation, as the petitioner's claim was premised on the argument that, if S and B had adequately investigated his alibi defense, they would have learned that their concerns about its weaknesses were unfounded and, thus, would have presented the testimony of J and A at the petitioner's criminal trial; moreover, both parties questioned S and B extensively at the habeas trial regarding their investigation into the alibi defense, the respondent did not object to the petitioner's argument that his claim of failure to present the alibi defense was premised on the failure of S and B to adequately investigate that defense, and there was no meaningful distinction between the failure to prepare and present, and the failure to investigate and present.
2. The Appellate Court correctly determined that it was reasonable trial strategy for S and B not to present J and A as alibi witnesses, and, accordingly, counsel did not perform deficiently: the alibi defense possibly would have been more harmful than helpful to the petitioner, as it could have distracted the jury from F's recantation, introduced issues of the petitioner's close proximity to the crime scene at the time of the murder and his consciousness of guilt, and failed to account definitively for the petitioner's whereabouts at the time of the murder; moreover, it was reasonable for S and B to be concerned that the jury might have questioned whether J was distracted by the television or by her children on the night of the murder, as her testimony did not account for the fact that the petitioner was not in her line of sight at the time of the murder, and the imprecision in the timing of the murder and the telephone calls between the petitioner and A left open the possibility that the jury might infer that the petitioner committed the murder and also participated in the telephone calls, especially in view of the close proximity of the petitioner's house to the crime scene; furthermore, the decision of S and B to cease investigating J's testimony after determining that it could be more harmful than helpful was reasonable, and new information regarding the timing of the murder that S and B learned of by the time of the second trial called into question the strength of A's alibi testimony.
3. The petitioner could not prevail on his claim that S and B provided ineffective assistance of counsel by failing to present a third-party culpability defense through H's testimony: S and B did not perform deficiently in failing to present such a defense, as H's testimony failed to establish

a sufficient nexus between F and the murder because H never definitively testified that the gun he saw F possess was the same make as the murder weapon, there was no clear evidence that F possessed a gun or was at the crime scene at the time of the murder, and the record was devoid of any statements by F, the victim, or any other witness that would implicate F as the shooter, and, even if H's testimony created some direct link between F and the murder, that nexus was sufficiently weak so as to justify the strategic decision by S and B not to offer H's testimony on the ground that it would distract the jury from the weakness of the state's case and F's recantation; moreover, the petitioner did not demonstrate that H would have been unable to successfully invoke his fifth amendment privilege against self-incrimination, as other pending, unrelated charges against him involved guns, and there was a possibility that his testimony that he had attempted to steal a gun, previously possessed a gun, and recognized F's gun might have resulted in an injurious disclosure, and, because the petitioner could not establish that H's invocation of his privilege against self-incrimination would have been rejected, the petitioner could not prove that the failure of S and B to present the third-party culpability defense through H's testimony would have been prejudicial.

Argued September 12, 2018—officially released January 8, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment granting the petition in part, from which the respondent, on the granting of certification, appealed to the Appellate Court, *Beach*, *Keller* and *Mullins*, *Js.*, which reversed in part the judgment of the habeas court and remanded the case with direction to deny the habeas petition in part, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Damon A. R. Kirschbaum, with whom were *Vishal K. Garg* and, on the brief, *Desmond M. Ryan*, for the appellant (petitioner).

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Adrienne Russo*, deputy assistant state's attorney, for the appellee (respondent).

Opinion

D'AURIA, J. The petitioner, Carvaughn Johnson, appeals, upon our grant of certification, from the judgment of the Appellate Court reversing in part the judgment of the habeas court, which granted in part his petition for a writ of habeas corpus on the ground that his defense counsel had provided ineffective assistance by failing (1) to adequately prepare and present an alibi defense, and (2) to present a third-party culpability defense. The Appellate Court agreed with the respondent, the Commissioner of Correction, that it was reasonable trial strategy not to present an alibi defense, that the petitioner's claim of inadequate investigation of the alibi defense was unpreserved, and that the petitioner was not prejudiced by counsel's failure to present a third-party culpability defense. Because we hold that it was not deficient performance for defense counsel not to present the alibi defense and that it was not deficient performance or prejudicial for defense counsel not to present the third-party culpability defense, we affirm the judgment of the Appellate Court.

I

A

The jury in the underlying criminal case reasonably could have found the following facts, as set forth in this court's decision in *State* v. *Johnson*, 288 Conn. 236, 951 A.2d 1257 (2008), which affirmed the trial court's judgment of conviction on direct appeal: "The [petitioner] shot and killed the sixteen year old victim, Markeith Strong, on the evening of October 10, 2001, in New Haven. In the weeks prior to that evening, the [petitioner] and the victim had been at odds with each other. Approximately three weeks prior to the shooting, the victim's teenage sister, L'Kaya Ford [L'Kaya], was sitting with the victim at the corner of Read and Shepard Streets when she observed the [petitioner] approach.

The [petitioner] walked toward [L'Kaya] and the victim, called the victim 'a punk,' and threatened to assault him. The victim said nothing, and the [petitioner] walked away.

"The victim next encountered the [petitioner] in the late afternoon of September 29, 2001, and the two engaged in a dispute over a bicycle. The victim and Ralph Ford [Ford] were around the intersection of Read and Shepard Streets, where the victim either was riding his bicycle or standing near it, when the [petitioner] stopped him, declared that the bicycle belonged to him and demanded that the victim give it to him. The victim refused and informed the [petitioner] that he had found the bicycle about one month earlier and had fixed it up. The victim told the [petitioner] that he owned the bicycle. The [petitioner] asked for the bicycle a second time, and, when the victim refused, the [petitioner] said, '[d]on't make me do something to you.' The [petitioner] then punched the left side of the victim's head twice, which caused a small cut near the victim's left ear. During this encounter, the [petitioner] may have been carrying a gun. The [petitioner] then took the bicycle and rode away.

"After this encounter, the victim, accompanied by [Ford], returned home, where his family contacted the New Haven police to report the incident. After speaking with the victim, the police officers radioed a description of the [petitioner] and notice of a possible robbery and larceny. The police did not apprehend any suspect that day. Over the next few days, the [petitioner] approached the victim and [L'Kaya] about the police report, asserted that he was not going to jail, apologized to the victim and told him not to press charges. Toward the end of September, the [petitioner] also expressed concern to his friend, Tashana Milton Toles, about the possible criminal charges that he faced as a result of the bicycle

incident and specifically remarked to her that he thought he might be going back to jail.

"On the morning of October 10, the [petitioner] approached [L'Kaya] while she was waiting for a bus. The [petitioner], who was driving a black car that [L'Kaya] described as an Acura or Ford Probe, pulled the car alongside of her and accused her of being a snitch. The [petitioner] insulted her, told her he did not like snitches and that she knew what happened to 'snitches in the hood.' That night, the victim, [L'Kaya], [Ford], and other friends gathered on the corner of Read and Shepard Streets to celebrate [L'Kaya's] birthday. Some of the group, but not [Ford] or the victim, were drinking alcohol and smoking marijuana. Around 10 p.m., the victim and [Ford] departed together. The neighborhood around Read, Shepard, Huntington and Newhall Streets affords many shortcuts through the yards of houses that are occupied by neighborhood residents. On that night, however, [Ford] did not take his usual shortcut but parted from the victim, who took the shortcut home.[1] [Ford] then continued walking alone on Read Street and proceeded around the corner to his house on Newhall Street. Upon arriving at his house, [Ford] heard a gunshot coming from the backyard of the house across the street. [Ford] then entered his front hallway. [Ford] heard someone running from the yard across the street and saw the [petitioner] run into the driveway leading to Ford's house. [Ford] saw the [petitioner] carrying a semiautomatic handgun and entering a black Acura as it exited the driveway. James

[1] The jury reasonably could have found these facts regarding Ford's actions on the basis of his testimony from the petitioner's first trial, which culminated in a hung jury and a mistrial. At the second trial, Ford recanted and testified that he never saw the petitioner on the night of the shooting but felt pressured by the police to implicate the petitioner. Ford's testimony from the first trial was read into the record at the second trial pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

Baker, who lived near the crime scene, heard someone run past his window, jump the fence outside his house and head into the backyard, toward Huntington Street. Approximately five minutes later, and around 10:20 p.m., Baker heard a single gunshot coming from behind his house. LaMont Wilson, who had left the group earlier than [Ford] and the victim, lived on Read Street and also heard a gunshot from the direction of his backyard, sometime between 10 and 10:45 p.m. Baker called the police at approximately 10:45 p.m. to report the gunshot but did not initially identify himself because he feared retaliation from 'certain individuals' for contacting the police. Joanie Joyner, a resident of Huntington Street and the victim's next-door neighbor, also heard a loud 'boom' from the direction of her backyard and then, sometime after 11 p.m., saw something in her yard. At approximately 11:25 p.m., she also called the police.

"The [petitioner] contacted Toles by telephone between 9:45 and 10 p.m., told her that he was about five minutes away from her dormitory at Southern Connecticut State University, and asked if he could visit her. Toles agreed. The [petitioner] did not arrive at the dormitory until 11 p.m., at which time he phoned Toles from the lobby, and she came down to the lobby to register him as a visitor at the security desk. The [petitioner] was with a friend, Travis Scott. To enter the dormitory, the [petitioner] was required to provide identification at the security desk where security personnel record the information. The sign-in sheet at Toles' dormitory indicated that she signed the [petitioner] into her building at 11:10 p.m. Shortly after they signed in, a fire alarm required all residents and visitors to evacuate the building. The alarm occurred at approximately 11:30 p.m., and the fire department and university police responded to the scene. The [petitioner] and Scott waited with Toles and her roommate until the university permitted students to reenter the building. They

retrieved their identification from the security desk and departed. During the investigation, Detective Daryl Breland of the New Haven [P]olice [D]epartment drove from [Ford's] house to Toles' dormitory, recorded the distance to be about three miles and noted that the trip took approximately ten minutes.

"Officers Mark Taylor and Brian Pazsak of the New Haven [P]olice D]epartment were on patrol in the Newhall and Huntington Street area on the night of October 10, 2001, and received the dispatch related to Baker's and Joyner's calls. Police responded first to Baker's call and investigated the general area, but saw nothing amiss. After responding to Joyner's call around 11:35 p.m., the officers found the victim lying face down in Joyner's backyard. The victim appeared to be unconscious and bleeding from the mouth. The officers also found a spent nine millimeter shell casing nearby. New Haven [F]ire [D]epartment personnel were called but were unable to resuscitate the victim, who was pronounced dead at the Hospital of Saint Raphael in New Haven.

"Arkady Katsnelson of the [C]hief [M]edical [E]xaminer's [O]ffice performed an autopsy of the victim on October 11, 2001, and determined that he had died of a single gunshot wound to the right side of his face. Katsnelson concluded that the bullet penetrated the victim's face and neck, and completely severed the spinal cord, instantly incapacitating the victim. The [petitioner] was charged with the victim's murder and related crimes . . . and subsequently was tried. After seven days of deliberations, the jury in the [petitioner's] first trial was unable to reach a verdict. Therefore, the trial court, *Licari*, *J.*, declared a mistrial pursuant to Practice Book § 42-45." (Footnote added and footnotes omitted.) Id., 239–44.

After a second trial, the petitioner was convicted of murder in violation of General Statutes § 53a-54a (a)

and carrying a pistol without a permit in violation of General Statutes § 29-35. The petitioner was sentenced to a total effective term of imprisonment of forty-three years. This court affirmed the judgment of conviction. Id., 290.

B

Thereafter, the petitioner brought an amended petition for a writ of habeas corpus, claiming that his defense counsel, Scott Jones and Beth Merkin, had provided ineffective assistance and had an actual conflict of interest. Only the ineffective assistance of counsel claim is relevant to the present appeal. Regarding the ineffective assistance of counsel claim, the petitioner alleged that defense counsel failed (1) to present an alibi defense through the testimony of his sister, Joyce Johnson (Joyce), and his friend, Taylor Allen, and (2) to present a third-party culpability defense through the testimony of William Holly.

With respect to the alibi defense, the petitioner claimed that defense counsel had performed deficiently by failing to adequately prepare and present the testimony of Joyce and Allen. According to the petitioner, if defense counsel had properly investigated his alibi, they would have realized that he was home with Joyce and speaking on the telephone with Allen via his landline at the time of the murder. With respect to the third-party culpability defense, the petitioner claimed that defense counsel had performed deficiently by failing to present the testimony of Holly, who would have testified that a few days before the murder, he saw Ford with a gun that was similar to the murder weapon.

After a five day trial, the habeas court ruled in favor of the petitioner with respect to both ineffective assistance of counsel claims but rejected his conflict of interest claim. In its memorandum of decision, the habeas court set forth the following additional facts:

"In the petitioner's first criminal trial, the court declared a mistrial due to a hung jury. The state presented testimony at the first criminal trial from an eyewitness, [Ford], who testified consistent with his statements to the police that he heard a gunshot and saw the petitioner run out of the backyard across the street carrying a black gun in his hand. At the first trial, trial counsel presented a partial alibi defense with testimony indicating that the petitioner was at Southern Connecticut State University around 11 p.m. on the night of the murder. [The defense] did not explain the petitioner's whereabouts between 10 and 11 p.m. After the first trial resulted in a hung jury, a juror indicated that it would have been helpful for the jury to know where the petitioner was at the time of the shooting [which occurred] prior to 11 p.m.

"At the petitioner's second criminal trial, the state's key witness, Ford, recanted his prior statement and testimony that he had seen the petitioner running from the crime scene with a gun. Instead, Ford testified that the police forced him to make those statements. Ford's prior inconsistent statements at the first criminal trial were admitted for substantive purposes in the second criminal trial pursuant to [the doctrine set forth in *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986)].

"At the second trial, trial counsel's defense strategy was that the state failed to prove the petitioner's guilt beyond a reasonable doubt, that Ford was not credible, and that it was Ford [who] had accidentally shot the victim, who was Ford's friend. The petitioner's trial attorneys disagreed over whether to present an alibi, including the petitioner's whereabouts between 10 and 11 p.m. or a third-party culpability defense; Attorney Jones wanted to present both defenses and Attorney Merkin did not. Attorney Merkin prevailed, and trial counsel did not present either defense at the second trial." (Footnote omitted.)

Regarding the alibi defense, the habeas court stated: "The petitioner's trial counsel were aware of the two alibi witnesses, Allen and [Joyce], who could testify as to [the] petitioner's whereabouts between 10 and 11 p.m. on the evening of the shooting, but disagreed as to whether . . . an alibi defense should be presented. They were also aware that the jury in the first trial wanted to know where the petitioner was between 10 to 11 p.m."

The habeas court specifically found that "[Joyce] and Allen testified credibly at the habeas trial as to the petitioner's whereabouts on the night of the shooting. [Joyce] testified that the petitioner was home between 5 p.m. and 11 p.m. on the night of the shooting. During that time, [Joyce] was home with her young son and was, for the most part, in the living room in the front of the apartment watching television. From her position, she would have been able to see if the petitioner had left the house during that time. At some point, [Joyce] was aware that the petitioner and his friend were at the house and ordered a pizza. The living room had two large windows facing the driveway, and any movement outside would have activated the motion sensor lights in the driveway. If the petitioner had left through the back door, [Joyce] would have heard him because that door screeched loudly when [it was] opened. At approximately 11 p.m., [Joyce] heard a horn honk outside, and she saw the petitioner leave the house with Allen."

The habeas court also found that "Allen, who also testified at the habeas trial credibly, called the petitioner's cell phone at 10:20 p.m., and he asked her to call his home telephone number. Allen immediately hung up and called the petitioner at home on his landline. Allen and the petitioner spoke for approximately ten to fifteen minutes on the petitioner's home phone. The petitioner then called Allen again from his home tele-

phone around 10:40 p.m. or 10:45 p.m. Shortly thereafter, Allen drove to the petitioner's home, picked him up at approximately 10:50 p.m. or 10:55 p.m. and drove him to Southern Connecticut State University."

The habeas court also found "that trial counsel [were] aware of the statements of [Joyce] and Allen, that their testimony was credible and that production of such testimony at trial would have been helpful to the defense." Specifically, it found that "trial counsel's decision to not call the alibi witnesses was not based on the witnesses' credibility. Both Attorney Jones and Attorney Merkin found [Joyce] and Allen to be credible witnesses. Moreover, the court finds that their testimony would have been helpful to the petitioner's defense that he was home at the time of the shooting.

"Attorney Merkin decided to not present [Joyce's] testimony because she was related to the petitioner, the shooting occurred in close proximity to the petitioner's home and it was unclear whether the petitioner was in her direct vision for the entire evening. Attorney Merkin did not present Allen's testimony because she believed that Allen estimated the times of the phone calls, and the petitioner's close proximity to the crime scene would have allowed him to commit the murder despite receiving and making the phone calls at the times indicated by Allen. Trial counsel acknowledged at the habeas trial, however, that they failed to investigate [Joyce's] ability to provide an alibi at the times when the petitioner was not in her direct view.

"[Joyce] testified that the motion sensor lights and the screeching back door would have prevented the petitioner from leaving the house without [Joyce's] knowledge. Moreover, the times of the phone calls between Allen and the petitioner were seen on Allen's caller identification. That evidence, if presented, would have established that the petitioner was at home using

his landline at the time the shooting occurred. Further, while Attorney Merkin was concerned that the alibi defense would place the petitioner in close proximity to the crime scene, there was already evidence before the jury that the petitioner was at Southern Connecticut State University, close to the crime scene, shortly before 11 p.m. on the night of the victim's murder. In addition, the evidence from the three alibi witnesses covered the time period between 10 and 11 p.m., making it highly unlikely that the petitioner could have committed the shooting."

The habeas court was "particularly influenced by the fact that when trial counsel decided not to submit the petitioner's alibi, they were aware that the first jury was conflicted about the petitioner's guilt, which resulted in a hung jury, and [counsel] knew that the first jury wanted to know where the petitioner was at the time the shooting occurred. While each jury is different, having this information in the petitioner's second criminal trial was a significant bonus to the defense and should have been utilized in determining whether to pursue the alibi defense."

Because the habeas court found Joyce and Allen credible and that their testimony would have been helpful to the alibi defense, the habeas court concluded that it was not reasonable trial strategy for defense counsel not to present their testimony, and, thus, defense counsel performed deficiently. Additionally, the habeas court found that the petitioner was prejudiced by defense counsel's deficient performance.

Regarding the third-party culpability defense, the habeas court stated in relevant part: "At the second criminal trial, the state established that the bullet recovered from the victim was from a Hi-Point nine millimeter pistol or semiautomatic rifle. At the habeas trial, the petitioner established that Ford showed Holly a black

handgun that Ford had tucked into the waistband of his pants on the afternoon of the shooting. Holly believed that a photograph [he was shown, which had been admitted into evidence], of the Hi-Point nine millimeter pistol used in the shooting looked like the gun that he saw Ford carrying. The murder weapon and Ford's gun both had ridges above the handle, and ridges were not a common feature on the guns that Holly had seen.

"The petitioner's trial attorneys disagreed as to whether the third-party culpability defense should be presented to the jury. Attorney Jones believed that Holly's testimony should have been presented and Attorney Merkin did not, even though she admitted that Holly's testimony was consistent with the defense theory of the case, which was that Ford accidentally shot the victim.[2] The court finds the third-party culpability defense consisting of the facts that (1) Ford had been the last person seen with the victim, (2) was in close proximity to the location of the shooting at the time of the shooting, and (3) had been seen with a gun matching the description of the murder weapon on the day of the shooting, were consistent with and relevant to the defense theory that it was Ford who shot the victim by accident.

"Both Attorney Jones and Attorney Merkin thought that they would not be able to present Holly's testimony without Ford first admitting that he knew Holly. Trial

[2] At the habeas trial, Attorney Merkin testified that the theory of defense was that "there was not enough evidence in a single eyewitness [identification] case to convict [the petitioner] " and that the strategy for presenting this defense was "[t]o discredit . . . [Ford] as best we could and kind of make a claim that—with very weak credibility, that the jury shouldn't find that [the petitioner] was the person who committed this crime." As to Ford, specifically, part of defense counsel's theory, Merkin testified, "was that [Ford] wasn't in a location where he could see what he claimed to have seen. Part of it was that he was very coercively, in our view, interrogated . . . . And part of it was that we had some suspicion or belief that he was actually involved himself, whether accidentally or otherwise killing his friend."

counsel believed, incorrectly, that they needed, and did not have, a foundation to introduce third-party culpability evidence—that is, the testimony of Holly—once [Ford] denied knowing Holly while on the witness stand at the petitioner's criminal trial. At the habeas trial, Attorney Merkin conceded that the presentation of Holly's testimony was not contingent upon Ford admitting that he knew Holly." (Footnote added.)

The habeas court went on to state that "[t]he standard for determining whether evidence of third-party culpability is admissible is whether the presented evidence is relevant. Here, it was. Holly's testimony regarding Ford's possession of the same type of gun that was used to kill the victim on the day of the shooting, as well as other facts pointing to Ford as the shooter, would have established the necessary factual nexus for a third-party culpability claim regardless of whether Ford knew Holly. The court finds that it is reasonably likely that the trial court would have allowed Holly's testimony."

Regarding the argument that Holly might have invoked his fifth amendment privilege against self-incrimination and not testified at the petitioner's criminal trial, the habeas court found that Holly's appointed counsel at the time, Attorney Thomas Farver, "had communicated to the [trial] court on Holly's behalf that Holly would assert his fifth amendment privilege and refuse to testify if he was called [as a witness due to pending charges of robbery as well as other charges against him, and an unrelated murder investigation]. However, both Attorney Farver and Attorney Merkin testified that they were uncertain that Holly would have been permitted to invoke his fifth amendment privilege at the petitioner's criminal trial due to the fact that Holly's pending charges were unrelated to the petitioner's case. . . .

"In the present case, Holly's pending charges were unrelated to the petitioner's case, and there is no indica-

tion that Holly's testimony that he saw Ford with a gun on the day of the shooting would have exposed him to any criminal prosecution in the petitioner's or any other case. Fear of potential prosecutorial retaliation in an unrelated case does not constitute sufficient grounds to invoke the fifth amendment, as it is a mere subjective belief, not a reality, and the actual testimony would not have been incriminating in any way. Therefore, the court finds that it is not reasonably likely that Holly would have been permitted to invoke his privilege against self-incrimination in the petitioner's criminal case had trial counsel proffered him as a defense witness to support the third-party culpability defense." (Citations omitted.)

The habeas court determined that because Holly's testimony was relevant, and, thus, admissible as third-party culpability evidence, and not privileged under the fifth amendment, defense counsel were deficient for failing to present a third-party culpability defense. The habeas court further found that the petitioner was prejudiced by defense counsel's actions. Accordingly, the habeas court granted the petitioner's habeas petition with respect to the ineffective assistance of counsel claims.

C

The respondent appealed to the Appellate Court. See *Johnson* v. *Commissioner of Correction*, 166 Conn. App. 95, 140 A.3d 1087 (2016). The Appellate Court reversed the habeas court's judgment in part.[3] As to the alibi defense, the Appellate Court determined that it was a reasonable, strategic decision not to present an alibi defense, despite the witnesses' credibility, in light of defense counsel's strategy of focusing on the weaknesses in the state's case instead of muddying the waters

[3] The petitioner has not challenged the habeas court's rejection of his conflict of interest claim on appeal.

with an alibi defense that raised "many reasonable concerns . . . ." Id., 141. Such concerns included placing the petitioner in very close proximity to the shooting at or near the time of the shooting and allowing the state to argue consciousness of guilt on the basis of the petitioner's having fled from the area of the crime to Southern Connecticut State University. Id., 137 n.16, 142.

As to the third-party culpability defense, the Appellate Court assumed without deciding that defense counsel's performance was deficient. Id., 117. However, the Appellate Court determined that the petitioner was not prejudiced by defense counsel's deficient performance because it was speculative as to whether any portion of Holly's testimony would have been admissible as third-party culpability evidence; id., 128; and because the petitioner had failed to establish that Holly would not have been entitled to invoke his fifth amendment right against self-incrimination. Id., 126. The Appellate Court determined that it was speculative as to whether the trial court would have viewed the third-party culpability evidence as having proved a direct connection between Ford and the murder. Id., 129–30. Specifically, the Appellate Court reasoned that there was no evidence that Ford was armed with the murder weapon at the scene of the crime at the time of the shooting. Id. Regarding Holly's fifth amendment privilege, the Appellate Court determined that there was insufficient evidence in the record to establish that it was perfectly clear that Holly was not entitled to invoke his fifth amendment privilege. Id., 122, 126.

Accordingly, the Appellate Court reversed the judgment of the habeas court with respect to the petitioner's ineffective assistance of counsel claims and remanded the case to the habeas court with direction to deny the petition for a writ of habeas corpus as to those claims. Id., 142. We granted certification as to whether (1) the

petitioner's claim that defense counsel performed deficiently by failing to adequately investigate the alibi witnesses was reviewable, (2) defense counsel's failure to present an alibi defense constituted deficient performance, and (3) the petitioner was prejudiced by defense counsel's failure to present a third-party culpability defense. See *Johnson* v. *Commissioner of Correction*, 324 Conn. 904, 152 A.3d 545 (2017).

II

The petitioner claims that the Appellate Court improperly rejected the habeas court's conclusion that defense counsel provided ineffective assistance of counsel. First, the petitioner claims that the Appellate Court improperly held that defense counsel's failure to present alibi witnesses was reasonable trial strategy. Second, he claims that the Appellate Court improperly held that he was not prejudiced by defense counsel's failure to present evidence of third-party culpability.

"In reviewing these claims, we are mindful that [t]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 666–67, 159 A.3d 1112 (2017).

"To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was

not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against a petitioner on either ground." (Citations omitted; internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, supra, 325 Conn. 668–69.

Because both of the petitioner's claims involve whether defense counsel performed deficiently by failing to present the testimony of certain witnesses, we note that the deficient performance prong of *Strickland* is based on what an objectively reasonable attorney would do under the circumstances: "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. . . . In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (Citations omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 688; accord *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 79–80, 967 A.2d 41 (2009); *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 512–13, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that

counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . ." (Citation omitted; internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632, 126 A.3d 558 (2015).

When faced with the question of whether counsel performed deficiently by failing to call a certain witness, the question is whether "this omission was objectively reasonable because there was a strategic reason not to offer such . . . testimony . . . [and] whether reasonable counsel could have concluded that the benefit of presenting [the witness' testimony] . . . was outweighed by any damaging effect" it might have. (Citation omitted.) Id., 633–34.

A

The petitioner's first claim is that, as the habeas court determined, defense counsel acted deficiently by failing to investigate and present alibi witnesses. Specifically, he argues that defense counsel based their decision not to call alibi witnesses on their erroneous belief that the petitioner's alibi defense was weak. The petitioner contends that if defense counsel had fully investigated the alibi witnesses' potential testimony, they would have realized that their concerns were misplaced, especially in light of the habeas court's finding that the alibi witnesses were credible.

The respondent counters that defense counsel made a reasonable, strategic decision that was based on a myriad of concerns, regardless of the alibi witnesses' credibility. The respondent's principal contention is that the Appellate Court properly concluded that it was a reasonable tactical decision not to distract the jury from Ford's recantation by muddying the waters with an alibi defense that was not airtight and was possibly more harmful than helpful. We agree with the respondent and the Appellate Court.

1

As an initial matter, we must address the reviewability of the inadequate investigation portion of the petitioner's claim. The Appellate Court held that the petitioner's claim of inadequate investigation of the alibi witnesses was not properly preserved because he framed his claim as a failure to " 'present' " alibi witnesses, not as a failure to investigate. *Johnson* v. *Commissioner of Correction*, supra, 166 Conn. App. 132 n.14. We disagree with the Appellate Court.

The Appellate Court is correct that we review only claims that were distinctly raised before the habeas court. See, e.g., *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 597–98, 188 A.3d 702 (2018). We conclude that the petitioner did distinctly raise before the habeas court his claim that defense counsel failed to "properly prepare and present" his alibi defense. Although, in his amended petition for a writ of habeas corpus, the petitioner phrased his claim as a failure to "present" the testimony of Joyce and Allen, it is sufficiently clear from the record that, throughout the habeas proceedings, the petitioner proceeded on a general theory that if defense counsel had adequately investigated his alibi defense, they would have learned that their concerns about its weaknesses were unfounded and, thus, would have presented the alibi witnesses'

testimony at trial. See *Broadnax* v. *New Haven*, 270 Conn. 133, 173–74, 851 A.2d 1113 (2004) ("[t]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties" [internal quotation marks omitted]).

Both parties questioned defense counsel extensively at the habeas trial regarding their investigation into the alibi defense. The respondent never objected to the petitioner's argument that his claim of failure to present the alibi defense was premised on defense counsel's failure to adequately investigate the defense. The petitioner's posttrial brief framed his claim as a failure "to properly prepare and present [his] alibi defense . . . ." He specifically argued in his posttrial brief that defense counsel's failure to sufficiently investigate his alibi defense led to their failure to present alibi witnesses. In response, the respondent in [his] posttrial brief argued that defense counsel's actions constituted reasonable trial strategy, notwithstanding the failure to investigate Joyce more thoroughly.

We see no meaningful distinction between the phrases "failure to prepare and present" and "failure to investigate and present" that renders the investigation portion of this claim unpreserved. "Preparation" necessarily includes "investigation." See *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 34, 188 A.3d 1 (2018) ("[p]retrial investigation, principally because it provides a basis [on] which most of the defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation" [internal quotation marks omitted]); *State* v. *Komisarjevsky*, 302 Conn. 162, 177–78, 25 A.3d 613 (2011) ("[t]he right to prepare a defense for its presentation at trial is an integral part of a fair trial, and includes investigation of material facts and access to potential witnesses").

Moreover, we note that underlying a claim of failure to present a witness are the issues of whether defense counsel conducted a reasonable investigation and had an adequate explanation for deciding not to call that witness. See *State* v. *Talton*, 197 Conn. 280, 297, 497 A.2d 35 (1985) (defense counsel will be deemed ineffective only if they know about a witness, and "without a reasonable investigation and without adequate explanation, failed to call the witness at trial"). In the present case, the record establishes that the petitioner's claim of inadequate presentation was inextricably linked to his related claim of inadequate preparation. In other words, the petitioner's claim was premised on the argument that, if defense counsel had adequately investigated his alibi defense, they would have learned that their concerns regarding its weaknesses were unfounded and, thus, would have presented the alibi witnesses' testimony at trial.

Finally, as reflected in its memorandum of decision, the habeas court understood the petitioner's claim as a "[f]ailure to prepare and present [an] alibi defense." In reciting the relevant law on this issue, the habeas court specifically stated that "[d]efense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation and without adequate explanation, failed to call the witness at trial." (Internal quotation marks omitted.) The habeas court found that defense counsel had "failed to investigate [Joyce's] ability to provide an alibi at the times when the petitioner was not in her direct view."

It is clear to us that the habeas court considered defense counsel's investigation of Joyce in reaching its determination that her testimony would have provided an alibi and should have been presented to the jury. Thus, all parties and the habeas court were aware that

the petitioner's claim of failure to present the alibi defense included his claim that defense counsel had allegedly undertaken an inadequate investigation. Therefore, our review of this claim would not prejudice the respondent. We find that the petitioner adequately preserved his claim that defense counsel performed deficiently by failing to adequately prepare and present his alibi defense.

2

The following additional facts are necessary to our determination of this claim. At the habeas trial, Joyce testified that the petitioner was home with her from approximately 5 to 11 p.m. on the night of the shooting. She further testified that the petitioner had a female guest named Camia at the house from between approximately 6 to 8 p.m. and that he stayed home after she left. Joyce testified that during the critical time between 10 and 11 p.m., when the murder occurred, the petitioner was home, "walking around the house" "back and forth [in between] rooms [and] talking on the phone," but that he was "mainly in his room." During this time, she was in the living room playing with her children and watching television. She admitted, however, that the petitioner was not consistently within her line of sight. She testified that the petitioner left the house at about 11 p.m. and that he did not leave the house at any other time between 5 and 10:45 p.m. because either she would have seen him leave through the front door, or, if he had left through the back door, she would have seen the sensor light located in the driveway go on or would have heard the back door screech. Joyce testified that she never gave a sworn statement to the police but did convey all of this information to defense counsel's investigator, Matthew Whalen, prior to the second trial.

Joyce's testimony was not offered at the criminal trial because defense counsel elected not to present an alibi

defense. Attorney Jones testified that he and Attorney Merkin disagreed about this decision. Attorney Jones testified that he wanted to present the alibi defense but Attorney Merkin did not.[4] In the end, defense counsel testified that after hearing Ford recant during the state's case-in-chief, Attorney Jones yielded to Attorney Merkin's decision not to present the alibi defense on the ground that it was cleaner to have "the jury just focused on whether or not the state met its burden of proof through Ralph Ford," in light of the fact that he was the sole eyewitness and had recanted on the witness stand at the second trial. Defense counsel were concerned that the alibi defense would "[pull] attention away from [the recantation and] the weaknesses in the state's case and . . . [place the] jurors' focus on the weaknesses in the alibi."

Attorney Merkin testified that Joyce's testimony was weak on the basis of various concerns she had: "[O]ne, that she's a family member; two, that this [the alibi] happened a block away from the shooting; number three, that he was getting a ride and leaving the area at 10:45 [p.m., creating possible consciousness of guilt evidence on the basis of flight]. I didn't like that because the jurors could infer that he had maybe done the shooting and was taking off. Plus, I thought that we had done a very good job in [the] second trial of attacking Ralph Ford."[5] An additional concern, according to Attorney

[4] Attorney Merkin testified that she generally preferred not to present an alibi defense unless it was airtight: "My belief about alibis is that unless they are solid, they can get you into trouble. It's the last thing the jury hears if you have a good prosecutor who's a good cross-examiner and can try to kind of attack either a family member who's an alibi witness or some other vulnerability to the alibi. To me, it pulls attention away from the weaknesses in the state's case, and it kind of develops jurors' focus on the weaknesses in the alibi. So, it's just been my practice to shy away from alibis unless they're solid, and I had some concerns about the alibi in this case."

[5] Although Attorney Merkin testified that the petitioner's house was one block away from the crime scene and Attorney Jones testified that it was a few blocks away, the evidence offered at the criminal trial established that the petitioner's house was approximately two blocks from the crime scene.

Merkin, was that Joyce did not come forward and give a statement to the police.[6] Attorney Merkin also testified that when the defense team initially spoke with Joyce, she was not as clear and certain about the times when the petitioner was home,[7] or about whether the petitioner was within her range of vision or in the house the entire night until 10:45 p.m. Attorney Merkin related that she was concerned that, on cross-examination, the prosecutor could get Joyce to admit that her attention had wandered to the television or that she had gone into another room for a few minutes, allowing for the inference that the petitioner could have left without her knowledge.

Although Attorney Jones admitted that he was "pretty confident" that he and Attorney Merkin never asked Joyce *how* she knew the petitioner was in the house even when she did not see him, he nevertheless testified that if they had known about the sensor light and screeching door, "it wouldn't have necessarily made or broke the decision in this regard to present the alibi defense." He testified that there remained the concern that Joyce "could not unequivocally tell you that she was in the presence of [the petitioner] between 10:20 and even 10:45 p.m. . . . Not continuously . . . ." Additionally, although the jury knew that the petitioner's home was close to the crime scene, in the absence of the alibi testimony, there was no evidence in the record to suggest that the petitioner was home at the

[6] Detective Breland, who was in charge of the police investigation, testified at the habeas trial that Joyce did not provide him with information or give a sworn statement. Moreover, he testified that the petitioner did not tell him that Joyce had been home with him at the time of the murder. Rather, according to Detective Breland, the petitioner told him that he did not know who was home with him on the night of the murder.

[7] For example, Attorney Merkin testified that, initially, Joyce informed the defense team that the petitioner left the house sometime between 11 p.m. and 12 a.m. but then in a later interview stated that he left sometime between 10:45 and 11 p.m.

time of the murder,[8] and such evidence could have had the harmful effect of placing him in very close proximity to the crime scene at the time of the shooting.

As to Allen, she testified at the habeas trial that she had called the petitioner on his cellular phone between 10 and 10:20 p.m. on the night of the shooting. According to her, the petitioner answered her call and told her to call him back on his home phone. She testified that she called him back on his landline and that they spoke for approximately ten to fifteen minutes. Allen testified that they spoke about the petitioner lending her money to buy supplies for her baby. She further testified that he then called her from his landline at 10:35 p.m. and that they spoke for approximately five minutes. Her caller identification system recorded that the petitioner called her from his landline at 10:35 p.m., but it did not record the timing of the prior calls. Allen then picked the petitioner up with her vehicle at his home at approximately 10:50 p.m. and drove him to Southern Connecticut State University. Allen testified that she related this information to Investigator Whalen.

Investigator Whalen testified at the habeas trial that although Allen told the police that she first had called the petitioner on his landline at approximately 10:20 p.m. on the night of the shooting, she told him that she initially called him on his cell phone and then called him back on his landline between 10 and 10:15 p.m.

[8] The only evidence presented at the petitioner's criminal trial regarding his whereabouts on the night of the murder was the testimony of Toles that the petitioner had called her at about 9:45 p.m. from his cell phone, stating that he was in the area and wanted to stop by her dormitory room at Southern Connecticut State University. She further testified that the petitioner did not immediately show up but that he arrived at her dormitory room at about 11 p.m. Southern Connecticut State University is approximately three miles from the crime scene. Although this evidence placed the petitioner a few miles from the crime scene after the murder, there was no evidence that placed him within two blocks of the crime scene at or near the time of the murder, as Joyce's testimony would have done.

Moreover, Investigator Whalen testified that because the shooting occurred sometime between 10:20 and 10:30 p.m. and because Allen was uncertain as to the timing of the first two phone calls, there was "no definitive information from her that a phone call was taking place during the time that . . . the shots were fired . . . ."[9]

Attorney Jones testified that although he wanted to present the alibi defense, he was concerned that Allen's testimony would place the petitioner in close proximity to the shooting and that "the jury could find it plausible that he could slip out [of his home to commit the murder] in a relatively short time period." Attorney Merkin testified that, in addition to her general concerns about alibi defenses; see footnote 4 of this opinion; she was concerned that Allen was not certain enough about the timing and length of the first two phone calls. Allen's testimony regarding the length of the first call to the petitioner's landline was uncertain, fluctuating anywhere between five minutes, ten minutes, and twenty minutes. Attorney Merkin believed Allen to be "vulnerable to cross-examination. . . . How do you know how long you were talking, you know; are you sure it was 10:00? Was it 10:00? Was it 10:20? You say 10:00 or 10:20—you know, things like that that were shifting variables in her testimony, that concerned me." Like Attorney Jones, Attorney Merkin also testified that she was concerned about placing the petitioner in close proximity to the crime scene and informing the jury that, soon after the shooting, the petitioner fled from the area. Attorney Merkin testified that she did not want

[9] At the criminal trial, Joyner, who lived in the house outside of which the victim's body was found, testified that she heard a boom sound sometime between 10:25 and 10:30 p.m. Additionally, Baker, who lived in the neighborhood close to where the shooting occurred, testified at the criminal trial that he heard a person run past his window on the side of his house and into his backyard at about 10:15 p.m. and then heard a gunshot approximately five minutes later at about 10:20 p.m.

the issues of timing, proximity, and flight to distract the jury's attention "away from the questions about [Ford's] credibility."

In determining whether defense counsel failed to properly prepare and present Joyce's and Allen's alibi testimony, the following additional legal principles guide our analysis. Defense counsel will be deemed ineffective only if they knew of the existence of a witness and, "without a reasonable investigation and without adequate explanation, failed to call the witness at trial. The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it." *State* v. *Talton*, supra, 197 Conn. 297–98.

"[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, [including] . . . when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . ." *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 681–82, 51 A.3d 948 (2012); see *Morquecho* v. *Commissioner of Correction*, 164 Conn. App. 676, 685, 138 A.3d 424 (2016) ("we note that the petitioner's first criminal trial resulted in a hung jury, lending credence to [defense counsel's] decision not to present 'weak witnesses' who could tarnish the petitioner's defense during his second criminal trial").

Moreover, "we acknowledge that counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 683. "[T]he failure of defense counsel to call a potential defense witness does not constitute

ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." Id., 681. When the failure to call a witness implicates an alibi defense, an alibi witness' testimony has been found unhelpful and defense counsel's actions have been found reasonable when "the proffered witnesses would fail to account sufficiently for a defendant's location during the time or period in question . . . ." *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 546, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016); see also *Morquecho* v. *Commissioner of Correction*, supra, 164 Conn. App. 685 (decision not to call alibi witnesses was reasonable when "no witness could establish that the petitioner was at home during the critical time frame").

For example, in *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 533, the petitioner alleged that his defense counsel had performed deficiently by failing to present alibi witnesses at his criminal trial. The petitioner in *Spearman* had been charged with and convicted of arson for setting fire to a house located across the street from the house in which he was staying. Id., 534–35, 546. Alibi witnesses told defense counsel that the petitioner had been asleep in his room at the time the fire was set and started. Id., 548, 550–52. All of the alibi witnesses were believed to be credible by defense counsel. Id., 546. However, defense counsel was concerned that the alibi witnesses were vulnerable on cross-examination because they were all family members, they could not provide an airtight alibi, and they would place the petitioner in close proximity to the crime scene. Defense counsel in *Spearman* found the alibi to be weak because although the witnesses credibly stated that they believed the petitioner to be in his room asleep, the petitioner had not been in their line of sight during the relevant time period. Id., 548.

As a result, defense counsel decided not to offer an alibi defense at trial.

Both the habeas court and the Appellate Court in *Spearman* held defense counsel's decision to be reasonable trial strategy.[10] Id., 552, 561. Specifically, both courts determined that defense counsel "reasonably was concerned about offering the alibi testimony because none of these witnesses [was] able to provide an alibi for the petitioner before the fire, and it was not disputed that the petitioner's house was in close proximity to, and easily accessible by the petitioner from, the site of the arson. In particular, [defense counsel] testified that cross-examination might potentially have exposed the possibility that the petitioner [c]ould . . . have woken up and went out the back door and returned . . . . None of the proffered alibi testimony, even if believed, established that the petitioner was in bed . . . either sufficiently prior to, or at the precise moment, when the fire was started." (Internal quotation marks omitted.) Id., 562. The Appellate Court in *Spearman* found defense counsel's decision reasonable even though the state's case was relatively weak and rested primarily on the testimony of one eyewitness of questionable credibility.

In the present case, defense counsel testified to a variety of strategic reasons for their decision not to present an alibi defense. We are required to "indulge [the] strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Cullen* v. *Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). In fact, we are "required not simply to give [the] attorneys the benefit of the doubt

[10] The Appellate Court in *Spearman* held both that defense counsel's decision was reasonable trial strategy and that the petitioner was not prejudiced by defense counsel's decision. See *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 565.

. . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as they did . . . .'' (Citations omitted; internal quotation marks omitted.) Id.

In general, defense counsel were concerned that the alibi defense would distract the jury from Ford's recantation.[11] Defense counsel decided to focus the jury's attention on the fact that the state had a weak case and that the only eyewitness had recanted on the witness stand, especially in light of the fact that the first trial ended in a hung jury. Defense counsel wanted the last thing that the jury heard before it began deliberations to be the state's lack of evidence, and not a possibly problematic alibi defense. Specifically, as to both Joyce and Allen, defense counsel were concerned that the alibi defense would place the petitioner in close proximity to the crime scene and allow the prosecutor to argue consciousness of guilt on the basis of flight because both witnesses testified that the petitioner left the area at approximately 10:50 p.m. As to Joyce in particular, defense counsel believed that she would be vulnerable on cross-examination based on her bias as a family member, the petitioner's having been outside of her line of sight when they were in the house together, her having been potentially too distracted by her children and the television to notice the petitioner leaving the

[11] The petitioner argues that defense counsel's decision not to present an alibi defense cannot be strategic on the basis of counsel's not wanting to distract the jury from Ford's recantation because defense counsel did not know about the recantation prior to the start of evidence in the second trial. The petitioner argues that defense counsel are attempting to retroactively justify their actions. Attorney Merkin, however, testified that she made the final decision not to offer the alibi defense only after hearing Ford's recantation.

Moreover, the habeas court never determined that defense counsel's actions were not strategic; rather, it determined that defense counsel's strategy was unreasonable. As such, the issue is not whether defense counsel's decision not to present the alibi defense was strategic but whether it was a reasonable strategic decision.

house, her failure to give a sworn statement to the police, and the petitioner's failure to identify her to the police as an alibi witness. As to Allen, defense counsel had concerns that the imprecise timing of the telephone calls between her and the petitioner, and the shooting, would allow the jury to infer that the petitioner had time to both commit the murder and speak with Allen on the telephone.

The reasons stated by defense counsel are similar to those found reasonable in *Spearman*. In both cases, the alibi witnesses were family, the alibi placed the petitioner in close proximity to the crime scene, and the alibi witnesses testified that the petitioner was home but not within their line of sight. In the present case, although Joyce testified that she would have known if the petitioner left the house because of the screeching back door and sensor lights in the driveway, her testimony did not account for the fact that the petitioner was not within her line of sight during the time of the murder. It was reasonable for defense counsel to be concerned that the jury might have questioned whether she was distracted by the television or her children that night.[12] Such a concern was justified even if she was considered a credible witness by the habeas court or defense counsel.

Additionally, although the jury reasonably could have concluded that Allen's testimony established that the petitioner was speaking with her from his landline at the time of the murder, the imprecision in the timing of the calls and the timing of the murder also made it

[12] Joyce never testified that she was tasked with watching the petitioner or keeping account of his movements on the night of the shooting. Rather, she testified that the petitioner was not consistently within her line of sight during the time of the shooting and that she was watching her children and the television. If she had testified at the underlying criminal trial, the jury reasonably could have found that her focus had been on her children and the television.

possible that the jury could have concluded that he participated in the calls *and* committed the murder, especially given the close proximity of his house to the crime scene. Once again, despite the habeas court's finding that Allen's testimony was credible,[13] it was reasonable for defense counsel to be concerned that the jury might determine that the imprecision in timing left open the possibility that the petitioner committed the murder *and* participated in the telephone calls.

It is important to accord due weight to defense counsel's concern that the alibi testimony would have placed the petitioner a mere two blocks from the crime scene at or near the time of shooting. The petitioner argues that the alibi defense would not have been risky because the jury already knew where the petitioner's house was located and that at approximately 11 p.m. he was a few miles away from the crime scene at Southern Connecticut State University. But the alibi evidence, if presented, would have established that at the time of the shooting, the petitioner was at or near his home in very close proximity to the shooting. No other evidence so directly highlighted the petitioner's proximity to the scene of the crime at the time of the shooting. There is a distinction

[13] The petitioner contends that if defense counsel believes an alibi witness to be credible, it is deficient performance not to offer the witness' testimony at trial. This argument, however, ignores the fact that even if a witness is found to be highly credible by counsel or by the habeas court, it may be a reasonable strategic decision not to offer that witness' testimony if the witness would be vulnerable to attack on other grounds, or their testimony would raise other concerns or leave gaps in a defense. See *Michael T.* v. *Commissioner of Correction*, supra, 319 Conn. 637 ("in making a tactical decision whether to proffer [highly credible] expert testimony, reasonable counsel would have recognized that [the witness] would have been vulnerable to attack on various grounds"). Even though defense counsel found Joyce and Allen to be credible, defense counsel reasonably believed that the testimony of Joyce and Allen did not definitively account for the petitioner's whereabouts and instead created issues regarding the petitioner's proximity to the crime scene and consciousness of guilt. The credibility of Joyce and Allen did nothing to ameliorate defense counsel's concerns about these issues.

between being a few miles away from the crime scene soon after the murder, and being within two blocks of the crime scene at or near the time of the murder and then fleeing from the scene shortly thereafter.

As a result, we conclude, as the Appellate Court did in *Spearman*, that counsel made a reasonable strategic decision because "the proffered witnesses would [have] fail[ed] to account sufficiently for [the petitioner's] location during the time or period in question . . . ." *Spearman* v. *Commissioner of Correction*, supra, 164 Conn. App. 546. Even if "there [was] some showing that the [alibi] testimony would have been helpful in establishing the asserted [alibi] defense"; (internal quotation marks omitted) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681; defense counsel made a strategic decision that presenting an alibi defense had the potential to be more harmful than helpful to the petitioner's case. See id., 681–82; see also *Morquecho* v. *Commissioner of Correction*, supra, 164 Conn. App. 681–85 (defense counsel's decision not to present alibi was reasonable strategy when alibi did not definitely place petitioner home at time of murder and would possibly distract jury from state's weak case). Although the state's case against the petitioner might not have been overwhelming and another attorney might have defended him differently,[14] we cannot conclude that his conviction was a result of constitutionally deficient counsel under *Strickland*.

[14] Attorney Jones and Attorney Merkin testified that they disagreed about whether their concerns regarding the alibi defense outweighed the benefits of presenting the alibi defense. This case exemplifies the well established principle that because no two lawyers will try a case the same way, we must "affirmatively entertain the range of possible reasons [for counsel's decisions] . . . ." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, supra, 319 Conn. 632. This disagreement between defense counsel also is further proof that they strategically and thoughtfully considered the potential benefits and harm of presenting the alibi defense. Under the circumstances of this case, such consideration is not constitutionally deficient.

Nevertheless, the petitioner argues that proper investigation into the testimony of Joyce and Allen would have enabled defense counsel to address any weaknesses in the alibi defense. As to Joyce, he argues that defense counsel's concern about his having been outside of Joyce's line of sight when he was in the house with her would have been ameliorated if defense counsel had learned that Joyce would have known if he had left the house because she would have heard the screeching back door or seen the outdoor sensor lights. At the habeas trial, defense counsel admitted to not having asked or known about the screeching back door or the sensor lights. But Attorney Jones also testified that such knowledge would not have affected the decision not to present the alibi defense. Screeching door or not, defense counsel still had concerns regarding (1) the petitioner's having been outside of Joyce's line of sight, (2) Joyce's having potentially been too distracted by her children and the television to notice the petitioner leaving the house, even with the screeching door and sensor lights, (3) proximity to the crime scene, (4) consciousness of guilt on the basis of flight, and (5) bias. Defense counsel ceased investigating only after they decided that calling Joyce potentially would be more harmful than helpful to the case. See *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681–82. Such a decision is reasonable, and we will not second-guess it with the advantage of hindsight.

As to Allen, the petitioner alleges that defense counsel would have presented her testimony if they had properly investigated the timing of the telephone calls between her and the petitioner. He contends that defense counsel were mistaken regarding the timing of the calls and the shooting. If defense counsel had been fully aware of Allen's testimony, the petitioner reasons, they would have realized that her testimony made it impossible for him to have time to participate in the

telephone calls with Allen and to leave the house to commit the murder.

It is true that at the first criminal trial, defense counsel mistakenly believed that the shooting occurred at approximately 10:45 p.m. At oral argument before this court, the petitioner contended that during the second criminal trial, defense counsel continued to labor under the misapprehension that the shooting occurred at 10:45 p.m. His contention was based on defense counsel's notice of alibi, which stated that the shooting occurred at 10:45 p.m. The notice of alibi, however, was from the first criminal trial. Defense counsel testified at the habeas trial that by the time of the *second* trial, they *were* aware that the shooting occurred between 10:20 and 10:30 p.m., and that Allen had indicated that she had spoken with the petitioner on the telephone via his landline sometime between 10 and 10:20 p.m. for an uncertain length of time and again at 10:35 p.m. Defense counsel knew of and considered this information when they decided not to present Allen's testimony at the second criminal trial. As a result, the petitioner has not identified any information that defense counsel failed to glean from their investigation of Allen.[15]

Additionally, the petitioner argues that defense counsel's decision to forgo an alibi defense was not reason-

[15] To the extent that the petitioner argued before this court that defense counsel should have conducted additional investigation by obtaining phone records to solidify the timing of the telephone calls, he did not raise this argument in the habeas court and failed to present any evidence at his habeas trial to establish that the telephone records would have definitively proved that he was at home talking to Allen on the telephone via his landline at the precise time of the shooting. Not only did the petitioner fail to offer any telephone records that showed the timing of the telephone calls, but he failed to offer any evidence that established the precise time of the shooting. In the absence of such evidence, and in light of the proximity of the crime scene to the petitioner's house, the alibi defense leaves open the possibility that the petitioner could have left home unnoticed, committed the crime, and returned home unnoticed in a short span of time.

able because a juror from the first criminal trial specifically told defense counsel that it would have been helpful if the jury knew where the petitioner was between 10 and 11 p.m. on the night of the shooting. According to the petitioner, his "whereabouts at the time of the shooting was the most significant factor in the jury's failure to acquit."[16] This reasoning is flawed on two accounts. First, although the first jury may have wanted to know where the petitioner was at the relevant time, the answer provided by the alibi evidence was decidedly double-edged because it placed the petitioner extremely close to the scene of the crime. Second, the second trial occurred under circumstances that were markedly different from those of the first trial because of Ford's recantation. It was reasonable for defense counsel to change their strategy accordingly. Defense counsel made the strategic decision that, despite the first jury's having wanted to know the petitioner's whereabouts, the alibi evidence had the potential to do more harm than good at the second trial and should be sidelined in favor of a less risky strategy that was based on Ford's recantation.

For all of the foregoing reasons, we agree with the Appellate Court that defense counsel made a reasonable strategic decision not to present an alibi defense that possibly would have been more harmful than helpful by distracting the jury from Ford's recantation, introducing issues of proximity and consciousness of guilt, and failing to account definitively for the petitioner's whereabouts during the time of the shooting. Because defense counsel's performance was not deficient, we conclude that the petitioner failed to satisfy his burden under the first prong of *Strickland*.

[16] Despite the petitioner's contention that the jury in his first trial would have found him not guilty if it had known his whereabouts at the time of the shooting, it is noteworthy that defense counsel spoke only with a single juror about her concerns, and that that juror reported that the jury was divided ten to two in favor of finding the petitioner guilty.

B

The petitioner next claims that the Appellate Court improperly concluded that he was not prejudiced by defense counsel's failure to present third-party culpability evidence. Specifically, he argues that the Appellate Court improperly determined that (1) Holly's testimony was inadmissible as third-party culpability evidence, and (2) he had failed to establish that Holly would not have been allowed to invoke his fifth amendment privilege against self-incrimination.[17] As to whether there was sufficient evidence to establish third-party culpability, the petitioner argues that there was substantial evidence connecting Ford to the shooting because he was the last person to see the victim alive and had possessed a gun similar to the murder weapon.[18] As to

[17] The petitioner contends that because these issues are evidentiary in nature, the Appellate Court should have afforded deference to the habeas court's determinations and reviewed the issues under the abuse of discretion standard. We disagree.

Evidentiary rulings are afforded deference because a trial court has the inherent discretionary power to control the proceedings before it. See *Downs* v. *Trias*, 306 Conn. 81, 102, 49 A.3d 180 (2012) ("trial court possesses inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial" [internal quotation marks omitted]). In the present case, the habeas court was not exercising its discretion to control the habeas trial. Rather, the habeas court was asked to determine a legal question—if Holly had been called at the underlying criminal trial, would the trial court have been compelled to admit his testimony or exercised *its* discretion to do so? As such, the habeas court was called on to review the hypothetical actions of another court regarding admissibility and privilege, not to make discretionary evidentiary rulings in a trial it was conducting. This court is equally capable of reviewing this legal question. Accordingly, our review is plenary.

[18] The petitioner also argues that the Appellate Court, acting sua sponte, improperly reached an issue that the parties did not brief: whether Holly's testimony was admissible as evidence of third-party culpability. We disagree. In the petitioner's brief before the Appellate Court, he specifically argued that defense counsel were deficient for failing to offer the testimony of Holly because it provided a sufficient factual nexus connecting Ford to the murder, which triggered the petitioner's right to present a third-party culpability defense. He argued that the habeas court properly determined that this nexus existed, making Holly's testimony relevant and, thus, admissible. Because the petitioner raised this issue before the Appellate Court as

Holly's fifth amendment privilege, the petitioner argues that Holly would have provided no valid basis at the criminal trial for invoking this privilege.

The respondent contends that the Appellate Court properly determined that Holly's testimony was inadmissible and that there was insufficient evidence to determine whether Holly would have been able to successfully invoke his fifth amendment privilege. We agree with the reasoning of the Appellate Court, although we believe that the admissibility of Holly's testimony is more appropriately considered under the deficient performance prong of *Strickland*, whereas the issue of his fifth amendment privilege should be reviewed under the prejudice prong. Accordingly, we affirm the decision of the Appellate Court, albeit on slightly different grounds.

The following additional facts are necessary to our determination of this claim. At the underlying criminal trial, the state offered the testimony of James Stephenson, a firearms and tool mark examiner with the state's forensic science laboratory. Stephenson testified that a nine millimeter cartridge casing was found at the scene of the crime and that a nine millimeter jacketed bullet was retrieved from the victim's gunshot wound. He testified that there was no scientific way to prove that the bullet was part of the cartridge casing that had been found at the scene of the crime. Additionally, the murder weapon had never been recovered. However, on the basis of the markings on the bullet, he testified that the bullet had been fired from a gun manufactured by Hi-Point and that the gun was either a semiautomatic pistol or a rifle.

At the habeas trial, the petitioner offered the testimony of Gerard Petillo, a firearms expert, who con-

support for upholding the habeas court's decision, we reject the petitioner's argument that the Appellate Court improperly addressed this issue sua sponte.

firmed Stephenson's testimony that Hi-Point guns create distinctive ballistics evidence. Petillo further testified regarding unique physical characteristics of Hi-Point guns, such as the Hi-Point logo and firearm information stamped onto the left side of the gun. Neither expert testified about whether the ridging design near the handle of a Hi-Point semiautomatic pistol was unique to pistols manufactured by Hi-Point.

At the habeas trial, Holly testified that he saw the victim and Ford on the afternoon of the shooting coming down Newhall Street on bicycles when they stopped and Ford showed Holly a handgun that he had tucked into the waistband of his pants. Holly testified that he tried to grab the gun because he wanted it but that Ford ran away.

Holly testified that he saw only the handle of the gun, not the barrel. He described the gun as either a nine millimeter or .380 caliber black pistol. He testified further that he was not sure if the gun was real or fake and thought it could have been a BB gun. However, Holly did testify that it "looked like one of the guns [he] had before" and that he knew guns. When shown the photograph of a black, Hi-Point nine millimeter semiautomatic pistol, Holly testified that "[t]hat might be it. It looked like the gun" that he saw in Ford's possession because of the ridges at the top near the handle but that he had seen other kinds of guns with ridges in the past. He further testified that he had provided all of this information to Investigator Whalen.

Despite having provided this information at the habeas trial, Holly also testified that he had told both his own attorneys and Investigator Whalen that he was not willing to testify at the criminal trial. He testified that he had been advised by counsel to invoke his fifth amendment privilege against self-incrimination. Nevertheless, he testified that if he had been ordered to testify

by the criminal court, he would have testified. He testified that he did not recall telling Attorney Farver that he would not testify at the criminal trial even if the trial court rejected his claim of a fifth amendment privilege. Holly testified that his reason for not wanting to testify was that he was worried that the prosecutor handling a criminal case then pending against him also was the prosecutor for the petitioner's case and would hold any testimony favorable to the petitioner against him.

Holly testified that although he wanted to invoke his fifth amendment privilege, he had not been worried at the time of the criminal trial that he possibly would incriminate himself if he had been required to take the witness stand. This claim does not withstand scrutiny. Holly had multiple criminal cases pending against him at the time of the petitioner's criminal trial. Specifically, Farver testified at the habeas trial that Holly was under investigation in a murder case and had been "busted with the gun" involved in that case. Additionally, Attorney Thomas Ullman, a public defender who represented Holly in connection with other criminal matters, testified at the habeas trial that he represented Holly at the time of the petitioner's criminal trial in relation to charges of robbery in the first degree and assault on a police officer. Attorney Ullman also testified that he had represented Holly in some other matters as well at that time but that they did not result in a plea or sentence. On the basis of these other pending criminal matters, Attorney Ullman stated, he advised Holly not to speak with Investigator Whalen or to testify at the petitioner's criminal trial "[b]ecause [there was] the potential that . . . Holly could incriminate himself or hurt his situation in the pending case" in which Attorney Ullman was representing him.

Attorney Farver testified that Holly had informed him that he intended to invoke his fifth amendment privilege, but he did not recall Holly's reasoning for wanting

to do so and believed that even if he did recall Holly's reasoning, such information would be privileged. He further testified that he had told the criminal court at the hearing on a motion for a new trial that Holly would be exercising his fifth amendment right because he had pending charges and did not want to testify. He also had told the court that although he was not certain whether Holly could successfully invoke this privilege, Holly had told him that he would not testify even if ordered to do so by the court.

At the habeas trial, defense counsel's description of Holly's hypothetical, third-party culpability testimony differed from Holly's testimony at the habeas trial. Both Attorney Jones and Attorney Merkin testified that Holly had informed them that he had seen Ford with a gun two or three days before the victim was shot. Specifically, defense counsel testified that Holly had informed them that two or three days before the murder, he had seen Ford, the victim, and another person named Cory Hunter on the corner of Newhall and Huntington Streets, and that Ford had "[e]ither a nine millimeter or a .380 caliber, black semiautomatic" gun. Although Holly was not sure if the gun was real or fake and did not know the manufacturer, he told defense counsel that he had wanted the gun and tried to grab it. Additionally, Attorney Jones testified that Holly did not witness Ford shoot the victim and that the murder weapon was never recovered.

On the basis of this information, defense counsel testified that, at the time of the criminal trial, (1) they did not believe that there was sufficient evidence to support a third-party culpability defense, and, (2) as with the alibi testimony, they did not want to distract from the weakness of the state's case and Ford's recan-

tation.[19] Defense counsel were concerned that there was not a sufficient nexus to establish third-party culpability because Holly's testimony did not directly connect Ford to the murder in any way: Holly's testimony was about seeing a gun two or three days prior to the murder, not on the day of the murder; there were no statements by Ford about using the gun; Holly could not provide specific information regarding the gun, such as its manufacturer, make, or model; and no one witnessed Ford using the gun. However, Attorney Merkin admitted at the habeas trial that defense counsel did not show Holly a photograph of a nine millimeter Hi-Point pistol to see if he could identify it as the kind of gun he saw in Ford's waistband.

Attorney Jones also testified that he was aware that Holly would exercise his fifth amendment right not to testify, "[t]o the extent that he could," if called to testify. He recalled that Holly had been advised not to cooperate and to invoke his fifth amendment privilege. Nevertheless, Attorney Jones testified that this knowledge did not factor into the decision not to call Holly at the criminal trial.

Attorney Merkin also testified that Holly's intention to invoke his fifth amendment privilege against self-incrimination was not part of her decision not to call him as a witness. She was aware, however, of his intention to invoke the privilege and thought about his intent to do so prior to making the decision not to call him. Attorney Merkin further testified that although Holly never was implicated in the present case, his testimony regarding his attempt to grab the gun from Ford may have been self-incriminating.

[19] Defense counsel also testified at the habeas trial that they thought at the time of the second criminal trial that Ford had to admit to knowing Holly in order to create a foundation to present Holly's testimony. Defense counsel admitted at the habeas trial, however, that no such foundation was required.

1

With this factual backdrop in mind, "the question of whether [counsel's] actions fell below an objective standard of reasonableness turns on whether [the] decision not to solicit the testimony of . . . [a witness] to support the [third–party] culpability defense can be considered sound trial strategy, or whether it constitutes a serious deviation from the actions of an attorney of ordinary training and skill in criminal law." *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 513.

To determine whether an objectively reasonable attorney would decide not to present a third-party culpability defense on the ground of inadmissibility, it is necessary to review the legal principles underlying such a defense: "The admissibility of evidence of [third–party] culpability is governed by the rules relating to relevancy. . . . Relevant evidence is evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence. . . . Accordingly . . . the proffered evidence [must] establish a direct connection to a third party, rather than raise merely a bare suspicion regarding a third party . . . . Such evidence is relevant, exculpatory evidence, rather than merely tenuous evidence of [third–party] culpability [introduced by a defendant] in an attempt to divert from himself the evidence of guilt. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination. A trial court's decision, therefore, that [third–party] culpability evidence proffered by the

defendant is admissible, necessarily entails a determination that the proffered evidence is relevant to the jury's determination of whether a reasonable doubt exists as to the defendant's guilt." (Citations omitted; internal quotation marks omitted.) Id., 514–15.

"Whether a defendant has sufficiently established a direct connection between a third party and the crime with which the defendant has been charged is necessarily a fact intensive inquiry. In other cases, this court has found that proof of a third party's physical presence at a crime scene, combined with evidence indicating that the third party would have had the opportunity to commit the crime with which the defendant has been charged, can be a sufficiently direct connection for purposes of third party culpability. . . . Similarly, this court has found the direct connection threshold satisfied for purposes of [third–party] culpability when physical evidence links a third party to a crime scene and there is a lack of similar physical evidence linking the charged defendant to the scene. . . . Finally, this court has found that statements by a victim that implicate the purported third party, combined with a lack of physical evidence linking the defendant to the crime with which he or she has been charged, can sufficiently establish a direct connection for [third–party] culpability purposes." (Citations omitted.) *State* v. *Baltas*, 311 Conn. 786, 811–12, 91 A.3d 384 (2014).

"It is not ineffective assistance of counsel . . . to decline to pursue a [third–party] culpability defense when there is insufficient evidence to support that defense. See *Dunkley* v. *Commissioner of Correction*, 73 Conn. App. 819, 827, 810 A.2d 281 (2002) (no evidence to support [third–party] claim, in part, because no one at scene implicated alleged third party), cert. denied, 262 Conn. 953, 818 A.2d 780 (2003); see also *Floyd* v. *Commissioner of Correction*, 99 Conn. App. 526, 531–32, 914 A.2d 1049 (insufficient evidence to substantiate

[third–party] claim when predicated on alleged testimony of unlocated drug dealers who were also gang members), cert. denied, 282 Conn. 905, 920 A.2d 308 (2007); *Santiago* v. *Commissioner of Correction*, 87 Conn. App. 568, 591–92, 867 A.2d 70 ([third–party] statements did not contain sufficient substance to support viable [third–party] claim), cert. denied, 273 Conn. 930, 873 A.2d 997 (2005); *Alvarez* v. *Commissioner of Correction*, 79 Conn. App. 847, 851, 832 A.2d 102 (insufficient evidence to support [third–party] culpability defense when petitioner called only one witness at habeas hearing who did not even observe shooting), cert. denied, 266 Conn. 933, 837 A.2d 804 (2003); *Daniel* v. *Commissioner of Correction*, 57 Conn. App. 651, 684, 751 A.2d 398 (testimony not sufficient to raise [third–party] culpability defense because supporting witnesses' statements were inconsistent), cert. denied, 254 Conn. 918, 759 A.2d 1024 (2000)." *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 515–16.

In the present case, one of the reasons that defense counsel decided not to present a third-party culpability defense was that they did not believe that Holly's testimony was sufficient to establish a direct connection between Ford and the shooting but, rather, that it created only a mere suspicion that Ford may have accidentally shot the victim. According to defense counsel, there was no evidence that directly established that Ford shot the victim, either accidentally or otherwise, and none was introduced at the criminal trial.[20] In the absence of this nexus, defense counsel believed that Holly's testimony was irrelevant and, thus, inadmissible.

[20] Attorney Merkin testified that people in the community did mention to Investigator Whalen that there was a rumor that Ford had accidentally shot the victim, but there were no witnesses who were able to testify that they heard Ford confess or saw Ford shoot the victim.

Defense counsel were correct that Holly's testimony would have failed to establish a sufficient nexus between the victim's murder and Ford. The third-party culpability evidence would have consisted of the following: (1) Ford had been the last person seen with the victim; (2) Ford had been in close proximity to the crime scene near the time of the shooting; and (3) Ford had been seen with a black semiautomatic pistol—manufacturer unknown, possibly fake—two to three days before the shooting.

Although Holly stated at the habeas trial that the gun he saw looked similar to the photograph he had been shown of a nine millimeter Hi-Point semiautomatic pistol, he never definitively testified that the gun he saw was a nine millimeter Hi-Point semiautomatic pistol. He testified only that the gun he saw might have been a nine millimeter Hi-Point pistol on the basis of the fact that its ridges looked similar. He admitted, however, that he had seen other guns that have these kinds of ridges as well. There also was no evidence admitted at the habeas trial to establish that these ridges were a unique characteristic of a Hi-Point pistol. Thus, there was no clear evidence that Ford possessed the murder weapon.

Additionally, as far as defense counsel were aware,[21] there was no evidence that Ford had a gun in his possession at the time of the murder. There also was no evi-

[21] Attorney Merkin, Attorney Jones, and Investigator Whalen consistently testified that Holly initially told them that he had seen Ford with a gun a few days before the murder. We are required to review defense counsel's performance on the basis of "counsel's perspective at the time," not on the basis of hindsight. *Strickland* v. *Washington*, supra, 466 U.S. 689. Defense counsel testified that on the basis of what Holly told them, they believed he had seen Ford with a gun two or three days before the shooting, not on the day of the shooting, as Holly later testified during the habeas trial. Additionally, even if Holly did see Ford with a gun on the day of the murder, as he claimed at the habeas trial, no evidence established that Ford continued to have the gun in his possession later that night at the time of the murder.

dence that anyone saw Ford shoot the victim or that Ford was present at the crime scene at the time of the shooting. Moreover, the record is devoid of any statements by Ford, the victim, or any other witness that would implicate Ford as the shooter.

As a result, the third-party culpability evidence at best created a mere suspicion of, but was too speculative to establish, a direct connection between Ford and the murder.[22] In the absence of this nexus, Holly's testimony was irrelevant and, thus, likely inadmissible.

Even if Holly's testimony did create some direct link between Ford and the murder, this nexus was sufficiently weak so as to justify defense counsel's strategic decision not to offer Holly's testimony on the ground that it would distract the jury from the weakness of the state's case and Ford's recantation. See, e.g., *Michael T.* v. *Commissioner of Correction*, supra, 319 Conn. 634 ("whether reasonable counsel could have concluded that the benefit of presenting [expert witness' testimony] . . . was outweighed by any damaging effect" that could occur, where testimony could have

[22] As further support for defense counsel's decision not to offer Holly's testimony because it was too speculative, it is noteworthy that in denying defense counsel's motion for a new trial, the trial court determined that defense counsel's argument that Holly's testimony provided a direct connection between Ford and the murder was "pure speculation." Following the jury's verdict in the second criminal trial, defense counsel filed a motion for a new trial on the ground that Holly's testimony should have been presented and was exculpatory. Because of Holly's intention to invoke his fifth amendment privilege against self-incrimination, the trial court accepted as true defense counsel's representation as to his proposed testimony for purposes of deciding the motion. Even after crediting Holly's testimony, the trial court determined that Holly's testimony would not produce a different result in a new trial because his testimony raised mere speculation, not a direct connection, that Ford committed the murder. The petitioner did not challenge this ruling on direct appeal. If he had done so, the issue would have been subject to the abuse of discretion standard of review because the judge who heard the motion for a new trial was the same judge who presided over the criminal trial. See *Jones* v. *State*, 328 Conn. 84, 104–105, 177 A.3d 534 (2018).

provided basis for admission of other evidence potentially harmful to petitioner); *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681–82 (it is not deficient performance not to call witness if "counsel learns of the substance of the witness' testimony and determines that calling that witness is . . . potentially harmful to the case"). Holly's testimony would have required the jury essentially to conduct a trial within a trial to determine whether there was sufficient evidence that Ford had shot the victim so as to create reasonable doubt about the petitioner's guilt. As discussed previously, the evidence directly connecting Ford to the shooting was weak enough that it possibly would have served only to confuse or distract the jury by focusing the jury on the competing likelihood of whether Ford or the petitioner committed the murder. After all, the petitioner recently had assaulted and injured the victim and taken a bicycle from him. He expressed to Toles that he was concerned that he might be going back to jail over that incident. In an attempt to focus the jury on Ford's recantation and not to muddy the waters, defense counsel made a reasonable strategic decision not to present a third-party culpability defense through Holly's testimony on the grounds that it was inadmissible and would distract from Ford's recantation. Accordingly, defense counsel did not perform deficiently by failing to present a third-party culpability defense. Therefore, the petitioner's claim fails under the first prong of *Strickland*.

2

Moreover, even if Holly's testimony were admissible, we also conclude that the petitioner failed to establish that Holly would have been unable to successfully invoke his fifth amendment privilege against self-incrimination. Without such evidence, the petitioner cannot establish prejudice under the second prong of *Strickland*.

Under the prejudice prong of *Strickland*, the petitioner was required to "demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, supra, 325 Conn. 669. It is undisputed that if Holly had been called at the criminal trial, he would have attempted to invoke his fifth amendment privilege against self-incrimination.[23] As a result, to prove prejudice, the petitioner was required to establish that Holly's invocation of the privilege would have been rejected.

It is well settled that "[a] court may not deny a witness' invocation of the fifth amendment privilege against compelled self-incrimination unless it is *perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have [a] tendency to incriminate. . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure could result." (Citations omitted; emphasis added; internal quotation marks omitted.) *Martin* v. *Flanagan*, 259 Conn. 487, 495, 789 A.2d 979 (2002); accord *In re Keijam T.*, 226 Conn. 497, 503–504, 628 A.2d 562 (1993).

"The privilege afforded not only extends to answers that would in themselves support a conviction under a . . . criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a . . . crime.

[23] Although there is a dispute as to whether Holly would have testified if the trial court had rejected his invocation of the fifth amendment privilege, there is no dispute that Holly would have attempted to invoke the privilege.

. . . But this protection must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer. . . . To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." (Citations omitted; internal quotation marks omitted.) *Hoffman* v. *United States*, 341 U.S. 479, 486–87, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

In the present case, there was insufficient evidence to determine that Holly's invocation of his fifth amendment privilege would not have been sustained. Holly's testimony included an admission that he attempted to steal a gun, that he had previously possessed a similar gun, and that he "knew" guns. These statements must be viewed in light of Holly's pending armed robbery and assault charges, and the unrelated murder investigation. From this limited record, it appears that both the robbery charge and the murder investigation involved guns. It is unknown from this record what kinds of guns were at issue in those other matters. It is also unknown whether these other crimes occurred before or after the murder in this case. As a result, it is plausible that Holly's statement that he previously possessed a similar gun would implicate him in these other crimes. On this record, therefore, it is not "perfectly clear" that Holly would not have been entitled to invoke his fifth amendment privilege. In the absence of such clarity, the criminal trial court likely would have been precluded from denying Holly's invocation of his fifth amendment privilege against compelled self-incrimination.

The petitioner argues that this analysis focuses on the wrong question. He contends that the question is not whether Holly actually was entitled to invoke the privilege, but whether, on the basis of the information that would have been presented at the criminal trial, the trial court would have permitted Holly to invoke the privilege. The petitioner contends, on the basis of the evidence that would have been available at the time of the criminal trial, that there would not have been sufficient evidence to establish that Holly would be incriminated by his testimony such that the court would have rejected his invocation of the fifth amendment privilege.

The petitioner is correct that the question at issue is not whether Holly actually was entitled to invoke his fifth amendment privilege against self-incrimination. The petitioner, however, attempts to place too stringent of a burden on Holly to establish his right to remain silent at trial. For Holly to have invoked this privilege at the underlying criminal trial, he would not have had to prove that his testimony definitively would have incriminated him. To invoke the privilege, "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." (Internal quotation marks omitted.) *Martin* v. *Flanagan*, supra, 259 Conn. 495. Thus, the question is: on the basis of the evidence provided, was there a possibility that Holly's testimony might be dangerous to him because injurious disclosure could result?

The testimony of Holly, Attorney Ullman, and Attorney Farver at the habeas trial established that there was indeed a possibility that Holly's testimony might

result in an injurious disclosure.[24] Specifically, Holly's testimony involved his previous possession of guns. At the time of trial, Holly was charged with armed robbery involving a gun and was being investigated in connection with a murder that involved a gun. As a result, Holly's testimony that he recognized Ford's gun because it looked like a gun that he previously possessed had the possibility to "be dangerous because injurious disclosure could result." (Internal quotation marks omitted.) Id.

Because of this possibility of danger, a court could not reject Holly's invocation of the fifth amendment privilege because it would not be "perfectly clear" that he was not entitled to invoke the privilege. It was the petitioner's burden under *Strickland* to establish deficient performance by presenting sufficient evidence to show that it was perfectly clear that Holly was mistaken and that the trial court would have rejected his invocation. As discussed previously, the evidence presented at the habeas trial was insufficient to establish that it was "perfectly clear" that Holly was not entitled to invoke this privilege.

To overcome the shortcomings in the record, the petitioner emphasizes the fact that Holly testified that

[24] The habeas court made no findings regarding the credibility of Attorney Ullman and Attorney Farver. It did, however, emphasize the fact that Attorney Farver was uncertain as to whether Holly would be able to invoke the fifth amendment privilege. The habeas court determined that Holly would have been required to testify because his pending charges were unrelated to the present case and there was no indication that his statement that he saw Ford with a gun would have exposed him to criminal liability in these other unrelated cases.

As the Appellate Court properly and succinctly stated: "[T]he [habeas] court took a [too] narrow view of the fifth amendment issue, considering only whether Holly's direct observations of Ford likely would have subjected him to criminal prosecution, rather than whether it was possible that any questions asked of Holly during his direct or cross-examination could possibly have incriminated him in any other criminal prosecution." (Emphasis omitted.) *Johnson* v. *Commissioner of Correction*, supra, 166 Conn. App. 126.

he did not believe that his testimony would incriminate him. The petitioner contends that, on the basis of this statement, Holly could not have invoked the privilege because a witness must have "reasonable cause to apprehend danger . . . ." *Hoffman* v. *United States*, supra, 341 U.S. 486.

It is true that a witness cannot invoke his fifth amendment privilege as a pretext to avoid answering questions. The standard, however, for determining whether a witness may invoke the privilege is not whether the witness correctly believes that his testimony would be self-incriminating but, rather, whether there is a possibility of incrimination. See *In re Keijam T.*, supra, 226 Conn. 504. As discussed previously, on the basis of the limited evidence in the record, there was such a possibility, and Holly's counsel had so advised him.

In the absence of the petitioner's having conclusively established that Holly could not invoke his fifth amendment privilege against self-incrimination and would have been required to testify, the petitioner cannot establish that he was prejudiced by defense counsel's failure to present a third-party culpability defense through Holly's testimony. See *Smith* v. *Commissioner of Correction*, 141 Conn. App. 626, 634–35, 62 A.3d 554 (no prejudice when witness invoked fifth amendment privilege), cert. denied, 308 Conn. 947, 67 A.3d 290 (2013); *Robinson* v. *Warden*, Docket No. CV-04-0004561, 2009 WL 1333799, *4–5 (Conn. Super. April 21, 2009) (no prejudice where counsel believed witnesses might have invoked fifth amendment privilege), appeal dismissed sub nom. *Robinson* v. *Commissioner of Correction*, 129 Conn. App. 699, 21 A.3d 901, cert. denied, 302 Conn. 921, 28 A.3d 342 (2011); see also *Robinson* v. *Commissioner of Correction*, 129 Conn. App. 699, 704, 21 A.3d 901 (it was strategic decision by counsel not to call witness when counsel believed that witness might invoke fifth amendment privilege), cert. denied, 302 Conn. 921, 28 A.3d 342

(2011). Accordingly, the petitioner cannot establish his claim under the second prong of *Strickland*.

The judgment is affirmed.

In this opinion the other justices concurred.

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CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* NIRAJ PRABHAKAR PATEL
(AC 40605)

Sheldon, Keller and Bright, Js.

Syllabus

Convicted of the crimes of felony murder, home invasion as an accessory, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree and hindering prosecution in the second degree in connection with the shooting death of the victim, the defendant appealed. *Held*:

1. The trial court did not abuse its discretion in denying the defendant's motion for a continuance, which was made due to the fact that the defendant was experiencing, among other things, laryngitis and coughing, when he was scheduled to testify on his own behalf; the facts in the record, which were known to the trial court at the time of the defendant's request, demonstrated that the defendant had requested multiple continuances, that the defendant's physician testified that the defendant was medically able to testify via microphone, that the court

was aware that the defendant had been working at his family's business and speaking with customers in the interim, and that the court had made adjustments to its amplification system in the courtroom to assist the jury in better hearing the defendant and others.

2. The trial court did not abuse its discretion in denying the defendant's motions for a mistrial, which the defendant made during and immediately after his testimony because the jury had informed the court that it could not hear him; although the jury initially may have had trouble hearing the defendant due, in part, to problems with the court's amplification system, the jury properly notified the court, which took immediate corrective action, including having the previous testimony read back to the jury in its entirety, permitting counsel to offer corrections to the testimony that was read back, and correcting the problem with the amplification system, it was clear from the record that the jury heard the defendant's testimony through the court's correction of its amplification system or when the testimony was read back, and was able to observe the defendant's demeanor while testifying, and defense counsel made a strategic choice not to ask the defendant to reanswer questions the jury originally had difficulty hearing.

3. The defendant could not prevail on his claim that the trial court improperly admitted into evidence as statements against penal interest a jailhouse recording of a confidential informant and one of his coconspirators, C, who was the informant's cellmate, which was based on his claim that the statements made in the recording were testimonial in nature and were not trustworthy or reliable: C's statements to the informant, which implicated the defendant, bore none of the characteristics of testimonial hearsay, as C made the statements to his prison cellmate in an informal setting, he implicated himself and two others, and there was no indication that he anticipated that his statements would be used in a criminal investigation or prosecution, and, therefore, the trial court did not violate the defendant's right to confrontation by admitting the recording into evidence; moreover, the defendant's claim that the statements were not trustworthy or reliable was not reviewable, as the trial court denied the defendant's motion in limine to exclude the recording without prejudice and specifically told defense counsel that its ruling was not final and that defense counsel could question the cellmate outside the presence of the jury, through which defense counsel could have developed the record further and attempted to establish that the recording was untrustworthy or unreliable, but defense counsel did not do so, nor did defense counsel object at the time the recording was offered into evidence, and, therefore, the claim was not preserved for appellate review.

4. The trial court did not abuse its discretion in preventing the defendant from asking certain questions to potential jurors during voir dire regarding the death penalty as a means of exploring potential racial biases in jurors and whether jurors could keep an open mind through the end of

the trial, including the questioning of the final witness, whom the defendant claimed in many cases is the most important witness: the questions regarding the death penalty could have been misleading and confusing to a potential juror, the record revealed that defense counsel was given wide latitude in questioning potential jurors regarding their ability to be fair and impartial and to follow the law, the trial court never imposed any prohibition on defense counsel's ability to explore potential racial bias or prejudices, and defense counsel chose not to engage in such exploration; moreover, the defendant's proffered question regarding the final witness presented had the potential to plant prejudicial matter in the minds of the jurors and might have caused the potential jurors to assume that the final witness was special or more important than other witnesses.

5. The defendant's claim that the trial court erred in giving a certain limiting instruction to the jury regarding nonhearsay testimony and that such instruction impacted his right to testify in his own defense by affecting his credibility was not reviewable; the defendant specifically having voiced agreement with the trial court's statement that it would give a limiting instruction and, thereafter, having failed to object to the precise instruction given by the court, the claim of instructional error was unpreserved, and because the claim was evidentiary in nature, it was not reviewable pursuant to *State* v. *Golding* (213 Conn. 233).

Argued September 21, 2018—officially released January 8, 2019

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, home invasion as an accessory, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, conspiracy to commit robbery in the first degree, and hindering prosecution in the second degree, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Danaher*, *J.*; verdict and judgment of guilty; thereafter, the court vacated the defendant's conviction of murder and conspiracy to commit robbery in the first degree, and the defendant appealed. *Affirmed.*

Hubert J. Santos, with whom was *Trent A. LaLima*, for the appellant (defendant).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Dawn Gallo*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Niraj Prabhakar Patel, appeals from the judgment of conviction of felony murder in violation of General Statutes (Rev. to 2011) § 53a-54c, home invasion as an accessory in violation of General Statutes §§ 53a-100aa (a) (1) and 53a-8 (a) and (b), home invasion as an accessory in violation of §§ 53a-100aa (a) (2) and 53a-8 (b), burglary in the first degree as an accessory in violation of General Statutes §§ 53a-101 (a) (1) and 53a-8 (a) and (b), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-134 (a) (2) and 53a-8 (a) and (b), conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-101 (a) (1) and 53a-48, and hindering prosecution in the second degree in violation of General Statutes § 53a-166.[1] On appeal, the defendant claims that the trial court erred in (1) denying his motion for a continuance, (2) denying his motions for a mistrial, (3) admitting into evidence the jailhouse recording between a confidential informant and Michael Calabrese, one of the defendant's coconspirators, (4) preventing him from asking certain questions to potential jurors during voir dire, and (5) giving an improper limiting instruction to the jury regarding nonhearsay testimony. We affirm the judgment of the trial court.

The following facts reasonably could have been found by the jury. On June 12, 2012, the defendant was

[1] The defendant was also convicted of murder and conspiracy to commit robbery in the first degree. The trial court vacated his conviction of those charges to avoid double jeopardy concerns, and imposed a total effective sentence of sixty years incarceration, execution suspended after forty years, thirty years mandatory minimum, with five years probation.

arrested by the Torrington police following a traffic stop. In his vehicle, the police discovered a black duffle bag containing, among other things, marijuana and $12,375 in cash. The defendant, thereafter, needed money to retain a lawyer and to pay the person to whom he owed the $12,375 that the police had confiscated. The defendant searched for legal loans, fast cash loans, and cash advances, to no avail. He also, unsuccessfully, attempted to borrow money from family members. When these efforts failed, the defendant enlisted the help of his cousin, Hiral Patel (Patel), and his friend, Calabrese. The defendant concocted a plan to rob another friend, Luke Vitalis, who was a marijuana dealer. Calabrese agreed to help the defendant because the defendant led him to believe that Vitalis owed money to the defendant, and that the robbery was a way to obtain the money that Vitalis owed. The defendant also led Calabrese to believe that he and the defendant would split the proceeds from the robbery.

The defendant learned that Vitalis was going to sell $29,000 worth of marijuana to a client and that the sale was to occur on the evening of August 5, 2012, at Vitalis' home, located in Sharon. The defendant then set up his own purchase from Vitalis for the following evening, with the intention of robbing him of those proceeds. On August 6, 2012, the defendant drove Patel and Calabrese to the vicinity of Vitalis' home. Calabrese was armed with a loaded .40 caliber Ruger handgun, which the defendant had given to him.

Patel and Calabrese watched the home for a while, and, then, at approximately 6 p.m., they covered their faces with masks and put on black hats and gloves, before entering the home and declaring that it was a home invasion. Vitalis' mother was in the home, and Patel and Calabrese tied her hands, as she begged them not to hurt or kill her son. Calabrese then went upstairs, struck Vitalis with the Ruger, and shot him three times,

killing him and leaving "chunks of . . . brain . . . all over the wall." Calabrese could hear Vitalis' mother screaming. Calabrese, soaked in blood, then searched for Vitalis' money, but was able to find only $70 and approximately one-half ounce of marijuana, both of which he took. Patel and Calabrese then fled the scene, leaving a bloody footprint behind. As they left the house, one of them was on a cell phone, and Vitalis' mother heard him saying "hurry up, hurry the fuck up."

Vitalis' mother was able to free herself, and she called 911. After the police arrived, they went upstairs and found Vitalis' body. The police searched the ransacked room and discovered an empty Pioneer speaker box. In total, the police found $32,150 in the bedroom, and they discovered .40 caliber shell casings. They also found a large quantity of marijuana in the home. After the police had arrived at Vitalis' home, the defendant, in an effort to mislead the police, sent a text message to Vitalis' cell phone saying that he was on his way and would be at Vitalis' home in approximately forty-five minutes.

Eventually Patel and Calabrese met up with the defendant. Calabrese thereafter burned his clothing and his sneakers, which police later discovered, enabling them to match the print of the sneaker to that of the bloody footprint left at the scene of the murder. Calabrese also disposed of the Ruger, which never was found. Later, the defendant attempted to dispose of a bulletproof vest, a Ruger pistol box, a magazine, and a shotgun, leaving the items with relatives in New York City and repeatedly requesting that his cousin dispose of the items in different locations.[2]

[2] Although the defendant agreed with much of the state's evidence, he testified that he previously had sold the Ruger to Calabrese in December, 2011, for $600. He also testified that he had asked Calabrese and Patel to purchase $20,000 worth of marijuana from Vitalis for him, and that he would drop them off and pick them up. Approximately fifteen minutes after dropping off the pair at Vitalis' home, he received a frantic call from Patel telling him to hurry up. Upon driving near the home, the defendant testified,

On September 11, 2013, the state police arrested the defendant. Following a trial, the jury, on February 4, 2016, returned a verdict of guilty on all counts. Specifically, the jury found the defendant guilty of felony murder, murder under the *Pinkerton* doctrine,[3] two counts of home invasion as an accessory, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree, conspiracy to commit robbery in the first degree, and hindering prosecution in the second degree. The court, thereafter, rendered judgment in accordance with the jury's verdict. See footnote 1 of this opinion. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims that the court abused its discretion in denying his motion for a continuance, which was made because the defendant was experiencing, among other things, laryngitis and coughing, when he was scheduled to testify on his own behalf. The defendant argues that his request was reasonable, supported by his affidavit and the note and testimony of his physician, and would have involved only a one day delay in the presentation of evidence in a case that was well ahead of schedule. He contends that this alleged error was harmful because it placed him in a bad light before the jury, which was not able to get an accurate impression of him in order to assess his credibility. The state

he saw the police and assumed a drug raid had occurred, and, in an effort to mislead police, he sent a text message to Vitalis. He alleged that he had no knowledge of the killing at that time.

[3] "[U]nder the *Pinkerton* doctrine, [see *Pinkerton* v. *United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)], a conspirator may be found guilty of a crime that he or she did not commit if the state can establish that a coconspirator did commit the crime and that the crime was within the scope of the conspiracy, in furtherance of the conspiracy, and a reasonably foreseeable consequence of the conspiracy." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Taylor*, 177 Conn. App. 18, 20 n.1, 171 A.3d 1061 (2017), cert. denied, 327 Conn. 998, 176 A.3d 555 (2018).

argues that the court acted well within its discretion in denying another continuance in this matter, especially in light of the fact that the defendant had gone to work at his family's business and there was no guarantee that his laryngitis would have been better with this delay. We conclude that the court acted well within its discretion.

The following additional facts inform our review of this claim. The prosecution rested its case on Wednesday, January 20, 2016. The defendant then requested a continuance to Tuesday, January 26, 2016. The court granted the request. Over the weekend, however, the defendant became ill, and was coughing, vomiting, and experiencing trouble speaking. Defense counsel notified the court, presented a note from the defendant's physician, and requested a continuance to Friday, January 29, 2016. The court considered the request, granted a further continuance to Wednesday, January 27, 2016, and told defense counsel that he could present witnesses other than the defendant on that day, thereby giving the defendant another day to recuperate before testifying.

On January 28, 2016, the defendant still was experiencing laryngitis and coughing, with the ability to speak only in a low voice. His attorney requested a continuance until Tuesday, February 2, 2016. The prosecution argued that the defendant had been seen working at his family's business in the preceding days and that the continuance should not be granted. Defense counsel conceded that the defendant had been at the family's business but argued that this was quite different from testifying in court while experiencing fits of coughing and having laryngitis. Counsel also argued that to make the defendant testify while his health and voice were compromised would violate his rights under both the state and federal constitutions.

Later that day, the state presented the testimony of the defendant's physician, who opined that the defendant was ill. The physician also stated that he had given the defendant a prescription on Monday, January 25, 2016. He further indicated that with this medication, the defendant should be able to testify approximately seventy-two hours after beginning the medication. He specifically confirmed that if the defendant had started his prescription on Tuesday, he would be ready to testify on Friday, January 29. He further testified that the defendant had not called his office for a follow-up visit and had not indicated to him that the defendant's condition had worsened. On cross-examination, the physician testified that when he told the defendant on Monday to take seventy-two hours off, that meant that the defendant was not supposed to work. When asked if he would recommend that the defendant take more time off, he answered "[n]o."

Defense counsel also had the defendant speak his name and address so the physician could hear the quality of the defendant's voice. After listening to the defendant, the physician further opined that the defendant was medically able to testify with a microphone. The court denied the requested continuance, noting that it would use the microphone amplification system and "turn it up as high as we need to," when the defendant testified on Friday, January 29, 2016. Defense counsel then requested permission to make a record and argued that the court's ruling interfered with the defendant's right to testify under both the state and federal constitutions. In response, the state noted that it already had its rebuttal witnesses make accommodations and that they were on standby. The court then restated its ruling that the defendant would testify the next day, noting that (1) the defendant had contributed to his own problem by not following medical advice when he returned

to work earlier in the week, (2) the defendant's physician had testified that the defendant could testify, and (3) the court had an amplification system to project the defendant's voice.

The defendant argues that the court abused its discretion when it denied his request for a continuance. Although he suggests that the court's ruling under these circumstances implicates his right to testify under the federal and state constitutions, he has not made a free-standing constitutional claim. Instead he has briefed the claim under only the abuse of discretion standard using the *Hamilton* factors. See *State* v. *Hamilton*, 228 Conn. 234, 240–41, 636 A.2d 760 (1994). Applying those factors, we conclude that the court did not abuse its discretion.

"[T]rial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, broad discretion must be granted trial courts on matters of continuances . . . ." (Internal quotation marks omitted.) *State* v. *Bush*, 325 Conn. 272, 316, 157 A.3d 586 (2017).

"A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary. . . . There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. . . .

"In appellate review of matters of continuances, federal and state courts have identified multiple factors that appropriately may enter into the trial court's exercise of its discretion. Although the applicable factors cannot be exhaustively catalogued, they generally fall into two categories. One set of factors focuses on the facts of record before the trial court at the time when it rendered its decision. From this perspective, courts have considered matters such as: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the defendant's personal responsibility for the timing of the request; the likelihood that the denial would substantially impair the defendant's ability to defend himself; the availability of other, adequately equipped and prepared counsel to try the case; and the adequacy of the representation already being afforded to the defendant. . . . Another set of factors has included, as part of the inquiry into a possible abuse of discretion, a consideration of the prejudice that the defendant actually suffered by reason of the denial of the motion for continuance." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Hamilton*, supra, 228 Conn. 240–41; see *State* v. *Bush*, supra, 325 Conn. 316–17.

In this matter, the facts of record before the trial court at the time it rendered its decision were the following. The request for an additional continuance came during the evidentiary portion of the trial. The prosecution rested on January 20, 2016, after having presented more than thirty witnesses over a two week period, and the court granted the defendant a continuance to January 26, 2016. On January 26, the defendant requested

another continuance, this time due to his illness, to Friday, January 29, 2016. The court granted another continuance but only until Wednesday, January 27, 2016, and it told the defendant that he could present witnesses other than himself on that date, thereby giving him the additional day to recover that he had requested.

On January 28, the defendant, still coughing and asserting that he was having trouble speaking, requested another continuance to Tuesday, February 2, 2016, with no guarantees that he would recover by that date or that his voice would be back to normal; defense counsel stated that he "hope[d]" the defendant's voice would be better by then. Moreover, the defendant's physician testified that the defendant was medically able to testify with a microphone, despite his illness. Additionally, the court was aware that the defendant had been working at his family's business and speaking with customers, although the defendant was arguing that he was not fit to testify because of illness, and his attorney had believed that he was home resting during that time. To assist the jury in better hearing the defendant and others, the court also instructed that the amplification system be turned up as loud as needed. On the basis of these facts, which were known to the trial court at the time of the defendant's request for a continuance, we conclude that the trial court did not abuse its discretion in denying the defendant's request.[4]

II

The defendant claims that the court erred in denying his motions for a mistrial, made during and immediately after his testimony, because the jury had informed the

[4] Because we have concluded that the court did not act unreasonably in denying the defendant's additional request for a continuance, we need not engage in harmless error analysis. See *State* v. *Hamilton*, supra, 228 Conn. 242.

court that it could not clearly hear the defendant. The defendant argues: "When the jury informed the court [that] it could not hear [the defendant], he had already testified about all of the conduct that may encompass all of the crimes except hindering prosecution. The court was also aware that the credibility of [the defendant's] testimony was the crucial question, and a jury that credit[s] [the defendant's testimony] must acquit on all charges except, possibly, hindering prosecution. . . . [Although] the court was in a difficult position after the jury's note, this position had no possible remedies to restore [the defendant's right to a] fair trial." We are not persuaded.

The following additional facts are necessary to our consideration of this claim. The day after the court had denied the defendant's motion for another continuance, he was called to testify. The defendant explained to the jury that he had bronchitis and laryngitis, and that this was affecting his voice. Several times during his testimony, the defendant was asked to repeat his answers and move closer to the microphone. The defendant testified about the events that had occurred before the crimes of which he was accused, ending at the point where he had dropped off Patel and Calabrese at Vitalis' home. See footnote 2 of this opinion. The jury then was excused for its morning break, and it sent a note to the court stating that it was having trouble hearing the defendant. The defendant requested that the court poll the jury to see how many of them did not hear his testimony, and to ascertain what they did not hear, and he requested that the court declare a mistrial. The state objected to the defendant's request, noting that at other points during the trial, jurors had raised their hands and asked for testimony to be repeated when they did not hear it, and that this had not occurred during the defendant's testimony. The state also noted that defense

counsel could take the defendant through his testimony again if counsel thought it was appropriate to do so.

The court denied both the request to poll the jury and the defendant's motion for a mistrial. At the request of the jury, the defendant's previous testimony thereafter was read to the jury. The court also repositioned the defendant's microphone, placed the speaker directly in front of the jury, and instructed the jurors that if any one of them had any further difficulty hearing testimony, she or he should immediately notify the court by raising her or his hand. The defendant's live testimony then continued. Almost immediately, one or more jurors raised his or her hand, and the amplification system again was adjusted. No subsequent problems were recorded. Following the defendant's testimony, he again moved for a mistrial, which the court denied. The defendant claims the court committed error by denying his motions for a mistrial. We disagree.

"[T]he principles that govern our review of a trial court's ruling on a motion for a mistrial are well established. Appellate review of a trial court's decision granting or denying a motion for a [mistrial] must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided. . . . Thus, [a] motion for a [mistrial] is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds. . . . In our review of the denial of a motion for [a] mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion. . . .

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be

exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . Therefore, [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal is required." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 628, 175 A.3d 514 (2018).

Although the defendant's voice may have been low and the jury initially may have had trouble hearing him due, at least in part, to problems with the court's amplification system,[5] the jury properly notified the court, which took immediate corrective action. The court had the previous testimony read to the jury in its entirety, and counsel was permitted to offer corrections to the read back. The court also adjusted the defendant's microphone, the speakers, and the amplification system. The court told the jury to notify it immediately if there was any further difficulty hearing testimony, and, almost immediately, such notification was given to the court, which took further corrective action, and the jury, again, was instructed to notify the court if any further problems were encountered. The defendant then resumed his testimony, with no further problems.

We readily acknowledge the defendant's concern that the jury was required to assess his credibility and that its ability to do so could be compromised if it was unable to hear him. The shortcoming of the defendant's argument, however, is that the court corrected the problem with the amplification system, had the testimony

[5] The court also voiced concern that the defendant may have been exaggerating his symptoms, and it pointed to several specific instances where it had to direct the defendant to speak into the microphone.

read to the jury, and gave counsel an opportunity to offer any corrections to the testimony that was read back, and the defendant resumed his live testimony. Had defense counsel thought it crucial that the jury hear the missed testimony live, directly from the defendant, rather than read back, he could have reinquired of the defendant or asked the court to strike the prior testimony that the jury did not hear and allow him to begin anew.[6] He chose not to do so. It is clear from the record that the jury heard the defendant's testimony, either live or by virtue of its being read, and was able to observe the defendant's demeanor while testifying,[7] and that defense counsel made a strategic choice not to ask the defendant to reanswer the questions that the jury originally had difficulty hearing. On this basis, we conclude that the court did not abuse its discretion in denying the defendant's motions for a mistrial.[8]

[6] Of course, it would have been up to the court to rule on a request to strike the prior testimony, but, in any event, the record reveals that the defendant did not undertake such a request.

[7] The defendant claims that certain symptoms of his illness, including his coughing and illness related pauses in his speech, could have been viewed as "tics" that the jury interpreted as indications that the defendant was anxious or lying. The defendant's argument ignores the fact that the jury was told at the outset of the defendant's testimony that he was not feeling well and had laryngitis and bronchitis.

[8] The defendant also requested that we review a video recording of the defendant's testimony made by a news organization. The defendant claims that the recording would allow us to see for ourselves whether the defendant adequately could be heard when he testified. We decline the defendant's invitation for several reasons. First, the recording was not marked as an exhibit in the trial court and, therefore, is not part of the record before us. Second, we have no way of knowing whether the recording accurately depicts the vantage point of the jury. Third, the state does not dispute that at least some jurors had difficulty hearing the defendant before the morning recess. Finally, the court took steps to address the issue raised by the jury. The defendant does not claim that the jury was unable to hear him after those steps were taken. Nor does he claim that any inaccuracies in the read back of his prior testimony were not immediately corrected or that the court in any way restricted defense counsel's ability to reask questions, the answers to which counsel was concerned the jury might not have heard the first time.

III

The defendant next claims that the trial court erred in admitting into evidence, as statements against penal interest under § 8-6 (4) of the Connecticut Code of Evidence, (1) the jailhouse recording of a confidential informant and Calabrese, the informant's cellmate, and (2) the testimony of Calabrese's former girlfriend, Britney Colwell, who testified to statements made by Calabrese that implicated the defendant. The defendant first argues that by admitting the jailhouse recording into evidence, the court violated his right to confrontation.[9] He contends that Calabrese's statements were testimonial in nature, and, even if they were not testimonial, they failed to meet the requirements of the Connecticut Code of Evidence because they were not trustworthy or reliable. The defendant argues that Calabrese's statements to Colwell were unreliable and not against Calabrese's penal interest. The state argues that Calabrese's statements in the jailhouse recording were not testimonial in nature and that their admission into evidence, therefore, did not violate the defendant's right to confrontation. Additionally, the state argues that, as an evidentiary matter, the defendant's claim is not reviewable, but, to the extent that we deem it reviewable, the statements in the jailhouse recording were both trustworthy and reliable as dual inculpatory statements

[9] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." Although the defendant does not clarify whether his claim is brought pursuant to the sixth amendment to the federal constitution or article first, § 8, of our state constitution, the defendant makes no claim that our state constitution provides greater protections, and we, in fact, previously have held that the confrontation clause in our state constitution does not provide greater rights than those guaranteed by the federal constitution. See *State* v. *Jones*, 140 Conn. App. 455, 466, 59 A.3d 320 (2013) ("there exists no legal basis that suggests that our state constitution provides the defendant any broader protection to confront a witness against him"), aff'd, 314 Conn. 410, 102 A.3d 694 (2014).

and that their admission, therefore, did not violate the Connecticut Code of Evidence. We agree with the state.[10]

The following additional facts inform our review. After Calabrese was arrested, he and his cellmate were talking about the charges that were pending against them. Thereafter, the cellmate approached a security officer and offered to record Calabrese. The cellmate was set up with a recording device, and he recorded his conversation with Calabrese, who was unaware that he was being recorded. Calabrese told his cellmate about the events surrounding Vitalis' killing, implicating himself, Patel, and the defendant.

The defendant filed a motion in limine seeking to exclude the jailhouse recording of Calabrese and his cellmate, alleging that the admission of this recording would be in violation of the fourth, fifth, sixth, and fourteenth amendments to the United States Constitution, Article I, §§ 8, 9, and 10 of the Connecticut constitution, and § 42-15 of the Practice Book. The court denied the motion *without prejudice*, explaining that it did not

[10] In its brief, the state does not address the admission of Colwell's testimony. This is not entirely surprising given the manner in which the defendant, in his principal brief, sets forth his argument regarding Calabrese's out-of-court statements. The defendant repeatedly uses the term "statements" to refer to the various statements made by Calabrese in the jailhouse recording. He then makes only passing reference to Colwell's testimony in his brief when discussing the reliability of Calabrese's "statements." The defendant also fails to include any harm analysis directed specifically to Colwell's testimony. Similarly, the defendant, in his reply brief, focuses on "[t]he out-of-court statement made by [Calabrese] to [his cellmate informant] . . . ." In fact, Colwell is not mentioned a single time in the reply brief. Finally, to the extent Calabrese's statements were addressed at oral argument before this court, the defendant discussed only the statements made in the jailhouse recording. Nevertheless, for the same reason that we hold in part B of this section that any evidentiary objection to the admission of the jailhouse recording was not preserved properly by the defendant, we also hold that any claim that the trial court erred by admitting Colwell's testimony as to the statements made to her by Calabrese has been abandoned by the defendant's failure to raise any objection to such testimony at trial after the court denied, *without prejudice*, his motion in limine.

consider the issue to be final and that it also would permit the defendant, out of the presence of the jury, to question the cellmate about the recording before the cellmate testified to the jury. The defendant has not pointed us to anything in the record that indicates that the defendant opted to pursue such questioning.

On the morning that the cellmate was scheduled to testify, the prosecutor notified the court and defense counsel that it had received a letter from Calabrese's attorney stating that Calabrese would invoke his fifth amendment privilege against self-incrimination if called to testify at the defendant's criminal trial and that his attorney would instruct him to remain silent. The following colloquy then occurred:

"[The Prosecutor]: I had discussions with Your Honor and defense counsel on a date prior to today in anticipation of [the cellmate's] testimony, and I believe that we had agreed in chambers that a representation made by way of letter from [Calabrese's attorney] on behalf of his client would suffice insofar as the foundation necessary for the dual inculpatory statement's admission.

"The Court: All right. Is . . . the record you just made sufficient for your purposes or do you want to mark the letter as an exhibit?

"[The Prosecutor]: I would like to mark it, please, for ID, Your Honor.

"The Court: All right, marked for ID only. That will be state's exhibit—

"The Clerk: Thirty-seven.

"The Court: Anything from the defense?

"[Defense Counsel]: No, Your Honor."

When the cellmate was called to testify at the defendant's trial, he admitted that he had a cooperation agreement with the state that provided that if he testified honestly and truthfully that the state, in the future,

would notify the court of his cooperation. The prosecutor then questioned him about his offer to record Calabrese, and moved to admit the recording as a full exhibit. Defense counsel specifically stated that he had "[n]o objection." The prosecutor then moved to admit into evidence transcripts of the recording. When the court asked defense counsel if he had any objection, defense counsel responded: "No." The court instructed the jury that the transcripts were to assist them, but that they should rely on their understanding of the recording, and that if they believed something in the transcript differed from what they heard in the recording, the recording would control. The prosecutor then played the recording for the jury. Shortly thereafter, defense counsel began his cross-examination. Redirect by the prosecutor and recross by defense counsel followed. After the cellmate was excused from the courtroom, the court asked the parties if there was anything further before they took a recess, and both the prosecutor and defense counsel said no.

The defendant now claims that the court violated his right to confrontation by admitting this recording into evidence because the statements made in the recording were testimonial in nature,[11] and, even if they were not testimonial in nature, they failed to meet the requirements of the Connecticut Code of Evidence because they were not trustworthy or reliable. We consider each argument in turn.

[11] Insofar as the defendant failed to renew his objection after the court denied his motion to exclude *without prejudice*, we consider this claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015) (defendant can prevail on claim of constitutional error not preserved at trial only if following conditions are met: [1] record is adequate to review alleged claim; [2] claim is of constitutional magnitude alleging violation of fundamental right; [3] alleged constitutional violation exists and deprived defendant of fair trial; and [4] if subject to harmless error analysis, state failed to demonstrate harmlessness beyond reasonable doubt). We conclude, however, that the statements made in the recording were not testimonial in nature, and that

A

Whether the Statements were Testimonial

"Under *Crawford* v. *Washington*, [541 U.S. 36, 68–69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the hearsay statements of an unavailable witness that are testimonial in nature may be admitted under the sixth amendment's confrontation clause only if the defendant has had a prior opportunity to cross-examine the declarant. Hearsay statements that are nontestimonial in nature are not governed by the confrontation clause, and their admissibility is governed solely by the rules of evidence. . . . Thus, the threshold inquiry for purposes of the admissibility of such statements under the confrontation clause is whether they are testimonial in nature." (Internal quotation marks omitted.) *State* v. *Maguire*, 310 Conn. 535, 564 n.14, 78 A.3d 828 (2013). "Because this determination is a question of law, our review is plenary." *State* v. *Madigosky*, 291 Conn. 28, 44, 966 A.2d 730 (2009).

"In *Crawford*, the Supreme Court declined to spell out a comprehensive definition of testimonial . . . . Instead, the court defined a testimonial statement in general terms: A solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . The court did note, however, three formulations of th[e] core class of testimonial statements . . . [1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions

this claim, therefore, is not of constitutional magnitude, thus failing *Golding*'s second prong.

. . . [and 3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . .'' (Internal quotation marks omitted.) Id., 44–45.

''Subsequently, in *Davis* v. *Washington*, [547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)], the United States Supreme Court elaborated on the third category and applied a 'primary purpose' test to distinguish testimonial from nontestimonial statements given to police officials, holding: 'Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.' In *Davis*, the court held that statements given to a 911 operator while an emergency was unfolding were nontestimonial and could be admitted because they were given for the primary purpose of responding to the emergency. . . . In contrast, statements given in an affidavit following a 911 telephone call to a police officer were testimonial and therefore inadmissible because they were provided to the officer after the emergency had passed for the primary purpose of developing evidence against an accused. . . .

''In *State* v. *Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008)], we reconciled *Crawford* and *Davis*, noting: 'We view the primary purpose gloss articulated in *Davis* as entirely consistent with *Crawford*'s focus on the reasonable expectation of the declarant. . . . [I]n focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what

Crawford had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution.' . . . We further emphasized that 'this expectation must be reasonable under the circumstances and not some subjective or far-fetched, hypothetical expectation that takes the reasoning in *Crawford* and *Davis* to its logical extreme.' " (Citations omitted.) *State* v. *Smith*, 289 Conn. 598, 623–24, 960 A.2d 993 (2008).

The defendant contends that "there was no ongoing emergency [and] the entire purpose behind correction officers having [the cellmate] make the recording of Calabrese was to obtain evidence against him and others for later prosecution. . . . An objective witness in Calabrese's position, as an incarcerated person, should have reasonably expected that anything he said about his crimes to another inmate . . . could be later relayed and used at a trial. An objective person would not reasonably trust a person he just met with the details of a murder without suspecting his words may later haunt him." (Citations omitted; footnote omitted.) He further contends that "[t]he relevant inquiry is not based upon Calabrese's subjective beliefs but, rather, that of an objective, reasonable witness under similar circumstances."

The state responds that an objective witness would not expect his statements to his cellmate to be recorded and used against him or his coconspirator. Additionally, the state argues, "[m]oreover, post-*Crawford*, the majority of federal courts have held that dual inculpatory or coconspirator statements made by one prisoner to another, even when one of the prisoners is a confidential informant for law enforcement, are nontestimonial

and these courts have done so after analyzing the question from the perspective of the declarant.[12]" We agree with the state.

It does not appear as though our Supreme Court has addressed the specific issue of whether a recording initiated by a prisoner, who is acting as a confidential informant, of a fellow prisoner unwittingly making dual inculpatory statements about himself and a coconspirator or codefendant are testimonial in nature. After reviewing relevant case law, we conclude that Calabrese's statements at issue in the present case are nontestimonial in nature.

In *Davis*, the Supreme Court indicated that statements made unwittingly to a government informant, or statements made from one prisoner to another, "were clearly nontestimonial." *Davis* v. *Washington*, supra, 547 U.S. 825 ("Where our cases . . . dispense[d] with [the confrontation clause requirements of unavailability and prior cross-examination in cases that involved testimonial hearsay]—even under the [pre-*Crawford*] approach—the statements at issue were clearly nontestimonial. See, e.g., *Bourjaily* v. *United States*, 483 U.S. 171, 181–184[,] [107 S. Ct. 2775, 97 L. Ed. 2d 144] [1987] [statements made unwittingly to a Government informant]; *Dutton* v. *Evans*, 400 U.S. 74, 87–89[,] [91 S.

[12] "See *United States* v. *Pelletier*, 666 F.3d 1, 9–10 (1st Cir. 2011) (dual inculpatory statement of one inmate to another nontestimonial) (collecting cases from Fourth, Sixth, Eighth, Tenth, and Eleventh Circuit Courts of Appeals), cert. denied, 566 U.S. 1023, 132 S. Ct. 2683, 183 L. Ed. 2d 48 (2012); *United States* v. *Pike*, 292 Fed. Appx. 108, 112 (2d Cir. 2008) . . . (dual inculpatory statement from one inmate to another who was confidential informant nontestimonial where informant's status unknown to declarant), cert. denied, 555 U.S. 1122, 129 S. Ct. 959, 173 L. Ed. 2d 150 (2009), [and cert. denied sub nom. *Pattison* v. *United States*, 555 U.S. 1122, 129 S. Ct. 957, 173 L. Ed. 2d 150 (2009)]; *United States* v. *Underwood*, 446 F.3d 1340, 1346–48 (11th Cir. 2006) (dual inculpatory statements of one inmate to another nontestimonial), cert. denied, 549 U.S. 903, 127 S. Ct. 225, 166 L. Ed. 2d 179 (2006)."

Ct. 210, 27 L. Ed. 2d 213] [1970] [plurality opinion] [statements from one prisoner to another].").

In *United States* v. *Saget*, 377 F.3d 223, 228 (2d Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005),[13] then Judge Sotomayor explained in a unanimous decision that "[a]lthough [the Supreme Court in *Crawford*] declined to spell out a comprehensive definition of testimonial . . . it provided examples of those statements at the core of the definition, including prior testimony at a preliminary hearing, previous trial, or grand jury proceeding, as well as responses made during police interrogations. . . . With respect to the last example, the Court observed that [a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. . . . Thus, the types of statements cited by the Court as testimonial share certain characteristics; all involve a declarant's knowing responses to structured questioning in an investigative environment or a courtroom setting where the declarant would reasonably expect that his or her responses might be used in future judicial proceedings." (Citations omitted; internal quotation marks omitted.)

The court further opined, "*Crawford* at least suggests that the determinative factor in determining whether a declarant bears testimony is the *declarant's awareness or expectation* that his or her statements may later be used at a trial. [*Crawford*] lists several formulations of the types of statements that are included in the core

[13] "Decisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive. *Turner* v. *Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000); see also *State* v. *Spencer*, 268 Conn. 575, 610, 848 A.2d 1183 (opinions of Second Circuit entitled to significant deference), cert. denied, 543 U.S. 957, 125 S. Ct. 409, 160 L. Ed. 2d 320 (2004)." (Internal quotation marks omitted.) *State* v. *Miller*, 95 Conn. App. 362, 382 n.13, 896 A.2d 844, cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006).

class of testimonial statements, such as 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' . . . All of these definitions provide that the statement must be such that the *declarant reasonably expects* that the statement might be used in future judicial proceedings. . . . Although the Court [in *Crawford*] did not adopt any one of these formulations, its statement that '[t]hese formulations all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it' suggests that the Court would use the reasonable expectation *of the declarant* as the anchor of a more concrete definition of testimony." (Citations omitted; emphasis added; footnote omitted.) Id., 228–29; see also *State* v. *Miller*, 95 Conn. App. 362, 382, 896 A.2d 844 (discussing *Saget*), cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006).

In *Saget*, it was undisputed that the coconspirator of the defendant had no knowledge that he was speaking with a confidential informant. *United States* v. *Saget*, supra, 377 F.3d 229. The court stated that, in light of this, it would not "attempt to articulate a complete definition of testimonial statements in order to hold that [the coconspirator's] statements did not constitute testimony . . . because *Crawford* indicates that the specific type of statements at issue here are nontestimonial in nature." Id.

The court in *Saget* went on to discuss the Supreme Court's decision in *Bourjaily* v. *United States*, supra, 483 U.S. 171, which it found relevant. *United States* v. *Saget*, supra, 377 F.3d 229. It explained, *Bourjaily* "involved a co-defendant's unwitting statements to an FBI informant, as an example of a case in which nontestimonial statements were correctly admitted against the defendant without a prior opportunity for cross-examination. . . . In *Bourjaily*, the declarant's conversation

with a confidential informant, in which he implicated the defendant, was recorded without the declarant's knowledge. . . . The Court held that even though the defendant had no opportunity to cross-examine the declarant at the time that he made the statements and the declarant was unavailable to testify at trial, the admission of the declarant's statements against the defendant did not violate the Confrontation Clause. . . . *Crawford* approved of this holding, citing it as an example of an earlier case that was consistent with the principle that the Clause permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination." (Citations omitted; internal quotation marks omitted.) Id.

In reliance on *Crawford* and *Bourjaily*, the court in *Saget* firmly held that "a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*." Id.; accord *United States* v. *Dargan*, 738 F.3d 643, 650–51 (4th Cir. 2013) (statements made by coconspirator of defendant to cellmate in informal setting were "plainly nontestimonial" under *Davis* and *Crawford*); *United States* v. *Pelletier*, 666 F.3d 1, 9 (1st Cir. 2011) ("Although we have not previously had occasion to apply *Davis* to the situation presented here—statements made by one inmate to another—we have little difficulty holding that such statements are not testimonial. . . . [The declarant's] jailhouse statements to [his fellow inmate] bear none of the characteristics of testimonial hearsay. They were made not under formal circumstances, but rather to a fellow inmate with a shared history, under circumstances that did not portend their use at trial against [the defendant]." [Citations omitted.]), cert. denied, 566 U.S. 1023, 132 S. Ct. 2683, 183 L. Ed. 2d 48 (2012); *United States* v. *Smalls*, 605 F.3d 765, 778, 780 (10th Cir. 2010)

(accomplice declarant's recorded statement to confidential informant cellmate "unquestionably nontestimonial" because declarant "in no sense intended to bear testimony against [defendant]; [declarant] in no manner sought to establish facts for use in a criminal investigation or prosecution . . . [declarant] boasted of the *details* of a cold-blooded murder in response to 'casual questioning' by a fellow inmate and apparent friend" [citation omitted; emphasis in original]); *United States* v. *Johnson*, 581 F.3d 320, 325 (6th Cir. 2009) (declarant's dual inculpatory statements implicating himself and codefendants, unwittingly made to confidential jailhouse informant wearing wire, were nontestimonial), cert. denied, 560 U.S. 966, 130 S. Ct. 3409, 177 L. Ed. 2d 326 (2010); *United States* v. *Watson*, 525 F.3d 583, 589 (7th Cir. 2008) ("statement unwittingly made to a confidential informant and recorded by the government is not 'testimonial' for Confrontation Clause purposes"), cert. denied sub nom. *Redmond* v. *United States*, 555 U.S. 1037, 129 S. Ct. 610, 172 L. Ed. 2d 466 (2008), and cert. denied, 555 U.S. 1104, 129 S. Ct. 972, 173 L. Ed. 2d 117 (2009); *United States* v. *Udeozor*, 515 F.3d 260, 270 (4th Cir. 2008) (because defendant plainly did not think he was giving any sort of testimony when making statements to victim during recorded telephone calls, admission of taped conversations into evidence did not violate defendant's rights under confrontation clause).

In the present case, Calabrese's statements to his prison cellmate bear none of the characteristics of testimonial hearsay. Calabrese made these statements to his prison cellmate in an informal setting. He implicated himself, Patel, and the defendant, and there is no indication that he anticipated that his statements would be used in a criminal investigation or prosecution. Accordingly, we conclude that the trial court did not violate

the defendant's right to confrontation by admitting into evidence the recording of Calabrese's statements.[14]

B

Whether Calabrese's Statements were Trustworthy or Reliable

The defendant contends that the court improperly admitted Calabrese's statements under § 8-6 (4) of the Connecticut Code of Evidence as statements against penal interest when they were not trustworthy or reliable. The state argues that, as an evidentiary matter, the defendant's claim is not reviewable because he failed to preserve his objection properly by reasserting it after his motion in limine was denied *without prejudice*. In the alternative, it argues that the statements were both trustworthy and reliable. We conclude that this claim is not reviewable because the defendant failed to preserve his objection.

As set forth in our statement of additional facts, in ruling on the defendant's motion in limine to exclude Calabrese's statements, the court denied the motion *without prejudice* and specifically told defense counsel that its ruling was not final, and that defense counsel could question the cellmate outside of the presence of the jury, before he testified and before the recording was introduced into evidence. Defense counsel has not asserted on appeal that he took the opportunity to question the cellmate outside of the jury's presence. Additionally, the record clearly demonstrates that defense

[14] To the extent that the defendant also argues that even if the statements were nontestimonial, their admission still violated his right of confrontation, we reject this claim as inconsistent with our law. See *State* v. *Smith*, supra, 289 Conn. 618 ("[n]ontestimonial statements . . . are not subject to the confrontation clause"); *State* v. *Anwar S.*, 141 Conn. App. 355, 361, 61 A.3d 1129 ("[h]earsay statements that are nontestimonial in nature are not governed by the confrontation clause, and their admissibility is governed solely by the rules of evidence" [internal quotation marks omitted]), cert. denied, 308 Conn. 936, 66 A.3d 499 (2013).

counsel did not object when the recording of the statements was offered into evidence. The record also reveals that defense counsel specifically agreed that the prosecutor had laid the necessary foundation for admission of the recording by his submission of a letter from Calabrese's attorney stating that Calabrese would invoke his fifth amendment privilege if called to testify.

Practice Book § 60-5 provides in relevant part: "In jury trials, where there is a motion, argument, or offer of proof or evidence in the absence of the jury, whether during trial or before, pertaining to an issue that later arises in the presence of the jury, *and counsel has fully complied with the requirements for preserving any objection or exception to the judge's adverse ruling* thereon in the absence of the jury, the matter shall be deemed to be distinctly raised at the trial for purposes of this rule without a further objection or exception provided that the grounds for such objection or exception, and the ruling thereon as previously articulated, remain the same. . . ." (Emphasis added.)

"A trial court may entertain a motion in limine made by either party regarding the admission or exclusion of anticipated evidence. . . . The judicial authority may grant the relief sought in the motion or such other relief as it may deem appropriate, may deny the motion with or *without prejudice to its later renewal*, or may reserve decision thereon until a later time in the proceeding. Practice Book § 42-15. This court has said that [t]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial." (Emphasis added; internal quotation marks omitted.) *State* v. *Holmes*, 64 Conn. App. 80, 85, 778 A.2d 253, cert. denied, 258 Conn. 911, 782 A.2d 1249 (2001).

Our Supreme Court has stated: "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly." (Internal quotation marks omitted.) *State* v. *Cabral*, 275 Conn. 514, 530–31, 881 A.2d 247, cert. denied, 546 U.S. 1048, 126 S. Ct. 773, 163 L. Ed. 2d 600 (2005). In particular, where the court's evidentiary ruling is preliminary and not final, it is "incumbent on the defendant to seek a definitive ruling [when the evidence is offered at trial] in order fully to comply with the requirements of our court rules of practice for preserving his claim of error . . . ." *State* v. *Johnson*, 214 Conn. 161, 170, 571 A.2d 79 (1990).

We conclude that the defendant's claim is not reviewable. The court denied the defendant's motion in limine *without prejudice*, and specifically stated that its ruling *was not final*, in order to permit defense counsel the opportunity to question the cellmate out of the presence of the jury; defense counsel, through such questioning, would have had the opportunity to attempt to establish that the recording containing Calabrese's statement was untrustworthy or unreliable. The defendant specifically was permitted to make such a showing and to raise additional objections when the recording was introduced into evidence. This would have allowed the trial court to make a final ruling after the record was further developed by defense counsel and the court was in a better position to evaluate the circumstances surrounding the recording. Having not taken advantage of the court's offer and having not objected at the time the evidence was offered, the defendant has not preserved this evidentiary issue for appellate review.[15]

[15] The defendant argues in his reply brief that his evidentiary claim is preserved properly because he did not need to again raise his objection at trial because "no additional information arose." This assertion is not correct.

IV

The defendant also claims that the trial court erred in preventing him from asking certain questions to potential jurors during voir dire. Specifically, the defendant claims that the court abused its discretion in preventing him from questioning potential jurors regarding (1) their opinions on the death penalty and (2) whether they would keep an open mind throughout the trial, including when the final witness was questioned because "many times the most important witness is the last witness." The state contends that the court properly prohibited these questions on the ground that they raised irrelevant and improper matters. After setting forth our standard of review and the principles that guide us, we will consider each voir dire question in turn.

"Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our constitutional and statutory law permit each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or

At the time the court rendered its preliminary ruling, neither it nor the parties had the benefit of the informant's testimony. The situation at trial was different when the state offered the recording after the defendant had stipulated that a foundation for its admission had been laid and the informant provided additional foundational testimony before the state offered it into evidence. See generally this part of the opinion. The defendant chose not to conduct any examination of the informant before the statement was admitted into evidence. To the contrary, defense counsel stated that he had "[n]o objection" to the introduction of the statement. The defendant thus made no attempt to seek a definitive ruling from the court on the basis of either the record at trial or the additional testimony he could have procured from the informant. Consequently, not only did the defendant fail to preserve the claim he now raises on appeal, he abandoned the claim at trial.

her] fitness to serve on the jury. Conn. Const., art. I, § 19; General Statutes § 54-82f; Practice Book [§ 42-12]. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause." (Internal quotation marks omitted.) *State* v. *Edwards*, 314 Conn. 465, 483, 102 A.3d 52 (2014).

"[I]f there is any likelihood that some prejudice is in the juror's mind which will even subconsciously affect his decision of the case, the party who may be adversely affected should be permitted questions designed to uncover that prejudice. . . . The latitude . . . afforded the parties in order that they may accomplish the purposes of the voir dire [however] is tempered by the rule that [q]uestions addressed to prospective jurors involving assumptions or hypotheses concerning the evidence which may be offered at the trial . . . should be discouraged . . . . [A]ll too frequently such inquiries represent a calculated effort on the part of counsel to ascertain before the trial starts what the reaction of the venire[person] will be to certain issues of fact or law or, at least, to implant in his mind a prejudice or prejudgment on those issues. Such an effort transcends the proper limits of the voir dire and represents an abuse of the statutory right of examination. . . .

"Thus, we afford trial courts wide discretion in their supervision of voir dire proceedings to strike a proper balance between [the] competing considerations . . .

but at the same time recognize that, as a practical matter, [v]oir dire that touches on the facts of the case should be discouraged." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *State* v. *Ebron*, 292 Conn. 656, 666–67, 975 A.2d 17 (2009), overruled on other grounds by *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). "[T]he permissible content of the voir dire questions cannot be reduced to simplistic rules, but must be left fluid in order to accommodate the particular circumstances under which the trial is being conducted. Thus, a particular question may be appropriate under some circumstances but not under other circumstances. . . . The trial court has broad discretion to determine the latitude and the nature of the questioning that is reasonably necessary to search out potential prejudices of the jurors." (Citation omitted; internal quotation marks omitted.) *State* v. *Skipper*, 228 Conn. 610, 626–27, 637 A.2d 1101 (1994).

A

On October 26, 2015, the defendant filed a motion for permission to question prospective jurors about their views on the death penalty on the grounds that he wanted to evaluate whether jurors were defense or prosecution oriented, and he wanted to "gauge [their] knowledge and awareness of current issues."[16] He asserted that he would inform the jury that this was not a death penalty case. The prosecutor objected, arguing, in part, that, since the death penalty is nonexistent in Connecticut, these types of questions would mislead and confuse the jury, which has no say in the defendant's punishment in any case. The prosecutor contended that there were many other ways that defense counsel could explore juror bias without

[16] The death penalty prospectively was repealed by the legislature in 2012. See Public Acts 2012, No. 12-5. Our Supreme Court, thereafter, on August 25, 2015, in *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015), declared the death penalty unconstitutional for previous convictions as well.

injecting irrelevant and inappropriate matters into the case. The court denied the defendant's motion on the basis that the questions sought to inquire into whether prospective jurors were aware that the death penalty had been abolished, and an inquiry into a juror's knowledge of existing law was impermissible under *Duffy* v. *Carroll*, 137 Conn. 51, 56–57, 75 A.2d 33 (1950) ("Neither is a juror's knowledge or ignorance concerning questions of law a proper subject of inquiry. These are concerned with matters which the juror is bound to take from the court. A juror cannot be a law to himself, but is bound to follow the instructions of the court in that respect, and hence his knowledge or ignorance concerning questions of law is not a proper subject of inquiry upon the trial of the challenge for cause." [Internal quotation marks omitted.]). The court also stated that sentencing was not a matter for potential jurors to consider.

The defendant argues that the court's prohibition on his questions regarding the death penalty was an abuse of discretion because studies have indicated that "pro-death penalty jurors would be more likely to harbor racial biases against [the defendant, and it] is proper for defense counsel to inquire regarding the death penalty as a means of exploring potential racial biases in jurors as well as jurors' favorable views of the prosecution." We are not persuaded.

In the defendant's motion, he specifically stated in part that he wanted to gauge the knowledge of prospective jurors concerning current issues, namely the death penalty. We agree with the state and the trial court that such questioning could be misleading and confusing to a potential juror. "[A] juror's knowledge or ignorance with respect to questions of law is not a proper subject of inquiry on voir dire. . . . [A]ll too frequently such inquiries represent a calculated effort on the part of counsel to ascertain before the trial starts what the

reaction of the venireman will be to certain issues of fact or law or, at least, to implant in his mind a prejudice or prejudgment on those issues. Such an effort transcends the proper limits of the voir dire and represents an abuse of the statutory right of examination." (Citations omitted; internal quotation marks omitted.) *Lamb* v. *Burns*, 202 Conn. 158, 164, 520 A.2d 190 (1987). "[I]t is important that the trial [court], in the exercise of [its] discretion, be punctilious in restricting counsel's inquiries to questions which are pertinent and proper for testing the capacity and competency of the juror . . . and which are neither designed nor likely to plant prejudicial matter in his mind." (Citation omitted; internal quotation marks omitted.) *State* v. *Anthony*, 172 Conn. 172, 176, 374 A.2d 156 (1976).

Here, the record reveals that defense counsel was given wide latitude in questioning potential jurors regarding their ability to be fair and impartial and to follow the law. Specifically, he inquired about, inter alia, their feelings about the criminal justice system, about their ability to remain fair and impartial despite the defendant's arrest and the facts of the crimes alleged, about potential sympathy for the victim's mother, and about the presumption of innocence and reasonable doubt. Furthermore, the court never imposed any prohibition on defense counsel's ability to explore potential racial bias or prejudices; rather, it appears that defense counsel chose not to engage in such exploration. On the basis of the foregoing, we conclude that the court did not abuse its discretion in preventing the defendant from questioning potential jurors about the death penalty.

B

On November 5, 2015, the defendant questioned potential jurors about whether they could keep an open mind through the end of trial because "many times, the

most important witness is the last witness." After jury selection ended for the morning session, the court noted these questions and told defense counsel that they were problematic because they focused on the final witness, regardless of who that witness might be, and they could lead a juror to conclude that the last witness was more important than other witnesses. The court suggested that counsel could ask the potential jurors whether they would keep an open mind throughout the entire trial.

The defendant argues that his proposed question "did not instruct the juror to place extra weight on the testimony of the last witness; instead, to ensure the juror waits until all the evidence is presented, it asks the juror to be open to the possibility that the last witness is most important. The situation proposed by the statement is true; sometimes the last witness truly *is* the most important." (Emphasis in original.) We conclude that the court did not abuse its discretion in disallowing this question.

As stated in part A of this section: "[I]t is important that the trial [court], in the exercise of [its] discretion, be punctilious in restricting counsel's inquiries to questions which are pertinent and proper for testing the capacity and competency of the juror . . . and which are neither designed nor likely to plant prejudicial matter in his mind." (Citation omitted; internal quotation marks omitted.) *State* v. *Anthony*, supra, 172 Conn. 176. In this case, the court was concerned that defense counsel's focus on "the last witness" might cause the potential jurors to assume that the last witness was special or more important than other witnesses. With this concern in mind, the court told defense counsel that he could ask whether the juror would remain open minded throughout the entire trial, from start to finish, but he could not ask specifically about "the last witness." We conclude that this question has the potential to plant prejudicial matter in the minds of the jurors. See id. Accordingly, we conclude that the trial court did not abuse its discretion in prohibiting it.

V

The defendant claims that the court erred in giving a certain limiting instruction to the jury regarding nonhearsay testimony. He also contends that the court's limiting instruction affected his right to testify in his own defense by affecting his credibility, and, therefore, that this claim is of constitutional magnitude appropriate for *Golding* review.[17] The state argues, in relevant part, that this is nothing more than an alleged evidentiary error, which the defendant failed to preserve. We agree with the state.

The following additional facts inform our consideration of this claim. On January 29, 2016, during a break in the defendant's direct testimony, defense counsel filed a motion requesting to introduce certain out-of-court statements, particularly a statement allegedly made by Calabrese to the defendant on the ground that such statement was being "offered not for its truth but to show its effect on the hearer, [and], therefore, [it] is not hearsay." The court heard argument on the motion, which included the following colloquy:

"The Court: My first question . . . is exactly what statements [are we] talking about. You indicated before the break that you wanted to offer, through your client, a statement that Michael Calabrese said the day after the shooting that, '[i]f I'm going down, you're going down.' Are there other statements that are not identified in this motion that are going to come up?

"[Defense Counsel]: Correct. That statement was made—something to that effect, I don't know the exact language, and I believe—I believe that's all we have, yes.

"The Court: All right.

[17] See *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).

"[Defense Counsel]: And then that statement affected a number of things after, but that's the one statement essentially. . . .

"The Court: My understanding of your argument, at least one you articulated, is that this is offered not for the truth, but to explain why the defendant took the steps he did and that the state argues constitute consciousness of guilt. Is that correct, that's the argument?

"[Defense Counsel]: Correct, Your Honor. I believe it's relevant. The state has made consciousness of guilt a large portion of [its] case, particularly things that happened after the homicide, therefore this statement to my client and my client heard on the morning after the homicide colored all of his actions afterwards, and would be, I think, crucial and necessary explanation for why he took some of the steps he did, which would otherwise could raise suspicion with the jury as to consciousness of guilt charge.

* * *

"The Court: So you do want the statement in for the truth, you want the jury to hear those words.

"[Defense Counsel]: We believe the words are important to understand why they would have that impact on the defendant. And I fail to see the prejudice here. I mean, I suppose the jury could be prejudiced against Mr. Calabrese for making a threatening statement, but they already heard numerous statements by Mr. Calabrese here in court that I think would sufficiently prejudice them against him and would already lead them to believe that he could be violent and that he could be threatening, and I don't see . . . prejudice here, that was all on the tape. And the probative value here, the consciousness of guilt evidence, he acts like this because Calabrese says I will essentially—that I will take action to make sure you are guilty.

"The Court: How can you say the jury must hear those particular words and at the same time argue that you're not offering those words for the truth, you don't want the jury to credit those words?

"[Defense Counsel]: They don't need to credit them, they need to understand why the statement was so alarming to my client. Did you know that you could be legally liable for this, that would be different, but if 'I go down, you go down,' he knows that Mr. Calabrese will go down based on what Mr. Calabrese did, that statement is much more alarming than just a general idea of Calabrese saying you could be legally liable.

"The Court: Isn't that the point. I mean, didn't he learn that day or sooner that Michael Calabrese shot Luke Vitalis, and that's in evidence, that Luke Vitalis was dead, that his testimony is that he believed Luke Vitalis was only going to make a drug purchase, that he knew, and you established this, that he gave a gun to Michael Calabrese, he knew he drove Michael Calabrese to Luke Vitalis' house, he knew that he drove Michael Calabrese from Luke Vitalis' house, and this is all of his testimony, all of that is admissible, it's not hearsay, and all of those things would certainly go to why he did the investigation that he did. I don't—again, it seems that you're telling me you don't want the jury to believe the words, but you want them to hear the words, all—and, quite frankly, are less incriminating, the fact that Michael Calabrese said that, than all the facts I just outlined that are in evidence.

"[Defense Counsel]: I believe that fact that there's a threat would explain the panic on the part of the defendant. And it doesn't matter whether or not it's a credible threat, it matters the language of it and what he hears. I don't think we need to judge whether or not it's a credible threat by Mr. Calabrese, whether or not the language is such it would cause someone in the

defendant's position to panic and to take rash actions to try and potentially remove himself from—

"The Court: Did that alarm him more than knowing he now is involved in a murder?

"[Defense Counsel]: I—people—I don't know what his legal knowledge was before this, but it would be reason for him to say I didn't plan this, I didn't have no involvement, I can't get in trouble for it, and then the next morning what Calabrese says, oh, my God, I could be going to jail for that. That's a reasonable thought someone could have being told that threat, and I think the full language of the threat is necessary to communicate why he would panic, why he would take certain actions.

"The Court: Turning to your alternative argument, that this statement by Michael Calabrese is against his penal interest. How is he exposed to prosecution by saying the words, 'If I go down, you go down?'

"[Defense Counsel]: First, it's an admission by Mr. Calabrese that he could be going down. Second, it's tampering with a witness by threatening [the defendant] not to go forward with any information, because he's saying if you take any action to make sure I'm punished, I will make sure you come down with me.

"The Court: [Prosecutor]?

"[The Prosecutor]: There's no—well, I mean, an admission—Mr. Calabrese is not on trial, so the defendant can't offer Mr. Calabrese's statement as an admission. 'If I'm going down, you're going down,' in no way implicates Mr. Calabrese, because it's conditional. I mean . . . it's a conditional situation. He's not saying, 'Yo, man, I did this, you drove me, and if you tell the cops that I did this, I'm telling 'em you drove me.' It's not factual. It's conditional. . . . [H]ow can a conditional statement be a statement against penal interest? It's alleging something in the future.

"[Defense Counsel]: Your Honor, first, if [the defendant] had testified at Mr. Calabrese's trial, this statement would come in as an admission against penal interest. I have no doubt about that. Additionally, we would ask that the state articulate the potential proof of prejudice is so great it would outweigh its probative value. I don't think we've heard any prejudice articulated, but that's a prejudice articulated at this time.

"The Court: What is the prejudice to the state if it's not offered for the truth?

"[The Prosecutor]: Your Honor, the defendant's whole case is going to be to attempt to discount the credibility of Mr. Calabrese's taped statement, and so they're—inevitably they're going to have to argue that somehow Mr. Calabrese's intent was to frame [the defendant]. . . . And this statement goes directly to that.

"The Court: I understand. Am I correct in my understanding and expectation that if the [court] were to admit it, that there would be no argument in closing argument or at any other time that—no reference to the statement as supporting the defendant's claim that Calabrese's tape recording is not accurate?

"[Defense Counsel]: That's correct. And the idea that we're attacking credibility of Mr. Calabrese, is further evidence we're not producing it for the truth, Mr. Calabrese is lying on the tape, he's lying here.

"The Court: I don't know if it's be[ing] introduced for the truth, but I think I am going to—I'm not confident that this is the only way to get this evidence before the jury and that it's necessary. I will allow it, but there will be a corrective instruction immediately that it's not being offered for the truth, that the jury will not consider it to be the truth, or draw any conclusions or make any findings based upon whether the statement is truthful

or not, it's simply offered to explain why the defendant took certain subsequent actions. Is that fair?

"[Defense Counsel]: Very good.

"The Court: All right. Please call the jury."

After the defendant resumed the witness stand, he testified that Calabrese told him: " 'Don't say anything. If I go down, you're going down with me.' " The court immediately provided a limiting instruction to the jury: "All right, at this point, ladies and gentlemen, that is a statement that is offered for a specific purpose, and that is a limited purpose, and so when you engage in your deliberations, you can only consider it for that limited purpose, and it is as follows: That statement, as I understand it, is going to be offered to explain why the defendant took certain subsequent actions. It is not offered for the truth. *It is not offered with the expectation or the understanding that you believe that those were the words that were spoken*. All right. Go ahead." (Emphasis added.) It is the emphasized portion of the court's limiting instruction that the defendant now contends violated his right to testify in his own defense. He alleges that the court effectively undermined his credibility by giving this instruction.

First, we conclude that this claim is an evidentiary matter. Our Supreme Court repeatedly has opined that "because an instructional error relating to general principles of witness credibility is not constitutional in nature; *State* v. *Patterson*, [276 Conn. 452, 469–71, 886 A.2d 777 (2005)]; the defendant would not be entitled to review of any such claim under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989) . . . ." (Internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 114, 25 A.3d 594 (2011). Accordingly, we will not afford *Golding* review to this evidentiary matter.

Moreover, in the present case, the defendant specifically voiced agreement with the court's statement that

it would give a limiting instruction, and the defendant, thereafter, failed to object to the precise instruction given by the court. His claim, therefore, is unreviewable. See *State* v. *William C.*, 103 Conn. App. 508, 520 n.6, 930 A.2d 753 ("[t]he defendant did not object at trial, however, to the court's instructions, and, therefore, the unpreserved claim of instructional error is not reviewable"), cert. denied, 284 Conn. 928, 934 A.2d 244 (2007).[18]

The judgment is affirmed.

In this opinion the other judges concurred.

OHAN KARAGOZIAN *v.* USV OPTICAL, INC.
(AC 40907)

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

Syllabus

The plaintiff, who had been employed by the defendant as a licensed optician manager of the optical department that it owned and operated in a department store, sought to recover damages for his alleged constructive discharge from his employment. In his complaint, the plaintiff alleged, inter alia, that from the beginning of his employment in June, 2014, to

[18] During oral argument before this court, the defendant argued that he properly preserved this claim by raising an objection to a similar limiting instruction given in the court's final instruction to the jury. We disagree. In its final instruction the court stated, "there was testimony by the defendant that Michael Calabrese made a statement to him about, if I go down, you're going down with me, or words to that effect. That was offered for a limited purpose. That was to show the effect of such a statement on the defendant; it is not to be considered by you for the truth of those statements or for you to conclude that those statements were made in those words." After the defendant objected on the ground that the jury was charged incorrectly that it could not "conclude that those statements were made," the court offered the defendant an opportunity to submit a corrective charge to the court. After the luncheon recess, defense counsel confirmed to the court that he no longer was seeking that the jury be recharged on this issue. Thus, any claim that the defendant might have had that the jury was charged incorrectly explicitly was waived by counsel when he declined the opportunity to have the jury recharged.

when he resigned in October, 2014, the defendant, acting through its supervisory personnel, required as part of his duties that he provide optometric assistant services to the doctor of optometry in the store, which violated certain public policies of the state, that he requested of the defendant's supervisory personnel that he not be required to perform the duties assigned to him, that following the defendant's refusal to excuse him, he was compelled to resign from his position and that the defendant thereby constructively discharged him in violation of the public policy of the state. The trial court granted the defendant's motion to strike the complaint on the ground that the complaint insufficiently alleged both elements of a claim of constructive discharge, finding that the allegations in no way could fairly be construed to establish that the defendant intentionally created an intolerable workplace or that there was an intolerable workplace that would have compelled a reasonable person to resign. Thereafter, the trial court granted the plaintiff's motion for judgment and rendered judgment in favor of the defendant. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendant's motion to strike the complaint and determined that the plaintiff failed to state a claim for constructive discharge: the plaintiff failed to allege in his complaint that the defendant intended to create a work environment so intolerable that a reasonable person would have been compelled to resign involuntarily, and the cases relied on by the plaintiff in support of his claim were inapplicable, as they had nothing to do with an employer's intent to create intolerable working conditions or to compel an employee to resign involuntarily; moreover, the plaintiff's attempt to bootstrap his claim by comparing his working conditions to those in *Sheets* v. *Teddy's Frost Foods, Inc.* (179 Conn. 471) and *Faulkner* v. *United Technologies Corp.* (240 Conn. 576) was unavailing, those cases having concerned wrongful retaliatory discharge claims, not constructive discharge, and the working environment in the subject store was not comparable to the ones confronted by the plaintiffs in either *Sheets* or *Faulkner*, as the plaintiff in the present case merely alleged that he was assigned duties that allegedly violated public policy and did not allege the consequences that may have befallen him by performing the duties to which he was assigned.

Argued October 11, 2018—officially released January 8, 2019

Procedural History

Action to recover damages for the plaintiff's alleged constructive discharge from employment, and for other relief, brought to the Superior Court in the judicial district of New Haven at Meriden, where the court, *Hon.*

John F. Cronan, judge trial referee, granted the defendant's motion to strike the complaint; thereafter, the court, *Harmon*, *J.*, granted the plaintiff's motion for judgment and rendered judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

John R. Williams, for the appellant (plaintiff).

Robert M. Palumbos, pro hac vice, with whom was *Elizabeth M. Lacombe*, for the appellee (defendant).

Scott Madeo and *Brian Festa* filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

Opinion

LAVINE, J. The plaintiff, Ohan Karagozian, appeals from the judgment rendered by the trial court subsequent to its granting of the motion to strike the complaint filed by the defendant, USV Optical, Inc. The substance of the plaintiff's claim on appeal is that the court improperly concluded that he had failed to state a claim for constructive discharge.[1] We disagree and affirm the judgment of the trial court.

The record discloses the following procedural history. The plaintiff commenced the present action on September 12, 2016. The operative complaint for pur-

[1] In his appellate brief, the plaintiff presented the following issue: "If an employee is ordered by his employer to engage in illegal activities and refuses to do so, and thereafter the employer on multiple occasions refuses to excuse [the employee] from the requirement of engaging in the said illegal activities, whereupon the employee resigns rather than violate the law, does the employer's conduct constitute constructive termination of employment in violation of public policy?"

The defendant contends that the issue presented by the plaintiff is a hypothetical one. We review the claim on the basis of the judgment from which the plaintiff has appealed and the underlying procedural facts.

poses of the present appeal is the corrected revised complaint (complaint) filed on December 19, 2016.

The complaint alleged, in relevant part, that the plaintiff is an optician licensed in Connecticut and that the defendant owns and operates optical departments in JCPenney stores. Between June and October, 2014, the defendant employed the plaintiff as a licensed optician manager in the JCPenney store in Trumbull (store). From approximately June 28 through October 17, 2104, the defendant, acting through its supervisory personnel, required the plaintiff, as part of his duties, to provide optometric assistant services to the doctor of optometry in the store. The complaint further alleged that the duties the plaintiff was required to perform violated the public policies of the state,[2] which prohibit employees under the control of unlicensed third parties from performing services for licensed optometrists,[3] and pro-

[2] The complaint alleged that the defendant required the plaintiff to perform the following duties: obtain and record a patient's preliminary case history; maintain records; schedule appointments, perform bookkeeping, correspondence and filing; prepare patients for vision examinations; assist in tests for near and far acuity, depth perception, macula integrity, color perception, and visual field, utilizing ocular testing apparatus; instruct patients in care and use of glasses and contact lenses; work with patients in vision therapy; assist patients in frame selection; adjust and repair glasses; modify contact lenses; maintain an inventory of materials and cleaning instruments; assist in fabrication of glasses and contact lenses; test and measure patients' acuity, peripheral vision, depth perception, focus, ocular movement and color as requested by the doctor; measure intraocular pressure of eyes using glaucoma test; measure axial length of eye, using ultrasound equipment; examine eyes for abnormalities of cornea and anterior or posterior chambers using slit lamp; apply drops to anesthetize, dilate or medicate eyes; instruct patients in eye care and use of glasses or contact lenses; adjust and repair glasses using screwdrivers and pliers; and take money from patients and record only those payments that are made with credit card and check on the store cash register inside the optical store while keeping tendered cash receipts from patients in an envelope under the cash drawer.

[3] The complaint alleged that the public policy is articulated in a declaratory ruling issued by the Connecticut Board of Examiners for Optometrists on May 1, 2002, titled *In re Petition of Lawrence Lefland, O.D.*, which was attached to the complaint as an exhibit. The plaintiff was not a party to the declaratory ruling, which concerns optometrists. The plaintiff alleged that he is a licensed optician.

hibit licensed opticians from performing the duties of an optometric assistant and providing services for optometrists by whom they are not employed.[4] The complaint also alleged that the duties the plaintiff was required to perform violated General Statutes § 31-130 (i),[5] which requires that the defendant or the store have a staffing permit allowing either of them to provide staffing services to a "doctor." On September 20 and October 3 and 16, 2014, and on other dates, the plaintiff requested of the defendant's supervisory personnel that he not be required to perform the duties assigned to him. The defendant refused to excuse the plaintiff as he requested. As a result, the complaint alleged that the plaintiff was compelled to resign from his position and to suffer the attendant loss of income. Lastly, the complaint alleged that the defendant constructively discharged the plaintiff in violation of the public policy of the state.

[4] The complaint alleged that the public policy is articulated in a cease and desist consent order issued jointly by the Connecticut Board of Examiners for Optometrists and the Connecticut Board of Examiners for Opticians in February, 2006, in regard to petition number 2003-0321-003-003. The cease and desist order was attached to the complaint as an exhibit. The plaintiff was not a party to the cease and desist order.

[5] The complaint alleged that the relevant public policy is set forth in General Statutes § 31-130 (i), which provides: "No person shall engage in the business of procuring or offering to procure employees for persons seeking the services of employees or supplying employees to render services where a fee or other valuable thing is exacted, charged or received from the employer for procuring or assisting to procure or supplying such employees unless he registers with the Labor Commissioner. Application for such registration or for the annual renewal of such registration shall be on forms furnished by the commissioner and shall be accompanied by a fee of one hundred fifty dollars."

"[T]he policy behind General Statutes §§ 31-129 to 31-131c is to protect individual applicants (prospective employees) from unscrupulous employment agencies." *Monaco* v. *Turbomotive, Inc.*, 68 Conn. App. 61, 66, 789 A.2d 1099 (2002) (distinguishing between employment agencies that require employer, not employee, to pay fee); see also id., 66 n.2 (registration fee, not licensing fee, to prevent loss of state revenue). The defendant notes that the plaintiff did not allege that the defendant charged a fee.

The defendant filed a motion to strike the complaint on the grounds that (1) there is no private right of action for the claim alleged and (2) the complaint failed to allege a claim of constructive discharge. In its memorandum of law in support of its motion to strike, the defendant addressed each of the bases for the plaintiff's claimed violations of public policy and explained why none of them created a private right of action. The defendant argued that the only factual basis for the plaintiff's claim is the allegation that the defendant created an intolerable work environment by requiring him to provide optometric assistance services to the store doctor of optometry from the day his employment commenced. The defendant argued that it defies logic to claim that from the very first day of the plaintiff's employment the defendant intended to force him to resign.

The plaintiff opposed the motion to strike, arguing that "he was terminated because he declined to participate" in the duties he was required to perform and that such termination violated Connecticut public policy. He denied that the action was brought pursuant to § 31-130 (i) and the two administrative rulings; rather, he argued that the action sounds in the common-law exception to the at-will employment doctrine articulated in *Sheets* v. *Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980). In *Sheets*, the employer *discharged the employee in retaliation* for the employee's objection to the employer's failure to comply with the requirements of Connecticut's Uniform Food, Drug and Cosmetic Act (act), General Statutes § 19-211 et seq. Id., 473. Our Supreme Court concluded that that plaintiff had stated a cause of action under the common law for *retaliatory wrongful discharge*. Id., 480. The plaintiff in the present case argued that *Sheets* "has since been applied to any termination in retaliation for refusing to violate laws or regulations or for insisting upon compliance therewith. See, e.g., *Faulkner* v. *United Technologies Corp.* 240 Conn. 576, 693 A.2d 293 (1997)."

The defendant responded to the plaintiff's opposition by noting, in part, that the plaintiff failed to allege a claim for wrongful termination or wrongful discharge. Although the plaintiff asserted in his opposition to the motion to strike that "he was terminated because he declined to participate in . . . activities and that such termination violated Connecticut public policy," the defendant correctly noted that the complaint specifically alleges that the "plaintiff was compelled to resign his position with the defendant." The defendant emphasized that it did not terminate the plaintiff's employment. The defendant also argued that the plaintiff misinterpreted the elements of a constructive discharge claim, noting that in *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 717 A.2d 1254 (1998), our Supreme Court stated that the "[c]onstuctive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily." (Emphasis in original; internal quotation marks omitted.) Id., 178, quoting *Chertkova* v. *Connecticut General Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996). It also pointed out that both *Sheets* and *Faulkner* were cases alleging wrongful termination of employment, not constructive discharge.

The trial court heard oral argument on the defendant's motion to strike and issued a memorandum of decision on April 26, 2017, in which it granted the motion. The court relied on *Brittell* as the legal basis of its decision,[6] finding that the complaint insufficiently

[6] In *Brittell*, our Supreme Court was presented with a claim of sexual harassment in violation of General Statutes §§ 46a-60 (a) (1) and (8) and 46a-70. *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 161. In that case, our Supreme Court stated that it looks to federal case law in interpreting discrimination cases. Id., 164. "Constructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily. . . . Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. . . . Accordingly, [a] claim of constructive dis-

alleged both elements of constructive discharge. It bluntly stated that "[i]n no way" can the allegations fairly be construed to establish that the defendant *intentionally* created an intolerable workplace or that there was even an intolerable workplace that would compel a reasonable person to resign. The court concluded that although the complaint alleged constructive discharge in violation of public policy, the plaintiff had relied on cases dealing with wrongful termination of employment rather than constructive discharge. The plaintiff did not allege that he was wrongfully terminated in retaliation for refusing to participate in activities that violated the law. Cf. *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 480. The court, therefore, granted the motion to strike.

The plaintiff declined to replead and asked the court to render judgment in favor of the defendant. Following the entry of judgment, the plaintiff appealed. On appeal, the plaintiff claims that "[i]f an employer orders an employee to engage in illegal activity, and the employee resigns rather than break the law, the employee has been constructively discharged in violation of public policy and has a cause of action pursuant to the doctrine of *Sheets* . . . ."[7] Although the plaintiff acknowledges

charge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign." (Citations omitted; internal quotation marks omitted.) Id., 178. Our Supreme Court concluded that the plaintiff had failed to meet "her burden of establishing an essential element of her claim, namely, the existence of an intolerable work atmosphere that would compel a reasonable person in that situation to resign." Id., 179.

[7] The issue before our Supreme Court in *Sheets* was "whether to recognize an exception to the traditional rules governing employment at will so as to permit a cause of action for wrongful discharge where the discharge contravenes a clear mandate of public policy." *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 474.

"In Connecticut, an employer and employee have an at-will employment relationship in the absence of a contract to the contrary. Employment at will grants both parties the right to terminate the relationship for any reason, or no reason, at any time without fear of legal liability." (Internal quotation marks omitted.) *Thibodeau* v. *Design Group One Architects, LLC*, 260 Conn. 691, 697–98, 802 A.2d 731 (2002).

that *Sheets* is a wrongful termination case and that *Faulkner* is a wrongful retaliatory discharge case, he argues that in those cases, as in the present case, the employees were required to engage in illegal activity. He argues that whether an employer discharges an employee directly under the *Sheets* doctrine or constructively discharges the employee, the effect on the employee is the same and there cannot be any difference in the law's prohibition.

The defendant again contends in its appellate brief that the plaintiff failed to plead sufficient facts to support a claim for constructive discharge, noting that a plaintiff must allege that instead of firing an employee directly, the employer intentionally created "an intolerable work atmosphere that forces an employee to quit involuntarily." (Internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 178. It argues that one cannot infer from the allegations of the complaint that the defendant intended to create an intolerable work atmosphere when it hired the plaintiff to provide optometric assistant services to the doctor of optometry in the store. The defendant states once again that it is illogical to conclude that it intended from the first day of the plaintiff's employment to force him to quit involuntarily.[8] We agree with the defendant.

We briefly review the applicable legal principles and our standard of review. "The purpose of a motion to

[8] In *Petrosino* v. *Bell Atlantic*, 385 F.3d 210, 231 (2d Cir. 2004), the United States Court of Appeals for the Second Circuit stated that the "law is clear that a constructive discharge claim cannot be proved by demonstrating that an employee is dissatisfied with the work assignments she receives within her job title." See *Stetson* v. *NYNEX Service Co.*, 995 F.2d 355, 360 (2d Cir. 1993). *Petrosino* was cited frequently in the amicus curiae brief of the Commission on Human Rights and Opportunities with respect to the nature of an employer's intent in a constructive discharge case, but it did not address the quoted language. Neither the plaintiff nor the defendant addressed the law stated in *Stetson*, i.e., "constructive discharge generally cannot be established, however, simply through evidence that an employee was dissatisfied with the nature of his assignments." Id.

strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted. . . . [S]ee Practice Book § 10-39. A motion to strike challenges the legal sufficiency of a pleading, and consequently, requires no factual findings by the trial court. . . . We take the facts to be those alleged in the complaint . . . and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . A motion to strike is properly granted if the complaint alleges mere conclusions of law that are unsupported by the facts alleged." (Internal quotation marks omitted.) *Vazquez* v. *Buhl*, 150 Conn. App. 117, 125, 90 A.3d 331 (2014). Construction of a complaint is a question of law. *Edelman* v. *Page*, 123 Conn. App. 233, 243, 1 A.3d 1188, cert. denied, 299 Conn. 908, 10 A.3d 525 (2010). Our review of the court's ruling on a motion to strike is plenary. *U.S. Bank National Assn.* v. *Blowers*, 177 Conn. App. 622, 627, 172 A.3d 837 (2017), cert. granted on other grounds, 328 Conn. 904, 177 A.3d 1160 (2018).

"The constructive discharge concept originated in the labor-law field in the [1930s]; the National Labor Relations Board . . . developed the doctrine to address situations in which employers coerced employees to resign, often by creating intolerable working conditions, in retaliation for employees' engagement in collective activities. . . . Over the next two decades, Courts of Appeals sustained the [National Labor Relations Board's] constructive discharge rulings." (Citations omitted.) *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 141, 124 S. Ct. 2342, 159 L. Ed. 2d 204 (2004).

In Connecticut, "[c]onstructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an

employee to quit involuntarily. . . . Working conditions are intolerable if they are so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign. . . . *Brittell* v. *Dept. of Correction*, [supra, 247 Conn. 178]. A claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign. *Seery* v. *Yale-New Haven Hospital*, 17 Conn. App. 532, 540, 554 A.2d 757 (1989). Normally, an employee who resigns is not regarded as having been discharged, and thus would have no right of action for abusive discharge. . . . Through the use of constructive discharge, the law recognizes that an employee's voluntary resignation may be, in reality, a dismissal by the employer. . . . Id. Moreover, [i]n order to meet the high standard applicable to a claim of constructive discharge, a plaintiff is required to show both (1) that there is evidence of the employer's intent to create an intolerable environment that forces the employee to resign, and (2) that the evidence shows that a reasonable person would have found the work conditions so intolerable that he would have felt compelled to resign. . . . *Irizarry* v. *Lily Transportation Corp.*, Docket No. 3:15-CV-1335 (DJS), 2017 WL 3037782, *4 (D. Conn. July 18, 2017), citing *Adams* v. *Festival Fun Parks, LLC*, 560 Fed. Appx. 47, 49 (2d Cir. 2014)." (Emphasis in original; internal quotation marks omitted.) *Horvath* v. *Hartford*, 178 Conn. App. 504, 510–11, 176 A.3d 592 (2017). Notably, a constructive discharge cause of action does not require that an employer violated a public policy.

On the basis of our plenary review of the allegations in the complaint, we conclude that the trial court properly determined that the plaintiff failed to state a claim for constructive discharge. There is no allegation in the complaint that reasonably can be construed to claim

that the defendant *intended* to create conditions so intolerable that a reasonable person would be compelled to resign. See *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 178–79. The plaintiff denies the plain language of *Brittell*, arguing that a more sensible reading of *Brittell* would conclude that it is the employer's intent to create the work atmosphere in question that matters, rather than an intent that such atmosphere should force an employee to resign. He looks to federal cases to support his argument that, in cases applying the doctrine of constructive discharge, courts did not focus on the employer's state of mind, but on the objective reality of the working conditions and the impact of that objective reality, and not on the particular employee in question, but on the hypothetical reasonable person in the employee's position.[9] In his appellate brief, the plaintiff provides the following quote: " 'To find that an employee's resignation amounted to a constructive discharge, the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.' *Whidbee* v. *Garzarelli Food Specialties*, *Inc.*, 223 F.3d 62, 73 (2d Cir. 2000) . . . ."[10] (Citation omitted.) See also *Pennsylvania State Police* v. *Suders*, supra, 542 U.S. 147.[11]

[9] The plaintiff claims that this is an issue of first impression. He did not, however, raise this claim in the trial court when he opposed the defendant's motion to strike. The trial court, therefore, did not have an opportunity to address it.

[10] *Whidbee* concerned claims of a hostile work environment and constructive discharge brought pursuant to 42 U.S.C. § 1981 and New York law prohibiting inappropriate racial comments and tension created by one of the plaintiffs' coworkers. *Whidbee* v. *Garzarelli Food Specialties*, *Inc.*, supra, 223 F.3d 67. The Court of Appeals reversed the District Court's summary judgment in favor of the defendants on the plaintiffs' § 1981 claims regarding a hostile work environment but affirmed the summary judgment with respect to the constructive discharge claim against the defendants, concluding that there was no evidence that the defendants "*intentionally* create[d] an intolerable work atmosphere that force[d] an employee to quit involuntarily." (Emphasis added; internal quotation marks omitted.) Id., 74.

[11] A fuller reading of *Pennsylvania State Police*, a hostile work environment case brought pursuant to Title VII of the Civil Rights Act of 1964, 42

We acknowledge the federal standard as to the conditions that may compel an employee to resign involuntarily, which, as quoted, is no different from Connecticut's standard. The issues in the cases cited by the plaintiff, however, had nothing to do with an employer's intent, whether it related to the creation of intolerable working conditions or to compel an employee to resign involuntarily. In *Pennsylvania State Police*, the question concerned the burden of proof that parties bear when a sexual harassment/constructive discharge claim is asserted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. *Pennsylvania State Police* v. *Suders*, supra, 542 U.S. 133.[12] That case, therefore, is inapplicable.

U.S.C. § 2000e et seq., discloses the following analysis. "The constructive discharge here at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment. For an atmosphere of sexual harassment or hostility to be actionable, we reiterate . . . the offending behavior must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. . . . A hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign. See, e.g., *Breeding* v. *Arthur Gallagher & Co.*, 164 F.3d 1151, 1160 (8th Cir. 1999) ([A]lthough there may be evidence from which a jury could find sexual harassment, . . . the fact alleged [for constructive discharge must be] . . . so intolerable that a reasonable person would be forced to quit.); *Perry* v. *Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997) ([U]nless conditions are beyond ordinary discrimination, a complaining employee is expected to remain on the job while seeking redress.)." (Citation omitted; internal quotation marks omitted.) *Pennsylvania State Police* v. *Suders*, supra, 542 U.S. 146–47.

[12] *Pennsylvania State Police* concerned "an employer's liability for one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual harassment, or hostile work environment, attributable to a supervisor." (Internal quotation marks omitted.) *Pennsylvania State Police* v. *Suders*, supra, 542 U.S. 143. There are "two categories of hostile work environment claims: (1) harassment that culminates in a tangible employment action for which employers are strictly liable . . . and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense . . . ." (Citations omitted; internal quotation marks omitted.) Id.; see *Faragher* v. *Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1989) (when no tangible employment action taken, employer may raise affirmative defense to liability comprising two elements: employer exercised reasonable care to prevent

The trial court in the present case also concluded that the complaint failed to allege an intolerable workplace that would compel an objectively reasonable employee to resign. With respect to the workplace conditions in the store, the plaintiff attempts to bootstrap his claim by comparing his working conditions to those in *Sheets* v. *Teddy's Frost Foods, Inc.*, supra, 179 Conn. 471, and *Faulkner* v. *United Technologies Corp.*, supra, 240 Conn. 576. We reject his attempt. First of all, those cases concerned wrongful retaliatory discharge claims, not constructive discharge. Second, the circumstances under which the plaintiff alleged he was employed in the store are not comparable to those confronted by the plaintiffs in either *Sheets* or *Faulkner*. The plaintiff in the present case merely alleged that he was assigned duties that allegedly violated public policy.[13] Moreover, he did not allege the consequences that may have befallen him by performing the duties to which he was assigned. "A claim of constructive discharge must be supported by more than the employee's subjective opinion that the job conditions have become so intolerable that he or she was forced to resign." *Seery* v. *Yale-New Haven Hospital*, 17 Conn. App. 532, 540, 554 A.2d 757 (1989). Although *Sheets* and *Faulkner* are cases concerning wrongful retaliatory discharges, we examine them briefly to demonstrate the differences in workplace conditions.

The plaintiff in *Sheets* was employed as the quality control director and operations manager of Teddy's Frosted Foods, Inc., a producer of frozen food products. *Sheets* v. *Teddy's Frosted Foods, Inc.*, supra, 179 Conn. 473. During the course of his employment, the plaintiff noticed deviations from his employer's standards and labels, substandard vegetables, and underweight meat

and correct promptly sexual harassing behavior and employee unreasonably failed to take advantage of preventive or corrective opportunities provided by employer or otherwise to avoid harm); *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1989) (same).

[13] We need not determine whether the duties the plaintiff was assigned violated public policy. But see footnotes 3, 4 and 5 of this opinion.

components. Id. Such deviations meant that the employer's products violated the express representations on its labels. Id. False or misleading labels violate the provisions of the act. Id. The plaintiff communicated his concern in writing to his employer and recommended more selective purchasing and conforming components. Id. His suggestions were ignored, and his employment was later terminated. Id. The plaintiff was discharged in retaliation for his efforts to ensure his employer's products complied with applicable law. Id. Our Supreme Court stated that the act imposes criminal penalties on anyone who violates it and that the criminal sanctions do not depend on proof of intent to defraud. Id., 478. The plaintiff's position as quality control director and operations manager may have exposed him to criminal prosecution under the act. Id. The court also found that the act was intended to safeguard public health and to promote the public welfare by protecting the public from injury due to merchandising deceit. Id.

In *Faulkner*, our Supreme Court noted that in *Sheets* it stated that, "an employee should not be put to an election whether to risk criminal sanction or to jeopardize his continued employment." (Internal quotation marks omitted.) *Faulkner* v. *United Technologies Corp.*, supra, 240 Conn. 583. In *Faulkner*, our Supreme Court was called upon to determine whether the foregoing proposition applied to situations in which the source of criminal sanction was federal, rather than state, law.[14] Id. The court perceived no difference between *Sheets* and a situation in which an employee may be forced to engage in conduct that exposes the employee to federal criminal sanctions. The plaintiff in *Faulkner*

[14] In *Faulkner*, the defendant, United Technologies Corporation, claimed that the plaintiff could not state a cause of action pursuant to *Sheets* because his complaint was not grounded in a state law or public policy. See *Faulkner* v. *United Technologies Corp.*, supra, 240 Conn. 584.

alleged that his employer discharged him in violation of the public policy against government contract fraud. Id., 581. At the time, the Major Frauds Act, 18 U.S.C. § 1031, provided for the imposition of fines up to $10,000,000 and imprisonment up to ten years for a violation. Id. The plaintiff was a "supplier quality assurance representative." Id., 578. His job required him to inspect Blackhawk helicopter parts provided by various suppliers to ensure that they met the employer's engineering specifications. Id. On numerous occasions, he rejected defective parts despite pressure from the suppliers and his superiors to accept them. Id. He reported the existence of the defective parts to his superiors, who did nothing to correct the situation but informed the plaintiff that he might be disciplined for rejecting parts in the future. Id. The defendant employer subsequently discharged the plaintiff on the ground that he had engaged in misconduct. Id. In his complaint, the plaintiff alleged that he was discharged for refusing to accept substandard and defective helicopter parts. Id., 579. Our Supreme Court held that the plaintiff had stated a claim for wrongful discharge pursuant to the public policy limitation established in *Sheets*. Id., 589. In the present case, the plaintiff's work environment was not comparable to the one in either *Sheets* or *Faulkner*.

For the foregoing reasons, we conclude that the trial court properly granted the defendant's motion to strike. The plaintiff failed to allege that the defendant intended to create an intolerable work atmosphere that would compel a reasonable person to resign involuntarily.[15]

[15] The Commission on Human Rights and Opportunities (commission) submitted an amicus curiae brief. In its brief, the commission asserted that it is responsible for investigating complaints that invoke the constructive discharge theory and has an interest in decisions that may affect its decision-making responsibilities. With respect to the present appeal, the commission claims that the decision of the trial court is unclear and subject to different interpretations. It, therefore, asks this court to address whether an employer's intent to create an intolerable work atmosphere is a necessary element

The judgment is affirmed.

In this opinion the other judges concurred.

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of a constructive discharge claim. It argues that our Supreme Court attempted to resolve the role of an employer's intent in *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 148, but did so unsuccessfully when it stated "[c]onstructive discharge of an employee occurs when an employer, rather than directly discharging an individual, *intentionally* creates an intolerable work atmosphere that forces an employee to quit involuntarily. . . . *Chertkova* v. *Connecticut General Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996); accord *Serry* v. *Yale New Haven Hospital*, [supra, 17 Conn. App. 540]." (Emphasis in original; internal quotation marks omitted.) *Brittell* v. *Dept. of Correction*, supra, 178.

The commission recognizes the plaintiff's argument that "a more sensible reading of *Brittell* would conclude that it is the intent to create the work atmosphere in question that matters, rather than an intent that such atmosphere should force an employee to resign." It acknowledges, however, that the most recent constructive discharge decision of this court is *Horvath* v. *Hartford*, supra, 178 Conn. App. 504, which adhered to the language in *Brittell*. Id., 510.

We decline the commission's request. As an intermediate court of appeal, we are "unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court." (Internal quotation marks omitted.) *State* v. *Brantley*, 164 Conn. App. 459, 468, 138 A.3d 347, cert. denied, 321 Conn. 918, 136 A.3d 1276 (2016).

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CONNECTICUT APPELLATE REPORTS

Vol. 187

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

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STATE OF CONNECTICUT

DESIGNS FOR HEALTH, INC. *v.* MARK MILLER
(AC 40708)

Keller, Bright and Pellegrino, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for breach of contract in connection with an agreement pursuant to which the defendant agreed to sell certain products provided by the plaintiff. In its complaint, the plaintiff alleged that the defendant, who is a resident of California and maintains his primary place of business there, violated the terms of the agreement and, therefore, was required to pay the plaintiff damages pursuant to a liquidated damages clause in the agreement, which contained a forum selection clause that required litigation arising from the agreement to be resolved by Connecticut courts. The defendant filed a motion to dismiss the action for lack of personal jurisdiction, asserting that the plaintiff could not meet its burden to prove that he had signed the agreement. The defendant attached to his motion an affidavit in which he averred that he never had any contact with Connecticut and never signed, or authorized anyone to sign, any document that might constitute doing business of any kind in Connecticut. The plaintiff filed a memorandum of law in opposition to the motion to dismiss in which it contended that the trial court had personal jurisdiction over the defendant because he had signed the agreement electronically. The plaintiff submitted a number of attachments in support of its opposition that cumulatively asserted that the defendant had signed the agreement electronically. The defendant filed a reply and an attached supplemental affidavit in which he specifically rebutted the plaintiff's contentions. Thereafter, the court conducted a hearing on the motion to dismiss at which it heard the parties' oral arguments. The parties did not request and the court did not hold a full evidentiary hearing but,

instead, relied on the memoranda and documentary evidence submitted by the parties to resolve the critical factual dispute as to whether the defendant had signed the agreement electronically. The trial court granted the motion to dismiss and rendered judgment thereon, concluding that the plaintiff failed to meet its burden to establish that the court had jurisdiction over the defendant pursuant to the long arm statute (§ 52-59b [a] [1]) applicable to nonresident individuals because it failed to establish that the defendant had signed the agreement electronically. On the plaintiff's appeal to this court, *held* that the trial court improperly granted the defendant's motion to dismiss and concluded that it lacked personal jurisdiction over the defendant: applying the prima facie standard used by the United States Court of Appeals for the Second Circuit in cases involving jurisdictional disputes where the evidentiary record is only partially developed and the parties have not requested a full evidentiary hearing, this court concluded that the plaintiff met its burden to make a prima facie showing that the court had personal jurisdiction over the defendant because the plaintiff submitted evidence, which, if credited by the trier of fact, was sufficient to establish that the defendant electronically had signed the agreement containing the forum selection clause; moreover, because the plaintiff met its threshold burden of making a prima facie showing and the parties did not request and the trial court did not hold a full evidentiary hearing, the trial court was required to deny the defendant's motion to dismiss.

Argued October 9, 2018—officially released January 8, 2019

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Scholl*, *J.*, granted the defendant's motion to dismiss for lack of personal jurisdiction and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Stephen J. Curley, with whom, on the brief, was *Daniel B. Fitzgerald*, for the appellant (plaintiff).

Jeffrey Hellman, for the appellee (defendant).

Opinion

BRIGHT, J. The plaintiff, Designs for Health, Inc., appeals from the judgment of the trial court granting the motion to dismiss filed by the defendant, Mark

Miller. On appeal, the plaintiff claims that the court improperly concluded that it lacked personal jurisdiction over the defendant because the plaintiff failed to establish that the defendant had signed electronically an agreement in which the parties expressly agreed to submit to the jurisdiction of state and federal courts in Connecticut. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's claim. On September 27, 2016, the plaintiff filed this breach of contract action against the defendant. In the one count complaint, the plaintiff alleged the following relevant facts. The plaintiff, a Florida corporation with offices in Connecticut, "is in the business of producing and selling a professional line of nutraceutical and natural health products . . . to consumers for sale through health care providers . . . ." The defendant, a podiatrist, maintains a primary place of business in California and is a resident of California. On or about June 10, 2016, the plaintiff and the defendant entered into an agreement pursuant to which the defendant agreed to sell products provided by the plaintiff. Between August 17 and September 8, 2016, the defendant violated the agreement when he sold products that he had purchased from the plaintiff on a website that had not been authorized by the plaintiff. As a result of this violation, the defendant is required, pursuant to a liquidated damages clause in the agreement, to pay the plaintiff at least $53,000. The agreement, which was attached to the complaint, contains a forum selection clause that requires litigation arising from the agreement to be resolved by Connecticut courts.[1]

[1] The forum selection clause of the agreement provides: "This [a]greement shall be governed in all respects by the substantive laws of the [s]tate of Connecticut without regard to such state's conflict of law principles. [The parties] agree that the sole and exclusive venue and jurisdiction for disputes arising from this [a]greement shall be in the state or federal court located in Hartford [c]ounty, Connecticut, and [the parties] hereby submit to the

On November 3, 2016, the defendant filed a motion to dismiss in which he argued that the court lacked personal jurisdiction over him because the plaintiff could not meet its burden to prove that he had signed the agreement. The defendant attached to his motion, among other things, an affidavit in which he averred that he never had any contact with the state of Connecticut and never signed, or authorized anyone to sign, any document that "might constitute doing business of any kind in Connecticut." On December 2, 2016, the plaintiff filed a motion for an extension of time to respond to the defendant's motion so that it could depose the defendant regarding the factual statements made in his affidavit. On January 23, 2017, the court entered a scheduling order that permitted the plaintiff to conduct the defendant's deposition. On February 22, 2017, the plaintiff took the deposition of the defendant in California.

On March 24, 2017, the plaintiff filed a memorandum of law in opposition to the defendant's motion to dismiss in which it contended that the court had personal jurisdiction over the defendant because he had signed electronically the agreement that contained the forum selection clause. The plaintiff submitted a number of attachments in support of its opposition that cumulatively asserted that the defendant had signed electronically the agreement, including certain excerpts of the deposition of the defendant, a copy of the agreement, an affidavit of its general counsel, Stephen M. Carruthers, a "DocuSign" certificate of completion, a screenshot of a "GeoMapLookup" search, notice sent by Carruthers to the defendant informing him of his alleged breach of the agreement, documents evincing the service of the defendant, an affidavit of the plaintiff's independent sales representative, Toni Lyn Davis, as well as a redacted record of her telephone calls, and a series

jurisdiction of such courts; provided, however, that equitable relief may be sought in any court having proper jurisdiction."

of e-mails that purportedly were exchanged between Carruthers and the defendant. On April 7, 2017, the defendant filed a reply that contended that the plaintiff failed to meet its burden to establish personal jurisdiction, and he attached a supplemental affidavit in which he specifically rebutted the contentions made by the plaintiff in support of its opposition.

On May 22, 2017, the court conducted a hearing on the motion to dismiss at which it heard the parties' oral arguments. On May 31, 2017, the court issued a memorandum of decision in which it granted the defendant's motion. Therein, the court noted that, although "due process requires that a trial-like hearing be held" when "issues of fact are necessary to the determination of a court's jurisdiction," the "parties did not request that an evidentiary hearing be held but rel[ied] on evidence they ha[d] submitted by affidavit." (Internal quotation marks omitted.) Accordingly, the court compared the evidence submitted by both parties[2] and concluded that "the plaintiff has failed to meet its burden to establish that this court has jurisdiction over the defendant.

[2] The court excluded the evidence of the "GeoMapLookup" screenshot and Carruthers' related statements in his affidavit that purportedly demonstrated the physical location of the Internet Protocol address (IP address) used to execute the agreement. The court specifically stated that "[t]he only evidence submitted by the plaintiff to establish that the referenced IP address is the defendant's is inadmissible and irrelevant hearsay in that it is information from a domain which indicates that the IP address can be traced to the vicinity of a town in California which borders the town in which the defendant allegedly maintains a place of business." Generally, although a plaintiff may rely on only evidence that would be admissible at trial to make a prima facie showing; see *Lujan* v. *Cabana Management, Inc.*, 284 F.R.D. 50, 64 (E.D.N.Y. 2012); *Adams* v. *Wex*, 56 F. Supp. 2d 227, 229 (D. Conn. 1999); but see *Schmidt* v. *Martec Industries Corp.*, United States District Court, Docket No. 07-5020 (DRH) (E.D.N.Y. Sept. 3, 2009); we need not consider whether the trial court erred by excluding this evidence because the proximity of the physical location of the IP address is not necessary to our resolution of this appeal. Consequently, assuming, without deciding, that the trial court properly excluded this evidence, we likewise omit this evidence from our consideration.

It has not established that the defendant . . . transacted any business in this state, that is, entered into the agreement which is the subject of this lawsuit, such that the court has jurisdiction over the defendant pursuant to the long arm statute" applicable to nonresident individuals, General Statutes § 52-59b (a) (1).[3] On June 20, 2017, the plaintiff filed a motion to reargue, which was denied summarily by the trial court. This appeal followed. Additional facts will be set forth as necessary.

We begin with our standard of review and relevant legal principles. "[A] challenge to the jurisdiction of the court presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Kenny* v. *Banks*, 289 Conn. 529, 532, 958 A.2d 750 (2008). "When a defendant challenges personal jurisdiction in a motion to dismiss, the court must undertake a two part inquiry to determine the propriety of its exercising such jurisdiction over the defendant. The trial court must first decide whether the applicable state [long arm] statute authorizes the assertion of jurisdiction over the [defendant]. If the statutory requirements [are] met, its second obligation [is] then to decide whether the exercise of jurisdiction over the [defendant] would violate constitutional principles of due process." (Internal quotation marks omitted.) *Samelko* v. *Kingstone Ins. Co.*, 329 Conn. 249, 256, 184 A.3d 741 (2018).

"Ordinarily, the defendant has the burden to disprove personal jurisdiction." Id. Nevertheless, "[i]f the defendant challenging the court's personal jurisdiction is a foreign corporation or a nonresident individual, it is the plaintiff's burden to prove the court's jurisdiction." *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 515, 923 A.2d 638 (2007); see *Standard Tallow Corp.* v.

[3] General Statutes § 52-59b (a) provides in relevant part: "[A] court may exercise personal jurisdiction over any nonresident individual . . . who in person or through an agent . . . (1) [t]ransacts any business within the state . . . ."

Jowdy, 190 Conn. 48, 53–54, 459 A.2d 503 (1983). "To do so, the [plaintiff] must produce evidence adequate to establish such jurisdiction." (Internal quotation marks omitted.) *Samelko* v. *Kingstone Ins. Co.*, supra, 329 Conn. 256.

In the present case, the plaintiff's sole basis for the court's exercise of personal jurisdiction over the defendant is that he signed electronically the agreement that contained the forum selection clause. The defendant does not dispute that the court would have personal jurisdiction over him if he had signed the agreement containing the forum selection clause;[4] rather, the defendant maintains that he did not sign the agreement.

In determining whether a plaintiff met its burden to establish personal jurisdiction over a defendant, a trial court "may encounter different situations, depending on the status of the record in the case. . . . [L]ack of . . . jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." (Internal quotation marks omitted.) *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 274, 193 A.3d 520 (2018); see also *Cogswell* v. *American Transit Ins. Co.*, supra, 282 Conn. 516.

[4] "Unlike subject matter jurisdiction . . . personal jurisdiction may be created through consent or waiver." (Internal quotation marks omitted.) *Narayan* v. *Narayan*, 305 Conn. 394, 402, 46 A.3d 90 (2012). "Where an agreement contains a valid and enforceable forum selection clause, it is not necessary to analyze jurisdiction under the state long-arm statutes or federal constitutional due process. . . . Parties may consent to personal jurisdiction through forum-selection clauses in contractual agreements." (Citation omitted; internal quotation marks omitted.) *Discover Property & Casualty Ins. Co.* v. *TETCO, Inc.*, 932 F. Supp. 2d 304, 309 (D. Conn. 2013); see *Phoenix Leasing, Inc.* v. *Kosinski*, 47 Conn. App. 650, 653, 707 A.2d 314 (1998) ("forum selection clauses have generally been found to satisfy the due process concerns targeted by the minimum contacts analysis").

"When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . .

"[When] the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint . . . but may rest on the jurisdictional allegations therein." (Internal quotation marks omitted.) *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 274–75; see *Golodner* v. *Women's Center of Southeastern Connecticut, Inc.*, 281 Conn. 819, 826–27, 917 A.2d 959 (2007) (trial court should accept all undisputed facts when making personal jurisdiction determination where no evidentiary hearing was requested); *Knipple* v. *Viking Communications, Ltd.*, 236 Conn. 602, 608–609, 674 A.2d 426 (1996) (same).

"Finally, [when] a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding [on the basis of] memoranda and documents submitted by the parties. . . . In such circumstances, the court may also in its discretion choose to postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, [until] a full trial on the merits has occurred." (Citations omitted; internal quotation marks omitted.) *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 275–76; see *Kenny* v. *Banks*, supra, 289 Conn. 533–34 (trial court erred in concluding that it lacked personal jurisdiction over nonresident defendant without first holding evidentiary hearing to resolve factual issues); *Standard Tallow Corp.* v. *Jowdy*, supra, 190 Conn. 56 (same).

In the present case, the evidence submitted by both parties created a critical factual dispute as to whether the defendant had signed the agreement.[5] The court, notwithstanding the foregoing standard, resolved that critical factual dispute on the basis of only the memoranda and documents submitted by the parties because the "parties did not request that an evidentiary hearing be held but rel[ied] on evidence they ha[d] submitted by affidavit." Indeed, we readily acknowledge that there

[5] As outlined previously in this opinion, the plaintiff submitted the agreement containing the forum selection clause and a number of other attachments that purportedly established that the defendant had signed the agreement. The defendant submitted two affidavits in which he categorically denied signing the agreement.

is nothing in the record to indicate that, prior to the court's decision on the motion to dismiss, the parties specifically requested that the court hold an evidentiary hearing, defer resolution to permit further discovery, or postpone deciding that issue until trial.[6]

On appeal, the plaintiff does not argue that the court erred by considering the critical factual dispute on the basis of only the memoranda and documents submitted by the parties; rather, the plaintiff's position is that the court erred when it improperly applied a heightened standard of proof to resolve the critical factual dispute in favor of the defendant. Although it is well established that a plaintiff has the burden to prove the court's personal jurisdiction over a nonresident defendant; see *Standard Tallow Corp.* v. *Jowdy*, supra, 190 Conn. 51–54; the plaintiff maintains that neither our Supreme Court nor this court has articulated the standard of proof by which a plaintiff must establish personal jurisdiction to defeat a motion to dismiss filed by a nonresident defendant in a circumstance where a trial court decides the motion on the basis of only the documentary evidence submitted by the parties and without a full evidentiary hearing. In the absence of such a rule, the plaintiff advocates that we apply the prima facie standard that is employed by the federal courts and, at

[6] At the May 22, 2017 hearing on the motion to dismiss, the plaintiff advocated that the issue of whether the defendant signed the agreement is eventually going to have to be determined at trial, however, it did not request that the court specifically delay making that determination until trial and, in fact, argued that it had carried its burden "at the motion to dismiss phase." Furthermore, in its June 29, 2017 motion to reargue, the plaintiff set forth the following proposition: "[The plaintiff] believes that the court can and should deny [the] defendant's motion without any additional corroborating information concerning the IP address. However, if the court takes the position that additional information regarding the IP address is essential to deciding the motion, [the plaintiff] would appreciate the opportunity to conduct some additional discovery and subpoena information relating to the IP address." See footnote 2 of this opinion. This request, however, was made after the court already had decided the motion to dismiss.

times, by our Superior Court,[7] to circumstances as in the present case. We agree with the plaintiff.

We find particularly persuasive the decision of the United States Court of Appeals for the Second Circuit in *Dorchester Financial Securities, Inc.* v. *Banco BRJ, S.A.*, 722 F.3d 81 (2nd Cir. 2013),[8] which outlined the following federal standard applicable to motions to dismiss for lack of personal jurisdiction: "[I]n deciding a pretrial motion to dismiss for lack of personal jurisdiction a district court has considerable procedural leeway. It may determine the motion on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion. . . . Significantly, however, the showing a plaintiff must make to defeat a defendant's claim that the court lacks personal jurisdiction over it varies depending on the procedural posture of the litigation. . . . [W]e [have] explained this sliding scale as follows:

"Prior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, legally sufficient allegations of

[7] See, e.g., *Tregaskis* v. *Wine Enthusiast Cos.*, Superior Court, judicial district of Litchfield, Docket No. CV-95-0067373-S (July 21, 1995) (relying on *In re Connecticut Asbestos Litigation*, 677 F. Supp 70, 72 [D. Conn 1986]); *Noon* v. *Calley & Currier Co.*, Superior Court, judicial district of Hartford, Docket No. CV-93-521514-S (March 9, 1995) (14 Conn. L. Rptr. 132) (same); *Vitale Fireworks Display Co.* v. *S. Mantsuna & Co.*, Superior Court, judicial district of Litchfield, Docket No. CV-93-0064860-S (October 31, 1994) (same); but see *Gamlestaden PLC* v. *Lindholm*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-93-0130058-S (February 28, 1996) (declining to follow prima facie rule).

[8] "[F]ederal rules of civil procedure and the federal court's interpretations thereon are not binding upon the state courts. . . . Federal case law, particularly decisions of the United States Court of Appeals for the Second Circuit . . . can be persuasive in the absence of state appellate authority . . . ." (Citations omitted; internal quotation marks omitted.) *Duart* v. *Dept. of Correction*, 116 Conn. App. 758, 765, 977 A.2d 670 (2009), aff'd, 303 Conn. 479, 34 A.3d 343 (2012); *Turner* v. *Frowein*, 253 Conn. 312, 341, 752 A.2d 955 (2000) ("[d]ecisions of the Second Circuit Court of Appeals, although not binding on us, are particularly persuasive").

jurisdiction. At that preliminary stage, the plaintiff's prima facie showing may be established solely by allegations. After discovery, the plaintiff's prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that, if credited by the trier, would suffice to establish jurisdiction over the defendant. At that point, the prima facie showing must be factually supported.

"Where the jurisdictional issue is in dispute, the plaintiff's averment of jurisdictional facts will normally be met in one of three ways . . . . If the defendant is content to challenge only the sufficiency of the plaintiff's factual allegation . . . the plaintiff need persuade the court only that its factual allegations constitute a prima facie showing of jurisdiction. If the defendant asserts . . . that undisputed facts show the absence of jurisdiction, the court proceeds . . . to determine if undisputed facts exist that warrant the relief sought. If the defendant contests the plaintiff's factual allegations, then a hearing is required, at which the plaintiff must prove the existence of jurisdiction by a preponderance of the evidence." (Citations omitted; internal quotation marks omitted.) Id., 84–85; see *Marine Midland Bank, N.A.* v. *Miller*, 664 F.2d 899, 904 (2d Cir. 1981) ("If the court chooses not to conduct a full-blown evidentiary hearing on the motion, the plaintiff need make only a prima facie showing of jurisdiction through its own affidavits and supporting materials. Eventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial. But until such a hearing is held, a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion.").

We are persuaded that the sliding scale standard outlined by the United States Court of Appeals for the Second Circuit in *Dorchester Financial Securities*,

Inc., should be applied to jurisdictional disputes arising before Connecticut courts because it is entirely consistent with Connecticut's existing framework for the resolution of jurisdictional issues. For instance, when a Connecticut trial court decides a jurisdictional issue on the basis of only the complaint, it accepts the plaintiff's jurisdictional allegations as true, essentially determining whether the plaintiff has made a prima facie case for the exercise of jurisdiction. By contrast, when there is a critical factual dispute relating to jurisdiction, or when the question of jurisdiction is intertwined with the resolution of the merits of the case, the trial court, when requested by a party, must defer resolution of the jurisdictional issue until an evidentiary hearing or a trial on the merits has occurred. Because the proof of a fact at the trial on the merits typically must be by a preponderance of the evidence, that necessarily would be the plaintiff's burden to prove the same fact for jurisdictional purposes. Furthermore, it would be futile to hold a trial-like hearing if the burden of proof was less than by a preponderance of the evidence.

Given the consistency of Connecticut practice with Second Circuit jurisprudence in cases with no evidentiary record and those with a full evidentiary record, we also conclude that the Second Circuit's use of the prima facie standard makes sense for cases, such as this, where the evidentiary record is only partially developed and the parties have not requested a full evidentiary hearing. Our Supreme Court repeatedly has cautioned trial courts not to make jurisdictional findings where there are disputed issues of fact until the court has held a full evidentiary hearing "because a court cannot make a critical factual [jurisdictional] finding [on the basis of] memoranda and documents submitted by the parties." (Internal quotation marks omitted.) *Angersola* v. *Radiologic Associates of Middletown, P.C.*, supra, 330 Conn. 275. Consequently, where, as in

the present case, neither party requests an evidentiary hearing, the court cannot resolve the parties' factual dispute. Instead, the court must determine whether the plaintiff's submissions establish a prima facie case. The prima facie standard ensures that the critical factual dispute remains unresolved until after an evidentiary hearing or trial is held, at which the plaintiff would have the elevated burden of proving the court's personal jurisdiction by a preponderance of the evidence. Accordingly, having concluded that the prima facie standard applies to the present case, we now consider whether the plaintiff met its burden to make a prima facie showing that the court had personal jurisdiction over the defendant.[9]

"[T]o establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . [T]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor." (Internal quotation marks omitted.) *Schweiger* v. *Amica Mutual Ins. Co.*, 110 Conn. App. 736, 739, 955 A.2d 1241, cert. denied, 289 Conn. 955, 961 A.2d 421 (2008); see 9 J. Wigmore, Evidence (3d Ed. 1940) § 2494 (delineating general principles of prima facie case). Consequently, because the evidence submitted by the defendant tended to establish that the court lacked personal jurisdiction and the

[9] Although the court rendered its judgment without the benefit of this opinion, we need not remand the matter to the trial court for a determination as to whether the plaintiff made a prima facie showing of personal jurisdiction because that issue can be determined as a matter of law on the basis of the record before us. See *Emerick* v. *Glastonbury*, 145 Conn. App. 122, 131, 74 A.3d 512 (2013) (remand unnecessary where record on appeal sufficient to make determination as matter of law), cert. denied, 311 Conn. 901, 83 A.3d 348 (2014); *Rosenthal* v. *Bloomfield*, 178 Conn. App. 258, 263, 174 A.3d 839 (2017) ("[w]hether the plaintiff has made out a prima facie case is a question of law" [internal quotation marks omitted]).

court decided the defendant's motion to dismiss on the basis of only the parties' documentary evidence, "the plaintiff's prima facie showing, necessary to defeat a jurisdiction testing motion, must include an averment of facts that [are factually supported, and] if credited by the trier, would suffice to establish jurisdiction over the defendant." (Internal quotation marks omitted.) *Dorchester Financial Securities, Inc.* v. *Banco BRJ, S.A.*, supra, 722 F.3d 85. This prima facie showing is made notwithstanding any controverting presentation by the defendant. Id., 86; see *Marine Midland Bank, N.A.* v. *Miller*, supra, 664 F.2d 904.

In the present case, the plaintiff submitted several attachments in support of its opposition to the defendant's motion to dismiss that purportedly established that the defendant signed the agreement. In particular, the plaintiff attached a copy of the alleged agreement that contained the forum selection clause. The agreement provides that it was entered into on June 10, 2016, by the plaintiff and "Mark Miller . . . having an address of 2640B El Camino Real, Carlsbad, CA 92008." The plaintiff's general counsel, Carruthers, attested in his affidavit that the agreement was executed electronically "through a secure portal provided by a third-party known as 'DocuSign' . . . ." The plaintiff submitted a copy of a DocuSign certificate of completion that purportedly established that the defendant electronically signed the agreement on June 10, 2016, using the e-mail address drmillerorders@gmail.com. Carruthers further averred that he had engaged in e-mail correspondences concerning the breach of the alleged agreement with the defendant, who was using the e-mail address drmillerorders@gmail.com. The plaintiff submitted a printout of these e-mail correspondences, which occurred between December 7 and 9, 2016.

The plaintiff also submitted an affidavit from its independent sales representative, Davis, wherein she attested that on June 22, 2016, twelve days after the agreement allegedly was executed, she received a voice-

mail left by an individual who identified himself as "Dr. Mark Miller." She further averred that, approximately ten minutes after she attempted to return the call, she received a second call from the same telephone number and that she spoke to an individual "who identified himself as Dr. Mark Miller," and who "indicated that he desired to open an account to purchase [the plaintiff's] products for the patients of a group of five . . . health care professionals . . . ." Davis attached to her affidavit a redacted printout of her telephone bill that evinces the "place called," date, time, number called, and duration of these telephone calls.

The plaintiff additionally submitted certain excerpts of the deposition of the defendant taken on February 22, 2017. Therein, the defendant testified that he operates a mobile podiatry practice and that his "corporate address" is a United Parcel Service store at 2604B El Camino Real, Box No. 311, Carlsbad, California 92008.[10] He further testified that he received at his corporate address a copy of the writ of summons and complaint that stemmed from the present action, which was addressed to 2640B El Camino Real, Carlsbad, California 92008. Further, the defendant stated that he was familiar with DocuSign and that he previously had used it to sign documents. The defendant also testified that his only personal telephone number is the same telephone number identified by Davis and that he had received a telephone call "in late summer [or] early fall" from Davis "about signing up as a distributor." He further testified that he previously had heard of the plaintiff because it was recommended by one of his patients "last summer," but he could not recall whether he ever ordered or received products from the plaintiff.

[10] The defendant's corporate address, 2604B El Camino Real, Box No. 311, Carlsbad, California 92008, is substantially similar to the defendant's address listed on the agreement, "2640B El Camino Real, Carlsbad, CA 92008."

The circumstances of the present case are strikingly similar to those at issue in *Dorchester Financial Securities, Inc.* v. *Banco BRJ, S.A.*, supra, 722 F.3d 81. In that case, the plaintiff, a Florida corporation with offices in New York, filed an action alleging that the defendant, a Brazilian bank, was liable for breaching an agreement between the parties concerning an irrevocable letter of credit. Id., 82–83. The defendant moved to dismiss the action on the ground that the court lacked personal jurisdiction over it. Id., 83. In response, the plaintiff filed a memorandum of law and attached, among other things, the agreement that contained a forum selection clause by which the defendant allegedly consented to submit to the jurisdiction of the state of New York. Id. In support of its motion to dismiss, the defendant contended that the plaintiff's attachments were forgeries, and, accordingly, it submitted sworn declarations and supporting documentation that categorically denied the plaintiff's contentions.[11] Id., 83–84. The District Court granted the motion to dismiss on the basis of the defendant's "direct, highly specific testimonial evidence" submitted in support of its denials, and the plaintiff appealed therefrom. Id., 84.

The Second Circuit Court of Appeals applied the prima facie standard to vacate the District Court's decision that granted the defendant's motion to dismiss. Id., 85. The court held that, in the absence of an evidentiary hearing or trial, the defendant's alleged consent to the forum selection clause contained within the agreement submitted by the plaintiff was sufficient to establish a prima facie case of personal jurisdiction. Id. The court recognized that "there is plainly reason to question the

[11] Specifically, the defendant's evidence tended to show that (1) it had no prior relationship with the plaintiff, (2) it never did business in the United States, and (3) it had never issued financial instruments of the size and nature of the purported letter of credit. The defendant also submitted court documents from Florida and California to show that it had been the victim of similar fraudulent schemes in those states.

authenticity of the . . . agreement, as [the defendant's] evidence submitted to the district court tends to show that the agreement and the other documents upon which [the plaintiff] relied were forgeries. But in the absence of an evidentiary hearing, it was error for the district court to resolve that factual dispute in [the defendant's] favor." Id., 86. It further held that "[t]o be clear, we do not hold that the district court in this case erred in failing to hold an evidentiary hearing, as there is no indication that either party requested one. Nor did the district court err in considering materials outside the pleadings, as we have made clear that a district court may do so . . . . Instead, the district court's error was, having chosen not to conduct a full-blown evidentiary hearing . . . in resolving the parties' dispute over the authenticity of [the plaintiff's] evidence rather than evaluating, whether [the plaintiff] had, through its pleadings and affidavits, made a prima facie showing of personal jurisdiction notwithstanding any controverting presentation by the defendant . . . ." (Citations omitted; internal quotation marks omitted.) Id.

The cumulative evidence submitted by the plaintiff in the present case exceeds the evidence the Second Circuit considered to be sufficient to establish a prima facie case in *Dorchester Financial Securities, Inc.*, in which the court stated that it "need look no further" than the agreement that contained the forum selection clause. See id., 85 and n.3. In the present case, the plaintiff submitted an abundance of corroborating evidence to establish that the defendant signed the agreement. Carruthers' affidavit evinced that the agreement was executed electronically through DocuSign by "Mark Miller," who has an address of "2640B El Camino Real, Carlsbad, CA 92008." In his deposition, the defendant testified that he received service stemming from the present case at his corporate address,

which is sufficiently similar to the address designated on the agreement. The defendant also testified that he was familiar with DocuSign and had used it in the past. The DocuSign certificate of completion evinces that the agreement was signed on June 10, 2016, using the e-mail address drmillerorders@gmail.com. That e-mail address is corroborated by the statements in Carruthers' affidavit and the attached series of e-mails, which purportedly demonstrated correspondences regarding the breach of the alleged agreement between Carruthers and drmillerorders@gmail.com. Additionally, the defendant agreed at his deposition that he engaged in a telephone conversation with Davis regarding the sale of the plaintiff's products around the time that the agreement allegedly was executed. This admission is substantiated by Davis' affidavit and the printout of her telephone bill that displays the particular details of those telephone calls, which occurred two weeks after the agreement allegedly was executed. Indeed, the defendant conceded that his telephone number was identified accurately by Davis. Finally, the defendant acknowledged his familiarity with the plaintiff and did not affirmatively deny that he ordered or received products from the plaintiff, but, rather, he responded that he *could not recall*.

Applying the foregoing principles to the present case, we conclude that the plaintiff met its burden to make a prima facie showing that the court had personal jurisdiction over the defendant because the plaintiff submitted evidence, which, if credited by the trier of fact, was sufficient to establish that the defendant had signed the agreement containing the forum selection clause. Nevertheless, we recognize, as the court did in *Dorchester Financial Securities, Inc.*, that the evidence submitted by the defendant in support of his motion to dismiss plainly calls into question whether the defendant actually signed the alleged agreement. Although a trial court

properly can consider such documentary evidence in determining whether a critical factual dispute exists, it cannot consider such evidence when determining whether a plaintiff has made a prima facie showing, and, absent a full evidentiary hearing, it cannot utilize this evidence to resolve a critical factual dispute. Thus, because the plaintiff met its threshold burden of making a prima facie showing, and the parties did not request and the court did not hold a full evidentiary hearing, the court was required to deny the defendant's motion to dismiss.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JOSEPH A. STEPHENSON
(AC 40250)

Sheldon, Bright and Mihalakos, Js.

Syllabus

Convicted of the crimes of burglary in the third degree, attempt to commit tampering with physical evidence and attempt to commit arson in the second degree in connection with a break-in at a courthouse, the defendant appealed to this court. The defendant had two felony charges pending against him and was scheduled to commence jury selection in a trial of those pending charges. Two days before the start of jury selection, a silent alarm was triggered at the courthouse at approximately 11:00 p.m. Upon arrival, the state police discovered, inter alia, a broken window in an interior state's attorney's office, a black duffel bag with six unopened canisters of industrial strength kerosene on the floor of a state's attorney's office and several case files lying in a disorganized pile on the floor near a secretary's desk area. The defendant claimed, inter alia, that the evidence presented at trial was insufficient to support his conviction of each offense as charged by the state, which alleged, as a common essential element of each charge, that the defendant had entered the courthouse with the intent to commit the crime of tampering with physical evidence therein so as to impair the availability of his case files for use against him in the prosecution of the pending felony charges. *Held* that the evidence was insufficient to support the defendant's conviction of the charged offenses; although there was physical

evidence that directly linked the defendant to the bag containing the kerosene, which supported an inference that the defendant dropped the bag where the police found it, there was no such evidence that placed the defendant in the office where the files were located, as the state presented no evidence at all from which the jury reasonably could have inferred that the defendant entered the courthouse through the broken window of the interior office and went to a filing cabinet in another office and removed the files found on the floor, and although the state argued that the defendant's intent to tamper with physical evidence, necessary to prove him guilty of each charged offense, could be inferred from his handling of the files, the evidence presented, which did not include the names of the disorganized case files or where those files had been stored in the office before the intruder entered, show that the intruder had touched, altered, destroyed, concealed or removed any of the case files, or address any reason why the defendant might have wanted to tamper with his case files, showed only that the defendant entered the courthouse through the broken window, walked through the office, and dropped the duffel bag on the floor; accordingly, in the absence of any evidence that the defendant ever touched case files in the state's attorney's office, or that he did so with the intent to tamper with such files or their contents, the jury reasonably could not have inferred that the defendant had that intent, as required to prove him guilty of each of the three offenses of which he was convicted, and, thus, his conviction could not stand.

Argued September 11, 2018—officially released January 8, 2019

Procedural History

Substitute information charging the defendant with the crimes of burglary in the third degree, attempt to commit tampering with physical evidence, and attempt to commit arson in the second degree, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the jury before *White*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

Vishal K. Garg, for the appellant (defendant).

Sarah Hanna, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, *Jr.*, state's attorney, and *Michelle Manning*, assistant state's attorney, for the appellee (state).

SHELDON, J. The defendant, Joseph A. Stephenson, appeals from the judgment of conviction rendered against him after a jury trial in the Stamford Superior Court on charges of burglary in the third degree in violation of General Statutes § 53a-103, attempt to commit tampering with physical evidence in violation of General Statutes §§ 53a-49 (a) (2) and (Rev. to 2013) 53a-155 (a) (1),[1] and attempt to commit arson in the second degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-112 (a) (1) (B). The defendant claims on appeal that (1) the evidence presented at trial was insufficient to support his conviction on those charges, and thus that he is entitled to the reversal of his conviction and the entry of a judgment of acquittal on each such charge, and (2) the court improperly prevented him from presenting exculpatory testimony from his trial attorney as to a conversation between them two days before his alleged commission of the charged offenses that tended to contradict the state's claim that he had a special motive for committing those offenses. We agree with the defendant that the evidence presented at trial was insufficient to convict him of any of the charged offenses, as the state charged and sought to prove them in this case, and, thus, we conclude that his conviction on those charges must be reversed and this case must be remanded with direction to render a judgment of acquittal thereon. In light of this conclusion, we need not address the defendant's second claim.

The following procedural history and evidence, as presented at trial, are relevant to our resolution of the defendant's claims. On Sunday, March 3, 2013, at approximately 11:00 p.m., the silent alarm at the Norwalk Superior Courthouse was triggered by the breaking of a window in the state's attorney's office on the

[1] All references in this opinion to § 53a-155 (a) (1) are to the 2013 revision.

east side of the courthouse.[2] Soon thereafter, Connecticut State Trooper Justin Lund arrived at the courthouse, followed almost immediately by Troopers Darrell Tetreault and Alex Pearston. Upon Tetreault's arrival, he saw Lund standing "right against the building, at the window, with his firearm deployed yelling at somebody in the building." Because, however, Lund was later injured and could not testify at the defendant's trial, no evidence was presented as to what, if anything, he saw or heard through the broken courthouse window at that time.

The troopers promptly established a perimeter around the outside of the courthouse and radioed for the assistance of a canine unit. When a canine unit arrived several minutes later, the troopers followed it inside the courthouse, which they promptly searched for intruders, without success.

The searching officers determined that the broken window was located in an interior office on the east side of the state's attorney's office, which was shared by two assistant state's attorneys, each of whom kept a desk and certain personal effects in the office. Photos of the interior office taken after the break-in showed that a set of blinds that had been hanging in the window through which the intruder entered the building were bent and broken, but still hanging where they were when the intruder came in through them.

Inside the larger state's attorney's office, the troopers found a black duffel bag on the floor near the south end of the corridor running past the doors of the three interior offices on the east side of the larger office,

[2] Although the state's exhibit 36, which is a diagram of the Norwalk Superior courthouse, bears a notation indicating that the window that was broken was on the north side of the building, all of the other evidence at trial indicates that it was, in fact, located on the east side of the building. We therefore construe the notation on exhibit 36 as an error.

including the middle office where the intruder had broken the window and entered the building. The bag thus lay to the far left of a person entering the larger office through the door of the interior office with the broken window. Inside the duffel bag were six unopened blue canisters of industrial strength kerosene with their tags and UPC strips cut off. The officers swabbed the bag and the six canisters of kerosene for DNA.

Meanwhile, in the "secretary's desk area" in the northwest corner of the larger state's attorney's office, across the room from and to the right of a person entering the larger office from the interior office with the broken window, the troopers found several case files lying in a disorganized pile on the floor, where they appeared to have been dumped, dropped or knocked over. The secretary's desk area contained two adjacent desks on which telephones, computer monitors, other case files, assorted office equipment and personal memorabilia were arrayed. The desk further to the north, in front of which the pile of files was found, had two partially open drawers on its left side, above which other case files were loosely stacked. To the left of and behind the chair of a person sitting at that desk were two large lateral file cabinets with case files densely packed on open shelves inside them. No evidence was presented as to which case files were found either in the disorganized pile on the floor or in the loose stack on the adjacent desk. Nor, because those case files were never identified, was there any evidence as to where such files had been stored in the office before the intruder entered or whether, if the intruder had moved such files to where they were found from another location in the office, the intruder had touched or disturbed anything in any such location in such a way as to shed light on the object or purpose of his search. None of the case files or any other objects in any locations where they were stored before or found

after the break-in was dusted for fingerprints or swabbed for DNA.

The troopers also recovered a ball-peen hammer from the vestibule area just inside an exterior door to the courthouse, marked "employee entrance only," through which it was later determined that the intruder fled from the courthouse after the troopers arrived, and began to search inside it. The troopers also swabbed the hammer for DNA.

During their ensuing investigation, police investigators obtained and reviewed surveillance videos of the outside of the courthouse, which had been taken on the evening of the break-in by cameras installed on the courthouse itself and in a beauty salon to the east of the courthouse. Video footage obtained from those cameras included a sequence in which an "individual . . . dressed all in black, [who] appeared to have a black mask on, [a] black jacket, [and] black pants, and appeared to be carrying a black or dark colored bag . . . approached the side of the courthouse, which is the side that the window was broken on, the side adjacent to the beauty salon." It also included, in the hour before the foregoing sequence was recorded, several other sequences in which a suspicious vehicle—a light colored SUV with a defective rear brake light and a roof rack on the top, a brush bar on the front, and a tire mounted on the back—could be seen driving slowly past the front of the courthouse and driving in and out of the courthouse parking lot. Finally, it included a short sequence, filmed shortly after the troopers entered the courthouse, in which a person dressed all in black emerged from the east side door of the courthouse and ran away across the parking lot where the suspicious vehicle had been seen before the break-in.

The troopers later identified the make, model and vintage of the suspicious vehicle seen in the surveillance

videos as a Land Rover Freelander manufactured between the years 2002 and 2005. They subsequently determined that the database of the Connecticut Department of Motor Vehicles listed 167 registered vehicles that matched the suspicious vehicle's description. Later, upon narrowing their search to matching vehicles registered to persons living in the Norwalk and Stamford areas, investigators learned that one such vehicle, a 2002 Land Rover Freelander, was registered to Chuck Morrell, the defendant's stepfather. When Morrell was interviewed by the police, he informed them that he had purchased the vehicle for his wife, the defendant's mother, in 2012, and that both the defendant and his mother used the vehicle and were listed as insureds on his automobile insurance policy. When police investigators finally examined Morrell's vehicle several weeks after the break-in, they found that it closely matched the suspicious vehicle seen in the surveillance videos because it not only had aftermarket equipment of the sorts installed on the suspicious vehicle, but it had a defective rear brake light.

In addition to the previously described information, police investigators developed the following additional information concerning the defendant's possible involvement in the courthouse break-in. On March 4, 2013, the day after the break-in, the defendant called the Norwalk public defenders' office to ask if the courthouse would be open that day. The defendant was then scheduled to commence jury selection in the trial of two felony charges then pending against him in Norwalk the following day. The window that had been broken and used to gain access to the courthouse on March 3, 2013, was located in the office of the assistant state's attorney who was responsible for prosecuting the defendant in his upcoming trial.

The state also presented evidence that the defendant, while incarcerated in April, 2013, made certain recorded

phone calls to his brother Christopher Stephenson, and his mother, in which he discussed the March 3, 2013 break-in. In particular, the defendant's brother told the defendant in one such phone call that Morrell "must have" told the police about the defendant's use of the Freelander on the evening of the break-in and the defendant stated that the police "must have" seen the vehicle at the courthouse on that evening. The defendant urged his brother to say that he had been in New York at the time of the break-in, and thereafter urged both his brother and his mother not to discuss anything about the break-in with the police.

Finally, upon testing the DNA swabs taken from the physical evidence discarded by the intruder at the courthouse on the evening of March 3, 2013, personnel from the Connecticut Forensic Science Laboratory determined that each swab contained a mixture of DNA from at least two persons, and that the defendant could not be eliminated as a possible contributor to any such mixture.

In his own defense, the defendant presented testimony from his brother that they were together in New York on the evening of the break-in. In addition, he attempted unsuccessfully to present testimony from his attorney as to a conversation between them on the Friday before the break-in, in which he had voiced his intention to plead guilty to the charges then pending against him in Norwalk rather than to go to trial the following Tuesday. The trial court sustained the state's objection to such testimony on the ground that it was inadmissible hearsay.

On the basis of the foregoing evidence, the state urged the jury to find the defendant guilty of all three offenses with which he was charged: burglary in the third degree in violation of § 53a-103; attempt to commit tampering with physical evidence in violation of §§ 53a-49 (a) (2)

and 53a-155 (a) (1); and attempt to commit arson in the second degree in violation of §§ 53a-49 (a) (2) and 53a-112 (a) (1) (B).[3] The state attempted to prove its case against the defendant under the following, closely intertwined theories of factual and legal liability.

As to the charge of burglary in the third degree, the state claimed that the defendant had entered or remained unlawfully in the courthouse, when it was closed to the public and he had no license or privilege to be there for any lawful purpose, with the intent to commit the crime of tampering with physical evidence therein. Although the state conceded that the defendant had not completed the crime of tampering with physical evidence while he was inside the courthouse, it nonetheless claimed that he had intended to commit that offense within the courthouse by engaging in conduct constituting an attempt to commit that offense therein. On that score, the state further argued that the defendant had broken into the courthouse through the window of the assistant state's attorney who was prosecuting him on two pending felony charges, entered the larger state's attorney's office and gone directly to the file cabinets where the state stored its case files, and in the short time he had there before the state police arrived in response to the silent alarm, begun to rummage through the state's case files in an effort to find and tamper with the contents of his own case files. Claiming that the defendant was desperate to avoid his impending trial, the state argued that the defendant thereby attempted to tamper with his case file by altering, destroying, concealing or removing its contents, and thus to impair the verity or availability of such materials for use against him in his upcoming trial. Finally, as to the charge of attempt to commit arson in

[3] The defendant initially was charged with criminal mischief in the first degree in violation of General Statues § 53a-115, rather than attempted tampering with physical evidence.

the second degree, the state claimed that the defendant had committed that offense by breaking into the Norwalk courthouse as aforesaid, while carrying a duffel bag containing six canisters of industrial strength kerosene, and thereby intentionally taking a substantial step in a course of conduct planned to culminate in the commission of arson in the second degree by starting a fire inside the courthouse, with the intent to destroy or damage the courthouse building, for the purpose of concealing his planned crime of tampering with physical evidence, as described previously.

The state expressly disclaimed any intent to prosecute the defendant for tampering with physical evidence on the theory that he attempted to start a fire inside the courthouse in order to damage or destroy the building, and thus to damage or destroy the contents of his case files or their contents by fire. Instead, it claimed that the defendant planned to start a fire in the courthouse in order to conceal his earlier crime of tampering with physical evidence. Similarly, the state did not allege or seek to prove that the defendant had committed burglary in the third degree by entering or remaining unlawfully in the courthouse with the intent to commit arson in the second degree therein.

Following a jury trial in which the jury was specifically instructed on the charged offenses under the previously-described theories of liability, the defendant was found guilty on all three charges. He later was sentenced on those charges to a total effective sentence of twelve years incarceration followed by eight years of special parole. This appeal followed.

The defendant first claims that the evidence presented at trial was insufficient to support his conviction of any of the three offenses of which his jury found him guilty because such evidence failed to prove a single common essential element of those offenses, as the

state charged and sought to prove them in this case, beyond a reasonable doubt. That common essential element was that, upon entering the Norwalk Superior courthouse on March 3, 2013, the defendant's intent was to tamper with physical evidence. In making this claim, the defendant does not challenge the sufficiency of the state's evidence to prove that he was the intruder who broke into the courthouse on the evening of March 3, 2013. Rather, he claims that neither his proven conduct on that evening, nor any of his words or actions thereafter, afforded the jury any nonspeculative basis for inferring that his intent, upon entering the courthouse on that evening, was to commit the crime of tampering with physical evidence therein.[4]

"In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we *determine* whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . [I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with

[4] The defendant also argues that, in order to convict him of attempting to tamper with physical evidence, the state was required to prove beyond a reasonable doubt that the documents or materials he attempted to tamper with qualified as "physical evidence" within the meaning of General Statutes § 53a-146 (8), in that they constituted "any article, object, document, record, or other thing of physical substance which is or is about to be produced or used as evidence in an official proceeding." General Statutes § 53a-146 (8). Because we reverse the defendant's conviction on the ground that the state failed to prove that the defendant intended to tamper with the case files and/or their contents with which he is claimed to have attempted to tamper, we need not address his claim that the state failed to prove that such case files and their contents did not qualify as physical evidence under § 53a-146 (8).

innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Emphasis added; internal quotation marks omitted.) *State* v. *Perez*, 147 Conn. App. 53, 64–65, 80 A.3d 103 (2013), aff'd, 322 Conn. 118, 139 A.3d 654 (2016). It is axiomatic, however, that in evaluating the sufficiency of the evidence to support a criminal conviction, the only theory of liability upon which the conviction can be sustained is that upon which the case was actually tried, in the sense that it was not only charged in the information, but it was argued by the state and instructed upon by the court. *State* v. *Carter*, 317 Conn. 845, 853–54, 120 A.3d 1229 (2015).

As a threshold matter, we note that the defendant is correct in asserting that a common essential element of his conviction of all three charges here challenged is that, upon entering the Norwalk Superior courthouse on the evening of March 3, 2013, he had the intent to commit the crime of tampering with physical evidence therein. All three counts of the amended long form information on which he was brought to trial so alleged,[5]

[5] In its amended long form information dated September 30, 2016, the state charged the defendant as follows:

"[The] State's Attorney for the Judicial District of Stamford-Norwalk accuses Joseph Stephenson of the crime of burglary in the third degree and charges that in the city of Norwalk, on or about the [third] day of March, 2013, the said defendant . . . did enter and remain unlawfully in a building *with intent to commit the crime of tampering with physical evidence, in violation of* . . . [*§§*] *53a-103 and 53a-155 (a) (1).* . . .

"And said state's attorney further accuses the defendant . . . of the crime of attempted tampering with physical evidence, and alleges that, acting with the belief that an official proceeding is pending and about to be instituted, *did an act, which under the circumstances as he believed them to be, was an act which constituted a substantial step in a course of conduct planned to culminate in his commission of the crime of tampering with evidence in violation of* . . . [*§§*] *53a-155 (a) (1) and 53a-49 (a) (2).* . . .

"And said state's attorney further accuses the defendant . . . with the crime of attempt at arson in the second degree and alleges that in the city of Norwalk on or about the [third] day of March 2013, the said defendant . . . with intent to destroy and damage a building, did an act, which under

the state's attorney so argued in his closing arguments,[6] and the court so instructed the jury in its final instructions on the law.[7] Accordingly, the state does not dispute this aspect of the defendant's evidentiary sufficiency claims on appeal. Therefore, our sole focus in resolving those claims must be on whether the evidence presented at trial, construed in the light most favorable to sustaining the challenged conviction, was sufficient to prove beyond a reasonable doubt that, when the defendant entered the courthouse on the evening of March 3, 2013, he did so with the intent to commit the offense of tampering with physical evidence therein by some means other than setting fire to the building.[8]

General Statutes § 53a-3 (11) provides that "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when

the circumstances as he believed them to be, was an act which constituted a substantial step in a course of conduct planned to culminate in starting a fire and such fire was intended *to conceal the crime of tampering with physical evidence in violation of . . . [§§] 53a-112 (a) (1) (B), 53a-49 (a) (2), and 53a-155 (a) (1).*" (Emphasis added.)

[6] In its closing argument to the jury, the state argued specifically, inter alia, that the evidence "clearly show[ed] . . . what [the defendant's] motive, and *what his intentions were, and what that plan really was there to do and that was to tamper with the files, to get to his case or any case, and hinder the prosecution, the prosecution that was going to start in two days.*" (Emphasis added.)

[7] The court instructed the jury, inter alia, that to find the defendant guilty of burglary in the third degree, "the state must prove beyond a reasonable doubt that, one, the defendant unlawfully entered a building and, two, that *he intended to commit a crime therein, to wit, tampering with physical evidence.*" (Emphasis added.)

The court also instructed the jury that: "A person is guilty of arson in the second degree when, with intent to destroy or damage a building, he starts a fire . . . and *such fire was intended to conceal some other criminal act, to wit, the crime of tampering with physical evidence.*" (Emphasis added.)

[8] As stated herein, the state expressly disavowed any contention that the defendant intended to tamper with evidence by setting it on fire, and consistently argued that the defendant intended to tamper with physical evidence and then to conceal his act of tampering by setting the building on fire.

his conscious objective is to cause such result or to engage in such conduct . . . .'' Section 53a-155 (a) (1), in turn, provides in relevant part: ''A person is guilty of tampering with . . . physical evidence if, believing that an official proceeding is pending . . . he . . . [a]lters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such [official] proceeding . . . .''[9] Under the foregoing provisions, a person acts with the intent to commit tampering with physical evidence when, believing that an official proceeding is pending, he engages in conduct with the conscious objective of altering, destroying, concealing or removing any record, document or thing in order to impair its verity or availability for use in that official proceeding. Here, more particularly, the state claimed and sought to prove that the defendant acted with that intent by breaking into the Norwalk Superior courthouse, where he was about to start trial in two pending felony cases, in order to alter, destroy, conceal or remove his case files in those cases or their contents, and thereby impair the verity or availability of such materials for use against him in those prosecutions.

''Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one. . . . Moreover, the [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent. . . . Intent may be and usually is inferred from conduct. Of necessity, it must be proved by the statement or acts of the person whose act is being scrutinized and ordinarily it can only be proved by circumstantial evidence.'' (Internal quotation marks omitted.) *State* v. *O'Donnell*, 174 Conn. App. 675, 687–88, 166 A.3d 646,

[9] Section 53a-155 was amended in 2015 to add that one may be guilty of tampering during a criminal investigation or when a criminal proceeding is about to commence.

cert. denied, 327 Conn. 956, 172 A.3d 205 (2017). "The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Internal quotation marks omitted.) *State* v. *Lamantia*, 181 Conn. App. 648, 665, 187 A.3d 513, cert. granted, 330 Conn. 919, A.3d (2018).

The defendant does not dispute that two felony prosecutions, both official proceedings, were pending against him in the Norwalk Superior Court when he allegedly broke into the Norwalk Superior courthouse on the evening of March 3, 2013, or that he lacked knowledge of the pendency of those official proceedings, in which trial was scheduled to begin two days later. Nor, to reiterate, does he argue that the evidence presented at trial was insufficient to prove that he was the intruder who broke into the courthouse on that evening. Instead, he claims that such evidence was insufficient to prove that he then acted with the intent to tamper with physical evidence within the courthouse because the state failed to establish any connection between his proven conduct within the courthouse and any of the files or materials with which he is claimed to have had the intent to tamper. We agree.

Here, the state claims that, on the evening of March 3, 2013, the defendant broke a window in the state's attorney's office at the courthouse, climbed through that window into the office of the assistant state's attorney who was then prosecuting him on two felony charges, walked through that office into the larger state's attorney's office where he dropped a duffel bag containing kerosene at the end of the corridor running past it to his left, then "walked all the way around to the [state's attorneys'] case files" on the other side of

the larger office, where he "pull[ed] [the] files down onto the floor and [went] through them." The state further argued to the jury such evidence showed that the defendant's intent was to tamper with his own case files or their contents before lighting the building on fire because he did not ignite one of the bottles of kerosene and throw it through the broken window, or start a fire immediately upon entering the building. Instead, the state argued, "[the] [f]irst thing he did was drop that bag of kerosene in the hall outside the office, walk all the way around the wall past the secretary's desk and over to the corner where the criminal files were kept and he started going through them." On that basis, the state claims that the defendant intended to alter, destroy, conceal or remove either his own case files or something contained within them, then to start a fire within the office to conceal his act of tampering.

The state concedes that no witness saw the defendant engage in any of these acts. Furthermore, although there is physical evidence that directly links the defendant to the bag containing the kerosene, supporting a reasonable inference that the defendant dropped the bag where the police found it, there is no such evidence that puts the defendant in the office where the files were located. Instead, the state argued that the jury could infer that the defendant entered the office, proceeded to the secretary area where the files were located, started to go through them and did so with the intent of tampering with evidence all from the single fact that there was a disorganized pile of files on the floor. We conclude that this single fact was insufficient for the jury to infer that the defendant ever touched any case files in the state's attorney's office on March 3, 2013, let alone pulled case files out of any file cabinet or off any desk, shelf or table, or that he went through such files for any purpose, much less that he took any steps to alter, remove, conceal or destroy the files or

their contents as or after he went through them. This is true for four fundamental reasons. To reiterate, no witness saw or heard the intruder doing anything while he was inside the state's attorney's office or any other part of the courthouse. The only person who may possibly have seen or heard the intruder in that time frame was Trooper Lund, who was seen standing by the broken window, and heard yelling at someone inside the building when the other troopers arrived. Lund, however, did not testify because he had been injured in another incident before trial began, and no other witness reported seeing or hearing anyone doing anything inside the building during the break-in. Without such direct testimony, the state was left to prove its claim by circumstantial evidence based upon the intruder's proven conduct during the break-in and thereafter.

Second, although the state expressly theorized that the intruder, upon entering the larger state's attorney's office, dropped his duffel bag of kerosene down a hallway to his left, then circled all the way around the office to his right, where he pulled case files out of lateral file cabinets in that area and rummaged through them, assertedly for the purpose of finding his own case files and tampering with them or their contents, before dumping the pulled out case files in a disorganized pile on the floor, it failed to establish that the intruder ever touched those or any other case files in the office during the break-in. To begin with, no evidence was presented that the files on the floor were not exactly where police investigators found them when the state's attorney's office last closed before the break-in. Although the supervising state's attorney testified that her colleagues generally kept their case files in orderly fashion in the lateral file cabinets in the secretary's desk area, she did not state that they always did so. In fact she testified that they did not always do so, for they sometimes kept their own files with them, particularly when they were

preparing cases for trial. This testimony was confirmed by photographic evidence showing piles of case files lying elsewhere in the office, undermining the state's unsupported contention that the files in the pile on the floor must have been pulled out of the lateral file cabinets and left there by the intruder. Indeed, such photos also showed that the lateral file cabinets were so densely packed with case files, without apparent gaps or irregularities, as to make it unlikely that the large number of files on the floor had been indiscriminately pulled out of there during the break-in.

Third, no list or inventory was ever made of the files on the floor. Therefore, not only was there no evidence that the defendant's case files were among the files found on the floor, but there was no evidence as to where in the office any such files had been stored before the break-in. Armed with such information, the state might reasonably have claimed that the intruder gained access to the files during the break-in and moved them to where the police later found them on the floor. It might also have been able to argue, from the names or numbers on the files or the places where the intruder had searched for and found them, that by selecting files in that manner, the intruder had given evidence as to his purpose in so doing. If, for example, the selected files were in an alphabetical sequence that included the defendant's name, or in a numerical sequence that included the date of the defendant's upcoming trial, such a selection might have supported the inference that the intruder was searching for the defendant's file. Similarly, if he had selected files that were stored in the office of the assistant state's attorney who was prosecuting his cases, such a selection might have supported the inference that he was searching for the defendant's files. In that event, the state might have further supported its claim by lifting fingerprints from or taking DNA swabs of the places where the selected files had

been stored or the files themselves. Without an inventory of the files found on the floor, however, no such logical inference could be argued and no supporting forensic evidence was sought or presented.

Fourth and finally, there is no evidence that the defendant's purpose in going through any case files, if in fact he did so, was to alter, destroy, conceal or remove them or their contents from the state's attorney's office. No evidence was presented that any case file was altered, destroyed, concealed or removed in any way. Nor was evidence presented as to the contents of the case files in the defendant's two pending cases, or of any reason why the defendant might have found it in his interest to tamper with them prior to his trial. Indeed, although the supervising state's attorney testified as to the types of materials that case files often contain, including physical evidence and witness statements, neither she nor any other witness offered evidence as to the contents of the defendant's pending case files, or advanced any reason why the defendant might have believed that it was in his interest to compromise their verity or availability to the state in advance of his impending trial. Nor could the jury have drawn an inference as to the defendant's motive to tamper with his case files from the nature of his pending charges, for those charges were never listed for the jury.

In conclusion, the state presented no evidence at all from which the jury reasonably could have inferred that, during the short period of time between the intruder's breaking of the window and the arrival of the state police on the scene, the defendant entered the building through that window and went directly to the filing cabinet in another office and removed the files that were later discovered on the floor. Although the state argued that the defendant's intent to tamper with physical evidence could be inferred from his "handl[ing]" of those files, the evidence presented showed only that

the defendant entered the courthouse through the window of the office of two assistant state's attorneys, walked through that office and dropped the duffel bag containing the six bottles of kerosene onto the floor in the corridor running past that office, to the far left of the door leading into the larger state's attorney's office.

In the absence of any evidence that the defendant ever touched case files in the state's attorney's office, much less that he did so with the intent to tamper with such files or their contents, the jury reasonably could not have inferred that the defendant had that intent, as required to prove him guilty of each of the three offenses of which he was convicted. Accordingly, his conviction cannot stand.[10]

The defendant also claims, as previously noted, that the court improperly prevented him from presenting exculpatory testimony from his trial attorney as to a conversation between them two days before his alleged commission of the charged offenses that tended to contradict the state's claim that he had a special motive for committing those offenses. Because we reverse his conviction for the reasons stated previously, we need not address this claim.

The judgment is reversed and the case is remanded with direction to render judgment of acquittal on all three charges against the defendant.

In this opinion the other judges concurred.

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[10] The state has not argued that the defendant should be convicted of any lesser included offenses in the event that we determine that the evidence was insufficient to sustain his conviction. Accordingly, we have no occasion to so order. See *State* v. *Jahsim T.*, 165 Conn. App. 534, 541, 139 A.3d 816 (2016).

HOSPITAL MEDIA NETWORK, LLC *v.* JAMES G. HENDERSON ET AL.
(AC 40197)

Alvord, Keller and Flynn, Js.

Syllabus

The plaintiff sought to recover damages from the defendant H, its former employee, for, inter alia, breach of fiduciary duty. H was employed by the plaintiff as its chief revenue officer until the plaintiff terminated H's employment on September 5, 2013. The plaintiff thereafter brought the present action, claiming, inter alia, that H had a fiduciary relationship with the plaintiff and that H breached his fiduciary duty by working for G Co., a private equity investment firm, to raise capital to acquire C Co., which was involved in the same business sector as the plaintiff, without the plaintiff's permission or knowledge. G Co.'s acquisition of C Co. closed on September 26, 2013, upon which H was paid a $150,000 finder's fee by either G Co. or C Co., awarded a three year consulting contract with C Co. at $50,000 annually, and given the opportunity to purchase restricted stock of C Co. After H was defaulted for failure to comply with a discovery order, the trial court granted the plaintiff's motion for judgment on the default. Following a hearing in damages, the trial court awarded damages against H in the amount of $454,579.76 on the plaintiff's claim of breach of fiduciary duty, which included the entire salary and bonus H received from the plaintiff as a full-time employee in 2013, the finder's fee paid to H by G Co. or C Co., the consulting fees paid to H by C Co. from 2013 to 2016, and the value of the C Co. stock at the time of H's purchase. On H's appeal to this court, *held* that the trial court abused its discretion in ordering a wholesale forfeiture of the salary and bonus paid to H by the plaintiff in 2013, and requiring H to disgorge in full all profits received from C Co. and G Co., as the award of monetary relief was disproportionate to the misconduct at issue and failed to take into account the equities in the case: although the remedies of forfeiture of compensation paid by an employer and disgorgement of amounts received by the employee from third parties are available when an employer has proven a breach of the fiduciary duty of loyalty by the employee, the imposition of those remedies is dependent on the equities of the particular case, and trial court's findings here that H provided significant value to the plaintiff by contributing to the plaintiff's rapid growth, despite his breach of fiduciary duty, and that H did not act with a bad motive or reckless indifference, but rather failed to comprehend or ignored the differences between being an employee and a consultant, should have weighed in favor of a measured forfeiture rather than H's full salary and bonus; moreover, full disgorgement of the benefits conferred on H by C Co. and G Co. was

improper, as H rendered some of the services for which he was compensated by C Co. and G Co. both prior and subsequent to his full-time employment with the plaintiff, and the commensurate portion of the compensation received in exchange for those services should not have been included in the court's order of disgorgement.

Argued September 18, 2018–officially released January 8, 2019

Procedural History

Action to recover damages for, inter alia, breach of fiduciary duty, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants filed a counterclaim; thereafter, the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for default against the defendants and for nonsuit on the defendants' counterclaim; subsequently, the court, *Hon. A. William Mottolese*, judge trial referee, granted the plaintiff's motion for judgment on the default and rendered judgment of nonsuit as to the defendants' counterclaim; thereafter, following a hearing in damages, the court, *Hon. Taggart D. Adams*, judge trial referee, rendered judgment for the plaintiff, from which the defendants appealed to this court. *Reversed in part; further proceedings.*

James G. Henderson, self-represented, with whom was *Taylor Henderson*, self-represented, the appellants (defendants).

Gary S. Klein, with whom was *Liam S. Burke*, for the appellee (plaintiff).

Opinion

ALVORD, J. The self-represented defendant, James G. Henderson, appeals from the judgment of the trial court, following a hearing in damages upon default as to liability, awarding the plaintiff, Hospital Media Network, LLC, monetary relief pursuant to the equitable theories of forfeiture and disgorgement in the amount

of $454,579.76 on its claim of breach of fiduciary duty.[1] On appeal, the defendant claims that the court's award was improper because the plaintiff failed to prove it suffered any damages. We conclude that the court abused its discretion in ordering a wholesale forfeiture of the defendant's salary and bonus and requiring the defendant to disgorge in full all profits received from third parties, such that the award, in the full amount requested by the plaintiff, was inequitable. Accordingly, we reverse in part the judgment of the court as to the award of damages against James Henderson and remand the case for a new hearing in damages. We otherwise affirm the court's judgment.

The following facts and procedural history are relevant to the resolution of this appeal. In November, 2013, the plaintiff commenced this action alleging that the defendant, its former employee, violated the Connecticut Uniform Trade Secrets Act (CUTSA), General Statutes § 35-50 et seq., committed tortious interference with the plaintiff's business and contractual relations, breached the duty of employee loyalty, breached his fiduciary duty, and usurped corporate opportunities of the plaintiff. The defendant was defaulted, and the trial court held a hearing in damages. After the hearing, the court awarded the plaintiff damages solely on its claim of breach of fiduciary duty,[2] the essential elements of

[1] The court additionally awarded the plaintiff $2000 in damages against Taylor Henderson, who was also named as a defendant in this action, and $21,922.50 in attorney's fees against James Henderson and Taylor Henderson jointly and severally. Although James and Taylor Henderson jointly filed briefing to this court, neither James nor Taylor challenges the judgment against Taylor or the award of attorney's fees. Because the appeal challenges only the judgment against James Henderson, we accordingly refer to James Henderson as the defendant.

[2] Although the plaintiff alleged breach of the duty of employee loyalty separate from its claim of breach of fiduciary duty, it specified in its breach of fiduciary duty count that one such fiduciary duty breached was the duty of loyalty. In its memorandum of decision, the court awarded damages for "breach of fiduciary duty owed to the corporation" and cited case law and secondary sources addressing the fiduciary duty of loyalty. Our Supreme

which were admitted by virtue of the defendant's default.

With respect to its breach of fiduciary duty count, the plaintiff alleged that it employed the defendant as its chief revenue officer and paid him substantial compensation from January 1 to September 2013. On September 5, 2013, the plaintiff terminated the defendant's employment "for cause for several reasons including, without limitation [the defendant's] actively working for various companies unrelated to [the plaintiff] for his own benefit and without [the plaintiff's] permission or knowledge during regular business hours." Specifically, it alleged that the defendant worked for or on behalf of Generation Partners (Generation), a private equity investment firm, "to raise capital for other digital media companies including but not limited to" Captivate Network Holdings, Inc. (Captivate), and used the plaintiff's computers and infrastructure to conduct business for those other digital media companies without the plaintiff's permission or knowledge. The plaintiff claimed that the defendant played golf on a social basis and otherwise took time off during regular business hours without the plaintiff's permission.

The plaintiff further alleged that the parties had a fiduciary relationship "by virtue of the trust and confidence" the plaintiff placed in the defendant as its chief revenue officer, a senior executive position. Among the duties allegedly owed to the plaintiff were the duty of loyalty, the duty to act in good faith, and the duty to act in the best interest of the plaintiff. The plaintiff asserted that the defendant breached these duties in advancing his own interests to the detriment of the plaintiff. Lastly, the plaintiff alleged that the defendant's

Court likewise has treated the duty of loyalty as a fiduciary duty in the employment context. See *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 733, 154 A.3d 989 (2017).

breach caused it to sustain damages.[3] The plaintiff sought, inter alia, compensatory and punitive damages.

The defendant answered and filed an amended counterclaim, alleging breach of contract, wrongful termination, misrepresentation and deceit, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. The defendant requested, inter alia, compensatory and punitive damages.

The parties engaged in discovery disputes, resulting in an April, 2016 order from the court that the parties "confer face-to-face in an effort to resolve these discovery disputes, bearing in mind that reasonable good faith efforts at compromise are essential to every discovery dispute." On June 27, 2016, after finding the defendant's objections to the plaintiff's discovery requests "intentionally evasive and intended to obstruct the process," the court ordered full compliance within thirty days. On July 28, 2016, the plaintiff filed a motion for default and nonsuit on the basis that the defendant had failed to comply with the court's June 27 order. The court granted the motion, finding that the "[p]laintiff is clearly prejudiced by these obstructive tactics and the only appropriate remedy proportionate to the infraction is default." On September 26, 2016, the court rendered judgment for the plaintiff on its affirmative claims and against the defendant on his counterclaim.

On September 27, 2016, the court held a hearing in damages. The plaintiff presented the testimony of

[3] Although not necessary to resolving the present appeal from the judgment awarding damages on the plaintiff's breach of fiduciary duty claim, the essential elements of the plaintiff's remaining claims were also admitted by virtue of the defendant's default. Although the court declined to award the plaintiff damages on its remaining claims, the plaintiff has not cross appealed from the court's refusal to award damages on the claims alleging a violation of CUTSA, tortious interference with the plaintiff's business and contractual relations, breach of the duty of employee loyalty, and usurpation of corporate opportunities.

Andrew Hertzmark, an employee of Generation;[4] Christopher Culver, chief executive officer of the plaintiff; Taylor Henderson; and James Henderson. At the conclusion of the hearing, the court requested posttrial briefing, which the parties submitted on October 18, 2016.

On February 15, 2017, the court issued a memorandum of decision. In its memorandum, the court reviewed the evidence presented during the hearing in damages. From 2011 to 2013, the defendant was a consultant to the plaintiff, and the plaintiff compensated the defendant by making payments to his consulting company, St. Ives Development Group. On January 1, 2013, the defendant became a full-time employee and chief revenue officer of the plaintiff. The plaintiff paid him a salary of over $12,000 per month, totaling $121,579.84 in 2013, and also paid him a sales target bonus of $25,000 in May, 2013. That bonus was paid to St. Ives Development Group.[5] Just weeks after becoming a full-time employee of the plaintiff, the defendant communicated with Hertzmark, identifying the plaintiff as a possible investment target for his fund, and included the plaintiff's revenues and possible buyout price.

In 2013, Hertzmark was working on a potential transaction in which Generation would acquire Captivate from Gannett Company, Inc. (Gannett).[6] Both Captivate

[4] According to Hertzmark, Generation is a private equity firm that had been interested in investing in the plaintiff at one point in time but decided not to do so in 2011.

[5] Aside from explaining that it paid the bonus through St. Ives Development Group at the defendant's request, the plaintiff's counsel during oral argument before this court had no additional explanation for why, after having made the defendant a full-time employee as of January 1, 2013, it would pay the bonus to the defendant as an independent contractor through his consulting company.

[6] Gannett's point person for the transaction was Douglas Kuckelman, a member of Gannett's corporate development department. The defendant corresponded via e-mail with Kuckelman in late December, 2012, and early 2013.

and the plaintiff are involved in the same business sector. While Captivate sells advertising space on digital monitors in elevators, the plaintiff sells advertising space on monitors located in hospitals and medical offices. Hertzmark testified that the defendant assisted with the Captivate acquisition, giving a presentation with Hertzmark to Gannett and helping formulate the letter of intent memorializing Generation's proposed purchase of Captivate.[7] In March, 2013, Hertzmark e-mailed the defendant stating that Generation's letter of intent was not shared with the head of Captivate and, therefore, Gannett was surprised to learn that the head of Captivate was aware of plans to install the defendant as the new chief executive officer of Captivate once that business was acquired by Generation.[8] In March and April, 2013, the defendant corresponded with Hertzmark regarding Captivate's attributes as an investment and reviewed due diligence information provided by Captivate from February through April, 2013. He told Hertzmark on July 6, 2013, that he wanted his attorney to review his Captivate employment contract once completed.

The plaintiff terminated the defendant's employment on September 5, 2013, and Generation's acquisition of Captivate from Gannett closed on September 26, 2013. Upon the transaction's closing, the defendant was paid a finder's fee of $150,000, awarded a consulting contract with Captivate for three years at $50,000 annually, and given the opportunity to purchase restricted stock of Captivate.[9]

[7] Although Hertzmark knew that the defendant had a connection with the plaintiff, he maintained that he was not aware that the defendant was employed full-time by the plaintiff in 2013. He further stated that the defendant told him he was a consultant for the plaintiff.

[8] Generation considered the defendant as a potential candidate for chief executive officer of Captivate, and the defendant provided his resume to Generation on May 19, 2013.

[9] Hertzmark did not know whether the $150,000 finder's fee was paid by Generation or Captivate.

The court found that "during the events in this case [the defendant] either never comprehended or ignored the different consequences of being a company employee and being a consultant," referring to the defendant's testimony in which he described himself as a "consultant employee" of the plaintiff. The court referenced the testimony of Culver, the plaintiff's chief executive officer, that the plaintiff's sales increased from $1.9 million in 2010 to $6.6 million in 2013. The court additionally noted Culver's testimony that the plaintiff "held itself out to be the fastest growing company of its kind during this period" and his recognition that the defendant was part of this "terrific growth." Crediting Culver's testimony, the court found that "there was a sharp increase in the company's sales" while the defendant worked for the plaintiff.

Turning to the plaintiff's claimed damages, the court first found that the plaintiff was not entitled to the defendant's "compensation from Captivate" on the theory that the defendant usurped a corporate opportunity. Specifically, the court found that the opportunity the defendant took was "employment" at Captivate, which was not an opportunity available to the plaintiff. The court determined, however, that damages were appropriate on the plaintiff's claim of the breach of fiduciary duty of loyalty, and measured the damages "by the gain to the faithless employee."[10] The court awarded damages against the defendant in the total amount of $454,579.76, including $146,579.84, representing the defendant's 2013 salary ($121,579.84) and bonus ($25,000); $150,000, representing the finder's fee paid by Generation or Captivate; $150,000, representing the

[10] In its posttrial brief, the plaintiff expressly abandoned its claim for expense reimbursements. Specifically, it no longer sought "damages for [James] Henderson's 2013 reimbursed expenses totaling $17,718.33, or Taylor Henderson's 2012 and 2013 reimbursed expenses totaling $11,887.90 and $11,498.10 respectively."

consulting fees to be paid by Captivate from 2013 through 2016; and $7999.92, representing the value of the Captivate stock at the time of purchase.[11]

The court declined to award attorney's fees under CUTSA, finding that "there was minimal or no misappropriation of trade secrets in this case, and no justifiable basis for awarding fees under that statute." The court further declined to award attorney's fees as punitive damages under the common law, on the basis that the defendant "has been penalized severely already by this court's decision. To add hundreds of thousands of dollars more, would not only be punitive, it would be overkill." It additionally found that although the defendant's actions were "uninformed, and even stupid," his conduct did not meet the common-law standard for awarding attorney's fees, which, the court observed, requires that the conduct be "outrageous, done with a bad motive, or with reckless indifference." This appeal followed.

On appeal, the defendant claims that the plaintiff was "unable to offer proof as to any of [its] damages by a preponderance of [the] evidence" and therefore is "not entitled to any award of damages."

We begin by addressing the effect of the default. The defendant was defaulted for failure to comply with the court's discovery order, and he concedes that he did not file a notice of intent to present defenses.[12] "[C]ase

[11] The court additionally awarded attorney's fees in the amount of $21,922.50, representing the time the plaintiff's counsel spent addressing the parties' discovery disputes. The defendant does not challenge this portion of the award on appeal. See footnote 1 of this opinion.

[12] "After a default, a defendant may still contest liability. Practice Book §§ 17-34, 17-35 and 17-37 delineate a defendant's right to contest liability in a hearing in damages after default. Unless the defendant provides the plaintiff written notice of any defenses, the defendant is foreclosed from contesting liability. . . . If written notice is furnished to the plaintiff, the defendant may offer evidence contradicting any allegation of the complaint and may challenge the right of the plaintiff to maintain the action or prove any matter of defense. . . . This approximates what the defendant would have been

law makes clear . . . that once the defendants had been defaulted and had failed to file a notice of intent to present defenses, they, by operation of law, were deemed to have admitted to all the essential elements in the claim and would not be allowed to contest liability at the hearing in damages." (Internal quotation marks omitted.) *Abbott Terrace Health Center, Inc.* v. *Parawich*, 120 Conn. App. 78, 85, 990 A.2d 1267 (2010). "A default admits the material facts that constitute a cause of action . . . and entry of default, when appropriately made, conclusively determines the liability of a defendant. . . . If the allegations of the plaintiff's complaint are sufficient on their face to make out a valid claim for the relief requested, the plaintiff, on the entry of a default against the defendant, need not offer evidence to support those allegations." (Internal quotation marks omitted.) *Perez* v. *Carlevaro*, 158 Conn. App. 716, 725, 120 A.3d 1265 (2015); see also *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 130 n.9, 74 A.3d 1225 (2013). "Following the entry of a default, all that remains is for the plaintiff to prove the amount of damages to which it is entitled. . . . At a minimum, the plaintiff in such instances is entitled to nominal damages." (Internal quotation marks omitted.) *Gaynor* v. *Hi-Tech Homes*, 149 Conn. App. 267, 271, 89 A.3d 373 (2014).

Because of the default entered against the defendant, he is precluded from challenging his liability to the plaintiff under the claims pleaded. "In an action at law,

able to do if he had filed an answer and special defenses." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Schwartz* v. *Milazzo*, 84 Conn. App. 175, 178–79, 852 A.2d 847, cert. denied, 271 Conn. 942, 861 A.2d 515 (2004). "To be timely, notice must be given within the time period provided in Practice Book § 17-35." *Bank of New York* v. *National Funding*, 97 Conn. App. 133, 140, 902 A.2d 1073, cert. denied, 280 Conn. 925, 908 A.2d 1087 (2006), and cert. denied sub nom. *Reyad* v. *Bank of New York*, 549 U.S. 1265, 127 S. Ct. 1493, 167 L. Ed. 2d 229 (2007). Section 17-35 (b) provides that "notice of defenses must be filed within ten days after notice from the clerk to the defendant that a default has been entered."

the rule is that the entry of a default operates as a confession by the defaulted defendant of the truth of the material facts alleged in the complaint which are essential to entitle the plaintiff to some of the relief prayed. It is not the equivalent of an admission of all of the facts pleaded. The limit of its effect is to preclude the defaulted defendant from making any further defense and to permit the entry of a judgment against him on the theory that he has admitted such of the facts alleged in the complaint as are essential to such a judgment. It does not follow that the plaintiff is entitled to a judgment for the full amount of the relief claimed. *The plaintiff must still prove how much of the judgment prayed for in the complaint he is entitled to receive*." (Emphasis in original; internal quotation marks omitted.) Id., 271–72.

Throughout his principal and reply briefing and during oral argument before this court, the defendant raises arguments challenging his liability to the plaintiff. Specifically, he argues that the plaintiff waived its claims of breach of the duty of loyalty when hiring the defendant, in that the plaintiff hired him with full knowledge that he would continue to consult for other companies. The central contention expressed in the defendant's reply brief is that the duty of loyalty never applied to his relationship with the plaintiff, and that "[w]here there was no duty of faithfulness, loyalty, or an agency or fiduciary relationship implicit in the parties' agreement, logically there cannot be any breach of it. Without a breach, damages are not available as a matter of fact and law." Such arguments are unavailing given the entry of a default, which operates as an admission by the defendant of the facts alleged in the complaint that are essential to the judgment rendered in favor of the plaintiff on its claim of breach of fiduciary duty.

The defendant is entitled, however, to challenge the determination of monetary relief awarded by the court.

Our standard of review is as follows. "As a general matter, [t]he trial court has broad discretion in determining whether damages are appropriate. . . . Its decision will not be disturbed on appeal absent a clear abuse of discretion. . . . Our review of the amounts of monetary awards rendered pursuant to various equitable doctrines is similarly deferential."[13] (Citation omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, 324 Conn. 718, 729, 154 A.3d 989 (2017).

Our Supreme Court, in *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 732, recently provided guidance on the equitable remedies available to an employer upon proving that an employee has breached his fiduciary duty of loyalty. In *Wall Systems, Inc.*, the defendant worked for the plaintiff building contractor as head of its exterior insulation finish systems division. Id., 722. Without informing the plaintiff, he began working simultaneously for a competitor, performing estimating work for which he earned approximately $90,000 over the course of five years. Id., 723. The plaintiff also submitted bids for some of the same jobs that the defendant had estimated for its competitor. The defendant additionally accepted kickbacks from a subcontractor in connection with his work for the plaintiff. Id., 724. The plaintiff terminated the defendant's employment and filed an action alleging that he breached his duty of loyalty to the plaintiff.

After a bench trial, the court awarded damages to the plaintiff arising out of the kickback scheme in the amounts of $14,400, for jobs on which the defendant had increased the contract price, and $43,200, representing treble damages as a result of the defendant's statutory theft. Id., 726. The trial court declined to require the

[13] Although the determination of whether equitable doctrines are applicable in a particular case is a question of law subject to plenary review; see *Walpole Woodworkers, Inc.* v. *Manning*, 307 Conn. 582, 588, 57 A.3d 730 (2012); the amount of damages awarded under such doctrines is a question for the trier of fact. *David M. Somers & Associates, P.C.* v. *Busch*, 283 Conn. 396, 407, 927 A.2d 832 (2007).

defendant to forfeit the compensation he earned from either the plaintiff or its competitor, citing a lack of evidence that the plaintiff had been harmed due to the defendant's working for the competitor, and finding that the defendant had worked for the competitor on his own time. Id., 726–27. On appeal, the plaintiff claimed as a matter of law that the trial court improperly declined to order the defendant to forfeit his earnings from the plaintiff and to require the defendant to disgorge the compensation he received from the competitor. Id., 727–28. Our Supreme Court, recognizing that the remedies of forfeiture and disgorgement are available once an employer has proven breach of the fiduciary duty of loyalty, nevertheless held that the remedies are not mandatory, but "are discretionary ones whose imposition is dependent upon the equities of the case at hand." Id., 729.

The court in *Wall Systems, Inc.* provided: "The law of restitution and unjust enrichment . . . creates a basis for an [employee's] liability to [an employer] when the [employee] breaches a fiduciary duty, even when no loss to the employer is shown. 2 Restatement (Third), [Agency] § 8.01 comment (d) (1), p. 258 [(2006)]. More specifically, if an employee realizes a material benefit from a third party in connection with his breach of the duty of loyalty, the employee is subject to liability to deliver the benefit, its proceeds, or its value to the [employer]. Id.; see also id., § 8.02, comment (e), p. 285. Accordingly, [a]n employee who breaches the fiduciary duty of loyalty may be required to disgorge any profit or benefit he received as a result of his disloyal activities, regardless of whether the employer has suffered a corresponding loss. . . .

"Additionally, an employer may seek forfeiture of its employee's compensation. *Cameco, Inc.* v. *Gedicke*, 157 N.J. 504, 519, 724 A.2d 783 (1999); 2 Restatement (Third), supra, § 8.01, comment (d) (2), pp. 258–59. Forfeiture of a disloyal employee's compensation, like disgorgement of material benefits received from third

parties, is an equitable rather than a legal remedy. . . . It is derived from a principle of contract law: if the employee breaches the duty of loyalty at the heart of the employment relationship, he or she may be compelled to forego the compensation earned during the period of disloyalty. The remedy is substantially rooted in the notion that compensation during a period in which the employee is disloyal is, in effect, unearned. . . . Forfeiture may be the only available remedy when it is difficult to prove that harm to [the employer] resulted from the [employee's] breach or when the [employee] realizes no profit from the breach. In many cases, forfeiture enables a remedy to be determined at a much lower cost to litigants. Forfeiture may also have a valuable deterrent effect because its availability signals [employees] that some adverse consequence will follow a breach of fiduciary duty. 2 Restatement (Third), supra, § 801, comment (d) (2), p. 259 . . . . Notably, however, even in cases in which a court orders forfeiture of compensation, the forfeiture normally is apportioned, that is, it is limited to the period of time during which the employee engaged in disloyal activity." (Citations omitted; internal quotation marks omitted.) Id., 733–34.

Our Supreme Court made clear that the remedies of forfeiture of compensation and disgorgement of material benefits are discretionary, especially in "cases involving breaches of the duty of loyalty due to their highly fact specific nature." Id., 736. The court further articulated the following nonexhaustive list of factors a trial court should consider in determining whether to invoke forfeiture and disgorgement: "the employee's position, duties and degree of responsibility with the employer; the level of compensation that the employee receives from the employer; the frequency, timing and egregiousness of the employee's disloyal acts; the wilfulness of the disloyal acts; the extent or degree of the

employer's knowledge of the employee's disloyal acts; the effect of the disloyal acts on the value of the employee's properly performed services to the employer; the potential for harm, or actual harm, to the employer's business as a result of the disloyal acts; the degree of planning taken by the employee to undermine the employer; and the adequacy of other available remedies, as herein discussed. . . . The several factors embrace broad considerations which must be weighed together and not mechanically applied. . . . [T]he judicial task is to search for a fair and reasonable solution in light of the relevant considerations . . . and to avoid unjust enrichment to either party. . . . Additionally, when imposing the remedy of forfeiture of compensation, depending on the circumstances, a trial court may in its discretion apply apportionment principles, rather than ordering a wholesale forfeiture that may be disproportionate to the misconduct at issue. . . . Conversely, the court may conclude that all compensation should be forfeited because the employee's unusually egregious or reprehensible conduct pervaded and corrupted the entire [employment] relationship." (Citations omitted; internal quotation marks omitted.) Id., 737–38.

The factors articulated in *Wall Systems, Inc.*, are designed to assist the trial court in reaching "a fair and reasonable solution" and to "avoid unjust enrichment to either party." Id., 738. Specifically, the court in *Wall Systems, Inc.* noted that in certain circumstances the application of apportionment principles may be more appropriate than "a wholesale forfeiture that may be disproportionate to the misconduct at issue." Id. In the present case, we conclude that the award of monetary relief was disproportionate to the misconduct at issue and failed to take into account the equities of the case at hand.[14]

[14] The self-represented defendant advances a number of arguments for reversal of the court's judgment that have no basis in the court's memorandum of decision or in our case law.

We focus our analysis on the court's award pursuant to the doctrine of forfeiture. The court ordered a wholesale forfeiture of the defendant's salary for the entire duration of his full-time employment with the plaintiff, $121,579.84, and the entire amount of what the plaintiff itself categorized as the defendant's achieving his "sales target bonus," $25,000, which it paid to the defendant

He first contends that the court erred in requiring him to repay amounts earned prior to September 5, 2013, arguing that Connecticut law does not permit the forfeiture of past compensation upon finding a breach of duty of loyalty. The defendant maintains that future compensation only may be subject to forfeiture, citing *Dunsmore & Associates, Ltd.* v. *D'Alessio*, Superior Court, judicial district of New Haven, Docket No. 409906 (January 6, 2000) (26 Conn. L. Rptr. 228), in support of his argument. That superior court case involved claims of breach of contract and breach of the implied covenant of good faith and fair dealing, and thus is both distinguishable and not binding on this court. In contrast, *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 733–34, provides generally that "[i]f the employee breaches the duty of loyalty at the heart of the employment relationship, he or she may be compelled to forego *the compensation earned* during the period of disloyalty." (Emphasis added.)

Second, the defendant argues that because the plaintiff prospered during the period of the defendant's employment, the plaintiff cannot show it was damaged by his acts and is not entitled to recover damages for lost profits. Although the court abused its discretion in fashioning its damage award, it did not use lost profits as the measure of damages, and, thus, the defendant's argument is inapposite.

Third, the defendant argues that "[t]he proper measure of damages for breach of covenant not to compete is the nonbreaching party's losses, not the breaching party's gains. . . . Where the judge reversed this standard in his memo on damages, he applied an incorrect standard, which rendered an incorrect award of damages" to the plaintiff. Because this action contains no claim of breach of a covenant not to compete, the defendant's argument and supporting case law is inapplicable.

Fourth, recognizing that no damages were awarded on the plaintiff's count alleging violation of CUTSA, the defendant nevertheless argues, in the event that the plaintiff "may choose to raise [the CUTSA claim] in this appeal," that no recovery under CUTSA is proper. Specifically, he argues, citing *Dunsmore & Associates, Ltd.* v. *D'Alessio*, supra, 26 Conn. L. Rptr. 228, that the plaintiff is not entitled to recover compensatory damages under § 35-53 because it has failed to prove that it sustained actual loss or that the defendant was unjustly enriched as a result of his misappropriation. He also argues that the plaintiff is not entitled to punitive damages under CUTSA. He further argues that the plaintiff cannot recover damages for tortious interference, on the basis that it has failed to prove a loss suffered by the plaintiff and caused by the defendant's tortious conduct. Because the court awarded no damages under either the CUTSA or tortious interference counts and the plaintiff did not file a cross appeal from the trial court's judgment, we need not address these arguments.

as an independent contractor through his consulting company. Specifically, Culver testified during the hearing in damages that the $25,000 bonus paid to the defendant in May, 2013, was compensation for "hitting a target of four . . . million in sales for that year."

Although the court in the present case did not have the benefit of the *Wall Systems, Inc.*, factors at the time it rendered its decision, our Supreme Court noted that the factors had been "gleaned from existing jurisprudence." Id., 737. The court did, in its memorandum of decision, make factual findings, fully supported by the record and corresponding with the *Wall Systems, Inc.*, factors, but ultimately failed to give proper weight to these findings in fashioning its damages award. Specifically, the trial court expressly recognized the value of the services the defendant provided the plaintiff, finding "a sharp increase in the company's sales" while the defendant worked for the plaintiff, and concluding that the defendant was part of this "terrific growth." That finding corresponds with the *Wall Systems, Inc.*, factor prompting consideration of "the effect of the disloyal acts on the value of the employee's properly performed services to the employer." The court's finding, in essence a recognition that the defendant was providing extraordinary value to the plaintiff despite his breach of fiduciary duty, should have weighed in favor of a measured forfeiture, not the defendant's full salary and bonus.

Indeed, as the court in *Wall Systems, Inc.*, explained, forfeiture as a remedy "is substantially rooted in the notion that compensation during a period in which the employee is disloyal is, in effect, unearned." Id., 734. In accord with this principle, courts in other states have recognized that an employee may be entitled to retain some portion of his compensation where the breach is minor or the employee has provided value to the employer in the form of services properly rendered. See *Cameco, Inc.* v. *Gedicke*, supra, 157 N.J. 521 ("if

the employee's breach is minor, involves only a minimal amount of time, or does not harm the employer, the employee may be entitled to all or substantially all of his or her compensation"); *Futch* v. *McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 609, 518 S.E.2d 591 (1999) (noting that "[t]he goal is to avoid the unjust enrichment of either party by examining factors such as . . . the value to the employer of the services properly rendered by the employee").

The 2 Restatement (Third), supra, § 8.01 comment (d) (2) also suggests that forfeiture in full is disproportionate under certain circumstances. It provides: "Although forfeiture is generally available as a remedy for breach of fiduciary duty, cases are divided on how absolute a measure to apply. Some cases require forfeiture of all compensation paid or payable over the period of disloyalty, while others permit apportionment over a series of tasks or specified items of work when only some are tainted by the agent's disloyal conduct. The better rule permits the court to consider the specifics of the agent's work and the nature of the agent's breach of duty and to evaluate whether the agent's breach of fiduciary duty tainted all of the agent's work or was confined to discrete transactions for which the agent was entitled to apportioned compensation."

In the present case, the court also made a finding related to the wilfulness of the defendant's actions, another of the *Wall Systems, Inc.*, factors. The court characterized the defendant's actions as "uninformed, and even stupid." By declining to award attorney's fees as punitive damages under the common law on this basis, it is evident that the court rejected any notion that the defendant's conduct was "outrageous, done with a bad motive, or with reckless indifference." The court also found that the defendant had "either never comprehended or ignored the different consequences of being a company employee and being a consultant," referring to the defendant's testimony in which he

described himself as a "consultant employee" of the plaintiff. Despite recognizing that the defendant potentially "never comprehended" the distinction between serving as an employee and a consultant and finding that the defendant's behavior was "uninformed" rather than done with a bad motive, the court failed to give proper weight to these findings when fashioning its award.

We acknowledge that a trial court "may conclude that all compensation should be forfeited because the employee's unusually egregious or reprehensible conduct pervaded and corrupted the entire [employment] relationship." (Internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 738. The court in *Wall Systems, Inc.*, recognized that "if the compensation received by a disloyal employee is *not* apportioned to particular time periods or items of work, and his or her breach of the duty of loyalty is *wilful and deliberate*, forfeiture of his or her entire compensation may result." (Emphasis altered.) Id., 734 n.11. In the present case, however, the trial court's express factual findings reflect an uninformed employee who continued to provide significant value to his employer despite his breach of fiduciary duty. These findings, clearly not in the nature of corrupt or reprehensible behavior, should have weighed in favor of an award of something less than full forfeiture.

We further note briefly that forfeiture was not the sole remedy available to the court, as the court had before it evidence of the benefit the defendant received from third parties Generation and Captivate. Cf. id., 734 ("[f]orfeiture may be the only available remedy when . . . the [employee] realizes no profit from the breach"). The court found those benefits, including the finder's fee, value of the stock purchased, and the three year consulting agreement, to amount to a total of $307,992.92, and ordered disgorgement in full. That amount, however, appears to reflect compensation that the defendant had earned for consulting that he per-

formed both prior to and subsequent to his nine month period of full-time employment with the plaintiff.[15]

To the extent the defendant rendered some of the services for which he was compensated by third parties both prior and subsequent to his full-time employment with the plaintiff, some commensurate portion of the compensation received in exchange for those services cannot be said to have been gained by the defendant's breach and should not have been included in the court's order of disgorgement. See id., 733 ("[a]n employee who breaches the fiduciary duty of loyalty may be required to disgorge any profit or benefit he received *as a result of his disloyal activities*" [emphasis added; internal quotation marks omitted]); *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 433, 460,

[15] With respect to the finder's fee, although Hertzmark testified that the defendant received $150,000 for the work he performed in 2013, he acknowledged that "*during the course of several years*, [the defendant] and I have looked at a number of companies, thirty-five, thirty different companies, and ultimately settled in 2013 on Captivate. So . . . what you're hearing about with Captivate was *the tail end of the relationship*." (Emphasis added.) The arrangement between Hertzmark and the defendant began in 2010 or 2011, and the defendant was uncompensated when the two began to look at potential companies together. It was agreed that if an acquisition closed, the defendant would be paid a finder's fee at that time. For the majority of the term of that relationship, the defendant was not a full-time employee of the plaintiff. Hertzmark testified that even had he known that the defendant was a full-time employee of the plaintiff in 2013, he still would have paid him the "cash compensation regardless of his employment because [the defendant] had made the introduction many years ago."

Moreover, although Hertzmark testified that the three year, $150,000 prospective consulting contract was part of the defendant's compensation for working on the Captivate transaction in 2013, he later clarified that the defendant "has been given $50,000 per year for his work on the transaction *and since the transaction has closed*." (Emphasis added.) He further testified that "I would say through the work we did together in 2013, we saw that he would be a valuable post-transaction consultant, and so we signed him up to a three year agreement, post closing." Thus, although he was provided the opportunity to sign the agreement as a consultant on the basis of his work in 2013, he performed the services specified in the agreement and earned the $50,000 per year subsequent to the termination of his employment with the plaintiff.

970 A.2d 592 (2009) (explaining that restitutionary remedies are "not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep" [internal quotation marks omitted]); *XL Specialty Ins. Co.* v. *Carvill America, Inc.*, Superior Court, judicial district of Middlesex, Complex Litigation Docket, Docket No. X04-CV-04-4000148-S (May 31, 2007) (43 Conn. L. Rptr. 536) ("[t]he principal is entitled to any loss resulting from or caused by the breach, and the agent may as well be required to forfeit any profit gained *by the breach*" [emphasis in original]).

"[C]ourts exercising their equitable powers are charged with formulating fair and practical remedies appropriate to the specific dispute. . . . In doing equity, [a] court has the power to adapt equitable remedies to the particular circumstances of each particular case. . . . [E]quitable discretion is not governed by fixed principles and definite rules . . . . Rather, implicit therein is conscientious judgment directed by law and reason and looking to a just result." (Citations omitted; internal quotation marks omitted.) *Wall Systems, Inc.* v. *Pompa*, supra, 324 Conn. 736. In fashioning its damage award, the court failed to formulate a remedy appropriate to the particular circumstances of this case, in light of its own factual findings which weighed in favor of a measured award. Ultimately, the award of wholesale forfeiture and disgorgement in full failed to take into account the equities of the case at hand and did not achieve a just result.

The judgment is reversed only as to the award of damages against James G. Henderson, and the case is remanded for a new hearing in damages. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

LAUREN WOOD *v.* THOMAS J. RUTHERFORD ET AL.
(AC 40142)

Sheldon, Elgo and Flynn, Js.

Syllabus

The plaintiff patient sought to recover damages from the defendant R, a licensed gynecological oncologist, alleging that R's conduct during a certain postoperative examination constituted battery and the negligent infliction of emotional distress. The plaintiff alleged that she underwent a surgical procedure known as a laser ablation of the vulva that was performed by R, and that he, having subsequently discovered during the postoperative examination that the plaintiff's labia were agglutinated, digitally separated her agglutinated labia without providing her with any warning or notice. R filed a motion to dismiss, claiming that the plaintiff's claims against him were for medical malpractice and, as such, the plaintiff was required by statute (§ 52-190a) to attach to the complaint a certificate of good faith and a written opinion letter of a similar health provider. The trial court found that the claims were for medical malpractice and, thus, granted the motion to dismiss without prejudice to the plaintiff filing a separate action claiming a lack of informed consent. The plaintiff then filed a revised complaint claiming that R had failed to obtain her informed consent before embarking on a course of medical treatment for a complication that he discovered during the postoperative examination. Subsequently, R filed a motion for summary judgment, which the court granted on the ground that R's conduct in separating the plaintiff's agglutinated labia was not a separate procedure or course of treatment giving rise to a duty to obtain informed consent but was, instead, a part of another examination for which R had received the written consent of the plaintiff. On appeal, the plaintiff challenged the trial court's conclusion and, specifically, claimed that although R had obtained her informed consent to perform the laser ablation of her vulva and, as part of that course of treatment, to perform a postoperative examination, a substantial change in circumstances occurred when R discovered a complication during the postoperative examination that required medical intervention, which in turn obligated R to obtain her informed consent before proceeding further. *Held*:

1. The trial court improperly granted R's motion to dismiss the plaintiff's battery and negligent infliction of emotional distress counts due to the plaintiff's noncompliance with § 52-190a: the written opinion letter requirement of § 52-190a did not apply to the plaintiff's battery claim, as our Supreme Court has held that the written opinion letter requirement contained in § 52-190a applies only to claims of medical negligence, and the plaintiff's battery claim, which contained no allegations of negligence

on the part of R and did not allege any deviation from the applicable standard of care, was predicated on the alleged lack of informed consent and was, thus, not subject to that requirement; moreover, the plaintiff's negligent infliction of emotional distress count was not a claim of medical negligence subject to the requirements of § 52-190a, as that count lacked any allegation that R departed from the applicable standard of care, and it was, instead, derivative of the plaintiff's battery claim, as it concerned her general theory that R lacked informed consent to digitally separate her agglutinated labia.

2. The trial court improperly rendered summary judgment in favor of R on the plaintiff's revised complaint: when a substantial and material alteration of the risks, anticipated benefits, or alternatives previously disclosed to the patient occurs during a course of medical treatment, the doctrine of informed consent generally requires an additional informed consent discussion between the physician and the patient, and, in the present case, a genuine issue of material fact existed as to whether R's discovery of the plaintiff's medical complication during the postoperative examination constituted a substantial and material change in circumstances, such that R was obligated to disclose the risks, anticipated benefits, and viable alternatives to the plaintiff before embarking on a course of treatment, as a finder of fact could have concluded on the basis of certain statements in the affidavits of the plaintiff and her mother, which alleged that R, after separating the plaintiff's agglutinated labia, informed them that he performed that procedure so that the plaintiff would not have to go to the operating room for surgery, as well as R's admission that severely agglutinated labia may require a surgical procedure and evidence from both parties of the significant pain experienced by the plaintiff, that R discovered the medical complication during his initial examination of the plaintiff and then, without her informed consent, made a unilateral decision to pursue a particular course of treatment, namely, digital separation, when another viable alternative existed; moreover, although a physician's failure to obtain informed consent may be excused in certain circumstances, such as when the patient has authorized the physician to remedy complications that arise during a course of medical treatment, a genuine issue of material fact existed as to whether the plaintiff had authorized R to remedy unforeseen complications that arose, not during her laser ablation procedure but, rather, during the postoperative examination that occurred weeks later, as the plaintiff's signed consent form, when read in the light most favorable to the plaintiff as the nonmoving party, authorized R to take whatever action may be necessary only with respect to unforeseen complications that arose during the laser ablation procedure and did not discuss postoperative care.

Argued May 22, 2018—officially released January 8, 2019

Procedural History

Action to recover damages for, inter alia, battery, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Radcliffe*, *J.*, granted the named defendant's motion to dismiss; thereafter, the court granted the plaintiff's motion to cite in the named defendant as a party defendant and the plaintiff filed an amended complaint; subsequently, the court granted the motion to dismiss filed by the defendant Yale University and rendered judgment thereon; thereafter, the court granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

John L. Cesaroni, with whom was *James R. Miron*, for the appellant (plaintiff).

Tadhg Dooley, with whom, on the brief, was *Jeffrey R. Babbin*, for the appellee (named defendant).

Opinion

ELGO, J. This case concerns the conduct of a physician who discovered a complication during a postoperative examination. The plaintiff, Lauren Wood, appeals from the trial court's dismissal of her August 25, 2015 amended complaint, which alleged one count of battery and one count of negligent infliction of emotional distress against the defendant, Thomas J. Rutherford, M.D.[1] The plaintiff claims that the court improperly concluded that those counts sounded in medical malpractice and, thus, required compliance with General

[1] The operative complaints in the present case also named Yale University as a defendant and alleged negligent supervision on its part. The trial court subsequently granted Yale University's motion to dismiss that claim, and the plaintiff has not appealed from that judgment. Furthermore, Yale University is not a party to this appeal. We therefore refer to Thomas J. Rutherford, M.D., as the defendant in this opinion.

Statutes § 52-190a. The plaintiff also challenges the propriety of the summary judgment rendered by the court on her February 8, 2016 revised complaint, which alleged that the defendant failed to obtain her informed consent before embarking on a course of treatment for a complication discovered during a postoperative examination. We agree with the plaintiff that the court improperly dismissed the battery and negligent infliction of emotional distress counts of her August 25, 2015 amended complaint, as those counts were predicated on an alleged lack of informed consent. We further conclude that a genuine issue of material fact exists as to whether a substantial change in circumstances occurred during the course of medical treatment that necessitated a further informed consent discussion between the parties, rendering summary judgment inappropriate. We, therefore, reverse the judgment of the trial court.

The operative complaints, the plaintiff's August 25, 2015 amended complaint and her February 8, 2016 revised complaint, contain similar factual allegations. In both, the plaintiff alleged that, at all relevant times, she was a patient of the defendant, a licensed gynecological oncologist. She further alleged that "[o]n April 25, 2014, the plaintiff underwent a surgical procedure known as a CO_2 laser ablation[2] of the vulva [to remove precancerous growths] that was performed by [the defendant] at Yale University Gynecologic Center . . . . On May 14, 2014, upon the advice of [the defendant], the plaintiff returned to Yale University Gynecologic Center for a postoperative examination. During the postoperative examination . . . [the defendant] discovered that the plaintiff's labia [were] agglutinated.[3]

[2] Ablation is the "[r]emoval of a body part or the destruction of its function, as by a surgical procedure, morbid process, or noxious substance." Stedman's Medical Dictionary (27th Ed. 2000) p. 3.

[3] Agglutination is the "[a]dhesion of the surfaces of a wound." Stedman's Medical Dictionary (27th Ed. 2000) p. 35; see also Webster's Third New

During the postoperative examination . . . [the defendant], *without any warning or notice to or consent from the plaintiff* . . . forcefully inserted his fingers through the plaintiff's agglutinated labia and into her vagina." (Emphasis added; footnotes added.) The plaintiff further alleged that she sustained injuries as a result thereof, including "scarring and impairment to her vulva and vagina . . . ."

The plaintiff commenced this action in 2015. Her August 25, 2015 amended complaint contained two counts against the defendant that alleged that his conduct during the postoperative examination constituted battery and negligent infliction of emotional distress. In response, the defendant filed a motion to dismiss, in which he argued that "regardless of the caption applied to them by the plaintiff, both of the claims . . . are for medical malpractice. As such, the plaintiff is required by [§] 52-190a[4] to attach to the complaint a

International Dictionary (2002) p. 41 (defining "agglutinate" as "joined with or as if with glue").

[4] General Statutes § 52-190a provides in relevant part: "(a) No civil action or apportionment complaint shall be filed to recover damages resulting from personal injury or wrongful death occurring on or after October 1, 1987, whether in tort or in contract, in which it is alleged that such injury or death resulted from the negligence of a health care provider, unless the attorney or party filing the action or apportionment complaint has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint, initial pleading or apportionment complaint shall contain a certificate of the attorney or party filing the action or apportionment complaint that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant or for an apportionment complaint against each named apportionment defendant. To show the existence of such good faith, the claimant or the claimant's attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. . . .

"(c) The failure to obtain and file the written opinion required by subsection (a) of this section shall be grounds for the dismissal of the action."

good faith certificate and written opinion letter. The plaintiff's failure to attach these documents is fatal to her claim and mandates that it be dismissed." (Footnote added.)

The court heard argument from the parties on that motion on October 19, 2015, at which the plaintiff's counsel acknowledged that the plaintiff had consented to the postoperative examination on May 14, 2014, but not to the defendant forcefully separating her agglutinated labia without warning or notice to her.[5] The plaintiff's counsel emphasized that, in her complaint, the plaintiff did not "allege that there was a deviation of the standard of care. . . . We don't allege negligence in this case." Counsel then stated that count one of the complaint "is not a negligence case. Count one is a battery case, and the theory of battery as a basis for recovery" against the defendant was his failure to obtain informed consent. Counsel continued: "We don't claim negligence at all. Our claim here is that [the plaintiff] had no knowledge . . . and was not informed . . . and didn't consent to [the defendant] sticking his fingers into her vagina the way he did . . . ." In response, the court stated in relevant part: "[Y]ou certainly have every right to plead that this was a surgical procedure, that there was a lack of informed consent and, as a result of a lack of informed consent, the plaintiff sustained damages . . . . That you can do. You can't transform

[5] The plaintiff's counsel stated that the plaintiff "consented to [the defendant] examining her vagina. . . . [W]hat she didn't consent to was his jamming his fingers into her vagina forcibly to separate something, and she [had] no knowledge of that procedure, she didn't know that was going to happen, and she . . . didn't consent to that. . . . [S]he will testify that had she known that [her labia were agglutinated], she would have asked for more clarification of what the process was going to entail, whether she could get some sort of pain medication. She had no idea—she consented only to being examined, not to having the [defendant], without any warning, jam his fingers into her vagina. . . . [T]hat's why we [pleaded] it as a battery. There's no consent to what he did to her."

. . . what amounts to a medical negligence or malpractice claim into a tortious action for purposes of circumventing § 52-190a . . . .'' The court then made an express finding that the three factors determinative of whether a negligence claim sounds in medical malpractice[6] all were satisfied. The court thus granted the motion to dismiss ''without prejudice to the plaintiff filing a separate action claiming a lack of informed consent . . . .''[7]

Nine days later, the plaintiff requested leave to amend her complaint pursuant to Practice Book § 10-60, which the court granted. The plaintiff thereafter filed an amended complaint claiming that the defendant had failed to obtain her informed consent before embarking on a course of treatment for a complication that he discovered during the postoperative examination. More specifically, the plaintiff alleged in her February 8, 2016

[6] ''The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. [P]rofessional negligence or malpractice . . . [is] defined as the *failure of one rendering professional services* to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. . . . Furthermore, malpractice presupposes some *improper conduct in the treatment or operative skill* [or] . . . the failure to exercise requisite medical skill . . . . From those definitions, we conclude that the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.'' (Emphasis in original; internal quotation marks omitted.) *Boone* v. *William W. Backus Hospital*, 272 Conn. 551, 562–63, 864 A.2d 1 (2005).

[7] On November 9, 2015, the plaintiff filed a notice of intent to appeal the ruling of the court granting the motion to dismiss, in which the plaintiff stated that she ''seeks to defer the taking of an appeal until a final judgment that disposes of this case for all purposes and as to all parties is rendered.'' The defendant did not object to that notice and has raised no claim with respect thereto in this appeal.

revised complaint that the defendant's actions during the postoperative examination "violated his duty to provide the plaintiff with information that a reasonable patient would have found material for making a decision to embark upon the course of treatment performed by [the defendant] in that: (a) [the defendant] failed to inform the plaintiff as to the nature of the procedure he performed because he did not give her any warning or explanation of said procedure; (b) [the defendant] failed to disclose any risks and hazards of the procedure; (c) [the defendant] failed to discuss any alternatives to the procedure he performed where, upon information and belief, other procedures were available; and (d) [the defendant] failed to disclose any anticipated benefits of the procedure he performed." In his answer, the defendant admitted that, while conducting the postoperative examination, he discovered that the plaintiff's labia were agglutinated. He further admitted that "during the postoperative examination, [he] separated the skin of the labia by inserting a finger through the agglutination."[8] The defendant otherwise denied the

[8] To be clear, the plaintiff in the present case does not allege that labial agglutination was a material risk of the laser ablation procedure that the defendant had a duty to disclose prior to performing that procedure, nor has she furnished any affidavits or other proof that would support such a contention. The only evidence in the record before us regarding the risk of labial agglutination is the defendant's uncontroverted statement in his November 4, 2016 affidavit indicating that labial agglutination is a rare complication of the laser ablation procedure. See *Logan* v. *Greenwich Hospital Assn.*, 191 Conn. 282, 291, 465 A.2d 294 (1983) (duty of informed consent does not require disclosure of "all information which may have some bearing, however remote, upon the patient's decision"); see also *Munn* v. *Hotchkiss School*, 326 Conn. 540, 605, 165 A.3d 1167 (2017) (*Espinosa*, *J.*, concurring) ("a physician need not disclose to patients every remote risk potentially associated with a medical procedure but only those deemed sufficiently likely as to be material"); *Pedersen* v. *Vahidy*, 209 Conn. 510, 523, 552 A.2d 419 (1989) (disclosure generally unnecessary when "the likelihood of such injury is remote"). For that reason, the defendant emphasizes in his appellate brief that the plaintiff "has never alleged, let alone offered evidence, that agglutination is a 'known material risk' of CO_2 laser ablation of the vulva such that [the defendant] had a specific duty to warn her about it before she consented to the original procedure. . . . [I]t has never been the plain-

substance of the plaintiff's lack of informed consent claim.

On October 3, 2016, the plaintiff filed a certificate of closed pleadings with the trial court, in which she claimed a jury trial. The defendant filed a motion for summary judgment on November 15, 2016, arguing that "[t]here is no triable issue of fact . . . because the incident in question—the separation of agglutinated labia during a postoperative examination of the plaintiff's vagina—was not a 'procedure' requiring consent. Even if it [was], the plaintiff consented to [the defendant] performing the vaginal exam, which necessarily included separating her labia to observe the surgical site." That motion was accompanied by three exhibits, including the defendant's November 4, 2016 affidavit and his August 17, 2016 responses to the interrogatories of the plaintiff.

On January 23, 2017, the plaintiff filed an objection to the motion for summary judgment, arguing that the defendant, after discovering the complication during the postoperative examination, "performed an invasive procedure, which constitutes a course of treatment triggering a physician's duty to inform." The plaintiff noted that the "cases that find a course of treatment that triggers a physician's duty to provide informed consent share the fact that they involve the physician providing, or attempting to provide, a therapeutic remedy to the plaintiff. The mechanism of the treatment itself is not important, but rather, the key element is that a medical treatment was provided." Because the defendant provided a medical treatment to remedy her labial agglutination, the plaintiff argued that he was obligated to

tiff's claim that [the defendant] failed to obtain her informed consent to the laser ablation procedure." On appeal, the plaintiff does not disagree with that statement. Rather, her claim is altogether a different one—namely, that the defendant, after discovering the labial agglutination during the postoperative examination, embarked on a course of treatment to remedy that complication without her consent.

apprise her of "any material risks or alternatives" prior to embarking on that course of treatment. In support of her assertion that the defendant provided a medical treatment, the plaintiff appended to her objection (1) a copy of her answers to certain interrogatories, (2) affidavits of the plaintiff and her mother, Janice Andersen, and (3) copies of five Superior Court decisions.

The defendant filed a reply to the plaintiff's objection on February 1, 2017, in which he maintained that the plaintiff's consent to the laser ablation procedure included her consent to the postoperative examination, as that examination was "not a separate course of therapy from the operation." The defendant further submitted that "[t]he uncontroverted evidence shows that [he] had to separate the plaintiff's labia, which were agglutinated, in order to examine the surgical site." A copy of the plaintiff's signed consent to the laser ablation procedure was included as an exhibit to that reply.[9]

The court held a hearing on the motion for summary judgment on February 6, 2017, at which the defendant's counsel contended that the May 14, 2014 postoperative examination did not involve a procedure of any kind. The court then inquired as to whether the plaintiff's counsel had "any authority that says that this type of thing is a procedure"; counsel responded that there was "nothing in Connecticut that says that this . . . is or is not a course of treatment under the standard [set forth] in *Logan* [v. *Greenwich Hospital Assn.*, 191 Conn. 282, 292, 465 A.2d 294 (1983)]." The plaintiff's counsel nevertheless argued that, after discovering the labial agglutination, the defendant failed to disclose to the

[9] In her principal appellate brief, the plaintiff briefly notes her objection to the inclusion of her signed consent form as an exhibit to the defendant's reply brief. Nonetheless, she raised no objection to that exhibit before the trial court, either in written form or during the February 6, 2017 hearing on the motion for summary judgment, rendering that evidentiary objection unpreserved.

plaintiff the nature of the course of treatment he ultimately undertook to resolve that medical complication. Counsel reminded the court that the affidavits submitted by the plaintiff and Andersen in opposition to the motion for summary judgment both indicated that the defendant told them that he performed the digital separation of the agglutination "to avoid having to go into the operating room" to resolve that complication.[10] Counsel then rhetorically asked what the difference was between a course of treatment in an operating room and a course of treatment in an examination room, before stating: "[T]he take home message is that the form of treatment is not what's important. It's that the doctor . . . and the patient embark on a course of treatment, and the patient has to go into it with open eyes, and that just didn't happen here." The plaintiff's counsel concluded his remarks by noting that the defendant "provided a treatment. [The plaintiff's] labia [were] fused together, and he separated [them]. There certainly is some evidence that [separation] could have been done in an operating room, and maybe it should have. [The plaintiff] deserves to be able to explore that. And certainly if [the defendant] can refute that, that's fine, but it's an issue of fact to be decided in this case by the trier of fact . . . ."

When those arguments concluded, the court stated that it "makes a finding that the activities of [the defendant], in examining the surgical site following a surgical procedure which took place three weeks earlier, is not a procedure which would give rise to the duty to inform the plaintiff that a certain portion of the examination of the surgical site might induce pain and [to conclude otherwise] would extend the definition of a surgery

[10] At oral argument on the motion for summary judgment, the defendant's counsel conceded that "going into an operating room, of course," constitutes "a separate course of therapy" for which a medical practitioner must obtain "a separate consent" from the patient.

far afield. Under *Logan* [v. *Greenwich Hospital Assn.*, supra, 191 Conn. 292], informed consent deals with a procedure, an operation or surgery. This was not an operation. It was not surgery. It was not a procedure in and of itself. It was, rather, part of another examination for which the [defendant] received the written consent of the plaintiff. So, the motion for summary judgment is granted." Accordingly, the court rendered judgment in favor of the defendant, and this appeal followed.

I

We first consider the plaintiff's challenge to the dismissal of her August 25, 2015 amended complaint against the defendant. Although that complaint contained counts labeled battery and negligent infliction of emotional distress, the trial court determined that, despite the nomenclature employed by the plaintiff, those counts both sounded in medical malpractice. As a result, the court held that the plaintiff's failure to comply with the strictures of § 52-190a required dismissal of those counts due to lack of personal jurisdiction. That determination warrants closer scrutiny.

"When a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Gaudiano*, 142 Conn. App. 440, 441, 68 A.3d 101, cert. denied, 310 Conn. 902, 75 A.3d 29 (2013); see also *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 395, 21 A.3d 451 (2011) ("[i]n any consideration of the trial court's dismissal, we take the facts as alleged in the

complaint as true"). As our Supreme Court has recognized, the failure to attach a proper written opinion letter pursuant to § 52-190a to a complaint alleging injury due to the medical negligence of a health care provider "implicates personal jurisdiction" and mandates the dismissal of an action. *Morgan* v. *Hartford Hospital*, supra, 402; see also General Statutes § 52-190a (c) (failure to provide written opinion letter "shall be grounds for the dismissal of the action"). "Our review of a trial court's ruling on a motion to dismiss pursuant to § 52-190a is plenary." *Torres* v. *Carrese*, 149 Conn. App. 596, 608, 90 A.3d 256, cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

The present case requires us to construe the nature of the causes of action alleged in the plaintiff's August 25, 2015 amended complaint to determine whether compliance with § 52-190a was necessary.[11] "The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary. . . . [W]e long have eschewed the notion that pleadings should be read in a hypertechnical manner. Rather, [we must] construe pleadings broadly and realistically, rather than narrowly and technically. . . . [A] pleading must be construed reasonably, to contain all that it fairly means, but carries with it the related proposition that it must not be contorted in such a way so as to strain the bounds of rational comprehension. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties."

[11] We emphasize that the question before us in part I of this opinion is a narrow one regarding the applicability of § 52-190a, and not whether the plaintiff's battery and negligent infliction of emotional distress counts, as pleaded, could survive a motion to strike or a motion for summary judgment.

(Citations omitted; internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536–37, 51 A.3d 367 (2012).

A

Battery

We begin with the first count of the August 25, 2015 amended complaint. It alleges in relevant part that, during the postoperative examination, the defendant "without any warning or notice or consent from the plaintiff, intentionally, wantonly and/or forcefully inserted his fingers through the plaintiff's agglutinated labia and into her vagina." Count one further alleges that the defendant's conduct "constituted a battery in that his actions were harmful and/or offensive to the plaintiff" and concludes by alleging a variety of injuries that the plaintiff sustained as the "result of the harmful and/or offensive conduct" of the defendant. In dismissing that count, the court concluded that those allegations constituted a claim of medical negligence on the part of the defendant, which necessitated compliance with § 52-190a. We disagree.

As the plaintiff emphasized at the hearing on the defendant's motion to dismiss, and as the complaint plainly indicates, her battery claim was predicated on the lack of informed consent. Our Supreme Court has "long recognized the principle that [e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." (Internal quotation marks omitted.) *Godwin* v. *Danbury Eye Physicians & Surgeons, P.C.*, 254 Conn. 131, 136, 757 A.2d 516 (2000). In *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 289, the Supreme Court clarified that a patient can recover on a "theory of battery as a basis for recovery" against a physician

in three limited circumstances: (1) when a physician performs a procedure other than that for which consent was granted; (2) when a physician performs a procedure without obtaining any consent from the patient; and (3) when a physician realizes that the patient does not understand what the procedure entails. This court similarly has observed that "[o]ur courts have long adhered to the principle that the theory of intentional assault or battery is a basis for recovery against a physician who performs surgery without consent." *Chouinard* v. *Marjani*, 21 Conn. App. 572, 579, 575 A.2d 238 (1990); see also *Canterbury* v. *Spence*, 464 F.2d 772, 783 (D.C. Cir.) ("[i]t is the settled rule that therapy not authorized by the patient may amount to . . . a common law battery"), cert. denied, 409 U.S. 1064, 93 S. Ct. 560, 34 L. Ed. 2d 518 (1972); *Schmeltz* v. *Tracy*, 119 Conn. 492, 495, 177 A. 520 (1935) ("if the lack of consent was established, the removal of the moles [by the physician] was in itself a trespass and had the legal result of an assault"); *Torres* v. *Carrese*, supra, 149 Conn. App. 621 n.29 ("[l]ack of informed consent is a cause of action separate from a claim of medical negligence"); *Shadrick* v. *Coker*, 963 S.W.2d 726, 732 (Tenn. 1998) ("the doctrine of lack of informed consent is based upon the tort of battery, not negligence, since the treatment or procedure was performed without having first obtained the patient's informed consent").

Count one contains no allegations of negligence on the part of the defendant. It likewise does not allege any deviation from the applicable standard of care.[12]

[12] For that reason, the three part test for ascertaining whether a negligence claim properly is classified as one sounding in medical negligence; see footnote 6 of this opinion; is inapposite. The defendant's reliance on *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 585, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009), likewise is misplaced. Unlike the present case, the plaintiff's complaint in *Votre* "included factual allegations that implicated deviation from professional medical standards," a distinction that this court expressly deemed to be significant. Id., 574. The court in *Votre* further emphasized that "[a]lthough the plaintiff here denominated the claims in her complaint as sounding in

The strictures of § 52-190a, therefore, do not apply to that cause of action. Section 52-190a was enacted "to prevent the filing of frivolous medical malpractice actions." *Morgan* v. *Hartford Hospital*, supra, 301 Conn. 398. By its plain language, that statute applies to actions "to recover damages resulting from personal injury or wrongful death . . . whether in tort or in contract, in which it is alleged that such injury or death resulted from the *negligence* of a health care provider . . . ." (Emphasis added.) General Statutes § 52-190a (a). Significantly, our Supreme Court has held that the written opinion letter requirement contained in § 52-190a applies only to claims of medical negligence, which is defined as "the failure to use that degree of care for the protection of another that the ordinarily reasonably careful and prudent [person] would use under like circumstances. . . . It signifies a want of care in the performance of an act, by one having no positive intention to injure the person complaining of it." (Internal quotation marks omitted.) *Dias* v. *Grady*, 292 Conn. 350, 354, 972 A.2d 715 (2009); see also *Wilkins* v. *Connecticut Childbirth & Women's Center*, 314 Conn. 709, 723 n.4, 104 A.3d 671 (2014) ("§ 52-190a applies only to claims of medical malpractice"); *Dias* v. *Grady*, supra, 359 ("the phrase 'medical negligence,' as used in § 52-190a (a), means breach of the standard of care").

In *Shortell* v. *Cavanagh*, 300 Conn. 383, 385, 15 A.3d 1042 (2011), the Supreme Court expressly held that a cause of action against a physician predicated on a lack of informed consent is not subject to the written opinion letter requirement of § 52-190a. The court explained that "[u]nlike a medical malpractice claim, a claim for

ordinary tort and breach of contract, the factual allegations underlying the claims require proof of the defendants' deviation from the applicable standard of care of a health care provider . . . ." Id., 580. That is not the case when a cause of action is predicated on a lack of informed consent. *Shortell* v. *Cavanagh*, 300 Conn. 383, 390–91, 15 A.3d 1042 (2011).

lack of informed consent is determined by a lay standard of materiality, rather than an expert medical standard of care which guides the trier of fact in its determination." Id., 388; see also *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 293 (adopting lay standard for informed consent claims). Accordingly, "in an informed consent case, the plaintiff is not required to present the testimony of a similar health care provider regarding the standard of care at trial." *Shortell* v. *Cavanagh*, supra, 389. The court thus reasoned that "[i]t would not be logical that an opinion from a similar health care provider would be required to commence an action of this nature, when the testimony of a medical expert would not be necessary at trial to prove the standard of care and its breach." Id., 388. To do so would "frustrate the purpose of using the lay standard for informed consent cases if we were to require a plaintiff in such a case to comply with § 52-190a and attach to the complaint a good faith certificate and written opinion of a similar health care provider." Id., 391.

In count one of her August 25, 2015 amended complaint, the plaintiff alleges that the defendant committed a battery through his intentional conduct during the postoperative examination by failing to obtain her informed consent prior to digitally separating her agglutinated labia. "[M]edical standards of care are inapplicable" to such claims. *Chouinard* v. *Marjani*, supra, 21 Conn. App. 580; accord *Sherwood* v. *Danbury Hospital*, 278 Conn. 163, 180, 896 A.2d 777 (2006) ("[u]nlike the traditional action of [medical] negligence, a claim for lack of informed consent focuses not on the level of skill exercised in the performance of the procedure itself but on the adequacy of the explanation given by the physician in obtaining the patient's consent" [internal quotation marks omitted]). As a result, the written opinion letter requirement of § 52-190a does not

apply to informed consent claims. *Shortell* v. *Cavanagh*, supra, 300 Conn. 385. The trial court, therefore, improperly dismissed count one due to the plaintiff's failure to append to her complaint a written opinion letter of a similar health care provider.

B

Negligent Infliction of Emotional Distress

We next consider the second count of the plaintiff's August 25, 2015 amended complaint. Titled "Negligent Infliction of Emotional Distress against Dr. Rutherford," it reiterates the allegation that, during the postoperative examination, the defendant "without any warning or notice [to] the plaintiff, forcefully inserted his fingers through the plaintiff's agglutinated labia and into her vagina." The count further alleges that "[t]he conduct of [the defendant] . . . created an unreasonable risk of causing, and did in fact cause, the plaintiff emotional distress. The plaintiff's emotional distress was a foreseeable result of the conduct of [the defendant]. The emotional distress . . . was severe enough that it resulted in illness and may result in further illness or bodily harm. The conduct [of the defendant] was the cause of the plaintiff's distress."

As the plaintiff noted in her memorandum of law in opposition to the motion to dismiss, the negligent infliction of emotional distress claim set forth in count two "is not based upon or incident to a claim of medical negligence, but rather, is based upon her claim of battery against the defendant in count one." Although count two does not explicitly reference the term "consent," we are mindful that, in construing a particular cause of action, "[t]he complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded . . . ." (Internal quotation marks omitted.) *Perry* v. *Valerio*, 167 Conn. App. 734, 739–40, 143 A.3d

1202 (2016). Read broadly and realistically, count two plainly alleges that the plaintiff suffered emotional distress occasioned by the alleged battery perpetrated by the defendant, as detailed in the preceding count of the complaint. Both counts one and two claim that the defendant, without warning or notice to the plaintiff, digitally separated her agglutinated labia. The factual issues of whether warnings and notice were provided to the plaintiff, in turn, both pertain to the issue of informed consent. See, e.g., *Duffy* v. *Flagg*, 279 Conn. 682, 692, 905 A.2d 15 (2006) (physician must disclose, inter alia, nature of procedure and risks and hazards of procedure to patient "in order to obtain valid informed consent"); *Janusauskas* v. *Fichman*, 264 Conn. 796, 810, 826 A.2d 1066 (2003) (informed consent requires physician to provide patient with information that reasonable patient would have found material for making decision whether to embark upon contemplated course of treatment). We therefore agree with the plaintiff that both counts one and two advanced claims related to her general theory that there was a lack of informed consent to the defendant's conduct during the postoperative examination.

Like count one, count two contains no allegations that the defendant deviated from an applicable standard of care. It thus cannot properly be construed under our law as a claim of medical negligence. See *Dias* v. *Grady*, supra, 292 Conn. 359 ("the phrase 'medical negligence,' as used in § 52-190a (a), means breach of the standard of care"). As the trial judge aptly observed in an unrelated case, "[i]n a medical negligence claim, a treating physician must be found to have breached a standard of care applicable to the patient. . . . By contrast, a claim of negligent infliction of emotional distress need not necessarily involve a breach of the applicable standard of care by the treating physician. If the plaintiff's fear or distress was reasonable, in light of the defendant's

conduct, and the defendant should have realized that his conduct created an unreasonable risk of causing distress, there is a basis for liability." (Citations omitted.) *Brown* v. *Cusick*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6060283-S (October 2, 2017); see also *Brown* v. *Njoku*, 170 Conn. App. 329, 331, 154 A.3d 587 (affirming judgment awarding plaintiff $35,000 in damages following court trial in action for, inter alia, battery and negligent infliction of emotional distress against physician who "inappropriately touched [her] buttocks and breasts"), cert. denied, 326 Conn. 901, 162 A.3d 724 (2017).

Because count two lacks any allegation that the defendant departed from the applicable standard of care, it cannot be deemed a claim of medical negligence subject to the requirements of § 52-190a. Rather, it more properly is construed as one derivative of the plaintiff's battery claim, for it concerns her general theory that the defendant lacked informed consent to digitally separate her agglutinated labia. For that reason, the court improperly granted the defendant's motion to dismiss due to noncompliance with § 52-190a.

II

Normally, our determination that a motion to dismiss was improperly granted would conclude our inquiry. In the present case, however, the court granted the motion to dismiss without prejudice to the plaintiff's pursuit of an action against the defendant for lack of informed consent. After filing a notice of intent to appeal from that dismissal; see footnote 7 of this opinion; the plaintiff then obtained permission from the court to file an amended pleading, on which the court ultimately rendered summary judgment in favor of the defendant. The plaintiff now challenges the propriety of that determination.

On appeal, the plaintiff claims that the court improperly concluded, as a matter of law, that she could not prevail in an informed consent action because the defendant's conduct in separating her agglutinated labia was not a separate procedure or course of treatment giving rise to a duty to obtain informed consent. She contends that a substantial change in circumstances occurred when the defendant discovered a complication during the postoperative examination that required medical intervention, which in turn obligated the defendant to obtain her informed consent before proceeding further. The parties agree that this issue is one of first impression in Connecticut. Accordingly, we first review the doctrine of informed consent to determine the proper legal standard by which to measure the plaintiff's claim. We then apply that standard to the facts before us, ever mindful of the procedural posture of this case.

A

The doctrine of informed consent traces its origins to the common-law notion that an adult "has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault, for which he is liable in damages." (Internal quotation marks omitted.) *Schmeltz* v. *Tracy*, supra, 119 Conn. 495–96, quoting *Schloendorff* v. *New York Hospital*, 211 N.Y. 125, 129–30, 105 N.E. 92 (1914) (Cardozo, J.), overruled on other grounds by *Bing* v. *Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957); see also *Union Pacific Railway Co.* v. *Botsford*, 141 U.S. 250, 251, 11 S. Ct. 1000, 35 L. Ed. 734 (1891) ("[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law"); *Abigail Alliance for Better Access to Developmental Drugs* v. *von Eschenbach*, 495 F.3d 695, 717

(D.C. Cir. 2007) (en banc) (courts have long "recognized with universal acquiescence that the free citizen's first and greatest right, which underlies all others, is the right to the inviolability of his person" [internal quotation marks omitted]), cert. denied, 552 U.S. 1159, 128 S. Ct. 1069, 169 L. Ed. 2d 839 (2008). As the United States Supreme Court has recognized, the "notion of bodily integrity [is] embodied in the requirement that informed consent is generally required for medical treatment." *Cruzan* v. *Director, Missouri Dept. of Health*, 497 U.S. 261, 269, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990).

The doctrine of informed consent attempts to balance the autonomy of the patient with the professional obligations of the physician.[13] In the seminal decision of *Canterbury* v. *Spence*, supra, 464 F.2d 780, the United States Court of Appeals for the District of Columbia Circuit explained that "[t]rue consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each. The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision. From these almost axiomatic considerations springs the need, and in turn the requirement, of a reasonable divulgence by physician to patient to make such a decision possible." (Footnotes omitted.) The court continued: "A physician is under a duty to treat his patient skillfully but proficiency in diagnosis and therapy is not the full measure of his

[13] As one court succinctly put it, "[t]he doctor's primary duty is to do what is best for the patient." *Watson* v. *Clutts*, 262 N.C. 153, 159, 136 S.E.2d 617 (1964). For a discussion of the tension that arises when principles of patient autonomy and physician beneficence collide, see P. Walter, "The Doctrine of Informed Consent: To Inform or Not to Inform," 71 St. John's L. Rev. 543 (1997).

responsibility. . . . [T]he physician is under an obligation to communicate specific information to the patient when the exigencies of reasonable care call for it. . . . The context in which the duty of risk-disclosure arises is invariably the occasion for decision as to whether a particular treatment procedure is to be undertaken. To the physician, whose training enables a self-satisfying evaluation, the answer may seem clear, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie. To enable the patient to chart his course understandably, some familiarity with the therapeutic alternatives and their hazards becomes essential." (Footnotes omitted.) Id., 781. For that reason, the court held that "the physician's overall obligation to the patient [includes the] duty of reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved." Id., 782. Accordingly, a physician "must seek and secure his patient's consent before commencing an operation or other course of treatment."[14] Id.

The doctrine of informed consent "is embedded firmly in American jurisprudence, now forming a recognizable basis for physician liability in the [fifty] [s]tates and the District of Columbia." J. Merz, "On a Decision-Making Paradigm of Medical Informed Consent," 14 J. Legal Med. 231, 231 (1993). In Connecticut, "[i]nformed consent requires a physician to provide the patient with the information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy." (Internal quotation marks omitted.) *Janusauskas* v. *Fichman*, supra,

[14] In *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 290–93, the seminal Connecticut decision on the doctrine of informed consent, our Supreme Court expressly adopted the reasoning of *Canterbury* in holding that a lay standard of disclosure governs informed consent claims in Connecticut. See also *Downs* v. *Trias*, 306 Conn. 81, 88–89 n.5, 49 A.3d 180 (2012).

264 Conn. 810; accord *Canterbury* v. *Spence*, supra, 464 F.2d 787 ("[a] risk is . . . material when a reasonable person . . . would be likely to attach significance to the risk . . . in deciding whether or not to forego the proposed therapy" [internal quotation marks omitted]). As our Supreme Court held in *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 292, "the physician's disclosure should include: (1) the nature of the procedure, (2) the risks and hazards of the procedure, (3) the alternatives to the procedure, and (4) the anticipated benefits of the procedure." (Internal quotation marks omitted.)

At the same time, our Supreme Court has emphasized that the doctrine of informed consent "is a limited one" that requires "something less than a full disclosure of all information which may have some bearing, however remote, upon the patient's decision."[15] (Internal quotation marks omitted.) *Duffy* v. *Flagg*, supra, 279 Conn. 692–93; see also *Munn* v. *Hotchkiss School*, 326 Conn. 540, 605, 165 A.3d 1167 (2017) (*Espinosa*, *J.*, concurring) ("a physician need not disclose to patients every remote risk potentially associated with a medical procedure but only those deemed sufficiently likely as to be material"); *Pedersen* v. *Vahidy*, 209 Conn. 510, 523, 552 A.2d 419 (1989) (disclosure generally unnecessary when "the likelihood of such injury is remote"); *Precourt* v. *Frederick*, 395 Mass. 689, 694–95, 481 N.E.2d 1144 (1985) ("The materiality of information about a potential injury is a function not only of the severity of the injury, but also of the likelihood that it will occur.

[15] As the Supreme Court of Idaho has observed, "it would be impossible for a healthcare provider to fully apprise his or her patients of every aspect of each procedure. The human body is amazingly complex, and to fully comprehend even the most mundane treatment one must have an advanced understanding of anatomy and physiology. Without some limit on the amount of information that a healthcare provider is obligated to discuss, our healthcare infrastructure would grind to a halt." *Peckham* v. *Idaho State Board of Dentistry*, 154 Idaho 846, 853, 303 P.3d 205 (2013).

Regardless of the severity of a potential injury, if the probability that the injury will occur is so small as to be practically nonexistent, then the possibility of that injury occurring cannot be considered a material factor in a rational assessment of whether to engage in the activity that exposes one to the potential injury."). Furthermore, "there is no need to disclose risks that are likely to be known by the average patient or that are in fact known to the patient usually because of a past experience with the procedure in question." (Internal quotation marks omitted.) *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 292. A physician nonetheless is obligated "to advise a patient of feasible alternatives"; id., 287; even when "some involve more hazard than others." Id., 295.

Under Connecticut law, application of the doctrine of informed consent is not confined to operations and surgical procedures. Rather, it concerns the physician's "duty to provide patients with material information concerning a proposed course of treatment." *Downs* v. *Trias*, 306 Conn. 81, 89, 49 A.3d 180 (2012); see also *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 292–93 (physician obligated to provide patient with information "material for making a decision whether to embark upon a contemplated course of therapy"). A contemplated course of therapy includes—but is not limited to—a particular procedure, operation, or surgery. See *Torres* v. *Carrese*, supra, 149 Conn. App. 622.[16]

[16] In *Torres*, this court noted that "[o]ur case law regarding the issue of a physician's obligation to obtain a patient's informed consent focuses on the decision to embark upon a contemplated course of therapy, *such as* a procedure, operation, or surgery." (Emphasis added; internal quotation marks omitted.) *Torres* v. *Carrese*, supra, 149 Conn. App. 622. In *Torres*, the court concluded that a physician who provided prenatal care to a patient, but was not the surgeon who subsequently performed a cesarean section, had no duty to apprise her of the risks involved in that surgical procedure. As the court explained, "[u]nder our law . . . a physician's obligation to obtain informed consent turns on the performance of a procedure and *not* the intent to perform a procedure." (Emphasis in original.) Id., 623. "Because the procedure was to be performed in the future and [the physician who

For example, in *Curran* v. *Kroll*, 303 Conn. 845, 859–60, 37 A.3d 700 (2012), the patient sought medical treatment for menopausal issues. Our Supreme Court held that the failure of the defendant physician to advise the patient of "any symptoms and risks associated" with the birth control medication that the physician had prescribed gave rise to "a cause of action for lack of informed consent." Id., 858; see also *Johnson* v. *Rheumatology Associates, P.C.*, Superior Court, judicial district of Hartford, Docket No. CV-12-6031500-S (December 29, 2014) (59 Conn. L. Rptr. 549, 550) ("[o]bviously treatment of a condition by the prescribing of medication is no less a form of treatment than surgery for a condition"). Our Supreme Court likewise has held that the nonsurgical procedure of obtaining a blood transfusion constituted a course of therapy and, thus, properly could give rise to a cause of action for lack of informed consent. *Sherwood* v. *Danbury Hospital*, supra, 278 Conn. 180–82. Accordingly, the doctrine of informed consent applies to a course of medical treatment undertaken by a patient in consultation with a medical practitioner.

1

In the present case, the parties do not dispute that the defendant obtained the informed consent of the plaintiff to perform the laser ablation of her vulva on April 25, 2014. Indeed, her consent was memorialized on the signed consent form. The plaintiff further concedes that she consented, as part of that course of treatment, to the May 14, 2014 postoperative examination.[17] The

provided prenatal care] was never in the position to be the operating surgeon, [that physician] had no obligation to obtain informed consent." Id., 623 n.30. By contrast, the defendant in the present case performed both the laser ablation procedure on April 25, 2014, and the postoperative examination of the plaintiff on May 14, 2014.

[17] At the October 19, 2015 hearing on the defendant's motion to dismiss, the plaintiff's counsel acknowledged that the plaintiff had consented to the postoperative examination. The plaintiff's counsel likewise confirmed at oral argument before this court that the plaintiff was "not contesting [that she consented to] the postoperative examination."

plaintiff nonetheless argues that a substantial and material change in circumstances occurred when the defendant discovered the labial agglutination, which obligated the defendant to obtain her informed consent before embarking on a course of treatment therefor.[18] That claim presents an issue of first impression in this state. For his part, the defendant in his appellate brief acknowledges that a "new informed consent" may be required when "a substantial and material change in circumstances" arises during a course of treatment.

The "determination of the proper legal standard in any given case is a question of law subject to our plenary review." (Internal quotation marks omitted.) *Mirjavadi* v. *Vakilzadeh*, 310 Conn. 176, 183, 74 A.3d 1278 (2013). In light of the rationale underlying the doctrine of informed consent, as well as persuasive out-of-state authority, we agree with the parties that, when a substantial and material change in circumstances occurs during the course of medical treatment, a duty may arise on the part of the physician to secure the consent of the patient before proceeding further.

The doctrine of informed consent is rooted in the recognition of a patient's right to bodily autonomy. See *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 288 ("[w]e have approved the principle that [e]very human being of adult years and sound mind has a right to determine what shall be done with his own body" [internal quotation marks omitted]). The doctrine further is premised on the precept that "[t]rue consent to what happens to one's self is the informed exercise of

[18] We reiterate that the plaintiff has not claimed, at any stage of the proceedings, that labial agglutination was a likely and, hence, material risk that the defendant had a duty to disclose *prior* to performing the laser ablation procedure. See footnote 8 of this opinion. Rather, her claim is that, when that remote risk subsequently materialized, the defendant was obligated to apprise her of all viable treatment alternatives and their attendant risks and benefits before proceeding further.

a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each." *Canterbury* v. *Spence*, supra, 464 F.2d 780; see also *Logan* v. *Greenwich Hospital Assn.*, supra, 295 (physician obligated to advise patient of "all viable alternatives . . . even though some involve more hazard than others"). Accordingly, a physician is required to provide the patient with that information which a reasonable person would deem material in deciding whether to embark upon a particular course of treatment.[19] *Sherwood* v. *Danbury Hospital*, supra, 278 Conn. 180.

Significantly, our decisions on the doctrine of informed consent do not limit that duty to the actual date that a particular procedure is performed or medical service is rendered. Rather, Connecticut law consistently has delineated that duty as one that applies to a "course of treatment"; see, e.g., *Downs* v. *Trias*, supra, 306 Conn. 89; or a "course of therapy" undertaken by a patient. See *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 293. While a physician's treatment of a patient sometimes begins and ends in a matter of hours or days, a course of treatment often transpires over a much longer period. See, e.g., *Curran* v. *Kroll*, supra, 303 Conn. 848 (medical treatment of patient occurred over span of "approximately one month before her death" [internal quotation marks omitted]); *Tetreault* v. *Eslick*, 271 Conn. 466, 469, 857 A.2d 888 (2004) (physician "planned to continue [the] course of treatment for a period of at least six months").

As the Supreme Court of Wisconsin has observed, a patient's consent to treatment is not "categorically

[19] That duty obligates a physician to disclose "(1) the nature of the procedure, (2) the risks and hazards of the procedure, (3) the alternatives to the procedure, and (4) the anticipated benefits of the procedure." (Internal quotation marks omitted.) *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 292.

immutable" once it has been given to a physician. *Schreiber* v. *Physicians Ins. Co. of Wisconsin*, 223 Wis. 2d 417, 429, 588 N.W.2d 26, cert. denied, 528 U.S. 869, 120 S. Ct. 169, 145 L. Ed. 2d 143 (1999). When a substantial change of circumstances occurs during the course of medical treatment, it "results in an alteration of the universe of options a patient has and alters the agreed upon course of navigation through that universe."[20] Id., 432. Although a patient previously may have provided informed consent to a particular course of treatment, the Supreme Court of Wisconsin "decline[d] to view the informed consent discussion as a solitary and blanketing event, a point on a timeline after which such discussions are no longer needed because they are 'covered' by some articulable occurrence in the past. Rather, a substantial change in circumstances . . . requires a new informed consent discussion. . . . To conclude otherwise would allow a solitary informed consent discussion to immunize a physician for any and all subsequent treatment of that patient." (Citation omitted.) Id., 433–34. The court, thus, concluded that, when a substantial change in circumstances arises, the physician has "a duty to conduct another informed consent discussion and [provide the patient with] her treatment options and . . . the opportunity to choose."[21] Id., 434.

[20] As in Connecticut, the duty of informed consent under Wisconsin law is measured by a materiality standard, for which "the touchstone [is whether a] reasonable person in the position of the patient would want to know" of a given risk, benefit, or alternative to a particular course of treatment. *Schreiber* v. *Physicians Ins. Co. of Wisconsin*, supra, 223 Wis. 2d 427; accord *Janusauskas* v. *Fichman*, supra, 264 Conn. 810 (informed consent requires physician to provide patient with information that reasonable patient would have found material for making decision whether to embark upon contemplated course of treatment). In *Schreiber*, the court noted that a substantial change in circumstances involves a material alteration of the risks, benefits, or alternatives that accompany a particular treatment. *Schreiber* v. *Physicians Ins. Co. of Wisconsin*, supra, 428–32.

[21] That conclusion comports with the precept that "[t]he context in which the [physician's] duty [to disclose] arises is invariably the occasion for decision as to whether a particular treatment procedure is to be undertaken." *Canterbury* v. *Spence*, supra, 464 F.2d 781.

The Supreme Court of Colorado likewise has recognized that, when a "previously undisclosed, and substantial risk arises," a physician may have a "duty [to obtain informed consent that is] based on changed circumstances." *Gorab* v. *Zook*, 943 P.2d 423, 430 (Colo. 1997) (en banc).

We find that authority highly persuasive, particularly in light of the underpinnings of the doctrine of informed consent. When consent is provided by a patient in a given case, its scope necessarily is limited to the course of treatment outlined by the medical practitioner, and encompasses only those risks, hazards, alternatives, and anticipated benefits then disclosed. For that reason, when a truly substantial change arises during the course of treatment that meets the standard of materiality under our law,[22] we agree that the medical practitioner generally is obligated to obtain consent from the patient before proceeding further. To conclude otherwise would contravene the fundamental purpose of the doctrine of informed consent.

2

At the same time, the circumstances in which substantial changes arise do not always lend themselves to such a dialogue between patient and physician. For that reason, a physician's duty to secure informed consent is not an absolute one, but rather is contingent on

[22] "Materiality may be said to be the significance a reasonable person, in what the physician knows or should know is his patient's position, would attach to the disclosed risk or risks in deciding whether to submit or not to submit to surgery or treatment." (Internal quotation marks omitted.) *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 291. Under Connecticut law, a physician is obligated "to provide the patient with that information which a reasonable patient would have found material for making a decision whether to embark upon a contemplated course of therapy." Id., 292–93; see also *Duffy* v. *Flagg*, supra, 279 Conn. 691; *Janusauskas* v. *Fichman*, supra, 264 Conn. 810; *DeGennaro* v. *Tandon*, 89 Conn. App. 183, 190, 873 A.2d 191, cert. denied, 274 Conn. 914, 879 A.2d 892 (2005).

the particular context in which it arises. To accommodate the exigencies inherent in the practice of medicine, courts have crafted exceptions to the physician's general duty that excuse the failure to obtain such consent in certain circumstances.[23] See generally A. Meisel, "The 'Exceptions' to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking," 1979 Wis. L. Rev. 413 (1979). As the Supreme Court of Iowa recently observed, "a number of situations may be established by the defendant physician as a defense to an informed consent action, constituting exceptions to the duty to disclo[se]. These include: (1) Situations in which complete and candid disclosure might have a detrimental effect on the physical or psychological well-being of the patient;[24] (2) Situations in which a patient is incapable of giving consent by reason of mental disability or infancy; (3) Situations in which an emergency makes it impractical to obtain consent; (4) Situations in which the risk is either known to the patient or is so obvious as to justify a presumption on the part of the physician that the patient has knowledge of the risk; (5) Situations in which the procedure itself is simple and the danger remote and commonly appreciated to be remote; (6) Situations in which the physician does not know of an otherwise material risk and should not have been aware of it in the exercise

[23] Several of the exceptions that are well established in other jurisdictions have not been formally recognized under Connecticut law. Their development in those jurisdictions, therefore, is illuminating. See *Grovenburg* v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 57, 165 A.3d 193 (2017).

[24] "[T]he so-called 'therapeutic exception' "; *Arato* v. *Avedon*, 5 Cal. 4th 1172, 1190, 858 P.2d 598, 23 Cal. Rptr. 2d 131 (1993) (en banc); permits "a physician to withhold information where disclosure might jeopardize a course of therapy." *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 292; see also *Scott* v. *Bradford*, 606 P.2d 554, 558 (Okla. 1979) ("where full disclosure would be detrimental to a patient's total care and best interests a physician may withhold such disclosure, for example, where disclosure would alarm an emotionally upset or apprehensive patient" [footnote omitted]).

of ordinary care."[25] (Footnote added; internal quotation marks omitted.) *Andersen* v. *Khanna*, 913 N.W.2d 526, 537 n.4 (Iowa 2018); see also *Holt* v. *Nelson*, 11 Wn. App. 230, 240–41, 523 P.2d 211 (1974) (enumerating various exceptions).

The emergency exception has been recognized by courts across the country. See *Shine* v. *Vega*, 429 Mass. 456, 464, 709 N.E.2d 58 (1999) ("[t]he emergency exception to the informed consent doctrine has been widely recognized"); *Miller* v. *Rhode Island Hospital*, 625 A.2d 778, 784 (R.I. 1993) ("[e]qually as well established as the informed consent doctrine is the exception to it for emergencies"). As the court in *Canterbury* explained, the emergency exception "comes into play when the patient is unconscious or otherwise incapable of consenting, and harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment. When a genuine emergency of that sort arises, it is settled that the impracticality of conferring with the patient dispenses with need for it." *Canterbury* v. *Spence*, supra, 464 F.2d 788–89. Put simply, "a physician is not required to obtain the patient's consent in an emergency situation where the patient is in immediate danger." *Wheeldon* v. *Madison*, 374 N.W.2d 367, 375 (S.D. 1985). Although our appellate courts have not had occasion to circumscribe the precise parameters of the emergency exception, it applies under our state regulations to medical treatment performed in hospitals throughout Connecticut. See Regs., Conn. State Agencies § 19-13-D3 (d) (8);[26] cf. *In re Cassandra C.*, 316

[25] Some jurisdictions have enacted statutes codifying such exceptions. See, e.g., Alaska Stat. § 09.55.556 (b) (2012); Del. Code Ann. tit. 18, § 6852 (b) (1974); N.Y. Pub. Health Law § 2805-d (4) (2012); Utah Code Ann. § 78B-3-406 (3) (2012); Wis. Stat. § 448.30 (Supp. 2017); Vt. Stat. Ann. tit. 12, § 1909 (2017).

[26] Section 19-13-D3 (d) (8) provides: "Informed consent. It shall be the responsibility of each hospital to assure that the bylaws or rules and regulations of the medical staff include the requirement that, *except in emergency situations*, the responsible physician shall obtain proper informed consent as a prerequisite to any procedure or treatment for which it is appropriate

Conn. 476, 496–97, 112 A.3d 158 (2015) ("[A]t common law, minors generally were considered to lack the legal capacity to give valid consent to medical treatment or services, and consequently a parent, guardian, or other legally authorized person generally was required to provide the requisite consent. *In the absence of an emergency*, a physician who provided medical care to a minor without such parental or other legally authorized consent could be sued for battery." [Emphasis added; internal quotation marks omitted.]); *Ranciato* v. *Schwartz*, Superior Court, judicial district of New Haven, Docket No. CV-11-6023107-S (November 26, 2014) ("in the absence of an emergency a healthcare provider must offer pertinent information to his or her patients" [internal quotation marks omitted]).

Courts also have recognized that a physician's alleged failure to secure informed consent properly is excused by the existence of a valid waiver on the part of the patient. See, e.g., *Arato* v. *Avedon*, 5 Cal. 4th 1172, 1189, 858 P.2d 598, 23 Cal. Rptr. 2d 131 (1993) (en banc) ("a patient may validly waive the right to be informed"); *Spar* v. *Cha*, 907 N.E.2d 974, 983 (Ind. 2009) ("[m]any jurisdictions recognize either by judicial ruling or statute that a patient may waive her right to informed consent"); cf. Utah Code Ann. § 78B-3-406 (3) (2012).[27] For

and provide evidence of consent by a form signed by the patient or a written statement signed by the physician on the patient's hospital record. The extent of information to be supplied by the physician to the patient shall include the specific procedure or treatment, or both, the reasonably foreseeable risks, and reasonable alternatives for care or treatment." (Emphasis added.)

[27] Utah's informed consent statute specifically addresses the issue of patient waiver. It provides in relevant part: "It shall be a defense to any malpractice action against a health care provider based upon alleged failure to obtain informed consent if . . . the patient stated, prior to receiving the health care complained of, that he would accept the health care involved regardless of the risk; or that he did not want to be informed of the matters to which he would be entitled to be informed . . . or . . . the patient or his representative executed a written consent which sets forth the nature and purpose of the intended health care and which contains a declaration that the patient accepts the risk of substantial and serious harm, if any,

that reason, "[w]hen a patient consents to surgery, acknowledges he or she understands complications may arise, and authorizes the doctor to remedy these complications, it follows that the patient has consented to treatment of those complications whether they occur in the operating room or afterward in the recovery room." *Hageny* v. *Bodensteiner*, 316 Wis. 2d 240, 250–51, 762 N.W.2d 452 (App. 2008); see also *Cobbs* v. *Grant*, 8 Cal. 3d 229, 245, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (en banc) ("a medical doctor need not make disclosure of risks when the patient requests that he not be so informed"); *Holt* v. *Nelson*, supra, 11 Wn. App. 241 ("[a] physician need not disclose the hazards of treatment when the patient has requested she not be told about the dangers"). The patient's ability to relieve a physician of the duty to obtain informed consent during the course of medical treatment is consistent with, and in furtherance of, the right to bodily autonomy. As one commentator aptly noted, "[a] properly obtained waiver is completely in keeping with the values sought to be promoted by informed consent. The patient remains the ultimate decisionmaker, but the content of his decision is shifted from the decisional level to the metadecisional level—from the equivalent of 'I want this treatment . . .' to . . . 'I don't want to decide; you make the decision as to what should be done.' Waiver thus permits the patient to be treated without participating in the medical decisionmaking process, or at least without fully participating." (Footnote omitted.) A. Meisel, supra, 1979 Wis. L. Rev. 459.

In *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 292, our Supreme Court acknowledged an additional exception, noting that "there is no need to disclose risks that are likely to be known by the average

in hopes of obtaining desired beneficial results of health care and which acknowledges that health care providers involved have explained his condition and the proposed health care in a satisfactory manner and that all questions asked about the health care and its attendant risks have been

patient or that are in fact known to the patient usually because of a past experience with the procedure in question." (Internal quotation marks omitted.) See also *Ranciato* v. *Schwartz*, supra, Superior Court, Docket No. CV-11-6023107-S (plaintiff could not prevail on informed consent claim when "she knew of [the] risk due to past experience"); *Crain* v. *Allison*, 443 A.2d 558, 562 (D.C. 1982) ("a physician need not advise concerning risks of which the patient already has actual knowledge"); *Spar* v. *Cha*, supra, 907 N.E.2d 984 (physician need not advise of risks known to patient because of past experience with procedure); *Sard* v. *Hardy*, 281 Md. 432, 445, 379 A.2d 1014 (1977) ("disclosure is not required where the risk is . . . known to the patient"); *Scaria* v. *St. Paul Fire & Marine Ins. Co.*, 68 Wis. 2d 1, 12–13, 227 N.W.2d 647 (1975) (physician "should not be required to discuss risks that are apparent or known to the patient"). The rationale for that exception is that the patient who is aware of the risks that accompany a particular procedure or course of treatment already is an informed patient.

Application of the doctrine of informed consent, therefore, involves more than simply an examination of the communications, or lack thereof, between physician and patient. It also requires consideration of the context in which the physician's duty arose. That context is crucial to the determination of whether an exception to that duty is implicated. Moreover, in an action predicated on an alleged lack of informed consent, "[t]he burden of proving an exception to [the] duty" rests with the physician. *Scott* v. *Bradford*, 606 P.2d 554, 558 (Okla. 1979); see also *Canterbury* v. *Spence*, supra, 464 F.2d 791 ("[t]he burden of going forward with evidence pertaining to a privilege not to disclose . . . rests properly upon the physician" [footnote omitted]); *Cobbs* v. *Grant*, supra, 8 Cal. 3d 245 (physician bears "the burden of [proving] justification for failure to disclose"); *Shine*

answered in a manner satisfactory to the patient or his representative." Utah Code Ann. § 78B-3-406 (3) (2012).

v. *Vega*, supra, 429 Mass. 462 ("the [defendant physician and hospital] had the burden of proving that an exception relieved them of tort liability").

3

Accordingly, we conclude that, when a substantial and material alteration of the risks, anticipated benefits, or alternatives previously disclosed to the patient occurs during a course of medical treatment, the doctrine of informed consent generally requires an additional informed consent discussion between physician and patient. When, however, the context of such alteration implicates an exception to the duty to disclose, the law relieves the physician of that obligation. With that analytical framework in mind, we return our attention to the present case.

B

In her revised complaint, the plaintiff alleges a cause of action for lack of informed consent. Distilled to its essence, her claim is that, upon discovering a complication that required medical intervention, the defendant unilaterally proceeded with a course of treatment without obtaining her informed consent. The court subsequently rendered summary judgment in favor of the defendant, concluding that the defendant's conduct in separating the plaintiff's agglutinated labia was not a separate procedure or course of treatment giving rise to a duty to obtain informed consent, but rather "was part of another examination for which the [defendant] received the written consent of the plaintiff." On appeal, the plaintiff challenges the propriety of that determination.

Summary judgment is appropriate when "the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Practice Book § 17-49; *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 744–45, 660 A.2d 810 (1995).

A material fact is one "that will make a difference in the result of the case." (Internal quotation marks omitted.) *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 728, 145 A.3d 292, cert. denied, 323 Conn. 930, 150 A.3d 231 (2016). "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Todd* v. *Nationwide Mutual Ins. Co.*, 121 Conn. App. 597, 601–602, 999 A.2d 761, cert. denied, 297 Conn. 929, 998 A.2d 1196 (2010).

The following additional facts, as gleaned from the pleadings, affidavits, and other proof submitted when

viewed in a light most favorable to the plaintiff; *Martinelli* v. *Fusi*, 290 Conn. 347, 350, 963 A.2d 640 (2009); are relevant to the plaintiff's claim. We begin by noting what is not in dispute. Years prior to the medical treatment at issue in this appeal, the defendant performed a laser ablation of the plaintiff's vulva to remove precancerous growths. Prior to performing that procedure on August 25, 2011, the defendant discussed the procedure with the plaintiff and she signed a consent form so indicating. After the procedure concluded, the plaintiff was provided lidocaine gel as a preventative measure to avoid labial agglutination.[28] The defendant at that time cautioned the plaintiff that "she should quit smoking or else she would end up needing the procedure again." Weeks later, the defendant conducted a postoperative examination of the surgical site to ensure that it was healing properly. No complications were discovered during that examination.

When precancerous growths later returned, the plaintiff again consulted with the defendant. The defendant discussed the laser ablation treatment with the plaintiff, who then signed a standardized consent form. That form stated in relevant part that the defendant "has explained to me in a way that I understand: (a) the nature and purpose of the procedure(s); (b) the potential benefits and risks of the procedure(s) including bleeding, infection, accidental injury of other body parts, failure to permanently improve my condition or, death, as well as the potential risks and benefits of the medications that may be administered to me as part of

[28] Although it is undisputed that the plaintiff was provided lidocaine gel, there is no indication in the record that the defendant ever discussed the risk of labial agglutination with the plaintiff. As the defendant acknowledged in his November 4, 2016 affidavit: "I do not warn patients that their labia might be agglutinated because most do not have agglutinated labia." The plaintiff in this case does not claim that labial agglutination was a material risk that the defendant had a duty to disclose prior to performing the laser ablation procedure. See footnote 8 of this opinion.

the procedure; and (c) the alternative(s) to the procedure(s) and their potential risks and benefits, including the option of not having the procedure." The consent form also authorized the defendant "to do whatever may be necessary if there is a complication or unforeseen condition during my procedure."

The defendant performed a second laser ablation to remove precancerous growths on the plaintiff's vulva on April 25, 2014. When that procedure concluded, the plaintiff again was provided with lidocaine gel and was advised to schedule a postoperative examination "so that [the defendant] could examine the surgical site and make sure that it was healing properly." The defendant conducted that examination approximately three weeks later, on May 14, 2014. Four individuals were present at that examination: the plaintiff, the defendant, Andersen, and an unidentified nurse. It is undisputed that the plaintiff consented to the postoperative examination. See footnote 17 of this opinion.

After arriving at the Yale University Gynecologic Center, the plaintiff undressed and placed her legs in stirrups. The defendant began his examination with a visual inspection of the plaintiff and then informed her that "everything looked fine." The parties disagree as to precisely what happened next.

In her operative complaint, the plaintiff alleged that the defendant discovered the labial agglutination "during" the postoperative examination; the defendant admitted the truth of that allegation in his answer. The plaintiff further alleged that the defendant at that time embarked on a course of treatment for that complication without first obtaining her informed consent. More specifically, the plaintiff alleged that the defendant "forcefully inserted his fingers through [her] agglutinated labia" without informing her of "the nature of the procedure," its "risks and hazards," its "anticipated

benefits," and "any alternatives [when] other procedures were available . . . ."

In his November 4, 2016 affidavit, the defendant described what transpired during the postoperative examination as follows: "I informed [the plaintiff] that I was going to examine her vagina. . . . In order to observe the surgical site, I had to separate [her] labia. As I did so, she yelped in pain. At that moment, I realized that her labia had become agglutinated. I apologized for causing her pain, and I continued with the examination. . . . Agglutination, which is the partial fusing of skin, can occur after laser ablation surgery. It occurs at the surgical site, which in [the plaintiff's] case, was on the interior of her labia. Because of that location, there was no way for me to know if [her] labia were agglutinated before trying to separate them to examine the surgical site." He continued: "If labia are agglutinated two weeks after laser surgery, they must be separated. Generally, the agglutination at that point is mild, and it can be done in a split-second using a finger. This is the least intrusive and most effective way of separating agglutinated labia." In his August 17, 2016 response to the plaintiff's first set of interrogatories, the defendant stated that although "[m]ore severely agglutinated labia may require a surgical procedure," the plaintiff's labia were not agglutinated "to the degree that . . . require[d] treatment or procedure." The defendant also acknowledged that, "[a]fter discovering that [the plaintiff's] labia were agglutinated during the examination, I discussed with her that her labia had agglutinated as a result of her laser ablation surgery. . . . I informed her that she had agglutinated labia that required separation. I told her I was sorry that I hurt her by separating her agglutinated labia." As he did in his affidavit, the defendant stated in his response to interrogatories that he "did not know that [the plaintiff's] labia were agglutinated until [he] separated them to perform [the] postoperative examination."

In opposing the motion for summary judgment, the plaintiff provided a different account of those events. In her sworn affidavit, she stated: "[W]hen the defendant entered the room, he said that he was going to take a look at me, and further stated that everything looked fine. . . . Then, without warning, [he] forcefully inserted his fingers into my vagina, separating an agglutination . . . of my labia, which caused me severe pain. . . . I cried out in pain as a result of the defendant inserting his fingers through the agglutination, and [he] expressed his concern that I may pass out as a result. . . . The defendant stated that he performed this procedure so that I would not have to go to the operating room for surgery." The plaintiff further stated that the defendant provided "no warning or notice to [her] . . . at any time before" he remedied the labial agglutination. In her affidavit, Andersen likewise averred that the defendant "expressed concern that the plaintiff may pass out as a result of the separation of her agglutinated labia" and then "stated that he performed [the] procedure so that the plaintiff would not have to go to the operating room for surgery."

Although the defendant claims that he "did not know that [the plaintiff's] labia were agglutinated until [he] separated them," the affidavits of the plaintiff and Andersen, read in the light most favorable to the plaintiff as the nonmoving party; see *Brooks* v. *Powers*, 328 Conn. 256, 259, 178 A.3d 366 (2018); suggest otherwise. Those affidavits allege that the defendant, after separating her agglutinated labia, informed them that he "performed [the] procedure *so that the plaintiff would not have to go to the operating room for surgery*."[29] (Emphasis added.) Viewed in a manner most favorable to the plaintiff, the finder of fact could construe that purported

[29] When used as a conjunction, the word "so" means "in order that" and "for that reason." See Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p. 1182.

statement, in light of the defendant's admission that "severely agglutinated labia may require a surgical procedure" and the significant pain experienced by the plaintiff,[30] as an admission that the defendant was aware of two viable alternative treatments at the time that he discovered the medical complication. See *Logan* v. *Greenwich Hospital Assn.*, supra, 191 Conn. 295 ("all viable alternatives [must] be disclosed even though some involve more hazard than others").[31] If the finder of fact were to credit those affirmations, it reasonably could conclude that the defendant discovered the complication during his initial examination of the plaintiff and then, without her informed consent, made a unilateral decision to pursue a particular course of treatment—digital separation—when another viable alternative existed.[32]

[30] It is undisputed that the plaintiff cried out in pain when the defendant digitally separated her agglutinated labia. The affidavits of Andersen and the plaintiff further aver that the defendant at that time expressed his concern that the plaintiff was going to lose consciousness.

[31] We note that the defendant, in his affidavit, stated that "[i]f labia are agglutinated two weeks after laser surgery, they must be separated." While the defendant may simply have been articulating a professional medical opinion, his statement nonetheless ignores the well established right of a patient to refuse medical treatment, even when the patient's life is in jeopardy. See *Cruzan* v. *Director, Missouri Dept. of Health*, supra, 497 U.S. 278 (competent individuals have protected liberty interest under fourteenth amendment to United States constitution to refuse unwanted medical treatment); *Stamford Hospital* v. *Vega*, 236 Conn. 646, 666, 674 A.2d 821 (1996) ("[i]f the common law right to refuse medical treatment, based on the doctrine of informed consent, is entitled to respect, that respect must be accorded when the consequences are likely to be the most serious—in matters of life and death"). The plaintiff has argued, before both the trial court and now this court on appeal, that she had a right "to refuse this treatment even if it was considered necessary."

[32] We reiterate that the defendant, in his response to interrogatories, averred that he did not discover the agglutination until *after* he had finished separating the plaintiff's agglutinated labia. If that statement is credited, his explanation to the plaintiff that he digitally separated the agglutination "so that [she] would not have to go to the operating room for surgery" becomes illogical, as a surgical option necessarily would have been impossible at that point.

In light of the foregoing, we conclude that a genuine issue of material fact exists as to whether the discovery of the medical complication during the postoperative examination constituted a substantial and material change in circumstances, such that the defendant was obligated to disclose the risks, anticipated benefits, and viable alternatives to the plaintiff before embarking on a course of treatment therefor.

That determination does not end our inquiry, as a physician's failure to obtain informed consent may be excused in certain circumstances, such as when the patient has authorized the physician to remedy complications that arise during a course of medical treatment. See, e.g., *Hageny* v. *Bodensteiner*, supra, 316 Wis. 2d 250–51. In rendering summary judgment, the court concluded that the materials submitted in connection with the motion for summary judgment demonstrated that the defendant's conduct in remedying the labial agglutination was treatment "for which [the defendant] received the written consent of the plaintiff." We disagree.

It is undisputed that, in the spring of 2014, the plaintiff, in consultation with the defendant, embarked on a course of treatment for precancerous growths on her vulva. That course of treatment included both the laser ablation procedure that the defendant performed on April 25, 2014, and the postoperative examination on May 14, 2014.

The plaintiff's informed consent is memorialized on the consent form, a copy of which was submitted as an exhibit to the defendant's reply to the plaintiff's objection to the motion for summary judgment. That written consent came on a standardized form titled "Yale-New Haven Hospital Consent for Operation or Special Procedure." The form provides in relevant part: "After discussing other options, including no treatment,

with [the defendant], I give [the defendant] permission to perform the following surgery, procedure(s) or treatment . . . CO_2 Laser Ablation of Vulva." The consent form further stated: "I give permission to [the defendant] to do whatever may be necessary if there is a complication or unforeseen condition *during my procedure*." (Emphasis added.)

Undoubtedly, that signed consent vested the defendant with discretion to deal with any complications or unforeseen conditions that arose during the laser ablation procedure performed on April 25, 2014. That consent form nevertheless is silent as to postoperative care. It confirms only that the plaintiff had discussed the CO_2 laser ablation procedure and "other options" with the defendant. The consent form contains no indication that the parties discussed the possibility of labial agglutination or various medical treatments for that complication. Indeed, in his November 4, 2016 affidavit, the defendant attested that, as a matter of practice, he does "not warn patients that their labia might be agglutinated because most do not have agglutinated labia."

Furthermore, paragraph 3 of the standardized consent form begins by stating: "My responsible practitioner has explained to me in a way that I understand: (a) the nature and purpose of the procedure(s); (b) the potential benefits and risks of the procedure(s) including bleeding, infection, accidental injury of other body parts, failure to permanently improve my condition or, death, as well as the potential risks and benefits of the medications that may be administered to me as part of the procedure; and (c) the alternative(s) to the procedure(s) and their potential risks and benefits, including the option of not having the procedure." It then states: "I understand that some possible complications of the procedure(s) include" followed by several

blank lines. That part of the consent form was left blank, with no possible complications identified.

Read literally, and in the light most favorable to the plaintiff as the nonmoving party, the consent form authorized the defendant "to do whatever may be necessary" only with respect to unforeseen complications that arose during the April 25, 2014 laser ablation procedure. The defendant has provided no evidence, such as affidavit testimony indicating otherwise. Accordingly, we conclude that a genuine issue of material fact exists as to whether the plaintiff had authorized the defendant to remedy unforeseen complications that arose not during the April 25, 2014 laser ablation procedure, but during the postoperative examination weeks later.

III

In sum, we conclude that the court improperly granted the defendant's motion to dismiss the battery and negligent infliction of emotional distress counts of the August 25, 2015 amended complaint due to noncompliance with § 52-190a. We further conclude that the court improperly rendered summary judgment in favor of the defendant on the plaintiff's February 8, 2016 revised complaint, as genuine issues of material fact exist regarding the defendant's discovery of a medical complication during the postoperative examination. The matter, therefore, must be remanded to the trial court for further proceedings.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

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NOTICES OF CONNECTICUT STATE AGENCIES

CITY OF MILFORD

PUBLIC NOTICE

The City of Milford, Connecticut intends to apply to the State of Connecticut for a state certificate of affordable housing completion pursuant to Conn. Gen. Stat. § 8-30g and Conn. Agencies Regs § 8-30g-6. The application for state certificate of affordable housing completion, including all supporting materials, is available for public inspection and comment at the office of the City Clerk, City of Milford, Parsons Government Center, 70 West River Street, Milford, Connecticut. Written comments concerning this application may be submitted to Julie Nash, Director of Community Development, City of Milford, 70 West River Street, Milford, Connecticut on or before January 31, 2019.

Dated January 4, 2019 at Milford, Connecticut.

NOTICES

Notice Regarding The Filing of Habeas Matters

Notice is hereby given that beginning February 1, 2019, newly initiated habeas matters, with a file date of 02/01/2019 and after, will be paperless and e-filable. Case Initiation for habeas matters will continue to be filed on paper with the appropriate clerk's office. The case initiation documents will be scanned by the clerk's office, and an electronic file will be created.

As with most other civil case types, E-filing in e-filable Habeas cases is mandatory for attorneys and law firms unless granted an exclusion from electronic services requirements and optional for self-represented parties. Documents subsequent to case initiation must be filed electronically by attorneys via Superior Court E-Services subject to exceptions as outlined in the E-Filing Procedures and Technical Standards document [https://www.jud.ct.gov/external/super/E-Services/e-standards.pdf]. Most documents filed on paperless habeas cases will be accessible publically over the internet using the Civil/Family Case Look-up.

For further information go to https://www.jud.ct.gov/external/super/E-Services/efile/ or contact eservices@jud.ct.gov

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of December 14, 2018:

Justin Frank Heinrich	Premier Education Group, L.P.
Adam David Jablon	Point 72 Asset Management, L.P.
Andrea V. Lockenour	Boehringer Ingelheim
Michel Nicolas Werthenschlag	World Wrestling Entertainment, Inc.

Certified as of December 17, 2018:

Lara Jean Loyd	UnitedHealthcare

Hon. Patrick L. Carroll III
Chief Court Administrator

Notice of Public Censure

In Re: Complaint of John Chaponis, filed June 20, 2018 against the Honorable George Levine, Judge Trial Referee

On this date, December 19, 2018, the Honorable George Levine, Judge Trial Referee, has acknowledged and agreed that there is sufficient evidence to sustain and prove the Judicial Review Council's Findings of Probable Cause regarding violations of the Judicial Code of Conduct and Connecticut General Statutes section 51-51i(a), based on the investigation and probable cause hearing into the allegations of misconduct set forth in the complaint of John Chaponis.

Further, Honorable George Levine, Judge Trial Referee, acknowledges that the violations as set forth below warrant affirmative action by the Judicial Review Council in the form of a public censure.

Specifically, Honorable George Levine, Judge Trial Referee, acknowledges that the evidence before the Judicial Review Council is sufficient to prove that he has committed the following violations:

(1) A violation of Rule 1.2 of the Judicial Code of Conduct and General Statutes section 51-51i(a)(1), by acting in a manner that reflected adversely on his temperament and on his appearance of impartiality;

(2) A violation of Rule 2.2 of the Judicial Code of Conduct and General Statutes section 51-51i(a)(1), by exhibiting a lack of impartiality toward a litigant, and a lack of appropriate judicial temperament;

(3) A violation of Rule 2.6(b) of the Judicial Code of Conduct and General Statutes section 51-51i(a)(1), by using intimidating language, with the goal of compelling a settlement; and

(4) A violation of Rule 2.8(b) of the Judicial Code of Conduct and General Statutes section 51-51i(a)(8), in that by speaking and acting in a manner that was undignified and discourteous, and that expressed exasperation and impatience.

The Honorable George Levine, Judge Trial Referee, has waived his right to litigate the Council's findings at a public hearing. Instead, through counsel the Honorable George Levine, Judge Trial Referee, has indicated a willingness to accept that his conduct, as set forth in the findings above, was not in accordance with the ethical standards for Connecticut Judges and Judge Trial Referees.

Accordingly, the Honorable George Levine, Judge Trial Referee, is hereby publicly censured for the violations as set forth above. The Judicial Review Council directs the Honorable George Levine, Judge Trial Referee, to conduct himself in the future in accordance with the requirements of the Judicial Code of Conduct and the relevant Connecticut General Statutes, so as to prevent any recurrences of unethical conduct.

The Judicial Review Council has determined that this public censure constitutes adequate discipline in this matter. No further action is warranted at this time.

Mark D. Phillips
Chairman, Judicial Review Council

Notice of Public Censure

In Re: Complaint of Attorney Dale Clayton, dated June 4, 2018, against the Honorable George Levine, Judge Trial Referee

On this date, December 19, 2018, the Honorable George Levine, Judge Trial Referee, has acknowledged and agreed that there is sufficient evidence to sustain and prove the Judicial Review Council's Findings of Probable Cause regarding violations of the Judicial Code of Conduct and Connecticut General Statutes section 51-51i(a) as set forth below, based on the Council's investigation and probable cause hearing into allegations of misconduct set forth in the complaint of Attorney Dale Clayton.

Further, the Honorable George Levine, Judge Trial Referee, acknowledges that the Findings of Probable Cause warrant affirmative action by the Judicial Review Council in the form of a public censure.

Specifically, Honorable George Levine, Judge Trial Referee, acknowledges that the evidence before the Judicial Review Council is sufficient to prove that he has committed the following violations:

(1) A violation of Rule 1.2 and of General Statutes section 51-51i(a)(1), by speaking and acting in a manner which reflects adversely on his impartiality and his temperament;

(2) A violation of Rule 2.8(b) and of General Statutes section 51-51i(a)(1); by speaking and acting in a manner that was undignified and discourteous, and that expressed exasperation and impatience; and

(3) A violation of Rule 2.8 and General Statutes section 51-51i(a)(8) by acting in a discourteous and undignified manner, employing sarcasm and intimidation in his interactions with a lawyer and a witness.

The Honorable George Levine, Judge Trial Referee, has waived his right to litigate the Judicial Review Council's findings at a public hearing. Instead, through counsel, he has indicated a willingness to accept that his conduct, as set forth above, was not in accordance with the ethical standards for Connecticut Judges and Judge Trial Referees.

Accordingly, the Honorable George Levine, Judge Trial Referee, is hereby publicly censured for the violations set forth above. The Judicial Review Council directs the Honorable George Levine, Judge Trial Referee, to conduct himself in the future in accordance with the requirements of the Judicial Code of Conduct and the relevant Connecticut General Statutes, so as to prevent any recurrences of unethical conduct.

The Judicial Review Council has determined that this public censure constitutes adequate discipline in this matter. No further action is warranted at this time.

Mark D. Phillips
Chairman, Judicial Review Council