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Table of Contents

CONNECTICUT REPORTS

Benistar Employer Services Trust Co. *v.* Benincasa (Order), 331 C 932 54
Bree *v.* Commissioner of Correction (Order), 331 C 933 55
Demond *v.* Project Service, LLC, 331 C 816 2
Negligence; public nuisance; summary judgment; whether trial court properly denied motions to set aside verdict and to direct judgment in favor of defendants on negligence claims; whether trial court properly concluded that defendant operators of service plaza owned by state owed duty of care to third-party motorists pursuant to Restatement (Second) of Torts (§ 324A) by undertaking contractual obligation to prevent consumption of alcohol and loitering at plaza; reviewability of claim that defendants were not liable for negligence because their conduct did not increase risk of harm to plaintiffs; reviewability of claim that defendants were not liable for negligence because neither highway motorists nor state relied on defendants' contractual undertaking; whether trial court properly granted defendants' motions for summary judgment with respect to plaintiffs' claim that defendants created public nuisance by allowing consumption of alcohol and loitering at service plaza.
Fields *v.* Skeen (Order), 331 C 931 53
Seaport Capital Partners, LLC *v.* 76–68 Truman Street, LLC (See Seaport Capital Partners, LLC *v.* Speer) (Order), 331 C 931 53
Seaport Capital Partners, LLC *v.* Spear (See Seaport Capital Partners, LLC *v.* Speer) (Order), 331 C 931 53
Seaport Capital Partners, LLC *v.* Speer (Order), 331 C 931 53
State *v.* Roman (Order), 331 C 931 53
Strano *v.* Azzinaro (Order), 331 C 932 54
Volume 331 Cumulative Table of Cases 57

CONNECTICUT APPELLATE REPORTS

Adams *v.* Commissioner of Correction (Memorandum Decision), 190 CA 904 . . . . . 146A
DeMaria *v.* Bridgeport, 190 CA 449 . . . . . 3A
Personal injury; claim that defendant city was liable under municipal defective highway statute (§ 13a-149) for damages plaintiff sustained in fall on sidewalk owned by city; whether trial court improperly admitted into evidence, under applicable statute (§ 52-174 [b]), certain medical records that had been written by plaintiff's primary care provider, who worked in veterans affairs hospital; claim that our Supreme Court previously had recognized standard for admissibility of medical records under § 52-174 (b) that requires only that plaintiff testify as to relevance of records and that records originated from hospital; whether medical records at issue should not have been admitted where, as here, author of records was prohibited, pursuant to applicable federal regulation (38 C.F.R. § 14.808), from providing any opinion or expert testimony in any forum and, thus, was unavailable for cross-examination; whether city was harmed by improper admission of medical records.
In re Natalia M., 190 CA 583 . . . . . 137A
Termination of parental rights; mootness; claim that trial court improperly concluded that Department of Children and Families had made reasonable efforts at reunification pursuant to statute (§ 17a-112 [j] [1]); failure of respondent father to challenge trial court's finding that he was unable or unwilling to benefit from reunification efforts, which was separate independent basis for upholding trial

(continued on next page)

court's determination that requirements of § 17a-112 (j) (1) had been satisfied; whether there was practical relief that could be afforded to father; whether appeal was moot.

Jordan *v.* Commissioner of Correction, 190 CA 557 . . . . . 111A
Habeas corpus; subject matter jurisdiction; manslaughter in first degree with firearm; carrying pistol or revolver without permit; claim that respondent Commissioner of Correction entered into, and subsequently breached, purported contract to award petitioner risk reduction credit in exchange for petitioner's adherence to offender accountability plan; whether habeas court properly dismissed petitioner's breach of contract claim for lack of subject matter jurisdiction; whether petitioner's claim gave rise to cognizable liberty interest.

Lewis *v.* Alves, 190 CA 580 . . . . . 134A
Summary judgment; alleged deprivation of plaintiff's federal constitutional rights; whether trial court properly rendered summary judgment in favor of defendants on plaintiff's claims that he was denied due process of law when he was not permitted to call witness and was assigned unwanted advocate at disciplinary hearing, and that he was subjected to improper conditions of confinement.

Miller *v.* Maurer (Memorandum Decision), 190 CA 904 . . . . . 146A

Outing *v.* Commissioner of Correction, 190 CA 510 . . . . . 64A
Habeas corpus; whether habeas court properly determined that petitioner's trial counsel did not render ineffective assistance; claim that habeas court improperly concluded that trial counsel's decision not to present alibi defense was not constitutionally deficient; whether trial counsel's approach to handling of certain witnesses was within wide range of reasonably effective assistance; whether trial counsel's decision to forgo testimony from expert witness concerning reliability of witness identifications was reasonable tactical choice under circumstances; claim that trial counsel performed deficiently by not preserving for appellate review claim related to trial court's exclusion of expert witness' testimony regarding eyewitness identifications; whether habeas court properly concluded that petitioner failed to prove that appellate counsel was deficient in failing to claim in petitioner's direct appeal that trial court incorrectly denied request to present surrebuttal evidence; claim that habeas court incorrectly determined that petitioner did not prove claim of actual innocence.

Rauser *v.* Pitney Bowes, Inc., 190 CA 541 . . . . . 95A
Workers' compensation; appeal from decision of Compensation Review Board affirming decision of Workers' Compensation Commissioner dismissing claim for workers' compensation benefits; whether evidence amply supported commissioner's determination that for several hours plaintiff was engaged in substantial deviation from his employment activities; claim that commissioner failed to set forth factual determination as to whether, at time plaintiff sustained subject injuries, he was on direct route of his business travel; whether plaintiff failed to demonstrate that either commissioner or board misapplied law in evaluating claim for benefits; credibility determinations.

(continued on next page)

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State *v.* Fernandes (See State *v.* Sanchez), 190 CA 466 . . . . . 20A
State *v.* Nalewajk, 190 CA 462 . . . . . 16A
Possession of narcotics with intent to sell by person who is not drug-dependent; failure to appear in first degree; motion to correct illegal sentence; mootness; whether defendant's death during pendency of appeal rendered appeal moot.
State *v.* Ramon A. G., 190 CA 483 . . . . . 37A
Assault in third degree; criminal violation of protective order; whether defendant properly preserved claim that trial court violated his constitutional rights to due process and to present defense by improperly declining to give jury instruction on defense of personal property with respect to assault charge; whether doctrine of implied waiver precluded substantive consideration of claim of instructional impropriety; whether improper comment of prosecutor deprived defendant of fair trial.
State *v.* Rodriguez (See State *v.* Sanchez), 190 CA 466 . . . . . 20A
State *v.* Sanchez, 190 CA 466 . . . . . 20A
Sale of narcotics by person who is not drug-dependent; possession of narcotics with intent to sell by person who is not drug-dependent; whether trial court improperly dismissed motions to correct illegal sentence for lack of subject matter jurisdiction; claim that lack of drug dependency by defendants was element that state was required to plead and prove beyond reasonable doubt pursuant to statute ([Rev. to 2013] § 21a-278 [b]); whether drug dependency is affirmative defense that must be proven by defendant; whether, at time trial court dismissed motions to correct, defendants raised colorable claims; whether, in light of Supreme Court's decision in State *v.* Evans *(329 Conn. 770), defendants' motions to correct no longer presented colorable claims of illegal sentence.*
State *v.* Slaughter (See State *v.* Sanchez), 190 CA 466 . . . . . 20A
State *v.* Thigpen (See State *v.* Sanchez), 190 CA 466 . . . . . 20A
Vassell *v.* Commissioner of Correction (Memorandum Decision), 190 CA 903 . . . . . 145A
Villafane *v.* Commissioner of Correction, 190 CA 566 . . . . . 120A
Habeas corpus; reviewability of claim that habeas court abused its discretion in denying petition for certification to appeal with respect to issue of whether habeas court improperly denied motions for appointment of habeas counsel; failure of petitioner to raise claim in petition for certification to appeal; reviewability of claim that habeas court abused its discretion in denying petition for certification to appeal with respect to issue of whether trial counsel rendered ineffective assistance; failure to brief claim adequately.
Volume 190 Cumulative Table of Cases 147A

CONNECTICUT PRACTICE BOOK

Notice of Public Hearing on Practice Book Revisions to the Rules of Appellate Procedure. 1PB

NOTICES OF CONNECTICUT STATE AGENCIES

Connecticut Housing Finance Authority 1B

MISCELLANEOUS

Bar Examining Committee 1C
Notice of Certification as Authorized House Counsel 4C
Notice of Resignation of Attorney. 4C

CONNECTICUT REPORTS

Vol. 331

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

GREGORY DEMOND, COADMINISTRATOR (ESTATE OF BENJAMIN DEMOND), ET AL. *v.* PROJECT SERVICE, LLC, ET AL.

(SC 20025)
(SC 20026)
(SC 20027)
(SC 20028)

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

Syllabus

Pursuant to the Restatement (Second) of Torts (§ 324A), "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking . . . ."

The plaintiffs sought to recover damages from the defendants, the operators of an interstate highway service plaza owned by the state, for, inter alia, the wrongful death of the named plaintiff's decedent, D, in an automobile accident caused by a drunken driver, G, a temporarily homeless man who for the week preceding the accident had been living out of his vehicle at the service plaza. On the date of the accident, G consumed a large amount of alcohol while parked at the plaza and then proceeded to depart the plaza and drive on the adjacent highway where he caused a multivehicle accident, killing D and injuring D's two children and another motorist who was driving on the highway at the time. The defendant P Co. previously had entered into a concession agreement with the state to operate and maintain the service plaza. P Co. subcontracted the day-to-day operation of the service plaza to the defendant A Co., and A Co. in turn subcontracted the operation of certain portions of the service plaza to the defendant F Co. Pursuant to the agreement, the defendants agreed not to permit the consumption of alcohol or loitering on the premises of the service plaza, to notify the police of

* These appeals originally were argued before a panel of this court consisting of Justices Palmer, McDonald, Robinson, D'Auria, Mullins and Kahn. Thereafter, Justice Ecker was added to the panel and has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision. The listing of justices reflects their seniority status on this court as of the date of oral argument.

any consumption of alcohol or loitering, and to train all subcontractors and their employees to comply with those contractual obligations. The plaintiffs alleged, inter alia, that the defendants breached a duty, arising under § 324A of the Restatement (Second) of Torts, to protect the plaintiffs from the increased risk of harm created by the defendants' failure to perform their contractual obligations and that the accident was caused by the defendants' negligence. The plaintiffs also alleged that the defendants created a public nuisance by permitting G to loiter and consume alcohol at the plaza. The defendants filed motions for summary judgment, contending, inter alia, that, under the circumstances, they did not owe a duty of care to the plaintiffs. The trial court granted the defendants' motions for summary judgment as to the public nuisance claims but denied them as to the negligence claims. Thereafter, a jury trial was held on the negligence claims. The trial court instructed the jury that the defendants owed a duty of care to the plaintiffs as a matter of law for the purpose of determining liability under § 324A, and the jury returned a verdict in favor of the plaintiffs, finding that the defendants were negligent, that their negligence increased the risk of harm to the plaintiffs beyond that which existed without the defendants' contractual undertaking, and that the plaintiffs or others had relied on the defendants to exercise reasonable care. Subsequently, the court denied the defendants' motions to set aside the verdict and to direct judgment in their favor as a matter of law, concluding that the defendants owed a duty to the plaintiffs, which was created by the concession agreement and willingly assumed by the defendants. The court further concluded that the jury reasonably could have found that the defendants had agreed that the provisions in the agreement prohibiting the consumption of alcohol and loitering at the service plaza were intended to protect motorists on the adjacent highway. The trial court rendered judgment for the plaintiffs on their negligence claims and for the defendants on the public nuisance claims, and the plaintiffs and the defendants filed separate appeals. *Held*:

1. The trial court incorrectly determined that the defendants, by undertaking a contractual obligation to prevent the consumption of alcohol and loitering at the service plaza, owed a duty of care to the plaintiffs under § 324A and, therefore, improperly denied the defendants' motions to set aside the verdict and to direct judgment in their favor on the negligence claims: a landowner or possessor of property has no common-law duty to prevent the risk of harm to third persons off the property that is caused by a person's consumption of alcohol on the property, and, to impose such a duty under § 324A of the Restatement (Second) of Torts, there must be an express contractual undertaking or evidence of an unambiguous intention on the part of the contracting parties to protect third persons from foreseeable, physical harm within the scope of the services to be performed under the contract; in the present case, the evidence was insufficient as a matter of law to support a finding that

the parties to the concession agreement, the state and P Co., had a specific intent to protect motorists on the highway adjacent to the service plaza from the risk of harm created by the consumption of alcohol at the service plaza, as the agreement itself did not mention an actual intention to provide such protection and there was no extrinsic evidence that demonstrated any such contractual intent; moreover, evidence that harm to passing motorists is a foreseeable result of the negligent failure to prevent alcohol consumption at the service plaza was not sufficient to establish that the no alcohol and no loitering provisions in the concession agreement were included with the intention of protecting highway travelers.

2. This court concluded that it was unnecessary, in light of its determination that the defendants owed no duty of care to the plaintiffs, to address the defendants' claims, raised as alternative grounds for reversing the judgment of the trial court, that, even if they owed a duty of care to the plaintiffs, they were not liable for negligence under either § 324A (a), because they did not increase the risk of harm to the plaintiffs by negligently performing their contractual undertaking, or under § 324A (c), because neither the state nor a third person relied on the defendants to protect highway motorists; nonetheless, this court observed that there was no evidence that the defendants' acts or omissions served to increase the risk of harm to the plaintiffs, and the evidence was insufficient to establish that either highway motorists or the state had relied on the defendants to protect motorists on the highway adjacent to the service plaza.

3. The plaintiffs could not prevail on their claim that the trial court improperly granted the defendants' motions for summary judgment with respect to their claim that the defendants created a public nuisance by allowing G to loiter and consume alcohol at the service plaza for one week; even if the defendants' conduct in allowing G to loiter and consume alcohol at the plaza contributed to such a dangerous condition, the sole proximate cause of the automobile accident was G's immoderate consumption of alcohol and G's act of driving his vehicle while intoxicated rather than the defendants' conduct in allowing G to loiter and consume alcohol at the plaza.

Argued April 30 and May 1, 2018—officially released June 11, 2019

Procedural History

Action to recover damages for, inter alia, the wrongful death of the named plaintiff's decedent, and for other relief, brought to the Superior Court in the judicial district of Waterbury, where the case was transferred to the Complex Litigation Docket; thereafter, the trial court, *Zemetis*, *J.*, granted in part the motions for sum-

mary judgment filed by the named defendant et al.; subsequently, the action was withdrawn as to O, R & L Facility Services, LLC; thereafter, the case was tried to the jury before *Zemetis*, *J.*; verdict for the plaintiffs; subsequently, the trial court, *Zemetis*, *J.*, granted the plaintiffs' motion for additur and rendered judgment for the plaintiffs, from which the plaintiffs and the named defendant et al. filed separate appeals. *Reversed in part*; *judgment directed.*

Daniel J. Krisch, with whom were *Rachel J. Fain* and, on the brief, *Michelle I. Schaffer*, *James M. Campbell*, pro hac vice, and *Jacob J. Lantry*, for the appellant in Docket No. SC 20025 and the appellee in Docket No. SC 20028 (defendant Alliance Energy, LLC).

Randy Faust, pro hac vice, with whom were *Stephen G. Murphy, Jr.*, and, on the brief, *Christopher F. Wanat*, for the appellant in Docket No. SC 20026 and the appellee in Docket No. SC 20028 (named defendant).

A. Jeffrey Somers, for the appellant in Docket No. SC 20027 and the appellee in Docket No. SC 20028 (defendant 4MM, LLC).

Karen L. Dowd and *Brendon P. Levesque*, with whom, on the brief, was *Wesley W. Horton*, for the appellants in Docket No. SC 20028 and the appellees in Docket Nos. SC 20025, SC 20026 and SC 20027 (plaintiffs).

Opinion

ECKER, J. Section 324A of the Restatement (Second) of Torts imposes negligence liability, when certain conditions are met, on a party whose negligent performance of a contractual undertaking causes foreseeable physical harm to a nonparty to the contract. The present appeals require us to determine the scope of this duty under unusual circumstances. For approximately one week preceding March 9, 2012, a temporarily home-

less man named Willis Goodale lived out of his Jeep at the Montville Service Plaza (service plaza) located on Interstate 395 (I-395) in Montville. On the evening of March 9, after consuming a large amount of alcohol while parked at the service plaza, Goodale drove his Jeep onto I-395, where he caused a multivehicle crash. Benjamin Demond was killed. Demond's young sons, Alexander Demond (Alexander) and Nicholas Demond (Nicholas), were severely injured, as was Andrew Crouch, the driver of another vehicle on the roadway at the time. The present lawsuit was brought on behalf of these victims against the parties responsible for operating and maintaining the service plaza. The theory of negligence underlying the plaintiffs' lawsuit derives from a contract (concession agreement) between the named defendant, Project Service, LLC (Project Service), and the Connecticut Department of Transportation (DOT), which owned the service plaza. The concession agreement imposed the responsibility on Project Service to operate and maintain the service plaza in all respects. Project Service subcontracted the day-to-day operation of the service plaza, or certain portions of it, to the defendant Alliance Energy, LLC (Alliance), which, in turn, subcontracted the operation of the convenience mart, parking area and plaza to the defendant 4MM, LLC (4MM), while retaining control over the fuel service area. As part of the concession agreement, Project Service and its subcontractors agreed not to allow the consumption of alcohol or loitering at the service plaza.

The plaintiffs alleged that the defendants created a public nuisance by permitting Goodale to loiter and to consume alcohol on the service plaza premises, and also breached a duty owed to passing motorists, arising under § 324A of the Restatement (Second), to protect them from the increased risk of harm created by the

defendants' failure to perform their contractual obligations.[1] The trial court rendered summary judgment on the plaintiffs' public nuisance claims but submitted their negligence claims to the jury. The jury returned a verdict in the plaintiffs' favor based on its express findings that the defendants were liable in negligence under the principles set forth in § 324A. The trial court rendered judgment against the defendants in the amount of $5,347,000.[2]

[1] Section 324A of the Restatement (Second) provides: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if

"(a) his failure to exercise reasonable care increases the risk of such harm, or

"(b) he has undertaken to perform a duty owed by the other to the third person, or

"(c) the harm is suffered because of reliance of the other or the third person upon the undertaking." 2 Restatement (Second), Torts § 324A, p. 142 (1965).

We note that the language in the introductory portion of this section, "to [perform] his undertaking," apparently included a typographical error and used the word "protect" instead of "perform." See *Hill* v. *United States Fidelty & Guaranty Co.*, 428 F.2d 112, 115 n.5 (5th Cir. 1970) ("[t]he reporter for this edition of the Restatement, by a letter to counsel furnished to this court, has verified that the word 'protect' which appears at this point is a typographical error and should read 'perform' ").

Section 324A of the Restatement (Second) and the accompanying commentary were substantially revised by § 43 of the Restatement (Third) of Torts, published in 2012. See 2 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 43, p. 114 (2012). For reasons not apparent from the record, the parties have neither cited nor relied on § 43 at any stage of this litigation. We decide the case as it was litigated, and, although we refer to § 43 and related provisions of the Restatement (Third) on occasion to help cast light on the construction and application of § 324A, we offer no definitive ruling as to whether we would adopt § 43 if asked to do so, or the effect that adopting § 43 might have on our analysis.

[2] The jury awarded damages to the plaintiffs in the amount of $1,835,000, and apportioned the defendants' negligence as follows: 40 percent to Project Service and 20 percent each to the other three defendants. The trial court thereafter granted the plaintiffs' motion for additur, increasing the total damages award to $5,347,000. The plaintiffs accepted the court-ordered additur on August 18, 2016.

On appeal,[3] the defendants contend that their contractual undertaking to prohibit loitering and alcohol consumption at the service plaza did not create a duty to third-party motorists injured off the service plaza premises by a drunk driver who became intoxicated at the service plaza; the plaintiffs, in their cross appeal, contend that the trial court improperly rendered summary judgment on their public nuisance claims. We conclude that the defendants' contractual undertaking did not create a duty to the plaintiffs, and the plaintiffs' public nuisance claims fail as a matter of law. We therefore reverse in part the judgment of the trial court.

I

The jury reasonably could have found the following facts. For approximately one week leading up to March 9, 2012, Goodale, who was temporarily homeless, lived in his Jeep in the parking lot of the service plaza on I-395. The service plaza was owned by the DOT. It was operated and maintained at all relevant times by Project Service pursuant to the concession agreement between Project Service and the DOT. Project Service subcontracted the day-to-day operation of the service plaza, or certain portions of it, to Alliance, which operated the fuel service area but subcontracted the operation of the convenience mart, parking area and plaza to 4MM. The concession agreement provided that Project Service and its subcontractors would not allow the consumption of alcohol or loitering at the service plaza (no alcohol/no loitering provisions).[4]

[3] The parties filed their appeals in the Appellate Court, and we transferred the appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] The concession agreement required Project Service to "provide all applicable . . . safety . . . safeguards for operations of the [service plaza] . . . that are required . . . to protect the health, safety and welfare of the public, [e]mployees, [the DOT] and its employees and any [DOT] [r]epresentatives and any of the [s]tate's [r]epresentatives in accordance with all applicable [l]egal [r]equirements." The concession agreement also provided that Project Service "shall not . . . allow the . . . consumption of any intoxicating or

Goodale was an alcoholic. During the time he lived in his Jeep at the service plaza, he frequented the service plaza's convenience store to buy food and nonalcoholic beverages, to use the bathroom, and to charge his cell phone. During that time, Goodale told a store employee that he would be staying at the service plaza until he could be admitted to the Stonington Institute, a treatment facility for alcohol and substance abuse. Goodale drank one-half gallon of vodka every two days while living at the service plaza, and some of the employees working at the service plaza were aware of his consumption of alcohol.

On March 9, 2012, Goodale spent a portion of the day drinking vodka in his Jeep while parked at the service plaza. At some point during the evening, he drove the Jeep from the parking lot onto the on-ramp to I-395 southbound. Goodale felt dizzy and immediately pulled to the shoulder, where he slept for approximately one to one and one-half hours. Upon awakening, Goodale decided to return to the service plaza by driving south a short distance on I-395 to an emergency turnaround in the median of the highway, intending to use the turnaround to access the northbound lanes

alcoholic beverages or any fermented ale, wine, liquor or spirits in any part of the [service plaza]." In addition, the safety plan that was incorporated into the concession agreement provided that "Project Service . . . has made a commitment to provide a drug and alcohol-free workplace. . . . The use, possession of open containers, personal sale, transfer, or acceptance of alcohol on Project [Service's] property is strictly prohibited. Project Service . . . has the right to remove from, or deny access to, our stores anyone on our property under the influence of [a]lcohol, and/or consuming [a]lcohol on our property. Project [Service's] [f]acilities [m]anager may report illegal activity to the appropriate law enforcement authorities." The safety plan also required Project Service and its subcontractors to "[l]ook for anyone who may be watching or loitering in or around the [service plaza]." The consumption of alcohol and loitering were considered to be emergencies requiring Project Service and its subcontractors to call the state police. The trial court found that the no alcohol/no loitering provisions were included as part of various safety plans, operation manuals and downstream subcontracts binding on Alliance and 4MM.

ofI-395 and then drive to the next emergency turnaround to return to the service plaza. When Goodale attempted to cut across the southbound lanes of I-395 to the turnaround, he struck a Nissan sedan being driven by Demond. Demond's sons, Alexander, aged six, and Nicholas, aged four, were in car seats in the back seat of the sedan. The collision caused Demond to lose control of the Nissan, and he veered through the turn-around into the oncoming northbound traffic. Demond's Nissan hit a Ford Explorer driven by Crouch head on, tumbled end over end, hit another vehicle and then came to rest. The results were catastrophic. Demond was killed in the crash, and Alexander, Nicholas and Crouch were severely injured. Testing of a blood sample taken from Goodale one hour after the crash showed that his blood alcohol level was .25 milligrams per deciliter, well over the legal limit.

The plaintiffs brought this action against Project Service, Alliance and 4MM, among others.[5] The second amended complaint alleged that the March 9, 2012 crash was the result of the defendants' negligent conduct, including, among other things, their failure to notify state or local police that Goodale was living at the service plaza and consuming alcohol there, or to take other steps to prevent him from engaging in those activities, as required by the no alcohol/no loitering provisions of the concession agreement and the various subcontracts. The plaintiffs also alleged that the defendants had maintained a public nuisance by allowing Goodale to live and to consume alcohol at the service plaza.

The defendants all filed motions for summary judgment. Those motions used variations on the same theme

[5] The complaint also named O, R & L Facility Services, LLC, and Global Partners, LP, as defendants. The claims against those defendants were disposed of before trial and are not at issue in these appeals.

to attack the negligence claims, with the common point being that the defendants owed no duty to the plaintiffs under the circumstances. Project Service relied on a number of cases holding that a party in its position has a legal duty to take steps to prevent another person from harming a third party only if the third party is an "identifiable victim," and contended that motorists traveling on I-395 were not identifiable victims under the circumstances. Alliance, for its part, contended that it had no duty to the plaintiffs because it was responsible only for the fuel service area, and Goodale had not consumed alcohol or loitered in that location. Alliance also contended that a person in control of premises has no duty to protect motorists from persons who consume alcohol on the premises but cause harm off the premises. 4MM contended that it had no duty to the plaintiffs because Goodale's criminal conduct, driving under the influence of alcohol, was a superseding cause of the crash.

As to the public nuisance claims, Project Service contended that those claims failed because they were derivative of the negligence claims. Alliance contended that the claims failed because it had no duty to the plaintiffs and because its "use of the land did not have a natural tendency to create a danger from motor vehicle accidents on the interstate highway," and 4MM contended that a garden variety premises liability claim did not give rise to a public nuisance claim.

The plaintiffs opposed summary judgment primarily on the ground that the no alcohol/no loitering provisions of the concession agreement were "intended to protect the public, not only at the plaza, but those passing motorists on the highway in proximity to the plaza." Their central argument was that the defendants were liable under § 324A of the Restatement (Second), because, among other reasons, the no alcohol/no loitering provisions gave rise to an "undertaking" by the

defendants to use due care to prevent harm of this nature from befalling the plaintiffs and other travelers. With respect to the public nuisance claims, the plaintiffs contended that the defendants had interfered with the right of the public to travel on the highway by permitting Goodale to live and to consume alcohol at the service plaza.

At oral argument on the motions for summary judgment, the trial court expressed its views that the issues arising from the negligence claims were "novel," that none of the cases cited by the parties was directly on point, and that "we're stretching every aspect of tort liability to see whether there is responsibility here." The trial court's written memorandum of decision reflects the court's serious engagement with the legal issues presented, as well as the difficulty posed by some of those issues. The trial court initially set forth the general rule that "[w]hether a duty exists is a question of law for the court . . . ." (Internal quotation marks omitted.) To answer that question, the court discussed this court's only decision addressing the applicability of § 324A of the Restatement (Second) under Connecticut law, *Gazo* v. *Stamford*, 255 Conn. 245, 765 A.2d 505 (2001), which held that a contractor who undertakes the snow removal duties of a landowner is liable to a plaintiff who slips as a result of the contractor's negligent performance. Id., 253; see id. ("[u]nder § 324A [b] of the Restatement [Second] [the defendant contractor] is subject to liability to the plaintiff for his physical injuries if the plaintiff can show that [the contractor] failed to exercise reasonable care when performing the duty owed by [the landowner who hired the contractor] to the plaintiff"); see also id., 250 n.4 ("[i]t should be emphasized that [the contractor] may be held liable to the plaintiff [under § 324A (b)] only to the extent that [1] his contractual undertaking permits, and [2] his

breach of duty to the plaintiff is part and parcel of [the landowner's] duty to the plaintiff").

Contrary to its initial inclination to decide the question of duty as a matter of law, the trial court ultimately concluded that "[t]he question of whether any or all of the defendants owe a legal duty of care to the plaintiffs is a question of fact for the trier of fact." The court did not directly address whether (or why) the no alcohol/no loitering provisions created a duty *to motorists on I-395*, but it appears to have assumed that the duty would apply to passing motorists under § 324A of the Restatement (Second) if harm to those motorists was a foreseeable result of the defendants' alleged failure to exercise reasonable care in enforcing the no alcohol/no loitering provisions. The court denied the defendants' motions for summary judgment as to the negligence claims on the ground that "[t]he finder of fact may conclude that [§ 324A] (a) and/or (b) [of the Restatement (Second)][6] impose a legal duty on any or all of the defendants for failure to adequately train, supervise, [and/or] implement the [relevant portions of

[6] At trial, the jury was instructed that Project Service could be held liable to the plaintiffs under § 324A (a) or (c) of the Restatement (Second), but not under subsection (b). Subsection (b) is strictly a "pass-through" provision, which, as we discuss subsequently in this opinion, imposes liability on an undertaking party based on that party's assumption of a preexisting duty owed by the original duty holder. See 2 Restatement (Second), Torts § 324A (b), p. 142 (1965). Subsection (b) evidently was charged out of this case because the plaintiffs made no claim that the original duty holder, the DOT, had a preexisting duty to protect them from the risk of harm created by persons who consumed alcohol at the service plaza and then drove onto the highway. Although the jury was instructed that it could not hold Project Service liable under subsection (b) of § 324A, no such instruction was provided as to Alliance or 4MM. To the contrary, the jury interrogatories and verdict form permitted the jury to find Alliance and 4MM liable under § 324A (b) for their negligent performance of a duty owed to the plaintiffs by either Project Service *or* the *DOT*. The record does not disclose why the jury was informed that Alliance and 4MM might have a duty arising from the DOT's duty to the plaintiffs when the parties believed that Project Service had no such duty.

the concession agreement] or otherwise comply with contractual obligations with respect to . . . Goodale's loitering and intoxication at the [s]ervice [p]laza." (Footnote added.) The trial court granted, however, the defendants' motions for summary judgment with respect to the public nuisance claims, on the ground that "there is no claim that *unreasonable or unlawful use of the defendant(s)' land* interfered with public rights." (Emphasis in original.)

The plaintiffs thereafter filed a third amended complaint, which is the operative pleading for purposes of these appeals, in which they reasserted the negligence claims against the defendants. At the conclusion of the plaintiffs' case-in-chief at trial, Alliance filed a motion for a directed verdict in which it renewed its claim that it had no duty to protect the plaintiffs from Goodale's tortious conduct because a person in control of premises has no duty to protect motorists from persons who consume alcohol on the premises and then drive off the premises. The trial court denied the motion.

Two particular circumstances regarding the submission of the case to the jury are relevant on appeal. First, although the trial court previously had determined, in its summary judgment ruling, that the existence of a duty owed by the defendants to the plaintiffs presented a factual issue for the jury, the court instructed the jury at trial that the defendants owed a duty of care to the plaintiffs for purposes of determining liability under § 324A of the Restatement (Second) *as a matter of law*.[7]

[7] The trial court gave the following instructions to the jury on this issue: "[T]he defendants have a legal duty to the plaintiffs arising out of the contracts with the [s]tate of Connecticut, and . . . [the DOT], and with each other."

"Project Service contractually undertook to render services to the [s]tate of Connecticut. Those services were defined by the [c]oncession [a]greement and the [s]afety [p]lan. Project Service had to perform its contractual obligations with reasonable care to avoid creating or increasing the risk of physical harm to a third person, *such as the plaintiffs*. The contractual obligations include adequate training and supervising its employees to report and

Second, the core jury findings with respect to liability under § 324A were made in response to written interrogatories. These interrogatories required the jury to determine whether each of the defendants had negligently performed their contractual undertaking pursuant to the concession agreement and safety plan and the various subcontracts, and, if so, whether that defendant's

respond to the consumption of alcoholic beverages, an intoxicated person, and/or allowing or permitting a person to live/loiter on the [service area] . . . . *Its legal duty is defined by its contractual undertakings*." (Emphasis added.)

The trial court also instructed the jury as follows with respect to § 324A of the Restatement (Second): "An actor who undertakes to render services to another and who knows or should know that the services will reduce the risk of physical harm to which a third party is exposed, *such as the plaintiffs*, *has a duty of reasonable care to the third person*, *the plaintiffs*, in conducting the undertaking if:

"(a) failing to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking, or

"(b) the actor has undertaken to perform a duty owed by the other to a third person, or

"(c) the persons to whom the services are rendered, the third party, or another relies on the actor's exercising reasonable care in the undertaking.

"If Project Service, through its agents, servants, or employees negligently performed those services or contractual undertakings, as alleged by the plaintiffs, when it knew or should have known that the contractual duties were intended or designed to reduce the risk of physical harm *to which the travelers on the adjacent interstate highway*, *such as the plaintiffs*, were exposed, and

"(a) Project Service's failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking, or

"(b) the person to whom the services are rendered, [the DOT], the third party, such as the plaintiffs, or another relies on Project Service's exercising reasonable care in the undertaking, *then Project Service violated the duty of care owed to the plaintiffs and is negligent*." (Emphasis added.) The court gave substantially similar jury instructions regarding the liability of Alliance and 4MM under § 324A of the Restatement (Second), with the additional instruction that those defendants could be held liable pursuant to the pass-through provision of § 324A (b) because they undertook to perform Project Service's contractual duties. See footnote 6 of this opinion.

In his closing argument to the jury, counsel for the plaintiffs made certain that the jury did not overlook this point, telling the jurors that the trial court was going to charge them that Project Service "had a legal duty to the plaintiffs arising out of the [contract] with the [DOT] . . . ."

negligence had increased the risk of harm to the plaintiffs beyond that which existed without the contractual undertaking (the determinative consideration under §324A [a]), or induced reliance by the DOT or the plaintiffs (the determinative consideration under § 324A [c]).[8]

The jury found that the defendants each were negligent, that their negligence increased the risk of harm to the plaintiffs, and that the plaintiffs or another had relied on each defendant to exercise reasonable care. Accordingly, the jury rendered a verdict in favor of the plaintiffs. The defendants filed timely motions to set aside the verdict and to direct judgment in their favor as a matter of law. In a supporting memorandum, adopted in full by Project Service, Alliance argued that it had no duty to the plaintiffs as a matter of law under § 324A (a) of the Restatement (Second) because the contractual undertaking to prevent the consumption of

[8] The jury interrogatories provide in relevant part: "1. Have the plaintiffs proven by a preponderance of the evidence that Project Service . . . through its agents, servants, or employees negligently performed the services or contractual undertakings described by the concession agreement and safety plan, as alleged by [the] plaintiffs, when it knew or should have known that the contractual duties were intended or designed to reduce the risk of physical harm to which the travelers on the adjacent interstate highway, such as the plaintiffs, were exposed, and

"(a) Project Service's failure to exercise reasonable care in undertaking or performing their contractual duties created or increased the risk of harm beyond that which existed without the undertaking?

"YES NO (Circle your response)

"AND/OR

"(b) the person/entity to whom the contractual services were rendered, [the DOT], the plaintiffs, or another relied on Project [Service's] exercising reasonable care in the undertaking or performing of [its] contractual duties, such that Project Service violated the duty of care owed to the plaintiffs and is negligent?

"YES NO (Circle your response)."

The jury interrogatories included substantially similar instructions with respect to Alliance and 4MM, with an additional instruction allowing the jury to find those defendants liable pursuant to the pass-through provision of § 324A (b) of the Restatement (Second). See footnote 6 of this opinion.

alcohol and loitering at the service area did not increase the risk of harm to motorists on I-395 beyond what the risk would have been if there had been no such contractual undertaking. Alliance further contended that it had no duty to the plaintiffs under § 324A (c) because "they were not within the scope of persons for whom Alliance had a contractual responsibility, i.e., 'patrons and [e]mployees of the [p]remises,' " and, therefore, the plaintiffs could not have relied on Alliance to protect them from harm. Finally, Alliance contended that no reasonable juror could have concluded that its negligence was a proximate cause of the plaintiffs' injuries.

The trial court denied the defendants' postverdict motions. With respect to the duty issue, the trial court stated that it had already found, in its ruling on the defendants' motions for summary judgment, that "a legal duty of care existed between the defendants and the plaintiffs as the context of their relationship created the duty. . . . The contracts created, and the defendants willingly assumed, the duty owed to [the] plaintiffs." The court also determined that the jury reasonably could have found that the defendants' representatives had agreed that the no alcohol/no loitering provisions were intended to protect motorists on the adjacent highway because "[e]ach [of the relevant witnesses] acknowledged that if people consumed alcohol while [at] highway service plazas, they would increase the risk of harm to passing motorists. Each acknowledged that motorists leaving the highway service plaza must travel on or along an interstate highway. Allowing intoxicated motorists to live [i]n highway service plazas, and operate motor vehicles from service plazas onto adjacent interstate highways, intensifies and concentrates the risk of collisions caused by drunk drivers in the area of service plazas."[9]

[9] We note that the jury was never asked to make a finding as to the scope of the defendants' undertaking or the contractual intent of the parties.

These appeals followed. The defendants contend in their appeals that the trial court improperly denied their motions to set aside the verdict and to direct judgment in their favor on the negligence claims because they owed no duty to the plaintiffs and have no liability to them under § 324A (a) or (c) of the Restatement (Second). The plaintiffs contend in their cross appeal that the trial court improperly granted summary judgment in the defendants' favor on the public nuisance claims.[10] We agree with the defendants and disagree with the plaintiffs.

II

We first address whether the defendants owed the plaintiffs a duty of care. The defendants argue that the trial court improperly denied their motions to set aside the verdict and to direct judgment in their favor on the negligence claims as a result of the court's improper determination that the defendants owed a duty of care to the plaintiffs under § 324A of the Restatement (Second). Their argument can be summarized succinctly: "Project Service [and the other defendants] did not contractually undertake a duty to prevent drunk driving on public highways."[11] In response, the plaintiffs renew

[10] The plaintiffs also contend that the trial court improperly applied the nondelegable duty doctrine to the jury's allocation of negligence. We do not address this contention because we conclude that the trial court improperly denied the defendants' motions to direct a verdict in their favor on the negligence claims and properly granted summary judgment on the public nuisance claims.

[11] For the sake of clarity and simplicity, we focus our analysis hereinafter on the question of whether Project Service, the general contractor, owed any duty or incurred any liability to the plaintiffs arising from its performance under the no alcohol/no loitering provisions in the concession agreement. On the facts of this case, the duties and liabilities of the other defendants derived from Project Service's undertaking. See footnote 4 of this opinion. Accordingly, if Project Service had no duty or liability to the plaintiffs, then it necessarily follows that the other defendants had no duty or liability to the plaintiffs. In light of our conclusion that Project Service owed no duty and incurred no liability to the plaintiffs, we need not consider the secondary argument of Alliance and 4MM that they did not owe the plaintiffs a duty even if Project Service did.

their argument, which succeeded in the trial court, that Project Service "undert[ook] . . . for consideration, to render services to another which [it] should recognize as necessary for the protection of a third person or his things, when [it] contractually obligated [itself] to operate the . . . service plaza in a safe and secure manner for the benefit of its patrons and the traveling public." (Internal quotation marks omitted.) The plaintiffs further contend that the jury reasonably could have found that (1) liability attaches under § 324A (a) because Project Service's failure to exercise due care in the performance of its contractual duties increased the risk of harm to passing motorists, and/or (2) liability attaches under § 324A (c), because (i) the plaintiffs relied on Project Service to prevent people from drinking at the service plaza and then using I-395 and would have avoided the highway if they had known that Project Service was not exercising due care, and/or (ii) the DOT relied on Project Service to prevent people from drinking at the service plaza and then using I-395, and would have taken precautions itself if not for Project Service's promise.

Our standard of review is well settled. "Directed verdicts are not favored. . . . A trial court should direct a verdict only when a jury could not reasonably and legally have reached any other conclusion. . . . In reviewing the trial court's decision [to deny the defendant's motion for a directed verdict] we must consider the evidence in the light most favorable to the plaintiff. . . . Although it is the jury's right to draw logical deductions and make reasonable inferences from the facts proven . . . it may not resort to mere conjecture and speculation. . . . A directed verdict is justified if . . . the evidence is so weak that it would be proper for the court to set aside a verdict rendered for the other party. . . . The foregoing standard of review also governs the trial court's denial of the defendant's motion for judg-

ment notwithstanding the verdict because that motion is not a new motion, but [is] the renewal of [the previous] motion for a directed verdict." (Citation omitted; internal quotation marks omitted.) *Bagley* v. *Adel Wiggins Group*, 327 Conn. 89, 102, 171 A.3d 432 (2017).

Under Connecticut law, "[t]he existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 538–39, 51 A.3d 367 (2012). "Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual." (Internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, 326 Conn. 540, 548, 165 A.3d 1167 (2017). Foreseeability is a critical factor in the analysis, because no duty exists unless "an ordinary person in the defendant's position, knowing what the defendant knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result . . . ." (Internal quotation marks omitted.) Id.; see also *Ruiz* v. *Victory Properties, LLC*, 315 Conn. 320, 328, 107 A.3d 381 (2015). Our law makes clear that foreseeability alone, however, does not automatically give rise to a duty of care: "[A] simple conclusion that the harm to the plaintiff was foreseeable . . . cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in

itself . . . but is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, supra, 549–50; see also *Lawrence* v. *O & G Industries, Inc.*, 319 Conn. 641, 650, 126 A.3d 569 (2015).

The duty analysis in the present case is complicated by the particular context in which the allegations of negligence arose against these defendants. The parties have framed the ultimate question as whether, under § 324A of the Restatement (Second), Project Service's contractual undertaking to operate the service plaza triggered a duty on its part to protect motorists on the highway from the risk of harm created by persons who consume alcohol on the premises of the service plaza.[12] In answering this question, we must keep in mind two

[12] Three observations should be noted at this point to avoid unnecessary analytical confusion. First, the discussion here is focused on the threshold question of whether a *duty* is owed to plaintiffs under § 324A of the Restatement (Second), not the question of establishing *liability* once that duty is found to exist. If a duty is owed, liability under § 324A for breach of the duty is determined by reference to subsections (a), (b) and (c) of § 324A. But the duty question comes first under § 324A, the same as it does in other areas of tort law, and this threshold inquiry must not be overlooked in cases under § 324A in which the scope of that duty is disputed. Second, as we discuss subsequently in this opinion, as in other areas of tort law, there are some circumstances in which policy considerations will be dispositive of the duty analysis, regardless of what conclusion would follow under § 324A alone. Third, it is important to keep in mind that an undertaking party can acquire an "ordinary" duty of care to others, directly and without regard to § 324A, by acts or omissions that *create* (rather than only increase) a risk of harm to others. See 2 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 43, comment (d), p. 115 (2012) (distinguishing acts that *increase* risk of harm, which are controlled by revised version of § 324A, and acts that create risk of harm, which are governed by usual rules governing negligence).

established principles of Connecticut negligence law. First, a person typically has no duty of care to protect third persons from harm caused by a primary tortfeasor, or to control the conduct of that tortfeasor, unless there is a special relationship between the defendant and either the third person or the tortfeasor, or other exceptional circumstances exist. See *Cannizzaro* v. *Marinyak*, 312 Conn. 361, 366–67, 93 A.3d 584 (2014) ("[T]here generally is no duty that obligates one party to aid or to protect another party. . . . One exception to this general rule arises when a definite relationship between the parties is of such a character that public policy justifies the imposition of a duty to aid or to protect another." [Citation omitted; internal quotation marks omitted.]); see also *Doe* v. *Boy Scouts of America Corp.*, 323 Conn. 303, 323–25, 147 A.3d 104 (2016) (discussing affirmative duty of care to protect minor participants from sexual abuse by patrol leader); *Murdock* v. *Croughwell*, 268 Conn. 559, 566, 848 A.2d 363 (2004) (special relationship of custody or control may give rise to duty to protect third person from conduct of another); *Fraser* v. *United States*, 236 Conn. 625, 632, 674 A.2d 811 (1996) (same). Section 314 of the Restatement (Second) expresses the general rule in these terms: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." 2 Restatement (Second), Torts § 314, p. 116 (1965); see also 2 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 37, p. 2 (2012) (updated version of § 314 of Restatement [Second]). Due to the increasingly interdependent nature of our social lives today, in which many institutional and other caretaking or custodial roles exist as a matter of course, relationships giving rise to such a duty of care are not uncommon, but it still is important to keep in mind that a duty of care does not

exist in the air, and caution must be exercised to ensure that a special relationship or other factors give rise to such a duty before negligence liability can be imposed for harm caused to a third person.[13]

Second, it is significant to our analysis that an owner or possessor of property in this state generally cannot be held liable in negligence for harms caused by adults who consume alcohol on that property but cause injury only after leaving to drive on the public roads.[14] This limitation holds true even when the owner or possessor plays an *active* role in creating the risk by actually serving the defendant the alcohol.[15] See *Bohan* v. *Last*, 236 Conn. 670, 676, 674 A.2d 839 (1996) ("[a]lthough we have never held that purveyors of alcohol have no [common-law] duty to exercise due care to protect the foreseeable victims of those who drink and drive, we

[13] To be clear, the discussion here related to a duty to protect in the context of off premises harm. There are other premises liability rules imposing liability on the possessor of land for harm caused by the conduct of a third person on the premises. See, e.g., 2 Restatement (Second), supra, § 344, pp. 223–24 ("[a] possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals"); see also *Merhi* v. *Becker*, 164 Conn. 516, 520, 325 A.2d 270 (1973).

[14] This rule does not apply when a property owner knowingly allows minors to consume alcohol on his or her property. See *Bohan* v. *Last*, 236 Conn. 670, 681, 674 A.2d 839 (1996) ("[i]n appropriate circumstances, adults have a duty to refrain from negligently or intentionally supplying alcohol to minors, whether such adults act as social hosts in their homes or as purveyors in a bar, because minors are presumed not to have the capacity to understand fully the risks associated with intoxication").

[15] Connecticut's Dram Shop Act, General Statutes § 30-102, governs the liability of commercial entities that *sell* alcohol to intoxicated persons. General Statutes § 30-102 provides in relevant part: "If any person, by such person or such person's agent, sells any alcoholic liquor to an intoxicated person, and such purchaser, in consequence of such intoxication, thereafter injures the person or property of another, such seller shall pay just damages to the person injured, up to the amount of two hundred fifty thousand dollars, or to persons injured in consequence of such intoxication up to an aggregate amount of two hundred fifty thousand dollars, to be recovered in an action under this section . . . ."

have, nonetheless, declined to recognize a claim in negligence"); *Quinnett* v. *Newman*, 213 Conn. 343, 345, 568 A.2d 786 (1990) ("[a]t common law there is no cause of action based upon negligence in selling alcohol to adults who are known to be intoxicated"), overruled on other grounds by *Craig* v. *Driscoll*, 262 Conn. 312, 813 A.2d 1003 (2003); *Nolan* v. *Morelli*, 154 Conn. 432, 443, 226 A.2d 383 (1967) ("the plaintiff has pointed to no common-law duty resting on these defendants, as sellers, proprietors or otherwise, to [prevent the tortfeasor, who had purchased and consumed alcohol on their property, from driving] or otherwise to guard against injuries sustained at unknown distances from the defendants' premises and at places and under circumstances wholly outside the defendants' knowledge or control").[16]

With these background principles in mind, it becomes apparent that Project Service had no common-law duty, arising from its status as possessor of the premises, to prevent the risk of harm to the plaintiffs; the alleged duty derives, if at all, from Project Service's contractual undertaking to prevent alcohol consumption and loitering at the service plaza. In other words, the question

[16] We recognize that these cases were decided on "causation" rather than "duty" grounds. See *Bohan* v. *Last*, supra, 236 Conn. 676 ("Although we have never held that [landowners who purvey alcohol to social guests] have no [common-law] duty to exercise due care to protect the foreseeable victims of those who drink and drive, we have, nonetheless, declined to recognize a claim in negligence. Such a claim has uniformly failed for the reason that the subsequent injury has been held to have been proximately caused by the intervening act of the immoderate consumer whose voluntary and imprudent consumption of the beverage brings about intoxication and the subsequent injury." [Internal quotation marks omitted.]). Both doctrines, however, are driven in significant part by considerations of policy, separate and apart from the foreseeability of harm, and it is fair to say that the causation doctrine developed in these cases is based primarily on policy considerations. For this reason, it is difficult to perceive any meaningful distinction between a doctrine holding that landowners have no duty to prevent harm to roadway travelers caused by drunk drivers and one holding that landowners have such a duty but their liability is categorically barred by the intervening act of the drunk driver.

in this case is whether Project Service, by undertaking a contractual obligation to prevent alcohol consumption and loitering on the premises, assumed a duty of care to off premises highway travelers that the DOT did not have in the first instance. The plaintiffs contend that Project Service's contractual undertaking gave rise to a duty to protect passing motorists from the risk of harm caused by persons who consume alcohol at the service plaza because the no alcohol/no loitering provisions were "necessary for the protection of" passing motorists. 2 Restatement (Second), supra, § 324A, p. 142 ("[o]ne who undertakes . . . to render services to another which he should recognize as necessary for the protection of a third person . . . is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care"). They argue that regardless of any limitation on the usual common-law duties of a property owner, Project Service assumed a duty to protect passing motorists because it knew or should have known that its contractual undertaking to prevent alcohol consumption at the service plaza would function to protect such motorists from the foreseeable risk of harm created by persons who consumed alcohol at the plaza and then drove onto the highway.[17]

In support of this claim, the plaintiffs cite numerous cases involving a party's contractual undertaking to keep premises safe in which the courts held that the undertaking party had a duty to a third person injured as the result of the negligent performance of the undertaking. See, e.g., *Gazo* v. *Stamford*, supra, 255 Conn. 252 (when owner of property abutting public sidewalk

[17] We address later in this opinion the plaintiffs' contention that, even if Project Service may not be held liable to the plaintiffs merely because it undertook to prevent alcohol consumption at the service plaza, it may be held liable because the parties to the concession agreement *specifically intended* to alter the common-law rule that a person in control of a property may not be held liable for injuries caused by a person who consumed alcohol on the property and then drove.

had duty to clear sidewalk of ice and snow, and owner contracted with defendant to perform that duty, defendant had duty to plaintiff who slipped on icy sidewalk and was injured under § 324A of Restatement [Second]); *Clay Electric Cooperative, Inc.* v. *Johnson*, 873 So. 2d 1182, 1187 (Fla. 2003) (electric company that contracted to maintain street lights on public street had duty to pedestrian who was killed as result of company's failure to maintain lights under § 324A);[18] *Ironwood Springs Christian Ranch, Inc.* v. *Walk to Emmaus*, 801 N.W.2d 193, 200 (Minn. App. 2011) (concluding that there was genuine issue of material fact as to whether entity that rented premises from owner had assumed duty to keep premises safe for benefit of invitee for purposes of § 324A); *Palka* v. *Servicemaster Management Services Corp.*, 83 N.Y.2d 579, 585–86, 634 N.E.2d 189, 611 N.Y.S.2d 817 (1994) (company that contracted with hospital to supervise preventative maintenance program was liable for injuries sustained by nurse when wall-mounted fan fell on her); *Tushaj* v. *Elm Management Associates, Inc.*, 293 App. Div. 2d 44, 48, 740 N.Y.S.2d 40 (2002) (managing agent of apartment building was liable to superintendent employed by building owner for injuries sustained as result of agent's failure to undertake repairs within its contractual obligation); see also *Marland* v. *Asplundh Tree Expert Co.*, Docket No. 1:14-CV-40 (TS), 2017 WL 639241, *1–2 (D. Utah February 16, 2017) (under Utah law, when power company had duty to prevent people from coming in contact with power line, and defendant contracted to undertake that duty on behalf of power company, defendant had duty to plaintiff who was injured as result of defen-

[18] Under Florida law, "a public or private entity which owns, operates, or controls a property, including a roadway, owes a duty to maintain that property, and a corresponding duty to warn of and correct dangerous conditions thereon." *Pollock* v. *Dept. of Highway Patrol*, 882 So. 2d 928, 933 (Fla. 2004).

dant's negligent performance of contractual undertaking under § 324A).

We consider these cases inapposite in the present circumstances, however, because each involves an undertaking party who takes on a *preexisting duty* already owed by the contracting party (the party hiring the undertaking party) to the plaintiff. In cases involving a preexisting (sometimes called a "pass-through") duty, the undertaking party is found to have the *same* duty to the injured person as the duty already owed by the contracting party itself. If Goodale had injured a patron or employee on the service plaza premises, for example, cases like *Gazo* would strongly support the conclusion that the defendants could be held liable for their negligent performance of the no alcohol/no loitering provisions because they undertook the DOT's preexisting duty "to keep its premises in a reasonably safe condition" for the benefit of invitees; (internal quotation marks omitted) *DiPietro* v. *Farmington Sports Arena, LLC*, 306 Conn. 107, 116, 49 A.3d 951 (2012); which includes the duty to protect invitees from the dangers created by allowing alcohol consumption on the premises. See *Merhi* v. *Becker*, 164 Conn. 516, 518–23, 325 A.2d 270 (1973) (when defendant union rented premises where it held picnic for union members and their guests, who were required to pay admission fee, and defendant failed to provide adequate security, defendant was liable when picnic attendee who had been consuming his own alcohol intentionally drove car toward third person and struck plaintiff, who was on premises); see also footnote 13 of this opinion. But this pass-through liability, which is imposed by § 324A (b) of the Restatement (Second), is the one theory of liability under §324A that was unavailable to the plaintiffs in the present case, because the DOT itself had no preexisting duty to protect highway travelers from the risk of harm posed by intoxicated drivers off the premises of the service plaza. See, e.g.,

Nolan v. *Morelli*, supra, 154 Conn. 443 (when tortfeasor consumed alcohol on landowner's property, landowner had no duty to guard against injuries caused by tortfeasor at off premises location wholly outside of landowner's control).

With the pass-through cases distinguished, we have arrived at the true center of the parties' dispute regarding the existence of a duty owed by the defendants to the plaintiffs. The plaintiffs argue that a duty of care arose under the facts of this case because the defendants' contractual undertaking to prevent consumption of alcohol and loitering at the service plaza constituted "services to another which he should recognize as necessary for protection of a third person" under § 324A of the Restatement (Second) and, therefore, created a duty of reasonable care owed to the plaintiffs. The plaintiffs contend that *foreseeability* is the touchstone of duty under § 324A—once the defendants agreed to the undertaking, they assumed a duty of care to all persons who sustained physical harm as a foreseeable result of the defendants' negligent performance of that undertaking.

The defendants propose a very different duty analysis under § 324A of the Restatement (Second). They argue that their contractual obligation was limited to safeguarding patrons and employees of the service plaza at the service plaza, period. The defendants contend that, even if harm to passing motorists on the highway was foreseeable, nothing in the concession agreement reflects an *intention* to safeguard those travelers; no duty to those travelers arose because the *purpose* of the contractual undertaking was not to make the highway safe or to protect travelers on the highway.

After careful consideration, we cannot subscribe entirely to the duty analysis proposed by either side, although, due in part to the idiosyncratic features of the present case, we end up adopting an approach closer to

the one proposed by the defendants. Our reservation concerning the defendants' argument is the undue weight it gives to the contractual origin of the duty owed to third parties under § 324A of the Restatement (Second). The third-party duty imposed under § 324A is implied in law. It is triggered in the first instance by a voluntary contractual (or gratuitous) undertaking, but the duty owed by the undertaking party under § 324A, once in existence, is not limited solely by reference to the underlying contract or defined solely by the intentions of the contracting parties. The duty of reasonable care imposed under § 324A exists regardless of whether there is a contract (the undertaking may be gratuitous) or whether the plaintiff is a third-party beneficiary of the contract. The terms of a contract may be relevant to the existence and scope of an undertaking, but they do not determine whether a duty exists.[19] Courts construing § 324A consistently have observed that "liability . . . does not arise from, nor is it circumscribed by, the contract [but] arises, if at all, from [the defendant's] undertaking" to render services to protect another. *Thompson* v. *Bohlken*, 312 N.W.2d 501, 507 (Iowa 1981);

[19] If the intentions of the contracting parties controlled exclusively, then there would be no need for § 324A of the Restatement (Second); we would ask only whether the motorists on I-395 were third-party beneficiaries of the concession agreement. See *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 580, 833 A.2d 908 (2003) ("[t]he ultimate test to be applied [in determining whether a person has a right of action as a third-party beneficiary] is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the [third-party beneficiary] and . . . that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties" [internal quotation marks omitted]). Section 324A exists because contractual principles alone have been deemed insufficient to provide adequate protection to those at risk of harm. See *Gazo* v. *Stamford*, supra, 255 Conn. 253–58 (holding that defendant had duty to plaintiff under § 324A, even though plaintiff was not third-party beneficiary of contract); *Jenkins* v. *Best*, 250 S.W.3d 680, 695 (Ky. App. 2007) (defendant that agreed to provide perinatal services to hospital owed tort duty to patient based on § 324A even though patient was not third-party beneficiary of contract).

see also *Davis* v. *Protection One Alarm Monitoring, Inc.*, 456 F. Supp. 2d 243, 251 (D. Mass. 2006) ("the scope of [the] defendant's duty to exercise due care cannot be limited merely to the precise boundaries of its contract, but instead are defined by the scope of the undertaking it is performing"); 2 Restatement (Third), supra, § 43, reporters' note to comment (h), p. 121 (although "[t]he existence of a contract may be relevant to the question of whether an undertaking exists . . . an undertaking does not require a valid contract, or indeed any contract, as gratuitous undertakings are sufficient" [citation omitted]). Although the contract may help to define the scope of the undertaking, "the congruence between the two need not be perfect," and the "ability of an injured party to recover [does not] rise or fall based on the exact language of the contract (or indeed [on] whether the parties had formed an enforceable contract at all) . . . ." *Davis* v. *Protection One Alarm Monitoring, Inc.*, supra, 251.

This concern, though substantial, does not lead us to conclude that the duty arising under § 324A of the Restatement (Second) extends to the outer limits of foreseeability, as the plaintiffs would have it. The plaintiffs' pure foreseeability model has superficial appeal because it is simple, it employs a familiar concept of foreseeability used in most negligence cases and, not insignificantly, it is tolerably compatible with the language of § 324A—"should recognize as necessary for protection of a third person . . . ."[20] Closer examina-

[20] A pure foreseeability model of duty is "tolerably compatible" with the relevant language of § 324A of the Restatement (Second) because the Restatement (Second) refers to "services to another which the [undertaking party] should recognize as necessary for the protection of [others] . . . ." 2 Restatement (Second), supra, § 324A, p. 142. The phrase "should recognize as necessary" is not a standard utilized in tort law, and its meaning is unclear. Cf. 1 Restatement (Second), Torts § 11, p. 19 (1965) (defining "reasonably believes" as used throughout Restatement); id., § 12, pp. 19–20 (defining "reason to know" and "should know"). Moreover, the commentary to § 324A provides no assistance in ascertaining the intended meaning. Courts appear to assume, without particularized analysis, that the phrase simply requires

tion, however, gives rise to fundamental concerns that prevent us from adopting foreseeability as the sole determinant of duty under § 324A.

As we have observed, the precise terms of a contractual undertaking will not strictly delimit the extent of the legal duty to protect third parties under § 324A of the Restatement (Second), but it would be anomalous if the nature and scope of the contractual undertaking were wholly irrelevant to the nature and scope of the duties arising from it. The foreseeability reference in § 324A is not free-floating but instead is anchored to the reasonable expectations of the undertaking party *arising from the services to be performed*. See 2

foreseeability of the third-party harm. See, e.g., *Davis* v. *Protection One Alarm Monitoring, Inc.*, supra, 456 F. Supp. 2d 249–52 (citing § 324A in support of proposition that one who assumes contractual duty must perform that duty with reasonable care to third parties who are foreseeably exposed to danger and injured as result of negligent performance); *Platson* v. *NSM, America, Inc.*, 322 Ill. App. 3d 138, 151, 748 N.E.2d 1278 (2001) ("[w]e hold . . . that [§] 324A would impose liability for [the defendant's] failure to protect [the] plaintiff against such dangers provided they were reasonably foreseeable when [the defendant's] omission occurred"); *Cantwell* v. *Allegheny County*, 506 Pa. 35, 41, 483 A.2d 1350 (1984) ("[t]his is essentially a requirement of foreseeability"); *Kuehl* v. *Horner (J.W.) Lumber Co.*, 678 N.W.2d 809, 813 (S.D. 2004) (reversing summary judgment in defendant's favor based on conclusion that "material issues of fact [exist] as to [the defendant's] assistance in loading the trailer for travel on a public highway and [its] failure to use reasonable care thereby increasing a foreseeable risk of harm to the public"); *Stephenson* v. *Universal Metrics, Inc.*, 251 Wis. 2d 171, 190, 641 N.W.2d 158 (2002) ("As this court has applied it, the framework of § 324A comports with Wisconsin's principles of negligence law. The basic principle of duty in Wisconsin is that a duty exists when a person fails to exercise reasonable care—when it is foreseeable that a person's act or omission may cause harm to someone."). In *Gazo* v. *Stamford*, supra, 255 Conn. 245, in which we adopted the principles of liability contained in § 324A (b), this court itself also underscored the important role that foreseeability plays in the extension of negligence liability to contractors. Id., 254; see id. ("[a]lthough we agree that contractors may be liable to parties whom they could not have necessarily identified specifically when entering into the original contract, they always have had a duty to perform their work in a nonnegligent manner, and our conclusion does no more than to hold contractors liable to those parties foreseeably injured by their negligence").

Restatement (Second), supra, § 324A, p. 142 (referring to "services . . . which [the undertaking party] should recognize as necessary for the protection of a third person"). It makes good sense that the scope of the duties will not be entirely independent of the scope of the undertaking when the undertaking is the original source of the duty. To summarize, under § 324A, the undertaking party not only will assume duties to third parties expressly set forth in the contract itself, as well as pass-through duties owed by the hiring party that are assigned or transferred to the undertaking party, but also will assume a duty of care to protect third parties from foreseeable, physical harm *within the scope of the services to be performed.*

Our conclusion in this regard is fully consistent with the historical origins of § 324A of the Restatement (Second) itself. Section 324A derives from the "modern" common-law rule, first adopted a century ago, that a defendant who undertakes to perform contractual services to another cannot raise a *nonprivity* defense against a third person who is injured by the defendant's negligent performance. See *Glanzer* v. *Shepard*, 233 N.Y. 236, 239, 135 N.E. 275 (1922) (Cardozo, J.) ("We do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual. Given the contract and the relation, the duty is imposed by law . . . ."); see also *Artiglio* v. *Corning Inc.*, 18 Cal. 4th 604, 613, 957 P.2d 1313, 76 Cal. Rptr. 2d 479 (1998) (§ 324A embodies principle set forth in *Glanzer*); *Kaplan* v. *U.S. Bank, N.A.*, 166 S.W.3d 60, 70 (Mo. App. 2003) (§ 324A embodies "one of the [well recognized] exceptions to the privity rule"). The animating principle behind § 324A recognizes that many modern and contemporary social activities, including commercial activities flowing from contractual undertakings, may have foreseeable effects on strangers to the transaction, and

the law sensibly imposes a duty of due care on the undertaking party to protect such persons who are put at increased risk by the negligent performance of the undertaking. The elimination of a privity defense, however, does not eliminate all *other* defenses that an undertaking party may have regarding the nature and scope of the duty imposed; nor does the elimination of privity expand the scope of the duty to third parties without limitation. Section 324A precludes a defendant from arguing that it owes no duty to third parties to the transaction merely because they are third parties. The defendant still can argue, however, that a particular third-party plaintiff belongs to a class that is outside the scope of protection afforded by § 324A due to the limited scope and nature of the particular undertaking at issue.

Under the circumstances of the present case, our task is simplified because the dispute regarding the scope of the duty arises in a very specific context involving third-party harm caused by a drunken motorist. Existing and well established Connecticut common-law rules provide significant guidance under these circumstances. As discussed previously, these rules, which the plaintiffs do not request us to revisit or rescind, exhibit a strong policy against imposing negligence liability for off premises harm caused by drunk drivers. Indeed, the defendants would not be exposed to negligence liability even if they had been operating a bar or liquor store rather than a service plaza, and had poured Goodale the alcohol that caused him to become intoxicated that day. The question presented in these appeals is whether by undertaking a contractual obligation to prevent alcohol consumption and loitering on the premises of the service plaza, the foregoing background common-law assumptions were altered such that the defendants will be deemed to have undertaken an obligation to prevent

the risk of harm posed to passing motorists by intoxicated drivers under § 324A of the Restatement (Second).

In our view, the same policy considerations underlying the preexisting Connecticut common law require, in the context of the present case, either an *express* contractual undertaking or evidence of an *unambiguous* intention on the part of the contracting parties before the law will impose a duty to protect third persons from off premises harm caused by an intoxicated driver. Unless there is sufficient evidence to support a jury finding that the contracting parties actually intended to depart from the preexisting liability rules, or some other basis for imposing a duty—e.g., a special caretaking or supervisory relationship between the defendant and either the primary tortfeasor or the victim—a landowner or possessor who undertakes to prevent the consumption of alcohol as part of its on premises responsibilities does not thereby incur a duty to protect third parties from off premises physical harm caused by a driver who became intoxicated before leaving the premises. The undertaking party's duty to protect third persons from off premises harm under these circumstances, in the absence of an express understanding between the contracting parties or an affirmative duty arising from some other source, is coextensive with the preexisting duty of the property owner under the common law. See *DiLullo* v. *Joseph*, 259 Conn. 847, 851, 792 A.2d 819 (2002) (determination as to appropriate default contract provision is based on policy considerations); *State* v. *King*, 361 Or. 646, 658, 398 P.3d 336 (2017) (contractual "[d]efault rules may be based on . . . basic principles of justice" [internal quotation marks omitted]).

In this regard, it is important to understand that the duty analysis under § 324A of the Restatement (Second) remains subject to policy based limitations. See *Ruiz* v. *Victory Properties, LLC*, supra, 315 Conn. 337 ("[t]he

final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results" [internal quotation marks omitted]); see also *Premo* v. *General Motors Corp.*, 210 Mich. App. 121, 123–24, 533 N.W.2d 332 (1995) (holding that Michigan public policy militated against imposing duty to third persons on employer who allowed intoxicated worker to drive away from workplace in alleged contravention of internal policy of preventing intoxicated employees from driving); 1 Restatement (Third), Torts, Liability for Physical and Emotional Harm § 7 (b), p. 77 (2010) ("[i]n exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty"); 2 Restatement (Third), supra, § 43, comment (b), p. 115 ("[e]ven though an affirmative duty might exist pursuant to this [s]ection, a court may decide, based on special problems of principle or policy, that no duty or a duty other than reasonable care exists"). The common-law rules that govern the premises liability of a property owner or possessor in this context embody the public policy determinations of the courts and the legislature regarding the appropriate allocation of rights and obligations among the various parties. See *Munn* v. *Hotchkiss School*, supra, 326 Conn. 549 ("duty . . . is only an expression of the sum total of those considerations of policy [that] lead the law to say that the plaintiff is entitled to protection" [internal quotation marks omitted]); see also *Barry* v. *Quality Steel Products, Inc.*, 263 Conn. 424, 440, 820 A.2d 258 (2003) ("the doctrine of superseding cause involves a question of policy and foreseeability regarding the actions for which a court will hold a defendant accountable"). There may or may not come a time in the future when those common-law rules change in response to policy developments

relating to the serious social problem of drunken driving. This case presents no occasion to consider the issue. In the absence of an express contractual provision or evidence of an unambiguous intention on the part of the contracting parties, we can perceive no reason why the policy considerations underlying our existing common-law rules of premises liability should automatically or presumptively be abrogated when a party's contract with a property owner includes an obligation to prevent alcohol consumption on the premises, without more. We therefore conclude that the duty proposed by the plaintiffs will not arise unless the parties to such a contract agree to expand the undertaking party's obligations beyond what is imposed by the existing law.

There is no evidence in the present case that the parties intended contractually to alter or extend the existing common-law rules holding that a party in the defendants' position has no duty to protect off premises travelers from the risks posed by intoxicated drivers who consumed alcohol while loitering at the service plaza. The contractual documents themselves do not mention or suggest the existence of any such duty. The documents establish only that Project Service undertook a contractual obligation to prohibit alcohol consumption and loitering at the service plaza, to notify the police of any consumption of alcohol or loitering, and to train all subcontractors and employees of subcontractors to comply with those contractual obligations. There is no reference to highway travelers or their protection in connection with the no alcohol/no loitering provision.[21] Simply put, no aspect of the con-

[21] In a different portion of the concession agreement, Project Service agreed to "maintain and control the [service plaza] in such a manner that *neither* [*Project Service*] *nor any* [*s*]*ubcontractor shall . . . intentionally impede or endanger the safe and orderly flow of traffic in and along the* [*r*]*oadways*," including I-395. (Emphasis added.) This latter provision has no connection to the no alcohol/no loitering provisions and, therefore, has no bearing on our analysis.

tract expresses an actual intention to protect highway motorists from the risk of harm created by alcohol consumption by individuals at the service plaza.

Nor does any extrinsic evidence presented by the plaintiffs demonstrate any such contractual intent. The plaintiffs submitted the deposition testimony of Paul Landino, the chief executive officer of Project Service, to support their contention that "[i]t was understood by Project Service . . . that the reason for [the no alcohol provision of the concession agreement] was the obvious danger to patrons of the service plaza and motorist on the adjacent . . . highway." Landino's testimony unquestionably supports the conclusion that the danger by its very nature is *foreseeable*, that is, that Project Service knew, or should have known, that a person who drove after consuming alcohol at the service plaza—or anywhere else—posed a foreseeable risk of harm to motorists on the roads. It is also reasonably clear that Project Service believed that preventing alcohol consumption at the service plaza could in one sense reduce the risk of such harm on the portion of the highway immediately adjacent to the service plaza.[22] But evidence that harm to motorists was a *foreseeable* result of the negligent failure to prevent alcohol consumption at the service plaza is not sufficient to establish that the no alcohol/no loitering provisions were included in the contract with the intention of protecting highway

[22] Landino testified as follows:

"Q: Do you have an understanding as to why it is that the consumption of alcohol is prohibited on the Montville service plaza premises?

* * *

"A. Yes.

"Q. Why is that?

"A. Obviously, driving and drinking is not a healthy thing to partake in.

"Q. So, I'm sure this is obvious, but so we get it clear on the record, you were aware and you understood that drinking alcohol and driving is a serious danger?

"A. Yes, sir.

"Q. And it poses even greater dangers on a highway service plaza, correct?

"A. It's bad everywhere.

"Q. I assume you were aware and you would agree that at all times prior to March 9 of 2012, you knew that the consumption of alcohol on the premises of the Montville service plaza not only posed a risk of harm to patrons at the plaza itself, but also to individuals on the highway as people would leave the plaza, correct?

"A. Absolutely.

"Q. . . . I noticed in a number of the documents, the bid proposal for instance was one of them, this document, there was an emphasis on the safety of motorists traveling on the highways in the immediate vicinity of the rest area.

"A. Yes.

"Q. You've seen that, correct?

"A. Yes, yes.

"Q. And that was and continues to be a primary concern of Project [Service], correct?

"A. Absolutely.

* * *

"Q. It is their responsibility if there is a consumption of alcohol on the property to follow the action plan that's set out for the employee, correct?

"A. That's correct.

"Q. And there is an awareness that if there's a failure to do that, that there is a serious danger to the motorists passing on the highway, correct?

"A. I would say there would be or could be."

On appeal, the plaintiffs also rely on the following trial testimony given by Landino:

"Q. And there was an awareness that if there was a failure to follow that emergency action plan, if there was a consumption of alcohol, that there is a serious danger to the motorists passing on the highway, true?

"A. Yes."

* * *

"Q. And you were aware, were you not, that if there was a failure to follow this action plan in the presence of consumption of alcohol at the Montville plaza as of March 9 of 2012, that there was a serious danger to passing motorists on the highway, true?

"A. There could be, yes."

* * *

"Q. And isn't it true, and you told me this in your deposition, and you reiterated it when I was asking you questions, that you were aware, and Project Service was aware, that . . . if they failed to control [the consumption of alcohol and living at the service plaza], that there was a serious danger or could be a serious danger to motorists on the passing highway; isn't that what you told me?

"A. Yes, sir."

travelers. Because Connecticut common law clearly establishes a rule of nonliability in this context, the plaintiffs were required to demonstrate that the parties to the undertaking had an actual intention to protect motorists when they included the no alcohol/no loitering provisions in the concession agreement. On this record, no reasonable fact finder could conclude that the parties to the concession agreement had such a specific intent.

The plaintiffs also submitted evidence at the summary judgment stage showing that loitering and alcohol consumption were ongoing problems at service plazas in this state while Project Service was operating the service plaza. In one inspection report, the DOT advised the operator of a service plaza that it had removed a sleeping homeless person from the service plaza and that "the hassle free experience at this plaza is your responsibility." In another inspection report, the DOT noted that the manager of the McDonald's restaurant at a service plaza wanted the operator of the service plaza "to remove [a] homeless man as [his presence] reduces sales and makes potential customers uncomfortable." In yet another inspection report, the DOT advised the operator of a service plaza that a "drunk man was harassing one of the [McDonald's restaurant] employees at the drive [through] window." Other inspection reports noted the presence of panhandlers and beggars at service plazas. These inspection reports do not provide the necessary evidence of contractual intention to create a jury issue. To the contrary, they tend to confirm the defendants' position that the purpose of the no alcohol/no loitering provisions was to ensure the safety and comfort of customers and employees of the service plaza. The reports cast no light on whether there was a specific intention to protect highway travelers.

We conclude that the evidence presented by the plaintiffs was insufficient as a matter of law to support a finding that the contracting parties had the specific intent to protect passing motorists from the risk of harm created by the consumption of alcohol at the service plaza. Because we hold that proof of such an intention is required in the particular context of this case, we must reverse the judgment of the trial court with respect to the plaintiffs' negligence claims and remand the case with direction to render judgment in favor of the defendants on those claims.

We recognize that the plaintiffs and their families have suffered a horrible tragedy, through no fault of their own. The plaintiffs' harm was caused by a wrongdoer, Goodale, who is morally and legally culpable for the unspeakable loss caused by his conduct. Although we understand the plaintiffs' desire to hold accountable all entities who might have contributed to their loss, we conclude for the foregoing reasons that the imposition of liability on the defendants is inconsistent with the present state of Connecticut law. Accordingly, we must reverse in part the judgment of the trial court.

III

It is unnecessary to reach the other grounds for reversal of the plaintiffs' negligence claims advanced by the defendants, but we do so briefly to demonstrate that the flaws contained in the plaintiffs' theory of liability run deep, and the judgment would not be saved even if we were to assume that Project Service undertook a duty to protect passing motorists from the risk of harm posed by intoxicated drivers. These additional grounds relate to the specific predicates to liability necessary under subsections (a) and (c) of § 324A of the Restatement (Second).

Section 324A (a) of the Restatement (Second) imposes liability only if the defendants' negligent con-

duct *increases* the risk of harm to the third party, in this case the passing motorists on I-395. See 2 Restatement (Second), supra, § 324A (a), p. 142 (person is liable for failure to perform undertaking with reasonable care if "his failure to exercise reasonable care increases the risk of such harm"). The plaintiffs claim that the defendants increased the risk of harm to them by negligently performing their undertaking of preventing the consumption of alcohol at the service plaza. They contend that if the defendants had done their job properly, the harm would have been prevented, and so their negligent performance increased the risk of harm. The flaw in this logic is concisely identified in *Jain* v. *State*, 617 N.W.2d 293 (Iowa 2000), in which the Iowa Supreme Court, analyzing a virtually identical increased risk element found in § 323 of the Restatement (Second), observed that "the increase in the risk of harm required is not simply that which occurs when a person fails to do something that he or she reasonably should have. Obviously, the risk of harm to the beneficiary of a service is always greater when the service is performed without due care. Rather . . . [liability exists] only when the defendant's actions increased the risk of harm to [the] plaintiff relative to the risk that would have existed had the defendant never provided the services initially. Put another way, the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun performance." (Citation omitted; internal quotation marks omitted.) Id., 299.

We find *Jain* persuasive as applied to the circumstances in this case and, therefore, reject the plaintiffs' suggestion that the negligent performance of an undertaking itself ordinarily will satisfy the increased risk requirement of § 324A (a) of the Restatement (Second). As the court in *Jain* recognized, under the plaintiffs' interpretation, the "increased risk" element contained

in § 324A (a) would become an illusory requirement because the failure to exercise reasonable care when performing an undertaking that is necessary for the protection of third persons will *always* increase the risk to such persons over the level of risk that would have existed *if the undertaking were performed non-negligently*. We agree with the court in *Jain* that, in the ordinary case under § 324A (a), a plaintiff must establish that the contracting party increased the risk of harm over the level of risk that would have existed if there had been no undertaking at all.[23]

There is no evidence in the present case that the defendants' acts or omissions did anything to increase the risk of harm within the meaning of § 324A (a) of the Restatement (Second). We reject, in this connection, the plaintiffs' claim that the defendants placed the plaintiffs in a worse position than they would have been in the absence of any undertaking because the defendants "made the [service] plaza an attractive option to Goodale" by permitting him to charge his cell phone in the convenience store, to use the restroom facilities and to purchase food. These allegations, even if true, do nothing to show that the conditions at the service plaza became *more* dangerous under the defendants' operation than before Project Service engaged in the undertaking, or that the defendants made the service plaza a *more* attractive option to Goodale than

[23] The Restatement (Third) points out that proof of reliance under § 324A (c) of the Restatement (Second) may also satisfy the "increase the risk of harm" requirement of subsection (a) of the Restatement (Second). See 2 Restatement (Third), supra, § 42, comment (f), p. 94 (increase in risk may be established by proving that "the plaintiff or another relied on the actor's performing the undertaking in a nonnegligent manner and declined to pursue an alternative means for protection"); see also id., § 43, comment (e), pp. 115–16 ("Reliance on an undertaking is another way in which the risk of harm may be increased. An undertaking may create an appearance of safety or make alternative arrangements appear unnecessary."). We address the issue of reliance separately in the text of this opinion.

it would have been if Project Service had never undertaken to prevent loitering and alcohol consumption in the first instance. Because there is no evidence that the plaintiffs were placed in a worse position than they would have been if there had been no undertaking in the first instance to prevent the consumption of alcohol at the service plaza, the increased risk requirement of § 324A (a) was not satisfied.

We likewise would conclude that liability under § 324A (c) of the Restatement (Second) has not been established on this record because there is insufficient evidence that either the DOT or passing motorists relied on the defendants to protect travelers on I-395. See 2 Restatement (Second), supra, § 324A (c), p. 142 (person is liable for failure to perform undertaking with reasonable care if "the harm is suffered because of reliance of the other or the third person upon the undertaking"). The plaintiffs assert that Demond and Crouch "likely would have avoided I-395 had they known [that] Project Service . . . [was] allowing an intoxicated alcoholic to live out of his car at the service plaza" but have cited no evidence that would support such a finding. Nothing in the record establishes that Demond or Crouch believed that alcohol consumption at the service plaza was not permitted or that they would have avoided I-395 if they had been aware that the defendants could not always be depended on to enforce such a prohibition.

A more substantial question under § 324A (c) of the Restatement (Second) is whether the DOT, by requiring Project Service and its subcontractors to prohibit loitering and alcohol consumption on the premises, relied on them to protect drivers on I-395 from the physical harm caused by drivers who might become intoxicated by consuming alcohol at the service plaza. It is not inconceivable to us that the DOT might wish to pursue the laudable goal of enhancing highway safety by including a provision, expressly reflecting that intention, in

its service plaza concession agreements. If it did so, and if the undertaking party agreed, then, assuming that the DOT has authority to impose such a contractual term,[24] the DOT's reliance on the undertaking party's performance presumably would trigger the undertaking party's liability to third parties under § 324A (c). But there is no evidence of any such intention here, as we previously have discussed in our duty analysis. The no alcohol/no loitering provisions say nothing about highway safety, there is nothing elsewhere in the contract to support a conclusion that the provisions were intended to enhance highway safety, and no witness testified that the DOT included the provisions to further that objective or relied on the defendants to help achieve it. Again, in the absence of such evidence, we will not presume reliance under the circumstances of this case in light of the well established, preexisting common-law rules that inform our analysis.

In summary, we conclude that the defendants' undertaking to prevent alcohol consumption and loitering at the service plaza, standing alone, did not constitute an undertaking to protect passing motorists from the risk of harm created by persons who consumed alcohol at the service plaza and then drove, thereby giving rise to a duty to such motorists under § 324A of the Restatement (Second). We also conclude that the plaintiffs have not established that the defendants increased the risk of harm to them within the meaning of § 324A (a), or that the plaintiffs or the DOT relied on the undertaking for the purposes of § 324A (c). Accordingly, we conclude that the trial court improperly denied the defendants' motions to set aside the verdict and to render judgment

[24] Alliance contended at oral argument before this court that, in the absence of action by the legislature, the DOT could not lawfully impose a contractual duty to protect third persons that is broader than the duty to protect third persons existing under the common law. In light of our resolution of the case, we need not address Alliance's contention.

in their favor on the plaintiffs' negligence claims, and we reverse the judgment as to those claims.

IV

We next address the plaintiffs' claim that the trial court improperly granted summary judgment in favor of the defendants on the plaintiffs' public nuisance claims. The plaintiffs contend that the defendants created a public nuisance by creating "an environment that allowed and encouraged Goodale to loiter and [to] consume alcohol at the . . . service plaza for over a week."[25] We affirm the judgment of the trial court on this claim.

[25] Alliance contends that the plaintiffs were not aggrieved by the trial court's granting of summary judgment in favor of the defendants on the public nuisance claims because the plaintiffs prevailed on their negligence claims and, therefore, this court lacks jurisdiction to entertain the plaintiffs' appeal. See, e.g., *Jones* v. *Redding*, 296 Conn. 352, 366, 995 A.2d 51 (2010) ("[A] litigant has no right to appeal a judgment in his or her favor merely for the purpose of having the judgment based on a different legal ground than that relied upon by the trial court, or to settle an abstract question of law. . . . Additionally, [a]s a general proposition, a party who has fully prevailed in the court below is not entitled to appeal from the judgment solely for the purpose of attacking as erroneous the reasons of the court or its conclusions of law." [Citation omitted; internal quotation marks omitted.]); see also *Soracco* v. *Williams Scotsman, Inc.*, 292 Conn. 86, 91, 971 A.2d 1 (2009) ("[i]f a party is found to lack [aggrievement], the court is without subject matter jurisdiction to determine the cause" [internal quotation marks omitted]). At oral argument before this court, Alliance contended that the plaintiffs would not be aggrieved by the trial court's ruling on the public nuisance claims even if the defendants prevailed in their appeals challenging the trial court's denial of their motions for a directed verdict in their favor on the negligence claims. We disagree. Our reversal of the judgment in the plaintiffs' favor on the negligence claims and our remand to the trial court with direction to render judgment for the defendants as to those claims places the plaintiffs in the same position they would have occupied if the trial court had ruled against them on those claims. If the defendants had prevailed on all counts, the plaintiffs obviously would have been entitled to appeal the adverse rulings on all counts, whether the rulings had come at the same time or at different stages of the proceedings in the trial court. It would make no sense to conclude that the trial court's erroneous ruling on the negligence claims somehow bars the plaintiffs' appeal from the court's earlier ruling against them on the public nuisance claims.

The standard of review is not disputed. "In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 290, 87 A.3d 534 (2014).

The substantive law governing public nuisance claims is also well established. "Section 821B of the Restatement (Second) of Torts defines a public nuisance as 'an unreasonable interference with a right common to the general public.' . . . Whether an interference is unreasonable in the public nuisance context depends, according to the Restatement (Second), on '(a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by [law] . . . .' 4 Restatement (Second), [Torts] § 821B [p. 87, (1979)]. The rights common to the general public can include, but certainly are not limited to, such things as the right to use a public park, highway, river or lake. Id., § 821D, comment (c) [p. 101]." (Citation omitted.) *Pestey* v. *Cushman*, 259 Conn. 345, 356 n.5, 788 A.2d 496 (2002).

"To prevail [on] a claim for public nuisance . . . a plaintiff must prove the following elements: (1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; [and] (4) the existence of the nuisance was the proximate cause of

the plaintiffs' injuries and damages. . . . In addition, the plaintiff must prove that the condition or conduct complained of interferes with a right common to the general public. . . . Nuisances are public where they . . . produce a common injury . . . . The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. A public nuisance is one that injures the citizens generally who may be so circumstanced as to come within its influence." (Citation omitted; internal quotation marks omitted.) *Shukis* v. *Board of Education*, 122 Conn. App. 555, 586–87, 1 A.3d 137 (2010).

In *Quinnett* v. *Newman*, supra, 213 Conn. 348, this court considered the question whether "the sale of substantial amounts of alcohol to one who thereafter operates a motor vehicle upon a public highway is analogous to the types of acts that have been held to be public nuisances." We concluded that this type of conduct by one in possession of land does not give rise to a public nuisance for the same reason that it does not give rise to a claim for negligence, namely, that the proximate cause of the plaintiff's decedent's death was the intoxicated motorist's "own immoderate use of the alcohol and not in its service to him by the defendant sellers." Id., 349.

The plaintiffs attempt to distinguish *Quinnett* on the ground that, in that case, "the inherently dangerous condition claimed to constitute a nuisance [was] the intoxicated adult operator of the motor vehicle"; id.; whereas, in the present case, the claimed dangerous condition was the "creation of an environment that allowed and encouraged Goodale to loiter and [to] consume alcohol at the highway service plaza for over a week." The supposed distinction does not survive examination on this record. As we have indicated, the plaintiff in *Quinnett* contended that the defendants' "*sale* of substantial amounts of alcohol to one who

thereafter operates a motor vehicle upon a public highway" created a public nuisance. (Emphasis added.) Id., 348. Our statement that the *intoxicated driver* was the "inherently dangerous condition claimed to constitute a nuisance" merely recognized that the defendants' sale of liquor, *in and of itself*, was not dangerous. To the extent that the defendants' conduct contributed to the creation of the dangerous condition (i.e., the intoxication of the motorist), their liability was cut off by the intoxicated motorist's own choice to consume alcohol immoderately and then drive. See id., 349; see also *Bohan* v. *Last*, supra, 236 Conn. 676 ("Although we have never held that [landowners who purvey alcohol to social guests] have no [common–law] duty to exercise due care to protect the foreseeable victims of those who drink and drive, we have, nonetheless, declined to recognize a claim in negligence. Such a claim has uniformly failed for the reason that the subsequent injury has been held to have been proximately caused by the intervening act of the immoderate consumer whose voluntary and imprudent consumption of the beverage brings about intoxication and the subsequent injury." [Internal quotation marks omitted.]); *Ely* v. *Murphy*, 207 Conn. 88, 93, 540 A.2d 54 (1988) ("At common law it was the general rule that no tort cause of action lay against one who furnished, whether by sale or gift, intoxicating liquor to a person who thereby voluntarily became intoxicated and in consequence of his intoxication injured the person or property either of himself or of another. The reason generally given for the rule was that the proximate cause of the intoxication was not the furnishing of the liquor, but the consumption of it by the purchaser or donee. The rule was based on the obvious fact that one could not become intoxicated by reason of liquor furnished him if he did not drink it." [Internal quotation marks omitted.]). Similarly, in the present case, even if we assume that the

defendants' conduct in allowing Goodale to live and consume alcohol at the service plaza contributed to the "dangerous condition" (i.e., Goodale's presence at the service plaza in an intoxicated state), established legal principles in Connecticut, which the plaintiffs have not asked us to overrule, deem the sole proximate cause of the crash to be Goodale's choice to consume alcohol immoderately and then drive on I-395. We conclude, therefore, that the trial court properly granted the defendants' motions for summary judgment on the plaintiffs' public nuisance claims.

The judgment is reversed with respect to the plaintiffs' claims for negligence and the case is remanded with direction to render judgment for the defendants as to those claims; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 331

SEAPORT CAPITAL PARTNERS, LLC
v. SHERI SPEER

SEAPORT CAPITAL PARTNERS, LLC
v. SHERI SPEAR

SEAPORT CAPITAL PARTNERS, LLC
v. SHERI SPEER ET AL.

SEAPORT CAPITAL PARTNERS, LLC *v.* 76–78
TRUMAN STREET, LLC, ET AL.

The petition of the plaintiff in error for certification to appeal from the Appellate Court, 177 Conn. App. 1 (AC 39315), is denied.

Edward Bona, self-represented, in support of the petition.

Lloyd L. Langhammer, in opposition.

Decided May 29, 2019

STATE OF CONNECTICUT *v.* JASON A. ROMAN

The defendant's petition for certification to appeal from the Appellate Court, 187 Conn. App. 903 (AC 40786), is denied.

David J. Reich, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided May 29, 2019

KERI FIELDS *v.* MICHAEL A. SKEEN

The plaintiff's petition for certification to appeal from the Appellate Court, 187 Conn. App. 903 (AC 40944), is denied.

Keri Fields, self-represented, in support of the petition.

Decided May 29, 2019

JOHN STRANO ET AL. *v.* DARWYN AZZINARO ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 188 Conn. App. 183 (AC 40752), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that the trial court properly granted the defendants' motion to strike the plaintiffs' revised complaint for failure to state a claim of intentional infliction of emotional distress?"

John R. Williams, in support of the petition.

Stephen P. Brown and *Nicole R. Cuglietto*, in opposition.

Decided May 29, 2019

BENISTAR EMPLOYER SERVICES TRUST COMPANY ET AL. *v.* JAMES J. BENINCASA ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 189 Conn. App. 304 (AC 40081), is denied.

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

Daniel J. Krisch, *Daniel P. Scapellati* and *Logan A. Carducci*, in support of the petition.

Jerome Patger and *Mark J. Kallenbach*, pro hac vice, in opposition.

Decided May 29, 2019

JASON BREE *v.* COMMISSIONER OF CORRECTION

The petitioner Jason Bree's petition for certification to appeal from the Appellate Court, 189 Conn. App. 411 (AC 40933), is denied.

Freesia Singngam Waldron, deputy assistant public defender, in support of the petition.

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

Decided May 29, 2019

Cumulative Table of Cases
Connecticut Reports
Volume 331

(Replaces Prior Cumulative Table)

Anderson *v.* Dike (Order) . . . 910
Andrade *v.* Lego Systems, Inc. (Order) . . . 921
Annulli *v.* Commissioner of Correction (Order) . . . 923
Ashmore *v.* Hartford Hospital . . . 777
Wrongful death; medical malpractice; loss of consortium; motion for remittitur of loss of consortium award; claim that this court should adopt plenary standard of appellate review of trial court's decision to grant or deny motion for remittitur and overrule prior case law establishing that such decisions are reviewed according to deferential abuse of discretion standard; whether loss of consortium award in wrongful death action presumptively should not be substantially greater than noneconomic damages portion of wrongful death award; whether jury reasonably could have found, on basis of evidence presented, that circumstances justified loss of consortium award that was substantially greater than wrongful death award; whether plaintiff's decision to terminate husband's life support constituted sort of harm that fell within ambit of loss of consortium; remand for reconsideration of defendant's motion for remittitur.
Bank of America, National Assn. *v.* Liebskind (Order) . . . 907
Becue *v.* Becue (Order) . . . 902
Benistar Employer Services Trust Co. *v.* Benincasa (Order) . . . 932
Betts *v.* Commissioner of Correction (Order) . . . 919
Board of Education *v.* New Milford Education Assn. . . . 524
Arbitration; application to vacate arbitration award; application to confirm arbitration award; claim that plaintiff board of education violated terms of parties' collective bargaining agreement; whether trial court correctly concluded that arbitrator did not manifestly disregard law in finding that claims raised in grievance were not barred under doctrines of res judicata and collateral estoppel in light of prior interest arbitration; claim that trial court incorrectly concluded that grievance was arbitrable.
Boria *v.* Commissioner of Correction (Order) . . . 902
Boucher *v.* Saint Francis GI Endoscopy, LLC (Order) . . . 905
Brennan *v.* Waterbury . . . 672
Workers' compensation; claim by city fire chief for statutory (§ 7-433c) heart and hypertension benefits; whether appeal should be dismissed on jurisdictional grounds because party identified on appeal form lacked standing to appeal from board's decision; whether claimant's estate could be proper recipient of heart and hypertension benefits if such benefits matured prior to claimant's death; whether record established that claimant's unpaid heart and hypertension benefits matured prior to his death.
Bree *v.* Commissioner of Correction (Order) . . . 933
Bruno *v.* Whipple (Order) . . . 911
Buie *v.* Commissioner of Correction (Order) . . . 905
Cannatelli *v.* Statewide Grievance Committee (Order) . . . 903
Caron *v.* Connecticut Pathology Group, P.C. (Order) . . . 922
Carson *v.* Allianz Life Ins. Co. of North America (Order) . . . 924
Citibank, N.A., Trustee *v.* Stein (Order) . . . 903
CitiMortgage, Inc. *v.* Pritchard (Order) . . . 906
Connecticut Community Bank, N.A. *v.* Kiernan (Order) . . . 911
Costello *v.* Goldstein & Peck, P.C. (Order) . . . 908
Day *v.* Seblatnigg (Order) . . . 913
Demond *v.* Project Service, LLC . . . 816
Negligence; public nuisance; summary judgment; whether trial court properly denied motions to set aside verdict and to direct judgment in favor of defendants on negligence claims; whether trial court properly concluded that defendant operators of service plaza owned by state owed duty of care to third-party motorists pursuant to Restatement (Second) of Torts (§ 324A) by undertaking contractual obligation

to prevent consumption of alcohol and loitering at plaza; reviewability of claim that defendants were not liable for negligence because their conduct did not increase risk of harm to plaintiffs; reviewability of claim that defendants were not liable for negligence because neither highway motorists nor state relied on defendants' contractual undertaking; whether trial court properly granted defendants' motions for summary judgment with respect to plaintiffs' claim that defendants created public nuisance by allowing consumption of alcohol and loitering at service plaza.

Deutsche Bank AG *v.* Sebastian Holdings, Inc. 379

Enforcement of foreign judgment; summary judgment; res judicata; collateral estoppel; certification from Appellate Court; whether Appellate Court correctly concluded that plaintiff's corporate veil piercing claim was not barred by res judicata; whether Appellate Court correctly concluded that individual defendant was not collaterally estopped from denying liability for foreign judgment rendered against defendant corporation.

Deutsche Bank National Trust Co. *v.* Cornelius (Order) 928

Dubinsky *v.* Reich (Order) 918

Eastern Savings Bank, FSB *v.* Toor (Order) 916

Essex Ins. Co. *v.* William Kramer & Associates, LLC 493

Negligence; statute of limitations (§ 52-577); continuing course of conduct doctrine; appeal from decision of United States District Court for District of Connecticut setting aside jury's verdict in favor of plaintiff on ground that there was insufficient evidence to support jury's finding that continuing course of conduct tolled statute of limitations; certification of question of law from United States Court of Appeals for Second Circuit; whether evidence presented at trial was legally sufficient to support plaintiff's claim that defendant engaged in continuing course of conduct that tolled limitation period under theory of special relationship between parties or under theory of later wrongful conduct by defendant; principles of agency and fiduciary law, discussed.

Federal National Mortgage Assn. *v.* Buhl (Order) 906

Feehan *v.* Marcone 436

Elections; whether trial court properly granted motion to dismiss plaintiff political candidate's claims for declaratory and mandatory injunctive relief; claim that elections clause of Connecticut constitution vests state legislature with exclusive jurisdiction over contested legislative elections; whether statute (§ 9-328) conferring jurisdiction on state courts in cases involving contested municipal elections applied to assembly district falling within single municipality; claim that trial court had jurisdiction to entertain plaintiff's claims regarding alleged violations of certain federal constitutional rights; whether trial court had jurisdiction to temporarily enjoin defendant state officers from canvassing votes and declaring winner in election; whether appeals from trial court's temporary injunction were rendered moot by passage of statutory (§ 9-319) deadline for canvass of votes.

Fields *v.* Skeen (Order) 931

Fingelly v. Fairfield (Order) 904

Francis *v.* State (Order) 918

Gabriel *v.* Mount Vernon Fire Ins. Co. (Order) 903

Garcia *v.* Cohen (Order) 921

Gould *v.* Stamford 289

Workers' compensation; single-member limited liability companies; denial and dismissal of claim for concurrent employment benefits pursuant to provision (§ 31-310) of Workers' Compensation Act (§ 31-275 et seq.) by Workers' Compensation Commissioner; appeal to Compensation Review Board; board's affirmance of commissioner's decision; whether board, in upholding commissioner's decision, properly reasoned that, because limited liability company of which plaintiff was only member allegedly did not maintain appropriate corporate formalities, its status as limited liability company had to be disregarded; whether chairman of Workers' Compensation Commission had authority to adopt conclusive presumption that members of single-member limited liability companies are not their employees for purposes of act; whether board incorrectly concluded that plaintiff was not employee of limited liability company and, therefore, was not entitled to concurrent employment benefits pursuant to § 31-310.

Griswold v. Camputaro 701

Zoning; consolidation of zoning appeal and zoning enforcement action; motion to open and modify stipulated judgment; motions to intervene pursuant to statute (§ 22a-19 [a] [1]); certification from Appellate Court; whether Appellate Court

correctly concluded that trial court improperly had denied motions to intervene; whether Appellate Court correctly concluded that trial court's expedited consideration of joint motion to open and modify denied proposed intervenors their statutory right to intervene pursuant to § 22a-19 (a) (1) and their right to participate in hearing under statute (§ 8-8 [n]) requiring hearing before zoning appeal is withdrawn or before settlement becomes effective; whether Appellate Court correctly concluded that trial court violated rule of practice (§ 11-15) by holding short calendar on motion to open and modify judgment less than five days after motion was filed.

Ham *v.* Commissioner of Correction (Order) 904
Hernaiz *v.* Commissioner of Correction (Order) 929
Hodges *v.* Commissioner of Correction (Order) 912
Holbrook *v.* Commissioner of Correction (Order) 928
Hynes *v.* Jones 385

Probate appeal; whether trial court properly dismissed plaintiff's appeal from Probate Court's denial of motion to dismiss guardianship proceedings; whether Probate Court had jurisdiction to monitor or approve use of money from September 11th Victim Compensation Fund previously paid to plaintiff as representative payee for benefit of minor child; history and purpose of September 11th Victim Compensation Fund, discussed.

In re Tresin J. (Order) 909
Jacobson *v.* Commissioner of Correction (Order) 901
Jones *v.* Commissioner of Correction (Order) 917
Karagozian *v.* USV Optical, Inc. (Order) 904
Lively *v.* Commissioner of Correction (Order) 929
Mangiafico *v.* Farmington 404

Action seeking, inter alia, damages and injunctive relief pursuant to federal statute (42 U.S.C. § 1983); alleged taking of property in violation of federal and state constitutions; motion to dismiss; motion for summary judgment; certification from Appellate Court; whether Appellate Court improperly upheld trial court's dismissal of plaintiff's § 1983 claims for lack of subject matter jurisdiction on ground that plaintiff was required but failed to exhaust state administrative remedies prior to bringing § 1983 claims in state court; reviewability of alternative ground for affirming Appellate Court's judgment that plaintiff's takings claims were not ripe for judicial review because there purportedly had not been final administrative decision; Laurel Park, Inc. *v.* Pac *(194 Conn. 677) and* Pet *v.* Dept. of Health Services *(207 Conn. 346), to extent they held that exhaustion of state administrative remedies is jurisdictional prerequisite to filing of § 1983 action for injunctive relief, overruled; this court's conclusion in* Port Clinton Associates *v.* Board of Selectmen *(217 Conn. 588) that lack of final administrative decision in § 1983 action alleging unlawful taking is jurisdictional defect that may be raised for first time on appeal, abandoned.*

Manzo-Ill *v.* Schoonmaker (Order) 925
Margarita O. *v.* Fernando I. (Order) 930
Margarita O. *v.* Irazu (Order) 908
Maurice *v.* Chester Housing Associates Ltd. Partnership (Order) 923
McClain *v.* Commissioner of Correction (Order) 914
Mitchell *v.* State (Order) 920
Money Source, Inc. *v.* Kilbride (Order) 930
Mosby *v.* Board of Education (Order) 917
Newland *v.* Commissioner of Correction 546

Habeas corpus; whether petitioner's claims regarding violation of constitutional right to counsel were barred by procedural default; whether, for purpose of standard set forth in Wainwright *v.* Sykes *(433 U.S. 72), prejudice may be presumed from complete denial of counsel; importance of right to counsel in criminal proceedings, discussed.*

Patty *v.* Planning & Zoning Commission (Order) 925
Raspberry Junction Holding, LLC *v.* Southeastern Connecticut Water Authority 364

Negligence; summary judgment; claim that defendant water authority, as municipal corporation engaged in proprietary function, was not immune from liability and had no authority, express or implied, to promulgate rules limiting its liability for negligence; claim that, if defendant had such authority, rule limiting liability would not be reasonable exercise of authority because defendant was not subject to regulations that might otherwise circumscribe its ability to set rates to cover liability costs.

Redding Life Care, LLC *v.* Redding 711
Writ of error; whether this court had subject matter jurisdiction to grant petition for certification to appeal from Appellate Court's judgment on writ of error; whether judgment on writ of error that had been transferred from this court to Appellate Court was tantamount to appeal for purposes of statute (§ 51-197f) governing petitions for certification to appeal; whether Appellate Court lacked subject matter jurisdiction over writ of error filed by plaintiff in error; whether trial court's interlocutory discovery order constituted appealable final judgment under this court's decision in State *v.* Curcio *(191 Conn. 27).*
Rivera *v.* Commissioner of Correction (Order) 901
Ross *v.* Commissioner of Correction (Order) 915
RoundPoint Mortgage Servicing Corp. *v.* Richloff (Order) 930
Seaport Capital Partners, LLC *v.* 76–68 Truman Street, LLC (See Seaport Capital Partners, LLC *v.* Speer) (Order) 931
Seaport Capital Partners, LLC *v.* Spear (See Seaport Capital Partners, LLC *v.* Speer) (Order) 931
Seaport Capital Partners, LLC *v.* Speer (Order) 923
Seaport Capital Partners, LLC *v.* Speer (Order) 931
Smalls *v.* Commissioner of Correction (Order) 920
Smith *v.* Commissioner of Correction (Order) 912
Soto *v.* Bushmaster Firearms International, LLC 53
Wrongful death action pursuant to statute (§ 52-555) against defendant manufacturers, distributors, and sellers of semiautomatic rifle used in school shooting; claim that defendants negligently entrusted to civilian consumers assault rifle that is suitable for use only by military and law enforcement personnel; claim that defendants violated Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) through sale or wrongful marketing of rifle; motion to strike plaintiffs' complaint; claim that all of plaintiffs' claims were barred by Protection of Lawful Commerce in Arms Act (PLCAA) (15 U.S.C. §§ 7901 through 7903 [2012]); whether trial court correctly concluded that plaintiffs did not plead legally sufficient cause of action based on negligent entrustment under state common law; whether trial court improperly struck plaintiffs' claims under CUTPA on ground that plaintiffs lacked standing because they were third-party victims who did not have consumer or commercial relationship with defendants; claim that prudential concerns supported restriction of CUTPA standing to persons who have direct business relationship with alleged wrongdoer; whether statute of limitations applicable to wrongful death claims or whether statute of limitations applicable to CUTPA claims applied to cause of action for wrongful death predicated on CUTPA violation; whether plaintiffs' wrongful death claims predicated on theory that any sale of military style assault weapons, such as rifle in question, represented unfair trade practice were time barred; whether plaintiffs' wrongful death claims predicated on theory that defendants violated CUTPA by advertising and marketing rifle in unethical, oppressive, immoral, and unscrupulous manner were time barred; claim, as alternative ground for affirming trial court's judgment, that exclusivity provision of Connecticut Product Liability Act (§ 52-572n [a]) barred plaintiffs' CUTPA claims that were predicated on defendants' allegedly wrongful advertising and marketing of rifle; whether personal injuries resulting in death that are alleged to have resulted directly from wrongful advertising and marketing practices are cognizable under CUTPA; whether PLCAA barred plaintiffs' wrongful death claims predicated on theory that defendants violated CUTPA by marketing rifle in question to civilians for criminal purposes; whether trial court correctly concluded that CUTPA, as applied to plaintiffs' allegations, fell within PLCAA's "predicate" exception to immunity for civil actions alleging that firearms manufacturer or seller knowingly violated state or federal statute "applicable" to "sale or marketing" of firearms, and violation was proximate cause of harm for which relief was sought; review of text of predicate exception and legislative history of PLCAA to determine whether Congress intended to preclude actions alleging that firearms manufacturer or seller violated state consumer protection laws by promoting its firearms for illegal, criminal purposes; whether CUTPA qualified as predicate statute under PLCAA insofar as it applied to wrongful advertising and marketing claims; whether congressional statement of findings and purposes set forth in PLCAA lent support for this court's conclusion that Congress did not intend PLCAA to preclude plaintiffs' wrongful advertising and marketing claims brought pursuant to CUTPA; whether construing statute of general applicability such as CUTPA to be predicate statute

would lead to absurd results; whether extrinsic indicia of congressional intent supported conclusion that CUTPA, as applied to plaintiffs' claims, qualified as predicate statute under PLCAA.
Stanley *v.* Scott (Order) 929
State *v.* Anderson (Order) 922
State *v.* Bennett (Order) 924
State *v.* Berrios (Order). 917
State *v.* Bischoff (Order) 926
State *v.* Brown 258
Burglary; larceny; conspiracy; attempt; criminal mischief; criminal trover; possession of burglar tools; motions to suppress; motion to dismiss; whether trial court properly granted motion to dismiss on basis of its conclusion that state obtained defendant's prospective and historical cell phone data from his telecommunications carrier in violation of statute ([Rev. to 2009] § 54-47aa); application of fourth amendment principles relating to disclosure of certain cell phone data set forth in United States Supreme Court's decision in Carpenter *v.* United States *(138 S. Ct. 2206), discussed; whether suppression of cell phone data was appropriate remedy when records were obtained in violation of defendant's fourth amendment rights and in violation of § 54-47aa; whether good faith exception to exclusionary rule was applicable to unconstitutional disclosure of historical cell phone data; whether trial court correctly determined that state failed to meet its burden of proving that inevitable discovery doctrine was applicable, under facts of case, to witness' statement to police and potential trial testimony implicating defendant in charged crimes.*
State *v.* Bumgarner-Ramos (Order) 910
State *v.* Carey (Order) 913
State *v.* Daniel B. 1
Attempt to commit murder; certification from Appellate Court; sufficiency of evidence; whether Appellate Court properly construed substantial step subdivision of attempt statute (§ 53a-49 [a] [2]) to require inquiry to focus on what already has been done rather than on what remains to be done to complete the substantive crime in determining whether defendant's conduct constituted substantial step in course of conduct planned to culminate in his commission of murder.
State *v.* Davis. 239
Criminal possession of pistol; carrying pistol without permit; conditional plea of nolo contendere; claim that trial court improperly denied defendant's motion to suppress handgun that gave rise to charges against defendant; whether anonymous 911 call in which caller claimed to have seen young man with handgun was sufficient to give rise to reasonable suspicion that defendant had been engaged in criminal activity; factors for determining whether anonymous tip has sufficient indicia of reliability under Navarette *v.* California *(572 U.S. 393), discussed.*
State *v.* Dunbar (Order) 926
State *v.* Fernando V.. 201
Sexual assault second degree; risk of injury to child; certification from Appellate Court; claim that Appellate Court improperly determined that trial court had abused its discretion in precluding testimony of complainant's boyfriend regarding complainant's behavior on ground that such testimony was cumulative of other evidence presented at trial; reviewability of state's unpreserved claim that testimony of complainant's boyfriend was properly excluded; whether improper exclusion of witness' testimony was harmless error when case turned solely on credibility of complainant's testimony.
State *v.* Grasso (Order) 928
State *v.* Gray-Brown (Order) 922
State *v.* Guerrera 628
Assault first degree; conspiracy to commit assault first degree; tampering with physical evidence; certification from Appellate Court; whether Appellate Court correctly concluded that trial court had properly granted in part motions to quash defendant's subpoena seeking certain audio recordings of his codefendants' conversations made by Department of Correction; whether trial court correctly concluded that department was not required to provide defendant with unreviewed recordings that department's monitor preserved pursuant to defendant's subpoena because they were not part of state's investigatory file and defendant failed to provide evidence to suggest that any review of them would result in exculpatory information.
State *v.* Jerrell R. (Order) 918

State *v.* Jones (Order) . . . 909
State *v.* Joseph B. (Order) . . . 908
State *v.* Juarez (Order) . . . 910
State *v.* McCoy . . . 561
Murder; certification from Appellate Court; whether Appellate Court correctly concluded that defendant was not deprived of due process right to fair trial by certain alleged prosecutorial improprieties; claim that trial court retained jurisdiction to hear timely filed motion for new trial following execution of defendant's sentence; whether trial court committed reversible error by imposing sentence while defendant's motion for new trial was pending; whether defendant's sentence should be vacated pursuant to plain error doctrine; jurisdiction of trial courts in criminal proceedings, discussed.
State *v.* Owen . . . 658
Nolle prosequi; strangulation second degree; assault second degree; unlawful restraint second degree; threatening second degree; interfering with emergency call; motion to dismiss; whether trial court properly determined that prosecutor was not exercising her discretion in manner clearly contrary to manifest public interest in seeking to enter nolle prosequi as to all charges; prosecutor's basis for claim that material witness had become disabled within meaning of statute (§ 54-56b) governing entry of nolle prosequi, discussed; whether trial court properly relied on prosecutor's representations to find that she was not abusing her discretion; whether court properly allowed prosecutor to enter nolle.
State *v.* Patel (Order) . . . 906
State *v.* Peluso (Order) . . . 924
State *v.* Purcell . . . 318
Risk of injury to child; motion to suppress; certification from Appellate Court; whether Appellate Court correctly determined that defendant's statements made during custodial interrogation did not constitute clear and unequivocal invocation of his right to counsel under standard set forth in Davis *v.* United States *(512 U.S. 452); ambiguous or equivocal requests for counsel, discussed; whether Appellate Court correctly determined that article first, § 8, of Connecticut constitution did not require police officers to cease questioning immediately and to clarify defendant's ambiguous or equivocal request for counsel during custodial interrogation.*
State *v.* Rivera (Order) . . . 911
State *v.* Roman (Order) . . . 931
State *v.* Ruiz (Order) . . . 915
State *v.* Santiago (Order) . . . 902
State *v.* Stephenson (Order) . . . 914
State *v.* Tyson (Order) . . . 919
State *v.* Walker (Order) . . . 914
State *v.* Weathers (Order) . . . 927
Strano *v.* Azzinaro (Order) . . . 932
Thomas *v.* Commissioner of Correction (Order) . . . 926
Trocki *v.* Borusiewicz (Order) . . . 907
Tuohy *v.* Groton . . . 745
Property tax appeal; whether trial court correctly concluded that defendant town's and defendant assessor's uniform application of adjustment factor to properties in specific neighborhood during revaluation was not illegal; whether plaintiff property owners were entitled to tax relief pursuant to statute (§ 12-119); professional standards for application of ratio studies during revaluation process, discussed.
U.S. Bank National Assn. *v.* Wolf (Order) . . . 901
Wethersfield *v.* PR Arrow, LLC (Order) . . . 907

CONNECTICUT APPELLATE REPORTS

Vol. 190

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

VICTOR DEMARIA *v.* CITY OF BRIDGEPORT
(AC 41234)

Lavine, Sheldon and Prescott, Js.*

Syllabus

The plaintiff sought, pursuant to the municipal defective highway statute (§ 13a-149), damages for personal injuries he sustained when he fell on a sidewalk owned by the defendant city of Bridgeport. After his fall, the plaintiff experienced certain symptoms and sought medical treatment at a veterans affairs hospital, where he consulted his primary care provider, V, and other medical professionals. V wrote a document for the plaintiff's medical file, in which she concluded that the plaintiff's injuries, including injuries to his fingers, a permanent disability of neuropathy, and left hand permanent weakness, were caused with a reasonable degree of medical certainty by his fall on the city's sidewalk. Prior to trial, the city filed a motion in limine to preclude the admission of V's treatment records, treatment reports, findings, conclusions, and medical opinions as evidence at trial. It claimed that V's treatment records and report were inadmissible under the applicable statute (§ 52-174 [b]) because the city would have no opportunity to cross-examine her, either at a deposition or at trial, as she was prevented from testifying by the applicable federal regulation (38 C.F.R. § 14.808). The trial court denied the city's motion in limine. After the jury returned a verdict for the plaintiff, the trial court denied the city's motion to set aside the verdict, and the city appealed to this court. *Held* that the trial court improperly admitted into evidence V's treatment records and report under § 52-174 (b): the plaintiff was incorrect in his assertion that our

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

Supreme Court, in *Rhode* v. *Milla* (287 Conn. 731), previously had recognized a standard for the admissibility of medical records under § 52-174 (b) that requires only that the plaintiff testify as to the relevance of the records and that the records originate from a hospital, as our Supreme Court in *Rhode* determined that it would have been improper to admit medical records under § 52-174 (b) if the opposing party had had no opportunity to cross-examine their author, either at a deposition or at trial, and in the present case, the medical records V authored should not have been admitted into evidence because V, who was prohibited from providing any opinion or expert testimony in any forum by 38 C.F.R. § 14.808, was unavailable for cross-examination at any time, and, therefore, to admit such medical records would enable a plaintiff, solely because he was treated at a veterans affairs hospital, to present favorable expert opinions from his medical provider without subjecting the author of those opinions to the crucible of cross-examination; moreover, the city was harmed by the trial court's error because the medical records concerned the central issues in the case, as the plaintiff's counsel expressly relied on V's report in closing argument to establish damages and a causal link between the plaintiff's fall and his lingering symptoms, the court did not take any measures, such as the giving of corrective instructions, which might have mitigated the effect of the evidentiary impropriety, and the improperly admitted medical records were not merely cumulative of other validly admitted testimony, as there was no other evidence from a treating medical provider rendering an opinion on either causation or the permanency of the plaintiff's injuries.

Argued January 28—officially released June 11, 2019

Procedural History

Action to recover damages for personal injuries sustained by the plaintiff as a result of an allegedly defective highway, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. William B. Rush*, judge trial referee, denied the defendant's motion to preclude certain evidence; thereafter, the matter was tried to the jury; verdict for the plaintiff; subsequently, the court denied the defendant's motion to set aside the verdict, and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Reversed*; *new trial.*

Eroll V. Skyers, for the appellant (defendant).

John H. Harrington, for the appellee (plaintiff).

Opinion

SHELDON, J. The defendant, the city of Bridgeport, appeals from the judgment of the trial court, rendered upon the verdict of a jury, awarding damages to the plaintiff, Victor DeMaria, for injuries he sustained in a fall that occurred on the defendant's sidewalk. On appeal, the defendant claims that the trial court improperly admitted into evidence certain medical records that had been written by Miriam Vitale, a physician assistant who was the plaintiff's primary care provider at the veterans affairs hospital (hospital) in West Haven, under General Statutes § 52-174 (b).[1] We agree with the defendant that the court improperly admitted the medical records written by Vitale into evidence under § 52-174 (b), and that the defendant was harmed by the court's error. Accordingly, we reverse the judgment of the trial court and remand the case for a new trial.

The record reveals the following procedural history and facts, as the jury reasonably could have found them.

[1] The defendant claims on appeal, in the alternative, that the court erred in admitting Vitale's medical records for three additional reasons: (1) the admission of Vitale's written expert opinion was precluded under the supremacy clause of the United States constitution and 38 C.F.R. § 14.808; (2) Vitale was not qualified as an expert, as required by § 7-2 of the Connecticut Code of Evidence; and (3) there was no testimony regarding the methodology that she employed in arriving at her medical opinion to establish its validity. See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). Because we conclude that it was improper to admit Vitale's medical records under § 52-174 (b), we do not reach these claims. We note, however, that the only foundation that is required for the admission of medical records or bills under § 52-174 (b) is that the record or bill be signed by a treating medical professional. See *Aspiazu* v. *Orgera*, 205 Conn. 623, 627, 535 A.2d 338 (1987). "Thus, once the statutory requirement that the report be signed by a treating physician [or physician assistant] is met, the evidence in that report is admissible and has the same effect as a business [record]." Id. Because § 52-174 (b) merely treats the report as a business record, it does not allow for the admission of medical records or parts of a medical record that would otherwise be inadmissible. See *Struckman* v. *Burns*, 205 Conn. 542, 554, 534 A.2d 888 (1987) ("[§] 52-174 [b] in no way eliminates a plaintiff's burden of establishing the relevancy of the expert opinions expressed [in the report]").

On March 27, 2014, the plaintiff tripped while walking on the sidewalk adjacent to Fairfield Avenue in Bridgeport, when he caught his foot on a raised portion of the sidewalk. As a result, the plaintiff fell forward onto his face and hands, causing him to suffer abrasions to his nose and hands, a broken nose and a broken finger on his left hand. Approximately two months after his fall, the plaintiff began to experience a burning sensation in his left arm, weakened grip strength and limited range of motion in his left hand. He sought medical attention at the hospital, where he consulted neurologists, radiologists, physical therapists, occupational therapists and his primary care provider, Vitale, concerning his symptoms. After the plaintiff received approximately two and one-half years of treatment, including extensive physical and occupational therapy, Vitale wrote a document for his medical file titled "Final Report of Injury," in which she opined that the plaintiff had reached the maximum potential use of his left hand, retained only 47 percent of his former grip strength and continued to experience pain and neuropathy in that hand. She further concluded that "these injuries were caused with a reasonable degree of medical certainty by the March 27, 2014 accident, [specifically], [to the] left fourth and fifth digit, a permanent disability of neuropathy, as well as left hand permanent weakness occurring as a result of fall and impact of [the plaintiff] during the fall."

The plaintiff brought this action against the defendant for economic and noneconomic damages under General Statutes § 13a-149,[2] alleging that his injuries had been caused by the defendant's failure to remedy a defect in its sidewalk, which it knew or should have known would cause injuries to pedestrians. Prior to

[2] General Statutes § 13a-149 provides in relevant part: "Any person injured in person or property by means of a defective road or bridge may recover damages from the party bound to keep it in repair. . . ."

trial, the defendant filed a motion in limine to preclude the admission of Vitale's treatment records, treatment reports, findings, conclusions, and medical opinions as evidence at trial. The defendant argued that Vitale's medical records were inadmissible under § 52-174 (b) because the defendant would have no opportunity to cross-examine her, either at a deposition or at trial, because she was prevented from testifying by 38 C.F.R. § 14.808.[3] The plaintiff responded that precluding the medical records would result in an injustice to him merely because his treating physician was made unavailable to testify by federal regulation and that that is the very type of injustice that § 52-174 (b) was intended to remedy. After a hearing, the court denied the defendant's motion in limine.

Following a three day trial, the jury returned a verdict for the plaintiff, awarding him $15,295.47 in economic damages and $77,500 in noneconomic damages, for a total award of $92,795.47. The court denied the defendant's subsequent motion to set aside the verdict, in which it argued, inter alia, that the trial court erred in admitting the medical records written by Vitale because the defendant had had no opportunity to cross-examine her at a deposition or at trial in violation of its common-law right to cross-examination. This appeal followed. Additional facts will be set forth as necessary.

"Whether the trial court improperly admitted evidence under § 52-174 (b) is an evidentiary question, and our review is for abuse of discretion." *Rhode* v. *Milla*, 287 Conn. 731, 742, 949 A.2d 1227 (2008). "To the extent [that] a trial court's admission of evidence is based on

[3] Title 38 of the Code of Federal Regulations, § 14.808, provides in relevant part: "(a) [Department of Veterans Affairs] personnel shall not provide, with or without compensation, opinion or expert testimony in any legal proceedings concerning official [Department of Veterans Affairs] information, subjects or activities, except on behalf of the United States or a party represented by the United States Department of Justice. . . ."

an interpretation of [our law of evidence], our standard of review is plenary. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . Thus, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling[s] [on these bases] . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did." (Internal quotation marks omitted.) *Weaver* v. *McKnight*, 313 Conn. 393, 426, 97 A.3d 920 (2014).

Section 52-174 (b) provides in relevant part: "In all actions for the recovery of damages for personal injuries or death, pending on October 1, 1977, or brought thereafter . . . any party offering in evidence a signed report and bill for treatment of any treating . . . physician assistant . . . may have the report and bill admitted into evidence as a business entry and it shall be presumed that the signature on the report is that of such treating . . . physician assistant . . . and that the report and bill were made in the ordinary course of business. . . ." Section 52-174 (b) "permits a signed doctor's report to be admitted as a business [record]. . . . [The statute] creates a presumption that the doctor's signature is genuine and that the report was made in the ordinary course of business. . . . Thus, once the statutory requirement that the report be signed by a treating physician [or physician assistant] is met, the evidence in that report is admissible and has the same effect as a business [record]. This does not mean, however, that the entire report is automatically admitted." (Citation omitted; footnote omitted.) *Aspiazu* v. *Orgera*, 205 Conn. 623, 626–27, 535 A.2d 338 (1987).

In *Struckman* v. *Burns*, 205 Conn. 542, 543, 548–49, 534 A.2d 888 (1987), our Supreme Court considered whether § 52-174 (b) would infringe upon a defendant's common-law right to cross-examination[4] if it were construed to permit the admission into evidence of records from a plaintiff's physician who, because he resided out of state, could not be subpoenaed for trial and, thus, would be unavailable for cross-examination at trial by the opposing party. The court concluded that such a reading of § 52-174 (b) did not significantly curtail the right of cross-examination in the case before it because it did not preclude the taking of the out-of-state physician's deposition in which he could have been effectively cross-examined. Id., 552.

In *Rhode* v. *Milla*, supra, 287 Conn. 732–33, 744, our Supreme Court applied its holding in *Struckman* to a case in which the plaintiff sought to introduce medical records from a chiropractor who, having invoked his fifth amendment privilege against self-incrimination, became unavailable to testify either at a deposition or at trial. In those circumstances, the court found that "the defendants did not have an adequate opportunity to cross-examine [the chiropractor] in a meaningful manner about his [records] either at his deposition or at trial because of his invocation of the fifth amendment privilege. . . . Thus, [it concluded] that the trial court improperly admitted the [records] into evidence pursuant to § 52-174 (b)." Id., 744.

The defendant claims that the present case is indistinguishable from *Rhode* and, thus, that the trial court improperly admitted the medical records containing Vitale's entries under § 52-174 (b). The plaintiff argues

[4] The court in *Struckman* "relied on *Gordon* v. *Indusco Management Corp.*, 164 Conn. 262, 271, 320 A.2d 811 (1973), for the principle that there is an absolute common-law right to cross-examination in a civil case." (Footnote omitted; internal quotation marks omitted.) *Rhode* v. *Milla*, supra, 287 Conn. 742–43.

that the defendant's reliance on *Rhode* is misplaced because that case can be distinguished from the present one. The plaintiff's argument that *Rhode* is not controlling precedent is unavailing.

The plaintiff claims that our Supreme Court recognized that medical records and bills are admissible "where the [plaintiff testifies] that the bills have been incurred as a result of the injuries received"; (internal quotation marks omitted) id., 745; and there is "corroboration as to the attendance of the doctor upon the plaintiff . . . furnished by hospital records admitted into evidence." *Bruneau* v. *Quick*, 187 Conn. 617, 622, 447 A.2d 742 (1982). Thus, the plaintiff contends that *Rhode* supports the admission of Vitale's records because the plaintiff here, like the plaintiff in *Rhode*, testified that he received the medical treatment detailed in the records, and the records of such treatment were produced by the hospital. However, the plaintiff's interpretation of *Rhode* ignores the context in which the quoted language was used and, thus, misstates the rule governing the admission of records under § 52-174 (b). The language quoted by the plaintiff immediately followed the court's conclusion that it had a "fair assurance that [the] evidentiary impropriety likely did not affect the jury's verdict." (Internal quotation marks omitted.) *Rhode* v. *Milla*, supra, 745. This language acknowledged that our Supreme Court had found error in the trial court's admission of the medical records and served as a transition to its discussion of harm. Therefore, the plaintiff is incorrect in his assertion that our Supreme Court recognized a standard for the admissibility of medical records under § 52-174 (b) that requires only that the plaintiff testify as to the relevance of the records and that the records originate from a hospital. To the contrary, the court in *Rhode* determined that it would have been improper to admit records under § 52-174 (b) if the opposing party had had no opportunity to

cross-examine their author, either at a deposition or at trial. Id., 744. Ultimately, the court found that the error in the case before it was harmless because, inter alia, the medical records did not bear upon a central issue in the case. Id., 744–46.

The plaintiff also claims that the *Rhode* court distinguishes, in its harmless error analysis, between medical evidence in personal injury cases and medical evidence in medical malpractice cases. The plaintiff argues that a complete reading of *Rhode* "reveals an equivocal treatment of medical records admission" but provides no further explanation or support for this argument.

Here, again, the plaintiff misinterprets the language used by the *Rhode* court. The language at issue appears in the court's discussion of the first factor of its harmless error analysis, where it stated: "[I]nasmuch as this case is not a medical malpractice action . . . the medical validity of [the chiropractor's] treatment methods is not a central issue herein." (Emphasis omitted.) *Rhode* v. *Milla*, supra, 287 Conn. 745. The court's language did not thereby limit the application of § 52-174 (b) to medical malpractice cases or give "equivocal treatment" to medical records in that context. Instead, it mentioned medical malpractice cases as a group of cases in which the treatment methods detailed in the medical records would likely be a central issue at trial. Moreover, as is apparent from the plain language of § 52-174 (b), the statute applies broadly to "actions for the recovery of damages for personal injuries or death . . . ." We, therefore, conclude that *Rhode* cannot meaningfully be distinguished from the present case and is controlling precedent.

Like the defendant in *Rhode*, the defendant in the present case did not have an opportunity to cross-examine the witness against it, Vitale, either at a deposition or at trial because she was legally unavailable to offer

opinion testimony in any forum. Because, more particularly, she was prohibited from providing any opinion or expert testimony by 38 C.F.R. § 14.808 and, thus, was unavailable for cross-examination at any time, the medical records she authored should not have been admitted into evidence. To admit such records would enable a plaintiff, solely because he was treated at a veterans affairs hospital, to present favorable expert opinions from his medical provider without subjecting the author of those opinions to the crucible of cross-examination.

"This conclusion does not, however, end our inquiry, because [e]ven when a trial court's evidentiary ruling is deemed to be improper, we must determine whether that ruling was so harmful as to require a new trial. . . . [A]n evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . [T]he standard in a civil case for determining whether an improper ruling was harmful is whether the . . . ruling [likely] would [have] affect[ed] the result. . . . Moreover, an evidentiary impropriety in a civil case is harmless only if we have a fair assurance that it did not affect the jury's verdict." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Hayes* v. *Camel*, 283 Conn. 475, 488–89, 927 A.2d 880 (2007).

"A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial. . . . Thus, our analysis includes a review of: (1) the relationship of the improper evidence to the central issues in the case, particularly as highlighted by the parties' summations; (2) whether the trial court took any measures, such as corrective instructions, that might mitigate the effect of the evidentiary impropriety; and (3) whether the improperly admitted evidence is merely cumulative of other validly admitted testimony. . . . The overriding question is whether the trial court's improper ruling

affected the jury's perception of the remaining evidence." (Citations omitted; internal quotation marks omitted.) Id., 489–90.

The following additional facts are relevant to our determination of harm. The plaintiff testified about his fall, his resulting injuries, and the medical treatment he received for those injuries. He explained that, since his fall, the grip strength in his left hand was less than that in his right hand, causing him to have trouble opening a bottle of water and picking up items with his left hand. By his own lay assessment, the grip strength in his left hand was "40 or 38" percent while the grip strength in his right hand was 90 percent. He further stated that, through physical therapy, he had been able to improve the grip strength in his left hand to 48 percent.

During the plaintiff's testimony, medical records were admitted into evidence as full exhibits, which detailed the plaintiff's treatment in the ambulance, at the emergency room, and in various follow-up appointments at the hospital. Included in the records was the report at issue, titled "Final Report of Injury," that had been written by Vitale. In the report, Vitale stated: "[The plaintiff] did not have these losses prior to his injuries sustained in the fall of March 27, 2014, and therefore it is concluded that [the plaintiff's] injuries were sustained from the fall on said date."

Vitale further opined that, "[a]fter extensive [physical therapy] and [occupational therapy], [the plaintiff's] diminished potential shown in the above grip strength amounts to 47 [percent] strength in his left hand as compared with his right hand. As such, this is his impairment rating in his left hand and he is considered to have achieved a maximum potential at this point." Nowhere else in the medical records that were admitted into evidence did any other treating medical provider

comment on the plaintiff's impairment rating or opine as to the cause of his ongoing symptoms. The medical records from the plaintiff's occupational therapist, however, listed the results of multiple grip strength tests of both of his hands.

In his closing argument, the plaintiff's counsel first noted that his client had sustained "permanent injuries," then read to the jury from Vitale's report. The plaintiff's counsel emphasized that the plaintiff was "considered to [have achieved] maximum potential," stating: "He can—he can squeeze all the—all the instruments, and squeezy balls and everything he wants, it's not [going to] get any better, that's it, he's stuck, stuck with this injury." Counsel then read from Vitale's report a second time, emphasizing her conclusions that the fall caused the plaintiff's injuries. He stated: "So there's no question that a competent medical professional not only found his injuries, but connected them to the accident in writing. I think that's—not only meets the burden of proof of, you know, preponderance of the evidence, I think it's—it's—it would [meet] a higher standard of clear and convincing evidence that these injuries were caused by the accident."

In the closing argument of the defendant's counsel, he questioned the reliability of Vitale's opinion by highlighting that the jury knew nothing about her qualifications and questioning the likelihood that a broken pinky could lead to the loss of function of which the plaintiff complained. In his rebuttal, the plaintiff's counsel attempted to rehabilitate Vitale by emphasizing her medical training and the length of time she had treated the plaintiff.

To determine whether the defendant was harmed by the admission of such improper evidence, we first consider the relationship of the evidence to the central issues in the case, particularly as highlighted by the

parties' closing arguments. The plaintiff's counsel expressly relied on Vitale's report in his closing argument to establish a causal link between the plaintiff's fall and his lingering symptoms. To that end, the plaintiff's counsel read from Vitale's report twice, highlighting her opinion on causation and specifically noting that that opinion established that the plaintiff had more than met his burden of proof on the issue of causation. In *Rhode*, our Supreme Court concluded that the medical records at issue did not bear on a central issue in the case because there was no question about the medical validity of the treatment methods detailed in those records and additional evidence was presented to support the plaintiff's claims of injury and disability. *Rhode* v. *Milla*, supra, 287 Conn. 745–46. Here, by contrast, the medical records at issue were the only evidence connecting the plaintiff's injuries that resulted from the fall to his lingering symptoms. Such evidence, thus, established causation while broadening the scope of damages to include compensation for prolonged suffering, disability, and resulting medical treatment. Because the plaintiff relied on the records at issue, as highlighted in his counsel's closing argument, to establish causation and damages, we conclude that such records concerned the central issues in the case.

We next consider whether the trial court took any measures, such as the giving of corrective instructions, which might have mitigated the effect of the evidentiary impropriety. No such measures were taken. To the contrary, the court cautioned the jury in its final charge that it was not to draw any adverse inference against the plaintiff from his decision to submit medical records instead of live testimony from his medical provider to prove his case.

Finally, we must consider whether the improperly admitted records were merely cumulative of other validly admitted testimony. We conclude that they were

not. In our review of the record, we could find no other evidence from a treating medical provider rendering an opinion on either causation or the permanency of the plaintiff's injuries. Although the plaintiff testified about the loss of grip strength in his hand and the records from the occupational therapist reflect the results of his grip strength tests over time, such evidence, which might have supported a lay inference of permanency, is not supported by expert opinion. Vitale's expert conclusion was, thus, not merely cumulative of such lay testimony on the issues of causation and permanency. For the foregoing reasons, we conclude that the court's evidentiary impropriety was harmful because we do not have a fair assurance that it did not affect the jury's verdict.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ALBERT EDWARD NALEWAJK
(AC 39195)

Alvord, Keller, Elgo, Bright and Moll, Js.

Syllabus

The defendant, who had been convicted on a guilty plea of the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent and failure to appear in the first degree, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. *Held* that the defendant having died during the pendency of the appeal, the appeal was dismissed as moot.

Argued March 6—officially released June 11, 2019

Procedural History

Substitute information charging the defendant with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent and failure to

appear in the first degree, brought to the Superior Court in the judicial district of Fairfield, where the defendant was presented to the court, *Iannotti*, *J.*, on a plea of guilty; judgment of guilty; thereafter, the court, *E. Richards*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Appeal dismissed.*

Daniel M. Erwin, assigned counsel, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. This opinion follows oral argument on this court's own motion to determine whether the present appeal should be dismissed as moot because the defendant, Albert Edward Nalewajk, died during the pendency of his appeal from the dismissal of his motion to correct an illegal sentence. We conclude that we lack subject matter jurisdiction and, accordingly, dismiss the appeal.

The relevant facts are not disputed. The defendant pleaded guilty to the charges of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes (Rev. to 2009) § 21a-278 (b) and failure to appear in the first degree in violation of General Statutes (Rev. to 2009) § 53a-172, and the court imposed a total effective sentence of ten years of incarceration, execution suspended after five years, followed by five years of probation. The defendant subsequently filed a motion to correct an illegal sentence, which the trial court dismissed. On May 10, 2016, the defendant filed this appeal from the court's dismissal of his motion to correct an illegal sentence. The appeal was stayed pending our Supreme Court's decisions in *State* v. *Allan*, 329 Conn. 815, 190

A.3d 874 (2018), cert. denied, U.S , 139 S. Ct. 1233, 203 L. Ed. 2d 247 (2019), and *State* v. *Evans*, 329 Conn. 770, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, L. Ed. 2d (2019). On November 16, 2018, this court lifted the appellate stay and ordered the parties to submit memoranda on or before December 17, 2018, addressing the impact of those decisions. The case was marked ready for argument on December 17, 2018.

Defense counsel thereafter notified this court, by letter dated January 3, 2019, that the defendant had died and that a formal suggestion of death would follow. On February 6, 2019, defense counsel filed a suggestion of death, accompanied by a copy of the defendant's death certificate. Although defense counsel in that filing acknowledged that "the issues presented in this appeal from a motion to correct an illegal sentence are likely moot" in light of the defendant's passing, counsel did not withdraw the appeal. In response, this court ordered the parties "to appear and give reasons, if any, why this appeal should not be dismissed as moot because the defendant has died. See *State* v. *Bostwick*, 251 Conn. 117, [740 A.2d 381] (1999); *State* v. *Trantolo*, 209 Conn. 169, [549 A.2d 1074] (1988)." We heard argument from the parties on March 6, 2019.

It is well established that "[m]ootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve." (Internal quotation marks omitted.) *Burbank* v. *Board of Education*, 299 Conn. 833, 839, 11 A.3d 658 (2011). "When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual

relief or from the determination of which no practical relief can follow." (Citation omitted; internal quotation marks omitted.) *State* v. *Bostwick*, supra, 251 Conn. 118–19.

In *State* v. *Bostwick*, supra, 251 Conn. 119, *State* v. *Corbeil*, 237 Conn. 919, 920, 676 A.2d 1374 (1996), and *State* v. *Trantolo*, supra, 209 Conn. 171, our Supreme Court dismissed the respective criminal appeals as moot because the defendants had died during the pendency of those appeals. In the present case, the defendant's death undoubtedly makes any claim regarding the legality of the sentence he was serving moot because there is no practical relief that we can afford the defendant through resolution of this appeal. In fact, we do not understand why counsel did not withdraw this appeal upon the defendant's death. Practice Book § 63-9 permits the filing of a withdrawal of an appeal prior to oral argument as of right. We therefore disagree with the suggestion made at oral argument by defense counsel that counsel was precluded from withdrawing the appeal because the defendant could not communicate whether he wished to withdraw his appeal in light of his death. Although rule 1.4 of the Rules of Professional Conduct provides that a lawyer is obligated to communicate with his or her client, and states in subsection (b) that a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation," the death of a client challenging the legality of his sentence necessarily ends the lawyer's obligation under the rule. Furthermore, we believe that a withdrawal of the appeal pursuant to Practice Book § 63-9 would have been much more consistent with counsel's obligations under rules 3.1 and 3.2 of the Rules of Professional Conduct, in that it would have conserved the resources expended by the state on what was an unnecessary hearing.

The appeal is dismissed.

STATE OF CONNECTICUT *v.* LIVORIO SANCHEZ
(AC 39193)

STATE OF CONNECTICUT *v.* MICHAEL A. FERNANDES
(AC 39194)

STATE OF CONNECTICUT *v.* FRANCISCO RODRIGUEZ
(AC 39196)

STATE OF CONNECTICUT *v.* FRANK SLAUGHTER
(AC 39198)

STATE OF CONNECTICUT *v.* MICHAEL ANTHONY THIGPEN
(AC 39199)

Keller, Bright and Bishop, Js.

Syllabus

The defendants, who previously had been convicted under informations in five separate cases of various crimes, including sale of narcotics by a person who is not drug-dependent and possession of narcotics with intent to sell by a person who is not drug-dependent in violation of statute ([Rev. to 2013] § 21a-278 [b]), appealed to this court from the judgments of the trial court dismissing their motions to correct an illegal sentence for lack of subject matter jurisdiction. The defendants claimed that because their lack of drug dependency was a fact that would result in a mandatory minimum sentence that would expose each defendant to a higher maximum sentence, their sentences were illegal because the lack of drug dependency was an element that the state was required to plead and prove beyond a reasonable doubt, which it failed to do. In making that argument, the defendants relied on *Apprendi* v. *New Jersey* (530 U.S. 466), which requires the state to charge and to prove to the fact finder beyond a reasonable doubt any factor, other than a prior conviction, that increases the maximum penalty for a crime, and *Alleyne* v. *United States* (570 U.S. 99), which extended the protections of *Apprendi* to mandatory minimum sentences. During the pendency of these appeals, our Supreme Court decided *State* v. *Evans* (329 Conn. 770), the factual and procedural history of which closely mirrored that underlying the present cases, and in which the court held that drug dependency is an affirmative defense that must be proven by the defendant, rather than an element that must be proven by the state, and, thus, that the

sentencing of a defendant under § 21a-278 (b) without a finding or admission that the defendant is not drug-dependent does not implicate *Alleyne*, which concerned the facts that must be proven by the state in order to trigger the mandatory minimum sentence for a crime. Following the release of *Evans*, the parties submitted supplemental briefs regarding its impact on their appeals. *Held* that *Evans* controlled the disposition of the defendants' appeals and, in light of that decision, the defendants' motions to correct no longer presented colorable claims of an illegal sentence: although it was improper for the trial court to have dismissed the defendants' motions to correct an illegal sentence for lack of subject matter jurisdiction because, at the time the trial court adjudicated the motions to correct before *Evans* was decided, they presented colorable claims of an illegal sentence, in light of *Evans*, it was clear that the defendants' claims of an illegal sentence would now fail on the merits, as our Supreme Court has now squarely rejected claims identical to those made by the defendants in the present cases, and, therefore, they no longer presented colorable issues; accordingly, in light of *Evans*, a trial court now faced with similar claims as the ones raised by the defendants in the present cases would not have subject matter jurisdiction to decide them, and, therefore, the judgements dismissing the motions to correct were affirmed.

Argued January 29—officially released June 11, 2019

Procedural History

Information, in the first case, charging the defendant with the crime of sale of narcotics by a person who is not drug-dependent, and information, in the second case, charging the defendant with the crimes of possession of narcotics with intent to sell by a person who is not drug-dependent and interfering with a police officer, and information, in the third case, charging the defendant with the crimes of possession of narcotics with the intent to sell by a person who is not drug-dependent, possession of narcotics with the intent to sell within 1500 feet of a school, carrying a pistol without a permit, and criminal possession of a firearm by a felon, and information, in the fourth case, charging the defendant with the crimes of sale of narcotics by a person who is not drug-dependent and possession of narcotics with the intent to sell by a person who is not drug-dependent,

and information, in the fifth case, charging the defendant with the crimes of sale of narcotics by a person who is not drug-dependent and possession of narcotics, brought to the Superior Court in the judicial district of Fairfield, where the defendants in the first, second and fourth cases were presented to the court, *Arnold*, *J.*, on pleas of guilty, and the defendants in the third and fifth cases were presented to the court, *Iannotti*, *J.*, on pleas of guilty; judgments of guilty; thereafter, the court, *E. Richards*, *J.*, dismissed the defendants' motions to correct illegal sentences, and the defendants filed separate appeals to this court. *Affirmed.*

Daniel M. Erwin, assigned counsel, with whom were *Temmy Ann Miller*, assigned counsel, and, on the briefs, *Nicholas Marolda*, assigned counsel, for the appellants (defendants).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the briefs, were *John C. Smriga*, state's attorney, *Marc R. Durso*, senior assistant state's attorney, *Nicholas J. Bove*, *Jr.*, senior assistant state's attorney, *Michael A. DeJoseph*, *Jr.*, senior assistant state's attorney, *Richard Palombo*, *Jr.*, former senior assistant state's attorney, and *Yamini Menon*, former special deputy assistant state's attorney, for the appellee (state).

Opinion

BISHOP, J. These appeals all stem from the same legal root with factual differences not pertinent to the common legal issues they present. In each case, the defendant was convicted, following a plea of guilty, of, inter alia, sale of narcotics and/or possession of narcotics with the intent to sell by a person who is not drug-dependent, in violation of General Statutes (Rev. to 2013) § 21a-278 (b),[1] and was sentenced to a term of

[1] The defendants were convicted at different times between 2011 and 2013. During this period of time, the language of § 21a-278 remained unchanged. For the sake of convenience, all references to § 21a-278 in this opinion are to the 2013 revision of the statute.

General Statutes (Rev. to 2013) § 21a-278 (b) provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, trans-

incarceration that included the statutorily mandated minimum sentence of five years. In each instance, the court made no finding, nor did the defendant admit, that he was not drug-dependent. Each defendant subsequently filed a motion to correct an illegal sentence, alleging, in essence, that his sentence was illegal because, under *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Alleyne* v. *United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), the state was required to plead and prove his lack of drug dependency beyond a reasonable doubt given that it is a fact that would result in a mandatory minimum sentence that would expose the defendant to a higher maximum sentence. The trial court dismissed each motion for lack of subject matter jurisdiction, and the defendants appealed to this court. We conclude that, in light of our Supreme Court's recent decision in *State* v. *Evans*, 329 Conn. 770, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, L. Ed. 2d (2019), the defendants' motions to correct no longer present colorable claims of an illegal sentence, and, accordingly, we affirm the trial court's dismissals of their motions.

The records in these appeals reveal the following undisputed facts and procedural history. On March 12,

ports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any narcotic substance, hallucinogenic substance other than marijuana, amphetamine-type substance, or one kilogram or more of a cannabis-type substance, except as authorized in this chapter, and who is not, at the time of such action, a drug-dependent person, for a first offense shall be imprisoned not less than five years or more than twenty years; and for each subsequent offense shall be imprisoned not less than ten years or more than twenty-five years. The execution of the mandatory minimum sentence imposed by the provisions of this subsection shall not be suspended, except the court may suspend the execution of such mandatory minimum sentence if at the time of the commission of the offense (1) such person was under the age of eighteen years, or (2) such person's mental capacity was significantly impaired, but not so impaired as to constitute a defense to prosecution."

2013, the defendant Livorio Sanchez was convicted, following a plea of guilty, of sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b). During the plea canvass, the prosecutor recited the facts underlying the alleged sale of heroin by Sanchez, but he made no representation as to whether Sanchez was drug-dependent. Similarly, during the questioning of Sanchez by the court, *Arnold*, *J.*, there was no discussion of drug dependency. Sanchez was subsequently sentenced on May 15, 2013, in accordance with an agreed upon disposition, to a term of incarceration of twelve years, execution suspended after eight years, followed by three years of probation. As a condition of his probation, the court ordered that he undergo "substance abuse evaluation and treatment including random urinalysis . . . ." During the sentencing hearing, however, there was no discussion by the court, counsel, or Sanchez of the issue of drug dependency, nor did the court make explicit that the defendant's period of incarceration included a mandatory minimum period of five years pursuant to § 21a-278 (b).

On April 12, 2012, the defendant Michael A. Fernandes was convicted, following a plea of guilty, of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b).[2] During a colloquy with defense counsel prior to canvassing Fernandes, the court, *Arnold*, *J.*, noted, and defense counsel agreed, that the narcotics charge included a mandatory minimum sentence of five years of incarceration. During the canvass itself, although the court asked Fernandes if his counsel had advised him of the elements of the charge to which he was pleading guilty and the mandatory minimum penalties that he could receive, there was no mention by the court or counsel of drug dependency. Having waived the requirement

[2] Fernandes also was convicted, on a plea of guilty, of interfering with a police officer in violation of General Statutes § 53a-167a.

of a presentence investigation report, Fernandes was immediately sentenced, pursuant to an agreed upon disposition, to a term of incarceration of ten years, execution suspended after five years, followed by a period of three years of probation. In reciting Fernandes' sentence, the court stated that the five year period of incarceration was the mandatory minimum sentence required by the statute.

On February 27, 2012, the defendant Francisco Rodriguez was convicted, following a plea of guilty, of possession of narcotics with the intent to sell by a person who is not drug-dependent in violation of § 21a-278 (b).[3] In response to a question from the court, *Iannotti*, *J.*, at the outset of its canvass, Rodriguez confirmed that his counsel had explained the maximum and mandatory minimum sentences to which his plea could expose him. Rodriguez also acknowledged during the canvass that by pleading guilty, he was giving up a number of enumerated rights, including the right to present defenses on his behalf at trial. Throughout the proceeding, there was no mention by the court, counsel, or Rodriguez of the issue of drug dependency. Having waived the requirement of a presentence investigation report, Rodriguez was immediately sentenced, pursuant to an agreed upon disposition, to a total effective term of incarceration of ten years, five of which reflected the mandatory minimum sentence under § 21a-278 (b).

On September 9, 2013, the defendant Frank Slaughter was convicted, following a plea of guilty, of one count of sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b) and two counts of

[3] Rodriguez also was convicted, on a plea of guilty, of possession of narcotics with the intent to sell within 1500 feet of a school in violation of General Statutes (Rev. to 2011) § 21a-278a (b), carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and criminal possession of a firearm by a felon in violation of General Statutes (Supp. 2012) § 53a-217. Rodriguez admitted, as well, to a violation of probation.

possession of narcotics with the intent to sell by a person who is not drug-dependent also in violation of § 21a-278 (b). As part of a plea agreement, the other charges then pending against Slaughter were nolled by the state. At the beginning of the canvass, the state informed the court, *Arnold*, *J.*, that all three counts required a mandatory minimum sentence of five years, and, in response to questioning from the court, Slaughter initially stated that he was unaware that the agreed disposition included a mandatory minimum period of incarceration of five years. After a brief colloquy, however, Slaughter stated to the court that he understood that the sentence to be imposed would carry a minimum term of five years of incarceration.

The record further reflects that before the court sentenced Slaughter, but after the court had stated the sentences to be imposed, Slaughter interjected as follows: "[A]s long as I've been coming in and out of the courthouse, I've been drug-dependent. I been drug-dependent. Now that I'm being charged with a drug-dependent case, how is that . . . ." At this juncture, the court pointed out to Slaughter the number of charges initially confronting him and the fact that, if he was convicted after trial, he could face "close to eighty years' worth of exposure." The court continued to inform Slaughter that it would accept his guilty pleas only if they were made voluntarily, and it offered him the opportunity either to withdraw his pleas or to proceed with the sentencing. Slaughter responded, "[p]roceed." After confirming Slaughter's response, the court found that his guilty pleas were knowingly and voluntarily made and found him guilty as to all three counts. Because Slaughter waived the requirement of a presentence investigation report, the court proceeded immediately to sentence him, pursuant to an agreed upon disposition, to twelve years of incarceration for each count, execution suspended after seven years, five of

which were mandatory, followed by a five year period of probation. As a condition of his probation, the court ordered that Slaughter undergo "substance abuse evaluation and treatment as deemed appropriate by the Department of Adult Probation." Other than Slaughter's statement that he was drug-dependent, there was no discussion by the court or counsel regarding the relationship between drug dependency and the criminal charges to which Slaughter pleaded guilty. Notably, when Slaughter raised the issue of his drug dependency, there was no discussion by the court or counsel as to whether such a claim could be a defense to any of the charges.

On July 26, 2011, the defendant Michael Anthony Thigpen was convicted, following a plea of guilty, of sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b).[4] During the canvass, Thigpen confirmed with the court, *Iannotti*, *J.*, that his counsel had discussed with him the elements of the offenses to which he was pleading guilty, as well as the maximum and mandatory minimum sentences to which his guilty pleas would expose him. Thigpen also acknowledged that he was giving up his right to present defenses by pleading guilty. There was no discussion by the court, counsel, or Thigpen of the issue of drug dependency. On September 22, 2011, pursuant to an agreed upon disposition, Thigpen was sentenced to a term of incarceration of fifteen years, execution suspended after eight years, five of which were mandatory, to be followed by three years of probation. As conditions of his probation, the court ordered him to undergo substance abuse evaluation and treatment, as deemed necessary, and to attend "ten weekly [Narcotics Anonymous] meetings." When asked if he wanted to speak prior to being

[4] In addition, upon his own admission, Thigpen was found to have violated his probation. He also was convicted, on a plea of guilty, of possession of narcotics in violation of General Statutes (Rev. to 2011) § 21a-279 (a).

sentenced, Thigpen indicated to the court that he had a heart condition for which he required medication and treatment. At no time during this hearing was the issue of drug dependency raised or discussed by the court, counsel, or Thigpen.[5]

On August 22, 2014, the defendants filed the operative, amended motions to correct their allegedly illegal sentences pursuant to Practice Book § 43-22;[6] although each was filed separately, the motions were identical in substance. The defendants claimed, inter alia, that their sentences were illegal because, under *Apprendi* v. *New Jersey*, supra, 530 U.S. 466, and *Alleyne* v. *United States*, supra, 570 U.S. 99, the sentences "exceed[ed] the relevant statutory maximum limits" and "the fact triggering the mandatory minimum sentence was not found by a proper fact finder or admitted by the defendant . . . ."[7] The state opposed the defendants'

[5] In light of the state of Connecticut's "Second Chance Society" initiatives and an attendant increased awareness of the central role drug dependency plays in criminal conduct, we believe that it would be appropriate for a trial court, while canvassing a defendant on a plea of guilty to a violation of § 21-278 (b), to ensure that the defendant understands that drug dependency is an affirmative defense to the charge and that a guilty plea constitutes a waiver of that defense, and to ensure that any such waiver is made knowingly and voluntarily. We make this suggestion in view of the fact that a guilty plea to this offense may, at least for the mandatory minimum period of incarceration, disqualify a defendant from participation in any intensive residential community based drug treatment program.

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

[7] In their motions to correct, the defendants also claimed that their sentences were illegal or imposed in an illegal manner because (1) the court relied on "an inaccurate understanding" of the relevant facts and legal principles, (2) the court was "unaware of the available sentencing range [due to an erroneous belief] that it was required to impose the mandatory minimum sentence," and (3) the sentences violated the rule of lenity and the requirement of article first, § 9, of the Connecticut constitution that no person shall be confined unless clearly warranted by law. In subsequently filed memoranda of law in support of the motions, the defendants additionally claimed that their sentences were illegal and imposed in an illegal manner

motions to correct, arguing, inter alia, that the court lacked subject matter jurisdiction because the motions attacked the validity of the defendants' guilty pleas rather than the sentences imposed.

The court, *E. Richards*, *J.*, heard the motions together in one proceeding on January 29, 2015.[8] On May 6, 2015, the court issued a memorandum of decision dismissing the motions to correct. Following its comprehensive review of the factual record and the relevant federal and Connecticut appellate decisional law, the court concluded that the defendants were, in essence, attacking their convictions and not their sentences and, for that reason, the court dismissed their motions for lack of subject matter jurisdiction. The defendants appealed to this court, arguing that the trial court misconstrued their motions to correct and that, properly construed, they alleged cognizable claims of an illegal sentence under *Apprendi* and *Alleyne*.[9]

because they violated the defendants' state and federal constitutional rights to equal protection of the laws and due process, in that there is no rational basis for punishing the same behavior with differing punishments under two separate statutes. The trial court determined that it lacked subject matter jurisdiction to decide these claims as well. The defendants do not challenge this determination on appeal, and we therefore do not address them further.

[8] In conjunction with these motions, the court also heard a similar motion to correct filed by Albert Nalewajk. Nalewajk appealed from the same memorandum of decision giving rise to the present appeals. On February 6, 2019, while Nalewajk's appeal was pending, his counsel filed a suggestion of death indicating that Nalewajk had died. Consequently, this court dismissed the appeal as moot. See *State* v. *Nalewajk*, 190 Conn. App. 462, A.3d (2019).

[9] While these appeals were pending and before the date of oral argument, we sent a notice to counsel in each appeal informing them that, at oral argument, they should be prepared to address the following additional issues at oral argument: "Is any defendant's case moot because: (1) he has fully served the incarceration part of his sentence; or (2) he has fully served the mandatory minimum portion of his incarceration sentence?" On the basis of representations made by counsel at oral argument, we are not able to conclude that any of the appeals at hand are moot for either of the reasons set forth in our notice to counsel.

On April 13, 2017, after the defendants had briefed their claims but before oral argument was scheduled, this court issued orders staying each appeal pending our Supreme Court's decisions in *State* v. *Evans*, supra, 329 Conn. 770, and *State* v. *Allan*, 329 Conn. 815, 190 A.3d 874 (2018), cert. denied, U.S. , 139 S. Ct. 1233, 203 L. Ed. 2d 247 (2019), the factual and procedural history of which closely mirror that underlying the present cases. Following the release of those decisions, the parties submitted supplemental briefs regarding the impact of the decisions on the present cases.[10] Because *Evans* controls our disposition of the defendants' appeals, we begin with a discussion of that decision.[11]

The defendant in *Evans* was convicted, following a plea of guilty, of sale of narcotics by a person who is not drug-dependent in violation of § 21a-278 (b). *State* v. *Evans*, supra, 329 Conn. 774. The issue of drug dependency was not discussed by the court, counsel, or the defendant during the plea hearing. Id. After being sentenced to five years of imprisonment with five years of special parole, the defendant filed a motion to correct an illegal sentence. Id., 775. Just as in the present cases, the defendant in *Evans* claimed in his motion to correct that his sentence was illegal because, inter alia, under *Alleyne* and *Apprendi*, the sentence "exceed[ed] the relevant statutory limits" and "the fact triggering the mandatory minimum [sentence] was not found by a

[10] On November 16, 2018, this court issued the following order in each of the appeals at hand: "It is hereby ordered that the stay of the appeal is lifted. The parties are also hereby ordered to file memoranda of no more than ten pages on or before December 17, 2018, addressing the impact of *State* v. *Evans*, [supra, 329 Conn. 770] and *State* v. *Allan*, [supra, 329 Conn. 815], on the appeal." The state and the defendants timely complied with this order.

[11] *Allan* is the companion case to *Evans* and is factually and procedurally similar to it. See *State* v. *Allan*, supra, 329 Conn. 816, 819. We therefore do not separately discuss *Allan*.

proper [fact finder] or admitted by the defendant . . . .'' (Internal quotation marks omitted.) Id.

The trial court in *Evans* denied the defendant's motion to correct on the merits. Id., 776. The trial court began by ''observing that, in *State* v. *Ray*, [290 Conn. 602, 623–26, 966 A.2d 148 (2009)], [our Supreme Court] had concluded that *Apprendi*, which requires that the state charge, and prove to the fact finder beyond a reasonable doubt, any factor, other than a prior conviction, that increases the maximum penalty for a crime; see *Apprendi* v. *New Jersey*, supra, 474–97; did not apply to proof of drug dependency under § 21a-278 (b) because such proof constitutes an affirmative defense under that statute. The trial court then rejected the defendant's argument that *Ray* is no longer good law under *Alleyne*, which extended the rule set forth in *Apprendi* to facts that increase a statutory minimum sentence. See *Alleyne* v. *United States*, supra, [570 U.S.] 103. After rejecting the defendant's other challenges to his sentence, the trial court rendered judgment denying the motion to correct an illegal sentence.'' (Footnotes omitted.) *State* v. *Evans*, supra, 329 Conn. 775–76.

On appeal to our Supreme Court,[12] the defendant claimed, inter alia, that the court should overrule its interpretation of § 21a-278 (b) in *Ray* because the United States Supreme Court's subsequent decision in *Alleyne* v. *United States*, supra, 570 U.S. 99, requires the state to plead and prove beyond a reasonable doubt those facts, such as lack of drug dependency under § 21a-278 (b), that trigger mandatory minimum sentences. *State* v. *Evans*, supra, 329 Conn. 791. The state disagreed with the merits of the defendant's claims and

[12] The court in *Evans* had granted the defendant's motion to transfer his appeal from the Appellate Court to our Supreme Court, pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2. *State* v. *Evans*, supra, 329 Conn. 773 n.2.

further contended that the trial court should have dismissed the defendant's motion to correct for lack of subject matter jurisdiction. Id., 776.

The court first addressed the state's challenge to the trial court's subject matter jurisdiction. The state argued, inter alia, that the defendant's motion to correct did not challenge the sentencing phase of the proceeding but, rather, the underlying conviction. Id., 778; see also *State* v. *Lawrence*, 281 Conn. 147, 158, 913 A.2d 428 (2007) ("[A] challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, *the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack*." [Emphasis added.]). The court disagreed. It began by noting that "[t]he state's jurisdictional challenge require[d] [it] to consider whether the defendant ha[d] raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid. . . . [This] jurisdictional inquiry is guided by the plausibility that the defendant's claim is a challenge to his sentence, rather than its ultimate legal correctness." (Citations omitted; internal quotation marks omitted.) *State* v. *Evans*, supra, 783–84.

Turning to the defendant's claims, the court in *Evans* noted that he was not asking it "to disturb his conviction under § 21a-278 (b), or otherwise claim[ing] that he was convicted under the wrong statute. Instead, the defendant [was seeking] resentencing, claiming that § 21a-278 (b) merely enhances the penalty available

under [General Statutes (Rev. to 2013)] § 21a-277 (a)[13] when those statutes are read with the judicial gloss rendered necessary by the United States Supreme Court's decisions in *Alleyne* v. *United States*, supra, 570 U.S. 99, and *Apprendi* v. *New Jersey*, supra, 530 U.S. 466." (Footnote added.) Id., 785. "Given the otherwise identical statutory language of §§ 21a-277 (a) and 21a-278 (b), and the lack of any case law from [our Supreme Court] squarely rejecting the defendant's proffered interpretation of § 21a-278 (b) as merely providing a penalty enhancement in view of the [United States] Supreme Court's decision in *Alleyne*, which extended the protections of *Apprendi* to mandatory minimum sentences . . . [the court] conclude[d] that the defendant's interpretation of the narcotics statutory scheme [was] sufficiently plausible to render it colorable for the purpose of jurisdiction over his motion." (Citation omitted.) Id., 786.

The court then turned to the defendant's claim that *Ray* should be overruled in light of *Alleyne*. Id., 791. The court began with a review of its decision in *Ray* interpreting § 21a-278 (b), which provides in relevant part that "[a]ny person who . . . sells . . . to another person any narcotic substance . . . and who is not, at the time of such action, a drug-dependent person, for

[13] For the reasons stated in footnote 1 of this opinion, we refer to the 2013 revision of § 21a-277, which provides: "Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned."

a first offense shall be imprisoned not less than five years or more than twenty years . . . .'' General Statutes (Rev. to 2013) § 21a-278 (b). ''[I]n *Ray*, [the court] declined the defendant's invitation to follow the analysis of Justice Berdon's dissent in [*State* v. *Hart*, 221 Conn. 595, 615–22, 605 A.2d 1366 (1992) (*Berdon*, *J.* dissenting)], which interpreted § 21a-278 (b) to be effectively . . . an aggravated form of § 21a-277 and concluded that, therefore, the 'not . . . a drug-dependent person' language in § 21a-278 (b) constitutes an aggravating factor that must be treated as an element and must be proven by the state.'' (Footnote omitted; internal quotation marks omitted.) *State* v. *Evans*, supra, 329 Conn. 794–95. ''Applying the principles of [United States Supreme Court case law leading to *Apprendi*, including *Patterson* v. *New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977), the court in *Ray* further concluded] that placing the burden on the defendant to prove by a preponderance of the evidence a fact—drug dependency—that affects the severity of his punishment under § 21a-278 (b) is not unconstitutional.'' (Internal quotation marks omitted.) *State* v. *Evans*, supra, 797.

With this review of *Ray* in mind, the court then turned to the defendant's claim that the United States Supreme Court's decision in *Alleyne* required it to overrule *Ray*. The defendant argued that ''lack of drug dependency has the effect of increasing punishment 'above what is otherwise legally prescribed'; *Alleyne* v. *United States*, supra, [570 U.S.] 108; by the otherwise identical § 21a-277 (a) and, therefore, is an element of the offense to be proven by the state. Accordingly, the defendant argue[d] that the imposition of a mandatory minimum sentence was improper because the state did not prove, nor did the defendant admit, a lack of drug dependency.'' *State* v. *Evans*, supra, 329 Conn. 798.

After reviewing *Alleyne* and related federal precedent, the court in *Evans* held that "*State* v. *Ray*, supra, 290 Conn. 602, remains good law in the wake of *Alleyne*. Although *Alleyne* extended *Apprendi* to mandatory minimum sentences, *Alleyne* did *not* disturb those portions of *Apprendi* that reaffirmed *Patterson* v. *New York*, supra, 432 U.S. 208–10, which upheld the states' prerogative to utilize affirmative defenses to mitigate or eliminate criminal liability without running afoul of due process. Moreover, *Alleyne* did nothing to disturb long-standing Supreme Court precedent holding that whether a sentencing factor is, in essence, an element requiring the state to plead and prove it beyond a reasonable doubt, or an affirmative defense, the pleading and proof of which may be allocated to the defendant, is a matter of state law for 'authoritative' determination by state courts interpreting state statutes . . . ." (Citation omitted; emphasis in original.) *State* v. *Evans*, supra, 329 Conn. 802–803. Accordingly, after rejecting the defendant's remaining claims, the court affirmed the trial court's denial of his motion to correct an illegal sentence. Id., 815.

In sum, the court in *Evans* cemented its prior holding in *Ray* that drug dependency is an affirmative defense to § 21a-278 (b) that must be proven by the defendant, and, thus, it held that the sentencing of a defendant under § 21a-278 (b) without a finding or admission that the defendant is not drug-dependent does not implicate *Alleyne*, which deals with facts that must be proven *by the state* in order to trigger the mandatory minimum sentence for a crime.

In the present cases, the defendants argued before the trial court that *Ray* is no longer good law in light of *Alleyne* and that not being drug-dependent therefore constitutes an element of § 21a-278 (b) that must be proven by the state. In view of *Evans*, it is clear that the defendants' claims of an illegal sentence would fail

on the merits. The trial court in the present cases, however, did not dispose of the defendants' motions to correct on the merits; it dismissed them for lack of subject matter jurisdiction.

The court's jurisdictional holding in *Evans* leads us to conclude that the trial court's dismissals in the cases at hand were improper because, at the time the trial court adjudicated the defendants' motions—pre-*Evans*—they presented colorable claims of an illegal sentence. See id., 786–88. In our view, however, the defendants' claims have since lost their hue. One of the primary reasons underlying the court's conclusion in *Evans* regarding jurisdiction was the fact that there had been a "lack of any case law from [our Supreme Court] squarely rejecting the defendant's proffered interpretation of § 21a-278 (b) as merely providing a penalty enhancement in view of the [United States] Supreme Court's decision in *Alleyne* . . . ." Id., 786. Because our Supreme Court has now squarely rejected claims identical to those made by the defendants in the present cases, they no longer present colorable issues. Accordingly, although it was error, at the time, for the trial court to have dismissed the defendants' motions for lack of subject matter jurisdiction, in light of *Evans*, a trial court faced with such claims today would not have subject matter jurisdiction to decide them. We therefore affirm the trial court's dismissals, as it would serve no beneficial purpose to remand the cases with direction to dismiss the motions pursuant to *Evans*.[14]

The judgments are affirmed.

In this opinion the other judges concurred.

[14] It is well accepted that "[w]hen a trial court reaches a correct outcome, but on grounds that cannot be sustained, [this court has] repeatedly upheld the court's judgment if there are other grounds to support it." (Internal quotation marks omitted.) *Lederle* v. *Spivey*, 151 Conn. App. 813, 818, 96 A.3d 1259, cert. denied, 314 Conn. 932, 102 A.3d 84 (2014).

STATE OF CONNECTICUT *v.* RAMON A. G.* (AC 39704)

Keller, Elgo and Moll, Js.

Syllabus

Convicted of the crimes of assault in the third degree and criminal violation of a protective order in connection with an incident in which the defendant assaulted the victim, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court violated his constitutional rights to due process and to present a defense by improperly declining to give a jury instruction on the defense of personal property with respect to the assault charge against him: the claim of instructional error was not properly preserved for appellate review, as neither the defendant's written request to charge nor anything else in the record indicated that the defendant ever alerted the trial court to the distinct instructional deficiency claimed on appeal; moreover, the doctrine of implied waiver precluded substantive consideration of the defendant's claim of instructional impropriety, as the record revealed that the defendant was provided with a meaningful opportunity to review the trial court's initial draft charge that the court provided during an in-chambers conference, the revised draft charge that the court sent to the parties later that night and the final draft charge that the court provided prior to the parties' closing arguments, that the court solicited and received comments from the parties over the course of multiple charge conferences, that the defendant thereafter expressed satisfaction with both the draft charge and the ultimate charge that the court delivered to the jury and that at no time at trial did the defendant voice any objection regarding the instructional deficiency he alleged on appeal.
2. The prosecutor's improper comment that certain cell phone records that were not in evidence probably would have helped the state's case did not deprive the defendant of a fair trial, as it did not so infect the trial with unfairness that the defendant's resulting conviction amounted to a denial of due process; the prosecutorial impropriety consisted of a single, isolated, inadvertent comment during rebuttal argument that was not particularly severe, the comment was not central to the critical issues in the case, as the existence of the cell phone records had little bearing on the question of whether the defendant perpetrated the charged offenses, the comment was invited by the defendant's testimony that suggested that the cell phone records would have corroborated his trial testimony, the state's case against the defendant was strong with

* In accordance with our policy of protecting the privacy interest of the victim of a criminal violation of a protective order, we decline to identify the victim or others through whom the victim's identity may be ascertained.

respect to the crimes of which he was convicted, and the trial court gave the jury a curative instruction that it should not consider the prosecutor's improper comment because it was not supported by evidence in the record.

Argued January 10—officially released June 11, 2019

Procedural History

Substitute information charging the defendant with the crimes of robbery in the first degree, assault in the second degree and criminal violation of a protective order, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Keegan, J.*; verdict and judgment of guilty of the lesser included offense of assault in the third degree and of criminal violation of a protective order, from which the defendant appealed to this court. *Affirmed.*

Jennifer B. Smith, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Elizabeth Moseley*, senior assistant state's attorney, for the appellee (state).

Opinion

ELGO, J. The defendant, Ramon A. G., appeals from the judgment of conviction, rendered after a jury trial, of assault in the third degree in violation of General Statutes § 53a-61 and criminal violation of a protective order in violation of General Statutes § 53a-223 (a). On appeal, the defendant claims that (1) the trial court improperly declined to furnish a jury instruction on the defense of personal property with respect to the assault charge and (2) prosecutorial impropriety during closing argument deprived him of his due process right to a fair trial. We affirm the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. In August, 2012, the victim began what she described

at trial as a "toxic relationship" with the defendant, which lasted seven months and concluded in March, 2013. On March 18, 2013, a protective order was issued that prohibited the defendant from having any contact with the victim.

At approximately nine o'clock on the evening of March 22, 2013, the victim received a text message from the defendant indicating that he wanted to meet with her.[1] Although initially hesitant, she ultimately agreed to do so and began walking toward the apartment where the defendant resided with his mother, who at that time was hospitalized. The defendant then picked the victim up in a motor vehicle and continued to the apartment, where they socialized with other individuals. When some attendees became rowdy, the victim decided to leave. As she exited the apartment, the victim took the keys to a vehicle belonging to the defendant's mother and began to walk home.

Halfway to her home, the victim "felt like something bad was going to happen," so she tossed the keys into a bush alongside the road, which she described at trial as "[s]omewhere safe where I could go back for them later." At that time, she was wearing a backpack that contained, among other things, her cell phone, a money order, and cash. Soon thereafter, a vehicle driven by an unidentified person stopped in the middle of the street. The defendant exited the vehicle and started yelling "[w]here's the keys" in an angry manner. The defendant then grabbed the victim's backpack and swung her around. With her backpack still on, the victim fell to the ground, and the defendant began kicking her

[1] At trial, the victim testified that because the defendant's cell phone was broken, he often called or texted her from a phone belonging to his mother, Maria. For that reason, she would receive incoming calls or text messages from him under a contact labeled "Maria." In her testimony, the victim indicated that all relevant phone calls or text messages received from the defendant were from that contact.

in the head, back, and stomach. After one particular blow to her temple area, the victim saw "stars" and let go of the backpack. The defendant rummaged through its contents, returned to the vehicle with the backpack in hand, and departed.

Martin Martinez was inside his nearby residence at the time of the altercation. When he looked outside, he saw a man kicking a woman on the ground. As he testified: "I . . . remember seeing a male beating up a female . . . . I saw some kicking. I saw her on the ground, and I saw someone—the male, you know, really giving it to her, stomping on her." Martinez immediately called 911 to report the incident.[2]

Officer Marcus Burrus of the New Britain Police Department arrived at the scene to find the victim crying, shaking, and hunched on the ground. The victim "was bleeding from areas of her face. She had blood on her ears, her face, [and] her hands." While awaiting medical assistance for the victim, Burrus answered an incoming call to her cell phone from a contact labeled "Maria." On the basis of prior experience and conversations with the defendant,[3] Burrus recognized the caller as the defendant. During that conversation, Burrus testified that the defendant "told [him] that he came to the area [where the altercation transpired] and that he had confronted [the victim] because he believed that she was in possession of his mother's keys. And [the defendant] stated that he didn't touch her, but that he was there and that he just was going to find and borrow his mother's keys."

[2] An audio recording of that 911 call was admitted into evidence.

[3] At trial, Burrus confirmed that he knew the defendant and had spoken with him prior to the night in question. Burrus testified that he knew the defendant by the nickname "Cito" and also knew the defendant's mother and brother. Burrus explained that he had "dealt with [the defendant] on other calls [in the course of his] duties as a police officer, and prior to that [knew him] as a teenager," as the defendant was a friend of Burrus' brother-in-law.

The victim was transported by ambulance to a nearby hospital, where she received medical treatment. Photographs of injuries to her face, neck, hands, and back were taken while she was hospitalized and were admitted into evidence at trial.

The victim was released from the hospital on the morning of March 23, 2013. Although a protective order remained in place, the victim received multiple text messages from the defendant later that morning. In those messages, the defendant indicated that he wanted to exchange the victim's backpack for the keys to his mother's vehicle. The victim, however, did not want to meet with the defendant. The defendant's cousin later returned the backpack to her with its contents secure.

Burrus met with the victim at her home the following day. At that time, the victim informed him that she had received text messages from the defendant, which Burrus reviewed on her phone.[4] At trial, Burrus testified that one such message contained "something along the lines of I ain't done with you yet."

The defendant testified at trial on his own behalf and provided a different account of the altercation. In his testimony, the defendant admitted that he had confronted the victim on the sidewalk as she was walking home that night. He testified that he "said please give me my mother's keys" and that the victim then "began to swing at [him]." The defendant testified that, as he grabbed her hands and "told her, please, just give me the keys," he slipped and fell to the ground, which he attributed to wintry weather conditions. The defendant further testified that, as he attempted to "get up to leave," the victim "grabbed a hold of [his] foot," causing him to again fall to the ground. The defendant testified

[4] Burrus testified that the text messages were from a contact labeled "Maria." See footnote 1 of this opinion.

that "I just shook my foot loose and I crossed the street and I got in the car and we left."

Following that altercation, the defendant was arrested and charged with robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), assault in the second degree in violation of General Statutes § 53a-60 (a) (2), and criminal violation of a protective order in violation of § 53a-223 (a). Pursuant to General Statutes § 53a-40b, the state also charged, in a part B information, that the defendant committed those offenses while on release "pursuant to [General Statutes] §§ 54-63a to 54-63g and/or [General Statutes] §§ 54-64a to 54-64c . . . ." A trial followed, at the conclusion of which the jury found the defendant not guilty of robbery in the first degree and assault in the second degree. The jury found the defendant guilty of criminal violation of a protective order and the lesser included offense of assault in the third degree. The defendant thereafter pleaded guilty to the charge set forth in the part B information. The court rendered judgment accordingly and sentenced the defendant to a total effective sentence of seven years incarceration, followed by three years of special parole. From that judgment, the defendant now appeals.

I

The defendant first claims that the court improperly declined to furnish a jury instruction on the defense of personal property with respect to the assault count. In response, the state submits that the defendant both failed to preserve and impliedly waived that claim at trial. We agree with the state.

The following additional facts are relevant to the defendant's claim. On the first day of trial, the defendant filed a one page request to charge with the court.[5] On

[5] The defendant's written request to charge states in full: "Defendant moves this court, pursuant to [Practice Book] § 42-16 et seq. and the [s]ixth and [f]ourteenth [a]mendments to the United States [c]onstitution, to give

the second day of trial, the court noted for the record that it had received the defendant's request to charge. The court then stated: "[W]hat I would like to do is try to have a discussion about this. I think it would be easiest to start it in chambers so that I can give you copies [of the court's draft charge], and then come out here and summarize on the record what we have done and what we discussed in chambers. Because if it gets to a point where we could do closing arguments tomorrow, I very much would like to do closing arguments tomorrow." The court indicated that it would "take about forty-five minutes to preliminarily discuss the jury charge with the attorneys" in chambers during an afternoon recess.

When that recess concluded, the court explained to the jury: "[W]e've had the opportunity to have a preliminary discussion on the jury charge. And I have given to each attorney a very rough draft of what I call my overinclusive jury charge. I intend to take out the areas that do not apply in this case, and then to also work further on the charges with respect to the crimes that are alleged in this case. And I intend to send this out via e-mail tonight to the two attorneys so that you will have that for review tonight. *I am going to grant the defendant's request to charge the jury on defense of personal property. I will put that in there.* And [if the prosecutor has] any objections to it, you can do that formally tomorrow on the record." (Emphasis added.)

The record before us contains a copy of the draft charge that the court provided to the parties later that

Jury Instruction 2.8-5, Defense of Personal Property ([General Statutes] § 53a-21). The evidence supports this request. Wherefore, for the reasons set forth above, together with such other reasons as may be advanced in any memorandum of law submitted and/or hearing conducted in connection herewith, [the defendant] respectfully prays that the [c]ourt adopt this proposed instruction." The defendant did not submit a memorandum of law on that request.

night.[6] That charge states in relevant part: "The evidence in this case raises the issue of the use of force against another to defend personal property. This defense applies to the charge of [r]obbery in the [f]irst [d]egree." The draft charge did not indicate that the defense applied to either the assault or the criminal violation of a protective order counts.

The next day, the court held a charge conference with the parties following the close of evidence. At the outset, the court indicated that it had sent a copy of its revised draft charge to the parties the previous night and inquired whether they had reviewed it; defense counsel answered affirmatively. The court also noted that "the defense did ask yesterday in chambers . . . for a lesser included [offense] of assault in the third degree on the assault second, so I have included that. . . . *And the defense also asked for the self-defense under the defense of* [*personal*] *property, which is included as well*." (Emphasis added.) The court then asked if the parties had sufficient time to review the court's proposed charge to the jury and solicited feedback thereon, at which time defense counsel asked the court to change the word "statement" to "statements" in a section on impeachment evidence because the defendant was claiming that multiple inconsistent statements had been made. After agreeing to that change, the court asked: "Anything else?" Defense counsel replied, "No, Your Honor. . . . I'm all set, Your Honor. Thank you." The court then stated: "All right. And you both have had enough time with the charge that you feel comfortable with the court charging [the jury] today?" Both parties answered, "Yes, Your Honor." The court then adjourned the proceeding for a midday recess.

[6] Following the commencement of this appeal, the state filed a motion for rectification, in which it asked the trial court to supplement the record with a copy of the draft charge. The court granted that request on January 29, 2018.

When that recess concluded, the court stated for the record that it had "sent both parties a copy of the final jury instruction in electronic form." The court then permitted the parties to make closing arguments. In his closing argument, defense counsel stated in relevant part that the defense of personal property "is a complete defense to robbery in the first degree." Counsel did not reference that defense in his discussion of either the assault or the criminal violation of a protective order offenses.

Following closing arguments, the court provided its charge to the jury. With respect to the defense of personal property, the court instructed the jury that this defense applied to the robbery charge.[7] When it concluded, the court asked the parties if they had any objections. At that time, defense counsel stated, "No objections, Your Honor, at all."

On appeal, the defendant claims that the court "improperly instructed the jury that the defense of [personal] property only applied to the robbery charge." He argues that, on the basis of his request to charge, the court should have instructed the jury that the defense applied to the robbery and assault charges set forth in counts one and two of the information, but not to the criminal violation of a protective order charge contained in count three. The court's failure to do so, he contends, violated his constitutional rights to due process and to present a defense.

[7] The court instructed the jury in relevant part: "The evidence in this case raises the issue of the use of force against another to defend personal property. This defense applies to the charge of robbery in the first degree. After you have considered all the evidence in this case on the charge of robbery in the first degree, if you find that the state has proved each element beyond a reasonable doubt, then you must go on to consider whether or not the defendant acted justifiably in the defense of personal property. In this case you must consider this defense in connection with count one of the information."

Before we can consider the merits of that claim, we must resolve two threshold issues. Specifically, we must determine whether the defendant properly preserved that claim with the trial court. If that claim was not properly preserved, we also must determine whether the doctrine of implied waiver precludes further review.

A

We begin by noting the fundamental precept, deeply ingrained in our decisional law and our rules of practice, that the appellate courts of this state "shall not be bound to consider a claim unless it was distinctly raised at the trial . . . ."[8] (Internal quotation marks omitted.) *Ulbrich* v. *Groth*, 310 Conn. 375, 427, 78 A.3d 76 (2013); see also Practice Book § 42-16 (party taking exception to court's instruction "shall state distinctly the matter objected to and the ground of exception"); Practice Book § 60-5 (party obligated to distinctly raise claim before trial court to be entitled to appellate review); *State* v. *King*, 289 Conn. 496, 505–506, 958 A.2d 731 (2008) (preservation requirement applies to challenges to jury instructions); *Lee* v. *Stanziale*, 161 Conn. App. 525, 538, 128 A.3d 579 (requirement that party distinctly raise claim of error before trial court "a prerequisite to appellate review"), cert. denied, 320 Conn. 915, 131 A.3d 750 (2015); *State* v. *Nieves*, 106 Conn. App. 40, 55, 941 A.2d 358 (requirement that party distinctly raise claim applies to jury instruction challenge), cert. denied, 286 Conn. 922, 949 A.2d 482 (2008). "The requirement that the claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked. . . . [It

[8] As our Supreme Court explained nearly two centuries ago: "It has been repeatedly decided, by us, that . . . we will not allow points of law to be discussed, which were not made, or which were waived, in the court below. We adhere to these decisions. The rule which they establish, is a salutary one, essential to the preservation of the rights of parties, and to the due administration of justice." *Torry* v. *Holmes*, 10 Conn. 499, 507 (1835).

must] alert the trial court to the specific deficiency now claimed on appeal." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Carter*, 198 Conn. 386, 396, 503 A.2d 576 (1986).

Requiring a party to distinctly raise a claim of error before the trial court is no mere formality; rather, it ensures that the trial court is specifically apprised of the alleged error and, thus, has an opportunity to respond accordingly. "As [our Supreme Court] repeatedly has observed, the essence of the preservation requirement is that fair notice be given to the trial court of the party's view of the governing law . . . . A secondary purpose of the preservation requirement is to prevent the possibility that an appellee would be lured into a course of conduct at the trial which it might have altered if it had any inkling that the [appellant] would . . . claim that such a course of conduct involved rulings which were erroneous and prejudicial to him. . . . Assigning error to a court's . . . rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Citations omitted; internal quotation marks omitted.) *State* v. *Benedict*, 313 Conn. 494, 505–506, 98 A.3d 42 (2014); accord *State* v. *Jorge P.*, 308 Conn. 740, 753, 66 A.3d 869 (2013) ("the sina qua non of preservation is fair notice to the trial court"). Through that lens must an appellate body view claims of error on the part of the trial court.

In the context of jury instructions, a party "may preserve for appeal a claim that an instruction . . . was . . . defective either by: (1) submitting a written request to charge covering the matter; or (2) taking an exception to the charge as given." (Internal quotation marks omitted.) *State* v. *King*, supra, 289 Conn. 505; see also Practice Book § 42-16. The defendant in the present case filed a written request to charge. See footnote 5 of this opinion. The question, then, is whether that request sufficiently covered the matter so as to

preserve the issue for appellate review. Put differently, the relevant inquiry is whether the defendant's request to charge alerted the trial court to the specific deficiency now claimed on appeal. See *State* v. *Carter*, supra, 198 Conn. 396.

We conclude that it did not. The distinct claim presented on appeal concerns the failure of the trial court to provide a defense of personal property instruction to the jury with respect to two of the three counts alleged in the operative information—namely, the robbery and assault counts, but not the criminal violation of a protective order count. On its face, the defendant's written request to charge is patently deficient in this regard, as it does not alert the trial court to such a request. The substance of that one page request merely communicated (1) the defendant's desire to have the court provide a defense of personal property instruction to the jury and (2) the defendant's belief that "[t]he evidence supports this request." As a result, the defendant's request is inherently ambiguous, in that it is unclear whether the defendant sought such an instruction as to only one of the charged offenses, all of the charged offenses, or some combination thereof.

As our Supreme Court has explained, "the submission of a request to charge covering the matter at issue preserves a claim that the trial court improperly failed to give an instruction on that matter. . . . In [such] instances, the trial court has been put on notice and afforded a timely opportunity to remedy the error. . . . It does not follow, however, that a request to charge addressed to the subject matter generally, but which *omits* an instruction on a specific component, preserves a claim that the trial court's instruction regarding that component was defective." (Citations omitted; emphasis in original.) *State* v. *Ramos*, 261 Conn. 156, 170–71, 801 A.2d 788 (2002), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862

(2014). A defendant's failure to distinctly raise an instructional claim in its written request to charge or to otherwise take an exception to the court's instruction renders that particular claim unpreserved for appellate review. See id., 171; see also *State* v. *Tozier*, 136 Conn. App. 731, 743, 46 A.3d 960 ("[t]he defendant did not preserve this claim for appellate review as he did not . . . distinctly raise these arguments [regarding instructional error] before the trial court"), cert. denied, 307 Conn. 925, 55 A.3d 567 (2012); *State* v. *Joseph*, 110 Conn. App. 454, 459–60, 955 A.2d 124 (because defendant's written request to charge contained general credibility instruction but did not distinctly raise issue of accomplice credibility, trial court "was not put on notice" of that issue, rendering it unpreserved), cert. denied, 289 Conn. 945, 959 A.2d 1010 (2008); *Abdelsayed* v. *Narumanchi*, 39 Conn. App. 778, 785, 668 A.2d 378 (1995) ("[W]hile the defendant did prepare a written request to charge, that proposed charge did not distinctly address the issue the defendant now raises. We, therefore, do not address his claim on appeal. [Footnote omitted.]"), cert. denied, 237 Conn. 915, 676 A.2d 397, cert. denied, 519 U.S. 868, 117 S. Ct. 180, 136 L. Ed. 2d 120 (1996); id., 785 n.1 (concluding that "these words [contained in the defendant's request to charge] did not sufficiently afford notice to the trial court as to the claimed error the defendant now raises"); contra *Benanti* v. *Delaware Ins. Co.*, 86 Conn. 15, 21, 84 A. 109 (1912) ("[t]he issue of misrepresentation of title . . . was distinctly presented in the defendant's requests to charge"); cf. *State* v. *Jones*, 289 Conn. 742, 760, 961 A.2d 322 (2008) ("when the trial court failed to instruct the jury as the defendant had requested, defense counsel objected two different times, thus effectively preserving the issue for appellate review even if his written request to charge was ambiguous").

The defendant claims that *State* v. *Ramos*, 271 Conn. 785, 860 A.2d 249 (2004), is "controlling" on the question

of preservation. We do not agree. In that case, only two counts remained following the close of evidence: assault in the second degree in violation of § 53a-60 (a) (2) and carrying a weapon in a motor vehicle in violation of General Statutes (Rev. to 1997) § 29-38. Id., 790. At trial, the defendant "requested that the trial court instruct the jury on the affirmative defense of self-defense but did not specify the count or counts of the information to which the defense applied. The trial court gave a self-defense instruction with respect to the assault charge, but . . . instructed the jury that self-defense was not a defense to the charge under § 29-38." Id., 800. On appeal, the defendant claimed that "the trial court improperly instructed the jury that the defense of self-defense did not apply to a charge under § 29-38." Id., 799. Our Supreme Court concluded that the defendant's claim was preserved for appellate review, stating: "Although we agree with the state that the record leaves some doubt as to whether the defendant's general request to charge was adequate to place the trial court on notice that he believed that the claim of self-defense applied to both charges, we read the failure to specify as an indication that it applied to both charges and that the claim was, therefore, preserved for review." Id., 801.

For two reasons, *Ramos* is readily distinguishable from the present case. First, as a factual matter, the defendant here is not arguing that his general request to charge on the defense of personal property should have been applied to *all* pending counts, as was the case in *Ramos*.[9] Rather, the defendant maintains that the court should have provided that instruction with respect to two of the three counts levied against him by the state and improperly furnished such an instruction as to only one of those counts.

[9] As the defendant acknowledges in his reply brief, his "trial counsel's theory of defense of property did not pertain to the protective order charge."

Second, as a procedural matter, the defendant overlooks the critical fact that, in *Ramos*, the state had filed "a supplemental request to charge" in response to the defendant's request to charge, in which the state maintained that "self-defense was not a defense to the charge under § 29-38." Id., 800. By so doing, the state alerted the court to the distinct issue of whether that defense so applied, rendering that issue properly preserved for appellate review. It nonetheless remains that the state in the present case neither filed a request to charge regarding the applicability of the defense of personal property to an assault charge nor otherwise raised that issue in any manner before the trial court. *Ramos*, therefore, is both factually and procedurally inapposite to the present case.

Similarly misplaced is the defendant's reliance on *State* v. *Paige*, 304 Conn. 426, 40 A.3d 279 (2012). In *Paige*, both the defendant *and* the state submitted requests to charge on the disputed instruction. Id., 439. Moreover, the trial court held a charging conference, at which it heard argument from the parties on that instructional issue. Id. With "the specific circumstances of the present case in mind," our Supreme Court ultimately concluded that the issue was preserved for appellate review, noting that "[w]e never have required . . . a defendant who has submitted a request to charge also to take an exception to a *contrary* charge . . . ." (Emphasis added.) Id., 442–43. Significantly, the state, in both *Paige* and *Ramos*, requested an alternative instruction that was contrary to the one requested by the defendant. As a result, the trial court in those cases plainly was apprised of the distinct instructional issue, obviating the need for the defendant to further memorialize his objection to the court's charge. No such contrary request was made by the state in the present case.

The defendant's reliance on *State* v. *Johnson*, 316 Conn. 45, 111 A.3d 436 (2015), also is unavailing. In that

case, the defendant filed a written request to charge that proposed specific language on the issues of constructive and nonexclusive possession. Id., 52. In both its draft charge and the final charge that it provided to the jury, the trial court declined to include all of the language requested by the defendant; instead, the court "selectively omitted certain paragraphs [specifically requested by the defendant] altogether." Id., 55–56. Furthermore, "[t]here was never any discussion relating to this charge or this element of the offenses." Id., 56. In such circumstances, our Supreme Court held that the defendant was not obligated to raise a further objection to the court's charge to preserve the issue for appeal because "[t]he defendant reasonably could have interpreted the trial court's selective adoption of parts of her possession instruction as a purposeful rejection of the omitted language. . . . [T]he defendant was not required to object to the truncated instruction to preserve her request for the more comprehensive instruction." Id. As in *Paige* and *Ramos*, the trial court in *Johnson* was specifically alerted to the distinct instructional deficiency later pursued on appeal.

The facts of the present case are markedly different. Neither the defendant's written request to charge nor anything else in the record before us indicates that the defendant ever alerted the court to the distinct instructional deficiency he now alleges on appeal. At no time did the defendant apprise the court of his desire to have the court furnish a defense of personal property instruction with respect to counts one and two, but not count three, of the information. Rather, the record before us indicates that (1) the defendant generally requested a defense of personal property instruction without specifying its alleged applicability to any particular counts; (2) the court discussed that request with both parties during an in-chambers conference on May 17, 2016, and then agreed on the record to provide a

defense of personal property instruction to the jury;[10] (3) at that time, the court stated that it would entertain any objections to that instruction at the charge conference the next day; (4) the court then included an instruction on the defense of personal property with respect to the robbery count in the draft charge that it provided to the parties; and (5) the court also included that instruction in both the revised charge that it "sent [to the] parties . . . in electronic form" and the final charge that it ultimately delivered to the jury. At no time did the defendant notify the court of any issue or disagreement with the court's instruction despite several opportunities to do so. Rather, defense counsel affirmatively indicated that he was "all set."

Accordingly, we cannot conclude on the particular facts of this case that the instruction provided by the court was "contrary" to that submitted by the defendant in his written request to charge. See *State* v. *Paige*, supra, 304 Conn. 443 (defendant who has submitted request to charge not required "to take an exception to a contrary charge"). The record indicates that the defendant asked for an instruction on the defense of personal property and that the court, after discussing the matter with the parties, granted the defendant's request and provided such an instruction. At the same time, the record does not reflect that the trial court ever was "on notice of the purported defect" that the defendant now advances on appeal. *State* v. *Thomas W.*, 301 Conn. 724, 736, 22 A.3d 1242 (2011).

Our law requires a party pursuing a claim of instructional error "to bring to the attention of the [trial] court the *precise* matter on which its decision is being asked" so as to "alert the trial court to the specific deficiency

[10] Following the in-chambers conference with the parties, the court stated: "I am going to grant the defendant's request to charge the jury on defense of personal property. I will put that in there."

now claimed on appeal." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Carter*, supra, 198 Conn. 396. The defendant failed to do so in his written request to charge. Furthermore, despite ample opportunity, the defendant raised no such objection to the court's instruction at any time. Accordingly, we conclude that his claim of instructional error was not properly preserved for appellate review.

B

Having determined that the defendant failed to alert the trial court to the distinct claim of instructional error presented in this appeal, we next consider whether the doctrine of implied waiver precludes substantive review. Whether a defendant has waived the right to challenge the court's jury instructions involves a question of law, over which our review is plenary. *State* v. *Davis*, 311 Conn. 468, 477, 88 A.3d 445 (2014).

Our analysis begins with the seminal decision of *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), in which our Supreme Court "established a framework under which we review claims of waiver of instructional error . . . ." *State* v. *McClain*, 324 Conn. 802, 810, 155 A.3d 209 (2017). In *Kitchens*, the court emphasized that waiver involves the idea of assent; *State* v. *Kitchens*, supra, 469; and explained that implied waiver occurs when a defendant "had sufficient *notice* of, and accepted, the instruction" proposed or given by the trial court. (Emphasis in original.) Id., 487 n.25. More specifically, the court held that "when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential

flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." Id., 482–83. The court further explained that "[s]uch a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case."[11] Id., 483; see also *State* v. *Bellamy*, 323 Conn. 400, 426, 147 A.3d 655 (2016) ("reviewing courts are required to determine whether the unique facts and circumstances in any given case support a finding of waiver").

In the present case, the trial court conducted a preliminary charge conference with the parties in chambers following the filing of the defendant's request to charge. When that conference concluded, the court indicated that it had provided the parties with "a very rough draft" of its jury charge, which it further refined later that day. The court also stated that it was "going to grant the defendant's request to charge the jury on defense of personal property. I will put that in there." The court then sent the parties a revised version of its draft charge that night, which included an instruction that the defense of personal property was a defense to the charge of robbery in the first degree.

The next day, the court held another charge conference, at which defense counsel confirmed that he had received the court's revised draft charge. The court at that time solicited comments from the parties regarding changes or modifications, and defense counsel asked the court to make a linguistic change to a section of the charge regarding impeachment evidence, which the court agreed to do. The court then asked: "Anything else?" Defense counsel replied, "No, Your Honor. . . .

[11] Our Supreme Court has since reaffirmed the vitality of the waiver rule enunciated in *Kitchens* and expressly rejected the claim that it "should be overturned because it is confusing, unworkable, interferes with an appellate court's discretion to review unpreserved claims and does not serve the interests of justice." *State* v. *Bellamy*, 323 Conn. 400, 403, 147 A.3d 655 (2016).

I'm all set, Your Honor. Thank you." The court then stated: "All right. And you both have had enough time with the charge that you feel comfortable with the court charging [the jury] today?" Defense counsel answered, "Yes, Your Honor."

Later that day, the court noted for the record that it had "sent both parties a copy of the final jury instruction in electronic form." The court then permitted the parties to make closing arguments. In his closing argument, defense counsel stated in relevant part that defense of personal property "is a complete defense to robbery in the first degree." Counsel did not reference that defense in his discussion of either the assault or the criminal violation of a protective order offenses. Furthermore, in its subsequent charge, the court instructed the jury that the defense of personal property applied to the robbery charge. When it concluded, the court asked the parties if they had any objections; defense counsel responded, "No objections, Your Honor, at all."

The facts and circumstances of this case largely resemble those chronicled in *State* v. *Thomas W.*, supra, 301 Conn. 724. As our Supreme Court stated: "[T]he following undisputed facts . . . establish an implied waiver under the *Kitchens* standard. The trial court conducted a charging conference, provided copies of the proposed charge to the defendant and elicited input from him. The defendant asked for an addition to the charge, and the court complied with that request. . . . [T]he defendant . . . conceded . . . that he had been given sufficient time to review [the court's draft charge]. . . . The defendant twice expressed satisfaction with the charge when asked by the court—before and after the charge was given." (Citations omitted.) Id., 734–35.

Here, a close examination of record reveals that the defendant was provided with a meaningful opportunity to review the court's initial draft charge that the

court provided during the in-chambers conference, the revised draft charge that the court sent to the parties later that night, and the final draft charge that the court provided prior to closing arguments. The court solicited and received comments from the parties over the course of multiple charge conferences. The defendant thereafter expressed satisfaction with both the draft charge that the court provided to the parties and the ultimate charge that the court delivered to the jury. Moreover, at no time at trial did the defendant voice any objection regarding the instructional deficiency he now alleges on appeal.[12] In light of those undisputed facts, we conclude that the doctrine of implied waiver precludes substantive consideration of the defendant's claim of instructional impropriety.[13] See *State* v. *Kitchens*, supra, 299 Conn. 482–83.

II

The defendant also claims that prosecutorial impropriety during closing argument deprived him of a fair trial. We disagree.

[12] In his principal appellate brief, the defendant also suggests that he preserved his objection by moving for a judgment of acquittal at his sentencing hearing months after his trial concluded. He has provided no legal authority in support of that contention. To the contrary, our Supreme Court has held that posttrial motions do not properly preserve a claim that the court's charge to the jury improperly omitted an appropriate instruction. See *Oakes* v. *New England Dairies, Inc.*, 219 Conn. 1, 8, 591 A.2d 1261 (1991); see also *State* v. *Santiago*, 142 Conn. App. 582, 602 n.17, 64 A.3d 832 (declining to address claim raised "for the first time at [the defendant's] posttrial sentencing hearing"), cert. denied, 309 Conn. 911, 69 A.3d 307 (2013).

[13] In his reply brief, the defendant also requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). In *Kitchens*, our Supreme Court explained that the doctrine of implied waiver, when applicable, bars recourse under *Golding*, as "[a] constitutional claim that has been waived does not satisfy [its] third prong . . . because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . ." (Internal quotation marks omitted.) *State* v. *Kitchens*, supra, 299 Conn. 467; see also *State* v. *McClain*, supra, 324 Conn. 808–809. Our determination that the defendant impliedly waived his instructional claim thus forecloses relief under *Golding*.

The following facts are relevant to this claim. At trial, the victim testified that the defendant placed phone calls and sent her text messages from a phone belonging to his mother. See footnote 1 of this opinion. In his testimony, Burrus stated that he had reviewed certain text messages sent to the victim from that phone. On cross-examination, defense counsel asked Burrus if he would "agree that if we had the cell phone records here, or the text phone messages here, that would be a much more reliable source of information"; Burris answered affirmatively. When the defendant testified the next day, the prosecutor asked him whether he spoke with Burrus on the night of the altercation, to which the defendant replied: "I never spoke with him. You should have got the phone records. I was asking for them. I never spoke with him."

Prior to closing arguments, the court advised the jury that the arguments of counsel "are not evidence" but, rather, were an "opportunity to go over the evidence that's been presented [to] you . . . ." The prosecutor then began her initial closing argument by urging the jurors as follows: "[I]f there's anything that I say during my oral argument to you and your recollection of the testimony or the evidence differs from my recollection, you follow your recollection, not mine, okay? So, I just want to make that very clear right from the get go." The prosecutor then discussed various aspects of the evidence presented at trial.

In his closing argument, defense counsel repeatedly reminded the jurors that the state had not presented evidence of the cell phone records. With respect to certain discrepancies between the respective testimony of the victim and the defendant, counsel stated: "This issue could have been simply solved by giving you the cell phone records, subpoena the Verizon records or whoever the carrier is, bring those in, show you guys those, show them to me, show them to the judge, those

are indisputable. Remember that it is always the state's burden of proof." Defense counsel later remarked: "As I've said over and over again, I said this several times during the course of the case, there's no info from that cell phone. It could have been downloaded and presented to you on a big screen, shown to me and shown to you. That would be solid evidence. We don't have it. I don't have it. You don't have it." After acknowledging that the victim sustained physical injuries on the night in question, defense counsel again noted the lack of evidence presented by the state, arguing: "I'm going to say it again, no cell phone records, there's no text messages to show you, there's no forensic evidence in this case . . . ."

During her rebuttal argument, the prosecutor responded to that line of argument by defense counsel, stating in relevant part: "Counsel also stated the fact that there were no cell phone records. Well, cell phone records, is he referring to the cell phone records of [the defendant's mother] or [the victim's] cell phone records? What would those records have said, had told us? I submit those records probably would have helped me. Counsel points that out to you about the cell phone records." Defense counsel did not object at the time that the prosecutor made that statement.

The next morning, defense counsel alerted the court to a concern about the prosecutor's statement, and the following colloquy ensued:

"[Defense Counsel]: I'm thinking more about the closing that the [prosecutor] did. She made a comment which was, I submit that the cell phone records would have . . . probably helped her. I don't think that that's a proper statement. . . . So, I would ask that the jury be instructed that the comment was not a proper one.

"The Court: All right. Any objection to that?

"[The Prosecutor]: Judge, it was inadvertent.

"The Court: Okay. . . .

"[The Prosecutor]: —and if the court feels at all that it was improper, I have no objection to any curative instruction the court wishes to give.

"The Court: All right. I mean, inadvertence happens, but I think it is important to reiterate to the jury that evidence is only what was before them, and I will specifically address this. Now—

"[Defense Counsel]: Thank you, and I agree with the state, it was completely an inadvertent thing.

"The Court: Okay. That's fine.

"[The Prosecutor]: Thank you, counsel."

The jury then reentered the courtroom, at which time the court provided a curative instruction advising it to disregard the prosecutor's statement from the previous day.[14]

On appeal, the defendant maintains that the prosecutor's statement that "those [cell phone] records probably would have helped me" was improper commentary on facts not in evidence, which deprived him of a fair trial. The state concedes, and we agree, that the prosecutor's statement was improper. The state nonetheless

[14] The court instructed the jury as follows: "[Y]esterday during closing argument, [the prosecutor], in addressing the cell phone records, made a comment where she said, I submit to you that if the cell phone records had been here they would have been favorable to the state. Now remember that I told you that the only evidence that you can decide the case upon is evidence that has been presented to you in court and there was no evidence presented to that so that was an argument of counsel that there is no evidence to support that so you should not consider that statement. During the course of argument, people make inadvertent statements, and so I bring it to your attention just to let you know you did not receive evidence on that so I just want to tell you that." The defendant thereafter did not object to the curative instruction provided by the court.

contends that it did not amount to a denial of the defendant's right to a fair trial.

"In analyzing claims of prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." (Internal quotation marks omitted.) *State* v. *Campbell*, 328 Conn. 444, 541–42, 180 A.3d 882 (2018). Only the second step of that analysis is at issue in the present case.

To determine whether the prosecutor's improper argument deprived the defendant of his due process right to a fair trial, "we are guided by the factors enumerated . . . in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). These factors include the extent to which the [impropriety] was invited by defense conduct or argument, the severity of the [impropriety], the frequency of the [impropriety], the centrality of the [impropriety] to the critical issues in the case, the strength of the curative measures adopted, and the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Martinez*, 319 Conn. 712, 736, 127 A.3d 164 (2015).

We first consider the frequency and the severity of the challenged remarks. As defense counsel conceded at trial, the prosecutorial impropriety at issue consisted of a single, inadvertent statement. The prosecutor made no mention of cell phone records in her initial closing argument and made only one isolated reference in her rebuttal argument. The comment also was not particularly severe, as it consisted of a brief suggestion that

any cell phone records "probably would have helped" the state's case. In this regard, we note that defense counsel did not object to the prosecutor's statement at the time that it was made. See *State* v. *Grant*, 154 Conn. App. 293, 328, 112 A.3d 175 (2014) ("defense counsel's failure to make a contemporaneous objection . . . permits an inference that counsel did not think the impropriety was severe"), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015). Furthermore, "the severity of the impropriety is often counterbalanced in part" by the infrequency of the impropriety. (Internal quotation marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 113, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018). The infrequency of the prosecutorial impropriety in the present case is undisputed.

In addition, the prosecutor's improper comment was not central to the critical issues in the case, as the existence of cell phone records had little bearing on the question of whether the defendant perpetrated the charged offenses. Although the defendant argues in his reply brief that "[t]he impropriety went directly to" his conviction for violating a protective order, the basis of that charge stemmed not from the defendant's phone calls or text messages to the victim but, rather, his confrontation with her as she walked home. In the long form information, the state specifically alleged that "on or about March 23, 2013, at approximately 2:45 [a.m.] in the area of 50 Kensington Avenue . . . [the defendant] violated a protective order when he made contact with [the victim] and assaulted her by repeatedly kicking her . . . ." At trial, the defendant admitted in his testimony that he confronted the victim as she was walking home. Moreover, Burrus testified that he spoke with the defendant soon after the altercation transpired, at which time the defendant acknowledged that "he came to the area [of the altercation] and that he had confronted" the

victim. On the basis of that testimony, the jury reasonably could have concluded that the defendant violated the terms of the protective order. We therefore disagree with the defendant that the prosecutor's improper comment about cell phone records was central to the critical issues in the case.

The prosecutor's improper comment also appears to have been invited by the defendant's testimony at trial. On cross-examination, the defendant denied speaking with Burrus shortly after the altercation, stating: "I never spoke with him. You should have got the phone records. I was asking for them. I never spoke with him." To the extent that the defendant in his testimony suggested that the cell phone records would have corroborated his trial testimony, he invited the prosecutor's improper comment to the contrary.

With respect to his conviction of criminal violation of a protective order and assault in the third degree, the state's case was strong. In his testimony, the defendant admitted that he made contact with the victim as she walked home on the night in question. Although the victim and the defendant provided differing accounts of the altercation, the jury also heard testimony from Martinez, who witnessed the incident and corroborated the victim's account. Contrary to the defendant's testimony at trial that he "didn't touch her," Martinez told the jury that he saw "a male beating up a female . . . . I saw some kicking. I saw her on the ground, and I saw someone—the male, you know, really giving it to her, stomping on her." The state's case also included testimony from Burrus, who responded to the scene and observed the victim's physical and emotional state, as well as photographs later taken at the hospital, which depict in graphic fashion the injuries to the victim's face, neck, hands, and back.

Lastly, the trial court provided a curative instruction in response to a concern raised by defense counsel the

day after closing arguments concluded. In that directive, the court instructed jurors that "you should not consider" the prosecutor's improper statement, as it was not supported by evidence in the record. See footnote 14 of this opinion. In the absence of an indication to the contrary, we presume that the jury followed that curative instruction. See *State* v. *Camacho*, 282 Conn. 328, 385, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007).

Having considered the foregoing factors in light of the record before us, we conclude that the prosecutor's improper comment did not so infect "the trial with unfairness as to make the resulting conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 204 Conn. 539. The defendant's prosecutorial impropriety claim, therefore, fails.

The judgment is affirmed.

In this opinion the other judges concurred.

J'VEIL OUTING *v.* COMMISSIONER OF CORRECTION (AC 41224)

Lavine, Moll and Bishop, Js.

Syllabus

The petitioner, who had been convicted of murder in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel and appellate counsel had rendered ineffective assistance. The petitioner alleged, inter alia, that his trial counsel improperly failed to present an alibi defense and to rebut the testimony of N and R, who had given statements to the police indicating that they had seen the petitioner shoot the victim and had identified him from police photographic arrays. The petitioner further alleged that his trial counsel improperly failed to obtain a ruling from the trial court as to the admissibility at trial of certain testimony by his expert witness, D, concerning the reliability of witness identifications. D's proffered testimony had been excluded during a previous hearing on the petitioner's unsuccessful motion to suppress the identification evidence of N

and R after they had recanted their statements to the police and their identifications of the defendant, which they claimed were the result of police coercion. After N and R disavowed their statements to the police, the petitioner's trial counsel decided not to present D's testimony at trial on mistaken identity and changed her approach to the case from one of mistaken identification to a claim of police coercion. The habeas court concluded that the petitioner had failed to establish deficient performance or prejudice with respect to his claims of ineffective assistance of trial or appellate counsel. The habeas court thereafter rendered judgment denying the petitioner's habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that the petitioner's trial counsel did not render ineffective assistance:

a. There was ample support for the habeas court's conclusion that trial counsel's decision not to present an alibi defense was not constitutionally deficient; trial counsel testified that she was concerned that presenting an alibi defense could do more harm than good, as the purported alibi witnesses placed the petitioner in the vicinity of his home, which was approximately one mile from the murder scene, at various times during the early evening of the murder, their testimonies were inconsistent and varied as to the times that they saw the petitioner and as to their descriptions of him, and many of the witnesses conceded that they could not account for the petitioner's whereabouts throughout the entire time period during which the events at issue occurred.

b. Trial counsel was not ineffective in deciding to forgo additional investigation and rebuttal of the eyewitness statements of N and R, and to forgo D's testimony at trial on the issue of misidentification: the record reflected that part of trial counsel's third-party culpability theory was to establish that the statements to the police that were made by N and R were the product of police coercion, her cross-examination of N and R advanced that theory, and although additional investigation into the statements by N and R may have shed more light on their credibility, the evidence in the record did not support a conclusion that trial counsel's failure to conduct that additional investigation was unreasonable; moreover, the record was clear that trial counsel's decision not to call D as an expert witness at trial was based on concern that doing so would have potentially detracted from the petitioner's coercion defense and, thus, was a reasonable tactical choice under the circumstances.

c. Trial counsel did not perform deficiently by not preserving for appellate review a claim related to the trial court's exclusion of D's testimony regarding factors concerning eyewitness identifications; because trial counsel already reasonably determined not to present D's testimony at the petitioner's criminal trial, she would have had no strategic reason to preserve the court's exclusion of evidence on a matter that she reasonably believed had been rendered moot by her tactical choice not to pursue a theory of mistaken identification, at the time of the criminal

trial, decisional law did not permit expert testimony on the subjects for which trial counsel initially sought to present D's testimony, and to impose on counsel the duty to foretell what tack the Supreme Court would take on that subject would represent the height of post hoc reasoning, which is not the task of a court on habeas review.

2. The petitioner could not prevail on his claim that his appellate counsel was ineffective in failing to claim, in his direct appeal, that the trial court incorrectly denied the petitioner's request to present surrebuttal evidence; appellate counsel made a reasonable, strategic decision not to raise the surrebuttal issue, which fell within the wide range of reasonable professional assistance, and a court will not second-guess an appellate counsel's tactical decision to limit the claims briefed to those that he or she reasonably viewed as most critical to the appeal.

3. The petitioner's assertion that the habeas court incorrectly determined that he did not prove his claim of actual innocence was unavailing, that court having aptly concluded that the mosaic of evidence presented by the petitioner did not constitute affirmative proof of actual innocence, as it did not tend to establish, in relation to the other evidence in the case, that he could not have committed the crime.

Argued March 14—officially released June 11, 2019

Procedural History

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

David R. Kritzman, assigned counsel, with whom, on the brief, was *Joshua C. Shulman*, assigned counsel, 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

BISHOP, J. The petitioner, J'Veil Outing, appeals from the judgment of the habeas court denying his petition

for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court erred in concluding that his trial counsel had not provided ineffective assistance in failing (1) to properly investigate and present an alibi defense, (2) to properly investigate and rebut the testimony of the eyewitnesses to the murder at issue, and (3) to adequately preserve an issue regarding expert testimony on eyewitness identification. The petitioner also claims that the court erred in concluding that his appellate counsel was not ineffective for failing to raise the issue, on direct appeal, of the trial court's refusal to permit surrebuttal evidence. Finally, the petitioner claims that the court incorrectly determined that he had not met his burden of proof regarding his claim of actual innocence. We affirm the judgment of the habeas court.

The record reveals that, after a jury trial, the petitioner was convicted on March 20, 2006, of murder in violation of General Statutes § 53a-54a. Thereafter, the petitioner was sentenced to fifty years of imprisonment. The petitioner's conviction was affirmed on direct appeal. *State* v. *Outing*, 298 Conn. 34, 86, 3 A.3d 1 (2010), cert. denied, 562 U.S. 1225, 131 S. Ct. 1479, 179 L. Ed. 2d 316 (2011).[1] In that appeal, our Supreme Court recited the following underlying facts that the jury reasonably could have found:

"At approximately 6:50 p.m. on June 23, 2005, Nadine Crimley was walking in a northerly direction on Canal Street in New Haven, pushing her infant son in a stroller. To her left, she saw her brother, Ray Caple, standing on the porch of her residence at 150 Canal Street. As Crimley walked up the street, she saw the [petitioner], whom she previously had seen in the neighborhood, pass her on his bicycle. Another unidentified man rode

[1] The habeas court took judicial notice of the decision in *State* v. *Outing*, supra, 298 Conn. 34, during the habeas trial.

a bicycle in front of the [petitioner]. Crimley then turned her attention back to her son. When she heard a series of popping noises, she looked up and saw the [petitioner], who was about ten feet away from her, firing a gun at the victim, Kevin Wright. The victim fell to the ground, and the [petitioner] ran from the scene.

"Caple, who had gone to high school with the [petitioner] and had known him for three and one-half years, also watched the [petitioner] as he rode his bicycle up Canal Street. As Caple watched, the [petitioner] moved his right hand toward his waist. Caple believed that the [petitioner] was reaching for a gun and was going to shoot him, but decided against doing so because Caple was holding his two year old daughter. Caple's mother and the victim were inside the residence at 150 Canal Street. Just after the [petitioner] passed the residence on his bicycle, the victim exited through the back door of the residence, retrieved his bicycle from the backyard and walked with it in an easterly direction on Gregory Street toward its intersection with Canal Street. As Caple stood on the porch, he heard a gunshot and the sound of a bicycle falling to the ground. When he looked around the corner of the porch, he observed Crimley and her son standing very close to the [petitioner], and he also saw the [petitioner], who had dismounted from his bicycle, fire three more shots at the victim. The [petitioner] then ran away, leaving his bicycle in the street. Caple ran to the victim, who was unresponsive. The victim died from a single gunshot wound to the chest.

"Shortly, after 10 p.m. on the day of the shooting, Crimley gave a statement to the New Haven police in which she indicated that she had been able to get a good look at the shooter and would be able to identify him. On June 27, 2005, four days after the shooting, Stephen Coppola, a New Haven police detective, interviewed Crimley and presented her with an array of eight

photographs, including one of the [petitioner]. Crimley identified the [petitioner] as the shooter and signed and dated the photographic array. Coppola tape-recorded his interview of Crimley. On the same day, Coppola also tape-recorded a statement from Caple and presented him with a second photographic array. Caple also identified the [petitioner] as the shooter and signed and dated the photographic array.

"Prior to trial, both Caple and Crimley recanted their statements to the police and their identifications of the [petitioner], claiming that they had been pressured by the police into giving the statements and making the identifications. Thereafter, the [petitioner] filed motions to suppress the identification evidence, claiming that the evidence was unreliable and the product of an unnecessarily suggestive police identification procedure. At a hearing on the [petitioner's] motions, both Crimley and Caple testified that they did not know who had killed the victim, that they had been pressured by the police to give false statements about the events surrounding the shooting, and that the police had pressured them to falsely identify the [petitioner] as the shooter. Crimley and Caple acknowledged that they were extremely frightened about being called as witnesses for the state and identifying the [petitioner] as the shooter. Coppola and Alfonso Vasquez, a New Haven police detective who had been present during Coppola's interviews of Crimley and Caple, testified that each of the witnesses had identified the [petitioner] as the shooter by selecting the [petitioner's] photograph from the photographic array spontaneously and without hesitation. The two detectives unequivocally denied that they had pressured or influenced either Crimley or Caple in any way.

"At the conclusion of the detectives' testimony, the state maintained that the tape-recorded statements that Crimley and Caple had given to the police met the

requirements for admissibility 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). The trial court found that the testimony of Crimley and Caple that they had been pressured to give false statements and to falsely identify the [petitioner] as the shooter was not credible. The court further concluded that the statements that they had given to the police met the *Whelan* admissibility requirements for purposes of the suppression hearing.

"Thereafter, at a continuation of the suppression hearing, the [petitioner] made an offer of proof regarding the testimony of his expert witness, Jennifer Dysart, concerning the reliability of eyewitness identifications. The state objected to the testimony, and the court sustained in part and overruled in part the state's objection to Dysart's proffered testimony. Dysart thereafter offered her opinion that the identification procedures used generally were not reliable. The trial court thereafter denied the [petitioner's] motions to suppress the photographic identifications that had been made of the [petitioner] by Crimley and Caple.

"At trial, Crimley and Caple testified that the police had pressured them to give false statements and to falsely identify the [petitioner] as the shooter. They further testified that the [petitioner] definitely was not the shooter and that they did not know who had shot the victim. Upon the state's motion pursuant to *Whelan*, the trial court admitted redacted tape recordings of the statements Crimley and Caple had given to the police as prior inconsistent statements. The trial court also admitted as exhibits copies of the photographic arrays that Crimley and Caple had signed and dated. The [petitioner] did not call Dysart as a witness at trial.

"Thereafter, the jury found the [petitioner] guilty of murder, and the trial court rendered judgment in accordance with the verdict, sentencing the [petitioner] to a

term of imprisonment of fifty years." (Footnotes omitted.) Id., 38–41.

After our Supreme Court affirmed his conviction, the petitioner filed a petition for a writ of habeas corpus dated October 5, 2010. The matter was tried on the petitioner's fifth amended petition, dated February 26, 2015, in which he set forth claims of ineffective assistance of trial and appellate counsel, a due process claim regarding the presentation of evidence at trial, and a claim of actual innocence.[2] The hearing on this matter before the habeas court, *Oliver*, *J.*, began on March 21, 2016, and continued intermittently for eight days, concluding on November 22, 2016. Following the receipt of posttrial briefs, the court issued its memorandum of decision on November 20, 2017, denying the petition.[3] In denying the petition, the habeas court concluded that the petitioner had not met his burden of establishing either deficient performance or prejudice with respect to several of his ineffective assistance of trial counsel claims, including the claims that his trial counsel failed to properly investigate and to present an alibi defense, to investigate and to rebut the testimony of the state's eyewitnesses, and to preserve the record concerning

[2] In particular, the petitioner raised twenty-nine ineffective assistance of counsel claims in regard to his trial counsel, including that counsel was ineffective for failing to properly investigate and present an alibi defense, failing to properly investigate and rebut the state's eyewitnesses, and failing to preserve the record concerning the trial testimony of an expert witness on witness identifications. The petitioner also claimed that his due process rights were violated by the trial court's denial of his request to present surrebuttal evidence; his appellate counsel provided ineffective assistance by failing to raise a claim on appeal challenging the trial court's denial of his request to present surrebuttal evidence; he was actually innocent; and the cumulative impact of both his trial and appellate counsels' errors deprived him of his right to the effective assistance of counsel and due process.

[3] The parties filed several motions for extensions of time to file their posttrial briefs. On July 21, 2017, after receiving the parties' posttrial briefs, the habeas court reserved the decision on its ruling.

the trial testimony of an expert witness on witness identifications. The court further concluded that the petitioner failed to sustain his burden of establishing deficient performance or prejudice with respect to his ineffective assistance of appellate counsel claim, and that the petitioner failed to establish his actual innocence. The court deemed the remainder of the petitioner's ineffective assistance of trial and appellate counsel claims to be abandoned on the basis of the petitioner's failure to address them in his posttrial brief. The court granted the petitioner's petition for certification to appeal, and this appeal followed.[4] Additional facts and procedural history will be set forth as necessary.

I

The petitioner raises three claims that his trial counsel rendered ineffective assistance. Before addressing each claim, we set forth the relevant legal principles and our well settled standard of review governing ineffective assistance of counsel claims. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 437, 119 A.3d 607 (2015); see also *Buie* v. *Commissioner of Correction*, 187 Conn. App. 414, 417,

[4] The only ineffective assistance of trial counsel claims that the petitioner raises in his brief on appeal are that his trial counsel failed (1) to properly investigate and to present an alibi defense, (2) to investigate and to rebut the testimony of the state's eyewitnesses, and (3) to preserve the record concerning the trial testimony of his expert witness on witness identifications. Thus, the petitioner's other ineffective assistance of trial counsel claims raised in his amended petition are deemed abandoned. See *Merle S.* v. *Commissioner of Correction*, 167 Conn. App. 585, 588 n.4, 143 A.3d 1183 (2016) (claims of ineffective assistance of trial counsel not pursued on appeal are deemed abandoned).

202 A.3d 453, cert. denied, 331 Conn. 905, 202 A.3d 373 (2019).

"In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction. . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . .

"To prove that his counsel's performance was deficient, the petitioner must demonstrate that trial counsel's representation fell below an objective standard of reasonableness. . . . *Competent representation is not to be equated with perfection*. The constitution guarantees only a fair trial and a competent attorney; it does not ensure that every conceivable constitutional claim will be recognized and raised. . . . 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* [*petitioner*] *must overcome the presumption that*, *under the circumstances*, *the challenged action might be considered sound trial strategy*. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Emphasis

added; internal quotation marks omitted.) *Moye* v. *Commissioner of Correction*, 168 Conn. App. 207, 217–18, 145 A.3d 362 (2016), cert. denied, 324 Conn. 905, 153 A.3d 653 (2017).

"With respect to the prejudice component of the *Strickland* test, the petitioner must demonstrate that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. . . . It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceedings. . . . Rather, [t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Citation omitted; internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, supra, 158 Conn. App. 438; *Holloway* v. *Commissioner of Correction*, 145 Conn. App. 353, 365, 77 A.3d 777 (2013).

Finally, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland* v. *Washington*, supra, 466 U.S. 697. Guided by these principles, we turn to the specific claims made by the petitioner.

A

We first turn to the petitioner's claim that his trial counsel failed to properly investigate and to present an alibi defense. The following additional information is relevant to our discussion of this claim. The record reflects that on June 23, 2005, the New Haven police received a telephone call regarding a shooting at 6:55 p.m. on Canal Street in New Haven, a separate call regarding a street fight in the neighborhood of the petitioner's residence at 7:10 p.m., and another call relating to the fight at 7:23 p.m. The record reflects, as well, that the police received a call at 7:57 p.m. regarding a scooter chase. At the time, the petitioner lived at 24 Harding Place in New Haven.

During the habeas hearing, the petitioner presented the testimony of then Attorney Auden C. Grogins,[5] who had represented the petitioner in the underlying criminal trial. Grogins testified that, although she had investigated the potential alibi defense and that either she or an investigator retained by her had reached out to some of the alibi witnesses identified by the petitioner, she had ultimately concluded that an alibi defense was not strong and that presenting such a defense could, in fact, be harmful to the petitioner at trial. Grogins' reasoning in that regard was multifaceted. She stated that she had considered the quality of the alibi witnesses and the fact that all of them were either family members or close friends with the petitioner's family. She also had considered that, although all of the alibi witnesses saw the petitioner on the street near his home during the day of the murder, none of them could pinpoint the petitioner's whereabouts at the time of the shooting. She further indicated that sightings of the petitioner

[5] Attorney Grogins has since become a judge of the Superior Court. With no disrespect intended to Judge Grogins, we follow our normal practice in this opinion of referring to witnesses by their last names after initially identifying them by their full names.

shortly after the murder at locations less than one mile from the murder scene would have not only been unhelpful to the petitioner, but would, in fact, have placed him in the vicinity of the crime.

Grogins testified, as well, that her determination not to present an alibi defense was informed by her knowledge that the petitioner initially had stated to the police when he was arrested that he did not recall where he was at the time of the murder, but had then provided a list of alibi witnesses the next morning, facts she believed would have undercut any alibi testimony. Finally, in regard to an alibi defense, she indicated that presenting such a defense could have detracted from a third-party culpability defense, which she had believed was stronger. Grogins further testified that she had ultimately concluded, on the basis of her experience as a trial attorney, that the presentation of an incomplete alibi defense, bolstered only by friends and relatives of the accused, often undermines the defendant's defense in a murder trial.

Evidence also was presented at the habeas hearing that the petitioner had given Grogins a list of potential alibi witnesses and that he had asked her to present an alibi defense. In particular, the petitioner presented several witnesses at the habeas hearing who claimed to have seen the petitioner in his neighborhood close to the time the shooting occurred. Nakia Black-Geter, a close friend of the petitioner's sister, testified that the petitioner was present when she had arrived at his home between 5 p.m. and 6 p.m. She testified, as well, that the petitioner had been present during the fight, although she could not say whether he was there for the entire time. Finally, she could not recall whether the petitioner was riding a bicycle when she had seen him in the vicinity of the fight.

Additionally, Antjuan Martin, the petitioner's cousin, agreed with defense counsel that he had started "hanging out" with the petitioner at 11 a.m. on the day in question and that he had seen the petitioner riding around on a mountain bicycle during the fight. He indicated, as well, that the petitioner had been out of his sight for approximately ten minutes while the petitioner rode his bicycle to Moe's Market before the fight started.[6] Martin had no recollection of the clothes that the petitioner had been wearing or the color of the bicycle that he had been riding. Dijon Wiggins, who lived across the street from the petitioner's home, also testified that he had observed the petitioner at the fight and later during the scooter chase. Wiggins recalled that the petitioner had been riding on a mountain bicycle, but he did not recall whether the petitioner had been on the bike before the fight began.

Furthermore, Natasha Outing, the petitioner's sister, testified that she arrived home from work between 5 p.m. and 5:30 p.m. She indicated that the petitioner had been present for the fight and had been riding a ten speed bicycle up and down the street, although she conceded that she had not seen the petitioner the entire time. She recalled that the petitioner had been wearing a blue dickey[7] shirt, jeans, and a baseball cap. She indicated, as well, that kids in the neighborhood had been in the habit of sharing bicycles.

Finally, Eric Williams, a cousin of both the petitioner and the victim, indicated that he had a close relationship with the petitioner and testified that the petitioner had

[6] The record reflects that Moe's Market is located at the intersection of Dixwell Avenue and Harding Place, about a three minute bicycle ride south of the petitioner's residence and, therefore, between his residence and Canal Street, the scene of the shooting.

[7] "Dickey" shirt may refer to the "Dickies" brand of apparel. In the habeas trial transcripts, the term is spelled as "dickey" or "Dickey." For consistency, we maintain the spelling as "dickey."

been present at the beginning of the fight. Williams also testified that the petitioner was in Moe's Market when Williams' mother had called to tell him about the shooting. Williams recalled that the petitioner had been wearing a dickey shirt, but no hat, during the fight, that the petitioner had been riding either a mountain bicycle or a "baja" bicycle, and that he had not seen the petitioner on the bicycle during the fight. He also indicated that he had not been with the petitioner prior to the time he witnessed the petitioner watching the fight.

The petitioner also presented evidence from Donald Light, a private investigator retained by Grogins, and Mike Udvardi, a private investigator retained by habeas counsel. Light testified that he had attempted, with varying success, to contact the alibi witnesses whose names had been given to him by Grogins. He testified, as well, that he had operated without substantial direction from Grogins and had free rein to follow leads as they developed. Udvardi testified that the fight and scooter chase had occurred "at or about presumably the time of the shooting . . . ." Specifically, he testified that, after his own investigation, he had been able to determine that calls were made to the New Haven Police Department at 7:10 p.m. and 7:23 p.m. regarding the fight, and that the dispatch time for the scooter chase was approximately 8 p.m. Udvardi indicated, as well, that his review of Grogins' trial file revealed no police reports or other records indicating an effort on Grogins' part to ascertain the timing of these events.

In assessing the petitioner's alibi witness claim, the habeas court concluded that the petitioner failed to meet his burden of proof both as to ineffectiveness and prejudice. The court concluded that Grogins' decision not to present an alibi defense was a matter of trial strategy and that her strategy was both well considered and reasonable. The court concluded, as well, that even

if Grogins' trial strategy had been deficient, the petitioner failed to demonstrate that he was prejudiced by Grogins' decision not to present an alibi defense because the testimony of alibi witnesses would not, in fact, have exculpated the petitioner. The court reasoned that the timing of the murder and the locations where the petitioner was sighted within the time frame reflected in the record would have allowed the petitioner to commit the murder and return to his neighborhood in time to have been observed by the alibi witnesses that he presented.

On the basis of our careful review of the record, we find ample support for the habeas court's conclusion that the petitioner failed to prove that Grogins provided ineffective assistance in failing to pursue and to present an alibi defense. Our Supreme Court has acknowledged "that counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it. . . . [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. . . . [Particularly] [w]hen 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* . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 548–49, 198 A.3d 52 (2019).

In *Johnson*, our Supreme Court discussed whether trial counsel's failure to present an alibi witness in that case constituted ineffective assistance. Although the underlying facts are, of course, not identical, the reasoning of the court in *Johnson* on this issue is instructive.

The court indicated that "counsel testified to a variety of strategic reasons for [her] decision not to present an alibi defense," and that it was "required to indulge [in the] strong presumption that counsel made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) Id., 550. The court noted the significance of trial counsel's reasoning for not presenting the alibi defense, particularly, the fact that "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." Id., 552. The court concluded 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 . . . ." (Internal quotation marks omitted.) Id., 554. The court concluded, as well, that "[e]ven if there [was] some showing that the [alibi] testimony would have been helpful in establishing the asserted [alibi] defense . . . 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." (Citation omitted; internal quotation marks omitted.) Id.

In the matter at hand, Grogins repeatedly testified at the habeas hearing that she believed that the third-party culpability defense was her strongest strategy at the petitioner's criminal trial and that she was concerned that presenting an alibi defense could do more harm than good. In addition, some of the purported alibi witnesses indicated that they had seen the petitioner in the vicinity of the fight, which was first reported to the police approximately fifteen minutes after the first report of the murder to the police, while some witnesses stated that they had observed the petitioner near the scene of a scooter chase, which took place shortly

before 8 p.m. in the vicinity of the petitioner's house. Many of the witnesses conceded, as well, that they could not account for the petitioner's whereabouts throughout the entire time period during which these events occurred. Although the witnesses each placed the petitioner in the vicinity of his home, approximately one mile from the scene of the murder at various times during the early evening, their testimonies were inconsistent and varied as to the time they saw the petitioner and their descriptions of the petitioner's clothing and bicycle. Accordingly, we agree with the habeas court and conclude that Grogins' decision not to present an alibi defense was not constitutionally deficient.

B

The petitioner next claims that Grogins was ineffective for failing to properly investigate and to rebut the testimony of the eyewitnesses to the murder. This claim has two interwoven parts. First, the petitioner claims that Grogins unreasonably failed to investigate the reliability of statements given by Crimley and Caple. Second, the petitioner asserts that Grogins unreasonably failed to preserve the record regarding potential expert testimony on the subject of eyewitness identification.

The following additional information is pertinent to our discussion. As previously noted, on June 23, 2005, Crimley gave a statement to the police indicating that she had witnessed the shooter pass her on a bicycle and fire a gun at the victim; four days later, she identified the petitioner as the shooter after being presented with a photographic array. *State* v. *Outing*, supra, 298 Conn. 38–39. Caple, who was a former high school classmate of the petitioner and had known him for a few years, also identified the petitioner as the shooter from a photographic array after indicating that he had witnessed the shooter ride his bicycle on Canal Street and shoot

the victim. Id. Prior to the start of the petitioner's criminal trial, both Crimley and Caple recanted their statements to the police and their identifications of the petitioner, alleging that they had been coerced into making the statements. Id., 39. Thereafter, at the hearing on the petitioner's motion to suppress the identifications, Crimley and Caple testified that they did not know who the shooter was and that the police had coerced them into making the statements. Id., 39–40. At the petitioner's criminal trial, Crimley and Caple testified, more adamantly than they had at the suppression hearing, that they were coerced into identifying the petitioner as the shooter.

During the habeas trial, Grogins indicated that when she was confronted with the initial statements from Crimley and Caple, she initially had intended to elicit Dysart's expert testimony concerning the fallibility of eyewitness identification. Grogins changed course, however, when she learned that Crimley and Caple had disavowed their statements and had, instead, alleged that their statements had been coerced by the police. From Grogins' perspective, the new assertions made by Crimley and Caple had changed her approach because she was no longer confronting an issue of mistaken identity but, rather, a claim of police coercion. Grogins also testified that presenting Dysart's testimony on mistaken identify would have been inconsistent with her trial strategy of undermining the identifications by demonstrating that police coercion had occurred. Accordingly, she decided not to present the testimony of Dysart at trial.

Grogins testified, as well, that she had directed her investigator, Light, to interview Crimley and Caple in an effort to develop their claim of police coercion, but Light had been unsuccessful in reaching them. Later in her testimony, Grogins indicated that she did not recall whether she had instructed Light to make ongoing

efforts to meet with Crimley and Caple after their suppression hearing testimony and prior to trial, but stated that she would not have any reason to dispute evidence indicating that such efforts had been made. Light also testified regarding his efforts to contact Crimley and Caple. He indicated that he had tried to contact Crimley and Caple, but those attempts had been unsuccessful. He indicated, as well, that Grogins had never provided him with specific instructions to meet with Crimley or Caple prior to the criminal trial.

In assessing Grogins' decision not to present Dysart's testimony and not to vigorously pursue Caple and Crimley before trial, the habeas court noted that, during the cross-examinations of Crimley and Caple at the criminal trial, Grogins concentrated on the issue of coercion and not whether their initial statements were borne of mistaken identifications of the petitioner. The court determined that Grogins had sufficiently articulated the tactical reasoning behind her method of investigation and examination of Crimley and Caple. The court also determined that Grogins had made the tactical decision not to produce an eyewitness identification expert at trial and that her decision not to pursue a theory of mistaken identity was reasonable under the circumstances.

The petitioner asserts that, even after Crimley and Caple had recanted their identifications of the petitioner at the suppression hearing, Grogins should have made efforts to contact them in the time period leading up to the criminal trial and, had she done so, she could have developed additional evidence regarding the reliability of their statements. The issue before us in this appeal, however, is not whether all reasonable lawyers would have made the same tactical decision as Grogins, but whether her decision to forgo additional investigation and rebuttal of the eyewitnesses' statements, which

included forgoing expert testimony on the issue of misidentification, fell within the broad parameters of her decisional discretion. "Paramount to the effective assistance of counsel is the obligation by the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. . . . We are mindful that, under certain circumstances, the failure to use any expert can result in a determination that a criminal defendant was denied the effective assistance of counsel. . . . Nevertheless, the question of whether to call an expert witness always is a strategic decision. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Arroyo* v. *Commissioner of Correction*, 172 Conn. App. 442, 467, 160 A.3d 425, cert. denied, 326 Conn. 921, 169 A.3d 235 (2017).

In the case at hand, we do not fault the habeas court's conclusion because we believe it accords appropriate deference to Grogins' tactical decision making in regard to forgoing additional investigation into Crimley's and Caple's statements and omitting Dysart's expert testimony on misidentification at trial. The record reflects that part of Grogins' third-party culpability theory at trial was to establish that the statements made by Crimley and Caple were the product of police coercion. Grogins' cross-examination of Crimley and Caple at the criminal trial advanced that theory by eliciting testimony that they were coerced. Although we acknowledge that additional investigation into Crimley's and Caple's statements may have shed more light on their credibility as witnesses, evidence in the record does

not support a conclusion that Grogins' failure to do so was unreasonable. See *Moye* v. *Commissioner of Correction*, supra, 168 Conn. App. 218 ("To prove that his counsel's performance was deficient, the petitioner must demonstrate that trial counsel's representation fell below an objective standard of reasonableness. . . . Competent representation is not to be equated with perfection." [Internal quotation marks omitted.]). In sum, we agree that Grogins' approach to the handling of these eyewitnesses fell within the wide range of reasonably effective assistance. In addition, the record is clear that Grogins' decision not to call Dysart as an expert at trial was based on her concern that doing so would have potentially detracted from the petitioner's coercion defense.[8] Thus, we also agree that Grogins' decision to forgo Dysart's expert testimony was a reasonable tactical choice under the circumstances and, accordingly, conclude that Grogins' performance was not deficient in this regard.

C

The petitioner next claims that Grogins was ineffective for failing to preserve for appellate review the trial court's exclusion of certain aspects of Dysart's expert testimony on eyewitness identification. Specifically, the petitioner claims that Grogins was ineffective for failing to obtain a ruling at trial as to the admissibility of five eyewitness identification factors about which the trial

[8] Our Supreme Court reached the same conclusion in the petitioner's direct appeal, albeit in the context of the petitioner's claim that the trial court had improperly barred him from presenting portions of Dysart's testimony at his criminal trial. See *State* v. *Outing*, supra, 298 Conn. 64 ("[m]oreover, it is reasonable to conclude that the [petitioner's] decision not to call Dysart as a trial witness was a tactical one predicated on the concern that to do so might detract from the [petitioner's] claim that Crimley and Caple had not made a good faith but mistaken identification of the [petitioner] as the shooter but, rather, had been coerced by the police into identifying the [petitioner]").

court had precluded Dysart from testifying at the hearing on the petitioner's motion to suppress.

The following additional information, as set forth by our Supreme Court in the petitioner's direct appeal, is relevant to our resolution of this claim. Prior to the start of the criminal trial, "[b]y way of a proffer, Dysart testified that . . . there is an undue risk of misidentification resulting from the identification procedure if, as occurred in the [underlying criminal] case: (1) the photographs are shown to the witness simultaneously rather than sequentially; (2) after advising the eyewitness that the perpetrator may or may not be in the photographic array, the police provide the witness with a form that does not contain a line on which the witness may indicate that the array does not include the perpetrator; and (3) the police do not use a double-blind identification procedure, that is, one in which the person administering the procedure does not know the identity of the suspect. Dysart also explained that she intended to testify that (1) the perpetrator's use of a disguise can impair the ability of a witness to make an accurate identification (disguise effect); (2) under the principle of unconscious transference, a witness is more likely to identify a person as the perpetrator if that person looks familiar to the witness; (3) a witness tends to focus on the perpetrator's weapon instead of on the perpetrator, thereby reducing the likelihood of an accurate identification (weapons focus effect); (4) there is little or no correlation between the reliability of an identification and the witness' confidence in the identification; (5) a witness who is under stress while observing the commission of the crime is less likely to make an accurate identification of the perpetrator; and (6) witness collaboration can adversely affect the reliability of an identification. The state objected to Dysart's proffered testimony, claiming, inter alia, that it was inadmissible in light of this court's determination in

State v. *Kemp*, 199 Conn. 473, 476–77, 507 A.2d 1387 (1986), and *State* v. *McClendon*, 248 Conn. 572, 586–87, 730 A.2d 1107 (1999), [both overruled in part by *State* v. *Guilbert*, 306 Conn. 218, 253, 49 A.3d 705 (2012)], that such testimony generally is within the common knowledge and experience of the average person and, therefore, it would not aid the fact finder in evaluating the identification evidence." (Footnote omitted; internal quotation marks omitted.) *State* v. *Outing*, supra, 298 Conn. 42–43.

"In reliance on *Kemp* and *McClendon*,[9] the trial court precluded Dysart from testifying that the reliability of the identification can be adversely affected by witness stress, witness collaboration, the perpetrator's use of a disguise and the perpetrator's use of a weapon, and that the witness' confidence in the accuracy of the identification bears little or no relation to the accuracy of the identification. In support of its ruling, the court explained that such testimony was unnecessary because it was within the realm of . . . common sense and . . . experience." (Footnote added; internal quotation marks omitted.) Id., 43 n.7. The court, however, "concluded that, out of an abundance of caution, Dysart could testify [at the suppression hearing] on the issues of the simultaneous presentation of photographs, police instructions to the witness, double-blind administration of the identification procedure and the theory of unconscious transference. The trial court emphasized that it was limiting its ruling to the testimony at the hearing on the motion to suppress . . . and left the issue open should the [petitioner] seek to introduce Dysart's testimony at trial." (Internal quotation marks omitted.) Id.,

[9] In *State* v. *Kemp*, supra, 199 Conn. 477, and *State* v. *McClendon*, supra, 248 Conn. 586, our Supreme Court affirmed the trial court's exclusion of expert testimony on eyewitness identification after observing that such testimony had previously "been excluded on the grounds that the reliability of eyewitness identification is within the knowledge of the jurors and expert testimony generally would not assist them in determining the question."

43–44. After Dysart's testimony, the court denied the petitioner's motion to suppress. See id., 45–46.

In addition, "at trial, the [petitioner] made a motion requesting that Dysart be permitted to provide testimony concerning the four factors pertaining to the reliability of eyewitness [identification] procedures about which the trial court had allowed Dysart to testify at the suppression hearing. The trial court granted the [petitioner's] motion. With respect to the other five factors about which the trial court precluded Dysart's testimony at the suppression hearing, however, the [petitioner] never renewed his request that Dysart be permitted to testify at trial with respect to those factors. In fact, the [petitioner] did not call Dysart as a trial witness at all." Id., 63. The petitioner appealed, claiming, inter alia, that the trial court had improperly precluded him from introducing Dysart's testimony regarding the additional five factors. See id., 62–63. Our Supreme Court held that this issue was not preserved for appellate review. Id., 63.

For the same reason as stated in part I B of this opinion, we do not fault Grogins for failing to preserve, for appellate review, a claim concerning the trial court's order disallowing the proffer of Dysart's testimony concerning the additional five factors that reduce the reliability of eyewitness identification. Because Grogins already had reasonably determined not to present Dysart's testimony at the petitioner's criminal trial, she would have had no strategic reason to preserve the court's exclusion of evidence on a matter that she reasonably believed had been rendered moot by her tactical choice not to pursue a theory of mistaken identification. "[T]here is no requirement that counsel call an expert when [s]he has developed a different trial strategy." (Internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 186 Conn. App. 366, 379,

199 A.3d 562 (2018), cert. denied, 330 Conn. 962, 199 A.3d 560 (2019).

Moreover, at the time of the underlying criminal trial, our decisional law did not permit expert testimony on the subjects for which Grogins initially sought to present expert testimony. Although *State* v. *Kemp*, supra, 199 Conn. 473, was overruled in part by *State* v. *Guilbert*, supra, 306 Conn. 253,[10] recent decisions of this court that have addressed claims of ineffective assistance of trial counsel arising from counsel's decisions on the issue of expert testimony on eyewitness identification in between our Supreme Court's opinions in *Kemp* and *Guilbert* have held that counsel's decision not to present the testimony of an eyewitness identification expert did not constitute deficient performance. See, e.g., *Davis* v. *Commissioner of Correction*, supra, 186 Conn. App. 378 ("[a]lthough *Kemp* was overruled . . . we consider [counsel's] performance in light of the standards in effect at the time of the petitioner's criminal trial . . . and conclude that the habeas court did not err in concluding that [counsel's] performance was not deficient"); *Bennett* v. *Commissioner of Correction*, 182 Conn. App. 541, 562, 190 A.3d 877 ("because the law in effect at the time of the criminal trial discouraged the use of expert testimony on the issue of eyewitness identification, [counsel] did not perform deficiently by not presenting expert testimony"), cert. denied, 330 Conn. 910, 193 A.3d 50 (2018). To impose on counsel the duty to foretell what tack our Supreme Court would take on this subject represents the height of post hoc reasoning, which is not the task of a court on habeas

[10] After the petitioner's criminal trial and direct appeal, our Supreme Court decided *State* v. *Guilbert*, supra, 306 Conn. 218, in which it expressly overruled *Kemp* and *State* v. *McClendon*, supra, 248 Conn. 572, and held that "the reliability of eyewitness identifications frequently is not a matter within the knowledge of an average juror"; *State* v. *Guilbert*, supra, 251; and "expert testimony is an effective way to educate jurors about the risks of misidentification." Id., 252.

review. See *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 462, 880 A.2d 160 (2005) (Counsel is not "required to change then-existing law to provide effective representation. . . . Counsel instead performs effectively when he elects to maneuver within the existing law . . . ." [Citation omitted; internal quotation marks omitted.]), cert. denied, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006). Accordingly, we agree with the habeas court and conclude that Grogins did not perform deficiently by not preserving for appellate review a claim related to the trial court's exclusion of Dysart's expert testimony regarding the additional five factors concerning eyewitness identifications.

II

The petitioner next claims that his appellate counsel was ineffective for failing to claim, in his direct appeal, that the trial court incorrectly denied the petitioner's request to present surrebuttal evidence at trial.[11] We note briefly our standard of review of a claim of ineffectiveness of appellate counsel. "A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in [*Strickland* v. *Washington*, supra, 466 U.S. 687] . . . . Our

[11] "Surrebuttal evidence is that which is offered to meet evidence raised in rebuttal. [O]nly evidence to explain away new facts brought forward by the proponent in rebuttal . . . is properly admissible [in surrebuttal]. . . . [Our Supreme Court previously has] stated that there is no constitutional right to present surrebuttal evidence. . . . The presentation of surrebuttal evidence is a matter resting squarely within the discretion of the trial court. . . . The defendant must demonstrate some compelling circumstance and the proffered evidence must be of such importance that its omission puts in doubt the achievement of a just result." (Internal quotation marks omitted.) *State* v. *Goriss*, 108 Conn. App. 264, 272, 947 A.2d 1041, cert. denied, 289 Conn. 904, 957 A.2d 873 (2008).

Supreme Court has, however, distinguished the standards of review for claims of ineffective assistance of trial counsel and of appellate counsel. . . . For claims of ineffective assistance of appellate counsel, we must assess whether there is a reasonable probability that, but for appellate counsel's failure to raise the issue on appeal, the petitioner would have prevailed [on] appeal, i.e., [obtaining] reversal of his conviction or granting of a new trial." (Citation omitted; internal quotation marks omitted.) *Smith* v. *Commissioner of Correction*, 148 Conn. App. 517, 530, 85 A.3d 1199, cert. denied, 312 Conn. 901, 91 A.3d 908 (2014).

Additionally, "[j]ust as with a claim of ineffective assistance of trial counsel, success on a claim of ineffective assistance of appellate counsel requires the petitioner to establish that appellate counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . [Although] an appellate advocate must provide effective assistance, [*she*] *is not under an obligation to raise every conceivable issue*. A brief that raises every colorable issue runs the risk of burying good arguments . . . in a verbal mound made up of strong and weak contentions. . . . Indeed, [e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. . . . Moreover, [a] habeas court will not, with the benefit of hindsight, second-guess the tactical decisions of appellate counsel." (Emphasis added; internal quotation marks omitted.) Id., 531.

The following additional information is relevant to this claim. As previously noted, Grogins pursued a claim of third-party culpability at the petitioner's criminal trial. In furtherance of this claim, Shaniah Outlaw testified on behalf of the petitioner that she had overheard

Darrell Mayes confess to the shooting. Once the petitioner's defense rested, the state called Vasquez as a rebuttal witness. Vasquez testified that when he had interviewed Outlaw, she denied ever telling anyone that she had overheard Mayes confess. In light of this testimony, Grogins sought to introduce surrebuttal testimony from Allison Carter, Outlaw's mother. By way of a proffer, Grogins indicated that Carter would testify that she was present when her daughter told Vasquez of the purported confession by Mayes. See *State* v. *Outing*, supra, 298 Conn. 71. The court denied the request to present Carter's surrebuttal testimony, and, on appeal, the petitioner's appellate counsel, Attorney James B. Streeto, did not claim that the trial court had abused its discretion in denying the petitioner's request for Carter's surrebuttal evidence. See id.

Streeto testified at the habeas trial that, given page limitations for briefing, he did not have the space to include an argument on this issue and that he had determined not to present such an argument because, in his view, it was one of the petitioner's weaker arguments. Streeto also testified that the level of deference afforded a trial court's decision not to allow surrebuttal evidence had impacted his assessment of whether to raise it as an issue on appeal. He believed, as well, that the inclusion of this relatively weak argument could have detracted from his presentation on the arguments he briefed.

The habeas court concluded, and we agree, that Streeto made a reasonable strategic decision not to raise the surrebuttal issue on appeal, and that his decision fell within the wide range of reasonable professional assistance. Our case law is clear that a court will not second-guess an appellate counsel's tactical decision to limit the claims briefed to those claims that he or she reasonably viewed as most critical to the

appeal. See, e.g., *Smith* v. *Commissioner of Correction*, supra, 148 Conn. App. 532 (petitioner failed to prove appellate counsel's performance fell below objective standard of reasonableness where counsel had "reviewed the pleadings and transcripts, identified the possible issues and then strategically determined which issues had the best chance of winning" [internal quotation marks omitted]); *Saucier* v. *Commissioner of Correction*, 139 Conn. App. 644, 652, 57 A.3d 399 (2012) (appellate counsel's performance not deficient where counsel had "made his tactical decision to focus on the strongest of the petitioner's claims on appeal . . . after considering the relevant case law and whether the claim was properly preserved, and after consulting with other experienced counsel"), cert. denied, 308 Conn. 907, 61 A.3d 530 (2013). Accordingly, we conclude that the court properly determined that the petitioner failed to prove that Streeto's performance was deficient.

III

Finally, the petitioner claims that the habeas court incorrectly determined that he did not prove his claim of actual innocence. "[T]he proper standard for evaluating a freestanding claim of actual innocence, like that of the petitioner, is twofold. First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime." *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 747, 700 A.2d 1108 (1997).

"Actual innocence is not demonstrated merely by showing that there was insufficient evidence to prove

guilt beyond a reasonable doubt. . . . Rather, actual innocence is demonstrated by affirmative proof that the petitioner did not commit the crime. . . . Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime even though it is unknown who committed the crime, that a third party committed the crime or that no crime actually occurred." (Internal quotation marks omitted.) *Carmon* v. *Commissioner of Correction*, 178 Conn. App. 356, 371, 175 A.3d 60 (2017), cert. denied, 328 Conn. 913, 180 A.3d 961 (2018).

This court has stated that "[a] claim of actual innocence must be based on newly discovered evidence. . . . This evidentiary burden is satisfied if a petitioner can demonstrate, by a preponderance of the evidence, that the proffered evidence could not have been discovered prior to the petitioner's criminal trial by the exercise of due diligence." (Internal quotation marks omitted.) *Ampero* v. *Commissioner of Correction*, 171 Conn. App. 670, 687, 157 A.3d 1192, cert. denied, 327 Conn. 953, 171 A.3d 453 (2017).

In support of his claim of actual innocence, the petitioner relies on third-party culpability evidence presented at the habeas trial, which he claims points either to Antwan Baldwin or Mayes as the shooter. In particular, the petitioner relies on the fact that Baldwin's fingerprints were found on a bicycle left at the murder scene, which Baldwin acknowledged he owned but claimed had been stolen from him. The petitioner relies, as well, on the negative inferences that he contends may be drawn from Mayes' invocation at the habeas trial of his fifth amendment privilege against self-incrimination. Additionally, the petitioner relies on testimony from his alibi witnesses that they saw him at the fight and on testimony from Crimley that the petitioner was not the shooter.

Given the well established parameters of decisional law on the topic of actual innocence, this claim warrants little discussion. The habeas court's conclusion is apt: "Even assuming arguendo that the evidence in support of an actual innocence claim was not required to be newly discovered, the court finds that the mosaic of evidence presented by the petitioner does not constitute affirmative proof of actual innocence, as it does not tend to establish that the petitioner could not have committed the crime as it relates to the other evidence in the case." (Internal quotation marks omitted.) The court's apt rejection of this claim needs no embellishment.

The judgment is affirmed.

In this opinion the other judges concurred.

JOHN RAUSER *v.* PITNEY BOWES, INC., ET AL.
(AC 41025)

Alvord, Keller and Beach, Js.

Syllabus

The plaintiff, who was employed by the named defendant, P Co., appealed to this court from the decision of the Compensation Review Board affirming the decision of the Workers' Compensation Commissioner dismissing his claim for benefits related to injuries that he had sustained when he was assaulted in a parking lot following a social gathering with fellow employees at bar and restaurant, while on work related travel for P Co. In dismissing the plaintiff's claim for benefits, the commissioner determined that the plaintiff failed to satisfy his burden to show that his injuries arose out of and in the course of his employment, which was based on his finding that, between 8 p.m. and midnight on the night when the plaintiff was socializing with his fellow employees at the restaurant, he was engaged in a substantial deviation from his work related activities. On appeal, the plaintiff claimed that the board erred in affirming the commissioner's decision because the commissioner failed to set forth a factual determination with respect to whether, at the time he sustained the subject injuries, he was returning to his rental vehicle to return to his hotel room, and, therefore, he was on the direct

route of his business travel. *Held* that the plaintiff failed to demonstrate that either the commissioner or the board misapplied the law in evaluating his claim for workers' compensation benefits: the evidence amply supported the commissioner's determination that for several hours, between 8 p.m. and midnight, the plaintiff was engaged in a substantial deviation from his employment activities, and the commissioner did not make any express finding with respect to whether the plaintiff sustained a compensable injury while on the direct route of his business travel because the plaintiff failed to present any persuasive evidence in support of that theory of recovery, as the evidence that the plaintiff relied on in support of his claim demonstrated only the location where the assault occurred, and the mere presence of the plaintiff at the scene of the assault, in and of itself, did not demonstrate that he had completed his deviation and had resumed his business travel; moreover, even if this court were to view certain testimony of the plaintiff and a coworker as dispositive evidence that, at the time of the assault, the plaintiff was returning to his vehicle to return to his hotel and, thus, as evidence that he was assaulted while on the direct route of his business travel, the plaintiff was unable to rely on that testimony in support of his claim, as the commissioner found that it was not credible and the plaintiff did not demonstrate that the factual findings that resulted from the commissioner's credibility determinations were unreasonable.

Argued March 19—officially released June 11, 2019

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Third District dismissing the plaintiff's claim for certain benefits, brought to the Compensation Review Board, which affirmed the commissioner's decision, and the plaintiff appealed to this court. *Affirmed.*

Michael Kerin, for the appellant (plaintiff).

Michael M. Buonopane, for the appellee (named defendant).

Opinion

KELLER, J. The plaintiff, John Rauser, appeals from the decision of the Compensation Review Board (board), affirming the decision of the Workers' Compensation Commissioner for the Third District (commissioner)

dismissing the plaintiff's claim for workers' compensation benefits. The plaintiff claims that the board erred in affirming the commissioner's decision in light of the fact that the commissioner failed to set forth a factual determination with respect to whether, at the time he sustained the injuries for which he sought benefits, he was on the direct route of his business travel.[1] We affirm the decision of the board.

On the basis of the subordinate factual findings made by the commissioner, we set forth the relevant facts as follows. On or about June 11, 2014, the plaintiff was employed by the defendant Pitney Bowes, Inc.,[2] as a director of channel management. He had been employed by the defendant for twenty-eight years. Part of his work related duties required him to develop a rapport with members of the defendant's sales staff in order to understand and evaluate not only what they have sold to the defendant's customers, but to approve or disapprove of their sales methods. On June 8, 2014, the plaintiff and another coworker, both of whom resided in Connecticut, traveled to Spokane, Washington, to meet with local sales staff employed by the

[1] The plaintiff's statement of the issues sets forth two distinct issues. The first issue, which we resolve in this opinion, is whether the commissioner erroneously failed to make a factual finding with respect to whether the plaintiff was on the direct route of his business travel at the time he sustained the injury at issue and, in light of that error on the part of the commissioner, whether the board erroneously affirmed the commissioner's dismissal of his claim for benefits. The second issue is whether the board erroneously "failed to find" that he was on the direct route of his business travel at the time he sustained the injury at issue. Setting aside the fact that the plaintiff's second claim is legally untenable on its face, as the board is not a trier of fact, we observe that the plaintiff has failed to set forth an independent analysis of the second claim in his brief. Accordingly, we deem the second claim to be abandoned. See, e.g., *Tonghini* v. *Tonghini*, 152 Conn. App. 231, 239, 98 A.3d 93 (2014) (assignments of error not briefed beyond statement of claim will be deemed abandoned and not reviewed by this court).

[2] Sedgwick Claims Management Services, Inc., which is identified in the record as the defendant's workers' compensation insurer, also is named as a defendant in this action. For ease of reference, references to the defendant are to Pitney Bowes, Inc.

defendant. As with prior work related travel of this nature undertaken by the plaintiff to evaluate sales, the defendant paid for expenses related to airfare, lodging, car rental, food, and alcoholic drinks.

The plaintiff had business meetings with Spokane sales staff on June 9 and 10, 2014. On June 11, 2014, a Spokane based sales representative, Trish Lopez, invited the plaintiff and other supervisory staff to a social gathering at a Spokane bar and restaurant named Fast Eddie's All Purpose Pub (Fast Eddie's). Lopez sent the invitations on behalf of Sean Johnson, who was employed by the defendant as a general financial sales specialist. There was no formal agenda for the event, as there would be for a business meeting, and attendance was considered to be voluntary. The invitation, which Lopez sent by e-mail, specified that the gathering at Fast Eddie's was scheduled to begin at 5:30 p.m. The plaintiff and several of his Spokane colleagues attended the gathering. The plaintiff began consuming alcoholic beverages immediately upon his arrival at or about 5:30 p.m. The plaintiff engaged in what he viewed as joking around with his colleagues, although he acknowledged that several of his jokes and comments were "inappropriate and beyond the bounds of what [the defendant] would say is acceptable." For example, the plaintiff offered to assist two of his female colleagues with work matters in exchange for "sexual favors." Only a small portion of the conversation at Fast Eddie's was devoted to discussing the defendant's interests.

Lopez had been instructed by one of her superiors, Jonathan Allen, to keep an open tab at Fast Eddie's to cover expenses up to $500, but no later than 8 p.m., whichever occurred first. At 8 p.m., Lopez closed the tab incurred at Fast Eddie's, which totaled $304.78. Later, Lopez was reimbursed for this expenditure.

After 8 p.m., the plaintiff and some of his colleagues left Fast Eddie's and went to a neighboring restaur-

ant and bar named Borracho Tacos & Tequilera (Borracho). There, the plaintiff consumed even more alcoholic beverages and continued to make comments of a sexual nature to and in the presence of his coworkers. For example, the plaintiff stated to a female coworker that if she would expose her breasts to him, he would "approve anything" that she sent to him. While at Borracho, one of his coworkers overheard him making a comment of a sexual nature to at least one other patron who was not an employee of the defendant. By 9:30 p.m., the plaintiff was visibly intoxicated, and, by midnight, the plaintiff's blood alcohol content was estimated to be .202, which significantly impaired his judgment, control, memory, skills, ability to react, and ability to assess risk.[3] Moreover, the plaintiff's blood alcohol content greatly exceeded the legal limit for purposes of operating a motor vehicle in Washington.

Shortly after midnight on June 12, 2014, the plaintiff, accompanied by Johnson, exited Borracho. While walking outside in the vicinity of Borracho, several men, who were unknown to the plaintiff and Johnson, beat the plaintiff severely.[4] The plaintiff sustained life threatening injuries for which he required immediate hospitalization. Following his release from the hospital, he underwent significant periods of rehabilitation both in Washington and Connecticut. Although the plaintiff's condition has improved, he continues to experience the effects of some of his injuries, including a diminished sense of taste and smell, as well as difficulty in performing some cognitive functions.

The plaintiff sought workers' compensation benefits related to the injuries he sustained in Spokane. The commissioner held a hearing related to the claim, which

[3] Following the events of June 11, 2014, the defendant reprimanded the plaintiff for both sexual harassment and excessive alcohol consumption.

[4] Johnson sustained physical injuries as well.

the defendant disputed, during which the commissioner considered documentary evidence related to the events at issue, the plaintiff's employment, and his medical treatment following the assault. The commissioner also considered the testimony of the plaintiff and several other witnesses who observed the plaintiff during the events leading up to the assault, including Johnson, Lopez, Desiree Cimarrustti, and Peter Binder. The commissioner went on to consider the testimony of Kevin O'Brien and Robbie Narcisse, both of whom had investigated the relevant events in the course of their employment with the defendant. Additionally, the commissioner considered the testimony of Marc Bayer, a toxicologist who had analyzed the plaintiff's blood alcohol content and opined with respect to the degree to which the plaintiff's blood alcohol content likely affected him during the events at issue. Finally, the court considered the police reports related to the assault.

In dismissing the claim for benefits, the commissioner found that any business purpose for which the plaintiff was present at Fast Eddie's ended by the time that Lopez paid the bar tab at 8 p.m., and that any food or drink consumed at Fast Eddie's or Borracho after that time was "purely social in nature and unrelated to the business interests of [the defendant]." The commissioner also found that "the intoxication, the sexual comments, and the drinking that continued until the midnight hour constitute a substantial deviation from work in furtherance of the employer's business . . . ." The commissioner concluded that "the [plaintiff] failed in his burden of persuasion to show that the assault arose out of and in the course of his duties for the employer" and that the claim was not compensable.[5]

[5] As the plaintiff correctly observes, the commissioner did not find that the injuries for which he sought workers' compensation benefits "were caused by his misconduct, intoxication, or by his participation in a social or recreational event; nor was there testimony or other evidence in the

Following the commissioner's decision, the plaintiff appealed to the board. In relevant part, the plaintiff claimed that the commissioner had erred in his determination that the plaintiff's injuries did not arise out of and in the course of his employment. The plaintiff argued that "he was assaulted and sustained injuries . . . incidental to his work for [the defendant] and he would not have been where he was when he was assaulted if it was not for his business trip to Spokane, Washington and, more specifically, at the work event which was at Fast Eddie's on the night of June 11, 2014."

Relying on the commissioner's factual findings, the board rejected the plaintiff's argument. It stated: "The fundamental question which must be answered here is whether, at the time of the injury, the [plaintiff] had deviated from his employment and was not doing something incidental to his employment. Pertinent to this inquiry, the . . . commissioner found that after 8 p.m. on June 11, 201[4], the [plaintiff] was no longer serving the business interests of the employer. The consumption of food, alcohol, and the nature of the discussions occurring after 8 p.m. on June 11, 201[4], constituted a substantial deviation from activities related to the [defendant's] business. . . . Such factual determinations will not be disturbed unless they are contrary to law, without evidence, or based on unreasonable or impermissible factual inferences. . . . On review, we are not persuaded that the trier's conclusion violates this appellate standard." (Citation omitted; footnote omitted.) The board also stated: "In the present matter, the [defendant's] encouragement of the [plaintiff's] social activities can only be inferred to support the time the claimant spent at Fast Eddie's. After 8 p.m. on the evening in question, the [plaintiff] no longer enjoyed the express consent or implied acquiescence of his

record to support such a finding." Neither the commissioner nor the board relied on these theories in determining that the claim should be dismissed.

employer for his social pursuits." Accordingly, the board affirmed the commissioner's dismissal of the plaintiff's claim.

The plaintiff argues that it is unnecessary for this court to resolve the issue of whether the commissioner correctly determined that, during the four hours between 8 p.m. and midnight, he had substantially deviated from his work on behalf of the defendant. He relies on the legal proposition that, even after an employee has completed a substantial personal deviation from his work, once he has resumed the direct route of his business travel, any injury occurring on that business route is ordinarily compensable. See, e.g., 2 A. Larson, Larson's Workers' Compensation Law (2018) § 17.03 ("we may also set aside one clearly compensable type of case—that in which the personal deviation has been completed and the direct business route has been resumed"); 2 A. Sevarino, Connecticut Workers' Compensation After Reforms (7th Ed. 2017) § 4.22.9, p. 579 ("[a]ny identifiable and significant deviation from a business trip for personal reasons takes the injured worker out of the course of employment until s/he returns, if ever, to the pursuit of business matters"). Before this court, the plaintiff claims that the board erred in affirming the commissioner's decision in light of the fact that the commissioner failed to make a factual determination with respect to whether, at the time he sustained the injuries for which he sought benefits, he was on the direct route of his business travel.[6]

[6] Consistent with his appellate argument, the plaintiff, in his proposed findings submitted to the commissioner, asked the commissioner to find that, at the time of the assault, he and Johnson were "in the parking lot behind Fast Eddie's and planning on heading to their hotels and homes, respectively." The plaintiff also asked the commissioner to find that "[t]he [plaintiff] was heading back to his rental car which was furnished to him by [the defendant] when he was attacked by unknown assailants" and "in a place he was reasonably expected to be."

In the plaintiff's motion to correct the commissioner's finding and dismissal, he asked the commissioner to find that at the time of the assault, "[t]he plaintiff was in a place that he was reasonably expected to be, to

The plaintiff argues that the evidence demonstrates that he was "on the direct business route of travel from Fast Eddie's . . . to [his] employer provided automobile" when he sustained the injuries underlying his claim. He argues in relevant part: "As the undisputed documentary evidence in the present case demonstrates, the [plaintiff] at the commencement of his being attacked by unknown assailants was returning to the rental car provided for his transportation during his business trip in Spokane, in order to return to his employer provided hotel to begin work the next morning. He fled away from his vehicle, eastward back along his direct business route, for about thirty yards in his attempt to evade his attackers, but was caught and brutally beaten and kicked." The plaintiff further argues: "At the time of his attack, he was in the direct route of his business travel, in the alley serving both the restaurant where his business meeting had occurred and the second restaurant where he had gone with fellow employees to socialize following the business meeting." Additionally, the plaintiff argues that the facts of the present case are similar to the facts at issue in prior decisions in which our Supreme Court determined that claimants were entitled to workers' compensation benefits after they deviated from a business purpose but sustained injury after they later had returned to business activities. See, e.g., *Carroll* v. *Westport Sanitarium*, 131 Conn. 334, 339, 39 A.2d 892 (1944); *Ohmen* v. *Adams Bros.*, 109 Conn. 378, 385–86, 146 A. 825 (1929); and *Carter* v. *Rowe*, 92 Conn. 82, 85, 101 A. 491 (1917).

The plaintiff argues that "[w]hether or not [he] was on the direct business route back to his rental car and

wit, in the parking lot where he parked to go to Fast Eddie's for business entertainment that was not only condoned but also encouraged by his employer. He was heading toward his vehicle with . . . Johnson with the intent of returning back to the hotel (which was all paid for by [the defendant])." The court denied this ground set forth in the motion to correct.

hotel was . . . a key finding of subordinate fact which the commissioner should have made in order properly to apply the law to the facts." Thus, the plaintiff urges us to conclude that the commissioner and the board improperly applied the governing legal principles to the facts of the present case. Furthermore, he urges us to conclude that, in light of the undisputed facts that appear in the record, the commissioner and the board erred in concluding that the injury was not compensable.

"The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . Neither the . . . board nor this court has the power to retry facts. . . .

"The standard of review to be used by the board when reviewing a commissioner's findings is set forth in Regulations of Connecticut State Agencies § 31-301-8.1 That section directs the board not to retry the case before it, but to determine whether evidence supports the commissioner's finding. . . . [T]he . . . [board's] hearing of an appeal from the commissioner is not a de novo hearing of the facts. . . . [I]t is oblig[ated] to hear the appeal on the record and not retry the facts. . . . [T]he power and duty of determining the facts rests on the commissioner, the trier of facts. . . . [T]he conclusions drawn by [him] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Sellers* v. *Sellers Garage, Inc.*, 92 Conn. App. 650, 650–51, 887 A.2d 382 (2005).

"It is an axiom of [workers'] compensation law that awards are determined by a two-part test. The [claimant] has the burden of proving that the injury claimed arose out of the employment and occurred in the course of the employment. There must be a conjunction of [these] two requirements . . . to permit compensation. . . . An injury is said to arise out of the employment when (a) it occurs in the course of the employment and (b) [it] is the result of a risk involved in the employment or incident to it or to the conditions under which it was required to be performed. . . . [C]ases have held that an injury [occurs] in the course of the employment when it takes place (a) within the period of the employment, (b) at a place where the employee may reasonably be and (c) while he is reasonably fulfilling the duties of the employment or doing something incidental to it. . . . There must be a conjunction of [these] two requirements [of the test] . . . to permit compensation. . . . The former requirement [of arising out of the employment] relates to the origin and cause of the accident, while the latter requirement [of occurring in the course of employment] relates to the time, place and [circumstance] of the accident. . . . Whether an injury arose out of and in the course of employment is a question of fact to be determined by the commissioner. . . . If supported by competent evidence and not inconsistent with the law, the commissioner's inference that an injury did or did not arise out of and in the course of employment is, thus, conclusive." (Internal quotation marks omitted.) *Mleczko* v. *Haynes Construction Co.*, 111 Conn. App. 744, 748–49, 960 A.2d 582 (2008).

The plaintiff does not make any significant attempt to undermine the commissioner's determination that, between 8 p.m. and midnight, he was no longer at a place he reasonably may have been expected to be in the course of his employment and he was no longer

fulfilling the duties of his employment or doing something incidental to his employment. Although the plaintiff attempts to depict his conduct between 8 p.m. and midnight in an employment related light by characterizing it as "[a] period of personal socialization with his fellow employees," he nonetheless acknowledges that "there was sufficient evidence for the . . . commissioner here to have found that there was a substantial deviation from the original business purpose (attending a business function at Fast Eddie's . . .) that caused [him] to leave his hotel and drive to the parking lot adjacent to the scene of the assault."

Indeed, the weight of the evidence reflects that, after 8 p.m., the defendant was no longer supporting financially any type of social gathering involving the plaintiff and the defendant's business interests were no longer being discussed by the plaintiff. During the course of the evening, the plaintiff became highly intoxicated and engaged in conduct that led to his reprimand by the defendant. Moreover, the evidence suggests that, during the latter part of the evening, the plaintiff, due to alcohol consumption, lacked the capacity to engage in any type of productive work related pursuits.[7] The plaintiff may

[7] The plaintiff, correctly referring to the principle that Connecticut has established a no-fault workers' compensation system that imposes a form of strict liability on employers; see, e.g., *Sapko* v. *State*, 305 Conn. 360, 377, 44 A.3d 827 (2012); urges this court not to focus solely on the issue of whether a work related injury occurred and not to consider whether his conduct at the time of the injury was socially proper or moral. Thus, the plaintiff argues that "in the present case [his] intoxication and reportedly offensive behavior are irrelevant: there is no evidence in the record nor finding of fact below to suggest that the injuries [he] sustained in this assault were due to his intoxication or wilful misconduct . . . ."

In affirming the decision of the commissioner, the board aptly observed on the basis of the evidence presented that the plaintiff had made comments that were "inappropriate and offensive" during the events at issue. The board then stated: "We presume that this testimony was offered so as to support an inference as to the [plaintiff's] intoxication level and that the nature of discussions was not in furtherance of the [defendant's] business. If the purpose of the testimony was to cast the character of the [plaintiff] in a bad light, we remind all that workers' compensation is a no-fault remedy.

have continued to socialize with some of his coworkers after 8 p.m., but that fact is not dispositive with respect to the issue of whether he was acting in the course of his employment. This is not a close issue; the evidence amply supports the commissioner's determination that for several hours, between 8 p.m. and midnight, the plaintiff was engaged in a substantial deviation from his employment activities. Cf. *McMorris* v. *New Haven Police Dept.*, 156 Conn. App. 822, 833, 115 A.3d 491 ("[a]t the time he was injured, the plaintiff was where he would have been expected to be in the course of his employment as a police officer" and his deviation from his normal route to work "was so inconsequential relative to his job duties, which includes driving into work, that it did not remove him from the course and scope of his employment" [internal quotation marks omitted]), cert. denied, 317 Conn. 911, 115 A.3d 1106 (2015); *Kish* v. *Nursing & Home Care, Inc.*, 248 Conn. 379, 391, 727 A.2d 1253 (1999) ("plaintiff's decision to momentarily [stop] to mail a personal card was so inconsequential . . . so as to not remove her from acting in the course and scope of her employment" [internal quotation marks omitted]).

We now turn to the plaintiff's primary contention in this appeal, namely, that "the uncontradicted evidence clearly and unequivocally demonstrates" that, following his personal deviation from work related activities between 8 p.m. and midnight, he resumed his business activities and sustained injury while on his direct business route of travel. Specifically, the plaintiff argues that the police reports and crime scene photographs reflect that he was assaulted in an alley between the

The character of a claimant neither assures nor bars entitlement to the remedy." This court fully agrees with the board's succinct explanation in this regard and, likewise, has evaluated the plaintiff's conduct solely for the purpose of evaluating whether he is entitled to benefits according to law.

building that housed Fast Eddie's and the building that housed Borracho. The alley is connected to a rear parking area.

It suffices to observe that the evidence on which the plaintiff relies in support of this claim demonstrates the location at which the assault occurred. There is no dispute as to this fact. The police reports and crime scene photographs, however, are far from dispositive with respect to the issue of whether the plaintiff was at that precise location at the time of the assault because, as he argues presently, he was returning to his rental automobile in order to return to his hotel. It is plausible that the plaintiff was in the parking lot or the alley near Borracho for any number of reasons that were unrelated to his returning to his automobile or his returning to his hotel. For instance, he may have exited Borracho merely to make a telephone call or to engage in a private conversation with a third party outside of the restaurant. He may have been in the area because he was asked to leave Borracho and, perhaps, was headed to another bar. The plaintiff's mere presence at the scene of the attack in and of itself does not demonstrate, as the plaintiff suggests, that he had completed his deviation and had resumed his business travel. "The determinative question is whether the plaintiff, at the time of [his] injury, was engaged in the line of [his] duty in the business affairs of [his] employer." *Luddie* v. *Foremost Ins. Co.*, 5 Conn. App. 193, 196, 497 A.2d 435 (1985). We reiterate that "the claimant in a workers' compensation case bears the burden of proving that the employee's employment proximately caused the claimed injury." *DiNuzzo* v. *Dan Perkins Chevrolet Geo, Inc.*, 294 Conn. 132, 147 n.11, 982 A.2d 157 (2009).

In our careful review of the record, we observe that the only other relevant evidence before the commis-

sioner with respect to this narrow factual issue, i.e., whether the plaintiff had returned to his direct business route of travel, came in the form of the hearing testimony of the plaintiff, as well as deposition testimony of Johnson. At the hearing, the plaintiff testified that he had "very little memory" of the events of June 11, 2014 through "almost August" of 2014. He described his recollection of relevant events from the evening in question as being "spotty." Nonetheless, he testified that the alley in which he was assaulted was the fastest route between Borracho and his automobile that was in the parking lot behind the restaurants. He testified that he "was told" by one or more other persons that the assault occurred while he was walking back to his automobile. The plaintiff testified that he did not know or could not recall if he had planned on driving back to his hotel after leaving Borracho. He testified: "I was going towards the car. I don't know if, as we were walking, if we had discussions about whether or not we would drive home." Johnson testified that he and the plaintiff made a decision to leave Borracho together, that they utilized the alley that led to the parking lot behind Fast Eddie's, and that they were "headed to [their] vehicles" that were parked in the parking lot when the assault occurred.

Even if we were to view the testimony of the plaintiff and Johnson as dispositive evidence with respect to the issue of whether, at the time of the assault, the plaintiff was returning to his automobile for the purpose of returning to his hotel and, thus, as evidence that he was assaulted while on the direct business route of travel, the plaintiff is unable to rely on his testimony or Johnson's testimony in support of his claim.[8] In his

[8] We observe that, although the plaintiff argues that the evidence demonstrated that he was attacked while on the direct business route of travel *between Fast Eddie's and his automobile*, the evidence on which the plaintiff relies, which includes, but is not limited to, his own testimony, demonstrates that he was attacked after exiting Borracho, not Fast Eddie's. As the plaintiff recognizes, Borracho and Fast Eddie's are distinct businesses, and although

findings, the commissioner expressly stated in relevant part: "I find the [plaintiff] was candid and that his testimony was credible [with respect to] the reason for the trip to Spokane and the occurrences during the early part of the evening at Fast Eddie's. I find the [plaintiff] not credible concerning what occurred in the latter portion of the evening at Fast Eddie's and at Borracho because his head trauma and inability to remember much of the evening renders the testimony unreliable." Moreover, the commissioner stated: "I find the testimony of . . . Johnson not to be credible." The plaintiff has not demonstrated that the factual findings that resulted from the commissioner's credibility determinations were unreasonable. We reiterate that "[i]t is within the discretion of the commissioner alone to determine the credibility of witnesses and the weighing of the evidence." *Ayna* v. *Graebel/CT Movers, Inc.*, 133 Conn. App. 65, 71, 33 A.3d 832, cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012).

It appears that the commissioner did not make any express finding with respect to whether the plaintiff sustained a compensable injury while on the direct business route of travel because the plaintiff failed to present any persuasive evidence in support of that theory of recovery. In light of the foregoing, we conclude that the plaintiff has not demonstrated that either the commissioner or the board misapplied the law in evaluating the claim for workers' compensation benefits.

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

Borracho is located near Fast Eddie's, they are located in separate buildings that are separated by an alley.

BRYAN JORDAN *v.* COMMISSIONER OF CORRECTION (AC 41750)

Keller, Elgo and Harper, Js.

Syllabus

The petitioner, who had been convicted of the crimes of manslaughter in the first degree with a firearm and carrying a pistol or revolver without a permit, sought a writ of habeas corpus, claiming that the respondent, the Commissioner of Correction, by having the petitioner sign an offender accountability plan, had entered into, and subsequently breached, a purported contract to award him risk reduction credit in exchange for his adherence to his offender accountability plan. The habeas court, sua sponte, rendered judgment dismissing the habeas petition for lack of subject matter jurisdiction and failure to state a claim on which habeas relief could be granted, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly dismissed the petitioner's breach of contract claim for lack of subject matter jurisdiction: both this court and our Supreme Court have consistently held that an inmate does not have a cognizable liberty interest in earning future risk reduction credit, and the petitioner's claim that he had a contractual interest in earning risk reduction credit by virtue of his offender accountability plan with the respondent that was sufficient to invoke the habeas court's subject matter jurisdiction was unavailing, as certain case law on which the petitioner relied in support of his claim holding that a prosecutor has an obligation to honor a plea agreement was distinguishable from the present case, which did not involve the plea bargaining process, and because the petitioner has not been segregated from the general prison population, there was no concern that he has not been afforded due process in avoiding segregation and his claim, thus, did not give rise to a cognizable liberty interest; moreover, there was no merit to the petitioner's claim that if he had not signed the offender accountability plan he would not be subject to the same punishment, as it would defy logic that the respondent would be unable to discipline an inmate for disobedience in the absence of an offender accountability plan.

Argued February 5—officially released June 11, 2019

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Hon. Edward J. Mullarkey*,

judge trial referee, sua sponte, rendered judgment dismissing the petition for lack of subject matter jurisdiction, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Arthur L. Ledford, special public defender, for the appellant (petitioner).

Steven R. Strom, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Bryan Jordan, appeals from the judgment of the habeas court dismissing his petition for a writ of habeas corpus for lack of subject matter jurisdiction and for the failure to state a claim upon which habeas relief can be granted. The petitioner's sole claim on appeal is that the habeas court improperly dismissed his claim that the respondent, the Commissioner of Correction, entered into, and subsequently breached, a purported contract with the petitioner to award him risk reduction credit in exchange for his adherence to his offender accountability plan. We disagree and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to the resolution of this appeal. The petitioner was found guilty, following a jury trial, of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a) and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35 (a). The charges stemmed from a shooting death that occurred on September 19, 2005. See *State* v. *Jordan*, 117 Conn. App. 160, 161, 978 A.2d 150, cert. denied, 294 Conn. 904, 982 A.2d 648 (2009). On April 27, 2007, the petitioner was sentenced to a total effective sentence

of forty-five years of incarceration.[1] The petitioner's conviction was upheld on direct appeal by this court. See id.

Thereafter, the then self-represented petitioner initiated this action by filing a petition for a writ of habeas corpus. On November 6, 2017, the petitioner, after obtaining counsel, filed the operative amended petition alleging, inter alia, breach of contract. Specifically, the petitioner's breach of contract claim alleges that the respondent, by virtue of having the petitioner sign his offender accountability plan, agreed to award the petitioner five days of risk reduction credit per month in exchange for the petitioner's adherence to the offender accountability plan. Further, he alleges that, once No. 15-216 of the 2015 Public Acts (P.A. 15-216) came into effect, which rendered the petitioner unable to earn further risk reduction credit, the respondent nonetheless breached the parties' agreement by failing to award further risk reduction credit.

On March 19, 2018, the court, sua sponte, dismissed the amended petition for lack of subject matter jurisdiction and failure to state a claim on which habeas relief could be granted.[2] See Practice Book § 23-29.[3] The court in its memorandum of decision did not address each of

[1] Specifically, the petitioner was sentenced to forty years of incarceration for manslaughter with a firearm in the first degree and five years of incarceration for carrying a pistol without a permit, to be served consecutively.

[2] In a separate proceeding on a different petition for a writ of habeas corpus alleging ineffective assistance of counsel, the habeas court vacated the petitioner's manslaughter conviction and remanded the case to the trial court for a new trial, after which the respondent filed an appeal to this court. See *Jordan* v. *Warden*, Superior Court, judicial district of Tolland, Docket No. CV-15-4007011-S (October 1, 2018). This court has yet to rule on that matter.

[3] Practice Book § 23-29 provides in relevant part: "The judicial authority may, at any time, upon its own motion . . . dismiss the [habeas] petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; [or] (2) the petition, or count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ."

the petitioner's counts but, instead, broadly concluded that the court did not have subject matter jurisdiction over the petitioner's claims and that the petitioner had failed to state a claim on which habeas relief could be granted. The court subsequently granted the petition for certification to appeal, which was timely filed in this court. Additional facts will be set forth as necessary.

We begin our analysis with the applicable standards of review and relevant legal principles. "Our Supreme Court has long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . Moreover, [i]t is a fundamental rule that a court may raise and review the issue of subject matter jurisdiction at any time. . . . Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal.

"With respect to the habeas court's jurisdiction, [t]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Citations omitted; internal quotation marks omitted.) *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 85, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

"Likewise, [w]hether a habeas court properly dismissed a petition pursuant to Practice Book § 23-29 (2), on the ground that it fails to state a claim upon which habeas corpus relief can be granted, presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn 357, 368, 163 A.3d 597 (2017). "It is well settled that [t]he petition for a writ of habeas corpus is essentially a pleading and, as such, it should conform generally to a complaint in a civil action." (Internal quotation marks omitted.) *Pentland* v. *Commissioner of Correction*, 176 Conn. App. 779, 786, 169 A.3d 851, cert. denied, 327 Conn. 978, 174 A.3d 800 (2017). "In reviewing whether a petitioner states a claim for habeas relief, we accept its allegations as true." *Coleman* v. *Commissioner of Correction*, 137 Conn. App. 51, 55, 46 A.3d 1050 (2012). We next turn to a brief discussion of the relevant law pertaining to risk reduction credit.

Pursuant to General Statutes (Rev. to 2011) § 18-98e, the respondent had discretion to award risk reduction credit to reduce an inmate's sentence, up to five days per month, for good conduct. Section 18-98e subsequently was amended, however, by P.A. 15-216, such that inmates convicted of certain violent crimes, including manslaughter in the first degree with a firearm, are no longer eligible to earn future risk reduction credit.[4] Both our Supreme Court and this court have consis-

[4] General Statutes (Supp. 2016) 18-98e (a) provides in relevant part: "Notwithstanding any provision of the general statutes, any person sentenced to a term of imprisonment for a crime committed on or after October 1, 1994, and committed to the custody of the Commissioner of Correction on or after said date, *except a person sentenced for a violation of* . . . [§] *53a-55a* . . . may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, at the discretion of the Commissioner of Correction for conduct as provided in subsection (b) of this section occurring on or after April 1, 2006." (Emphasis added.)

We also note that an additional amendment was made to § 18-98e pursuant to No. 18-155 of the 2018 Public Acts, but it is of no consequence to the matters raised in this appeal.

tently held that an inmate does not have a cognizable liberty interest in earning future risk reduction credit. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 370–73; *Rivera* v. *Commissioner of Correction*, 186 Conn. App. 506, 514, 200 A.3d 701 (2018), cert. denied, 331 Conn. 901, 201 A.3d 402 (2019) (collecting cases). With these legal principles in mind, we now turn to the petitioner's claim.

The petitioner argues that his claim that the respondent breached a contract by failing to award him risk reduction credit in exchange for adherence to his offender accountability plan implicates a cognizable liberty interest sufficient to invoke the court's subject matter jurisdiction. The petitioner does not dispute our well established jurisprudence that there is no liberty interest in risk reduction credit. See *Perez* v. *Commissioner of Correction*, supra, 326 Conn. 370–73. Rather, the petitioner essentially argues that he has a contractual interest in earning risk reduction credit by virtue of his alleged agreement with the respondent to adhere to his offender accountability plan in exchange for risk reduction credit.[5] To bolster this claim, the petitioner argues that, pursuant to *Santobello* v. *New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), his breach of contract claim is sufficient to invoke the court's subject matter jurisdiction. We do not find *Santobello* to be applicable in the present case.[6]

[5] A review of the petitioner's offender accountability plan reveals that it is a document which recommends and sets forth the expectation that an inmate should participate in various programs, services, and activities while incarcerated. The plan states that the failure to comply with the offender accountability plan "shall negatively impact your earning of [r]isk [r]eduction [e]arned [c]redit . . . ." Furthermore, the document states above the signature line that the inmate has reviewed the recommendations made in the plan and that he or she is expected to enroll in the recommended programs.

[6] The petitioner cites to *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 937 A.2d 656 (2007), for the proposition that our Supreme Court has recognized that habeas courts have subject matter jurisdiction over *Santobello* claims. Because *Santobello* is not applicable in the present case, however, *Orcutt* is inapposite.

In *Santobello*, the defendant agreed to plead guilty to a lesser offense if the prosecutor agreed not to make a recommendation as to the length of the defendant's sentence. Id., 258. At the time of the defendant's sentencing, a different prosecutor, who was unaware of the plea agreement, recommended the maximum sentence, which the court imposed, in violation of the agreement. Id., 259. The court held that a *prosecutor* has an obligation to honor a plea agreement with a criminal defendant. Id., 262. Central to the court's holding was the importance of plea bargaining to our judicial system and the need to ensure fairness during that phase of the judicial process. Id. ("[t]his [plea bargaining] phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances").

By contrast, in the present case, the alleged agreement between the petitioner and the respondent did not take place during the plea bargaining process, but, rather, after the petitioner had been convicted and was incarcerated. Thus, the concerns regarding fairness during the plea bargaining process are not present here as they were in *Santobello*. Moreover, our reading and application of *Santobello* in the present case is consistent with our prior holding in *Green* v. *Commissioner of Correction*, supra, 184 Conn. App. 84, in which this court addressed a petitioner's claim that he entered into a binding contract with the respondent that allegedly conferred on him a contractual right to earn risk reduction credit. This court rejected the petitioner's assertion in that case that the respondent, pursuant to *Santobello*, was required to honor the purported contract because it found that the habeas action "present[ed] a completely different procedural posture" than the plea bargaining process. Id., 89 n.7. Additionally, this court concluded that, even if the petitioner properly had alleged a breach

of contract claim against the respondent,[7] a breach of contract claim did not invoke the habeas court's subject matter jurisdiction because "the petitioner, at best, has a contractual interest in such [credit] rather than a constitutionally protected liberty interest." Id., 91.

The petitioner, citing to *Vandever* v. *Commissioner of Correction*, 315 Conn. 231, 106 A.3d 266 (2014), also argues that his claim raises a valid liberty interest because, if he does not comply with his offender accountability plan, he can potentially receive a disciplinary ticket and, as a result, may be segregated from the general inmate population. In *Vandever*, our Supreme Court recognized that "prison inmates have a protected liberty interest in avoiding certain conditions of confinement if, pursuant to state statute or regulation, they can be subjected to such conditions only if certain procedural requirements are met, and those conditions impose an atypical and significant hardship in relation to the ordinary incidents of prison life." Id., 232–33. The court therefore examined whether the petitioner in that case had a liberty interest in avoiding administrative segregation and was accordingly afforded due process before his segregation. Id., 233.

In the present case, the petitioner has not been segregated from the general prison population and, as a result, there is no concern that he has not been afforded due process in avoiding segregation. We also find dubious the petitioner's assertion in his appellate brief that, if he had not signed the offender accountability plan, he would not be subject to the same punishment. It defies logic that the respondent would be unable to discipline an inmate for disobedience in the absence of an offender accountability plan. Accordingly, because the petitioner's claim in the present case

[7] The petitioner in *Green* failed to identify in his operative habeas petition the contract between him and the respondent that was allegedly breached. *Green* v. *Commissioner of Correction*, supra, 184 Conn. App. 90. It was not until his appeal to this court that the petitioner in that case alleged that his

does not give rise to a cognizable liberty interest,[8] we conclude that the habeas court properly dismissed the petitioner's breach of contract claim for lack of subject matter jurisdiction.[9]

The judgment is affirmed.

In this opinion the other judges concurred.

offender accountability plan was a binding contract between him and the respondent. Id., 91.

[8] Moreover, in his appellate brief, the petitioner makes a conclusory statement that his case is analogous to *Anthony A.* v. *Commissioner of Correction*, 326 Conn. 668, 166 A.3d 614 (2017), because he will suffer negative consequences as a disciplinary problem if he does not adhere to his offender accountability plan. Our Supreme Court in *Anthony A.*, however, specifically addressed the stigmatizing effect of being classified as a sex offender. Id., 681. The petitioner in his appellate brief fails to elaborate on why being classified as a disciplinary problem is akin to being classified as a sex offender. Accordingly, we reject his claim as inadequately briefed. "Claims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and minimal or no citations from the record . . . ." (Internal quotation marks omitted.) *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 33, 144 A.3d 420 (2016).

[9] Even if the court had subject matter jurisdiction over the petitioner's claim, it still properly dismissed the petitioner's petition for its failure to state a claim on which habeas relief can be granted because there was no contract formed between the petitioner and respondent. Nowhere in the offender accountability plan is there a promise made by the respondent that, in exchange for adherence to the plan, the petitioner would receive a certain amount of risk reduction credit per month. Accordingly, a contract was not formed between the parties because there was no bargained for exchange. "[C]onsideration is [t]hat which is bargained-for by the promisor and given in exchange for the promise by the promisee . . . . Consideration consists of a benefit to the party promising, or a loss or detriment to the party to whom the promise is made." (Internal quotation marks omitted.) *Willamette Management Associates, Inc.* v. *Palczynski*, 134 Conn. App. 58, 70, 38 A.3d 1212 (2012).

We also note, as this court did in *Green* v. *Commissioner of Correction*, supra, 184 Conn. App. 91–92, that, given the discretion that the legislature has bestowed on the respondent to issue or revoke risk reduction credit pursuant to § 18-98e, it is doubtful that the respondent has the statutory authority to enter into a contract with an inmate by which it subsequently bargains away its discretion to award risk reduction credit. "Such action would contravene the plain language of the statute and frustrate the legislature's clear intent that the [risk reduction credit] program be discretionary in nature." Id.

Further, even if, arguendo, a valid contract was formed, the legislature has stripped the respondent of the authority to award future risk reduction

ANGEL VILLAFANE *v.* COMMISSIONER OF CORRECTION
(AC 40615)

Keller, Moll and Bishop, Js.

Syllabus

The self-represented petitioner, who had been convicted of burglary in the first degree and criminal violation of a protective order, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the petitioner's claim that the habeas court abused its discretion in denying his petition for certification to appeal with respect to the issue of whether the court properly denied his motions to appoint habeas counsel was not reviewable: because the petitioner did not include that claim as a potential ground for appeal in his petition for certification to appeal, he could not demonstrate that the habeas court abused its discretion in denying the petition for certification to appeal concerning an issue that was never before the habeas court when it considered the petition for certification, nor could this court review an exercise of discretion that did not occur, and because the petitioner adequately preserved this claim by raising, in both written and oral motions, requests for the appointment of habeas counsel, which were ultimately denied by the habeas court, the petitioner's reliance on the plain error doctrine for review of his claim was misplaced, and this court, thus, declined to review the claim under the plain error doctrine; moreover, the petitioner's claim that the habeas court abused its discretion in denying his petition for certification to appeal with respect to the issue of whether his trial counsel rendered ineffective assistance was not reviewable, the petitioner having failed to brief the claim adequately.

Argued January 9—officially released June 11, 2019

credit to the petitioner, thus rendering the respondent's performance under the contract legally impossible. "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." (Internal quotation marks omitted.) *West Haven Sound Development Corp.* v. *West Haven*, 201 Conn. 305, 313, 514 A.2d 734 (1986) (quoting 2 Restatement [Second], Contracts § 261 [1981]).

Procedural History

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

Cheryl A. Juniewic, assigned counsel, for the appellant (petitioner).

Nancy L. Walker, assistant state's attorney, with whom, on the brief, were *Kevin D. Lawlor*, former state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

KELLER, J. The petitioner, Angel Villafane, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly (1) denied his motions to appoint habeas counsel, and (2) rejected his claim that his trial counsel provided ineffective assistance. We disagree and, accordingly, dismiss the petitioner's appeal.

The following facts and procedural history are relevant to our resolution of this appeal. On December 17, 2014, the petitioner pleaded guilty to one count of burglary in the first degree in violation of General Statutes § 53a-101 (a) (2) and one count of criminal violation of a protective order in violation of General Statutes § 53a-223. The petitioner also admitted to violating his probation in two instances and violating a conditional discharge in violation of General Statutes § 53a-32. According to the factual basis provided by the state at the petitioner's plea hearing, the petitioner

forced his way into a house occupied by a woman with whom he had a previous relationship, where he proceeded to strike her "several times in the head, and then grabbed a knife from the kitchen and attempted to stab her . . . ." The prosecutor indicated that the woman's daughter called the police, and, at that time, the petitioner fled from the residence. After canvassing the petitioner, the court determined that the pleas had been "knowingly and voluntarily made" and were supported by a factual basis.

At the petitioner's sentencing hearing on February 25, 2015, the court imposed a total effective sentence of eight years incarceration followed by seven years of special parole. The court terminated the other probations that the petitioner was serving at the time.

On June 29, 2015, the petitioner, who was self-represented at the time, filed a petition for a writ of habeas corpus. The petitioner alleged, inter alia, that he was living at the victim's house on the day on which the crime was committed. He contended that, because he lived there, he "could not be guilty of burglary in the first degree . . . ." Based on this contention, he alleged that his attorney at the time of the plea hearing, public defender David Egan, provided ineffective assistance by recommending that he plead guilty to that crime and "take [nine] years and [seven] years special parole." Id. He also contended that Egan never "did his due diligence to remotely look into fighting" his case, nor did he investigate "the facts in the case or the witnesses . . . ." Additionally, the petitioner asserted that Egan and the trial court, *Iannotti*, *J.*, had violated his sixth and fourteenth amendment rights because Egan was ineffective and the trial court had refused to grant his motion to dismiss Egan as his attorney.

In his return, the respondent, the Commissioner of Correction, indicated that he was without sufficient

information to admit or deny any of the factual allegations contained in the petitioner's petition for a writ of habeas corpus. As such, the respondent indicated he would leave the petitioner to his proof.

On July 9, 2015, after the court received the petition for a writ of habeas corpus, it referred the petitioner to the Office of the Chief Public Defender for appointment of counsel. On August 17, 2015, Attorney James Ruane and his law firm, Ruane Attorneys at Law, entered an appearance on the petitioner's behalf. On December 6, 2016, however, the petitioner moved to dismiss counsel because, in his view, since the time he was appointed counsel, the petitioner had been "represented by [three] different attorneys" from the firm. He argued that each of the attorneys had "done nothing at all in the petitioner's case" and that his most recent attorney, Daniel F. Lage, had refused to investigate his case. The petitioner requested that the habeas court dismiss Lage and permit him to represent himself, and that a trial be scheduled for March 20, 2017.

On January 30, 2017, the habeas court, *Bright*, *J.*, heard arguments on the petitioner's motion to dismiss counsel. After canvassing the petitioner and cautioning him about the challenges of self-representation, the court stated: "[The petitioner] has thought through this. He understands the challenges of representing himself, but he's been working diligently in preparing his case. He has a right to represent himself. He says he's prepared to go to trial. I'm going to grant his motion."

On May 9, 2017, fifteen days before the habeas trial was scheduled to begin, the petitioner filed a written motion with the habeas court for "[appointment] of special counsel." The petitioner indicated in the motion that he wanted "special counsel to assist the petitioner with his habeas case." The court, *Sferrazza*, *J.*, who

presided over the habeas trial, denied the motion, indicating that the "petitioner specifically asked to dismiss appointed counsel and proceed [self-represented]."

The petitioner's habeas trial was held on May 24, 2017. At the outset of the proceeding, the petitioner renewed his request for counsel to assist him in his representation. He stated: "Now, being that I got the private investigator and the expert psychologist to do the work . . . I need . . . an attorney to be able to help me represent this because I'm having problems to understand why am I still being charged with burglary one when I live at that address and I have all the proof . . . ." The court responded: "[Y]ou don't get to pick and choose who your attorney is when you're having an appointed attorney. And the fact that you're disappointed with the attorney or you hold the attorney in low regard or the attorney is not presenting the case the way you would want is not grounds for disqualifying the attorney and getting a new attorney. And you opted to represent yourself, and that's what you're doing. If I were to appoint a new attorney now, that would be like allowing indigents to pick and choose their own attorney, which is not allowed. So you'll have to proceed and do the best you can in representing yourself." The petitioner did not revisit his request for counsel.

At trial, the self-represented petitioner presented testimony from three witnesses, including himself, and offered twelve exhibits, nine of which were admitted into evidence. The respondent presented no evidence.

In a memorandum of decision dated May 26, 2017, the habeas court denied the petitioner's petition for a writ of habeas corpus. The court aptly observed that the petitioner claimed that trial counsel had rendered ineffective assistance by (1) failing to conduct adequate pretrial investigation and preparation, (2) failing to

request that the petitioner undergo a competency examination pursuant to General Statutes § 54-56d, and (3) failing to advise the petitioner that one cannot burglarize one's own residence. The court concluded that the petitioner was unable to prevail on any of these claims.

Soon thereafter, the petitioner filed a petition for certification to appeal; see General Statutes § 52-470 (g); and an application for waiver of fees, costs, and expenses and appointment of counsel on appeal (fee waiver application). See General Statutes § 52-259b. He asserted the following grounds for his proposed appeal: "(1) I don't have money I'm flat broke," and "(2) my [sixth] and [fourteenth] amendment right[s] are violated. I have evidence to show that my . . . then Attorney Egan was ineffective and also the Milford court [*Iannotti*, *J.*] was bias[ed]. My due process was violated by the court [and] Attorney Egan." The habeas court denied the petition for certification to appeal but granted the fee waiver application and appointed counsel for purposes of the appeal. This appeal followed.

The petitioner claims that the habeas court abused its discretion in denying his petition for certification to appeal and improperly (1) denied his motions to appoint habeas counsel, and (2) rejected his claim that his trial counsel provided ineffective assistance.

Section 52-470 (g) provides: "No appeal from the judgment rendered in a habeas corpus proceeding brought by or on behalf of a person who has been convicted of a crime in order to obtain such person's release may be taken unless the appellant, within ten days after the case is decided, petitions the judge before whom the case was tried or, if such judge is unavailable, a judge of the Superior Court designated by the Chief Court Administrator, to certify that a question is involved in the decision which ought to be reviewed by the court having jurisdiction and the judge so certifies."

As our Supreme Court has explained, one of the goals our legislature intended by enacting this statute was "to limit the number of appeals filed in criminal cases and hasten the final conclusion of the criminal justice process . . . ." *Iovieno* v. *Commissioner of Correction*, 242 Conn. 689, 699, 699 A.2d 1003 (1997). "[T]he legislature intended to discourage frivolous habeas appeals." *Simms* v. *Warden*, 230 Conn. 608, 616, 646 A.2d 126 (1994). "[Section] 52-470 (b)[1] acts as a limitation on the scope of review, and not the jurisdiction, of the appellate tribunal." (Footnote added.) *Logan* v. *Commissioner of Correction*, 125 Conn. App. 744, 750, 9 A.3d 776 (2010), cert. denied, 300 Conn. 918, 14 A.3d 333 (2011).

"Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Logan* v. *Commissioner of Correction*, supra, 125 Conn. App. 750–51.

[1] Pursuant to No. 12-115, § 1, of the 2012 Public Acts, subsection (b) of § 52-470 was redesignated as subsection (g).

"In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by [our Supreme Court] for determining the propriety of the habeas court's denial of the petition for certification." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 821–22, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904,156 A.3d 536 (2017).

I

The petitioner first claims that the habeas court abused its discretion in denying his petition for certification to appeal with respect to the issue of whether the habeas court properly denied his motions for the appointment of habeas counsel. The respondent argues, however, that the petitioner failed to raise this issue as a ground for appeal either by stating it in his petition for certification to appeal or in his fee waiver application on which he expressly relied in his petition for certification to appeal. Thus, the respondent argues that the petitioner is unable to claim on appeal that the court abused its discretion in denying his petition for certification to appeal on this ground. The petitioner acknowledges that he did not include this ground in his petition for certification to appeal but alternatively "seeks to prevail on his claim pursuant to the plain error doctrine." We address these arguments in turn.

It is well established that a petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issue raised on appeal was never raised before the court at

the time that it considered the petition for certification to appeal as a ground on which certification should be granted. See, e.g., *Henderson* v. *Commissioner of Correction*, 181 Conn. App. 778, 792, 189 A.3d 135, cert. denied, 329 Conn. 911, 186 A.3d 707 (2018); *Tutson* v. *Commissioner of Correction*, 144 Conn. App. 203, 216–17, 72 A.3d 1162, cert. denied, 310 Conn. 928, 78 A.3d 145 (2013); *Perry* v. *Commissioner of Correction*, 131 Conn. App. 792, 796–97, 28 A.3d 1015, cert. denied, 303 Conn. 913, 32 A.3d 966 (2011); *Mercado* v. *Commissioner of Correction*, 85 Conn. App. 869, 872, 860 A.2d 270 (2004), cert. denied, 273 Conn. 908, 870 A.2d 1079 (2005).

Although the petitioner argues in his appellate brief that the habeas court abused its discretion in denying his petition for certification to appeal with respect to the issue of whether the habeas court properly denied his motions for the appointment of habeas counsel, as stated previously, the petitioner recognizes that he did not include that claim as a potential ground for appeal in his petition for certification to appeal. This omission is fatal to his claim. As our decisional law makes clear, "[b]ecause it is impossible to review an exercise of discretion that did not occur, we are confined to reviewing only those issues which were brought to the habeas court's attention in the petition for certification to appeal." (Emphasis omitted; internal quotation marks omitted.) *Henderson* v. *Commissioner of Correction*, supra, 181 Conn. App. 792 ("[A] petitioner cannot demonstrate that the habeas court abused its discretion in denying a petition for certification to appeal if the issues that the petitioner later raises on appeal were never presented to, or decided by, the habeas court. . . . Under such circumstances, a review of the petitioner's claims would amount to an ambuscade of the [habeas] judge." [Internal quotation marks omitted.]).

Alternatively, the petitioner attempts to raise an independent claim on which to obtain reversal of the habeas court's denial of his petition for a writ of habeas corpus. In particular, he invokes the plain error doctrine pursuant to Practice Book § 60-5. He contends that the habeas court's denial of his written and oral motions for the appointment of counsel is an error so obvious that it affects the fairness and integrity of, and public confidence in, the judicial proceedings.

The respondent, however, argues that this court should not consider the petitioner's claim under the plain error doctrine because the petitioner has failed to establish a prerequisite for appellate review—i.e., that the habeas court abused its discretion in denying certification to appeal. In support of his argument urging us not to consider the petitioner's plain error claim, the respondent cites to the concurring opinion in *Foote* v. *Commissioner of Correction*, 151 Conn. App. 559, 573–74, 96 A.3d 587 (*Keller*, *J.*, concurring) ("[e]ngaging in a plain error analysis of claims never raised in connection with a petition for certification to appeal expands the scope of review and thwarts the goals that the legislature sought to achieve by enacting § 52-470 [g]"), cert. denied, 314 Conn. 929, 102 A.3d 709 (2014), and cert. dismissed, 314 Conn. 929, 206 A.3d 764 (2014), and to this court's decision in *Mercado* v. *Commissioner of Correction*, supra, 85 Conn. App. 872 (dismissing appeal from denial of certification to appeal because petitioner did not raise claim of plain error in petition for certification to appeal). The respondent argues, inter alia, that considering the petitioner's claim of plain error invites petitioners who have been denied certification to appeal to circumvent the bounds of limited review pursuant to § 52-470 (g) simply by couching wholly unpreserved grounds as plain error. The respondent correctly acknowledges, however, that in appeals from the denial of a petition for certification to appeal, this

court previously has considered claims of plain error that were not included as potential grounds for appeal in a petition for certification to appeal. See, e.g., *Foote* v. *Commissioner of Correction*, supra, 151 Conn. App. 566–69 (in appeal from denial of certification to appeal, court considered claim of plain error not raised in petition for certification to appeal).

Despite this apparent inconsistency in this court's jurisprudence with respect to whether, in an appeal from the denial of a petition for certification to appeal, this court may consider a claim of plain error that was not raised as a ground on which certification should be granted, we need not attempt to resolve that reviewability issue in the present case. This is because we conclude that the petitioner's reliance on the plain error doctrine is flawed for a more fundamental reason, namely, the claim was adequately preserved during the habeas trial. The plain error doctrine is set forth at Practice Book § 60-5, which provides in relevant part: "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . ." The plain error doctrine "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either *not properly preserved or never raised* at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in

the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis added; internal quotation marks omitted.) *State* v. *Moore*, 293 Conn. 781, 823, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010).

In the present case, however, the petitioner did in fact raise, by written and oral motion, requests for the appointment of counsel, which were ultimately denied by the court. Because this claim was raised and ruled on by the habeas court and, thus, was properly preserved prior to and during the habeas trial, the petitioner's reliance on the plain error doctrine is misplaced. Cloaking the claim in plain error garb merely obfuscates the fact that the claim was raised and decided during the habeas trial.[2] If the petitioner desired appellate review of the court's denial of his motions, it was incumbent on him to include that issue as a ground for appeal

[2] In arguing that it is appropriate for this court to consider the claim under the plain error doctrine, the petitioner cites to *Foote* v. *Commissioner of Correction*, supra, 151 Conn. App. 566–69. *Foote* was an appeal brought by a petitioner from the denial of his petition for certification to appeal. Id., 560. He challenged the court's judgment denying certification to appeal on the ground that the court (1) abused its discretion and (2) committed plain error by failing to inquire adequately into his request for new habeas counsel. Id. This court concluded that the petitioner was unable to challenge the habeas court's judgment denying certification to appeal on the ground that the court abused its discretion by failing to inquire adequately into his request for new habeas counsel because that ground was raised for the first time on appeal. Id., 565–66. This court, however, then considered whether the habeas court committed plain error by failing to inquire adequately into the petitioner's request for new counsel. Id., 566–69. Ultimately, this court concluded that the petitioner had failed to demonstrate an error that was "so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." Id., 569.

in his petition for certification to appeal in order for the habeas court to rule on it. See General Statutes § 52-470 (g). Because he did not do so, we decline to afford it review. See *Tutson* v. *Commissioner of Correction*, supra, 144 Conn. App. 217.[3]

II

The petitioner also claims that the habeas court abused its discretion in denying his petition for certification to appeal with respect to the issue of whether his trial counsel rendered ineffective assistance. The respondent contends that this court should forgo reviewing this claim because it is inadequately briefed. We agree with the respondent.

"Ordinarily, [c]laims are inadequately briefed when they are merely mentioned and not briefed beyond a bare assertion. . . . Claims are also inadequately briefed when they . . . consist of conclusory assertions . . . with no mention of relevant authority and

Although the court in *Foote* considered the claim of plain error despite the fact that the claim of plain error was not set forth by the petitioner as a ground on which certification should be granted in his petition for certification to appeal, it did not expressly state that the claim was not preserved at trial or otherwise explain why the claim fell within the ambit of the plain error doctrine. We conclude that the claim at issue in the present case, however, was preserved at trial and, thus, is not a claim that falls within the ambit of the plain error doctrine. The petitioner, who properly preserved the issue at his habeas trial, nonetheless chose not to present that issue to the habeas court, by way of his petition for certification to appeal, in order for the court to certify that the issue ought to be reviewed by an appellate court of this state. See General Statutes § 52-470 (g). Although some of our cases have categorized this omission as failing to preserve the claim for review, a petitioner's decision not to include an issue in his petition for certification to appeal that was preserved during the habeas trial itself is more akin to abandoning the claim.

[3] To the extent the petitioner is also claiming that the habeas court plainly erred in failing, sua sponte, to suspend trial and appoint counsel after certain testimony was elicited from the petitioner's expert witness at the habeas trial, we deem that claim inadequately briefed and, thus, abandoned. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("[a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly").

minimal or no citations from the record . . . . As a general matter, the dispositive question in determining whether a claim is adequately briefed is whether the claim is reasonably discernible [from] the record . . . . We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Citation omitted; internal quotation marks omitted.) *Artiaco* v. *Commissioner of Correction*, 180 Conn. App. 243, 248–49, 182 A.3d 1208, cert. denied, 328 Conn. 931, 184 A.3d 758 (2018).

In the petitioner's appellate brief, he provides only bare assertions that the habeas court abused its discretion in denying the petition for certification to appeal with respect to his claim that his trial counsel provided ineffective assistance. As we explained previously, "[i]n determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 821–22. Although the petitioner provides in his brief a "merits" section titled "The Habeas Court Erred in Denying Petitioner's Claim of Ineffective Assistance of Trial Counsel," it contains no analysis pertaining to his trial counsel's performance. Instead, he devotes the section to arguing that the habeas court should have appointed him habeas counsel.[4] Because

[4] To be sure, in this section of his brief, the petitioner argues that he "was denied the opportunity of representation by counsel *in his habeas proceeding*, let alone the opportunity to have effective representation of counsel in that proceeding. Due to the lack of appointed counsel and the petitioner's lack of understanding of the legal system, trial procedures in particular, the petitioner was unable to prevail at trial." (Emphasis added.)

his brief provides only conclusory assertions that the court abused its discretion in denying his petition for certification to appeal and provided this court with no analysis of how his trial counsel provided ineffective assistance, we decline to review this claim.

The appeal is dismissed.

In this opinion the other judges concurred.

KACEY LEWIS *v.* JOHN ALVES ET AL.
(AC 39859)

Keller, Bright and Lavery, Js.

Syllabus

The self-represented, incarcerated plaintiff brought this action against the defendants, current and former employees of the Department of Correction, claiming violations of his federal constitutional rights. On appeal, the plaintiff claimed that the trial court improperly rendered summary judgment as to the third and fifth counts of his complaint, which alleged that he was denied due process of law when, at a disciplinary hearing, he was not permitted to call a witness and was assigned an unwanted advocate who advocated against his interests, and that he was subjected to improper conditions of confinement. *Held* that after a thorough review of the record, pleadings, and evidence submitted in support of and in opposition to the motion for summary judgment, this court found that the trial court correctly rendered summary judgment in favor of the defendants.

Argued March 20—officially released June 11, 2019

Procedural History

Action to recover damages for the alleged deprivation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Ecker*, *J.*, granted the defendants' motion for summary judgment

and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kacey Lewis, self-represented, the appellant (plaintiff).

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

Opinion

PER CURIAM. The self-represented plaintiff, Kacey Lewis, appeals from the judgment of the trial court rendering summary judgment in favor of the defendants, who are current or former employees of the Connecticut Department of Correction at Cheshire Correctional Institution.[1] Although the plaintiff in his five count complaint, which was brought pursuant to 42 U.S.C. § 1983, alleged several violations of his federal constitutional rights, on appeal, the plaintiff challenges the rendering of summary judgment only as to three alleged constitutional violations. In particular, the plaintiff claims that the court erroneously rendered summary judgment on the third count of his complaint as to his allegations that he was denied due process when (1) he was not permitted to call a witness at his disciplinary hearing and (2) he was assigned an unwanted advocate for that same hearing, who advocated against his interests. The plaintiff also claims that the court erred in rendering summary judgment as to the allegations in his fifth count that he was subjected to improper conditions of confinement. We affirm the judgment of the trial court.

Initially, we set forth the legal principles and the standard of review that guide our resolution of this

[1] The named defendants are John Alves, Jeffrey Adgers, Sr., Antonio Lopes, Michael Fortin, Christopher Johnson, and Stacy Anderson.

appeal. "The standards governing our review of a trial court's decision to grant a motion for summary judgment are well established. Practice Book [§ 17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . A material fact . . . [is] a fact which will make a difference in the result of the case. . . .

"Our review of the granting of a motion for summary judgment is plenary; accordingly, we must decide whether the trial court's conclusions were legally and logically correct and find support in the record." (Citations omitted; internal quotation marks omitted.) *Lamar* v. *Brevetti*, 173 Conn. App. 284, 288–89, 163 A.3d 627 (2017).

After thoroughly reviewing the record, including the pleadings and the evidence submitted in support of and in opposition to the defendants' motion for summary judgment, we are convinced that the trial court correctly rendered summary judgment in favor of the defendants. There was no error.

The judgment is affirmed.

IN RE NATALIA M.*
(AC 42512)

Alvord, Bright and Bear, Js.

Syllabus

The respondent father appealed to this court from the judgment of the trial court terminating his parental rights with respect to his minor child. He claimed that the trial court erroneously concluded that the Department of Children and Families had made reasonable efforts at reunification pursuant to the statute (§ 17a-112 [j] [1]) that requires a trial court to find by clear and convincing evidence that the department made reasonable efforts to reunify a parent and child unless it finds, instead, that the parent is unable or unwilling to benefit from such efforts. The trial court also found, pursuant to §17a-112 (j) (1), that the father was unable or unwilling to benefit from reunification efforts. *Held* that because the respondent father, who did not challenge the trial court's finding that he was unable or unwilling to benefit from reunification efforts, challenged only one of the two separate and independent bases for upholding the trial court's determination that the requirements of § 17a-112 (j) (1) had been satisfied, there existed a separate independent basis for upholding the court's determination, and, therefore, even if this court agreed with the father's claim, there was no practical relief that could be afforded to him; accordingly, the appeal was dismissed as moot.

Argued May 14—officially released June 3, 2019**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of New Haven, Juvenile Matters, where the matter was tried to the court, *Conway, J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to this court. *Appeal dismissed.*

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

** June 3, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

David J. Reich, for the appellant (respondent father).

Seon A. Bagot, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Benjamin Zivyon*, assistant attorney general, *Stephen G. Vitelli*, assistant attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Ingrid Swanson, for the minor child.

Opinion

PER CURIAM. The respondent father, Paul R., appeals from the judgment of the trial court terminating his parental rights with respect to his daughter, Natalia M. (child), pursuant to General Statutes § 17a-112 (j) (3) (B) (i).[1] On appeal, the respondent claims that the Department of Children and Families (department) violated his rights to due process of law by failing to provide adequate visitation with his child, which, he claims, ultimately led the court to terminate his parental rights after erroneously concluding that the department had made reasonable efforts at reunification, pursuant to § 17a-112 (j) (1).[2] The respondent does not claim that the court erred in its conclusion that he was unable or unwilling to benefit from reunification efforts. Because the respondent challenges only one of the two bases

[1] Specifically, the court found, by clear and convincing evidence, that "[t]he child has been found in a prior proceeding to have been neglected . . . AND the father has . . . failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, [he] could assume a reasonable position in the life of the child . . . ." The court also found that termination of the respondent's parental rights would be in the best interest of the child, pursuant to § 17a-112 (j) (2).

[2] General Statutes § 17a-112 (j) (1) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts . . . ."

for the court's determination that § 17a-112 (j) (1) had been satisfied, we conclude that the respondent's appeal is moot.

The child was born in November, 2016. From the time of her birth, the department was involved in attempting to assist the child and her mother. On December 2, 2016, members of the New Haven Police Department were dispatched to the Three Judges Motel in New Haven (motel) to investigate a stabbing. The child's mother, the child, and, at times, the respondent were staying at the motel. The boyfriend of the child's mother came to the motel and was holding the child when the respondent returned to the motel. A scuffle ensued and the boyfriend, who was injured and bleeding, accused the respondent of stabbing him. During their search of the scene, the police found narcotics.[3]

The petitioner, the Commissioner of Children and Families (commissioner), took temporary custody of the child and filed a neglect petition. The court issued an order of temporary custody on December 6, 2016. Pursuant to the court's order, the respondent was given specific steps, including domestic violence and substance abuse treatment, as well as the requirement that he cooperate with service providers. The respondent failed to comply with these steps. The respondent also questioned whether he was the father of the child. The respondent had no contact with the child between December 2, 2016 and April, 2017, when his paternity was confirmed. Even after he knew he was the child's father, the respondent ignored letters from the department offering him visitation with the child, and he had no contact with her because he was attempting to avoid being served with a warrant for his arrest.

[3] The respondent was arrested and charged with various crimes. He has a long criminal record and drug abuse history, which continued even after the start of these proceedings. For most of these proceedings, the respondent was in prison.

On May 18, 2017, the court adjudicated the child, who has serious health concerns, neglected, and it committed her to the custody of the commissioner. The court also ordered final specific steps for the respondent, with which he also failed to comply. In August, 2017, the respondent was arrested on charges unrelated to the alleged stabbing and narcotics incident, and, thereafter, he expressed an interest in visiting with the child. On October 5, 2017, a permanency plan, which proposed termination of both parents' rights and adoption, and to which the respondent objected, was approved by the court. Following this approval, the department met with the respondent to discuss visitation and the child's medical needs. The department was concerned about the toll it would take on the child's health for her to endure a two hour commute to the prison, and it expressed that concern to the respondent, who agreed that visitation should not occur until the child's health improved.

On December 5, 2017, the commissioner filed a petition for the termination of the parental rights of the respondent and the child's mother.[4] The respondent underwent a psychological evaluation on April 3, 2018, which included an interactive session with the respondent and the child. Following the evaluation, the psychologist determined that the respondent had little understanding regarding the needs of the child or the impact of his actions on her. In May, 2018, the department began taking the child to the prison to visit with the respondent, the child's health having improved. From May, 2018 through November, 2018, the department took the child to the prison for visitation approximately once or twice per month, depending, primarily, on the child's health.[5] On November 28, 2018, the court

[4] The child's mother consented to the termination of her parental rights and is not a party to this appeal.

[5] One visit in October, 2018, was canceled because the department's visitation supervisor was ill.

held a hearing on the petition for termination of parental rights. The court rendered judgment terminating such rights on December 12, 2018. Specifically, the court found in relevant part that (1) the department had made reasonable efforts at reunification and (2) the respondent was unable or unwilling to benefit from those efforts at reunification.

The respondent appeals from that judgment on the sole ground that the court erred in finding that the department had made reasonable efforts at reunification. He argues that this finding was in error because the department had violated his right to due process by failing to provide him with adequate visitation with the child prior to his April 3, 2018 psychological evaluation, at which time the psychologist had observed his interactions with the child, with whom the respondent had not had the benefit of prior visitation.

The commissioner argues that the respondent's appeal should be dismissed as moot because the respondent challenges only one of the two bases for the court's determination that the requirements of § 17a-112 (j) (1) had been satisfied. She contends that even if the respondent is successful in the claim he raises on appeal, there is no relief that can be afforded to him because there exists a separate independent basis for upholding the court's determination and it is unchallenged by the respondent. We agree and conclude that the respondent's appeal is moot because there is no practical relief that we could afford to him on appeal.

"Mootness raises the issue of a court's subject matter jurisdiction . . . . Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction . . . . We begin with the four part test for justiciability . . . . Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. Justiciability requires (1) that there be an actual

controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . [*I*]*t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow*. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Citations omitted; emphasis altered; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555–56, 979 A.2d 469 (2009).

Section 17a-112 (j) (1) "requires a trial court to find by clear and convincing evidence that the department made reasonable efforts to reunify a parent and child *unless it finds instead* that the parent is unable or unwilling to benefit from such efforts. In other words, either finding, standing alone, provides an independent basis for satisfying § 17a-112 (j) (1)." (Emphasis altered.) Id., 556. In the present case, the court found that both alternatives set forth in § 17a-112 (j) (1) had been satisfied—the department had made reasonable efforts to reunify the respondent with the child, *and* the respondent was unable or unwilling to benefit from reunification efforts.

Because the respondent challenges only one of the two separate and independent bases for upholding the court's determination that the requirements of § 17a-112 (j) (1) had been satisfied, even if we were to agree with his claim, the fact that there is a second independent basis for upholding the court's determination, which he does not challenge, renders us unable to provide him with any practical relief on appeal.

The appeal is dismissed.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 190

VERNON VASSELL *v.* COMMISSIONER
OF CORRECTION
(AC 41725)

Prescott, Elgo and Harper, Js.

Argued May 23—officially released June 11, 2019

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Sferrazza*, *J.*

Per Curiam. The appeal is dismissed.

JOSEPHINE S. MILLER *v.* ELISABETH MAURER ET AL.
(AC 42035)

Prescott, Elgo and Harper, Js.

Argued May 23—officially released June 11, 2019

Plaintiff's appeal from the Superior Court in the judicial district of Danbury, *Truglia, J.*; *Krumeich, J.*

Per Curiam. The appeal is dismissed as moot in light of the fact that the plaintiff has received all of the relief she requested at trial and in her brief on appeal.

DWAYNE ADAMS *v.* COMMISSIONER OF CORRECTION
(AC 40930)

Alvord, Elgo and Moll, Js.

Argued May 28—officially released June 11, 2019

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Sferrazza, J.*

Per Curiam. The appeal is dismissed.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 190

(Replaces Prior Cumulative Table)

Adams *v.* Commissioner of Correction (Memorandum Decision) . . . 904
Bank of America, N.A. *v.* Defelice (Memorandum Decision) . . . 902
Barry A. *v.* Commissioner of Correction (Memorandum Decision) . . . 903
Colby *v.* Colby . . . 140
Dissolution of marriage; foreign judgment; motion for relief; motion to reargue; whether trial court abused its discretion in denying motion for relief from certain order of California court on ground that defendant failed to timely seek relief under California law; whether trial court's finding that there was no extrinsic fraud was clearly erroneous; whether trial court properly calculated postjudgment interest on basis of entire arrearage owed by defendant.
Creative Masonry & Chimney, LLC *v.* Johnson (Memorandum Decision) . . . 901
Day *v.* Perkins Properties, LLC . . . 33
Nuisance per se; whether trial court properly concluded as matter of law that defendants' operation of landscaping business in residential zone in violation of local zoning regulations constituted nuisance per se; whether violation of local ordinance was sufficient in itself to constitute nuisance per se.
DeMaria *v.* Bridgeport . . . 449
Personal injury; claim that defendant city was liable under municipal defective highway statute (§ 13a-149) for damages plaintiff sustained in fall on sidewalk owned by city; whether trial court improperly admitted into evidence, under applicable statute (§ 52-174 [b]), certain medical records that had been written by plaintiff's primary care provider, who worked in veterans affairs hospital; claim that our Supreme Court previously had recognized standard for admissibility of medical records under § 52-174 (b) that requires only that plaintiff testify as to relevance of records and that records originated from hospital; whether medical records at issue should not have been admitted where, as here, author of records was prohibited, pursuant to applicable federal regulation (38 C.F.R. § 14.808), from providing any opinion or expert testimony in any forum and, thus, was unavailable for cross-examination; whether city was harmed by improper admission of medical records.
Ferrari *v.* Johnson & Johnson, Inc. . . . 152
Product liability; whether trial court properly granted motion for summary judgment as to design defect and breach of warranty claims; whether expert testimony was required to establish that product was defective and that alleged defect caused plaintiff's injury; whether ordinary consumer expectation test was applicable such that jury would not need expert testimony; whether trial court properly rendered summary judgment as to failure to warn claim on basis of learned intermediary doctrine.
Fisk *v.* Redding . . . 99
Public nuisance; whether trial court abused its discretion in denying motion to set aside verdict; claim that jury's answers to special interrogatories in verdict form were inconsistent and could not be harmonized; claim that trial court erred in excluding evidence of subsequent remedial measures taken by defendant; whether evidence of remedial measures was inadmissible to prove defendant's liability for nuisance.
Flagstar Bank, FSB *v.* Kepple . . . 312
Foreclosure; claim that plaintiff lacked standing to commence foreclosure action; whether defendants failed to rebut presumption that plaintiff, as holder of note, was rightful owner of underlying debt and, therefore, had standing to commence foreclosure action; whether statement by trial court at hearing constituted finding of fact.
Hilario Truck Center, LLC *v.* Kohn . . . 443
Contracts; third-party beneficiary; whether plaintiff towing company that provided towing services to defendant insured motorist had standing as third-party beneficiary to bring direct breach of contract action against defendant insurance com-

pany that provided automobile liability coverage to motorist; whether plaintiff met its burden of demonstrating that trial court committed error by granting motion to dismiss.

In re Elizabeth B. (Memorandum Decision) 902

In re Natalia M. 583

Termination of parental rights; mootness; claim that trial court improperly concluded that Department of Children and Families had made reasonable efforts at reunification pursuant to statute (§ 17a-112 [j] [1]); failure of respondent father to challenge trial court's finding that he was unable or unwilling to benefit from reunification efforts, which was separate independent basis for upholding trial court's determination that requirements of § 17a-112 (j) (1) had been satisfied; whether there was practical relief that could be afforded to father; whether appeal was moot.

In re Probate Appeal of Knott 56

Probate appeal; whether trial court properly dismissed probate appeal as untimely on ground that substitute plaintiff did not appeal within time limits set by applicable statute (§ 45a-186 [a]); whether time limits for filing probate appeal were tolled by filing of application for waiver of fees pursuant to applicable statute (§ 45a-186c [b]).

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

Jordan *v.* Commissioner of Correction 557

Habeas corpus; subject matter jurisdiction; manslaughter in first degree with firearm; carrying pistol or revolver without permit; claim that respondent Commissioner of Correction entered into, and subsequently breached, purported contract to award petitioner risk reduction credit in exchange for petitioner's adherence to offender accountability plan; whether habeas court properly dismissed petitioner's breach of contract claim for lack of subject matter jurisdiction; whether petitioner's claim gave rise to cognizable liberty interest.

Kaminski *v.* Poirot. 214

Legal malpractice; whether trial court properly granted motion for summary judgment; whether trial court properly determined that action was commenced beyond three year statute of limitations (§ 52-577) applicable to tort claims.

Lavy *v.* Lavy 186

Dissolution of marriage; whether trial court properly determined that plaintiff's failure to disclose certain assets on financial affidavit constituted material omissions that violated parties' separation agreement, which had been incorporated into dissolution judgment; claim that plaintiff's failure to disclose assets on financial affidavit was not material omission because defendant knew about them at time of dissolution judgment; claim that trial court inflated significance of omissions by comparing their value to total value of disclosed assets in same asset category; claim that trial court's discussion of relative value of assets rendered its determination that nondisclosures were material omissions legally or logically incorrect or unsupported by record; claim that trial court's finding that plaintiff knew about undisclosed bank account at time of dissolution judgment was clearly erroneous; whether trial court properly awarded defendant statutory (§ 37-3a [a]) prejudgment interest, where defendant raised claim for prejudgment interest in posthearing brief; claim that plaintiff was denied reasonable notice and opportunity to present defense regarding defendant's request for prejudgment interest; whether trial court violated rule of practice (§ 61-11) that provides for automatic appellate stay by awarding defendant postjudgment interest after plaintiff filed appeal; claim that § 37-3a was part of mechanism for statutory (§ 52-350f) enforcement of money judgment that is limited to execution or foreclosure of lien.

Lewis *v.* Alves 580

Summary judgment; alleged deprivation of plaintiff's federal constitutional rights; whether trial court properly rendered summary judgment in favor of defendants on plaintiff's claims that he was denied due process of law when he was not permitted to call witness and was assigned unwanted advocate at disciplinary hearing, and that he was subjected to improper conditions of confinement.

Miller *v.* Maurer (Memorandum Decision) 904

O'Brien-Kelley, Ltd. *v.* Goshen 420

Tax warrant; whether trial court properly granted motion for summary judgment; whether trial court properly concluded that defendant state marshal was entitled to statutory fee of 15 percent of tax, interest, fees and costs for service of alias tax warrant pursuant to statute (§ 12-162 [c]) to collect delinquent real estate

tax and interest; claim that defendant was not entitled to 15 percent fee under § 12-162 because he did not execute on tax warrant or collect delinquent taxes, but merely mailed notice of tax warrant to plaintiff, which thereafter paid delinquent tax and interest to town directly before warrant was served.

Oudheusden *v.* Oudheusden 169

Dissolution of marriage; claim that trial court improperly double counted certain marital asset for purposes of property division and spousal support awards; claim that trial court abused its discretion in failing to make equitable orders in division of marital estate; whether trial court deprived defendant of means with which to comply with orders; whether trial court's award of nonmodifiable, lifetime alimony to plaintiff was supported by facts in evidence; whether plaintiff's testimony at trial precluded conclusion that her physical condition and age rendered her permanently incapable of earning any income from any type of employment.

Outing *v.* Commissioner of Correction 510

Habeas corpus; whether habeas court properly determined that petitioner's trial counsel did not render ineffective assistance; claim that habeas court improperly concluded that trial counsel's decision not to present alibi defense was not constitutionally deficient; whether trial counsel's approach to handling of certain witnesses was within wide range of reasonably effective assistance; whether trial counsel's decision to forgo testimony from expert witness concerning reliability of witness identifications was reasonable tactical choice under circumstances; claim that trial counsel performed deficiently by not preserving for appellate review claim related to trial court's exclusion of expert witness' testimony regarding eyewitness identifications; whether habeas court properly concluded that petitioner failed to prove that appellate counsel was deficient in failing to claim in petitioner's direct appeal that trial court incorrectly denied request to present surrebuttal evidence; claim that habeas court incorrectly determined that petitioner did not prove claim of actual innocence.

Patrowicz *v.* Peloquin 124

Contracts; statute of frauds; whether trial court abused its discretion in denying request for continuance in order to subpoena witness; whether trial court committed reversible error by permitting material variance between amount of damages alleged in complaint and amount pursued at trial without requiring plaintiffs to file amended complaint; claim challenging trial court's determinations with respect to statute of frauds defense.

Rauser *v.* Pitney Bowes, Inc.. 541

Workers' compensation; appeal from decision of Compensation Review Board affirming decision of Workers' Compensation Commissioner dismissing claim for workers' compensation benefits; whether evidence amply supported commissioner's determination that for several hours plaintiff was engaged in substantial deviation from his employment activities; claim that commissioner failed to set forth factual determination as to whether, at time plaintiff sustained subject injuries, he was on direct route of his business travel; whether plaintiff failed to demonstrate that either commissioner or board misapplied law in evaluating claim for benefits; credibility determinations.

Reiner *v.* Reiner 268

Breach of fiduciary duty; enforcement of settlement agreement; claim that trial court, following hearing pursuant to Audubon Parking Associates Ltd. Partnership *v.* Barclay & Stubbs, Inc. *(225 Conn. 804), improperly denied motion to enforce settlement agreement; whether trial court incorrectly concluded that settlement agreement was clear and unambiguous with respect to method for calculating buyout price of plaintiff's interests in certain real properties; whether settlement agreement that is not clear and unambiguous can be enforced summarily pursuant to* Audubon Parking Associates Ltd. Partnership.

Roger R. *v.* Commissioner of Correction (Memorandum Decision). 902

Rosenthal Law Firm, LLC *v.* Cohen 284

Contracts; attorney's fees; discussion of Jones *v.* Ippoliti *(52 Conn. App. 199); claim that trial court erred in concluding that plaintiff, as self-represented law firm, was precluded from recovering attorney's fees from defendant under parties' retainer agreement; claim that portion of* Jones *on which trial court relied in reaching its conclusion was dictum and, therefore, was improperly treated as binding precedent by trial court; whether this court could overrule precedent established by previous panel in* Jones.

St. Denis-Lima *v.* St. Denis 296
Dissolution of marriage; whether trial court abused its discretion in ruling on motion to dismiss dissolution action without first holding evidentiary hearing; claim that certified and officially translated Brazilian document that plaintiff submitted to trial court established disputed jurisdictional fact that required evidentiary hearing on motion to dismiss; whether trial court's determination that there was final judgment of dissolution in Brazil was clearly erroneous; whether trial court abused its discretion in affording comity to dissolution judgment rendered by Brazilian court; claim that Brazilian judgment was contrary to public policy of Connecticut.
Santa Energy Corp. *v.* Santa (Memorandum Decision) 901
Stamford Hospital *v.* Schwartz. 63
Debt collection; action to collect debt, pursuant to statute (§ 46b-37 [b]), for medical services that plaintiff hospital rendered to defendants' minor child; special defenses; accord and satisfaction; reviewability of claims; whether record supported findings of attorney trial referee and trial court that defendants were indebted to plaintiff and that they exhibited bad faith throughout litigation; credibility of witnesses; whether referee acted within his authority to find by preponderance of evidence that defendants were untruthful; whether trial court's decision to award plaintiff attorney's fees was legally and logically correct.
State *v.* Dojnia 353
Assault of disabled person in second degree; unpreserved claim that statute (§ 53a-60b [a] [1]) prohibiting assault of disabled person in second degree is unconstitutionally vague as applied to defendant's violent conduct toward victim; whether statute (§ 1-1f [b]) that defines physical disability is ambiguous as to whether fibromyalgia constitutes physical disability; claim that state bore burden of proving beyond reasonable doubt that victim's physical disability was caused by any particular illness or injury and that diagnosis was medically accurate; whether evidence was sufficient to prove that victim had diagnosis of fibromyalgia; whether diagnosis of fibromyalgia satisfied physical disability requirement of § 53a-60b (a) (1); whether evidence was sufficient to prove that victim suffered from physical disability for purposes of § 53a-60b (a) (1); whether defendant was deprived of right to fair trial as result of prosecutor's comment during closing argument.
State *v.* Fernandes (See State *v.* Sanchez) 466
State *v.* Irizarry. 40
Assault in second degree; breach of peace in second degree; whether evidence was sufficient to support conviction of assault in second degree in violation of statute (§ 53a-60 [a] [1]); claim that state did not establish that defendant caused victim serious physical injury as defined by statute (§ 53a-3 [4]); claim that improper statement by prosecutor during closing argument to jury deprived defendant of constitutional right to fair trial; harmfulness of improper statement by prosecutor during closing argument to jury.
State *v.* Marcus H. 332
Assault in second degree with motor vehicle; risk of injury to child; reckless endangerment in first degree; reckless driving; operating motor vehicle while under influence of intoxicating liquor; interfering with officer; increasing speed in attempt to escape or elude police officer; application for public defender; claim that trial court violated defendant's constitutional right to counsel and, therefore, to due process, by denying application for appointment of public defender; whether trial court's implicit finding that defendant was not indigent was clearly erroneous; claim that trial court violated defendant's constitutional right to due process by failing to order, sua sponte, judicial marshal to remove defendant's shackles during trial; whether defendant demonstrated existence of constitutional violation that deprived him of fair trial; whether defendant's failure to object to being tried before jury in shackles was sufficient to negate compulsion necessary to establish constitutional violation; whether defendant was compelled to stand trial before jury while visibly shackled.
State *v.* Nalewajk 462
Possession of narcotics with intent to sell by person who is not drug-dependent; failure to appear in first degree; motion to correct illegal sentence; mootness; whether defendant's death during pendency of appeal rendered appeal moot.
State *v.* Ramon A. G. 483
Assault in third degree; criminal violation of protective order; whether defendant properly preserved claim that trial court violated his constitutional rights to due

process and to present defense by improperly declining to give jury instruction on defense of personal property with respect to assault charge; whether doctrine of implied waiver precluded substantive consideration of claim of instructional impropriety; whether improper comment of prosecutor deprived defendant of fair trial.

State *v.* Riley 1

Murder; whether resentencing court improperly denied motion for recusal where resentencing court was same court that presided over defendant's trial and imposed initial sentence; claim that recusal of resentencing court was required by statute (§ 51-183c), rule of practice (§ 1-22 [a]) Code of Judicial Conduct (rule 2.11 [a] [1]), and due process clauses of fifth and fourteenth amendments to United States constitution; claim that Practice Book § 1-22 provided ground for recusal independent of that provided by § 51-183c; claim that rule 2.11 (a) (1) of Code of Judicial Conduct required recusal on ground that resentencing court was biased in favor of justifying defendant's initial sentence; claim that defendant's initial sentence had anchoring effect that prevented resentencing court from approaching resentencing hearing with fully open mind that would allow it to fully consider requirement under Miller *v.* Alabama *(567 U.S. 460) that it give mitigating weight to defendant's youth and its hallmark features when considering whether to impose functional equivalent of life imprisonment without parole; claim that resentencing court considered seventy year sentence to be inappropriate but nevertheless imposed it because defendant would be eligible for parole pursuant to legislative amendments (P.A. 15-84) to statutes applicable to sentencing of children convicted of certain felonies (§ 54-91g) and parole eligibility (§ 54-125a); claim that resentencing court was required under Supreme Court's reversal of defendant's initial sentence and remand order to find that defendant was incorrigible, irreparably corrupt or irretrievably depraved before resentencing him to life without possibility of parole; whether discussion by Supreme Court in decision reversing defendant's initial sentence about presumption against life sentence without parole that must be overcome by evidence of unusual circumstances was rendered inapplicable by enactment of P.A. 15-84; claim that* Miller, *Supreme Court's decision reversing defendant's sentence and P.A. 15-84 limited resentencing court's discretion by creating presumption against imposition of life sentence that could be imposed only after finding that juvenile was permanently incorrigible, irreparably corrupt or irretrievable depraved.*

State *v.* Rodriguez (See State *v.* Sanchez) 466

State *v.* Sanchez 466

Sale of narcotics by person who is not drug-dependent; possession of narcotics with intent to sell by person who is not drug-dependent; whether trial court improperly dismissed motions to correct illegal sentence for lack of subject matter jurisdiction; claim that lack of drug dependency by defendants was element that state was required to plead and prove beyond reasonable doubt pursuant to statute ([Rev. to 2013] § 21a-278 [b]); whether drug dependency is affirmative defense that must be proven by defendant; whether, at time trial court dismissed motions to correct, defendants raised colorable claims; whether, in light of Supreme Court's decision in State *v.* Evans *(329 Conn. 770), defendants' motions to correct no longer presented colorable claims of illegal sentence.*

State *v.* Slaughter (See State *v.* Sanchez) 466

State *v.* Thigpen (See State *v.* Sanchez) 466

Turchiano *v.* Roadmaster Paving & Sealing, LLC (Memorandum Decision) 902

U.S. Bank Trust, N.A. *v.* Giblen 221

Foreclosure; motion for approval of committee sale; annulment of automatic stay by Bankruptcy Court; claim that trial court's approval of sale was void ab initio because it exceeded scope of Bankruptcy Court's order annulling bankruptcy stay; whether Bankruptcy Court's order annulling stay was intended only to permit committee to recover fees and expenses; whether trial court abused its discretion in granting committee's motion for approval of sale; reviewability of claim that certain irregularities with motion for approval of sale prevented defendants from realizing substantial amount of equity in subject property; whether defendants failed to show any injury resulting specifically from five claimed irregularities with motion for approval of sale.

Vassell *v.* Commissioner of Correction (Memorandum Decision) 903
Viking Construction, Inc. *v.* 777 Residential, LLC 245
Contracts; whether trial court erred in rendering summary judgment in favor of cross claim plaintiffs; whether defects, errors and omissions exclusion of builder's risk policy unambiguously barred coverage; claim that defects, errors and omissions exclusion of builder's risk policy did not bar recovery because damaged windows were not part of renovation; claim that recovery for damage to windows was not barred by defects, errors and omissions exclusion of builder's risk policy because exclusion applied only to finished product, not to process implemented by subcontractor who damaged windows; claim that renovation endorsement would have been rendered meaningless if exclusion applied; whether trial court incorrectly interpreted resulting loss clause as entitling cross claim plaintiffs to coverage.
Villafane *v.* Commissioner of Correction 566
Habeas corpus; reviewability of claim that habeas court abused its discretion in denying petition for certification to appeal with respect to issue of whether habeas court improperly denied motions for appointment of habeas counsel; failure of petitioner to raise claim in petition for certification to appeal; reviewability of claim that habeas court abused its discretion in denying petition for certification to appeal with respect to issue of whether trial counsel rendered ineffective assistance; failure to brief claim adequately.
Vitti *v.* Milford 398
Workers' compensation; whether Compensation Review Board erred as matter of law by applying version of applicable statute ([Rev. to 2009] § 7-433c) that was in effect on date of plaintiff's injury to plaintiff's claim for heart and hypertension benefits; claim that board should have applied version of § 7-433c that was in effect on date of plaintiff's hire in 1993; claim that board erred as matter of law by affirming finding of Workers' Compensation Commissioner that plaintiff's giant cell myocarditis constituted heart disease under § 7-433c; credibility of witnesses.
Wells Fargo Bank, N.A. *v.* Fitzpatrick. 231
Foreclosure; notice requirements of mortgage; whether trial court properly determined that certain two letters together substantially complied with notice requirements in mortgage deed; whether trial court's finding that defendants did not prove special defense of laches was clearly erroneous; whether defendants established that any alleged delay by plaintiff resulted in prejudice to them; whether trial court's reduction in interest that accrued while first of two foreclosure actions was pending equitably addressed any delay in first foreclosure action.
Zaniewski *v.* Zaniewski 386
Dissolution of marriage; claim that trial court improperly failed to use parties' net incomes in calculating its orders of child support and alimony; claim that trial court improperly ordered defendant to pay alimony in amount that exceeded ability to pay; claim that trial court abused its discretion by crafting inequitable property distribution and alimony orders; whether it was possible to ascertain what path trial court followed in crafting its support orders and dividing marital assets without engaging in pure speculation; whether defendant did all that could reasonably be expected to obtain articulation; whether unique circumstances of case warranted new trial on financial matters; whether presumption of correctness of trial court's orders applied where there was inadequate factual record and appellant did all that could reasonably be expected of him to obtain articulation of factual findings necessary to obtain review of financial orders but was thwarted, through no fault of his own, due to retirement of trial judge.

NOTICE

Public Hearing on Practice Book Revisions To the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On June 20, 2019, at 10 a.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) in the Supreme Court courtroom in Hartford for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure that are being considered by the Justices and Judges as well as any proposed new rule or any change in an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules were printed in the May 21, 2019 issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Comments may be forwarded to the co-chairs of the Advisory Committee on Appellate Rules by e-mail to Attorney Jill Begemann at Jill.Begemann@connapp.jud.ct.gov or may be forwarded to the co-chairs at the following address and should be received by June 14, 2019.

Co-Chairs of the Advisory Committee on Appellate Rules
Attn: Attorney Jill Begemann
Connecticut Appellate Court
75 Elm Street
Hartford, CT 06106

Each speaker at the public hearing will be limited to five minutes. Anyone who believes that they cannot cover their remarks within that time period may submit written comments to the Committee. If written comments are submitted, ten copies should be provided.

Wheelchair access is located in the rear of the Supreme Court building, and may be reached from the staff parking lot between Lafayette and Oak Streets. There are a limited number of accessible parking spaces in the gated staff lot, which may be entered from Oak Street. Use the intercom at the gate to speak to security about the availability of parking. Once at the accessible door, use the intercom to request entry from security. If you would like to attend the meeting and need an accommodation under the Americans with Disabilities Act, please e-mail Carl Cicchetti at Carl.Cicchetti@connapp.jud.ct.gov before June 14, 2019.

Hon. Richard N. Palmer
Hon. Alexandra D. DiPentima
Co-Chairs, Advisory Committee on Appellate Rules

NOTICES OF CONNECTICUT STATE AGENCIES

Connecticut Housing Finance Authority

Notice of Intent to Amend Procedures

In accordance with Section 1-121 of the Connecticut General Statutes, NOTICE IS HEREBY GIVEN that the Connecticut Housing Finance Authority proposes to amend Procedures:

Statement of Purpose: To amend the Low-Income Housing Tax Credit (''LIHTC'') Procedures of the Connecticut Housing Finance Authority.

Summary of Proposed Procedures: LIHTC Procedures are proposed to be amended to support applicant capacity and encourage applicant capacity building with the goal of achieving development completion and tenant occupancy most expeditiously. Specifically, effective 2020, to:

- Include a requirement for applicants to attend a pre-application conference with CHFA staff; and
- Include limits on applicant eligibility related to capacity and performance. Applicants that have received LIHTC awards in both of the two preceding years will not be eligible to submit new LIHTC application(s) for additional development(s) unless previously awarded developments are on track to meet benchmarks.

Copies of the proposed LIHTC Procedures may be obtained by calling (860) 571-4372 or by visiting www.chfa.org. All interested persons may submit written data, views and arguments in connection with the above-stated proposed LIHTC Procedures to Terry Nash, Planning Research and Evaluation, Connecticut Housing Finance Authority, 999 West Street, Rocky Hill, CT 06067 no later than 30 days after the publication of this notice.

NOTICES

CONNECTICUT BAR EXAMINING COMMITTEE

The following 325 persons have applied for admission to the Connecticut bar by examination to be held on July 30 & 31, 2019. Written objections or comments regarding any candidate should be addressed to the Connecticut Bar Examining Committee, 100 Washington Street, 1st Floor, Hartford, CT 06106 as soon as possible.

Jessica F. Kallipolites
Administrative Director

Abovyan, Lusine Rafiki of Bridgeport, CT
Aguila, Daniela of Trumbull, CT
Ahmad, Zainab of Chicopee, MA
Albaugh, Michael Allan of Palmyra, PA
Altieri, Raymond James of Shelton, CT
Amaral, Korrin Nichole of Mystic, CT
Amin, Dawud W. of New Haven, CT
Anderson, Lutherene A. of Miramar, FL
Andrews, Alexander George of Avon, CT
Andrews, Benjamin Z. of Wilton, CT
Antaya, Colin Scott of New Haven, CT
Antunes, Nicole Marie Carolino of Newington, CT
Apanovitch, Austin James of Glastonbury, CT
Austin, Matthew William of Sandy Hook, CT
Ayala, Rudwin of Delray Beach, FL
Baker, Andrew Charles of San Francisco, CA
Baldelli, Bianca Marie of East Boston, MA
Bang, Alissa of Hamden, CT
Barasch, James Matthew of Easton, CT
Barbascumpa, Galina of New York, NY
Barbet, Brittany M. of Hamden, CT
Bardoo, Sean Lincoln of Lowell, MA
Baron, Catalina of Northborough, MA
Bashaw, John Charles of Avon, CT
Bausch Jr., Jeffrey D. of Cheshire, CT
Beauvais, Kelly Anne of Hartford, CT
Bernal Turpo, Yessenia Gladys of Norwich, CT
Berriault, Robert Wendell of New Britain, CT
Bickings, Brent F. of Newport News, VA
Bixby, David Walter of Middletown, CT
Blatt, Samuel Fletcher of West Hartford, CT
Blouin, Katherine Anne of West Hartford, CT
Bonanno, MarcAnthony of Ellington, CT
Bonito, Angela Marie of North Branford, CT
Bosse, Kimberly Ashe of East Berlin, CT
Braga, Justin Richard of New Bedford, MA
Brantley, Richard Robert of West Haven, CT
Brennan-Reilly, Joseph Richard of Hamden, CT
Breton, Sergio of Stamford, CT
Brodzinski, Emily Kay of Chester, CT
Brookshire, Jr., Jermaine A. of St. Louis, MO
Brown, Kathleen Rose of Hamden, CT
Bush, Jennifer Megan of West Hartford, CT
Caine, Martin Leonard of Woodbury, CT
Cale, Jose Carlos Cordeiro of Newington, CT
Callis, Katherine Alexandra of Tolland, CT
Carabetta, Cristina A. of Meriden, CT
Carpenter, Amanda Lauren of Avon, CT
Carpenter Woods, Martina R. of Bowie, MD
Carredano, Jessenia Michele of Peabody, MA
Cartner, Joel Shanley of Hamden, CT
Cascarelli, Victoria Maria of Monroe, CT
Case, Amelie Mirreille of Washington, DC
Cassidy, Brendan Thomas of Derby, CT
Channer, Sherna Cavell of Shelton, CT
Choiniere, Michael Patrick of Danbury, CT
Chucta, Dayna Mariel of Prospect, CT
Chung, Sunny E. of Hartford, CT
Ciardiello, Eric James of Trumbull, CT
Clyne, Brianna Marie of Branford, CT
Collazo Cruz, Mariedy of Colchester, CT
Collins, Anastasiya of Trumbull, CT
Condon, Michael Thomas of Boston, MA
Corica, Dan Augustine of Shelton, CT
Cote, William Pohlman of East Haven, CT
Crichton, Ian Charles of New Haven, CT
Cutaia, Julienne Nicole of Manchester, CT
Da Silva, Maria Do Ceu of New Haven, CT
Dannenmaier, Katherine Starks of Dallas, TX
Daub, Anthony Thomas of Hamden, CT
Dawson, Angelique Adina of Old Greenwich, CT
Dean, Hannah Love of Brighton, MA
DeAngelo, Donald Graham of Bristol, CT
DeDominicis, Alyssa Marie of New Britain, CT
DeFalco, Kaila Michelle of Brockton, MA
Diamond, Matthew N. of Simsbury, CT
Donahue, Brendan Michael of West Hartford, CT
Dressler, Tavi J. of West Hartford, CT
DuBack, Rebecca N. of Danbury, CT
Dubuc, Danielle Rejeanne of Longmeadow, MA
Dwyer, Nicole M. of Branford, CT
Eastwood, Ethan Aaron of Braintree, MA
Eisen, Mary-Jane of Avon, CT
Eze, Paulette Nneka of West Hartford, CT
Faillace, Adam Christopher of Weston, CT
Falcon, Bernardo Martin of New Haven, CT
Fenaroli, Paul Richard of Bryn Mawr, PA
Ferriter Russo, Emily M. of Westfield, MA
Flaharty, Erin Kathleen of Lebanon, CT
Flament, Ryan Blake of Southbury, CT
Flynn, Casey Jean of Old Lyme, CT
Ford, Curran Michael of South Dennis, MA
Foster, Matthew Brian of Ledyard, CT
Fountaine, Adam Christopher of Glastonbury, CT
Francini, Anthony of Coventry, CT
Gaeta, Mary L. of New Haven, CT

Gahr, Deneen Toman of Enfield, CT
Gain, Zachary Thomas of New Hartford, CT
Gait, Emily Adams of Haddam, CT
Gallucci, Caroline Ann of Fairfield, CT
Ganow, Kyle Brandon of Greenwich, CT
Gaughan, Jr., James Mark of Boston, MA
Geary, Gina Marie of Higganum, CT
Georgio, Alfred Gerald of West Greenwich, RI
Gerarde, Eric Enfield of Wethersfield, CT
Gerosa, Nicole Marie of Branford, CT
Gersz, Meryl Rose of Killingworth, CT
Gherlone, Ashley Mary of Orange, CT
Giancarlo, Taylor Leigh of Meriden, CT
Gibson, Brooke Lamar of Weston, CT
Gill, Allison Baldwin of Higganum, CT
Giron-Sanchez, Juan Roberto of Hartford, CT
Giuliano, Jake Joseph of Wallingford, CT
Gorley, Samantha Emily of Meriden, CT
Grant, Megan Katherine of West Hartford, CT
Greenhalgh, Patrick Barry of Moosup, CT
Grijalva, Larry Emmanuel of East Hartford, CT
Gualtieri, Gianna Leigh of Bristol, RI
Haag-Fisk, Sarah Ruth of Greenwich, CT
Halasa, Lena Nadine of West Hartford, CT
Hale, Emma Jaye of Bristol, CT
Hamid, Rabia Sarosh of Plantsville, CT
Hanley, Daniel Andrew of Brookfield, CT
Harness Jr., John Robert of Durham, CT
Haroon, Shehrezad of Southington, CT
Harris, Thomas L. of Haddam Neck, CT
Haven, Kevin Patrick of New Milford, CT
Hawkins, Janene of Trumbull, CT
Hebert, Chelsea Emily of Wolcott, CT
Heckler, Andrew George of Old Saybrook, CT
Hendricks, Katherine Leigh of Wallingford, CT
Hennessey, Kaitlyn A. of Ansonia, CT
Hodges, Ashley Elizabeth of Oxford, CT
Holman Jr., Thomas Wyandotte of Middletown, CT
Hruszko, Sergio Brandon of West Haven, CT
Inzitari, Leonard F. of East Haven, CT
Ishikawa, David Wyatt of Hamden, CT
Isleib, Christopher Charles of Hartford, CT
Jackson, Roxanne O'Neill of Jacksonville, FL
Jimenez-Franck, Andres Douglas of Naugatuck, CT
Johnson, Emily Anne of Old Saybrook, CT
Jones, Jullian Hollingsworth of Cincinnati, OH
Josephs, Garrick Dane of Norwalk, CT
Kadison, Steen Surland of Fairfield, CT
Kaiser, Kevin Collier of Stratford, CT
Kaplan, Jeffrey Nathaniel of Hamden, CT
Kapur, Rohan Sandip of East Hampton, CT
Karamani, Christina Ruth of Wallingford, CT
Keating, Michael of West Hartford, CT
Kelly-Maynard, Megan E. of New London, CT
Kern, Gordon Edward of Staten Island, NY
Kernen, Tiffany Michelle of State College, PA
Kerrick, Andrew of Concord, NH
Kim, Yoonhee of San Diego, CA
King, Jesse Michael of Avon, CT
Knispel, Shelby Elizabeth of Guilford, CT
Knott, Olivia Taylor of West Hills, NY
Kochol, Michael J. of New Britain, CT
Kokias, Katherine Helen of Norwalk, CT
Koziatek, Albert James of East Lansing, MI
Kramer, Gerald Wayne of Newtown, CT
Kraner, Nathan E. of Hartford, CT
Kushner, Dawn Michelle of Pittsburgh, PA
LaRiviere, Ryan Conrad of Brookfield, CT
Larrubia, Trevor James of Middletown, CT
Lastrina, Angelo C. of Portland, CT
Lau, Arthur J. of New Haven, CT
Laurato, Maria Louisa of Savannah, GA
Lavache, Caminer of West Haven, CT
Lawless, Brendan R. of New Haven, CT
Lazaroff, Jeffrey Marc of North Haven, CT
Lebel, Edouard Guillaume of Southbury, CT
Lee, Youngdo of New Britain, CT
Lembo, Christopher James of Southington, CT
Lent, Jeremy Alan Balkam of New Haven, CT
Leo, Elizabeth Ann of West Hartford, CT
Levinson, Samuel David of New York, NY
Levitt, David Bernard of West Hartford, CT
Levy, Jasana Alexandria of Durham, NC
Lin, Ming-Yee of New Haven, CT
Locklin, Susan Byrum of West Springfield, MA
Logan, Nicole Lynn of Coventry, CT
Lombardi, Susanna Mary of Wallingford, CT
Loomis, Kelsey Elizabeth of North Haven, CT
Lovallo, Katherine Grace of North Haven, CT
Lum, Alexander Lee of Alexandra, VA
Lynch, Ellen Marie of New Haven, CT
Lyon, Meghan M. of New Milford, CT
Macaisa, Geraldine Blas of Hartford, CT
Magistro IV, John Louis of Rochester, NY
Mantei, Leah Beth of North Haven, CT
Marchinkoski, Abby Louise of Cromwell, CT
Margaryan, Marine of West Hartford, CT
Marichal, Melissa of New Haven, CT
Mario, Luke Carter of New Haven, CT
Martin, Luke T. of West Hartford, CT
Martin, Molly Rae of Old Saybrook, CT
Martinez, Jason Thayer of Hartford, CT
Mason, Susan Whitney of Sandy Hook, CT
Mastriano, Erik Francis of North Branford, CT
McCloud, Melissa Shawniece of Bloomfield, CT
McGrory, Sean Michael of Springfield, MA
McLaughlin, Conor Joseph of Fairfield, CT
McLaughlin, Karen of Meriden, CT
McMahon, Devin L. of Wallingford, CT
McWilliams, Ashley D. of Trumbull, CT
Mello, Dylan Marcus of Little Compton, RI
Merritt, Ian of Lake Forest, CA
Merrow, Taylor Frances of South Windsor, CT
Michelman, Glenn Perry of Boca Raton, FL
Miller, Ashley Marie of Bridgeport, CT
Miller, Kristen Constance of Stamford, CT
Miller-Fulton, Tudy A.S. of Wethersfield, CT
Milliken, Paul James of Boston, MA
Min, Yuri Park of Southington, CT
Minicucci, Gabriella Marie of Watertown, CT
Montouth, Tiffany Natalie of Hartford, CT
Morgan, Kathleen Elizabeth of Wethersfield, CT
Moscato, Julie Ann of Wallingford, CT
Mullany, David William of West Hartford, CT
Murphy, Heather Elizabeth of Columbia, CT
Murphy, Jessica Lynn of Bristol, CT
Murphy, Shelby Lynn of Wallingford, CT
Murray, Richard of Ellington, CT
Mwilwa Nachilima, Patricia Kapambwe of Stamford, CT
Naccarato, Bethany Mary of Wallingford, CT
Naclerio, Eric R. of Milford, CT

Najamy, Anthony Louis of Jacksonville, FL
Napper, Tyrone Jerome of West Hartford, CT
Nastyn, Paulina Nadine of Berlin, CT
Nichols-Fleming, Nathaniel Thomas of Farmington, CT
Nickerson, Jason Michael of Fairfield, CT
Nixon, Melissa of Milford, CT
Nobile, Ryan Vincent of North Branford, CT
Norton, Erin Elizabeth of Avon, CT
Norton, Gregory Charles of West Hartford, CT
Noujaim, Melissa Emile of Waterbury, CT
O'Connor, Carolyn Marie of Ewing, NJ
O'Donnell, Christopher William of Thorndike, MA
O'Leary, Kayla C. of Scarborough, ME
O'Leary, Kevin John of Prospect, CT
Olumide, Kunle M. of Windsor, CT
Onusko, Dave of Hamden, CT
Owens, Paige Lynne of Hartford, CT
Palmatier, Steven Curtis of Cromwell, CT
Panagoulias, Angeline N. of Monroe, CT
Panico, Elizabeth R. of Avon, CT
Paquette, Sean Edward of Berlin, CT
Parikh, Neha P. of Brighton, MA
Park, Daniel of New Britain, CT
Park, Naeseong of Somerville, MA
Parrilla, Geraldo Enrique of New Haven, CT
Parrish, Ainsley Quinn of Hartford, CT
Pedchenko, Kaitlyn of Chepachet, RI
Pervez, Sahar of Danbury, CT
Petion, Josue of Springfield, MA
Phanngavong, Samantha of Stratford, CT
Photos, Dominique Nicole of Shelton, CT
Picard, Jake Thomas of Chicopee, MA
Purtill, Emily Grisch of Glastonbury, CT
Raber, Emilie Madeleine of Philadelphia, PA
Ragno, Lucas Peter of Waterbury, CT
Redding, Victoria Reed of Branford, CT
Reed, Maegan Piper of Branford, CT
Regan, Samantha Marie of Old Saybrook, CT
Reichman, Justin Karl of Middletown, CT
Renaud, Jeffrey Earley of Swanton, VT
Repetto, Matthew Cole of Granby, CT
Rhi, Rachael H. of Centreville, VA
Richert, Cori Monique of Vernon, CT
Rimetz, Brendan N. of Manchester, CT
Robertson, Colin F. of Oakville, CT
Roman, Stephani Ann of New Britain, CT
Romania Jr., George Howard of Cheshire, CT
Rosario, Neil Diamond of Chicopee, MA
Roseman, Kyle Gardner of Stonington, CT
Rudiak, Alexander James of Springfield, MA
Russell, Tashika Tashani of Bridgeport, CT
Ryan, Erica Nicole of Farmingdale, NY
Ryff, Tyler Michael of Hartford, CT
Sakaj, Frida of Simsbury, CT
Salim, Keren of New Britain, CT
Sanandres, Kristy Y. of Hartford, CT
Sanidad, Kevin G. of South Windsor, CT
Santovasi, Nicholas Joseph of Goshen, CT
Saporito, Danielle Nicole of Ridgefield, CT
Scafariello, John Stephen of West Haven, CT
Seidman, Jessica Rachel of Woodbridge, CT
Semataska, Kevin Lawrence of Plantsville, CT
Seyal, Amina Aziz of Fairfield, CT
Shaw, Dylan Bruce of Hartford, CT
Simpkins, Henry Alan of East Lyme, CT
Smith, Raneil Antony of Bridgeport, CT
Solar, Philjay S. of Dedham, MA
Steere, Julia Kristin of West Hartford, CT
Tamzoke, Adam T. of Hartford, CT
Tirado, Leeza of North Haven, CT
Tomasko, Helen F. of Bethel, CT
Torrenti, John Thomas of Norwalk, CT
Townshend, William Augustin of Stamford, CT
Vakili, Sayyedeh Parastoo of Ashland, MA
Valenzano, Anthony Vito of Fairfield, CT
Vecchio, Alessandra Therese of Wallingford, CT
Vetrano, Alyssa Danae of Sandy Hook, CT
Vining Jr., Rodney T. of West Haven, CT
Viola, Pramod of South Ozone Park, NY
Vizcaino, Andrea Liliana of Stamford, CT
Vogel Short, Maria Lisa of Lake Hopatcong, NJ
Voyer, Jordan A. of Avon, CT
Wallace, Kelsey F. of Woodbridge, CT
Ward, Johanna Mei Ping of North Haven, CT
Werner, Michael Daniel of East Haddam, CT
Westbrook, Samantha Joan of Allston, MA
Whitaker, Samantha Nicole of Rocky Hill, CT
White, Trevor Sherlock of Farmington, CT
Wicken, Raagan Leah of Norwich, CT
Willard, Beth Ann of Lyme, CT
Wingard, Dylan Hall of Hamden, CT
Womack, Caroline Constance Leigh of New Britain, CT
Wunder, Victoria Katherine of Milford, CT
Zaccardi, Henry Paul Pasquale of West Hartford, CT
Zelinsky, Nathaniel Avi Gideon of Columbus, OH
Zheng, Alexander Chen of Newington, CT
Zimmer, James Benjamin of Manchester, CT
Zucaro, Anthony Ross of West Hartford, CT

Notice of Resignation of Attorney

Pursuant to § 2-52 of the Connecticut Practice Book, notice is hereby given that on May 22, 2019 in HHD-CV-19-6108114, this court accepted the resignation of Richard C. Gordon (#433161) of Hartford, CT and found that he has knowingly and voluntarily both resigned from the Connecticut Bar and waived the privilege of reapplying.

Susan Cobb
Judge

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 May 17, 2019:

Cheryl Marie Manley	Charter Communications, Inc.
Yesika Ramos Carro	Charter Communications, Inc.
Jared M. Williams	The Guardian Life Insurance Co. of America

Certified as of May 20, 2019:

Anjelica Simone Bader	ESPN

Hon. Patrick L. Carroll III
Chief Court Administrator