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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

RECLAIMANT CORP. *v.* WILLIAM J. DEUTSCH ET AL. (SC 20133)

McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

The plaintiff corporation sought to recover from the defendants for unjust enrichment in connection with the alleged overpayment of funds to them by the plaintiff's predecessor in interest, V Co., a Delaware limited partnership in which the defendants had invested pursuant to a limited partnership agreement. In early 2008, the defendants, who are Connecticut residents, each redeemed approximately 90 percent of the funds from their capital accounts in V Co. and thereafter withdrew from the partnership. The plaintiff alleged that, when the defendants redeemed their investments, V Co. had miscalculated the net value of the partnership's assets, and, consequently, the net values of the defendants' interests had been overstated, resulting in overpayments to the defendants. After the plaintiff filed its action in 2013, the defendants raised various special defenses, including, inter alia, that the plaintiff's unjust enrichment claims were time barred by either Delaware's three year limitation period (§ 17-607 [c]) in the Delaware Revised Uniform Limited Partnership Act or Connecticut's statutory (§ 52-577) three year limitation period generally applicable to tort actions, or were barred by the doctrine of laches. The plaintiff and the defendants each moved for summary judgment on certain of the defendants' special defenses. The trial court denied the plaintiff's motion for summary judgment, granted the defendants' motion as to their special defense that the plaintiff's claims were barred by the three year limitation period set forth in § 17-607 (c) and rendered judgment for the defendants. The trial court reasoned that the choice of law provision in the limited partnership agreement, which provided that the rights and liabilities of the parties were to be governed by and construed in accordance with the laws of Delaware, reflected an intent that both the substantive and procedural law of Delaware would govern the relationship between the parties and concluded that the plaintiff's claims were time barred by Delaware's three year limitation period because the plaintiff commenced its action more than three years after V Co. dispensed the funds to the defendants. The trial court also explicitly rejected the plaintiff's contention that the choice of law provision governed only substantive law and not procedural issues such as the statute of limitations. On appeal, the plaintiff claimed, inter alia, that the trial court improperly granted the defendants' motion for summary judgment because the procedural law of Connecticut, rather than that of Delaware, governed its unjust enrichment claims, under Connecticut procedural law, an equitable action for unjust enrichment was not subject to any statutory limitation period or, in the alternative, is subject to the six year statutory (§ 52-576 [a]) limitation period applicable to contracts, and that its action, therefore, was timely filed. *Held*:

1. The trial court incorrectly determined that Delaware law, rather than Connecticut law, governed the issue of whether the plaintiff's unjust enrichment claims were time barred: in a choice of law scenario, the forum state generally will apply the substantive law of the state chosen by the parties to govern their rights and duties under a contractual agreement but will apply its own law to matters of judicial administration and procedure, and, in Connecticut, whether a statute of limitations properly is characterized as substantive or procedural depends on the nature of the underlying right that forms the basis of the cause of action; in the present case, the choice of law provision in the limited partnership agreement was clear that the parties had agreed that Delaware law controlled the substantive rights and liabilities of the parties, and, therefore, Delaware substantive law governed the plaintiff's unjust enrichment claims; because, however, the plaintiff's claims for unjust enrichment were claims for restitution that derived from equitable principles under Delaware's common law, the limitation period applicable to those claims properly was characterized as procedural, as that limitation period functioned only as a qualification on the remedy to enforce a preexisting common-law right, and, accordingly, Connecticut law governed the timeliness issue; moreover, the fact that § 17-607 (c) properly is classified as a statute of repose, rather than a statute of limitations, had no bearing on whether that provision was deemed substantive or procedural for choice of law purposes, and the limited partnership agreement did not expressly incorporate that Delaware provision or otherwise indicate an intent that Delaware's procedural law would apply.
2. The defendants could not prevail on their claim, as an alternative ground for affirming the trial court's judgment, that the plaintiff's unjust enrichment claims were barred under Connecticut law by the three year limitation period generally applicable to tort actions, because the plaintiff's claims were equitable claims for relief and, thus, were not subject to any statute of limitations; furthermore, this court declined to address the issue of whether the defendants could prevail on their affirmative defense of laches, as the trial court made no factual findings with respect to that affirmative defense, and, accordingly, the case was remanded for the trial court's consideration of that defense, as well as any remaining grounds for summary judgment that the defendants raised in their summary judgment motion.

Argued November 7, 2018—officially released August 6, 2019

Procedural History

Action to recover damages for unjust enrichment, and for other relief, brought to the Superior Court in the judicial district of Stamford, where the defendants filed a counterclaim; thereafter, the court, *Genuario*, *J.*, granted the defendants' motion for summary judg-

ment and rendered judgment for the defendants as to the plaintiff's complaint, from which the plaintiff appealed. *Reversed*; *further proceedings*.

David S. Golub, with whom, on the brief, was *Jonathan M. Levine*, for the appellant (plaintiff).

Howard Graff, pro hac vice, with whom, on the brief, were *Stephen G. Walko* and *Andrea C. Sisca*, for the appellees (defendants).

Opinion

ECKER, J. The narrow issue presented by this appeal is whether the statute of limitations of the state of Connecticut or the state of Delaware governs the unjust enrichment claims brought by the plaintiff, Reclaimant Corp., against the defendants, William J. Deutsch and Laurence B. Simon, seeking recovery for alleged overpayments issued to the defendants by the plaintiff's putative predecessor in interest pursuant to a limited partnership agreement. The trial court rendered summary judgment in favor of the defendants, concluding that the plaintiff's unjust enrichment claims were governed by Delaware law and were time-barred under the three-year statute of limitations in the Delaware Revised Uniform Limited Partnership Act (DRULPA), Del. Code Ann. tit. 6, § 17-607 (c) (2005).[1] On appeal, the plaintiff contends that summary judgment was improper because Connecticut law governs the timeliness of its unjust enrichment claims and that those claims timely were filed under Connecticut law.

We conclude that Delaware law governs the substantive rights and liabilities of the parties arising out of the limited partnership agreement but that Connecticut

[1] Section 17-607 of DRULPA provides that, "[u]nless otherwise agreed, a limited partner who receives a distribution from a limited partnership shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of 3 years from the date of the distribution."

law governs matters of judicial administration and procedure. We further conclude that, because the plaintiff's unjust enrichment claims have a common-law origin, the limitation period properly is "characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right." *Baxter* v. *Sturm, Ruger & Co.*, 230 Conn. 335, 347, 644 A.2d 1297 (1994). Thus, Connecticut law, rather than Delaware law, controls the timeliness of the plaintiff's claims. We therefore reverse the judgment of the trial court and remand the case for further proceedings.

I

The record reveals the following relevant facts and procedural history. In 2007, the defendants entered into a limited partnership agreement with SV Special Situations Fund LP (SV Fund), a Delaware limited partnership formed for the purpose of investing in and trading securities and other investments. In early 2008, the defendants redeemed their respective investments and withdrew from the partnership as of March 31, 2008. Deutsch received approximately 90 percent of the funds in his capital account, for a total distribution in the amount of $22,309,473.03, and Simon received approximately 90 percent of the funds in his capital account, for a total distribution in the amount of $2,176,785.80.[2]

By letters dated September 4, 2012, Scott A. Stagg, the director of SV Fund, informed each of the defendants that the "net asset value of your interest in the . . . Fund was . . . overstated [at the time you redeemed your investment], resulting in . . . overpayment . . . ." Stagg alleged that Deutsch had received a total overpayment in the amount of $7,047,974.03 and that Simon had received a total overpayment in the

[2] Deutsch received the following distributions: (1) $15,000,000 in January, 2008; (2) $5,305,029.10 on May 8, 2008; (3) $2,000,000 on May 13, 2008; and (4) $4,443.93 on May 14, 2008. Simon received the following distributions: (1) $1,250,000 in January, 2008; and (2) $926,785.80 on May 2, 2008.

amount of $724,557.80, and he demanded that the defendants return the alleged overpayments within thirty days.

The defendants responded by requesting documentation and clarification of the alleged overpayments. The defendants also requested payment of the remaining funds in their capital accounts, which had been held back at the time of redemption. Specifically, Deutsch asked for the payment of $807,127.97 and Simon asked for the payment of $102,753.

SV Fund was liquidated in February, 2013, and its claims against the defendants were assigned to the plaintiff. On May 8, 2013, the plaintiff filed a two-count complaint against the defendants, both of whom reside in Connecticut. In the first count, the plaintiff alleged that Deutsch had been "unjustly enriched as a result of receiving and retaining" the alleged overpayment in the amount of $7,047,974.03. In the second count, the plaintiff alleged that Simon had been "unjustly enriched as a result of receiving and retaining" the alleged overpayment in the amount of $724,557.80.

The defendants moved to strike the complaint as time-barred under the three-year statute of limitations in § 17-607 (c) of DRULPA because "the distributions were made in 2008 and the complaint was not filed until 2013 . . . ." The plaintiff opposed the defendants' motion to strike, contending that, "if any statute of limitations applies to the plaintiff's equitable unjust enrichment claims . . . it is [Connecticut's] six-year statute [of limitations applicable to contracts] set forth in [General Statutes] § 52-576 (a), and the plaintiff's claims are, therefore, not time-barred." The trial court determined that it was "inappropriate to decide this potentially dispositive issue within the context of a motion to strike" and, therefore, denied the defendants' motion.

The defendants filed an answer denying that they had been unjustly enriched and raising the following affirmative defenses: (1) the plaintiff's claims are barred by § 17-607 (b) of DRULPA, "which specifies that a limited partner who unknowingly receives an alleged overpayment is not liable for returning the amount of that distribution"; (2) the plaintiff's claims are barred by the three-year statute of limitations in § 17-607 (c) of DRULPA; (3) the plaintiff's complaint fails to state a claim on which relief may be granted because SV Fund "could have prevented and/or addressed any potential alleged overpayments"; (4) the plaintiff's claims are barred by the three-year statute of limitations governing torts in General Statutes § 52-577; (5) the plaintiff "lacks standing because [it] has not established its right to bring a cause of action on behalf of SV Fund"; (6) the plaintiff "lacks standing because [it] has not established that SV Fund or its assignees have a right to bring a cause of action on behalf of 3V Capital Partners, LP";[3] (7) the plaintiff's claims are barred by the doctrine of laches due to its "inexcusable delay" in filing suit; (8) the plaintiff's claims are "barred by the doctrine of waiver"; (9) the plaintiff's claims are "barred by the doctrine of estoppel"; (10) the plaintiff's claims "are barred by the equitable doctrine of unclean hands"; (11) the plaintiff's claims "are barred by the doctrine of satisfaction and accord"; and (12) the plaintiff "failed to mitigate its damages, if any exist." The defendants also filed a counterclaim against the plaintiff on the basis of SV Fund's alleged failure to distribute the funds remaining in their capital accounts.

The plaintiff moved for summary judgment on the defendants' second and fourth special defenses, contending that "Connecticut's statute of limitations law applies to the plaintiff's common-law unjust enrichment

[3] 3V Capital Partners, LP, was a predecessor partnership to SV Fund, of which the defendants were limited partners.

claims" and "Connecticut law provides that either no statute of limitations applies to an equitable action for unjust enrichment, or, at a minimum, that a six-year statute of limitations applies, and this action is timely under either measure." The defendants opposed the plaintiff's motion for summary judgment and moved for summary judgment on their first, second, third, fourth, and seventh special defenses. The essence of the defendants' argument was that the plaintiff's "contention that Connecticut law applies to [this] dispute is academic since neither Connecticut nor Delaware law . . . permit[s] parties to pursue unjust enrichment claims as a means to rewrite the express terms of a written agreement governing the payments at issue" and the plaintiff's unjust enrichment claims are time-barred under both Delaware and Connecticut law.

The trial court's resolution of the parties' competing motions for summary judgment was guided largely by the fact that the limited partnership agreement contains a choice of law provision, which states: "This [a]greement and all rights and liabilities of the parties hereto shall be governed by and construed in accordance with the laws of the [s]tate of Delaware, without regard to its conflicts of law principles." The trial court observed that § 187 (1) of the Restatement (Second) of Conflict of Laws "requires that the law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue was one which the parties could have resolved by an explicit provision in their agreement directed to that issue." The trial court determined that the contractual choice of law provision here "expressly elects Delaware law for all issues regarding the parties' rights and liabilities including those set forth in [§] 17-607 (c) of . . . DRULPA." In arriving at its decision, the trial court rejected the plaintiff's contention that the choice of law provision governed the substantive law of the contract but not pro-

cedural matters like the applicable statute of limitations, reasoning that the "broad and clear" language of the contract "evidences an intent to include all issues (whether substantive or procedural) concerning rights, and all issues concerning liabilities, to be governed by Delaware law within the breadth of the choice of law election." Having determined that "the parties clearly and unambiguously elected to have Delaware law govern their relationship, even when it provides time limits on liabilities that are different [from] the time limits on liabilities that may be imposed by the state of Connecticut,"[4] the trial court granted the defendants' motion for summary judgment on their second special defense, denied the plaintiff's motion for summary judgment, and rendered judgment in favor of the defendants.

The plaintiff filed an appeal with the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. On appeal, the plaintiff claims that the trial court improperly rendered summary judgment in favor of the defendants because the choice of law provision in the limited partnership agreement "refers only to Delaware substantive law; it does not encompass Delaware procedural law," and the limitation period governing common-law claims properly is characterized as procedural rather than substantive. Alternatively, the plaintiff contends that, even if Delaware procedural law controls the timeliness of its claims, § 17-607 (c) of DRULPA is inapplicable because the defendants withdrew from the

[4] Additionally, the trial court rejected the plaintiff's argument that "[§] 17-607 (c) [of DRULPA] is not applicable because, upon their withdrawal, the defendant[s] ceased to be limited partners under the terms of the [limited partnership agreement]." The trial court determined that "a thorough reading of [§] 17-607 as a whole makes it clear that the words 'limited partner' refer to the person or entity who receives the distribution by virtue of the partner's status as a limited partner and applies even to withdrawing limited partners." The trial court did not reach the issue of "whether . . . the Connecticut statute of limitations would bar the plaintiff's claim[s]."

limited partnership in 2008 and, therefore, were not limited partners at the time the action was filed. Lastly, the plaintiff claims that its complaint was filed timely under Connecticut law because "unjust enrichment is either not subject to any statute of limitations at all (as an equitable claim) or is governed by the six-year [limitation] period [applicable to contracts] set forth in . . . § 52-576 (a)."

The defendants respond that the judgment of the trial court should be affirmed because that court properly concluded that the limited partnership agreement expressly incorporated Delaware law, including the three-year limitation period in § 17-607 (c) of DRULPA. They also argue that Connecticut law requires the application of § 17-607 (c) because General Statutes § 34-38f (1) provides that "the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." Alternatively, the defendants contend that, even if we were to conclude that Connecticut law, rather than Delaware law, governs the timeliness of the plaintiff's claims, the trial court's judgment nonetheless should be affirmed on the ground that the plaintiff's unjust enrichment claims are time-barred under either the three-year statute of limitations in § 52-577 or the doctrine of laches. Lastly, the defendants argue that the judgment of the trial court may be affirmed on the alternative ground that "the equitable remedy of unjust enrichment is unavailable where there is a written contract between the parties on the subject."

II

The applicable standard of review is not in dispute. "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 moving for summary judgment has the burden of showing the absence of any genuine issue of material fact and that the party is, therefore, entitled to judgment as a matter of law. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary." (Citations omitted; internal quotation marks omitted.) *Cogan* v. *Chase Manhattan Auto Financial Corp.*, 276 Conn. 1, 6–7, 882 A.2d 597 (2005). It is well settled that "[c]hoice of law questions are subject to de novo review." *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 322 Conn. 541, 558, 153 A.3d 574 (2016); see also *American States Ins. Co.* v. *Allstate Ins. Co.*, 282 Conn. 454, 461, 922 A.2d 1043 (2007) (noting that "choice of law issues present questions of law over which our review is plenary").

Nor do the parties disagree about the fundamental starting point of the conflict of laws analysis, which requires initial resort to Connecticut conflict of laws rules. "In determining the governing law, a forum applies its own [conflict of laws] rules . . . ." *Gibson* v. *Fullin*, 172 Conn. 407, 411, 374 A.2d 1061 (1977). The applicable Connecticut conflict of laws rule depends upon the nature of the plaintiff's claim. See *Macomber* v. *Travelers Property & Casualty Corp.*, 277 Conn. 617, 640, 894 A.2d 240 (2006) (applying different choice of law rules to tort and contract claims). This court previously has referred to unjust enrichment as both a tort[5]

[5] See, e.g., *LaSalla* v. *Doctor's Associates, Inc.*, 278 Conn. 578, 595, 898 A.2d 803 (2006); *Macomber* v. *Travelers Property & Casualty Corp.*, supra, 277 Conn. 640; *Fink* v. *Golenbock*, 238 Conn. 183, 193, 680 A.2d 1243 (1996).

and a quasi-contractual claim;[6] however, we also have recognized, more accurately, that it is neither a species of tort nor contract but, rather, an equitable "means of recovery in restitution." *Walpole Woodworkers, Inc.* v. *Manning*, 307 Conn. 582, 587 n.9, 57 A.3d 730 (2012) (clarifying that unjust enrichment is a "noncontractual means of recovery in restitution"); see also *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 573, 898 A.2d 178 (2006) ("[u]njust enrichment is, consistent with the principles of equity, a broad and flexible remedy," and there is "no other test than what, under a given set of circumstances, is just or unjust, equitable or inequitable, conscionable or unconscionable" [internal quotation marks omitted]); *Connecticut National Bank* v. *Chapman*, 153 Conn. 393, 399, 216 A.2d 814 (1966) (noting that unjust enrichment "is essentially equitable," and, in order to recover in restitution under that doctrine, there is no requirement that "the party unjustly enriched should have been guilty of any tortious or fraudulent act").

Section 221 of the Restatement (Second), titled "Restitution," "is concerned with what law governs a person's right to recover from another, on grounds of fairness and good conscience, the amount by which the other has been unjustly enriched at his expense." 1 Restatement (Second), Conflict of Laws c. 8, topic 6, introductory note, p. 726 (1971). Section 221 provides in relevant part that "[i]n actions for restitution, the rights and liabilities of the parties with respect to the particular issue are determined by the local law of the state which, with respect to that issue, has the most

[6] See, e.g., *Habetz* v. *Condon*, 224 Conn. 231, 236 n.9, 618 A.2d 501 (1992); *Sidney* v. *DeVries*, 215 Conn. 350, 351–52 n.1, 575 A.2d 228 (1990); *Liljedah Bros., Inc.* v. *Grigsby*, 215 Conn. 345, 346 n.1, 576 A.2d 149 (1990); see generally *Meaney* v. *Connecticut Hospital Assn., Inc.*, 250 Conn. 500, 511, 735 A.2d 813 (1999) ("[a]lthough, linguistically, such a claim is sometimes denominated an implied-in-law claim, or a quasi contract claim, it is more descriptive to call it what it is, a claim in restitution whose basis is the alleged unjust enrichment of one person at the expense of another").

significant relationship to the occurrence and the parties under the principles stated in § 6."[7] Id., § 221 (1), p. 727. Under subsection (2) of § 221, one of the "[c]ontacts to be taken into account in applying the principles of § 6" is "the place where a relationship between the parties was centered, provided that the receipt of enrichment was substantially related to the relationship." Id., § 221 (2) (a), p. 727. According to the commentary, "[t]he place where a relationship between the parties was centered, provided that this relationship was substantially related to the receipt of enrichment, is the contact that, as to most issues, is given the greatest weight in determining the state of the applicable law." Id., comment (d), pp. 729–30. For example, "[w]hen the enrichment was received in the course of the performance of a contract between the parties, the law selected by application of the rules of §§ 187–188 [of the Restatement (Second)] will presumably govern one party's rights in restitution against the other. The applicable law will be that chosen by the parties if they have made an effective choice under the circumstances stated in § 187." Id., comment (d), p. 730.

In the present case, the alleged unjust enrichment occurred in the course of the performance of the limited partnership agreement, and, therefore, we must turn to § 187 of the Restatement (Second) to resolve the con-

[7] We recognize that, in *Macomber* v. *Travelers Property & Casualty Corp.*, supra, 277 Conn. 640, we held that unjust enrichment was a tort for choice of law purposes, and, therefore, "we apply the law of the state in which the plaintiff was injured, unless to do so would produce an arbitrary or irrational result." As this court recently clarified, however, "we have completely abandoned the lex loci test in tort actions" and adopted "the most significant relationship test outlined in §§ 6 (2) and 145 of the Restatement (Second) of Conflict of Laws [as] the proper test to apply in tort actions to determine which state's law applies." *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, supra, 322 Conn. 551 n.9. Thus, regardless of whether a claim for unjust enrichment is characterized as a tort or an equitable claim for restitution, the same conflict of law principles apply, namely, the most significant relationship test set forth in the Restatement (Second).

flict of law inquiry. Section 187 of the Restatement (Second) provides in relevant part that "[t]he law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Id., § 187 (1), p. 561; see *Elgar* v. *Elgar*, 238 Conn. 839, 850, 679 A.2d 937 (1996) (noting that, under § 187, "parties to a contract generally are allowed to select the law that will govern their contract"). This "is a rule providing for incorporation by reference and is not a rule of choice of law. The parties, generally speaking, have power to determine the terms of their contractual engagements. They may spell out these terms in the contract. In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law. In such instances, the forum will apply the applicable provisions of the law of the designated state in order to effectuate the intention of the parties." 1 Restatement (Second), supra, § 187, comment (c), p. 563.

The limited partnership agreement here contains a choice of law provision that provides: "This [a]greement and all rights and liabilities of the parties hereto shall be governed by and construed in accordance with the laws of the [s]tate of Delaware, without regard to its conflicts of law principles." Pursuant to this choice of law provision, as well as the other parts of the contract evidencing the signatories' intent "to form a limited partnership . . . in accordance with the provisions of [DRULPA]," we conclude that Delaware substantive law controls the plaintiff's unjust enrichment claims.[8]

[8] There is no contention that either of the exceptions listed in § 187 (2) of the Restatement (Second) is applicable to the present case. See 1 Restatement (Second), supra, § 187 (2), p. 561 (providing that law of state chosen by parties will be applied unless either "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice" or "application of the law of

This does not end our analysis, however, because it is well established that "in a choice of law situation the forum state will apply its own procedure . . . ." *Paine Webber Jackson & Curtis, Inc.* v. *Winters*, 22 Conn. App. 640, 650, 579 A.2d 545, cert. denied, 216 Conn. 820, 581 A.2d 1055 (1990); see, e.g., *Ferri* v. *Powell-Ferri*, 326 Conn. 438, 447, 165 A.3d 1137 (2017) ("[a]lthough the choice of law provision in the 1983 trust dictates that matters of substance will be analyzed according to Massachusetts law, procedural issues such as the standard of review [and standing] are governed by Connecticut law"); *Montoya* v. *Montoya*, 280 Conn. 605, 612 n.7, 909 A.2d 947 (2006) ("[a]lthough the agreement's choice of law provision dictates that the substance of the contract will be analyzed according to New York law, procedural issues such as the applicable standard of review are governed by Connecticut law"); *People's United Bank* v. *Kudej*, 134 Conn. App. 432, 438, 39 A.3d 1139 (2012) ("because the 1998 note and the guarantee contain choice of law clauses stating that they are to be governed and construed in accordance with Massachusetts law . . . we are guided by Massachusetts substantive law in deciding the defendant's claims, but we must apply the procedural laws of Connecticut"). This approach is consistent with § 122 of the Restatement (Second), which provides that "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case." 1 Restatement (Second), supra, § 122, p. 350. As

the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties"); see also *Elgar* v. *Elgar*, supra, 238 Conn. 850 (holding that "parties to a contract generally are allowed to select the law that will govern their contract, unless either" exception in § 187 [2] of Restatement [Second] is applicable).

the commentary to that section explains, "[t]he forum has compelling reasons for applying its own rules" to procedural issues, even if the substantive law of another jurisdiction applies, because, "in matters of judicial administration, it would often be disruptive or difficult for the forum to apply the local rules of another state. The difficulties involved in doing so would not be repaid by a furtherance of the values that the application of another state's local law is designed to promote." Id., comment (a), p. 350. Additionally, "[p]arties do not usually give thought to matters of judicial administration before they enter into legal transactions," and, therefore, "the parties have no expectations as to such eventualities, and there is no danger of unfairly disappointing their hopes by applying the forum's rules in such matters." Id., p. 351. Even if the application of the forum's procedural rule would alter the outcome of a case, "the forum will usually apply its own rule if the issue primarily concerns judicial administration. The statute of limitations is a striking example of such an issue . . . ." Id.

In *Baxter* v. *Sturm, Ruger & Co.*, supra, 230 Conn. 339, we addressed whether a "statute of limitation[s] is procedural or substantive for choice of law purposes." We noted that it is "undisputed that . . . remedies and modes of procedure depend upon the lex fori" and that statutes of limitations typically are procedural because they "relate to the remedy as distinguished from the right." (Internal quotation marks omitted.) Id.; see also *Thomas Iron Co.* v. *Ensign-Bickford Co.*, 131 Conn. 665, 668, 42 A.2d 145 (1945) ("[i]t is undisputed that, as a principle of universal application, remedies and modes of procedure depend upon the lex fori"). Nonetheless, a statute of limitations may be deemed substantive, rather than procedural, "if the limitation is so interwoven with . . . the cause of action as to become one of the congeries of elements necessary to

establish the right . . . .'' (Internal quotation marks omitted.) *Baxter* v. *Sturm, Ruger & Co.*, supra, 340; see also *Thomas Iron Co.* v. *Ensign-Bickford Co.*, supra, 668–69 (observing that, if ''the remedial law of the foreign jurisdiction is inseparable from the cause of action,'' then ''the lex loci and not the lex fori governs''). We determined that neither statutes of limitations nor statutes of repose are ''substantive [or] procedural per se for choice of law purposes,'' but, rather, the characterization of the applicable limitation period ''depends on the nature of the underlying right that forms the basis of the lawsuit. If the right existed at common law, then the [limitation period] is properly characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right. If, however, the right is newly created by the statute, then the [limitation period] is properly characterized as substantive because the period of repose is so integral a part of the cause of action as to warrant saying that it qualifie[s] the right.'' (Internal quotation marks omitted.) *Baxter* v. *Sturm, Ruger & Co.*, supra, 346–47; see also 1 Restatement (Second), supra, § 143, p. 400 (''[a]n action will not be entertained in another state if it is barred in the state of the otherwise applicable law by a statute of limitations which bars the right and not merely the remedy'').[9] Applying these principles to the

[9] We recognize that §§ 142 and 143 of the Restatement (Second) were repealed and replaced with an amended § 142 in the 1988 revision of the Restatement (Second), which abandoned the procedural/substantive distinction and embraced ''the emerging trend'' that ''a claim will not be maintained if it is barred by the statute of limitations of the state which, with respect to the issue of limitations, is the state of most significant relationship to the occurrence and the parties under the principles stated in § 6.'' 1 Restatement (Second), Conflict of Laws § 142, comment (e), p. 125 (Supp. 1989). The parties in the present case have not asked us to overrule our prior precedent employing the traditional approach and adopt the 1988 revision to § 142 of the Restatement (Second), and, therefore, we have no reason to address the issue here. See *Spencer* v. *Hartford Financial Services Group, Inc.*, 256 F.R.D. 284, 300 (D. Conn. 2009) (noting that, although ''Connecticut courts are trending [toward] following the Restatement's 'most significant relationship' test in place of traditional rules,'' this court's 1994 decision in *Baxter*,

facts at issue in *Baxter*, we held that the timeliness of the plaintiff's product liability claims was governed by Connecticut's statute of limitations, rather than Oregon's statute of repose, "in light of the [common-law] origin of the law of products liability . . . ." *Baxter* v. *Sturm, Ruger & Co.*, supra, 347.

Pursuant to *Baxter*, the procedural or substantive nature of the limitation period depends on whether the plaintiff's right to relief existed under Delaware common law. See id., 341 (examining Oregon law to determine whether plaintiff's claims existed at common law).[10] Under Delaware law, unjust enrichment is a claim for restitution. See *Fleer Corp.* v. *Topps Chewing*

which postdated 1988 revision to § 142 of Restatement [Second], reflects that Connecticut courts continue to "follow the traditional rule" with respect to statutes of limitations); see also *Doe No. 1* v. *Knights of Columbus*, 930 F. Supp. 2d 337, 356 n.25 (D. Conn. 2013); *Bilodeau* v. *Vlack*, Docket No. 07-CV-1178 (JCH), 2009 WL 1505571, *4 (D. Conn. 2009).

[10] In *Baxter*, the term "common law" is used broadly to include all rights preexisting "new right[s] created by statute." *Baxter* v. *Sturm, Ruger & Co.*, supra, 230 Conn. 340. Thus, although the term may be used more narrowly in other contexts, in the present context, the "common law" includes "judicial precedent," "case law," and "natural law," as opposed to statutory law. (Internal quotation marks omitted.) *Moore* v. *Ganim*, 233 Conn. 557, 599, 660 A.2d 742 (1995); see also *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U.S. 92, 102, 21 S. Ct. 561, 45 L. Ed. 765 (1901) ("[a]s distinguished from law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs" [internal quotation marks omitted]); *State* v. *Courchesne*, 296 Conn. 622, 674 n.36, 998 A.2d 1 (2010) ("[t]he common law is generally described as those principles, usage, and rules of action applicable to the government and security of persons and property which do not rest for their authority [on] any express and positive declaration of the will of the legislature" [internal quotation marks omitted]). We recognize that there is a distinction between "legal" and "equitable" claims, which derives from the historical distinction in England between "courts of law and courts of equity." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 145, 84 A.3d 840 (2014); see id. (noting that, "[i]n the United States, most jurisdictions, including Connecticut and the federal courts, have merged law and equity courts"). This distinction, however, is irrelevant to the procedural/substantive analysis of a limitation period under *Baxter* and our use of the term "common law" here.

Gum, Inc., 539 A.2d 1060, 1062 (Del. 1988). The right to relief is not created by statute but, rather, derives from equitable principles under the common law. See, e.g., *Schock* v. *Nash*, 732 A.2d 217, 232 (Del. 1999) ("[u]njust enrichment is defined as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience" [internal quotation marks omitted]). Given the common-law origin of the plaintiff's unjust enrichment claims, we conclude that the limitation period "is properly characterized as procedural because it functions only as a qualification on the remedy to enforce the preexisting right."[11] *Baxter* v. *Strum, Ruger & Co.*, supra, 230 Conn. 347. Accordingly, Connecticut law, rather than Delaware law, governs the timeliness of the plaintiff's claims.

The defendants contend that § 17-607 (c) of DRULPA is substantive, rather than procedural, because it extinguishes the liability of a limited partner after the expiration of three years. To support this contention, the defendants rely on *Century City Doctors Hospital, LLC* v. *Friedman*, 466 B.R. 1, 12–13 (Bankr. C.D. Cal. 2012), and *Freeman* v. *Williamson*, 890 N.E.2d 1127, 1133–34 (Ill. App. 2008), both of which held that § 17-607 (c) is substantive because it is a statute of repose, not a statute of limitations. We agree with the courts in *Century*

[11] The defendants, quoting *Baxter* v. *Sturm, Ruger & Co.*, supra, 230 Conn. 340, contend that DRULPA "created rights based on unique statutory relationships that did not exist at common law," and, therefore, the three-year statute of limitations in § 17-607 (c) is "one of the 'congeries of elements necessary to establish the right.' " Although DRULPA created a statutory framework that did not exist at common law, the plaintiff does not seek to recover under DRULPA or any of the statutory rights created therein; it seeks recovery solely under the common-law doctrine of unjust enrichment. As the master of the complaint, the plaintiff is free to decide what theory of recovery to pursue, and, under *Baxter*, the theory of recovery chosen by the plaintiff is dispositive of whether a statute of limitations is deemed procedural or substantive for choice of law purposes. See *Baxter* v. *Sturm, Ruger & Co.*, supra, 347.

City Doctors Hospital, *LLC*, and *Freeman* that § 17-607 (c) properly is characterized as a statute of repose because it "clearly terminates the possibility of the limited partner's liability after a defined period of time, three years after receiving a distribution, regardless of whether a potential plaintiff knows of his or her cause of action." *Century City Doctors Hospital*, *LLC* v. *Friedman*, supra, 13, quoting *Freeman* v. *Williamson*, supra, 1134; see *Baxter* v. *Sturm*, *Ruger & Co.*, supra, 230 Conn. 341 (recognizing that "statutes of repose differ in some respects from statutes of limitation" because they terminate "any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury" [internal quotation marks omitted]). Labeling the statute as such does not resolve the issue at hand, however, because this court in *Baxter* explicitly rejected the notion that "statutes of repose . . . are always substantive"; *Baxter* v. *Sturm*, *Ruger & Co.*, supra, 341; instead, concluding that statutes of repose should be treated the same as statutes of limitations for choice of law purposes because they both "serve the same public policy of avoiding the litigation of stale claims." Id., 344. Under Connecticut's choice of law rules, the dispositive inquiry is not whether the statute at issue properly is characterized as a statute of repose or a statute of limitations, but whether the "nature of the underlying right that forms the basis of the lawsuit" existed at common law.[12] Id., 347. Because

[12] The defendants point out that "numerous Connecticut cases" have held "that a statute of limitation[s] is substantive." Nothing in the cases cited by the defendants is inconsistent with our holding in *Baxter* or the principles elucidated in this opinion, because, in all of those cases, the limitation period was part of a statutory scheme that did not exist at common law. See *Lostritto v. Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 26, 848 A.2d 418 (2004) (holding that 120-day limitation in General Statutes § 52-102b is substantive because it is part of statutory scheme that "confers rights that did not exist at common law"); *Ecker* v. *West Hartford*, 205 Conn. 219, 233, 530 A.2d 1056 (1987) (holding that three-year limitation in General Statutes § 52-555 is substantive because wrongful death statute "creates liability where none formerly existed" at common law); *Diamond National*

Delaware law recognizes a common-law claim for unjust enrichment, § 17-607 (c) of DRULPA is a procedural limitation on that preexisting right to relief.

The defendants next contend that the choice of law provision in the limited partnership agreement is worded broadly to include all of Delaware's procedural law as well as its substantive law. We disagree. "Choice of law provisions in contracts are generally understood to incorporate only substantive law, not procedural law such as statutes of limitation[s]." *Federal Deposit Ins. Corp.* v. *Peterson*, 770 F.2d 141, 142 (10th Cir. 1985). Thus, "[a]bsent an express statement that the parties intended another state's limitations statute to apply, the procedural law of the forum governs time restrictions . . . ." *Cole* v. *Mileti*, 133 F.3d 433, 437 (6th Cir.), cert. denied, 525 U.S. 810, 119 S. Ct. 42, 142 L. Ed. 2d 32 (1998); see also *Gluck* v. *Unisys Corp.*, 960 F.2d 1168, 1179 (3d Cir. 1992) ("[c]hoice of law provisions in contracts do not apply to statutes of limitations, unless the reference is express"); *Des Brisay* v. *Goldfield Corp.*, 637 F.2d 680, 682 (9th Cir. 1981) (Choice of law "clauses generally do not contemplate application to statutes of limitation. [Limitation] periods are usually considered to be related to judicial administration and thus governed by the rules of local law, even if the substantive law of another jurisdiction applies."); *Portfolio Recovery Associates, LLC* v. *King*, 14 N.Y.3d 410, 416, 927

Corp. v. *Dwelle*, 164 Conn. 540, 543, 325 A.2d 259 (1973) (holding that time limitation in General Statutes § 49-39 is substantive because "[a] mechanic's lien is a creature of statute and gives a right of action which did not exist at common law"); *Simmons* v. *Holcomb*, 98 Conn. 770, 774–75, 120 A. 510 (1923) (holding that statute of limitations for worker's compensation claim is substantive because "right of action . . . did not exist at common law," and, therefore, "it is a limitation of the liability itself, as created, and not of the remedy alone" [internal quotation marks omitted]); *Federal National Mortgage Assn.* v. *Jessup*, Docket No. CV-98-0169417-S, 1999 WL 624453, *11 (Conn. Super. August 3, 1999) (holding that statute of limitations for claim under Connecticut Unfair Trade Practices Act [CUTPA] is substantive because "CUTPA is a statutory creation").

N.E.2d 1059, 901 N.Y.S.2d 575 (2010) ("Choice of law provisions typically apply to only substantive issues . . . and statutes of limitations are considered procedural because they are deemed as pertaining to the remedy rather than the right . . . . There being no express intention in the agreement that Delaware's statute of limitations was to apply to this dispute, the choice of law provision cannot be read to encompass that [limitation] period." [Citations omitted; internal quotation marks omitted.]).

The choice of law provision in the limited partnership agreement does not mention, much less expressly incorporate, the three-year limitation period in § 17-607 (c) of DRULPA.[13] A "standard choice of law provision," such as the one at issue in the present case, which does not mention the procedural law of another state, "will not be interpreted as covering a statute of limitations." *Federal Deposit Ins. Corp.* v. *Peterson*, supra, 770 F.2d 142–43; see also *Generali-U.S. Branch* v. *Lachel & Associates, Inc.*, Docket No. 3:16-cv-595-DJH, 2017 WL 6999998, *3 (W.D. Ky. August 7, 2017) (holding that "the phrase 'governed by' is not an express statement indicating that Indiana law should apply to the statute of limitations"); *American Energy Technologies, Inc.* v. *Colley & McCoy Co.*, Docket No. CIV A. 98-398 MMS,

[13] The limited partnership agreement provides that the limited partnership is "*create*[*d*] *and form*[*ed*]" in accordance with DRULPA but is "*governed by and construed in accordance with* the laws of the [s]tate of Delaware . . . ." (Emphasis added.) Thus, although the parties may have incorporated DRULPA with respect to the creation and formation of the partnership, the agreement itself and "all rights and liabilities of the parties" arising out of the agreement are governed by Delaware law generally. In any event, as explained in the text of this opinion, § 187 of the Restatement (Second) "is a rule providing for incorporation by reference and is not a rule of choice of law." 1 Restatement (Second), supra, § 187, comment (c), p. 563. Accordingly, even where the law of another state expressly has been incorporated into a contract by reference, the procedural law of the forum applies in the absence of an express statement to the contrary. See id., § 122 and comments (a) through (c), pp. 350–53.

1999 WL 301648, *2 (D. Del. April 15, 1999) (holding that choice of law provision, providing in relevant part that "[t]he agreement shall be interpreted according to the laws of the [c]ommonwealth of Virginia," did "not expressly provide for the laws of the [c]ommonwealth of Virginia to apply to the statute of limitations," and, therefore, "Virginia's five-year statute of limitations for contract cases [was] inapplicable").

Finally, the defendants contend that § 17-607 (c) of DRULPA must apply to the plaintiff's unjust enrichment claims pursuant to the Connecticut Uniform Limited Partnership Act (CULPA), General Statutes § 34-9 et seq., which provides in relevant part that "[s]ubject to the Constitution of this state . . . the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners . . . ." General Statutes § 34-38f (1). Again, we disagree. Consistent with CULPA and the choice of law provision in the limited partnership agreement, Delaware law governs the substantive liability of the defendants with respect to the plaintiff's unjust enrichment claims. As we have explained, however, the time in which to file a Delaware unjust enrichment action is a matter of judicial administration and procedure that is controlled by Connecticut law. Therefore, Connecticut law governs the timeliness of the plaintiff's claims.

III

Having concluded that Connecticut law governs the timeliness of the plaintiff's unjust enrichment claims, we next address the defendants' contention that the judgment of the trial court may be affirmed on the alternative ground[14] that the plaintiff's claims are barred

[14] We note that the defendants did not file a preliminary statement of the issues "present[ing] for review alternative grounds upon which the judgment may be affirmed," as required Practice Book § 63-4 (a) (1). Nonetheless, we may consider the defendants' alternative grounds for affirmance as properly raised if "neither party would be prejudiced by our doing so . . . ." (Internal

by the three-year statute of limitations in § 52-577 generally applicable to tort actions.[15] The plaintiff responds that § 52-577 is inapplicable to the present case because unjust enrichment is not a tort but an equitable claim for relief. The plaintiff contends that its unjust enrichment claims are not subject to any limitation period at all or, in the alternative, are subject to the six-year statute of limitations applicable to contract actions. See General Statutes § 52-576 (a).[16]

As a preliminary matter, we note that the trial court did not reach the issue of which statute of limitations, if any, governs the plaintiff's unjust enrichment claims under Connecticut law. When a trial court has not ruled on all of the grounds raised in a motion for summary judgment, we have the discretion either to "remand for further trial court proceedings" or "to consider whether, as a matter of law, the trial court's judgment can be sustained on . . . [alternative] grounds." *Skuzinski* v. *Bouchard Fuels, Inc.*, 240 Conn. 694, 703, 694 A.2d 788 (1997); see also *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 219, 928 A.2d 586 (2007) ("[a]lthough the trial court did not rule on those [alternative] grounds for summary judgment, it is within our discretion to do so on appeal"), aff'd, 289 Conn. 57, 956 A.2d 579 (2008). Because the issue presents a pure question of law[17] that

quotation marks omitted.) *Gerardi* v. *Bridgeport*, 294 Conn. 461, 466, 985 A.2d 328 (2010). Because the applicability of § 52-577 was discussed extensively in its principal appellate brief, we conclude that the plaintiff would not be prejudiced by our consideration of the defendants' alternative grounds for affirmance. See, e.g., *Connecticut Ins. Guaranty Assn.* v. *Fontaine*, 278 Conn. 779, 784 n.4, 900 A.2d 18 (2006).

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

[16] General Statutes § 52-576 (a) provides in relevant part that "[n]o action for an account, or on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

[17] See, e.g., *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 407–08, 957 A.2d 836 (2008) ("[t]he question of whether a party's claim is barred by the statute of limitations is a question of law, which this court reviews de novo" [internal quotation marks omitted]).

has been briefed extensively by the parties on appeal, the interest of judicial economy induces us to consider whether the plaintiff's unjust enrichment claims are barred by the three-year limitation period in § 52-577.

As explained in part II of this opinion, unjust enrichment is not a legal claim sounding in either tort or contract—it is an equitable claim for relief. As an equitable claim, its timeliness is not subject to a statute of limitations but, rather, to the equitable doctrine of laches. See *Dunham* v. *Dunham*, 204 Conn. 303, 326–27, 528 A.2d 1123 (1987) (holding that plaintiff's equitable claim for relief was not barred by three-year statute of limitations in § 52-577), overruled in part on other grounds by *Santopietro* v. *New Haven*, 239 Conn. 207, 213 n.8, 682 A.2d 106 (1996); see also *Government Employees Ins. Co.* v. *Barros*, 184 Conn. App. 395, 399, 401, 195 A.3d 431 (2018) (recognizing that "[s]tatutes of limitations do not apply in a strict fashion to causes of action arising in equity," and when "the plaintiff's claim sounds only in equity, not in law or in both law and equity . . . the plaintiff's claim is not subject to any statute of limitations, let alone the same statutes of limitations applicable to the underlying claims" [footnote omitted]). In an action for equitable relief, a court is not "bound to apply the statute of limitations that governs the underlying cause of action. In fact, in an equitable proceeding, a court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within the period of the statute." *Dunham* v. *Dunham*, supra, 326. "Although courts in equitable proceedings often look by analogy to the statute of limitations to determine whether, in the interests of justice, a particular action should be heard, they are by no means obliged to adhere to those time limitations." Id., 326–27; see *Certain Underwriters at Lloyd's, London* v. *Cooperman*, 289 Conn. 383, 411, 957 A.2d

836 (2008) (concluding that plaintiffs' equitable claims were time-barred because its legal claims were time-barred under statute of limitations). As equitable claims for relief, the plaintiff's unjust enrichment claims are not barred by the three-year limitation period in § 52-577.

The defendants contend[18] that, even under the doctrine of laches, the three-year limitation period in § 52-577 should apply to this action by analogy because the plaintiff "has no excuse whatsoever for waiting until 2013 to seek recovery of payments made in 2008," and the defendants have suffered prejudice as a consequence of the plaintiff's delay because "SV Fund recouped the alleged loss, SV Fund no longer exists, and all of the other partners have received their distributions." To prevail on the affirmative defense of laches, the defendants must establish, first, that there was an inexcusable delay and, second, that the delay "prejudiced the defendant[s]. . . . The mere lapse of time does not constitute laches . . . unless it results in prejudice to the defendant[s] . . . . A conclusion that a plaintiff has been guilty of laches is one of fact for the trier and not one that can be made by this court, unless the subordinate facts found make such a conclusion inevitable as a matter of law." (Citations omitted; internal quotation marks omitted.) *Papcun* v. *Papcun*, 181 Conn. 618, 620–21, 436 A.2d 282 (1980). The trial court made no factual findings regarding the defendants' special defense of laches, and, in the absence of subordinate facts, we decline to address the issue. We therefore remand this case to the trial court for consideration of the defendants' seventh special defense of laches, as

[18] The defendants also contend that the judgment of the trial court may be affirmed on the alternative ground that "[i]t is well settled in Connecticut that the equitable remedy of unjust enrichment is unavailable where there is a written contract between the parties on the subject." We decline to address the defendants' alternative ground for affirmance in light of our conclusion in part II of this opinion that Delaware law, rather than Connecticut law, governs the substance of the plaintiff's unjust enrichment claims.

well as the remaining grounds for summary judgment raised in the defendants' August 12, 2016 motion for summary judgment.

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

In this opinion the other justices concurred.

ANGEL MELETRICH *v.* COMMISSIONER OF CORRECTION (SC 20075)

McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

The petitioner, who had been convicted of certain crimes in connection with a robbery, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel had rendered ineffective assistance by failing to present alibi testimony from the petitioner's aunt, G. The robbery occurred at a restaurant located less than one mile from the petitioner's house. The petitioner's cousin, B, who worked at the restaurant, informed the police that, before she went to work one day, the petitioner and another cousin had told her to leave a side door unlocked after closing so that they could rob the restaurant. B complied, and the restaurant was later robbed by three men wearing sweatshirts and ski masks. During the petitioner's criminal trial, the state introduced evidence that the police had searched the petitioner's home and seized, inter alia, sweatshirts and ski masks that purportedly had been used during the robbery and cash register drawers from the restaurant. In order to establish an alibi, trial counsel presented testimony from the petitioner's girlfriend, D, indicating that the two had spent the entire day and night in question together at the petitioner's house. The jury ultimately returned a verdict finding the petitioner guilty of first degree robbery and larceny, as well as conspiracy to commit first degree robbery and larceny, and the trial court rendered judgment in accordance with the verdict. During the habeas trial, G testified that she lived in the same house as the petitioner and that she had seen him there periodically throughout the day in question. The petitioner's trial counsel testified during the habeas trial that he had interviewed a number of relatives, including G, in preparing an alibi defense and that, in his judgment, D was the strongest witness because she could testify that she and the petitioner were together in bed when the robbery occurred. The habeas court rendered judgment denying the habeas petition and thereafter denied the petitioner's petition for

certification to appeal. The petitioner then appealed to the Appellate Court, which dismissed the petitioner's appeal. On the granting of certification, the petitioner appealed to this court. *Held* that the Appellate Court correctly concluded that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal, this court having concluded that the petitioner's claim that trial counsel had rendered ineffective assistance by failing to call G as an alibi witness was not debatable among jurists of reason; trial counsel's strategic decision to present an alibi defense only through D's testimony, which was entitled to deference, did not constitute deficient performance because G would not have been able to account sufficiently for the petitioner's whereabouts for the entire day and evening in question, as G was able to provide only general testimony that the petitioner had been home at various points during the relevant time periods, and, given the close proximity of the restaurant, G may not have noticed the petitioner leaving the house to confront B about leaving a door unlocked or to participate in the robbery, whereas D's testimony, if credited, would have provided a complete alibi for the petitioner at the time of both of those events.

Argued February 20—officially released August 6, 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, *Fuger*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to the Appellate Court, *Lavine*, *Elgo* and *Beach*, *Js.*, which dismissed the appeal, and the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (petitioner).

Melissa Patterson, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, *Jo Anne Sulik*, supervisory assistant state's attorney, and *Lisa Maria Proscino*, former special deputy assistant state's attorney, for the appellee (respondent).

Opinion

MULLINS, J. The principal issue in this appeal is whether the petitioner, Angel Meletrich, has demonstrated that his criminal trial counsel rendered ineffective assistance by failing to present the testimony of a second alibi witness to support his defense. The petitioner appeals from the judgment of the Appellate Court dismissing his appeal from the judgment of the habeas court, which denied his amended petition for a writ of habeas corpus. The petitioner claims that the Appellate Court incorrectly concluded that the habeas court acted within its discretion in denying certification to appeal because he established that his counsel had performed deficiently by failing to call a second alibi witness and, further, that had that witness testified, there is a reasonable probability that the outcome of the petitioner's criminal trial would have been different. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The Appellate Court's decision in *Meletrich* v. *Commissioner of Correction*, 178 Conn. App. 266, 174 A.3d 824 (2017), sets forth the relevant facts and procedural history of the petitioner's underlying criminal case. "[T]he petitioner was charged with one count of robbery in the first degree in violation of General Statutes § 53a-134 (a) (4), one count of conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134, one count of larceny in the first degree in violation of [General Statutes (Rev. to 2007)] § 53a-122 (a) (2), and one count of conspiracy to commit larceny in the first degree in violation of . . . § 53a-48 and [General Statutes (Rev. to 2007) § 53a-122]. The petitioner, represented by Attorney Claud Chong, proceeded to a jury trial. The jury returned [a verdict] of guilty on all counts, finding the petitioner guilty [on the counts alleging robbery in the first degree

and larceny in the first degree under a] theory of vicarious liability." Id., 268.

"On Wednesday, November 21, 2007, the day before Thanksgiving, the McDonald's restaurant near the New Brite Plaza area of New Britain had been open for business. . . .

"Shortly before midnight, when both the inside of the restaurant and the drive-through window stopped transacting business, the employees then on site prepared to close the restaurant. Among those employees were Assistant Manager Angel Echevarria and Bethza Meletrich. Echevarria's responsibilities at closing included collecting the eight cash register drawers in a safe located in a small office in the back of the restaurant. . . . The cash proceeds from sales [were] then secured inside the back office safe.

"Although it was normally Echevarria's responsibility to lock the two outside doors, on the evening of November 21, 2007, he was training another manager to count the money in the registers and [Echevarria] asked Bethza Meletrich to lock the two outside doors. Although Bethza Meletrich initially locked both doors . . . she returned [and unlocked them]. One of the restaurant's surveillance cameras shows Bethza Meletrich on her cell phone as she walked past the registers to the side door. Shortly thereafter, Bethza Meletrich walked past the registers again, and then three men, later described by Echevarria as being light skinned and of normal height and average size, who were dressed in dark hooded sweatshirts with the hoods pulled over their heads, and whose faces were concealed by dark ski masks, entered the McDonald's restaurant through the side door and made their way to the back office.

"Two of the men brandished handguns, one chrome with a wooden handle and the other black. One of the men called Echevarria by his nickname, Sidio, a name

either uncommon or unique to Echevarria, but known to employees of the McDonald's, including Bethza Meletrich. After one of the men asked Echevarria where the money was located, he told them in the office safe. One of the robbers stacked either seven or eight of the register drawers and carried the stack . . . out of the restaurant. Echevarria called 911 after the three men exited the restaurant and then went to the side door and observed a car driving away. Three of the surveillance cameras in the restaurant captured footage of the robbery.

"The police responded to the restaurant and began their investigation, which included interviewing all employees. Although Bethza Meletrich initially denied any involvement, she later gave a statement to New Britain police officers admitting her involvement in the robbery. In her statement, dated November 26, 2007, Bethza Meletrich indicated that she met Adam [Marcano] and the petitioner,[1] whose nickname was Rome or Romeo, before she went to work.[2] They asked her to leave the door open at closing time so that they could rob the restaurant. According to Bethza Meletrich, she was first offered money for her cooperation, which she declined, and then her two cousins threatened her [and] her girlfriend. Bethza Meletrich informed the police that the petitioner was armed with a silver gun that had a brown handle, which he displayed to her while it was tucked into his waistband. The petitioner and Adam Marcano, accompanied by a third person unknown to Bethza Meletrich, entered the restaurant shortly before midnight through the side door she had left unlocked.

"Also on November 26, 2007, the police executed a search warrant for one of the apartments in, as well

[1] We note that Adam Marcano, Anthony Marcano, and Bethza Meletrich are the petitioner's cousins, and that each of them was named as a codefendant.

[2] At the petitioner's criminal trial, Bethza Meletrich testified that she left for work between 5 and 6 p.m. and that it took approximately ten minutes to walk to the McDonald's restaurant.

as the basement of, 20 Acorn Street, New Britain, a multifamily dwelling approximately six blocks, or less than one mile, from the [McDonald's] restaurant that was robbed. The petitioner was at the apartment when the police executed the search warrant. Although [Adam] Marcano [and his brother, Anthony Marcano] were not present at that time, the police found items belonging to both [of them] in the apartment. The police investigation determined that the petitioner and both Marcano brothers lived at 20 Acorn Street on the first floor.

"The police also found three black hooded sweatshirts in the apartment. After gaining access to the basement from the apartment, the police searched the basement and found two money deposit bags, one of which contained several rolls of coins and loose quarters; a plastic bag containing three black ski masks, one pair of black fleece gloves and one pair of brown knit gloves; and three cash register drawers, one of which contained a McDonald's coupon. Subsequently, in January, 2008, the police received a phone call from the landlord of 20 Acorn Street apprising the police that other items had been found concealed under a subfloor of the basement. The police returned to 20 Acorn Street and seized five additional cash register drawers, one of which had a McDonald's sticker on it, that had been concealed under the subfloor.

"Forensic evidence recovered included [fingerprints] and palm prints from the plastic bag that contained the masks and gloves, as well as DNA from two of the ski masks. Three of the fingerprints—the right index, the right thumb, and the left thumb—were identified as belonging to Anthony [Marcano]. A DNA sample obtained from the petitioner allowed a comparison to [be] made with DNA from two of the masks. One mask interior had DNA from at least three individuals; the petitioner was determined to be a contributor to that

DNA profile. . . . A DNA sample from another mask's exterior had DNA from at least four individuals; the petitioner was determined to be a contributor to that DNA profile. . . .

"The state contended that the petitioner was guilty of the robbery and larceny in the first degree charges either as a principal offender or as an accessory to another participant in the crime. Additionally, the court instructed the jury on the robbery and larceny in the first degree charges as to the theory of vicarious liability. Thus, if the jury found beyond a reasonable doubt that the state had proven all elements of the conspiracy to commit robbery and larceny in the first degree charges, but that the state had not proven that the petitioner was a principal or accessory as [to] the robbery and larceny charges in counts one and three, then the jury could consider whether the petitioner was criminally liable for the criminal acts of the other [coconspirators] under vicarious liability. The jury was charged accordingly.

"The jury returned [a] guilty [verdict] on all counts. Specifically, the jury found the petitioner guilty of both the robbery and larceny in the first degree charges as a [coconspirator] under the theory of vicarious liability." (Footnotes added; internal quotation marks omitted.) Id., 268–72. The trial court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of twenty-three years of incarceration, followed by five years of special parole. As a self-represented party, the petitioner appealed from the judgment of the trial court to the Appellate Court, but subsequently withdrew that appeal following the appointment and advice of appellate counsel.

Thereafter, the petitioner, as a self-represented party, filed a six count petition for a writ of habeas corpus. After being assigned counsel, the petitioner filed an

amended seven count petition for a writ of habeas corpus claiming, inter alia, that his trial counsel had rendered ineffective assistance by failing to present the testimony of a second alibi witness, his aunt, Guillermina Meletrich.[3] Following a three day trial, the habeas court denied his petition for a writ of habeas corpus. Thereafter, the habeas court denied the petitioner's request for certification to appeal. The petitioner then appealed from the habeas court's judgment to the Appellate Court.

In that appeal, the petitioner claimed that the habeas court had abused its discretion in denying his petition and improperly had concluded that Chong did not render ineffective assistance by failing to call Guillermina Meletrich as a second alibi witness. Id., 268. The Appellate Court dismissed the petitioner's appeal, concluding that the petitioner had not established that Chong's decision not to call a second alibi witness amounted to deficient performance or that it prejudiced the petitioner. Id., 287. The petitioner appealed to this court, and we granted his petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that (a) trial counsel's failure to call the petitioner's aunt as an alibi witness was reasonable trial strategy and therefore not ineffective assistance of counsel, and (b) such failure did not prejudice the petitioner?" *Meletrich* v. *Commissioner of Correction*, 328 Conn. 908, 178 A.3d 1041 (2018).

On appeal, the petitioner claims that the Appellate Court incorrectly determined that the habeas court acted within its discretion in denying the petitioner certification to appeal because it is debatable among jurists of reason whether Chong rendered ineffective assistance by failing to present the testimony of Guiller-

[3] This is the only claim of ineffective assistance advanced by the petitioner in the present appeal.

mina Meletrich. The respondent counters that the Appellate Court properly dismissed the petitioner's appeal because Chong's decision not to call a second alibi witness was reasonable trial strategy.[4]

The following additional facts and procedural history are relevant to our resolution of this claim. At the petitioner's criminal trial, Chong pursued an alibi defense. In support of that defense, he presented the testimony of Christina Diaz, a woman with whom the petitioner had a romantic relationship and shared children.[5] Diaz testified as follows.

On the day of the robbery, Diaz travelled from New York, where she was living, in order to spend Thanksgiving with the petitioner. She arrived at the petitioner's residence, 20 Acorn Street, when "[i]t was still daylight outside" and proceeded to spend "the entire day and night at [his] house." She testified that neither she nor the petitioner left the house at any time that evening and that they spent the entire evening together. Her testimony was that they were together "100 percent of the time."

At the petitioner's habeas trial, several witnesses, including the petitioner, testified with regard to the petitioner's claim of ineffective assistance of counsel for failure to present a second alibi witness. First, the petitioner testified that he discussed his alibi with Chong. He stated that he told Chong that he had several alibi witnesses, including Guillermina Meletrich, Diaz, and "Tasha."

Additionally, Guillermina Meletrich testified at the habeas trial about the petitioner's whereabouts on the

[4] We note that the parties agree that this is not a claim of ineffectiveness of counsel for failure to investigate an alibi witness. Rather, the petitioner claims that Chong was ineffective for failing to present the testimony of a known second alibi witness.

[5] At trial, Diaz stated that the petitioner was her "ex-husband." In his brief, the petitioner refers to Diaz as his "girlfriend."

night of the robbery as follows. At the time of the robbery, she was living at the same house as the petitioner with her sister, nieces, and nephews. On the night of the robbery, she arrived home from work around 4:30 p.m. and stayed there the rest of the night. She testified that the petitioner and Diaz were also there and that the petitioner did not leave the house that day. She stated that she knew that he didn't leave "[b]ecause every time [she] came in he was there and [they] were kidding around." When asked if she would have been willing and available to testify at the petitioner's criminal trial, she responded that "[t]hey had asked [her] once to testify if he was at my house that day . . . and [she] said he was, but they never called [her]." She further testified that she would have provided the same testimony at the criminal trial that she provided at the habeas trial "because it's the truth."

Chong also testified at the habeas trial about his decision to present only Diaz as an alibi witness. He testified that the theory of defense was that the petitioner did not take part in the robbery. In particular, it was their position that the petitioner was at home at the time of the robbery. He testified that, in preparation of the alibi defense, he had spoken with "a number of relatives." Among those he spoke with was an aunt who lived at the residence, but he could not recall specific names of individuals or the substance of specific conversations. He did recall, however, "that a girlfriend claimed that she was in bed with [the petitioner] at the time of the . . . robbery" and that "it was [his] judgment at the time that she would provide the best testimony with respect to his whereabouts at the time of the robbery." Chong acknowledged that Bethza Meletrich's testimony was a major piece of evidence for the state at the criminal trial and that impeaching her would have been helpful to the petitioner's defense.

With regard to Guillermina Meletrich, Chong testified at the habeas trial that he recalled speaking with an aunt who remembered being with the petitioner on the day of the robbery, but she couldn't "account for his whereabouts within the specific timeframe of the actual commission of the robbery."[6] He explained that an important consideration was the close proximity of the petitioner's residence to the robbery because the two locations were within a five minute drive from each other. Ultimately, he testified that, "after interviewing a number of family members and friends who were at the residence, people were coming and going and family . . . members could not account for his presence every hour, every minute of the day and night. The only person who could testify in [his] judgment and provide the strongest testimony was the girlfriend who said . . . that she was in bed with him at the . . . specific time that the robbery occurred . . . ." When asked if calling an additional alibi witness would have been helpful, Chong testified that "you're assuming that other alibi witnesses were available, credible alibi witnesses," but declined to speculate any further.

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

[6] Although the record reveals that there were two aunts living at the petitioner's residence, the parties do not dispute, and there is support in the record, that Guillermina Meletrich is the aunt who spoke with Chong during his investigation of potential alibi witnesses and whose testimony is at issue in this appeal.

"Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and the applicable legal principles. . . . If the petitioner succeeds in surmounting that hurdle, the petitioner must then demonstrate that the judgment of the habeas court should be reversed on its merits." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *Crawford* v. *Commissioner of Correction*, 285 Conn. 585, 592, 940 A.2d 789 (2008). "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." (Internal quotation marks omitted.) *Castonguay* v. *Commissioner of Correction*, 300 Conn. 649, 658, 16 A.3d 676 (2011).

The following principles guide our review of the petitioner's claim of ineffective assistance of counsel. "To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant

must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Although a petitioner can succeed only if he satisfies both prongs, a reviewing court can find against a petitioner on either ground." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 537–38, 198 A.3d 52 (2019).

We first address the performance prong of *Strickland*. In order for a petitioner to prevail on an claim of ineffective assistance on the basis of deficient attorney performance, "a defendant must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms." *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 31, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019); see also *Strickland* v. *Washington*, supra, 466 U.S. 687–88.

"It is axiomatic that decisions of trial strategy and tactics rest with the attorney." *Crespo* v. *Commissioner of Correction*, 292 Conn. 804, 815 n.7, 975 A.2d 42 (2009). Furthermore, our review of counsel's performance is highly deferential. *Strickland* v. *Washington*, supra, 466 U.S. 689. Indeed, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*,

supra, 330 Conn. 538–39. Our cases instruct that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 319 Conn. 623, 632–33, 126 A.3d 558 (2015).

"[T]he decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel . . . ." (Citation omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 521, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009). "[O]ur habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, [including] . . . when . . . counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case . . . ." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 548.

In the present case, Chong testified that the theory of the case pursued by the defense at the petitioner's criminal trial was that the petitioner did not participate in the robbery and, instead, that he was at home the entire evening. In light of this theory, Chong pursued an alibi defense by presenting the testimony of Diaz, a witness who could account for his whereabouts at every minute on the night of the robbery. Diaz testified that the petitioner never left the house on the evening of the robbery. She further testified that she knew this because she was with the petitioner "100 percent of the time." Thus, Diaz' testimony, if believed, offered an airtight alibi for the petitioner. Her testimony could establish that he neither was at McDonald's during the robbery nor confronted Bethza Meletrich on her way to work.

The petitioner asserts, however, that Chong's decision was not reasonable trial strategy because Guillermina Meletrich also could have provided a complete alibi for all of the offenses charged, and, thus, her testimony would have corroborated and bolstered that of Diaz. We disagree.

At the habeas trial, Guillermina Meletrich testified that she came home from work around 4:30 p.m. and remained at home the rest of the night. Regarding her specific knowledge of the petitioner's whereabouts, she testified that she knew the petitioner never left the house because "every time [she] came in he was there . . . ." As the Appellate Court aptly pointed out, Guillermina Meletrich's testimony implies that there were times when she was not with the petitioner. *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn. App. 283. We agree with the Appellate Court that her testimony reveals that the petitioner was not always in her presence and that, therefore, she could not account for his whereabouts at every moment. This court has held that "[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. . . . When the failure to call a witness implicates an alibi defense, an alibi witness' testimony has been found unhelpful and defense counsel's actions have been found reasonable when the proffered witnesses would fail to account sufficiently for a defendant's location during the time or period in question . . . ." (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 548–49. In the present case, Guillermina Meletrich's testimony would not have been able to account sufficiently for the petitioner's whereabouts for the entire evening in question.

We find *Jackson* v. *Commissioner of Correction*, 149 Conn. App. 681, 697, 89 A.3d 426 (2014), appeal dismissed, 321 Conn. 765, 138 A.3d 278, cert. denied sub nom. *Jackson* v. *Semple*, U.S. , 137 S. Ct. 602, 196 L. Ed. 2d 482 (2016), instructive. In *Jackson*, the petitioner claimed that his trial counsel performed deficiently when he failed to call additional alibi witnesses at the petitioner's criminal trial. Id., 697. The petitioner in that case had been convicted on various charges related to the late night robbery of a deli. Id., 683–85 and n.2. At the petitioner's criminal trial, defense counsel presented the testimony of two alibi witnesses, one of whom testified that she was with the petitioner at her house at the time that the robbery occurred. Id., 698–99. The other testified that she saw the petitioner at least an hour prior to the robbery. Id., 699. The petitioner claimed, however, that his counsel performed deficiently by failing to call five additional alibi witnesses because the alibi witnesses that did testify were not credible and could not support a complete alibi defense, whereas the additional alibi witnesses could establish an uninterrupted timeline that accounted for his whereabouts during the time of the robbery. Id., 697.

At the petitioner's habeas trial in *Jackson*, each of the five alibi witnesses testified that they saw the petitioner at various times during the night of the robbery. Id., 699–701. None of them, however, could testify that they were with the petitioner during the exact time the crime occurred. Id., 701. Both the habeas court and the Appellate Court in *Jackson* concluded that defense counsel's decision not to call the additional alibi witnesses did not constitute deficient performance because none of the witnesses could account for the petitioner's whereabouts "immediately before, during, and after the robbery." Id.

Similarly, in the present case, Guillermina Meletrich could not account for the petitioner's whereabouts dur-

ing the relevant time periods, namely, when the petitioner confronted Bethza Meletrich on her way to work and at the time of the actual robbery. Guillermina Meletrich would merely have provided general testimony that the petitioner was at her home at the times that she happened to look for him during the course of the evening.

Moreover, there was evidence in the record that the McDonald's restaurant was a close distance from the petitioner's house. Thus, we agree with the Appellate Court's reasoning that, even if the jury were to believe Guillermina Meletrich's testimony, it was possible for the petitioner to leave the house to confront Bethza Meletrich on her way to work and to participate in the robbery without Guillermina Meletrich noticing. See *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn. App. 283. Therefore, under the circumstances, Guillermina Meletrich's testimony would not have been helpful because she could not sufficiently account for the petitioner specifically during the relevant time periods, which was critical considering the close proximity of the location of the robbery.

Conversely, Diaz, who testified that she was with the petitioner the entire night and that he never left the house, was able to account for the petitioner's whereabouts during both the robbery and the time that Bethza Meletrich claimed to have been confronted by the petitioner. On that basis, Chong made the strategic decision, to which we accord strong deference, to present the testimony of Diaz only.

Chong's decision finds support in our case law. Indeed, in *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 520, this court considered a similar set of facts. In that case, the petitioner claimed that his trial counsel performed deficiently by failing to present the testimony of two alibi witnesses at his criminal trial

for murder. Id., 528. At the habeas trial, one of the witnesses testified that the petitioner was at home with her on the night of the murder but conceded that he was not always within her line of sight while she was watching television and tending to her child. Id., 530. Evidence presented at the petitioner's criminal trial showed that the home was in close proximity to the crime scene. Id., 552–53.

In explaining his decision not to call that witness, defense counsel testified that the witness' testimony would open for the jury the possibility that the petitioner could have left the house, committed the murder, and returned without the alibi witnesses noticing. Id., 551. Instead, counsel relied on the weakness of the state's case. Id. Indulging the strong presumption that counsel's strategic decisions were reasonable, this court concluded that counsel's decision not to call the alibi witness was a reasonable strategic decision because that witness would have failed to account sufficiently for the petitioner's whereabouts at the time the crime occurred and would have placed the defendant in close proximity to the crime scene. Id., 554.

Similarly, in *Spearman* v. *Commissioner of Correction*, 164 Conn. App. 530, 537, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016), the petitioner claimed that his trial counsel performed deficiently when he failed to call several alibi witnesses, all family members of the petitioner, at the petitioner's criminal trial for arson. He contended that testimony from the alibi witnesses would have contradicted testimony from the state's two primary witnesses, who testified that they saw him near the location of the fire at the time it started. Id., 552–53. At the habeas trial, the alibi witnesses testified that they were at home with the petitioner, who lived across the street from the location of the fire, at the time the fire started. Id., 548–51. Each of the witnesses testified that the petitioner had been

asleep in his room but that, upon awaking at the sound of the explosion, they saw the petitioner run outside to move his car. Id.

In *Spearman*, defense counsel testified that he chose not to call the alibi witnesses at trial because their testimony would place the petitioner in close proximity to the crime scene at the time of the fire, allowing for the possibility that the jury could determine that he left his house, started the fire, and returned before the alibi witnesses saw him. Id., 562. On that basis, counsel decided instead to rely on the weakness of the state's case. Id., 551. The Appellate Court concluded that counsel's decision not to call the witnesses did not amount to deficient performance given that none of the alibi witnesses was able to sufficiently establish the petitioner's whereabouts before the fire, the crime scene was in close proximity to the petitioner's house, and the alibi witnesses were all relatives of the petitioner. Id., 562–63.

Like the alibi witnesses in *Johnson* and *Spearman*, Guillermina Meletrich was not able to account for the petitioner's whereabouts at the relevant times. She was able to provide only general testimony that the petitioner was at home whenever she saw him. That house was in close proximity to both the crime scene and the location where Bethza Meletrich testified that she was approached by the petitioner. Indulging a strong presumption, as we are required to do, that Chong's strategic decision not to call Guillermina Meletrich to testify was sound trial strategy, and in light of the substance of her testimony and the close proximity of the relevant locations, we conclude that Chong's conduct did not constitute deficient performance. Rather, Chong made a reasonable strategic decision to call only the witness who could testify to the petitioner's whereabouts at all of the relevant times.

The petitioner claims, however, that the testimony of Guillermina Meletrich was necessary to his defense

against the conspiracy charges, and, thus, Chong's decision not to call Guillermina Meletrich was not reasonable trial strategy. In support of his claim, he asserts that the state's witness, Bethza Meletrich, provided the only evidence of conspiracy when she testified that the petitioner approached her on her way to work and coerced her into participating in the robbery. In light of this, he argues that Diaz' contrary testimony that the petitioner was at home during that time was critical to his defense. He claims that the jury would have been more likely to accept Diaz' testimony if Guillermina Meletrich's testimony that he was at home also had been presented.[7] For the same reasons discussed previously, we disagree that Guillermina Meletrich's testimony would have been helpful to the petitioner's defense against the conspiracy charges.

As stated previously, Guillermina Meletrich could testify only in general terms that the petitioner was home whenever she saw him. She could not, however, provide specific times during the afternoon and evening that could be used to support the assertion that he was home the entire time between 5 and 6 p.m. when Bethza Meletrich was approached on her way to work. Bethza Meletrich testified that the McDonald's restaurant was only a ten minute walk from the petitioner's home. Therefore, it would have been possible for the jury to conclude that the petitioner slipped out of his house, confronted Bethza Meletrich on her way to work, and returned home unnoticed by Guillermina Meletrich. Thus, contrary to the petitioner's claims, Guillermina Meletrich was not able to account for his whereabouts specifically during the time that Bethza Meletrich was approached on her way to work. We conclude that, with regard to being able to provide a complete alibi for all of the charges, the testimony of Guillermina

[7] The petitioner does not claim on appeal that the evidence was insufficient to support his conviction on the conspiracy charges.

Meletrich was not necessary or helpful to the petitioner's defense.

The petitioner asserts, however, that the present situation is similar to the one in *Skakel*, in which we concluded that defense counsel was ineffective for failing to call an additional alibi witness when all of the other alibi witnesses were potentially biased as a result of being related to the defendant. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 54. Specifically, the petitioner asserts that, because Diaz was the petitioner's girlfriend, she was biased, and Guillermina Meletrich's testimony regarding the petitioner's alibi was therefore necessary to bolster Diaz. We disagree and conclude that *Skakel* is distinguishable from the present case.

In *Skakel*, we determined that the alibi witness that was not called to testify was completely neutral and disinterested by virtue of the fact that he was not related to the defendant and that he had not maintained contact with his only tie to the defendant's family in almost thirty years. Id., 51. On that basis, we concluded that the witness "would have been an independent and unbiased witness with no motive to lie" and whose testimony could have established "the credibility of the alibi generally" and "the credibility of the petitioner's witnesses more specifically." Id. Accordingly, this court concluded that the testimony of the alibi witness who was not called to testify at trial was not cumulative but would have been corroborative of the other alibi witnesses. See id. ("[alibi witnesses'] testimony, while corroborative, certainly was not cumulative, because the petitioner's other alibi witnesses were either siblings or cousins of the petitioner").

The present case is unlike *Skakel* because Guillermina Meletrich was not a neutral witness. In fact, she was related to almost everyone involved in the crime. Not only was she the aunt of the petitioner, but she

also was the aunt of every one of the codefendants, including Bethza Meletrich.

We also will not assume, as the petitioner invites us to do, that her personal relationships with Bethza Meletrich and the petitioner cancel each other out and render her a neutral witness because it would require us to speculate as to the details of the nature of her relationship with each person. From the limited information before us, we cannot draw the same conclusion that we did in *Skakel* that Guillermina Meletrich had no biases or motives for testifying falsely. Therefore, we agree with the Appellate Court that "neither [Diaz nor Guillermina Meletrich] was entirely neutral and disinterested." *Meletrich* v. *Commissioner of Correction*, supra, 178 Conn. App. 286. Thus, unlike the alibi witness in *Skakel*, Guillermina Meletrich was not a neutral witness, and, thus, we cannot conclude that her testimony would have been corroborative and not cumulative. See *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 550–52 (considering in analysis fact that potential alibi witness was family and, therefore, that counsel made reasonable strategic decision not to call witness).

Finally, the petitioner contends that Chong's decision to call only Diaz as an alibi witness cannot be considered reasonable trial strategy because Chong could not articulate a reason for not presenting the testimony of Guillermina Meletrich. We disagree.

At the habeas trial, Chong testified that he didn't "recall every detail of the trial or the investigation, but what [he did] recall [was] that, after interviewing a number of family members and friends who were at the residence, people were coming and going and family . . . members could not account for his presence every hour, every minute of the day and night. The only person who could testify in [his] judgment and provide the strongest testimony was the girlfriend who said . . . that she was in bed with him at the . . . specific time

that the robbery occurred . . . .'' He testified that ''it was [his] judgment at the time that she would provide the best testimony with respect to his whereabouts at the time of the robbery.'' Thus, Chong did articulate a reason for presenting only Diaz' testimony. See, e.g., *Morant* v. *Commissioner of Correction*, 117 Conn. App. 279, 303–304, 979 A.2d 507 (holding that defense counsel's decision not to call alibi witness was reasonable trial strategy despite counsel's inability to recall details of investigation of witness' testimony because witness was not strong and other alibi witnesses were available), cert. denied, 294 Conn. 906, 982 A.2d 1080 (2009); cf. *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 683, 51 A.3d 948 (2012) (considering in its analysis defense counsel's complete inability to explain reason for not investigating potential alibi witness).

After investigating multiple alibi witnesses, which included Guillermina Meletrich, Chong, in his professional judgment, determined that Diaz was the strongest alibi witness because she could account for the petitioner's whereabouts throughout the entire evening, including the relevant time periods, whereas Guillermina Meletrich could not. Indeed, we recognize that ''[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. . . . [A] reviewing court is required not simply to give [the trial attorney] the benefit of the doubt . . . but to affirmatively entertain the range of possible reasons . . . counsel may have had for proceeding as [he] did . . . .'' (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 330 Conn. 539.

On the basis of the foregoing, we conclude that the petitioner has not met his burden of overcoming the strong presumption that Chong's decision to present only the testimony of Diaz as an alibi witness was reasonable trial strategy. Thus, we further conclude that Chong's decision was not deficient performance. In

light of our conclusion, we need not address the second prong of the *Strickland* test, namely, whether the petitioner was prejudiced by Chong's decision. See, e.g., *Michael T.* v. *Commissioner of Correction*, supra, 319 Conn. 639 (declining to consider prejudice prong of *Strickland* test after concluding that defense counsel did not perform deficiently). Because the petitioner has not met his burden of showing that Chong performed deficiently, he cannot succeed on his claim of ineffective assistance of trial counsel. Therefore, we further conclude that it is not debatable among jurists of reason that Chong rendered ineffective assistance,[8] and that, thus, the Appellate Court correctly concluded that the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[8] The petitioner cites *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 664, and *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 502, as support for the contention that it is debatable among jurists of reason as to whether trial counsel's failure to investigate and present the testimony of an alibi witness is deficient performance. Those cases, however, are factually distinguishable from the present case. In *Gaines*, the petitioner's trial counsel failed to investigate potential alibi witnesses entirely and failed to present any alibi defense despite there having been witnesses who could testify to being with the defendant on the night of the murders. *Gaines* v. *Commissioner of Correction*, supra, 683–84. This court concluded that, because counsel failed to contact the potential alibi witnesses, he could not know the substance of their testimony, and, thus, his failure to investigate was not based on reasonable professional judgment. Id. In the present case, Chong investigated an alibi defense by speaking with several alibi witnesses, and, on the basis of information gained during his investigation, he determined that Diaz would provide the strongest testimony at trial.

In *Bryant*, the petitioner's trial counsel failed to present four witnesses whose testimony would have supported a third-party culpability defense despite being aware of the witnesses and knowing of their potential testimony. *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 519–20 and n.12. This court concluded that counsel's decision amounted to deficient performance that was prejudicial to the petitioner because the four witnesses were independent and credible, and their statements were made contemporaneously to the events in question. Id., 521. As such, a reasonable doubt could have been raised in the minds of the jurors as to the petitioner's guilt. Id., 520. In the present case, Chong presented an alibi defense with the witness that he believed to be the strongest. Moreover, as previously discussed, Guillermina Meletrich was not a neutral witness.

STATE OF CONNECTICUT *v.* LIONEL G. DUDLEY (SC 20177)

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

Syllabus

Pursuant to statute (§ 54-142d), whenever a person has been convicted of an offense in this state and such offense has been decriminalized subsequent to the date of conviction, such person may file a petition with the Superior Court for an order of erasure, "and the Superior Court or records center of the Judicial Department shall direct all police and court records and records of the state's or prosecuting attorney pertaining to such case to be physically destroyed."

The defendant appealed from the trial court's denial of his petition, filed pursuant to § 54-142d, to erase the records related to its finding that he had violated his probation. The defendant had been charged in 2010 with the possession and sale of a controlled substance and, in 2012, was convicted on a plea of guilty to possession of less than one-half ounce of marijuana. At the time of the defendant's conduct that led to his 2012 conviction, the defendant was on probation as a result of a prior narcotics conviction, the terms of which required that the defendant not violate any federal or state criminal law. During the 2012 plea proceedings, the defendant admitted that he had violated his probation. Subsequently, the trial court granted the defendant's petition to erase the records related to the 2012 conviction in light of the legislature's enactment of a statute (§ 21a-279a) in 2011 that decriminalized the possession of less than one-half ounce of marijuana. The trial court concluded, with respect to the defendant's separate petition to erase the records pertaining to his probation violation, that the defendant was not entitled to erasure of those records because a conviction was not necessary in order to find that he had violated his probation. On appeal from the trial court's denial of that petition, the defendant claimed that he was entitled to erasure because, among other reasons, the probation violation was premised on his 2012 conviction for conduct that has since been decriminalized, and, therefore, it could no longer serve as a basis for the violation of probation finding. *Held* that the trial court correctly determined that the defendant was not entitled to erasure of the records pertaining to the violation of probation finding: § 54-142d applies only to records pertaining to a criminal case in which a defendant has been convicted of an offense that subsequently was decriminalized, and, because the defendant's probation violation proceeding was not a criminal proceeding but constituted a separate civil proceeding, and thus a violation of probation cannot be "decriminalized," as that term is used in § 54-142d, that statute did not apply to the records pertaining to the

defendant's probation violation proceeding; moreover, the legislative history of the marijuana decriminalization statute, § 21a-279a, made clear that, although possession of a small amount of marijuana would be decriminalized, it would still remain illegal, and indicated that the legislature recognized that the state may retain public records of illegal conduct, even if there was no criminal record of such conduct; furthermore, the defendant could not prevail on his claim that § 54-142d clearly requires the erasure of any record containing a reference to his conviction for an offense that subsequently was decriminalized because, in the absence of such conviction, nothing in the record could support the probation violation finding, as the defendant's conduct of possessing marijuana, rather than his conviction based on that conduct, supported the probation violation finding, and, even without evidence of the defendant's conviction, his general admission during the plea proceedings that he had violated the terms of his probation was sufficient to support that finding.

Argued January 24—officially released August 6, 2019

Procedural History

Substitute information charging the defendant with the crime of possession of narcotics and with two counts of violation of probation, brought to the Superior Court in the judicial district of New London, geographical area number twenty-one, where the defendant was presented to the court, *Clifford, J.*, on a plea of guilty to the charge of possession of narcotics and on an admission of violation of probation; judgment of guilty in accordance with the plea and finding the defendant in violation of probation; thereafter, the court, *Newson, J.*, granted the defendant's petition for the destruction of certain records relating to the conviction of possession of narcotics and denied the defendant's petition for the destruction of certain records relating to the finding of violation of probation, and the defendant appealed. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *Stacey M. Miranda*, senior assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. In 2011, our General Assembly changed the penalty for possessing less than one-half ounce of marijuana from a potential term of imprisonment and/or a large fine to merely a fine. See Public Acts 2011, No. 11-71 (P.A. 11-71), codified at General Statutes § 21a-279a.[1] Subsequently, in *State* v. *Menditto*, 315 Conn. 861, 863, 110 A.3d 410 (2015), this court held that P.A. 11-71 "decriminalized" the possession of less than one-half ounce of marijuana for purposes of this state's erasure statute, General Statutes § 54-142d.[2] In the present case, the defendant asks us to hold that § 54-142d also compels the erasure of a finding of a violation of probation that he claims was premised on the now decriminalized offense of possession of less than one-

[1] General Statutes § 21a-279a (a) provides in relevant part: "Any person who possesses or has under his control less than one-half ounce of a cannabis-type substance . . . shall (1) for a first offense, be fined one hundred fifty dollars, and (2) for a subsequent offense, be fined not less than two hundred dollars or more than five hundred dollars."

As we recognized in *State* v. *Menditto*, 315 Conn. 861, 872–73, 110 A.3d 410 (2015), "[w]hen the legislature enacted P.A. 11-71 in 2011, it reduced the maximum penalty for a first offense of possession of less than one-half ounce of marijuana from a fine of up to $1000 and/or imprisonment of up to one year to a fine of $150, and reduced the penalty for subsequent offenses from a fine of up to $3000 and/or imprisonment of up to five years to a fine of between $200 and $500. P.A. 11-71, § 1. It did so by limiting the scope of conduct that constituted criminal possession of marijuana under [General Statutes] § 21a-279 and enacting a new statute imposing fines for the conduct excluded from the scope of § 21a-279. See General Statutes § 21a-279a. The legislature then added that new statutory provision proscribing possession of less than one-half ounce of marijuana to the list of minor civil violations in [General Statutes] § 51-164n (b); P.A. 11-71, § 6; which are deemed not to be offenses pursuant to § 51-164n (e)."

[2] General Statutes § 54-142d provides in relevant part: "Whenever any person has been convicted of an offense in any court in this state and such offense has been decriminalized subsequent to the date of such conviction, such person may file a petition with the superior court at the location in which such conviction was effected, or with the superior court at the location having custody of the records of such conviction . . . for an order of erasure, and the Superior Court or records center of the Judicial Department shall direct all police and court records and records of the state's or prosecuting attorney pertaining to such case to be physically destroyed."

half ounce of marijuana. The trial court rejected the defendant's argument, and we affirm the trial court's decision.

The record reveals the following undisputed facts and procedural history, which are relevant to the resolution of this appeal. In 2007, the defendant pleaded guilty under the *Alford* doctrine[3] to possession of narcotics in violation of General Statutes (Rev. to 2005) § 21a-279 (a). The trial court sentenced him to thirty months of imprisonment, execution suspended, and two years of probation. The terms of probation included that the defendant "not violate any criminal law of the United States, this state or any other state or territory." The court also ordered special conditions of probation, including substance abuse evaluation and twenty hours of community service.

In July, 2008, the defendant was arrested again, this time on a charge of selling narcotics. Pursuant to a September, 2009 plea agreement, he admitted to violating his probation, and the court extended his probation for another year. The court accepted a nolle prosequi from the state on the underlying narcotics charge.

With approximately eight days remaining on the defendant's extended probation, in July, 2010, the police found him in possession of less than one-half ounce of marijuana. Subsequently, an arrest warrant issued for the defendant, alleging that he had engaged in the sale of a controlled substance in violation of the conditions of his probation prohibiting the violation of any criminal law of the United States, this state or any other state. The arrest warrant also alleged that the defendant failed to provide verification that he had completed the twenty

[3] Pursuant to *North Carolina* v. *Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 1625 (1970), a defendant does not admit guilt but, rather, acknowledges that the state's case is so strong that he is willing to enter a plea of guilty.

hours of community service. He was arrested and charged with possession and sale of a controlled substance, and with violating his probation. In July, 2012, he pleaded guilty under the *Alford* doctrine to the misdemeanor charge of possession of less than four ounces of marijuana in violation of General Statutes (Rev. to 2009) § 21a-279 (c).[4] Also during the plea proceedings, the defendant admitted to the probation violation. The prosecutor stated on the record that the violation of probation charge was premised on both the defendant's arrest on the charge of sale of a controlled substance, as well as on the charge of possession of marijuana.[5] The defendant was sentenced to one year of incarceration, execution suspended, and one year of probation, and was required to make a charitable contribution of $250.[6]

In 2011, the legislature enacted P.A. 11-71, which changed the penalty for possessing less than one-half of an ounce of marijuana from a potential term of imprisonment and/or a fine to merely a fine of $150 for a first offense and a fine of between $200 and $500 for subsequent offenses. See General Statutes § 21a-279a (a).[7] In a decision officially released on March 24, 2015, this court held in *State* v. *Menditto*, supra, 315 Conn.

[4] General Statutes (Rev. to 2009) § 21a-279 (c) provides: "Any person who possesses or has under his control any quantity of any controlled substance other than a narcotic substance, or a hallucinogenic substance other than marijuana or who possesses or has under his control less than four ounces of a cannabis-type substance, except as authorized in this chapter, for a first offense, may be fined not more than one thousand dollars or be imprisoned not more than one year, or be both fined and imprisoned; and for a subsequent offense, may be fined not more than three thousand dollars or be imprisoned not more than five years, or be both fined and imprisoned."

[5] The state never argued that the violation of probation was premised on the defendant's conviction of possession of marijuana in violation of General Statutes (Rev. to 2009) § 21a-279 (c). Rather, the state relied more broadly on the fact that the defendant was found in possession of marijuana.

[6] The trial court noted during the defendant's plea that the plea agreement was the result of some weaknesses in the state's case regarding the count for sale of a controlled substance.

[7] See footnote 1 of this opinion.

871, that P.A. 11-71 had the effect of "decriminalizing" the possession of less than one-half of an ounce of marijuana, thus permitting a defendant to take advantage of the state's erasure statute, § 54-142d. As a result, an individual convicted of possessing less than one-half of an ounce of marijuana may petition the court to have the records "pertaining to such case" erased under § 54-142d. See *State* v. *Menditto*, supra, 876.

In September, 2015, in response both to the enactment of P.A. 11-71 and this court's 2015 decision in *Menditto*, the defendant in the present case filed a petition seeking erasure of the records related to his 2012 marijuana conviction. Because the defendant's July, 2012 conviction, which was based on his July, 2010 arrest, was for less than one-half of an ounce of marijuana, the trial court granted the defendant's motion.

In April, 2016, the defendant filed another petition, this time seeking erasure of the 2012 finding that he had violated his probation. The defendant argued that, because his 2012 marijuana conviction had been erased from his record, no conviction any longer supported the violation of probation finding. The trial court denied the defendant's motion, reasoning that "you don't need any conviction to violate your probation. . . . [It] is a standard condition of probation that you not violate any laws of the United States or any other state, so the conviction, whether there is in fact a conviction or not, isn't necessary."

The defendant appealed from the trial court's decision to the Appellate Court, and the appeal was transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

In addressing the defendant's sole claim on appeal, we begin with our well established standard of review and governing legal principles. The trial court's ruling that § 54-142d does not apply to a violation of probation

premised on subsequently decriminalized conduct is a question of law that we review de novo. See, e.g., *State* v. *Menditto*, supra, 315 Conn. 865. Because the issue "presents a question of statutory interpretation, our analysis is guided by General Statutes § 1-2z, the plain meaning rule. In seeking to determine the meaning of a statute, § 1-2z directs us first to consider the text of the statute itself and its relationship to the broader statutory scheme. 'If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.' General Statutes § 1-2z. 'The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation.' " *State* v. *Menditto*, supra, 865.

The erasure statute, § 54-142d, provides in relevant part: "Whenever any person has been *convicted of an offense* in any court in this state and *such offense* has been *decriminalized* subsequent to the date of *such conviction*, such person may file a petition with the superior court . . . for an order of erasure, and the Superior Court or records center of the Judicial Department shall direct all police and court records and records of the state's or prosecuting attorney *pertaining to such case* to be physically destroyed." (Emphasis added.) As we recognized in *Menditto*, "the purpose of the statute is to allow people who have been convicted of a criminal offense to erase their criminal records in the event that the legislature later decriminalizes such conduct." *State* v. *Menditto*, supra, 315 Conn. 866. The parties' disagreement centers on the meaning of the phrase, "pertaining to such case." To agree with the defendant and order the physical destruction of the record of the 2012 violation of probation finding, we must conclude that the record of that finding is a

"[record] . . . pertaining to such case . . . ." General Statutes § 54-142d. We do not agree with the defendant and therefore reject his argument.[8]

Both parties argue that § 54-142d plainly and unambiguously supports their respective positions. Although whether a statute is ambiguous is a legal question; cf. *Enviro Express, Inc.* v. *AIU Ins. Co.*, 279 Conn. 194, 200, 901 A.2d 666 (2006); "our case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Internal quotation marks omitted.) *Lackman* v. *McAnulty*, 324 Conn. 277, 286, 151 A.3d 1271 (2016). "Honest disagreement about the interpretation of a statutory provision does not, however, make the statute ambiguous or vague." *State* v. *Mattioli*, 210 Conn. 573, 579, 556 A.2d 584 (1989).

The defendant first argues that the finding that he violated his probation is a "record" that qualifies for erasure under § 54-142d because his conviction of possession of less than one-half of an ounce of marijuana, on which the violation was premised, has since been decriminalized. Because his decriminalized conduct is now classified as a minor civil violation, and not as a misdemeanor, the defendant argues that it also can no longer serve as the basis for the violation of probation

[8] The defendant was arrested on a charge of sale of a controlled substance in 2010. P.A. 11-71 became law on July 1, 2011. The defendant was convicted in July, 2012, after his arrest in connection with his July, 2010 conduct: possession of less than one-half of an ounce of marijuana. Thus, the legislature decriminalized possession of less than one-half of an ounce of marijuana *before*, not subsequent to, the defendant's conviction, although it was not until we decided *Menditto* in 2015 that this became clear. Nonetheless, because the state does not argue that the defendant was not "convicted of an offense . . . and such offense has been decriminalized *subsequent* to the date of such conviction"; (emphasis added) General Statutes § 54-142d; but instead was convicted of an offense in 2012 that was decriminalized *before* the defendant's conviction, we assume that the defendant fits this predicate.

finding. Thus, according to the defendant, the violation of probation finding "pertains to" his conviction of possession of marijuana, and, therefore, the court must order erasure.

The state responds that the erasure statute applies only to records pertaining to the criminal case in which the defendant was convicted of an offense later decriminalized. The state contends that the violation of probation proceeding did not "pertain to" that criminal case but was, in fact, a separate civil proceeding. We agree with the state.

In determining what the legislature intended by the term "such case," we must carefully examine the entire text of the statute. See, e.g., *Lackman* v. *McAnulty*, supra, 324 Conn. 287 ("[i]t is a basic tenet of statutory construction that [w]e construe a statute as a whole and read its subsections concurrently in order to reach a reasonable overall interpretation" [internal quotation marks omitted]). We first observe that the phrase "such case" undoubtedly refers to the phrases, "an offense," and "such offense," which appear earlier in the same sentence. Neither party contends otherwise. That is to say, "such case" can refer only to the case in which the "person has been convicted of *an offense* in any court in this state and *such offense* has been decriminalized subsequent to the date of such conviction . . . ." (Emphasis added.) General Statutes § 54-142d.

As applied to the defendant's record in the present case, "such case" can refer only to his 2012 conviction under his *Alford* plea in connection with his July, 2010 conduct, which resulted in his arrest on the misdemeanor charge of possession of less than four ounces of marijuana.[9] "Such case" cannot, as the defendant

[9] The defendant does not argue that "such case" refers either to his 2007 conviction of possession of narcotics, as that offense has not been decriminalized, or to his 2008 probation violation.

appears to initially contend, refer to his probation violation. This is because it is well established that a probation revocation proceeding is not a criminal proceeding but is instead more "akin to a civil proceeding." *State* v. *Davis*, 229 Conn. 285, 295, 641 A.2d 370 (1994). The trial court may "find a violation of probation [if] it finds that the predicate facts underlying the violation have been established by a preponderance of the evidence" and not beyond a reasonable doubt. Id., 302. As such, a defendant is not "convicted" of a probation violation and, most relevant to our purposes, because a revocation of probation proceeding is not a criminal proceeding, it would be a misnomer to say that a finding of a violation of probation could be "decriminalized." Therefore, the trial court's finding that the defendant violated his probation does not constitute a "convict[ion] of an offense" or an "offense [that] has been decriminalized . . . ." General Statutes § 54-142d. In turn, it also does not fall within the term "such case," compelling erasure pursuant to § 54-142d. The legislature could have chosen to craft our erasure statute to explicitly include probation violations but did not do so.

Alternatively, the defendant contends that even if the phrase, "such offense" or "such case," refers only to his 2012 conviction of possession of less than four ounces of marijuana, which has been decriminalized, records of the finding that he violated his probation fall within the scope of those records that are "pertaining to" that offense or criminal case. Specifically, he argues that the legislature's use of the phrase "pertaining to" manifests an intent to have the erasure statute extend beyond mere conviction information to encompass any records of any judicial proceeding that either reference the conviction or that rely on the underlying facts that supported the conviction. This includes, according to the defendant, records relating to the violation of probation proceeding, in which, he contends, the trial court

relied on his conviction of possession of less than four ounces of marijuana to support the finding that he violated his probation.

For its part, the state agrees that the phrase "pertaining to" expands the reach of the statute beyond mere conviction information, but argues that it does so in a different way than the defendant contends. Namely, the state argues that the phrase encompasses all records specifically pertaining to the criminal case in which the defendant was convicted of the offense that later was decriminalized. This includes records from the police, the prosecutor, and the courts that supported the conviction, such as, for example, investigative records, trial transcripts, and case files.

We conclude that the state has the better textual argument. The erasure statute provides that, upon the decriminalization of an offense, and upon a person's petition to the court for an order of erasure, "the Superior Court or records center of the Judicial Department shall direct" the physical destruction not of all records pertaining to such case, but of "all *police* and *court* records and records of the *state's* or *prosecuting attorney*" pertaining to such case. (Emphasis added.) General Statutes § 54-142d. The emphasized terms manifest an intent to expand the locations and type of records related to the defendant's conviction that are subject to destruction (e.g., police records, court records and prosecutor's records), not the type of proceeding to which the erasure statute applies (e.g., criminal proceeding versus probation violation proceeding). This would not support a conclusion that a defendant's probation violation finding must be erased when the conduct underlying that violation has been decriminalized. Essentially, a probation violation is simply a square peg the defendant seeks to fit in the round hole of the erasure statute.

Even if we thought that both the defendant's and the state's interpretations were plausible, a look at the text of the marijuana decriminalization statute and its legislative history makes clear that the legislature did not intend the result the defendant suggests. See *Lackman* v. *McAnulty*, supra, 324 Conn. 286. First, the text of P.A. 11-71, decriminalizing possession of less than four ounces of marijuana effective July 1, 2011, makes no mention of the erasure statute whatsoever. Nor does it speak to whether records of any noncriminal violations for possessing that amount of marijuana after the effective date would be available to the public. That records of "convictions" of possession of less than four ounces may now be erased is not an issue addressed explicitly by the text of P.A. 11-71, but is a conclusion drawn from the erasure statute itself once we concluded that P.A. 11-71 "decriminalized" this conduct. See *State* v. *Menditto*, supra, 315 Conn. 866.

Further, the legislative history of the marijuana decriminalization statute makes clear that the legislature did not intend to legalize possession of less than one-half of an ounce of marijuana. Rather, one of the purposes of P.A. 11-71 was to prevent imprisonment for mere possession of a small amount of marijuana. Id., 873. The legislature made clear that, although such possession would be decriminalized, it remained illegal and would result in a fine. See 54 S. Proc., Pt. 17, 2011 Sess., p. 5471, remarks of Senator Martin M. Looney ("decriminalization is not legalization . . . but we are trying to realign the punishment to something that is appropriate"); 54 H.R. Proc., Pt. 26, 2011 Sess., p. 8738, remarks of Representative Brendan J. Sharkey ("this policy of decriminalization—not making it legal, it's still illegal"); Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2011 Sess., p. 2435, remarks of Representative Lawrence F. Cafero, Jr. ("this bill doesn't seek to legalize marijuana").

Because the legislature did not intend to legalize possession of less than one-half of an ounce of marijuana, it recognized that, although such conduct would not result in a criminal record, the state may retain public records regarding such a violation because the conduct remains illegal. See 54 H.R. Proc., Pt. 25, 2011 Sess., p. 8530, remarks of Representative Gerald M. Fox III (explaining that, although "[t]here would be no criminal record," "[t]here would still be a record of the violation," and state would retain records of such violations). Specifically, this issue arose during the legislature's consideration of P.A. 11-71, in its discussion concerning arrests for violations of the new law going forward, which would not result in a criminal conviction but instead would result in a fine or, after more than two violations, an order requiring participation in a drug education program. See General Statutes § 21a-279a (c). Legislators were given no assurance that, upon completion of the program, the offender's "record [would] then [be] expunged." 54 H.R. Proc., Pt. 25, 2011 Sess., p. 8530, remarks of Representative Christopher G. Donovan. The proponent of the bill indicated: "I would say no [the records would not be expunged] because . . . it is a violation. There would be no criminal record. There would still be a record of the violation." Id., remarks of Representative Fox. Therefore, the proponent reasoned, such records might very well be available to the public, just as records of motor vehicle infractions and other violations would be available to the public. Id., p. 8537; see also 54 H.R. Proc., Pt. 26, 2011 Sess., pp. 8551–52, 8595, remarks of Representative Fox.

As such, in decriminalizing the conduct at issue, the legislature intended only to provide offenders with the opportunity to erase any criminal record, thereby allowing them to answer that they had not been convicted of a crime when asked in an employment or other context; the legislature did not intend to prevent

the creation of a record of the violation in general. See 54 H.R. Proc., Pt. 26, 2011 Sess., pp. 8551–52, 8595, remarks of Representative Fox (explaining that, although there may be record of violation, there would be no criminal record, and offenders may truthfully state on employment application that they have not been convicted of crime). Similarly, the purpose of the decriminalization provision of our erasure statute is not to remove from public view entirely all violations of law, including those that have been decriminalized but, rather, to allow those convicted of a criminal offense to have their criminal records erased upon subsequent decriminalization of the offense. *State* v. *Menditto*, supra, 315 Conn. 868–69 (purpose of decriminalization is to reduce penalties, not to legalize conduct).

As a result, the legislature's intent is not thwarted by an offender's violation of probation remaining publicly available and not being erased. The legislature never intended for there to be no record whatsoever of an offender's violation, only no *criminal* record. As previously discussed, violation of probation is not itself a crime and does not create a criminal record, but is more akin to a civil violation; *State* v. *Davis*, supra, 229 Conn. 295; not unlike violations that are not subject to erasure and remain publicly available. If, after 2011, an offender's violation for possessing less than one-half of an ounce of marijuana would not be erased, but would be publicly available, it stands to reason that a violation of probation for similar conduct would not need to be erased. In either instance, decriminalization has served its purpose in that the offender does not have a criminal record. We do not discern the legislature's intent as going any further than that.

The defendant counters that, to the extent that the erasure statute is ambiguous, the rule of lenity should apply, requiring this court to strictly construe the statute in his favor and against the state. See *State* v. *Cote*,

286 Conn. 603, 615, 945 A.2d 412 (2008). This argument is unpersuasive in light of our determination that, to the extent that the erasure and decriminalization statutes are ambiguous, any ambiguity is clarified by the legislative history. See *American Promotional Events, Inc.* v. *Blumenthal*, 285 Conn. 192, 206, 937 A.2d 1184 (2008) ("courts do not apply the rule of lenity unless a reasonable doubt persists about the statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute" [emphasis omitted; internal quotation marks omitted]). Additionally, the erasure statute does not fall within the scope of the rule of lenity. The rule of lenity "is a means of assuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, concerning actions that would expose them to liability for penalties and what the penalties would be . . . [and] to protect the individual against arbitrary discretion by officials and judges." (Citation omitted; internal quotation marks omitted.) *State* v. *Cote*, supra, 615. The erasure statute is not a criminal statute under the Penal Code; rather, it is a procedural statute that does not expose people to liability for any penalty. See also *Cisco* v. *Shelton*, 240 Conn. 590, 607, 692 A.2d 1255 (1997) (legislature provided defendants with "procedural protection" by requiring erasure of records of nolled case pursuant to General Statutes § 54-142a [c] [1]).

The defendant responds that, even if the erasure statute does not apply to a violation of probation finding, the erasure statute clearly requires the erasure of any reference to his conviction of possession of less than one-half of an ounce of marijuana and, in the absence of that conviction, nothing in the record supports the violation of probation finding. This argument fails. The arrest warrant specifically stated that the defendant

was arrested for and charged with sale of a controlled substance, which, the state alleged, violated the conditions of his probation, specifically, the requirement that he "not violate any criminal law of the United States, this state or any other state or territory." At the plea proceeding, the state specified on the record that the violation of probation charge was premised on both the fact that the defendant had been arrested and charged with sale of a controlled substance, and the fact that he had been in possession of marijuana. As alleged in the arrest warrant, such conduct at the time violated state law, which, in turn, violated the terms of his probation. Thus, although the defendant might very well be entitled to erasure of any reference to his *conviction*, including any reference in his probation violation file, even without reference to the conviction of the subsequently decriminalized conduct, the fact that the defendant was in possession of marijuana alone supported the finding of violation of probation because such conduct violated state criminal law when he was arrested in July, 2010. Moreover, the defendant advances no authority to now contest, or for a court to now review, whether there remains (as opposed to whether there *was*) a sufficient record to continue to support the probation violation that he admitted to having committed.

Additionally, in the arrest warrant and at the plea proceeding, the state relied on the fact that the defendant had been arrested and charged with sale of a controlled substance, which constituted a violation of the criminal laws of this state. The defendant contends, however, that he admitted only to the possession of marijuana charge under state law, not to the sale of a controlled substance charge or to having violated federal law. He argues that, without evidence of the conviction, there is insufficient evidence that he engaged in the sale of a controlled substance.

Contrary to his assertions, when the defendant admitted to the violation of probation charge, he did not specify that his admission was limited to the ground of possessing marijuana in violation of state law. The defendant was convicted of possession of marijuana in violation of General Statutes (Rev. to 2009) § 21a-279 (c) pursuant to an *Alford* plea, whereby he did not admit guilt. Subsequently, however, the defendant admitted to having violated his probation. The state then clarified on the record the basis for the violation of probation charge, including the arrest on the charges of sale of a controlled substance and possession of marijuana. The defendant at no time objected to the state's recitation of the reasons supporting the violation of probation charge. Rather, the defendant generally admitted to the charge of violation of probation, which was premised on more than the conviction of possession of marijuana. As a result, the state did not need to put on evidence to establish that the defendant violated his probation by a preponderance of the evidence because he admitted to the violation. Thus, even without evidence of the conviction, the defendant's general admission that he violated his probation was sufficient to support the trial court's finding that he violated his probation in light of the fact that the state did not rely solely on the conviction of possession of marijuana.

For all of the foregoing reasons, we agree with the state that § 54-142d does not entitle the defendant to erasure of the records pertaining to the 2012 finding that he violated his probation.

The decision of the trial court is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

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KAROL NIETUPSKI *v.* NERIDA DEL CASTILLO

The plaintiff's petition for certification to appeal from the Appellate Court (AC 42003) is dismissed.

Karol Nietupski, self-represented, in support of the petition.

Ramona Mercado-Espinoza, *Enelsa Diaz*, *Giovanna Shay* and *Christina Gill*, in opposition.

Decided July 24, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 191

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

MARGARET JACKSON ET AL. *v.* LAUREN K. DRURY ET AL.
(AC 40579)

Lavine, Bright and Bear, Js.

Syllabus

The plaintiffs, B, M, and N, beneficiaries of a settlor's estate, appealed to the trial court from an order by the Probate Court. After the settlor's estate was initially distributed, according to a certain trust instrument, another beneficiary, J, died, and subtrusts were created for the benefit of J's children. Upon discovery of unclaimed funds belonging to the settlor, the Probate Court appointed a temporary administrator to distribute the unclaimed funds to all beneficiaries, including J's children. The administrator petitioned the Probate Court to dissolve the subtrusts created for the benefit of J's children to allow him to distribute the unclaimed funds directly to the beneficiaries. The Probate Court granted the petition and, thereafter, B filed her first appeal to the trial court in 2015 against, inter alios, the defendant trust company, claiming that she was aggrieved by the Probate Court's decree dissolving the subtrusts. The trial court granted the defendants' motion to dismiss B's appeal on the ground that she was not aggrieved by the order and decree of the Probate Court. Subsequently, M and N sent a letter to the Probate Court, claiming that the trust company had breached its fiduciary duties and had misappropriated funds by imposing its litigation costs related to the 2015 appeal against their subtrust funds. In response, the Probate Court held a hearing on the matter and issued a decree, finding that the trust company had acted in good faith pursuant to its fiduciary duty and that it would take no further action at that time. Thereafter, M and N resolved their dispute with the trust company and signed indemnification agreements to that effect. Subsequently, B informed the trust company's attorney that she intended to file an appeal against the trust company for bad faith and mismanagement of the trust in connection with the Probate Court's decree regarding the litigation costs of the first appeal. Thereafter, the trust company's attorney sent M and N a letter notifying them that if B pursued her appeal, M and N would be held responsible for the legal fees incurred, due to the indemnification agreements they had previously signed. Subsequently, B, M, and N filed the present appeal

against, inter alios, the trust company. The trial court granted the trust company's motion to dismiss the appeal for lack of subject matter jurisdiction on the ground that the appeal was untimely pursuant to the statute (§ 45a-186 [a]) that provides that an appeal from a Probate Court order must be filed in the Superior Court within thirty days of when the order was mailed to the parties. On appeal to this court, the plaintiffs claimed that the trial court improperly dismissed their appeal. *Held:*

1. Because B was not aggrieved by the Probate Court decree, she lacked standing to appeal, as she failed to allege a colorable claim of direct personal injury, and the lack of aggrievement was a defect that deprived the Superior Court of jurisdiction to hear the probate appeal; the plaintiffs appealed from the Probate Court's decree and finding that the attorney's fees charged to the subtrusts of M and N for the trust company's defense of the 2015 appeal were reasonable, but because B's trust was in no way affected, her alleged injury, if any, was indirect and amorphous, as it derived from the decree of the Probate Court that pertained to the subtrusts of M and N, and, therefore, she was not aggrieved and lacked standing to appeal.
2. The trial court properly dismissed the probate appeal of M and N, as they failed to comply with the plain language of § 45a-186 (a), which required them to file the appeal within thirty days of when the Probate Court's order was mailed: M and N failed to file an appeal from the Probate Court's decree within thirty days of when it was mailed, and although they sought to have the trial court reconsider its decision by alleging that the trust company was guilty of fraud and deception, the thirty day appeal period had expired before the time of the alleged deceptive acts, and the plaintiffs' claim that the doctrine of equitable estoppel tolled the late filing of their appeal was unavailing, as the doctrine of equitable tolling does not apply to subject matter jurisdiction, a court has no authority to adjudicate the action before it when it lacks subject matter jurisdiction, and even if the jurisdictional time limit for filing a probate appeal could be equitably tolled, the claim of M and N failed because the conduct of the trust company of which they complained occurred after the jurisdictional deadline had passed; moreover, the alleged factual basis of the plaintiffs' claim on appeal was not material to the issue decided by the Probate Court, which was the reasonableness of the attorney's fees incurred by the trust company and not whether the trust company committed fraud and misappropriated the funds, and the allegations were not within the jurisdictional purview of the Superior Court sitting as a court of probate.

Argued March 4—officially released August 6, 2019

Procedural History

Appeal from the order and decree of the Probate Court for the district of New London, brought to the Superior Court in the judicial district of New London,

where the court, *Bates*, *J.*, granted the motion to dismiss the appeal filed by the defendant The Washington Trust Company and rendered judgment thereon, and the plaintiffs appealed to this court. *Affirmed.*

Nancy Burton, self-represented, with whom, on the brief, were *Margaret Jackson* and *Miarden Jackson*, self-represented, the appellants (plaintiffs).

Kenneth J. McDonnell, for the appellee (defendant The Washington Trust Company).

Opinion

LAVINE, J. The self-represented plaintiffs Nancy Burton (Burton), and Margaret Jackson and Miarden Jackson (Jackson plaintiffs), appeal from the judgment of dismissal rendered by the Superior Court in favor of the defendants, The Washington Trust Company (trust company) and Lauren K. Drury, vice president and senior fiduciary officer of the trust company.[1] The plaintiffs had appealed to the Superior Court from a decision of the Probate Court for the district of New London. On appeal, the plaintiffs have asserted numerous claims as to why the court erred in dismissing their probate appeal[2] but principally argue that the court improperly dismissed their appeal as untimely. In its brief to this

[1] The law firm of Gould Larson Bennet & O'Donnell (law firm) and Amanda Kaplan, an attorney with the law firm, also were cited as defendants in the plaintiffs' appeal to the Superior Court. Drury, Kaplan, and the law firm, however, were not parties to the August 23, 2016 Probate Court proceeding. The trust company is the only defendant that is a party to the present appeal.

[2] The plaintiffs claim that the trial court improperly determined that General Statutes § 45a-186 (a) is jurisdictional; failed to consider whether the facts and circumstances of the present matter qualify for the application of the doctrine of equitable estoppel and waiver of the thirty day appeal period; failed to consider whether General Statutes § 52-595, the fraudulent concealment statute, tolled the appeal period; committed reversible error in not addressing the central issue presented in the appeal; and failed to disclose its potential conflicts of interest and bias. The plaintiffs also claim that the Probate Court's notice was defective and deprived them of due process. In the alternative, the plaintiffs claim that the appeal is premature.

court, the trust company claims that Burton[3] is not aggrieved by the Probate Court's decision and, therefore, her appeal should be dismissed. We agree that Burton is not aggrieved by the Probate Court's decision. We also conclude that the Superior Court properly dismissed the plaintiffs' probate appeal because it was not timely filed. We, therefore, affirm the judgment of the Superior Court.

We begin with a summary of the underlying facts and procedural history, which we have gleaned from our review of the record in the present case and the file in *Burton* v. *Burton*, Superior Court, judicial district of New London, Docket No. CV-15-5014962-S (May 10, 2017) (2015 appeal).[4] The issues in both cases are related to the June K. Burton Revocable Trust (trust) that was created by June K. Burton (settlor) on February 19, 1998. Burton and Margaret Jackson are two of the settlor's children, and Miarden Jackson is the settlor's grandson. When the settlor died on March 23, 2003, the trust company succeeded her as trustee. The settlor's will directed that her residuary estate was to be placed in the trust and distributed, pursuant to a formula, to the settlor's children, i.e., Margaret Jackson, Burton, and John Burton; to her grandchildren; and to one other person. The trust company distributed the trust property in accordance with the trust instrument in 2008. John Burton died on December 26, 2013, and subtrusts were created for the benefit of his children.[5]

[3] The plaintiffs submitted a joint brief and a joint reply brief. Burton, a disbarred attorney, appeared and presented an oral argument on her own behalf. The Jackson plaintiffs did not present an oral argument.

[4] An appellate court may take judicial notice of files in the same or other cases. See *St. Paul's Flax Hill Co-operative* v. *Johnson*, 124 Conn. App. 728, 739 n.10, 6 A.3d 1168 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1002 (2011).

[5] The trust directed that in the event one of the settlor's children dies prior to a distribution of trust property, the deceased child's share of trust property shall be deemed to have lapsed and shall be divided among the deceased child's children. When John Burton died, subtrusts were established for that purpose.

Circa 2012, Burton learned that the treasurer of the state of Connecticut was holding unclaimed property (funds) of the settlor. The Probate Court appointed Burton as temporary administrator of the settlor's estate for the purpose of filing a claim for the funds. Due to a delay in the release of the funds, Burton's temporary appointment expired, and the Probate Court appointed Attorney Patrick L. Poeschl as temporary administrator of the settlor's estate to claim the funds. Upon receipt of the funds, Poeschl placed the funds in an escrow account and applied to the Probate Court to allow the amended final accounting and an order of distribution of the settlor's estate. He also petitioned the Probate Court to terminate the subtrusts, allowing him to distribute the funds directly to the beneficiaries of the subtrusts. Burton opposed Poeschl's proposed distribution, claiming that it was at odds with the distribution directed by the trust instrument. The Probate Court approved Poeschl's proposal and, on June 30, 2015, issued an order and decree granting Poeschl's application and petition.[6]

On September 2, 2015, Burton commenced the 2015 appeal from the June 30, 2015 order and decree and filed a complaint against Orsolya Burton as guardian

[6] The Probate Court's June 30, 2015 order and decree stated in relevant part: "An amended final account was submitted to this court by Attorney Patrick Poeschl. The time period covered in this accounting is March 30, 2015 through June 8, 2015. It is uneconomical and costly to have the distribution flow from the estate, to the June Burton Trust to the Milton Burton Trust and then to the beneficiaries, when the estate can distribute directly to the beneficiaries. *At issue is the construction of the trust and distribution to those taking under John Burton.* Attorney Poeschl shall file a petition to construct the terms of the Trust for proper distribution.

"And it is ordered and decreed that: accounting approval and distribution approved except for distribution to those taking under John Burton. Distribution shall be determined upon a decision by the Court on the trust construction. Attorney Poeschl has met all the requirements set forth in [General Statutes §] 45a-482 and 45a-484, to terminate the trusts re-established for Margaret Burton Jackson and Miarden Jackson, and allow for distribution to bypass trusts and distribute directly to the beneficiaries." (Emphasis added.)

of the minor Julia Burton and as executrix on the estate of John Burton, and against the trust company.[7] In the 2015 appeal, Burton alleged, among other things, that Poeschl's distribution awarded John Burton's lapsed one-sixth share of the trust to Orsolya Burton, as executrix of his estate, thereby divesting John Burton's "three children" of their rightful shares pursuant to the trust instrument. She also alleged that, as a named beneficiary of the trust, she is entitled to a one-sixth share of any and all trust property and that termination of the trust in accordance with the terms proposed by Poeschl diminished the monetary value of the trust property to which she is lawfully entitled. She claimed that she was aggrieved by the order of the Probate Court because she will suffer an economic loss directly attributable to the decree unless it is set aside.

Orsolya Burton filed a motion to dismiss the appeal claiming that Burton was not aggrieved by the June 30, 2015 order and decree. The trust company joined the motion to dismiss. The trial court, *Vacchelli*, *J.*, granted the motion to dismiss in a memorandum of decision dated January 29, 2016. The court concluded that Burton was not aggrieved by the order and decree of the Probate Court, which permitted the bypass of certain trusts and allowed the settlor's funds to be distributed to the settlor's beneficiaries.[8]

On July 15, 2016, the Jackson plaintiffs wrote a letter to the Probate Court, stating, in part, that the trust company "has breached its fiduciary duties and misappropriated $6670 of our subtrust funds by imposing its

[7] Orsolya Burton is John Burton's second wife; Julia Burton is their daughter. Kaplan and the law firm represented the trust company in the 2015 appeal.

[8] Judge Vacchelli's memorandum of decision stated in relevant part that Poeschl recovered $62,883.99 of the settlor's unclaimed funds from the state treasurer. In his amended final account, Proeschl proposed to distribute all of the funds to the beneficiaries in accordance with a schedule, except $963.99, which was reserved for fiduciary income tax purposes and $6880 for a later Probate Court determination as to how to distribute the sum among certain persons potentially taking shares due to the death of John

litigation costs from [the 2015 appeal] onto our undisputed and completely separate inheritance. We ask Your Honor to order [the trust company] to restore our accounts in full and release the balance of our subtrusts immediately."[9] In response to their request, the Probate Court held a hearing on August 23, 2016, and, thereafter, on *August 26, 2016*, mailed a document titled "decree" to the plaintiffs, Kaplan, and the trust company. In the document, the Probate Court stated that it found that the trust company "acted in good faith pursuant to [its] fiduciary duty in obtaining counsel for the [2015] appeal [and the] . . . attorney's fees incurred for the time spent and hourly rate are reasonable."[10] Consequently,

Burton. Poeschl proposed giving $10,320 to Burton, which was one-sixth of the total unclaimed funds recovered less the reserve for tax purposes.

Judge Vacchelli found no merit to Burton's contention that termination of the trust as proposed by Poeschl will diminish the monetary value of the trust property unnecessarily and that the decree will diminish the value of the trust property to which she is lawfully entitled. The court could not discern how Burton sustained an economic loss or any other adverse effect to her interests. There are no trustee charges involved in the Probate Court decree and there are no claims that the estate fees are otherwise excessive. The court, therefore, found that Burton was not aggrieved to bring the appeal and dismissed it.

Burton filed an appeal to this court from the judgment of dismissal rendered by Judge Vacchelli. She, however, withdrew the appeal on July 29, 2016.

[9] In response to the Jackson plaintiffs' letter, Kaplan wrote to the Probate Court on behalf of the trust company stating in part, that in the 2015 probate appeal, Burton "specifically appealed the termination of the Jacksons' Trusts, at which point [the trust company] was unable to complete the terminations of the Trusts and distribute the funds held therein. As is appropriate under well established law, the [trust company as trustee] hired [the law firm], to defend the termination of the Trusts, as required under [General Statutes] § 51-88. As is equally appropriate, the [trust company] paid the legal fees related to the representation directly from the Trusts. [General Statutes] § 45a-234 (19) and Article X of the June K. Burton Revocable Trust . . . . As is well-settled law: The trustee must do what is necessary within the bounds of law and reason to defend the trust and thus may retain counsel for that purpose and is entitled to have the costs of such representation absorbed by the trust." Kaplan cited legal authority for the trust's position.

[10] The court stated in full: "After due hearing, the court finds that . . . Margaret Jackson and Miarden Jackson filed a request for a hearing regarding [the trust company's] fiduciary duties and purported misappropriation of funds from the [settlor's] estate. *The issue presented to the court by the petitioner is solely stated to be the attorney[']s fees incurred and allocated*

the Probate Court issued a decree stating: "the Court takes no action at this time."[11] On August 29, 2016, the Jackson plaintiffs apparently resolved their dispute with the trust company, and each of them signed a Receipt, Release, and Indemnification Agreement.[12]

On October 3, 2016, Burton sent an e-mail to Drury stating that she was notifying Drury "in advance of [her] intended filing this week of a probate appeal as well as a separate action seeking monetary damages for [the trust company's] bad faith and mismanagement of the . . . trust."[13] The probate appeal to which Burton was

to the subtrusts. The court finds that the [trust company] acted in good faith pursuant to [its] fiduciary duty in obtaining counsel for the appeal from the Probate Court decision dated June 30, 2015. The review of attorney's fees incurred for the time spent and hourly rate are reasonable. The [trust company] has agreed to not pass on the charge to the beneficiaries the balance of $960.00 of attorney's fees along with additional fees incurred in this matter.

"And it is ordered and decreed that: Based on the foregoing, the court takes no action at this time." (Emphasis added.)

[11] Although the Probate Court did not use the word decree, the parties have treated the Probate Court document signed on August 23, 2016, and mailed on August 26, 2016, as a decree. A decree "is a judicial decision in a court of equity, admiralty, divorce or probate . . . ." Black's Law Dictionary (10th Ed. 2014). We conclude that the subject document is a decree. In their brief on appeal, the plaintiffs repeatedly refer to the document as a decree. Section 45a-186 (a) provides in relevant part that "any person aggrieved by any order, denial or decree of a Probate Court . . . may . . . appeal therefrom to the Superior Court."

[12] The Receipt, Release and Indemnity Agreement that each of the Jackson plaintiffs signed on August 29, 2016, states in relevant part: "I agree, for myself and my heirs, successors and assigns to release, indemnify and hold harmless [the trust company], and its successors, from any and all claims, demands, suits, judgments, costs, expenses, attorney's fees and all losses and damages of every kind and character whatsoever arising out of the administration of the Trust."

[13] The full text of Burton's e-mail to Drury states: "I am notifying you in advance of my intended filing this week of a probate appeal as well as a separate action seeking monetary damages for [the trust company's] bad faith and mismanagement of the . . . Trust.

"I intend to name you personally in addition to [the trust company] as well as the law firm which has been representing [the trust company].

"I will agree to forego these actions if [the trust company] agrees to return in full to Margaret Jackson and Miarden Jackson the money it misappropriated from the . . . Trust.

"I will need your response by close of business on October 5, 2016."

referring concerned the proceedings in the Probate Court on August 23, 2016. Thereafter, Drury sent an e-mail to the Jackson plaintiffs informing them that if Burton "proceeds as she has indicated, you will be held personally responsible for the legal fees incurred [by the trust company] due to the Receipt, Release and Indemnity Agreements you previously signed."

On *October 11, 2016*, the plaintiffs filed the present probate appeal. In their complaint, they alleged that on August 23, 2016, the Probate Court issued a decree that was mailed to them on *August 26, 2016*. On November 10, 2016, Kaplan, on behalf of Drury and the trust company, filed a motion to dismiss the probate appeal on the ground that it was not filed within thirty days of the date the decree was mailed as required by General Statutes § 45-186 (a), and, therefore, the Superior Court lacked subject matter jurisdiction. Burton filed an objection to the motion to dismiss.[14] The court, *Bates, J.*, granted the motion to dismiss and issued a memorandum of decision on May 10, 2017.

In his memorandum of decision, Judge Bates found that the Probate Court decree was mailed on August 26, 2016, that the appeal was filed on October 11, 2016, and that the plaintiffs conceded that the appeal was commenced after the limitation period of § 45a-186 (a), which provides in relevant part that probate appeals are to be taken "not later than thirty days after the mailing of an order, denial or decree. . . ." The court

[14] In her objection to the motion to dismiss, Burton stated that the appeal was taken beyond the thirty day appeal period, six days after Drury made the Jackson plaintiffs aware that the releases she directed them "to sign under duress for release of their inheritance as administered by [the trust company] to assess attorney's fees against [them] should a probate appeal be taken by any person challenging the August 26, 2016 Probate Court order and decree, inter alia, regardless of whether [they] participated in such probate appeal or were even aware of it. Neither [the trust company] nor . . . Drury notified Burton . . . that her sister . . . and nephew . . . would be held liable by [the trust company] should [Burton] take an appeal of the Probate Court order and decree."

found that the plaintiffs' appeal was taken well after the thirty day period. Although the plaintiffs made many arguments regarding the fairness of the Probate Court's decision regarding the distribution of assets, they never established a basis for ignoring the applicable appeal period. "[T]he meaning of the statute is plain and unambiguous. A party appealing to the Superior Court from probate is required to commence the appeal by filing the complaint with the court within thirty days of the mailing of the challenged action." *Gates* v. *Gates*, 51 Conn. Supp. 148, 152-53, 975 A.2d 147 (2008), aff'd, 115 Conn. App. 293, 971 A.2d 852, cert. denied, 293 Conn. 924, 980 A.2d 910 (2009). Judge Bates, therefore, stated that the appeal deadline was jurisdictional and concluded that, without compliance with the deadline, the decision of the Probate Court must stand. The court dismissed the plaintiffs' appeal for lack of jurisdiction.

Thereafter, on May 26, 2017, Burton filed a motion for reargument, which the court denied on June 6, 2017.[15] Burton then filed two motions for articulation in the trial court on June 12, 2017, on matters not directly related to the dismissal of the probate appeal.[16] The plaintiffs appealed to this court on June 27, 2017.

We now turn to the two issues before us: (1) whether Burton was aggrieved by the Probate Court's decree

[15] In denying the motion to reargue, Judge Bates stated that Burton seemed to be arguing that the proceeding was not a probate appeal, but a claim of misappropriation of funds by the trust company and, therefore, it was inappropriate to dismiss the case. The complaint, however, states that it is an appeal from probate and the Probate Court's August 23, 2016 decree is appended as an exhibit. Although Burton may have wanted to address allegations against the trust company in the context of the appeal, that does not mean that she "was immune from the appeal deadline and its jurisdictional ramifications."

[16] The first motion for articulation filed in the trial court sought articulation as to the court's denial of Burton's motions for reargument and the second motion for articulation filed in the trial court sought articulation as to the "Plaintiff's Request for Disclosure," filed on May 30, 2017, and Burton's "Correction to Plaintiff's Request for Disclosure," filed on June 5, 2017.

and, therefore, lacked standing to appeal, and (2) whether the Superior Court properly dismissed the plaintiffs' appeal from the Probate Court's decree mailed on August 26, 2016, because it was untimely.

I

The trust company claims that Burton was not aggrieved by the Probate Court's decree and, therefore, she lacked standing to appeal. We agree that Burton lacked standing to appeal.

The following facts are relevant to the trust company's claim. In its brief on appeal, the trust company stated in a footnote that Burton was not aggrieved by the Probate Court's decree that was mailed on August 26, 2016, and, therefore, she lacked standing to argue the appeal. The trust company also noted that the plaintiffs sought to have the court order the trust company to restore the attorney's fees approved by the Probate Court to the Jackson subtrusts. The trust company, however, did not file a motion to dismiss Burton's appeal, and this court did not issue an order directing the parties to be prepared at oral argument to address the question of Burton's standing. At oral argument, we asked Burton to explain the basis of her allegation that she was aggrieved by the Probate Court's decree.[17] Burton objected to the inquiry on the ground that she had no notice that she would be expected to address the question of her standing and requested an opportunity to brief the issue. We granted her request to file a memorandum of law with respect to whether she was aggrieved and permitted the trust company to file a response.

Burton filed successive memoranda of law and stated that the bases of her "aggrievement are manifest in the

[17] "[A] question of subject matter jurisdiction may be raised at any time, including sua sponte invocation by a reviewing court." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, 159 Conn. App. 751, 779 n.17, 125 A.3d 549 (2015).

record and relate in part to the fact that the release[s] which [the Probate Court] directed the Jacksons to sign had hidden, unexpressed potential negative consequences for [her]. . . . That is . . . [what] Drury stated in her October 5, 2016 email to the Jacksons . . . sent ten days after the expiration of the appeal period on September 26, 2016."[18] In response to Burton, the trust company argued, in part, that Burton had no legally protected interest in the Estate of June K. Burton that was adversely affected by the Probate Court's decree of August 23, 2016, approving the charge of attorney's fees to the Jackson plaintiffs.

"The question of whether an order from probate aggrieves a party concerns a trial court's subject matter jurisdiction." *In re Probate Appeal of Red Knot Acquisitions, LLC*, 147 Conn. App. 39, 42, 80 A.3d 594 (2013). Subject matter jurisdiction is a question of law and, therefore, our review is plenary. See *Isaacs* v. *Ottaviano*, 65 Conn. App. 418, 421, 783 A.2d 485 (2001).

"[S]tanding is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Nevertheless, [s]tanding is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights

[18] Burton argued that the "[trust company]/Drury's trickery came in three parts: first by withholding this information during the probate proceedings and from [the Probate Court] as they persuaded him to direct the Jacksons to sign 'whatever release [the trust company] prepared' to avoid forfeiture of their remaining inheritance; second by withholding notice of this to the Jacksons until after the appeal period had expired and third by failing to provide direct notice at any time to [her] or obtain her consent."

of others are forged in hot controversy, with each view fairly and vigorously represented. . . . These two objectives are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he [or she] has suffered or is likely to suffer, in an individual or representative capacity. Such a personal stake in the outcome of the controversy . . . provides the requisite assurance of concrete adverseness and diligent advocacy." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, 159 Conn. App. 751, 779–80, 125 A.3d 549 (2015).

"Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguable protected interests. . . . Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled two-fold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 214–15, 982 A.2d 1053 (2009).

"[A]s a general rule, a plaintiff lacks standing unless the harm alleged is direct rather than derivative or indirect. . . . [I]f the injuries claimed by the plaintiff are

remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. Where, for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the plaintiff has no standing to assert them." (Citation omitted; internal quotation marks omitted.) *Wiederman* v. *Halpert*, 178 Conn. App. 783, 795, 176 A.3d 1242 (2017), cert. granted on other grounds, 328 Conn. 906, 177 A.3d 1161 (2018).

Want of aggrievement is a defect that deprives the Superior Court of jurisdiction to hear a probate appeal. *Baskin's Appeal from Probate*, 194 Conn. 635, 637, 484 A.2d 934 (1984). The question is whether the appellant possibly has a legally protected interest in the estate that has been adversely affected by the Probate Court. See *Erisoty's Appeal from Probate*, 216 Conn. 514, 519, 582 A.2d 760 (1990).

On the basis of our review of the allegations of the complaint in the present case, we conclude that Burton has failed to allege a colorable claim of direct personal injury. The plaintiffs appealed from the Probate Court's August 23, 2016 finding that the attorney's fees charged to the Jackson plaintiffs' subtrusts for the trust company's defense of the 2015 appeal were reasonable. Burton's trust was in no way affected. Her alleged injury, if any—and we do not conclude that there was any—therefore, is indirect and amorphous as it derives from the decree of the Probate Court that pertained to the Jackson plaintiffs' subtrusts. The Superior Court, therefore, lacked subject matter jurisdiction over Burton's appeal as she was not aggrieved by the Probate Court decree and, therefore, lacked standing to appeal.[19]

[19] The trust company did not raise the issue of Burton's standing in the appeal to the Superior Court. Although the Superior Court did not dismiss Burton's appeal due to her lack of standing, we may affirm the court's decision on alternative grounds. "[W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial

II

The Jackson plaintiffs claim that the Superior Court improperly dismissed their appeal from the Probate Court decree mailed on August 26, 2016, on the basis of timeliness. We disagree.

The Jackson plaintiffs' appeal is controlled by § 45a-186 (a), which provides, in relevant part: "Except as provided in sections 45a-187 and 45a-188, any person aggrieved by an order, denial or decree of a Probate Court in any matter . . . may . . . not later than thirty days after mailing of an order, denial or decree for any matter in a Probate Court appeal therefrom to the Superior Court. Such an appeal shall be commenced by filing a complaint in the superior court in the judicial district in which such Probate Court is located . . . ."[20]

"The right to appeal from the decision of a Probate Court is purely statutory: General Statutes § 45-288 [now § 45a-186]; and the requirements fixed by statute for taking and prosecuting the appeal must be met. The Superior Court is without jurisdiction to entertain an appeal from probate unless the appeal complies with the conditions designated by statute as essential to the exercise of this power." *Bergin* v. *Bergin*, 3 Conn. App. 566, 568, 490 A.2d 543, cert. denied, 196 Conn. 806, 494

court record." (Internal quotation marks omitted.) *CitiMortgage, Inc.* v. *Tanasi*, 176 Conn. App. 829, 839 n.5, 171 A.3d 516, cert. denied, 327 Conn. 978, 174 A.3d 801 (2017). See part II of this opinion.

[20] On appeal, the plaintiffs argue that the time limitation in "§ 45a-186 (a) is directory, not mandatory and, therefore, is not subject matter jurisdictional." They argue that in imposing a time limitation, the legislature can manifest an intent to make the time constraint mandatory and not waivable. Whether the statute employs the word *may* or *shall* is determinant of the legislature's intent. The plaintiffs claim that because the statute employs the word *may*, and not the word *shall*, the time limitation is not jurisdictional.

We disagree with the plaintiffs' construction of the statute. The use of the word *may* in the statute grants a person aggrieved by an action of the Probate Court the right to appeal, i.e., may appeal. The time in which an appeal is to be filed is set off by commas, from the language granting the right to appeal. The plaintiffs' argument is unpersuasive.

A.2d 903 (1985), overruled in part on other grounds, 289 Conn 795, 961 A.2d 365 (2008). Probate appeals are properly commenced by filing a complaint in the Superior Court. Id.

As our Supreme Court has stated: "It is axiomatic that strict compliance with [the] terms [of § 45a-186] is a prerequisite to an aggrieved party's right to appeal and to the Superior Court's jurisdiction over the appeal." *Connery* v. *Gieske*, 323 Conn. 377, 389, 147 A.3d 94 (2016). "[J]urisdiction over a probate appeal attaches when the appeal is properly taken." *Heussner* v. *Hayes*, 289 Conn. 795, 802, 961 A.2d 365 (2008).

"[W]e are . . . mindful of the familiar principle that a court [that] exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation. . . . Our courts of probate have a limited jurisdiction and can exercise only such powers as are conferred on them by statute. . . . They have jurisdiction only when the facts exist on which the legislature has conditioned the exercise of their power." (Internal quotation marks omitted.) *Burnell* v. *Chorches*, 173 Conn. App. 788, 793, 164 A.3d 806 (2017). "It is also well established that [t]he right to appeal from a decree of the Probate Court is purely statutory and the rights fixed by statute for taking and prosecuting the appeal must be met. . . . Thus, only [w]hen the right to appeal . . . exists and the right has been duly exercised in the manner prescribed by law [does] the Superior Court [have] full jurisdiction over [it]." (Internal quotation marks omitted.) Id.

The timeline in the present case is not in dispute. The Probate Court's decree was mailed on August 26, 2016. The time in which the Jackson plaintiffs properly may have filed an appeal expired on September 26,

2016. The plaintiffs' appeal was filed in the Superior Court on October 11, 2016. The trust company and Drury filed a motion to dismiss on November 10, 2016. Judge Bates dismissed the appeal in a memorandum of decision on May 10, 2017, stating, in relevant part, that the appeal was brought "well after the thirty day deadline." The court also stated that the plaintiffs made "many arguments regarding the fairness of the decision and distribution of assets, but they never establish a basis for ignoring the applicable appeals period."

Burton filed a motion to reargue and to reconsider the court's judgment of dismissal in which she claimed that the court's memorandum of decision contained factual errors, specifically, that the appeal challenged "the distribution of trust funds by the Probate Court." Burton stated that the "appeal concerns the misappropriation of funds belonging to the [Jackson plaintiffs] by a fiduciary, [the trust company] and its agents." Judge Bates denied the motion to reargue stating that the "plaintiffs seem to be arguing that this proceeding was not a probate appeal, but rather, a claim of misappropriation of funds by the [trust company], and, therefore, it was inappropriate to dismiss the case. However, the complaint states it is an 'Appeal From Probate' and Exhibit A-1 of the complaint is the decision of the New London Probate Court dated August 23, 2016. The parties may have wished to address their allegations against the [trust company] in the context of the appeal, but that does not mean that they are somehow immune from the appeal deadline and its jurisdictional ramifications."

Following the filing of the present appeal to this court, the plaintiffs filed two motions for rectification/articulation in this court dated June 27, and July 18, 2007.[21] This court referred both motions to Judge Bates,

[21] Burton's second motion for rectification and articulation concerned her request for disclosure filed on May 30, 2017, in which she questioned Judge Bates' impartiality, including his association with a former vice president

who denied the motion for rectification/articulation as to the denial of the plaintiff's motions for reargument. In the trial court's response, dated October 20, 2017, the court stated that the plaintiffs were seeking to open the judgment of dismissal for consideration of allegations of fraud, deception, and bad faith on the part of the trust company. The court again stated that its May 11, 2017 dismissal of the appeal was not made on the merits of the appeal, but solely on its untimeliness. The plaintiffs failed to bring the appeal within thirty days of the Probate Court decree, and therefore, the Superior Court lacked jurisdiction to hear the appeal or to open the judgment of dismissal. The court also stated that "it appears that the plaintiffs are seeking to change the approval of a probate accounting into a civil case against [the trust company] for misappropriation and fraud. However, the plaintiffs' pleadings and accusations cannot change a late filed probate appeal into a civil action."

On appeal in this court, the Jackson plaintiffs argue that Judge Bates failed to consider whether the late filing of their appeal was tolled by the doctrine of equitable estoppel because Drury and the trust company allegedly committed a fraud on them. Once they became aware of the "trickery, bad faith, fraud, and unauthorized conduct of [the trust company and Drury] the plaintiffs made haste to file the appeal to try to set things right." This argument fails as a matter of law and of fact.

and trust officer of the trust company and whether he received any revenue for litigation concerning the Millstone nuclear power station when he was a partner at the law firm of Robinson & Cole, LLC. She also asked the court to articulate why the court's order in response to her motion for extension of time was dated June 19, 2017, but not mailed to her until June 29, 2017.

On October 20, 2017, the court responded to Burton's second motion for rectification and articulation, stating in part that it had no control over the mailing of orders from the court, that it was not aware of any facts that potentially give rise to its disqualification on the basis of bias, prejudice or conflict of interest, and that it "was not aware of any actions or relationships that would lead an impartial person to question [the court's] impartiality regarding the plaintiffs."

The doctrine of equitable tolling does not apply to subject matter jurisdiction. "Our Supreme Court has made clear that a court lacks the authority to apply the doctrine of equitable tolling or otherwise exercise discretionary authority to extend a limitations period if the applicable statute of limitations constitutes a limit on the court's subject matter jurisdiction." *Turner* v. *State*, 172 Conn. App. 352, 360, 160 A.3d 398 (2017). Once the jurisdictional deadline has passed, the court is without subject matter jurisdiction, which cannot be waived. See *Williams* v. *Commission on Human Rights & Opportunities*, 257 Conn. 258, 266, 777 A.2d 645, aff'd after remand, 67 Conn. App. 316, 786 A.2d 1283 (2001). When a court lacks subject matter jurisdiction, it has no authority to adjudicate the action before it. See *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 265, 193 A.2d 530 (2018).

Even if the jurisdictional time limit for filing a probate appeal could be equitably tolled, the Jackson plaintiffs' argument fails because the conduct of which they complain occurred after the jurisdictional deadline had passed. The factual basis of their argument is that Drury told them in response to an e-mail Burton sent her on October 5, 2016, that if Burton took an appeal from the August 23, 2016 Probate Court decree, attorney's fees would be charged to them pursuant to the Receipt, Release and Authorization they signed on August 29, 2016. See footnote 13 of this opinion. The alleged factual basis of the equitable estoppel claim, therefore, occurred after the thirty day time period in which to appeal from the Probate Court decree expired. Moreover, the alleged factual basis was not material to the issue decided by the Probate Court on August 23, 2016, which was the reasonableness of the attorney's fees incurred by the trust company.

In his memorandum denying the plaintiffs' motion for rectification/articulation, Judge Bates stated: "[i]t

appears that the plaintiffs are seeking to change the approval of a probate accounting into a civil case against [the trust company] for misappropriation and fraud. However, the plaintiffs' pleadings and accusations cannot change a late filed probate appeal into a civil action." We agree with the Superior Court's assessment of the plaintiffs' claim. Moreover, when sitting as a Probate Court, the Superior Court does not sit as a court of general jurisdiction.

The case of *Marshall* v. *Marshall*, 71 Conn. App. 565, 803 A.2d 919, cert. denied, 261 Conn. 941, 808 A.2d 1132 (2002), a probate appeal, is instructive. The plaintiff in *Marshall* claimed, among other things, that the Superior Court deprived her of due process by failing to hold an evidentiary hearing to determine whether her attorney had engaged in misconduct by withdrawing her probate appeal from the jury docket. Id., 569. In resolving the appeal, this court first addressed a jurisdictional issue that was implicit in the claim and determined that the claim failed because the court did not have jurisdiction to hold such an evidentiary hearing.

"[W]ith regard to appeals from probate, our case law states that [a]n appeal from a probate order or decree to the Superior Court is not a civil cause of action. It has no more of the ordinary attributes of a civil action than the original proceedings in the court of probate. . . . [A]ppeals from probate are not civil actions because it has always been held that the Superior Court, while hearing appeals from probate, sits as a court of probate and not as a constitutional court of general or common-law jurisdiction. It tries the questions presented to it de novo, but in so doing it is . . . exercising a special and limited jurisdiction conferred on it by the statute authorizing appeals from probate. . . .

"In a probate appeal, the Superior Court cannot consider events that occurred after the issuance of the

order or decree appealed form. . . . The appeal brings to the Superior Court only the order appealed from. The order remains intact until modified by a judgment of the Superior Court after a hearing de novo on the issues presented for review by the reasons of appeal. . . . The Superior Court may not consider or adjudicate issues beyond the scope of those proper for determination by the order or decree attacked. . . . Inasmuch as the motion for the appeal is made in the Court of Probate and forms a part of the proceedings in that court, no amendment to it may be made in the Superior Court. The Superior Court, therefore, cannot enlarge the scope of the appeal." (Internal quotation marks omitted.) Id., 569–70.

In the present case, the plaintiffs failed to file an appeal from the Probate Court's August 23, 2016 decree within thirty days of when it was mailed on August 26, 2016. The plaintiffs sought to have the court reconsider its decision by alleging that the trust company and Drury were guilty of fraud and deception with respect to the Receipt, Release, and Indemnity Agreement. The thirty day appeal period, however, had expired at the time of the defendants' alleged deceptive acts. Moreover, such allegations were not within the jurisdictional purview of the Superior Court sitting as a court of probate. We, therefore, affirm the Superior Court's judgment of dismissal.[22]

The judgment is affirmed.

In this opinion, the other judges concurred.

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[22] The plaintiffs also claim that the time limitation in § 45a-186 (a) can be waived. We disagree. Subject matter jurisdiction may not be waived. See *Williams* v. *Commission on Human Rights & Opportunities*, supra, 257 Conn. 266.

MANUEL MOUTINHO, TRUSTEE *v.* 500 NORTH AVENUE, LLC, ET AL.

MANUEL MOUTINHO, TRUSTEE *v.* 1794 BARNUM AVENUE, INC., ET AL.

MANUEL MOUTINHO, TRUSTEE *v.* RED BUFF RITA, INC., ET AL.

(AC 36115)

Sheldon, Keller and Moll, Js.*

Syllabus

The plaintiff M, as trustee, sought in four actions to foreclose mortgages on certain real properties owned by the defendants N Co., B. Co., and R. Co, and other lienholders and encumbrancers. The foreclosure actions were jointly tried to the trial court, which denied N Co.'s oral motion to dismiss under the applicable rule of practice (§ 15-8) and rendered judgments of strict foreclosure. Subsequently, N. Co., the defendant in the first action, was substituted as the defendant in the other three actions in place of B. Co. and R. Co., because it had become the owner of the properties that were the subject of those actions. On appeal to this court, N Co. claimed, inter alia, that the trial court improperly failed to rule on its motion for a judgment of dismissal at the close of M's case-in-chief. *Held:*

1. N Co.'s claims that the trial court improperly denied its motion to dismiss under Practice Book § 15-8 and concerning the timing of the court's ruling were not reviewable on appeal; in the context of the former motion for nonsuit for failure to make out a prima facie case, our Supreme Court has determined previously that the denial of such a motion is not reviewable on appeal, and although, on subsequent rare occasion, notably in cases where the question of reviewability was not raised, this court and our Supreme Court have reviewed the merits of appeals from the denial of motions under § 15-8 for a judgment of dismissal for failure to make out a prima facie case, as an intermediate appellate court, this court was bound by Supreme Court precedent and was unable to modify it.
2. Although the trial court acted in an untimely manner when it ruled on N Co.'s motion to dismiss after the close of evidence, as it should have been decided by the court before N Co. produced evidence, any error in the timing of the court's decision on the motion to dismiss was harmless; in rendering judgment in favor of M in each of the actions,

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

the court concluded, at a time when it was permitted to weigh credibility and make findings of fact, that M sustained his burden of proof, which was supported by evidence presented during M's case-in-chief, and N Co. did not challenge the court's factual findings, nor did it cite to any finding of the court that could only have been made on the basis of evidence presented in N Co.'s case-in-chief.

3. N Co. could not prevail on its claim that the trial court improperly denied its motion to dismiss, which was based on its claim that the plaintiff's failure to include certain allegations in the operative complaints, namely, that the original mortgagors, as the owners of the equity of redemption, were the title owners of the respective properties at the time the mortgages were executed, resulted in a material variance between the pleadings and the evidence presented and caused the plaintiff to fall short of pleading and proving a prima facie case in each of the actions: this court declined to address N Co.'s arguments that M's operative complaints were legally insufficient, as N Co., instead of moving to strike the plaintiff's complaints in the various actions on the basis of the purported absence of a material allegation, waited until the close of the plaintiff's case to challenge the sufficiency of the plaintiff's operative pleadings by way of its motion under Practice Book § 15-8 to dismiss for failure to make out a prima facie case, which was a procedurally improper use of § 15-8, and because N Co. did not claim that it was unfairly surprised or prejudiced by a defect in the plaintiff's operative complaints, it waived its claim on appeal challenging the legal sufficiency thereof; moreover, to the extent that N Co.'s claim challenged the sufficiency of M's evidence relating to the ownership of the respective properties at the time the mortgages were executed, this court found no error, as a review of the record revealed that at trial, the notes, mortgage deeds, and guarantees pertaining to the subject properties were offered into evidence by M, without objection, as part of his case-in-chief and were admitted as full exhibits, and the mortgage deeds themselves identified the named defendants as the grantors of the properties at issue.

4. N Co. could not prevail in its claim that the trial court improperly denied, without cause, its right to make closing arguments or to file posttrial briefs in lieu of closing arguments under the applicable rule of practice (§ 15-5 [a]): the record reflected that N Co.'s counsel did not request to make a closing argument at the close of evidence, there was no indication that the court expressed any refusal to permit closing arguments, and, in the absence of any statement from N Co.'s counsel to the court indicating that he wanted to make a closing argument, N Co. waived its claim concerning closing argument; moreover, N Co.'s claim that the court erred in refusing to permit the parties to submit posttrial briefs in violation of § 15-5 (a) was unavailing, as § 15-5 (a) is silent as to posttrial briefs and creates no independent obligation on the part of the court to permit their submission, the record reflects that N Co.'s counsel requested the court's permission to file posttrial briefs only with respect

to one of the foreclosure actions, the appeal as to which was previously withdrawn, and, accordingly, N Co.'s contention was rendered moot as to that action and was deemed waived as to the four actions pending on appeal.

Argued November 15, 2018—officially released August 6, 2019

Procedural History

Actions to foreclose mortgages on certain real properties, and for other relief, brought to the Superior Court in the judicial district of Waterbury, Complex Litigation Docket, where the foreclosure claims were jointly tried to the court, *Shaban, J.*; thereafter, the court, *Shaban, J.*, denied the motion to dismiss filed by the defendant 500 North Avenue, LLC, and rendered judgments of strict foreclosure; subsequently, the defendant 500 North Avenue, LLC, was substituted as a defendant in the second, third, and fourth actions, and the defendant 500 North Avenue, LLC appealed to this court. *Affirmed.*

Jonathan J. Klein, with whom, on the brief, was *Stephen R. Bellis*, for the appellant (defendant 500 North Avenue, LLC).

James M. Nugent, with whom, on the brief, was *James R. Winkel*, for the appellee (plaintiff).

Opinion

MOLL, J. The only defendant participating in this appeal, 500 North Avenue, LLC,[1] appeals from the judgments of strict foreclosure, rendered after a court trial,

[1] Although the joint appeal form identifies defendants Cell Phone Club, Inc., City Streets, Inc., Millionair Club, Inc., and Outlaw Boxing Kats, Inc., as appellants (in addition to 500 North Avenue, LLC), such parties are not mentioned in the "appellants' brief," nor is there any claim as to how they have been aggrieved by the judgments of the trial court. The only reference to such parties in each of the court's memoranda of decision is that such parties "are named in the first count as parties who may claim an interest in the property." In addition, in stating his appearance during oral argument before this court, counsel for "the appellants" identified 500 North Avenue, LLC, as the sole appellant. We deem, therefore, 500 North Avenue, LLC, to be the only participating defendant in this appeal. In light of the foregoing, and because these foreclosure actions involved numerous other defendants

in four jointly tried foreclosure actions commenced by the plaintiff, Manuel Moutinho, Trustee for the Mark IV Construction Company, Inc., 401 (K) Savings Plan.[2] On appeal, the defendant claims[3] that the trial court erred when it (1) failed to rule on the defendant's motion for a judgment of dismissal for failure to make out a prima facie case pursuant to Practice Book § 15-8 (motion to dismiss) at the close of the plaintiff's case-in-chief, (2) denied the defendant's motion to dismiss, and (3) denied, without cause, the defendant's right to make closing arguments or to file posttrial briefs in lieu of closing arguments pursuant to Practice Book § 15-5 (a).[4]

that are not participating in this appeal, we refer to 500 North Avenue, LLC, as "the defendant."

[2] The trial court heard the following eight foreclosure actions: (1) *Manuel Moutinho, Trustee* v. *3044 Main, LLC*, Superior Court, judicial district of Waterbury, Docket No. CV-10-6013994-S (*3044 Main*); (2) *Manuel Moutinho, Trustee* v. *500 North Avenue, LLC*, Superior Court, judicial district of Waterbury, Docket No. CV-10-6013996-S (*500 North Avenue*); (3) *Manuel Moutinho, Trustee* v. *1794 Barnum Avenue, Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-10-6013997-S (*1794 Barnum Avenue I*); (4) *Manuel Moutinho, Trustee* v. *1794 Barnum Avenue, Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-10-6013998-S (*1794 Barnum Avenue II*); (5) *Manuel Moutinho, Trustee* v. *Red Buff Rita, Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-11-6013990-S (*Red Buff Rita*); (6) *Manuel Moutinho, Trustee* v. *2060 East Main Street, Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-11-6014002-S (*2060 East Main Street*); (7) *Manuel Moutinho, Trustee* v. *Anthony Estates Developers, LLC*, Superior Court, judicial district of Waterbury, Docket No. CV-10-6014003-S (*Anthony Estates*); and (8) *Manuel Moutinho, Trustee* v. *D.A. Black, Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-10-6014733-S (*D.A. Black*).

On May 17, 2018, the appeal was withdrawn as to *3044 Main*, *2060 East Main Street*, *Anthony Estates*, and *D.A. Black*. With regard to the four actions that remain pending on appeal, the defendant was the original named defendant in *500 North Avenue* and was substituted as a party defendant for the named defendants in *1794 Barnum Avenue I*, *1794 Barnum Avenue II*, and *Red Buff Rita*.

[3] For ease of discussion, we address the defendant's claims in a different order than they appear in its appellate brief.

[4] In its principal appellate brief, the defendant makes three additional claims of error in connection with *2060 East Main Street*, *Anthony Estates*, *D.A. Black*, and *Red Buff Rita*. We decline to address the defendant's claims with respect to *2060 East Main Street*, *Anthony Estates*, and *D.A. Black*

With respect to the defendant's first and second claims, we conclude that (1) such claims are not reviewable pursuant to our Supreme Court precedent and (2) in the alternative, they fail on the merits. With respect to the defendant's third claim, we find no error. Accordingly, we affirm the judgments of the trial court.

The following procedural history and facts, as found by the trial court, are relevant to the defendant's claims. The original mortgagors, namely, the defendant, 3044 Main, LLC, 1794 Barnum Avenue, Inc., Red Buff Rita, Inc., 2060 East Main Street, Inc., Anthony Estates Developers, LLC, and D.A. Black, Inc. (original mortgagors), executed, respectively, promissory notes and mortgages securing those notes, pertaining to certain parcels of commercial real property located in Bridgeport, Milford, and Stratford. Gus Curcio, Sr., executed corresponding personal guarantees. The plaintiff is the owner and holder of the notes, mortgages, and guarantees. At various points in time, the original mortgagors stopped making payments on their respective notes. Consequently, during the period of 2009 to 2011, the plaintiff commenced eight foreclosure actions, asserting foreclosure claims against the original mortgagors and other lienholders and encumbrancers, as well as breach of guarantee claims against Curcio.

In April and May, 2013, the actions were tried together on the plaintiff's foreclosure claims only.[5] On May 1,

because the appeal as to those actions was withdrawn, and the defendant concedes, in its reply brief to this court, that such claims are moot. With respect to *Red Buff Rita*, the defendant claims that the court erred by refusing to consider its memorandum of law in opposition to the plaintiff's motion for summary judgment on the ground that the memorandum was untimely filed in violation of Practice Book § 17-45. The defendant has effectively abandoned this claim, however, as it concedes, in its reply brief to this court, that any claimed error was harmless. Therefore, we decline to review it.

[5] Prior to the commencement of trial, the court granted motions for summary judgment as to liability only filed by the plaintiff in *1794 Barnum Avenue I*, *Red Buff Rita*, and *2060 East Main Street*. The court did not

2013, after the plaintiff had rested his case, counsel for the defendant orally moved, among other things, for a judgment of dismissal on each of the plaintiff's foreclosure claims pursuant to Practice Book § 15-8. The court effectively reserved its decision until after the close of evidence. The defendant proceeded to offer evidence in its case, and the plaintiff's rebuttal case followed. After the close of evidence, the court issued an oral ruling from the bench, denying the motion to dismiss without stating its grounds therefor.

On July 3, 2013, the court issued eight separate memoranda of decision rendering a judgment of strict foreclosure in favor of the plaintiff in each action. On September 18, 2013, this joint appeal followed, and a lengthy period of motions practice ensued thereafter.[6] On May 17, 2018, the appeal was withdrawn as to four of the eight actions, namely, *3044 Main*, *2060 East Main Street*, *Anthony Estates*, and *D.A. Black*, leaving four actions pending on appeal, as follows: (1) *500 North Avenue, LLC*; (2) *1794 Barnum Avenue I*; (3) *1794 Barnum Avenue II*; and (4) *Red Buff Rita*. See footnote 2 of this opinion. We now address the defendant's claims with respect to those four actions. Additional facts and procedural history will be provided as necessary.

I

The defendant's first two claims on appeal relate to its Practice Book § 15-8 motion to dismiss, made orally

restrict the plaintiff's presentation of evidence with respect to those actions, however, during the trial.

[6] Although the July 3, 2013 judgments of strict foreclosure disposed of only a part of the plaintiff's actions, as the plaintiff's claims of breach of guarantee against Curcio were tried at a later date, the judgments are final, appealable judgments, as they disposed of all claims brought against the defendant. See Practice Book § 61-3 ("[a] judgment disposing of only a part of a complaint, counterclaim, or cross complaint is a final judgment if that judgment disposes of all causes of action in that complaint, counterclaim, or cross complaint brought by or against a particular party or parties").

at the close of the plaintiff's case-in-chief. The defendant first claims that the court erred when it failed to rule on its § 15-8 motion to dismiss at the close of the plaintiff's case-in-chief. The defendant next claims, as a substantive matter, that the court erred when it denied its § 15-8 motion to dismiss. These claims are unavailing because we conclude, on the basis of binding Supreme Court precedent, that the court's denial of the defendant's § 15-8 motion to dismiss, as well as the timing thereof, are not appealable.

Practice Book § 15-8, titled "Dismissal in Court Cases for Failure To Make Out a Prima Facie Case," provides: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority *may* grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made." (Emphasis added.) The statutory corollary to this rule of practice is General Statutes § 52-210, which provides: "If, on the trial of any issue of fact in a civil action, the plaintiff has produced his evidence and rested his cause, the defendant may move for judgment as in case of nonsuit, and the court may grant such motion, if in its opinion the plaintiff has failed to make out a prima facie case." "We note that [a] motion for judgment of dismissal has replaced the former motion for nonsuit . . . for failure to make out a prima facie case." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 700 n.9, 900 A.2d 498 (2006).

By way of additional background, we note that neither party raised the question of whether a trial court's *denial* of a motion for a judgment of dismissal pursuant to Practice Book § 15-8 is properly reviewable. On

March 22, 2019, this court sent the parties the following notice: "The parties are hereby ordered to file, on or before April 1, 2019, simultaneous supplemental briefs, of no longer than 5 pages in length, limited to the following issue: Whether the trial court's *denial* of the defendant['s] motion for judgment of dismissal pursuant to Practice Book § 15-8 is properly reviewable in light of Supreme Court precedent. See, e.g., *Rice* v. *Foley*, 98 Conn. 372, 373, 119 A. 353 (1923) ('The refusal of the court to grant defendant's motion for a nonsuit is not appealable.'); *Bennett* v. *Agricultural Ins. Co.*, 51 Conn. 504, 512 (1884) ('The refusal of the court to grant the motion for nonsuit, being matter committed to the discretion of the court, is not reviewable on application of the defendant.')." (Emphasis in original.) Thereafter, the parties submitted supplemental briefs.

In the context of the former motion for nonsuit for failure to make out a prima facie case, our Supreme Court repeatedly has held, in a body of century-old cases, that the *denial* of such a motion is not reviewable on appeal. For example, in *Bennett* v. *Agricultural Ins. Co.*, supra, 51 Conn. 512, in an appeal following a jury trial, the court held that "[t]he refusal of the court to grant the motion for nonsuit, being [a] matter committed to the discretion of the court, is not reviewable on application of the defendant. The practice in Connecticut, unlike that of some other states, is regulated by statute. [General Statutes (1875 Rev.) tit. 19, c. XIII, §§ 3, 4.] This statute provides for a nonsuit, not when all the evidence on both sides has been received, but when the plaintiff on his part has submitted his evidence and rested. If the court shall be of [the] opinion that a *prima facie* case is not made out, the court may (not must) grant a nonsuit. If granted the plaintiff has his remedy; if refused the defendant has no remedy on that account, but must go on with the trial and submit the case to the jury, either on the plaintiff's evidence alone,

if he chooses, or upon his own evidence as well . . . .'' Similarly, in *Rice*, in an appeal following a trial to the court, the court held that ''[t]he refusal of the court to grant defendant's motion for a nonsuit is not appealable.'' *Rice* v. *Foley*, supra, 98 Conn. 373. Our research has not revealed any authority that expressly undermines the reviewability holdings of *Bennett*, *Rice*, and the numerous cases of their ilk.

We acknowledge that on subsequent, rare occasion—notably, in cases where the question of reviewability was not raised—our Supreme Court, as well as this court, have reviewed the merits of appeals from the denial of Practice Book § 15-8 motions for a judgment of dismissal for failure to make out a prima facie case. See, e.g., *Statewide Grievance Committee* v. *Burton*, 299 Conn. 405, 417–18, 10 A.3d 507 (2011); *Cadle Co.* v. *Errato*, 71 Conn. App. 447, 450–60, 802 A.2d 887, cert. denied, 262 Conn. 918, 812 A.2d 861 (2002). Nevertheless, ''[a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions.'' (Internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 605 n.5, 197 A.3d 959 (2018), cert. denied, 332 Conn. 907, 209 A.3d 643 (2019).

In the present case, on the basis of the foregoing, we conclude that the court's denial of the defendant's Practice Book § 15-8 motion to dismiss, and the timing thereof, are not reviewable on appeal.

II

Notwithstanding the foregoing conclusion, which is not a subject matter jurisdictional bar to the discussion that follows, we offer an alternative analysis, addressing the merits of the defendant's claims relating to its Prac-

tice Book § 15-8 motion to dismiss. We first address the defendant's claim that the court erred when it failed to rule on the defendant's § 15-8 motion to dismiss at the close of the plaintiff's case-in-chief. Specifically, the defendant argues, without any specificity, that, by deferring its decision until the close of evidence, the court necessarily had its judgment clouded as to the sufficiency of the plaintiff's evidence presented in its case-in-chief. This claim is unavailing.

We return to the language of Practice Book § 15-8: "If, on the trial of any issue of fact in a civil matter tried to the court, the plaintiff has produced evidence and rested, a defendant may move for judgment of dismissal, and the judicial authority *may* grant such motion if the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made." (Emphasis added.) The defendant contends, without any citation to authority or reference to particular language within § 15-8, that the court erred by deferring its ruling on the defendant's motion to dismiss. The plaintiff argues in contrast, also without reference to particular language within § 15-8, that the court did not err in reserving its decision until after the close of evidence because trial courts routinely reserve decision under Practice Book § 15-8.

We pause to observe that the parties have pressed for competing applications of Practice Book § 15-8 as though the issue were one of first impression. It is not. The issue of the timeliness of a court's ruling after the close of evidence on a motion for a judgment of dismissal previously was considered by our Supreme Court in *Cormier* v. *Fugere*, 185 Conn. 1, 440 A.2d 820 (1981). In that case, after unsuccessfully moving for a judgment of dismissal pursuant to Practice Book (1978–

97) § 302[7]—the nearly identical predecessor to § 15-8—after the plaintiffs had rested their case, in part on the ground that the plaintiffs had failed to make out a prima facie case, the defendants moved for a judgment of dismissal for a second time, on the essentially identical ground, after resting *their* case and without producing any additional evidence. Id., 2. Upon reconsideration, the trial court granted the second motion. Id. On appeal, our Supreme Court stated: "A motion for judgment of dismissal must be made by the defendant *and decided by the court* after the plaintiff has rested his case, but before the defendant produces evidence. Practice Book § 302 [1978–97]; General Statutes § 52-210; *Bennett* v. *Agricultural Ins. Co.*, [supra, 51 Conn. 512]; Stephenson, Conn. Civ. Proc. (2d Ed.) §§ 192e and 193b. In this case, both the defendants' filing of the second motion for judgment of dismissal *and the court's granting of it* were untimely." (Emphasis added.) *Cormier* v. *Fugere*, supra, 2. Because none of the parties in *Cormier* raised on appeal a claim related to the untimeliness of the second motion or of the trial court's ruling thereon, our Supreme Court did not address the issue further. Id., 2–3. Instead, our Supreme Court addressed on the merits the trial court's granting of the second motion, examined the record of the proceedings below, and found that the plaintiffs had failed to produce evidence sufficient to prove causation. Id., 3, 6–7. Thereupon, our Supreme Court affirmed the trial court's granting of the second motion for a judgment of dismissal. Id., 7.

[7] Practice Book (1978–97) § 302 provided: "If, on the trial of any issue of fact in a civil action tried to the court, the plaintiff has produced his evidence and rested his cause, the defendant may move for judgment of dismissal, and the court may grant such motion, if in its opinion the plaintiff has failed to make out a prima facie case. The defendant may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made." The minor differences between the revisions, which resulted from amendments effective January 1, 2009, have no bearing on our decision.

For purposes of the present appeal, we focus our attention on our Supreme Court's pronouncement in *Cormier* that "[a] motion for judgment of dismissal must be made by the defendant *and decided by the court* after the plaintiff has rested his case, *but before the defendant produces evidence*." (Emphasis added.) *Cormier* v. *Fugere*, supra, 185 Conn. 2. This precise language was most recently cited approvingly by the Supreme Court in *Machado* v. *Taylor*, 326 Conn. 396, 402, 163 A.3d 558 (2017).[8] Despite the absence of any citation to *Cormier* in the parties' respective appellate briefs, and notwithstanding the parties' advocating that this court should engage in an original interpretation of Practice Book § 15-8, we are again constrained by the axiom that "[a]s an intermediate appellate court, we are bound by Supreme Court precedent and are unable to modify it . . . . [W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." (Internal quotation marks omitted.) *State* v. *Montanez*, supra, 185 Conn. App. 605 n.5.

Accordingly, applying the principle set forth in *Cormier* v. *Fugere*, supra, 185 Conn. 2, namely, that "[a] motion for judgment of dismissal must be . . . decided by the court . . . before the defendant produces evidence," we conclude, as an initial matter, that the court acted in an untimely manner when it ruled on the defendant's motion to dismiss after the close of evidence. We nonetheless conclude, however, that any error in the timing of the rendering of the court's decision on the motion to dismiss was harmless.

[8] In *Machado* v. *Taylor*, supra, 326 Conn. 401–402, the court held, inter alia, that the defendant waived a claim that the plaintiff failed to make out a prima facie case by filing an untimely motion under Practice Book § 15-8 following the close of evidence.

"The standard for determining whether the plaintiff has made out a prima facie case, under Practice Book § 15-8, is whether the plaintiff put forth sufficient evidence that, if believed, would establish a prima facie case, not whether the trier of fact believes it. . . . For the court to grant the motion [for judgment of dismissal pursuant to § 15-8], it must be of the opinion that the plaintiff has failed to make out a prima facie case. In testing the sufficiency of the evidence, the court compares the evidence with the allegations of the complaint. . . . In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove. . . . [T]he evidence offered by the plaintiff is to be taken as true and interpreted in the light most favorable to [the plaintiff], and every reasonable inference is to be drawn in [the plaintiff's] favor." (Emphasis omitted; internal quotation marks omitted.) *In re Natalie J.*, 148 Conn. App. 193, 204, 83 A.3d 1278, cert. denied, 311 Conn. 930, 86 A.3d 1056 (2014); see also *Charter Oak Lending Group, LLC* v. *August*, 127 Conn. App. 428, 437, 14 A.3d 449 ("relatively low standard" necessary to withstand defendant's § 15-8 motion to dismiss), cert. denied, 302 Conn. 901, 23 A.3d 1241 (2011). "Once a case is ultimately presented to the factfinder for final decision, [however,] an entirely different analysis is applied. Rather than being required to take as true the evidence offered by the plaintiff, the trier of fact can disbelieve any evidence, even if uncontradicted. . . . In addition, the trier of fact is no longer bound to interpret the evidence in the light most favorable to the plaintiff, or to draw every reasonable inference therefrom, for it is axiomatic that it is within the province of the trier of facts to assess the credibility of witnesses." (Citations omitted.) *Berchtold* v. *Maggi*, 191 Conn. 266, 272, 464 A.2d 1 (1983); see also *Sonepar Distribution New England, Inc.* v. *T & T Electrical Contractor's*,

Inc., 133 Conn. App. 752, 755, 37 A.3d 789 (2012) ("We agree that the preponderance of the evidence standard is inapplicable to a motion to dismiss for failure to make out a prima facie case, but conclude that the court's error in applying the preponderance standard was harmless, as ultimately the court was the trier of fact.").

Here, in ultimately rendering judgment in favor of the plaintiff in each of the actions, the court concluded, at a time when it was permitted to weigh credibility and make findings of fact, that the plaintiff in fact sustained his burden of proof, which is supported by evidence presented during the plaintiff's case-in-chief. Notably, the defendant does not challenge any of the court's factual findings, nor does it cite to any finding of the trial court that could only have been made on the basis of evidence presented in the defendant's case-in-chief. In light of the foregoing, we are unpersuaded by the defendant's timeliness claim.

III

The defendant also claims, as a substantive matter, that the court erred when it denied its motion to dismiss made pursuant to Practice Book § 15-8. Distilled to its essence, the defendant's claim is one of pleading deficiency, specifically, that, as part of the plaintiff's prima facie case for foreclosure, the plaintiff was required to have *pleaded* that the original mortgagors, as the owners of the equity of redemption, were the title owners of the respective properties at the time the mortgages were executed. The defendant argues that the plaintiff's failure to include such allegations in the operative complaints resulted in a material variance between the pleadings and the evidence presented and caused the plaintiff to fall short of *pleading* and, therefore, proving

a prima facie case in each of the actions.[9] This claim also fails.

As a threshold matter, we decline to address the defendant's arguments concerning the legal sufficiency of the plaintiff's operative complaints at this late stage of the proceedings. "[A] judgment ordinarily cures pleading defects . . . . The absence of a requisite allegation in a complaint that would have justified the granting of a motion to strike . . . is not a sufficient basis for vacating a judgment unless the pleading defect has resulted in prejudice. [I]f parties will insist on going to trial on issues framed in a slovenly manner, they must abide the verdict; judgment will not be arrested for faults in statement when facts sufficient to support the judgment have been substantially put in issue and found. . . . Want of precision in alleging the cause of an injury for which an action is brought, is waived by contesting the case upon its merits without questioning such defect." (Internal quotation marks omitted.) *Service Road Corp.* v. *Quinn*, 241 Conn. 630, 636, 698 A.2d 258 (1997).

[9] In opposition, the plaintiff argues, inter alia, that the defendant did not raise this ground in support of its motion to dismiss before the trial court, and, thus, the issue has been waived. Contrary to the plaintiff's assertion, however, the record demonstrates that, during trial, the defendant raised the issue of whether the plaintiff pleaded and proved that the original mortgagors were the owners of the mortgaged properties at the time that the mortgages were executed. Specifically, during argument on the defendant's motion to dismiss, the defendant's counsel argued that "the plaintiff failed to make a prima facie case because the plaintiff did not plead and did not prove that the mortgagor was the owner of the property at the time the loan was made. Only an owner of property can give a mortgage in Connecticut and the owner transfers title under the title theory in Connecticut. The forms provided in the Practice Book for foreclosure of a mortgage include the allegation that the party who made the loan was the owner of the property. The forms provided in [Caron] on [F]oreclosures, which have been cited many times [by] the [c]ourts, [provide] that the plaintiff [must] allege that the mortgagor was the owner of the property. That was not alleged and not proven. And, therefore, Your Honor, since they did not prove that the owner of the property gave them a mortgage on the property all of the cases should be dismissed." In light of the foregoing, we disagree with the

Our Supreme Court's analysis in *Service Road Corp.* v. *Quinn*, supra, 241 Conn. 630, is particularly instructive. In that case, "[i]nstead of submitting a motion to strike the plaintiffs' amended complaint, the defendants waited until the close of the plaintiffs' evidence and then moved, pursuant to Practice Book [1978–97] § 302 [the predecessor to Practice Book § 15-8], for a judgment of dismissal for failure of the plaintiffs to make out a prima facie case. Thus, the defendants challenged the sufficiency of the plaintiffs' evidence rather than the sufficiency of their pleading. Because the defendants did not raise their argument concerning the sufficiency of the plaintiffs' pleading in the trial court and have failed to demonstrate that they in any way were prejudiced by the plaintiffs' amended complaint, we conclude that the defendants have waived this claim." (Footnotes omitted.) Id., 636–37.

The same analysis applies here. Instead of moving to strike the plaintiff's complaints in the various actions on the basis of the purported absence of a material allegation, the defendant waited until the close of the plaintiff's case to challenge the sufficiency of the plaintiff's operative pleadings by way of its Practice Book § 15-8 motion to dismiss for failure to make out a prima facie case. Such use of § 15-8 is procedurally improper. Because the defendant has not claimed, either in its briefs or at oral argument to this court, that it was unfairly surprised or prejudiced by a defect in the plaintiff's operative complaints, we conclude that the defendant has waived its claim on appeal challenging the legal sufficiency thereof. *Service Road Corp.* v. *Quinn*, supra, 241 Conn. 637.

Moreover, to the extent that the defendant's claim challenges the sufficiency of the plaintiff's *evidence*

plaintiff that the defendant failed to raise this claim before the trial court as part of its motion to dismiss.

relating to the ownership of the respective properties at the time the mortgages were executed, we find no error. Our review of the record reveals that at trial, the notes, mortgage deeds, and guaranties pertaining to the subject properties were offered into evidence by the plaintiff, without objection, as part of his case-in-chief and were admitted as full exhibits. The mortgage deeds themselves identify the named defendants as the grantors of the properties at issue, and each deed provides, in relevant part, that the grantor "is well seized of the premises . . . ."

On the basis of the foregoing, we conclude that the court properly denied the defendant's motion to dismiss.

IV

The defendant makes the final claim that the court erred when it denied, without cause, its right (1) to make closing arguments or (2) to file posttrial briefs in lieu of closing arguments pursuant to Practice Book § 15-5 (a). We disagree and address these contentions in turn.

The following standard of review and legal principles are applicable to the defendant's claim. "The interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation. . . . The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . In seeking to determine [the] meaning [of a statute or rule of practice, we] . . . first . . . consider the text of the statute [or rule] itself and its relationship to other statutes [or rules]. . . . If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence . . . shall not be considered. . . . When

[the provision] is not plain and unambiguous, we also look for interpretive guidance to the . . . history and circumstances surrounding its enactment, to the . . . policy it was designed to implement, and to its relationship to existing [provisions] and common law principles governing the same general subject matter . . . . We recognize that terms [used] are to be assigned their ordinary meaning, unless context dictates otherwise. . . . Put differently, we follow the clear meaning of unambiguous rules, because [a]lthough we are directed to interpret liberally the rules of practice, that liberal construction applies only to situations in which a strict adherence to them [will] work surprise or injustice." (Citations omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 594–95, 181 A.3d 550 (2018).

We begin our analysis of the defendant's claim by turning to the text of Practice Book § 15-5 (a). Section 15-5 (a) provides: "Unless the judicial authority for cause permits otherwise, the parties shall proceed with the trial and argument in the following order: (1) The plaintiff shall present a case-in-chief. (2) The defendant may present a case-in-chief. (3) The plaintiff and the defendant may present rebuttal evidence in successive rebuttals, as required. The judicial authority for cause may permit a party to present evidence not of a rebuttal nature, and if the plaintiff is permitted to present further evidence in chief, the defendant may respond with further evidence in chief. (4) *The plaintiff shall be entitled to make the opening and final closing arguments.* (5) *The defendant may make a single closing argument following the opening argument of the plaintiff.*" (Emphasis added.) In accordance with § 15-5 (a), "in civil and family cases, a trial court may, for cause, elect to accept legal briefs in lieu of oral closing arguments." *de Repentigny* v. *de Repentigny*, 121 Conn. App. 451, 456, 995 A.2d 117 (2010). "[W]hen considering whether

there was cause for a court to [deviate from the procedures] prescribed in Practice Book § 15-5 (a), we review the decision of the court under the abuse of discretion standard. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Citation omitted; internal quotation marks omitted.) *Pan Handle Realty, LLC* v. *Olins*, 140 Conn. App. 556, 563–64, 59 A.3d 842 (2013).

The defendant first contends that the court erred in refusing to permit closing arguments. We reject this contention because the record reflects that the defendant's counsel did not request to make a closing argument at the close of evidence, and there is no indication that the court otherwise expressed any refusal to permit closing arguments. While Practice Book § 15-5 (a) confers the right to make a closing argument (subject to the court's power to depart from that procedure for cause); *Pan Handle Realty, LLC* v. *Olins*, supra, 140 Conn. App. 563–64; a party has the option to forgo making a closing argument in a civil matter. See Practice Book § 15-5 (a) (4) ("[t]he plaintiff shall be entitled to make the opening and final closing arguments") and (5) ("[t]he defendant *may* make a single closing argument following the opening argument of the plaintiff" [emphasis added]). Thus, in the absence of any statement from the defendant's counsel to the trial court indicating that he wanted to make a closing argument, we deem the defendant's first contention to be waived.[10] See *Apple Salon* v. *Commissioner of Public Health*, 132 Conn. App. 332, 334, 33 A.3d 755 (2011) ("Waiver is the

[10] Notwithstanding our conclusion herein, we emphasize that, rather than permitting the record to remain silent on the issue of closing arguments, the better practice is for the trial court to make a clear record as to whether counsel or any self-represented party wants to make a closing argument.

intentional relinquishment or abandonment of a known right or privilege. . . . Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." [Internal quotation marks omitted.]).

The defendant next contends that the court erred in refusing to permit the parties to submit posttrial briefs in violation of Practice Book § 15-5 (a). This contention fails for two reasons. First, § 15-5 (a) is silent as to posttrial briefs and creates no independent obligation on the part of the trial court to permit their submission. Second, the record reflects that the defendant's counsel requested the court's permission to file posttrial briefs only with respect to the *Anthony Estates* case,[11] the appeal as to which has been withdrawn. See footnote

[11] The following exchange occurred between counsel and the court:

"The Court: I'll be issuing a memorandum of decision on each of these files and I am not going to require any briefs from any of the parties. I don't believe they're necessary in this case. . . .

"And at this point then, hopefully I've addressed I think those things that I need to address relative to issuing a decision in the case. Is there anything that I've overlooked from any angle as a procedural matter? . . .

"[The Defendant's Counsel]: Your Honor, with regards to Anthony Estates, Your Honor, I respectfully request the right to do briefs, Your Honor. There's the bankruptcy issues [that] were raised, evidence is in the court and I think bankruptcy law is essential to be looked at for the court to measure the testimony of the witnesses and the exhibits that are before the court. I don't think it's possible to do without them.

"The Court: All right. Anybody else want to be heard on that request?

"[The Plaintiff's Counsel]: Yes, Your Honor. I would object to that request. I think the facts are very strong one way and need no interpretation on any complex issue. It's a matter of contract.

"The Court: All right. I agree. I don't know that—And I understand, with all due respect, your request for briefs, Mr. Bryk [the defendant's counsel]. I don't think that they're necessary in this case, so I will not require any briefs from the parties."

The record further demonstrates that, just prior to adjournment, the court posed one final inquiry to all counsel, asking whether there were any other matters for the court to address, and the defendant's counsel responded in the negative.

2 of this opinion. Therefore, the defendant's second contention has been rendered moot as to *Anthony Estates* and is deemed waived as to the four actions pending on appeal. See *Apple Salon* v. *Commissioner of Public Health*, supra, 132 Conn. App. 334.

The judgments are affirmed, and the cases are remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

ANGELA DUDLEY *v.* COMMISSIONER OF TRANSPORTATION ET AL.
(AC 40702)

DiPentima, C. J., and Prescott and Bright, Js.

Syllabus

The plaintiff sought to recover damages from the defendant Commissioner of Transportation for injuries she sustained as a result of an allegedly defective manhole cover, which flipped up when she stepped onto it, causing her to lose her balance and fall into the manhole. The defendant filed a motion to dismiss the action, claiming, inter alia, that the written notice of claim, which the plaintiff had filed pursuant to the state highway defect statute (§ 13a-144), was patently defective because it failed to provide the defendant with sufficient notice of the location of the allegedly defective manhole cover, which thereby deprived the court of subject matter jurisdiction. The trial court concluded that the notice met the minimum requirements of § 13a-144 and rendered judgment denying the motion to dismiss, from which the defendant appealed to this court. *Held*:

1. The trial court properly denied the defendant's motion to dismiss, as the plaintiff's written notice of claim provided sufficient information regarding the location of the allegedly defective manhole cover and, therefore, was not patently defective; contrary to the defendant's claim that the notice was vague and inaccurate and, thus, implicated the state's sovereign immunity, the plaintiff provided the defendant with notice describing the location of the defective manhole cover as on the sidewalk at the intersection of two state roads and stating that she had fallen into the sewage drainage system running underneath the sidewalk, and although the notice contained some descriptions of the location that were technically imprecise or vague, cartographical precision was not a legal requirement, and the notice, when viewed in light of the additional context provided therein, reasonably could be construed as containing sufficient information to identify the allegedly defective manhole cover

at issue, because even though there were three manholes at the intersection in question, only one could be regarded as within a sidewalk area as described by the plaintiff.

2. The defendant's claim that the statutory waiver of sovereign immunity did not apply because the state did not have a duty to maintain the sidewalk area in question and that its responsibility to maintain sidewalks extended only to the limited sidewalks on which a statute conferred such duty was unavailing; even though the incident allegedly occurred adjacent to, as opposed to directly on, a state highway, the allegedly defective manhole cover was within the definition of a highway defect pursuant to § 13a-144, as the record reflected that the allegedly defective manhole cover was located near the traveled portion of the state highway, arguably within the state's right-of-way line, and that the allegedly defected manhole cover served the state owned and operated highways, and existed solely to service the state highway as a means of access to the storm drain; moreover, a question of fact remained as to whether the waiver of sovereign immunity applied because the manhole in question was located between the state owned road and a stone wall, and there were no survey or boundary markers to delineate the state's right-of-way lines along the adjacent road to the allegedly defective manhole cover.

3. Contrary to the defendant's claim, the plaintiff could be considered a traveler on a highway for purposes of § 13a-144; although the defendant claimed that the plaintiff was a pedestrian traveling by foot and had not ventured incidentally onto the sidewalk and, therefore, that her travel was not for a purpose connected with travel over a state highway within the meaning of § 13a-144, the state may be held liable for injuries occurring in an area adjacent to a state highway, and a finder of fact reasonably could have concluded that her travel was incidental to and for purposes of travel on a highway, as the plaintiff testified that it was her intention to cross the intersection in question, and the notice alleged that she was walking on foot toward the state owned highway on the sidewalk.

Argued February 14—officially released August 6, 2019

Procedural History

Action to recover damages for, inter alia, personal injuries sustained as a result of an allegedly defective state highway, and for other relief, brought to the Superior Court in the judicial district of New London, where the action was withdrawn as against the defendant city of New London; thereafter, the court, *Cole-Chu*, *J.*, denied the named defendant's motion to dismiss, and the named defendant appealed to this court. *Affirmed.*

Lorinda S. Coon, with whom, on the brief, was *Jessica M. Scully*, for the appellant (defendant).

Thor Holth, with whom, on the brief, was *Lorena P. Mancini*, for the appellee (plaintiff).

Opinion

PRESCOTT, J. In this action, brought, in part, pursuant to the state defective highway statute, General Statutes § 13a-144,[1] the defendant, James P. Redeker, the Commissioner of Transportation (state),[2] appeals from the judgment of the trial court denying the state's motion to dismiss the claims asserted against it on sovereign immunity grounds.[3] The state claims that the court improperly denied the motion to dismiss because (1) the notice of claim (notice) provided by the plaintiff, Angela Dudley, pursuant to § 13a-144, was patently defective in its description of the location of the alleged defect, and (2) the state did not have a duty to maintain and repair the area in question. We affirm the judgment of the trial court.

[1] General Statutes § 13a-144, which serves as a waiver of the state's sovereign immunity for monetary claims seeking recovery for injuries caused by highway defects, provides in relevant part: "Any person injured in person or property through the neglect or default of the state . . . by means of any defective highway, bridge or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. No such action shall be brought except within two years from the date of such injury, nor unless notice of such injury and a general description of the same and of the cause thereof and of the time and place of its occurrence has been given in writing within ninety days thereafter to the commissioner . . . ."

[2] Although the plaintiff's operative complaint named both the state and the city of New London (city) as defendants, the action later was withdrawn as to the city, and, therefore, any reference to the defendant is to the state only.

[3] "Although the denial of a motion to dismiss generally is an interlocutory ruling that does not constitute an appealable final judgment, the denial of a motion to dismiss filed on the basis of a colorable claim of sovereign immunity is an immediately appealable final judgment." *Filippi* v. *Sullivan*, 273 Conn. 1, 6 n.5, 866 A.2d 599 (2005).

The plaintiff alleges the following facts.[4] On or about June 5, 2012, the plaintiff was walking on the sidewalk adjacent to Route 643, Lee Avenue, in New London, and was heading toward Route 213, Ocean Avenue. On or about June 1, 2012, and for several months prior, new utilities had been placed under the paved portion of Ocean Avenue, in an area close to Lee Avenue. During the course of construction, a manhole or inspection plate located at the intersection of Lee and Ocean Avenues was opened so that workers could access items underneath. Once the work was completed, one or more employees, agents, servants, or subcontractors for the state replaced the manhole cover in such a manner as to leave it dislodged or otherwise unstable.

When the plaintiff arrived at the portion of the sidewalk located at the corner of Ocean and Lee Avenues, she stepped onto the manhole cover, which was located in the grassy embankment between the sidewalk area and the adjacent street. When she stepped onto the manhole cover, it flipped up and struck her. The plaintiff lost her balance and fell through the exposed manhole into the sewage drain system. Consequently, the plaintiff suffered physical injury, emotional distress, and has a diminished capacity to earn a living.

The plaintiff provided the state with written notice on August 8, 2012, advising the state of the injuries she sustained from the allegedly defective manhole cover. The notice describes the place of injury as "[s]idewalk and/or intersection of Lee Avenue and Ocean Avenue, New London, Connecticut." It further states, in relevant part: "Cause of Injury and Defect: At approximately 5:20 p.m., June 5, 2012, [the plaintiff] was walking towards and/or onto Ocean Avenue, a State of Connecticut owned or maintained road, with due care along and/

[4] The plaintiff's factual allegations were set forth in her notice and operative complaint. The state did not answer these factual allegations but, instead, as discussed later in this opinion, filed several motions in response.

or upon the sidewalk located at the northeast side of the intersection of Ocean Avenue and Lee Avenue when she was caused to fall by her foot landing on an improperly placed or replaced manhole cover which flipped/tipped up and struck her, causing her to lose her balance and fall partially into the manhole and thereafter fail to regain her balance. The incident was caused by the defective and/or dangerous condition of the sidewalk and/or manhole cover, the State of Connecticut Department of Transportation's failure to remedy same, and/or its agents', servants' and/or employees' failure to remedy same. . . .

"As a result of her fall, [the plaintiff] was caused to fall into the sewage drainage system running under the sidewalk and/or street and was caused to land knee-deep in the contaminated water therein."

The plaintiff commenced this action on May 28, 2014. The operative complaint, filed on December 16, 2014, alleges four counts. The first count alleges that the plaintiff is entitled to relief against the state pursuant to § 13a-144. The second count is a municipal highway defect claim against the city pursuant to General Statutes § 13a-149. The third and fourth counts sound in negligence and nuisance, respectively, and are directed against the director of the New London Public Works, Timothy Hanser.[5]

On August 11, 2015, pursuant to Practice Book § 10-30 et seq., the state filed a motion to dismiss count one of the complaint, arguing that the plaintiff had failed to comply with the notice requirements of § 13a-144 and, therefore, her action against the state was barred

[5] Hanser filed a motion to strike counts three and four of the plaintiff's revised complaint, arguing that the common-law claims set forth therein were not legally cognizable causes of action because § 13a-149 provides the plaintiff's sole basis for relief. The court agreed with Hanser and, accordingly, granted his motion to strike on August 14, 2015.

by sovereign immunity. In its original motion to dismiss, dated August 11, 2015, the state claimed that the notice was patently defective for three reasons: (1) the location of the alleged incident was different from that which the plaintiff identified in her complaint; (2) the notice of the claim identified multiple locations; and (3) the area described in the notice contained multiple manhole covers. The state filed an amended motion to dismiss on December 15, 2015, which incorporated the three reasons set forth in its original motion to dismiss and additionally alleged that count one was barred by sovereign immunity because the plaintiff did not allege that the incident occurred on a state highway and, therefore, the state did not have a duty to maintain or repair the sidewalk on which the plaintiff allegedly was injured. The court heard oral argument on the state's motion to dismiss on June 30, 2016. On August 17, 2016, the court received the last of several posthearing briefs on the matter.

The court filed a memorandum of decision on June 9, 2017, rejecting all four of the state's claimed grounds for dismissal. In its analysis, the court consolidated its discussion of the first three grounds related to whether the plaintiff's notice was patently defective. Recognizing that the purpose of such notice is to provide the state with adequate information upon which it can make a timely investigation of the alleged facts, the court concluded that the notice provided sufficient factual information upon which the state reasonably could identify the location of the allegedly defective manhole cover. In particular, the court noted that the notice states that the plaintiff was walking on a sidewalk at the time of the incident and, further, that only one of the manhole covers in the area described in the notice is located within a sidewalk. Accordingly, the court concluded that the notice was not patently defective.

As to the fourth ground of the amended motion to dismiss, the court determined that the plaintiff's argument was not that the state had a duty to maintain the sidewalk, but instead, that the state had a duty to maintain the allegedly defective manhole cover. It concluded that further factual development was necessary to resolve this matter and, thus, rejected the state's argument that it is not liable as a matter of law. This appeal followed. Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the relevant principles of law and the applicable standard of review. "It is the established law of our state that the state is immune from suit unless the state, by appropriate legislation, consents to be sued. . . . The legislature waived the state's sovereign immunity from suit in certain prescribed instances by the enactment of § 13a-144. . . . The statute imposes the duty to keep the state highways in repair upon . . . the commissioner . . . and authorizes civil actions against the state for injuries caused by the neglect or default of the state . . . by means of any defective highway . . . . There being no right of action against the sovereign state at common law, the [plaintiff] must first prevail, if at all, under § 13a-144. . . .

"[T]he doctrine of sovereign immunity implicates [a court's] subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . In ruling on a motion to dismiss for lack of subject matter jurisdiction, the trial court must consider the allegations of the complaint in their most favorable light . . . including those facts necessarily implied from the allegations . . . ." (Citations omitted; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, 322 Conn. 344, 348, 141 A.3d 784 (2015).

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

"In contrast, if the complaint is supplemented by undisputed facts established by [1] affidavits submitted in support of the motion to dismiss . . . [2] other types of undisputed evidence . . . and/or [3] public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts] . . . ."[6] (Footnote added; internal quotation marks omitted.) *Norris* v. *Trumbull*, 187 Conn. App. 201, 209, 201 A.3d 1137 (2019).

"Conversely, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties. . . . The trial court may [also] in its discretion choose to

[6] Other types of undisputed evidence that a trial court may consider in deciding a motion to dismiss includes deposition testimony submitted in support or opposition thereto. *Dorry* v. *Garden*, 313 Conn. 516, 522-23, 98 A.3d 55 (2014).

postpone resolution of the jurisdictional question until the parties complete further discovery or, if necessary, a full trial on the merits has occurred. . . .

"We review a trial court's denial of a motion to dismiss on the ground of sovereign immunity, based on an application of § 13a-144, de novo." (Citations omitted; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 350.

I

The state claims that the court improperly denied its motion to dismiss because the notice provided by the plaintiff pursuant to § 13a-144 was patently defective. The state contends that the notice was so vague and inaccurate with respect to the location of the alleged defect that the plaintiff failed to provide sufficient information upon which the state could investigate the plaintiff's complaint. We disagree.

"The notice requirement contained in § 13a-144 is a condition precedent which, if not met, will prevent the destruction of sovereign immunity." *Lussier* v. *Department of Transportation*, 228 Conn. 343, 354, 636 A.2d 808 (1994). "The notice [mandated under § 13a-144] is to be tested with reference to the purpose for which it is required. . . . The [notice] requirement . . . was not devised as a means of placing difficulties in the path of an injured person. The purpose [of notice is] . . . to furnish the commissioner with such information as [will] enable him to make a timely investigation of the facts upon which a claim for damages [is] being made. . . . The notice requirement is not intended merely to alert the commissioner to the occurrence of an accident and resulting injury, but rather to permit the commissioner to gather information to protect himself in the event of a lawsuit. . . . [In other words] [t]he purpose of the requirement of notice is to furnish the [commissioner] such warning as would prompt him

to make such inquiries as he might deem necessary or prudent for the preservation of his interests, and such information as would furnish him a reasonable guide in the conduct of such inquiries, and in obtaining such information as he might deem helpful for his protection. . . .

"With respect to the degree of precision required of a claimant in describing the place of the injury, in many cases exactness of statement as to place cannot be expected, for the excitement and disturbance caused by the accident . . . make it impossible to observe with any carefulness the place where the accident occur[red] . . . . In such cases reasonable definiteness is all that can be expected or should be required. . . .

"Such precision is, therefore, not essential in order to comply with § 13a-144. . . . [Rather] [u]nder § 13a-144, the notice must provide sufficient information as to the injury and the cause thereof and the time and place of its occurrence to permit the commissioner to gather information about the case intelligently." (Citations omitted; internal quotation marks omitted.) *Filippi* v. *Sullivan*, 273 Conn. 1, 9–10, 866 A.2d 599 (2005).

Applying these principles, we conclude that the court correctly determined that the plaintiff's notice was not patently defective. In the present case, the notice described the site of the alleged incident as the "[s]idewalk located at the northeast side of the intersection of Ocean Avenue and Lee Avenue . . . ." Both parties agree that the area in question contains three manholes. The state, thus, argues that the notice did not adequately identify the allegedly defective manhole. Moreover, according to the state, it was not until the plaintiff was deposed on April 7, 2015, that the state received sufficient information upon which it could identify the specific manhole alleged to be defective.

Notice is patently defective if it (1) states a location different from the actual place of injury, or (2) is so vague that the commissioner could not reasonably be expected to make a timely investigation on the basis of the information provided. *Filippi* v. *Sullivan*, supra, 273 Conn. 10 n.6 (2005). The state contends that the notice was patently defective on both grounds. First, the state contends that the notice was inaccurate as to the actual place of injury because no manhole was located at the "northeast side" of the intersection, but instead, was located at the northwest area of the intersection. The state additionally contends that the notice was vague because it was worded in such a way so as to not commit to a specific location, but instead, described the location as the "[s]idewalk and/or intersection of Lee Avenue and Ocean Avenue" and alleged that the plaintiff "was walking towards and/or onto Ocean Avenue," and "along and/or upon the sidewalk."

Mathematical precision, however, is not required to notify adequately the commissioner of the location of a defect. *Lussier* v. *Department of Transportation*, supra, 228 Conn. 358 ("[t]he plaintiff is not required to be a cartographer in order to be able to describe adequately to the commissioner the location of the defect"). In *Filippi*, our Supreme Court held that a notice was not patently defective, even though the notice described the place of injury as two different locations that were 1.6 miles apart, because additional context provided in the notice established that the injury could have occurred only at one of those two points. *Filippi* v. *Sullivan*, supra, 273 Conn. 10–11. By contrast, in *Schaap* v. *Meriden*, 139 Conn. 254, 257, 93 A.2d 152 (1952), the plaintiff's notice was patently defective in that it described the allegedly defective condition as "near the edge of a manhole cover," without any additional context.

In the present case, the notice includes additional context from which the state could discern the specific allegedly defective manhole cover. One manhole cover is located on Ocean Avenue, close to the middle of the road. Another manhole cover is located on the southwest side of Ocean Avenue. A third manhole cover is surrounded by pavement and slightly elevated above the street on the northwest corner of the intersection between Ocean and Lee Avenues.

Of the three manholes at the intersection in question, only the third manhole cover reasonably could be regarded as within a sidewalk area. Although the third manhole cover is not located upon the sidewalk itself, it is surrounded by pavement on the otherwise grassy strip of land between the sidewalk and the highway. The other two manhole covers are located on the highway pavement.[7] Accordingly, the plaintiff's notice indicates that the plaintiff was walking "along and/or upon the sidewalk" at the time of the alleged incident, which reasonably could be read to identify the sole manhole cover located near the sidewalk. Additionally, the notice alleges that the plaintiff was walking "towards and/or onto Ocean Avenue," which reasonably could be understood, at a minimum, to eliminate the manhole cover located at the middle of the area that comprises the intersection of the two streets.

We acknowledge that the notice contained some descriptions of the location that arguably are technically imprecise or vague. For example, the notice indicates that the allegedly defective manhole was located at the "northeast side of the intersection of Ocean Avenue and Lee Avenue," whereas the record reflects that Lee Avenue terminates in a T-intersection along the

[7] The location of the manhole cover is most clearly depicted in the plaintiff's exhibits 1 and 2, which may be found at pages A-50 and A-51 of the appendix to the plaintiff's brief on appeal.

southwestern side of Ocean Avenue, and, thus, the "northeastern side" of the intersection would actually be wholly located on Ocean Avenue, not at the intersection at all.[8] Nevertheless, cartographical precision is not a legal requirement; see *Lussier* v. *Department of Transportation*, supra, 228 Conn. 358; and, if the notice is viewed in the light of the additional context provided, the notice reasonably can be construed as containing sufficient information to identify the allegedly defective manhole cover at issue, notwithstanding the reference to the "northeast side of the intersection."

We conclude that the plaintiff's notice afforded the state sufficient information to comply with the notice requirement contained in § 13a-144. Accordingly, the state's sovereign immunity was not implicated and the court properly rejected the state's motion to dismiss on that basis.[9]

[8] James F. Wilson, a transportation maintenance planner for the Connecticut Department of Transportation Bureau of Highway Operations, testified in his deposition on February 11, 2016, that Lee Avenue ends at the "southwest side" of the intersection, in other words, where it meets Ocean Avenue. He explained: "Lee Avenue isn't a four way intersection, so it's only a three way. It's a three way intersection. . . .

"[F]or all intents and purposes, if you took a string from the corner of this intersection on the northeast side and you went over here to the southwest side and you pulled the string across taut, that's . . . where the road ends and where it starts."

[9] In its memorandum of decision, the trial court stated that because the notice is not defective as a matter of law, the adequacy of the notice is a question to be determined by the trier of fact in this case. In reaching that conclusion, the trial court understandably relied on the following language contained in at least two decisions of our Supreme Court: "Unless a notice, in describing the place or cause of the injury, patently meets or fails to meet this test, the question of its adequacy is one for the jury and not for the court, and the cases make clear that this question must be determined on the basis of the particular case." *Filippi* v. *Sullivan*, supra, 273 Conn. 9; *Lussier* v. *Department of Transportation*, supra, 228 Conn. 354. Both *Filippi* and *Lussier* rely on identical language contained in a 1947 decision by the Supreme Court in *Morico* v. *Cox*, 134 Conn. 218, 56 A.2d 522 (1947), for this principle.

We take this opportunity to express our concern that *Morico* is unclear on whether the adequacy of the plaintiff's notice is a question for the jury

II

The state next claims that the court improperly denied its motion to dismiss because the plaintiff was not a traveler on a highway, bridge, or sidewalk that the state had a duty to maintain, and, therefore, the statutory waiver of sovereign immunity under § 13a-144 does not apply. More specifically, the state contends that the sidewalk upon which the incident allegedly occurred is not within the state highway system. The

in every case. *Morico* involved an action brought by a plaintiff who was injured on a state highway. Id., 219. The plaintiff in *Morico* asserted claims against the state pursuant to two different statutes, both of which contained a similar notice requirement to the one contained in § 13a-144. Id., 220.

First, the plaintiff in *Morico*, like the plaintiff here, asserted a defective state highway claim pursuant to General Statutes § 1481, the predecessor statute to § 13a-144. Id. Second, the plaintiff asserted a claim pursuant to General Statutes § 1419, as amended by § 301g of the 1943 Supplement. Id. This provision mandates that state highways and bridges have sufficient railings, and authorizes an injured party to bring an action against the state for harm caused by a defective or missing railing. Unlike § 1481, however, § 1419 as amended, contains a savings clause that provides: "No notice given under the provisions of this section shall be invalid or insufficient by reason of any inaccuracy in describing the injury, or in stating the time, place or cause of its occurrence if it appears that there was no intention to mislead or that [the state] was not misled thereby." See also General Statutes § 13a-149.

Although *Morico* is less than clear, the decision may be read as holding that the legal sufficiency of the notice required by these statutes is a question of law for the court and the jury's role in assessing the notice is implicated only in cases brought pursuant to statutes that contain a savings clause. As noted previously in this opinion, § 13a-144 does not contain a savings clause. See also General Statutes § 13a-149 (defective municipal roads and bridges). Because the adequacy of the notice in an action brought pursuant to § 13a-144 implicates the doctrine of sovereign immunity, it seems somewhat anomalous to ask the jury to adjudicate an issue that, as a matter of logic, should be decided definitively long before a trial commences. See, e.g., *Rodriguez* v. *State*, 155 Conn. App. 462, 469 n.7, 110 A.3d 467 ("[O]ur Supreme Court has recently recognized that, unlike unresolved factual issues concerning a governmental immunity claim, which can be decided by a jury, immunity from suit on the basis of sovereign immunity implicates subject matter jurisdiction and should be resolved prior to trial. *Edgerton* v. *Clinton*, 311 Conn. 217, 227 n.9, 86 A.3d 437 (2014)."), cert. granted, 316 Conn. 916 (2015) (appeal withdrawn December 15, 2015). Although we need not wander into this thicket at this stage in the proceeding, we suggest that this issue warrants further examination in the future.

state additionally contends that the plaintiff never attained the status of a "traveler" upon a state highway system. We are not persuaded by either contention.

We begin by setting forth legal principles regarding the scope of the state's waiver of sovereign immunity under § 13a-144. "[A] highway defect is [a]ny object in, upon, or *near* the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position would be likely to produce that result . . . . *[T]he defect need not be a part of the roadbed itself*, however, objects which have no necessary connection with the roadbed or public travel, which expose a person to danger, not as a traveler, but independent of the highway, do not ordinarily render the road defective. . . .

"The defective condition must also exist in an area intended for public travel, or in an area that the public is invited or reasonably expected to traverse. . . . [If] the state either invites or reasonably should expect the public to use a particular area that is not directly in the roadway but that is a necessary incident to travel on the roadway, a defective condition therein may give rise to a cognizable action under the statute. . . . The fact that the defective condition is in an area where members of the public are likely, and in fact encouraged, to use is an important consideration." (Citations omitted; emphasis added; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 359–60. Accordingly, the state's liability can extend to an area upon which members of the public likely will traverse incident to travel, even if the alleged defect is not located upon the highway itself.

In *Ferreira* v. *Pringle*, 255 Conn. 330, 766 A.2d 400 (2001), our Supreme Court concluded that the state could be held liable for a highway defect even though

the alleged defect was located on the grassy embankment at the shoulder of the road, indicating: "To hold that a defect . . . must exist in the traveled portion of the highway would run counter to our decisions and lead to results bordering on the ridiculous. . . . If in the use of the traveled portion of the highway and, as incidental thereto, the use of the shoulders for the purposes for which they are there, a condition exists which makes travel not reasonably safe for the public, the highway is defective."[10] (Footnote added; internal quotation marks omitted.) Id., 344.

A

We first address whether the statutory waiver of sovereign immunity may apply even though the incident allegedly occurred adjacent to, as opposed to directly upon, the state highway. In light of the following facts and analysis, we conclude that the statutory waiver of sovereign immunity applies.

"To define in general terms the precise limits of the duty of [the commissioner] in these cases is not an easy matter . . . . Generally, the question . . . is one of fact, depending on a great variety of circumstances, and this court will find error [in its determination as to whether a highway defect could exist] only when the conclusion is one which could not be reasonably reached by the trier." (Citation omitted; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 360.

In the present case, the state does not contend that the alleged defect needed to be located upon the highway pavement. Instead, the state argues that the statutory waiver of sovereign immunity does not apply because the state did not have a duty to maintain the

[10] *Ferreira* addressed the state's liability under General Statutes § 13a-149, which affords a right of recovery similar to that under § 13a-144 and is subject to the same limitations. Id., 348 n.13.

sidewalk area in question. The state notes that its responsibility to maintain sidewalks extends only to the limited sidewalks upon which a statute confers such duty. As a general rule, the state contends, sidewalk maintenance falls within the duty of the municipality, not the state. See *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 357 n.16 ("[m]unicipalities, rather than the state, are generally responsible for maintaining most sidewalks, even those adjacent to state highways").

This aspect of the state's argument, however, as was advanced before both the trial court and this court, largely is premised on its assertion that the manhole was in the sidewalk area, which the state did not have a duty to maintain. To the contrary, the plaintiff's notice alleges that the injury took place while the plaintiff was walking upon the manhole cover. It alleges that "she was caused to fall by her foot landing on an improperly placed or replaced manhole cover," which manhole cover the state would use to access the storm drain or catch basin located adjacent to the manhole cover, on Ocean Avenue. To invoke a statutory waiver of sovereign immunity, the plaintiff must "allege that he was a traveler on or user of the particular area, whether the vehicular portion of the highway or the sidewalk, which he claims to have been defective." *Tuckel* v. *Argraves*, 148 Conn. 355, 359, 170 A.2d 895 (1961). Thus, we agree with the court's determination that this case "is not a sidewalk maintenance case [but, instead,] is a state highway storm drain system maintenance case."

In support of her allegation that the state had a duty to maintain the manhole cover in question, the plaintiff counters that the manhole cover is located within the state's right-of-way line and, therefore, within an area upon which the state reasonably could expect pedestrians to traverse. Our courts have concluded that the state may be held liable for a highway defect that exists

within the state's right-of-way line. See *Ferreira* v. *Pringle*, supra, 255 Conn. 349–51 (state liability applied to defect embedded within shoulder of road seven feet from paved area within state's right-of-way line); *Serrano* v. *Burns*, 248 Conn. 419, 427 n. 7, 727 A.2d 1276 (1999) ("[w]hether the place of injury is within the state right-of-way line is the threshold inquiry in determining the state's liability, if any, under § 13a-144"); *Baker* v. *Ives*, 162 Conn. 295, 301–302, 294 A.2d 290 (1972) (state liability applied to grass parking strip located within state right-of-way line between paved portion of highway and sidewalk, in which state invited public to park).

James F. Wilson, the transportation maintenance planner for the Connecticut Department of Transportation Bureau of Highway Operations, testified at his February 11, 2016 deposition that Ocean and Lee Avenues are unbounded, in that no survey or boundary markers delineate their boundaries. Although Wilson believed that the state was not responsible for sidewalk maintenance, he acknowledged that the state's right-of way-line likely extends to the stone wall behind the sidewalk. Accordingly, a question of fact remains as to the boundary within which the statutory waiver of sovereign immunity applies because the manhole cover in question is located between Ocean Avenue and the stone wall.

Moreover, Wilson agreed that both Ocean and Lee Avenues are state owned and maintained roads. He testified that the manhole cover in question "serves the catch basin or storm drain which is located in the roadway on . . . Ocean Avenue." Wilson further testified that the manhole cover in question served as the means of access to the storm drain or catch basin. Additionally, Wilson agreed that "the sole purpose that this storm drain or catch basin exists is to service this state highway."

In light of the foregoing, the allegedly defective manhole cover is within the definition of "highway defect," pursuant to § 13a-144. The record reflects that the allegedly defective manhole cover is located near the traveled portion of the state highway, arguably within the state's right-of-way line, serves state owned and operated highways, and exists solely to service the state highway. On these facts, we reject the state's contention that the statutory waiver of liability does not apply as a matter of law.

B

We next address the state's contention that sovereign immunity applies because the plaintiff was not a "traveler" under § 13a-144. On this point, the state argues that the scope of its liability turned not only on whether an alleged highway defect is located within the state's right-of-way line, but also on whether the plaintiff had obtained traveler status prior to the alleged injury. We conclude that the plaintiff could be considered a "traveler" on the highway.

"It is settled law that the statutory right of action [under § 13a-144] is given only to a traveler on the road or sidewalk alleged to be defective. . . . A person must be on the highway for some legitimate purpose connected with travel thereon in order to obtain the protection of the statute. . . .

A person may, under some circumstances, traverse areas adjacent to the conventionally traveled highway while maintaining his status as a traveler entitled to bring action under § 13a-144. . . . Travel over such areas may fall within the purview of § 13a-144 when it is incidental to travel over the highway . . . and for a purpose connected with travel thereon . . . ." (Citations omitted; internal quotation marks omitted.) *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 351–52.

In *Giannoni*, our Supreme Court concluded that the plaintiff bicyclist retained his status as a traveler on a

highway when he moved from the shoulder of the road to the adjacent sidewalk and was injured while traversing a stream culvert located nine feet from the paved shoulder of the road, which culvert collected and removed water from under the highway, because his travel thereon was "incidental" to and "for a purpose connected with" his travel over the highway. Id., 353–54. The court reasoned that it was "undisputed that [the bicyclist] was traveling over the sidewalk immediately before he fell into the culvert. This fact alone, however, does not preclude a jury from finding that his travel over the sidewalk, driveway, and small patch of grass, was *incidental to* and *for a purpose connected with* his travel over [the highway]." (Emphasis added.) Id., 356; see also *Ferreira* v. *Pringle*, supra, 255 Conn. 352 (bus passenger disembarking onto grassy embankment adjacent to highway retained traveler status because disembarking from bus was in connection with purposes of public travel); *Serrano* v. *Burns*, supra, 248 Conn. 423–26 (court improperly granted summary judgment for state when jury properly could find that plaintiff's use of parking lot was incidental use of highway and for purpose connected with travel thereon).

The state attempts to distinguish the present case from *Giannoni*, *Ferreira*, and *Serrano* by arguing that the plaintiff was a pedestrian traveling locally, by foot, and had not ventured incidentally onto the sidewalk, as she had not first stepped foot onto the highway. Accordingly, the state contends that the plaintiff's travel was not for a purpose connected with travel over a state roadway. Although the plaintiffs in *Giannoni*, *Ferreira*, and *Serrano* each were injured during a detour from their travel upon a highway, we do not read our precedent so narrowly as to preclude recovery from a traveler who was injured on an area adjacent to a public sidewalk and state highway prior to traversing that highway.

It is notable that the plaintiff, at her deposition, testified that it was her intention to cross the intersection

in question. Additionally, the plaintiff's notice alleges, in relevant part, that at the time of the alleged incident she was walking "towards and/or onto Ocean Avenue . . . and/or upon the sidewalk located at the northeast side of the intersection of Ocean Avenue and Lee Avenue . . . ." Similarly, the plaintiff's operative complaint alleges that at the time of the alleged incident she was "proceeding on foot towards and/or upon Ocean Avenue, or the sidewalk located at the northerly side of the intersection of Lee Avenue and Ocean Avenue." A finder of fact reasonably could conclude that her travel was incidental to and for purposes of travel upon the highway. See *Giannoni* v. *Commissioner of Transportation*, supra, 322 Conn. 351–52 (travel upon sidewalk did not preclude finding that plaintiff was a traveler for purposes of bringing suit under § 13a-144). Because we conclude that the state may be held liable for injuries occurring in an area adjacent to a state highway and that a fact finder reasonably could conclude that the plaintiff was a traveler upon a state highway, the court properly denied the state's motion to dismiss on that basis.

The judgment is affirmed.

In this opinion, the other judges concurred.

CITY OF MERIDEN ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.
(AC 41441)

Prescott, Moll and Bishop, Js.

Syllabus

The plaintiffs, the city of Meriden and the Meriden City Council, appealed to this court from the judgment of the trial court dismissing their appeal from the final decision of the defendant Freedom of Information Commission, in which the commission found that the city council violated the open meeting requirements of the applicable provision (§ 1-225 [a]) of the Freedom of Information Act (§ 1-200 et seq.). Four political leaders

of the city council had gathered at city hall with the mayor and the retiring city manager to discuss the search for a new city manager. The leadership group, after arriving at a consensus to submit a resolution for action by the city council to create a city manager search committee, drafted a resolution that included the names of people to be appointed to the committee and detailed their duties, and the resolution was adopted at a city council meeting. Thereafter, a complaint was filed with the commission alleging that the gathering was an unnoticed and private meeting in violation of § 1-225 (a). The commission concluded that the gathering was a "proceeding" within the meaning of § 1-200 (2), that such a proceeding constituted a "meeting" within the meaning of that statute, and that the plaintiff had violated § 1-225 (a) by failing to properly notice the leadership group gathering. Thereafter, the plaintiffs appealed to the trial court, which rendered judgment dismissing the appeal, concluding that the commissioner's factual findings and conclusions were supported by substantial evidence, and that the leadership group gathering constituted a meeting within the meaning of § 1-200 (2). On appeal to this court, the plaintiff claimed that the trial court erred in concluding that a gathering of less than a quorum of city council members to set an agenda and decide to submit a resolution for action by the full city council constituted a "meeting" under § 1-200 (2), and that such a gathering constituted a step in the process of agency-member activity that made it a "proceeding" and, therefore, a "meeting" within the meaning of § 1-200 (2). *Held* that the gathering of the leadership group of less than a quorum of the city council members did not constitute a "meeting" within the meaning of § 1-200 (2) and did not trigger the open meeting requirements of § 1-225 (a): because the leadership group's gathering did not serve an adjudicatory function within the plain meaning of a "hearing" or a "proceeding," the gathering was not a hearing or other proceeding under § 1-200 (2) and, instead, constituted a "convening or assembly" for the purposes of that statute, and this court was bound by *Windham* v. *Freedom of Information Commission* (48 Conn. App. 529), in which this court previously held that a gathering akin to a convening or assembly, as opposed to a hearing or other proceeding, of less than a quorum of members of a public agency generally does not constitute a meeting within the meaning of § 1-200 (2); moreover, the trial court's interpretation of "hearing or other proceeding" in § 1-200 (2) as alluding to a gathering between agency members that constitutes a step in the process of agency-member activity lacked support in the language of the statute or in this court's interpretation of the statute, and although the court's discussion of public policy and the public benefits of transparency reflected laudable policy goals, such discussion was a matter of legislation, not judicial lawmaking.

Argued May 14—officially released August 6, 2019

Procedural History

Appeal from the decision of the defendant Freedom of Information Commission, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Henry Cohn*, judge trial referee, rendered judgment dismissing the plaintiffs' appeal, from which the plaintiffs appealed to this court. *Reversed*; *judgment directed.*

Deborah Leigh Moore, for the appellants (plaintiffs).

Valicia Dee Harmon, commission counsel, for the appellee (defendant Freedom of Information Commission).

Opinion

BISHOP, J. The plaintiffs, the city of Meriden and the Meriden City Council (city council), appeal from the judgment of the trial court dismissing their appeal from the final decision of the defendant Freedom of Information Commission (commission), in which the commission found that the city council violated the open meeting requirements of the Freedom of Information Act (FOIA), General Statutes § 1-200 et seq., specifically General Statutes § 1-225 (a).[1] On appeal, the plaintiff claims that the court erred in concluding that (1) a gathering of less than a quorum of city council members to set an agenda and decide to submit a resolution for action by the full city council constituted a "meeting" under § 1-200 (2), and (2) such a gathering constituted "a step in the process of agency-member activity" that made it a "proceeding" and, therefore, a "meeting" within the meaning of § 1-200 (2). We reverse the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. On

[1] We refer to the city and the city council collectively as "the plaintiff."

January 3, 2016, the four political leaders of the city council, i.e., the majority and minority leaders and their deputies (leadership group), gathered at city hall with the mayor and the retiring city manager to discuss the search for a new city manager.[2] The leadership group arrived at a consensus to submit a resolution for action by the city council to create a city manager search committee. The leadership group drafted a one page resolution, which included the names of people to be appointed to the committee and detailed the duties of such committee, including recommending to the city council suitable candidates for the city manager position. At the January 19, 2016 city council meeting, the leadership group introduced the resolution, which subsequently was placed on the council's consent calendar.

On January 25, 2016, an editor for the Meriden Record Journal[3] filed a complaint with the commission alleging that the January 3, 2016 leadership group gathering was an unnoticed and private meeting in violation of § 1-225 (a).[4] Following a hearing on April 18, 2016, at which both parties appeared and presented evidence, the commission issued a final decision on November 16, 2016. In that decision, the commission found that the leadership

[2] The city council is a public agency within the meaning of § 1-200 (1) (A). Section 1-200 (1) (A) provides in relevant part that "public agency" means: "Any executive, administrative or legislative office of the state or any political subdivision of the state and any state or town agency, any department, institution, bureau, board, commission, authority or official of the state or of any city, town, borough, municipal corporation, school district, regional district or other district or other political subdivision of the state, including any committee of, or created by, any such office, subdivision, agency, department, institution, bureau, board, commission, authority or official, and also includes any judicial office, official, or body or committee thereof but only with respect to its or their administrative functions . . . ."

[3] The Meriden Record Journal and Daniel Brechlin, an editor from that publication, were the complainants before the commission and were named as defendants in the administrative appeal, but they did not participate therein.

[4] General Statutes § 1-225 (a) provides in relevant part that "[t]he meetings of all public agencies . . . shall be open to the public. . . ."

group "gather[s] regularly with the mayor and city manager" to remain informed about issues that the city council may need to address. During these gatherings, the group "decides whether an issue requires city council action, and when necessary . . . discusses and drafts a resolution to go on the agenda of a city council meeting." The commission also found that such gatherings are not intended to constitute a quorum of the city council, which requires a meeting of at least seven members. The commission found, as well, that in gathering to discuss the formation of a city manager search committee and drafting the resolution, "the leadership group [had] met to discuss or act upon a matter over which the leadership and the city council as a whole has supervision and control." The commission also took administrative notice of the plaintiff's minutes of the January 19, 2016 meeting and found "that the resolution was adopted at the council meeting without discussion or change."

As to the plaintiff's claim that the leadership group gathering was not a "meeting" within the meaning of § 1-200 (2), the commission rejected the plaintiff's argument that the communications at the leadership group gathering were limited to notice of meetings or the setting of agendas. The commission also rejected the plaintiff's argument that the gathering was not a "meeting" because a quorum was not present. The commission analyzed the purported conflict between this court's decisions in *Windham* v. *Freedom of Information Commission*, 48 Conn. App. 529, 711 A.2d 741 (1998), appeal dismissed, 249 Conn. 291, 732 A.2d 752 (1999), and *Emergency Medical Services Commission* v. *Freedom of Information Commission*, 19 Conn. App. 352, 561 A.2d 981 (1989), and concluded that the latter decision more aptly applied to the facts of this case. On that basis, the commission concluded that the gathering was a "proceeding" within the meaning of § 1-200

(2), and that such a proceeding constituted a "meeting" within the meaning of that subdivision. Accordingly, the commission concluded that the plaintiff had violated § 1-225 (a) by failing to properly notice the leadership group gathering. The commission, therefore, ordered the plaintiff to comply strictly with the open meeting requirements of § 1-225 (a) and advised the plaintiff that the leadership group may, in its own right, constitute a "committee of" the city council pursuant to § 1-200 (1).

On December 28, 2016, the plaintiff filed an appeal from the commission's decision to the Superior Court, arguing "that a gathering of elected officials without a quorum does not constitute a quorum[5] in accordance with [*Windham* v. *Freedom of Information Commission*, supra, 48 Conn. App. 529]." (Footnote added.) On January 29, 2018, the court issued a memorandum of decision dismissing the plaintiff's appeal, concluding that this court's holding in *Windham* "is not completely determinative and, therefore, not binding on the issue" of whether the leadership group gathering fell within the definition of "meeting" under § 1-200 (2). Rather, the court stated that "there are times, factually, where certain agency members are merely 'convening' and there is a requirement of a quorum under § 1-200 (2); and there are times, factually, where agency members, in the language of the [commission] . . . are gathering with the implicit authorization of the city council as a whole and this gathering 'constituted a step in the process of agency-member activity.' " After stating that the commission's factual findings and conclusions were supported by substantial evidence, the court concluded that the leadership group gathering constituted a meeting within the meaning of § 1-200 (2). This appeal followed.

[5] Presumably, the plaintiff meant that a gathering without a quorum does not constitute a "meeting."

The principal issue in this appeal is whether the gathering of the leadership group constituted a "meeting" within the meaning of § 1-200 (2) and, thus, triggered the open meeting requirements of § 1-225 (a). The plaintiff claims that, because there was no quorum at the gathering of the leadership group, there was no "meeting" under § 1-200 (2). The plaintiff further asserts that the legislature did not intend "proceeding" to mean "a step in the process of agency-member activity" as found by the commission, but, rather, that "proceeding" refers to an adjudicatory process involving testimony, evidence, and administrative findings. The commission responds that there was sufficient evidence in the administrative record to conclude that the leadership group conducted a "proceeding" within the meaning of § 1-200 (2) and that, in doing so, the plaintiff failed to comply with the open meeting requirements of § 1-225 (a), which the commission contends apply to such proceedings regardless of whether a quorum is present.

We begin by setting forth the relevant legal principles and standard of review. "This court reviews the trial court's judgment pursuant to the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . [Similarly], this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . .

Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Citation omitted; internal quotation marks omitted.) *Chairperson, Connecticut Medical Examining Board* v. *Freedom of Information Commission*, 310 Conn. 276, 281–82, 77 A.3d 121 (2013).

Although the determination of what constitutes a "meeting" under § 1-200 (2) has been subjected to judicial interpretation, the issue in the present case requires this court to construe § 1-200 (2) to determine whether the leadership group gathering constituted a "proceeding" under that subdivision, and, therefore, a "meeting." Consequently, because the commission's interpretation of "proceeding" as meaning "a step in the process of agency-member activity" has not "been subjected to judicial scrutiny or consistently applied by the agency over a long period of time, our review is de novo." (Internal quotation marks omitted.) Id., 283.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the

text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Gould* v. *Freedom of Information Commission*, 314 Conn. 802, 810–11, 104 A.3d 727 (2014).

In addition, ''we are bound to interpret the statute *as it is written* and cannot ignore the words used by the legislature. It is a basic tenet of statutory construction that the legislature does not intend to enact meaningless provisions. . . . Every word and phrase [in a statute] is presumed to have meaning, and we do not construe statutes so as to render certain words and phrases surplusage.'' (Emphasis in original; internal quotation marks omitted.) *Fiona C.* v. *Kevin L.*, 166 Conn. App. 844, 852, 143 A.3d 604 (2016). Finally, our inquiry into the statutory definition of ''meeting'' contained in § 1-200 (2) ''must commence with the recognition of the legislature's general commitment to open governmental proceedings. The overarching legislative policy of the FOIA is one that favors the open conduct of governmental and free public access to government records. . . . Our construction of the [FOIA] must be guided by the policy favoring disclosure and exceptions to disclosure must be narrowly construed.'' (Citations omitted; internal quotation marks omitted.) *Glastonbury Education Assn.* v. *Freedom of Information Commission*, 234 Conn. 704, 711–12, 663 A.2d 349 (1995).

We begin our analysis by looking to the language of § 1-200 (2), which states in relevant part that a " '[m]eeting' means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency . . . to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power. . . ." Within this language, the phrase "hearing or other proceeding" is separate from the phrase "convening or assembly of a quorum." In addition, the term "quorum" is not present in the "hearing or other proceeding" phrase but is included in the two subsequent phrases containing the terms "multimember public agency." The language of the statute, therefore, provides that the FOIA public meeting requirements apply to "any hearing or other proceeding" of a public agency, no matter the number of people attending, but do not apply to a "convening or assembly" of less than a quorum of a multimember public agency. Accordingly, the present case requires us to determine whether the leadership group gathering was a "hearing or other proceeding," which does not require a quorum to constitute a "meeting."

The terms "hearing" and "proceeding" are not defined in the FOIA. "In the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 49, 161 A.3d 537 (2017); see also *Board of Selectman* v. *Freedom of Information* Commission, 294 Conn. 438, 449, 984 A.2d 748 (2010) ("when, as here, a statute does not define a term, we may look to the

dictionary to determine the commonly approved meaning of the term"). Ballentine's Law Dictionary defines a "proceeding" as, inter alia, "any application *to a court of justice*, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object." (Emphasis added.) Ballentine's Law Dictionary (3d Ed. 1969); see also *Hyllen-Davey* v. *Plan & Zoning Commission*, 57 Conn. App. 589, 596, 749 A.2d 682 ("[t]he term proceeding, as ordinarily used, is generic in meaning and broad enough to include all methods involving *the action of the courts*" [emphasis added; internal quotation marks omitted]), cert. denied, 253 Conn. 926, 754 A.2d 796 (2000). A "proceeding" is further defined as "the form *in which actions* are to be brought and defended, the manner of intervening in suits, of conducting them of opposing judgments and of executing. . . . Ordinary proceedings intend the regular and usual mode of *carrying on a suit by due course of common law*." (Citation omitted; emphasis altered; internal quotation marks omitted.) *Hyllen-Davey* v. *Plan & Zoning Commission*, supra, 597.

Similarly, a "hearing" is defined variously as "[t]he *presentation and consideration of proofs and arguments*, and determinative action with respect to the issue," and "[t]he *presentation of a case or defense* before an administrative agency, with opportunity to introduce evidence in chief and on rebuttal, and to cross-examine witnesses, as may be required for a full and true disclosure of the facts." (Emphasis added.) Ballentine's Law Dictionary, supra. A "hearing" is also defined as "[a] judicial session, [usually] open to the public, *held for the purpose of deciding issues of fact or of law*, sometimes with witnesses testifying," and "[a]ny setting in which an affected person *presents arguments to a decision-maker* . . . ." (Emphasis

added.) Black's Law Dictionary (9th Ed. 2009). In addition, "[w]here a statute provides for a 'hearing,' the term necessarily implies the power *to administer some adequate remedy*." (Emphasis added.) Ballentine's Law Dictionary, supra.[6]

On the basis of our review of these definitions, it is clear that the ordinary meaning of the terms "hearing" and "proceeding" allude to adjudicative activities. We, therefore, disagree with the trial court's interpretation of the phrase "hearing or other proceeding" in § 1-200 (2) as meaning a gathering among agency members that constitutes "a step in the process of agency-member activity . . . ." Rather, the more proper reading of that subdivision is that "hearing or other proceeding" refers to a process of adjudication, which falls outside the scope of activities conducted during the leadership group gathering in the present case. This interpretation of § 1-200 (2) imparts an operative distinction between "hearing or other proceeding" and "convening or assembly of a quorum," without which it would be unclear as to what constitutes a "hearing" or "proceeding" but not a "convening" or "assembly." See *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 543, 93 A.3d 1142 (2014) (to ignore language in statute "would contravene the cardinal maxim that statutes shall not be construed to render any sentence, clause, or phrase superfluous or meaningless" [internal quotation marks omitted]).

Moreover, the interpretation of "hearing or other proceeding" as relating to adjudication finds support in the language of our Supreme Court's decision in *Glastonbury Education Assn.* v. *Freedom of Information Commission*, supra, 234 Conn. 717–18, which, although

[6] In looking to the dictionary definitions of "hearing" and "proceeding," we note that "our analysis continues to be guided by the plain meaning rule . . . even when there are a range of dictionary meanings for [the] statutory term[s]." *State* v. *Ruocco*, 151 Conn. App. 732, 752, 95 A.3d 573 (2014), aff'd, 322 Conn. 796, 144 A.3d 354 (2016).

reserving the issue of whether evidentiary presentations in the context of arbitration proceedings could be subject to the open meeting requirements of the FOIA, implies that the evidentiary process generally, i.e., in the context of adjudication, falls within the definition of "meeting." See id. ("[T]he arbitration hearing also provides an opportunity for the parties to create an evidentiary record on which the arbitrators can rely in making their final determination of any issues left unresolved. Since we already have concluded that the FOIC order at issue here cannot stand, we postpone to another day questions concerning the validity of a more narrowly tailored FOIC order that requires open hearings only with respect to evidentiary presentations and permits executive sessions for discussion and argument about the contents of the parties' last best offers." [Footnote omitted.]). In sum, because the gathering of the leadership group did not serve an adjudicatory function within the plain meaning of "hearing" and "proceeding," the gathering was not a "hearing or other proceeding" under § 1-200 (2) but, instead, constituted a "convening or assembly" for the purposes of that subdivision.

The commission, nonetheless, argues that this court's previous decisions in regard to the interpretation of § 1-200 (2) are in conflict. Specifically, the commission asserts that the gathering of the leadership group constituted a proceeding and, pursuant to this court's decision in *Emergency Medical Services Commission* v. *Freedom of Information Commission*, supra, 19 Conn. App. 356, a "meeting." The commission further argues that *Windham* v. *Freedom of Information Commission*, supra, 48 Conn. App. 529, is not conclusive because it does not discuss the difference between the phrases "hearing or other proceeding" and "convening or assembly of a quorum . . . ." We disagree and, instead, conclude that the cases are not inconsistent and are, in fact, in harmony with our interpretation of § 1-200 (2).

In *Emergency Medical Services Commission* v. *Freedom of Information Commission*, supra, 19 Conn. App. 353–54, twenty to twenty-five people, including the mayor and less than a quorum of the East Hartford Emergency Medical Services Commission (EMSC), attended a presentation by two ambulance services. A member of the EMSC later filed a complaint with the commission, which subsequently determined that the EMSC had violated the open meeting provision of the FOIA by failing to provide notice of what it considered was a "meeting." Id. On appeal, the trial court reversed the decision of the commission hearing officer, concluding that a "hearing or other proceeding" of a public agency required the presence of a quorum for the open meeting provision to apply, and because there was no quorum at the presentation, there was no violation of the FOIA. Id., 355.

In addressing the question of whether the EMSC members' attendance at the presentation constituted a "meeting" under the FOIA, this court stated that "[t]he plain language of General Statutes § 1-18a (b) [the predecessor to § 1-200 (2)] does not require a quorum as a necessary precondition to any hearing or other proceeding of a public agency . . . . The word quorum does not appear in the clause dealing with any hearing or other proceeding of a public agency . . . . The legislature did not define a meeting as any hearing or proceeding of a quorum of a public agency, as it might have done." (Internal quotation marks omitted.) Id. The court further opined that "[t]he trial court's construction of § 1-18a (b) would make the quorum requirement in that section redundant. . . . Beyond the trial court's statutory interpretation, no reason has been cited for reading a quorum requirement into the first clause of § 1-18a (b) nor are we aware of any." (Citation omitted; internal quotation marks omitted.) Id., 356. The court, however, did not reverse the trial court's judgment

because it concluded that "there was an insufficient factual basis for the [commission's] finding that the presentation was a proceeding of a public agency to discuss or act upon a matter over which it had supervision, control, jurisdiction or advisory power." (Internal quotation marks omitted.) Id.

In *Windham* v. *Freedom of Information Commission*, supra, 48 Conn. App. 529, the town appealed from the trial court's judgment dismissing an administrative appeal taken from a final decision of the commission. The commission had concluded that the town's board of selectmen had violated the open meeting requirements of the FOIA by not providing notice of a "meeting," as defined under § 1-18a (b). Id., 530. The gathering at issue involved six town officials, including less than a quorum of selectmen, who met to discuss whether they would support a proposal by the first selectman that the board go into executive session to discuss a landfill contract matter. Id. On appeal, this court reversed the judgment of the trial court, and concluded that "[t]he Windham board of selectmen consists of eleven selectmen. Six members constitute a quorum. At the March 20, 1995 gathering, only four members of the board were present. As a result, there was no quorum and, therefore, no meeting as defined by § 1-18a (b)." Id., 531.

In reviewing the case at hand, we are bound by this court's holding in *Windham* v. *Freedom of Information Commission*, supra, 48 Conn. App. 531, that a gathering, akin to a "convening or assembly" as opposed to a "hearing or other proceeding," of less than a quorum of members of a public agency generally does not constitute a "meeting" within the meaning of § 1-200 (2).[7]

[7] "[I]t is axiomatic that one panel of this court cannot overrule the precedent established by a previous panel's holding. . . . As we have often stated, this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Citation omitted; internal quotation marks

As noted, and contrary to the commission's assertion, this holding is not in conflict with the decision in *Emergency Medical Services Commission* v. *Freedom of Information Commission*, supra, 19 Conn. App. 355, which, by stating that "any hearing or other proceeding"; (internal quotation marks omitted); need not contain a quorum to constitute a "meeting," implicitly reached the same conclusion that we reach in this case, which is that a "hearing or other proceeding" is different from a "convening or assembly" for purposes of determining whether a "meeting" occurred. When read together, these cases support the distinction between the two phrases, with the result being that a gathering, akin to a "convening or assembly," of less than a quorum of members of a public agency is not subject to the open meeting requirements of the FOIA unless that gathering may be considered a "hearing or other proceeding" within the meaning of § 1-200 (2). Moreover, as we already have determined, the leadership group gathering in the present case does not fit within the ordinary meaning of "hearing" or "proceeding" and, thus, does not constitute a "hearing or other proceeding" under § 1-200 (2). Accordingly, we conclude that the gathering of the leadership group of less than a quorum of the city council members did not constitute a "meeting" within the meaning of § 1-200 (2) and, pursuant to this court's decision in *Windham* v. *Freedom of Information Commission*, supra, 531, did not trigger the open meeting requirements of § 1-225 (a).

We also note that, to the extent that this court has interpreted § 1-200 (2) in *Emergency Medical Services Commission* v. *Freedom of Information Commission*, supra, 19 Conn. App. 352, and *Windham* v. *Freedom of Information Commission*, supra, 48 Conn. App. 529, the General Assembly's inaction in amending the statute

omitted.) *Staurovsky* v. *Milford Police Dept.*, 164 Conn. App. 182, 202, 134 A.3d 1263 (2016), appeal dismissed, 324 Conn. 693, 154 A.3d 525 (2017).

in the time since those cases were decided permits an inference of legislative acquiescence to this court's interpretation of it. See *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 267, 193 A.3d 520 (2018) ("following judicial construction of statute, [o]nce an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision" [internal quotation marks omitted]); *Efstathiadis* v. *Holder*, 317 Conn. 482, 492–93, 119 A.3d 522 (2015) ("Although we are aware that legislative inaction is not necessarily legislative affirmation . . . we also presume that the legislature is aware of [this court's] interpretation of a statute, and that its subsequent nonaction may be understood as a validation of that interpretation. . . . Indeed, one of the indicators of legislative acquiescence to our interpretation of a statute is the passage of an appropriate interval [of time] to permit legislative reconsideration . . . without corrective legislative action . . . ." [Citation omitted; internal quotation marks omitted.]).

Finally, we reiterate our previous point that the trial court's interpretation of "hearing or other proceeding" in § 1-200 (2) as alluding to a gathering between agency members that constitutes "a step in the process of agency-member activity" finds no support in the language of the statute or in this court's interpretation of the statute. Although the trial court's discussion of public policy and the public benefits of transparency reflect laudable policy goals, such discussion is a matter of legislation, not judicial lawmaking. "[I]t is up to the legislatures, not courts, to decide on the wisdom and utility of legislation. . . . [C]ourts do not substitute their social and economic beliefs for the judgment of

legislative bodies, who are elected to pass laws. *Ferguson* v. *Skrupa*, 372 U.S. 726, 729–30, 83 S. Ct. 1028, 10 L. Ed. 2d 93 [1963] . . . .'' (Internal quotation marks omitted.) *Castro* v. *Viera*, 207 Conn. 420, 435, 541 A.2d 1216 (1988); see also *Davis* v. *Forman School*, 54 Conn. App. 841, 858, 738 A.2d 697 (1999).

The judgment is reversed and the case is remanded to the trial court with direction to render judgment sustaining the plaintiff's appeal.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANGEL CARRASQUILLO
(AC 41806)

Keller, Elgo and Bishop, Js.

Syllabus

Convicted of the crimes of murder and criminal possession of a firearm in connection with the shooting deaths of the victims, the defendant appealed, claiming, inter alia, that the trial court violated his rights to due process and to a jury trial by coercing the jury to reach a verdict. On the sixth and final day of the jury's deliberations, the court received five notes from the jury. The first note stated that the jury was unable to reach a unanimous verdict. The next two notes were from two jurors, N and D, about personal matters that conflicted with their service as jurors. The court told the jury that it would take up the notes from N and D later in the day after it gave the jury an instruction to continue its deliberations in an effort to reach a unanimous verdict. The court then gave the jury a standard Chip Smith instruction in which it directed the jury to try to break its deadlock by continuing to deliberate, and stated that minority view jurors should consider the logic of the majority view jurors and that it was the jurors' obligation as individuals to give their own verdict without surrendering their conscientiously held views. Defense counsel did not object to the court's instruction. Thereafter, the court received a note from another juror, L, in which L stated that she was feeling attacked as a juror, thanked the court for its guidelines and was willing to keep an open mind and continue talking. Subsequently, the court received the fifth note from the jury stating that it had reached a unanimous verdict. The court thereafter summoned the jury to the courtroom, the verdict was announced, and the jury was

polled, with each juror expressing agreement with the verdict. At sentencing, the court denied the defendant's motion for a mistrial in which he claimed, inter alia, that the court had not fully explored the note from L at the time it received the note during trial. On the defendant's appeal, *held*:

1. The defendant could not prevail on his unpreserved claim that he was deprived of his rights to due process and to a jury trial because the trial court applied improper pressure on the jury to reach a verdict when it delivered the Chip Smith instruction: the defendant's claim that the jury would have believed that it would not be excused at the end of the day if it did not reach a verdict was unavailing, as the court did not state that the jury did not need to reach a verdict in order to be excused, the court suggested in the Chip Smith instruction that it would wait as long as it took the jury to reach a unanimous verdict, the jury had been excused at the end of each of the five prior days of deliberations, the court permitted the jury to be excused for the day on which it received a note from a juror that stated that deliberations were getting very heated and that continued deliberations would not be beneficial, and the court did not state before or during the Chip Smith instruction that the jury was expected or required to reach a verdict at any particular time; moreover, the court's statement in its initial jury charge that the jury was duty bound to return a verdict with respect to each count did not suggest that the court would not accept the jury's failure to reach a unanimous verdict, but merely expressed that a verdict must be unanimous, and the defendant was incorrect in claiming that the court did not respond to N's note, which simply alerted the court to the existence of a family emergency that would require N's absence beginning on a certain date, as the court stated that it would address any scheduling conflicts of jurors later that day, defense counsel, who had agreed with the court's response to N's note, did not ask the court to conduct further inquiry of N, and N's note did not suggest that he was distracted, agitated or likely to have felt pressured to agree or to cause other jurors to agree with his view of the case; furthermore, the court did not, as claimed by the defendant, sanction the pressure that L was under from other members of the jury, as defense counsel declined the opportunity to canvass L with respect to her note, which was not evidence of continued undue pressure on her or any minority view juror, nothing in the note reflected that she was unwilling to follow the court's Chip Smith instruction, and the court reasonably could have interpreted the note to reflect that, after it delivered its Chip Smith instruction, L felt better about continuing her deliberations with the rest of the jury, and the two hours of jury deliberations after the Chip Smith instruction did not suggest that the court coerced the jury to reach a unanimous verdict, as the jury had spent a lengthy amount of time in the prior days of deliberation listening to the playback of testimony, there was no mathematical formula to determine whether the amount of time between additional deliberation

following a Chip Smith instruction and the verdict indicated that the jury was coerced into reaching a verdict, and no juror expressed hesitation or disagreement with respect to the verdict when the jurors were individually polled.

2. The trial court did not abuse its discretion in denying the defendant's motion for a mistrial: the defendant waived any claim that the court failed to canvass L at the time it received her note, and the fact that the jury had difficulty reaching a unanimous verdict but then did so after further instruction and deliberation did not give rise to a concern that the jury was coerced into reaching its verdict, as it was reasonable to infer that L's note was a strong indication that the court's Chip Smith instruction was effective and that, despite any hostility during deliberations, she was open-minded and ready to continue talking with the other jurors; moreover, the jury deliberated for two additional hours after it received the Chip Smith instruction before reaching its verdict, and, at the defendant's request, the jurors, including L, were polled individually and expressed not even the slightest reservation or disagreement concerning the verdict.

3. The defendant could not prevail on his unpreserved claim that he was denied his right to due process because the trial court's response to a note from the jury about accessorial liability as to the murder charges against him created a reasonable possibility that the jury was misled about the state's burden of proof:

a. The defendant waived any objection to the court's jury instructions concerning accessorial liability and, thus, could not prevail under *State* v. *Golding* (213 Conn. 233); the court provided counsel with a copy of its proposed jury instructions, allowed a meaningful opportunity for review of its instructions, solicited comments from counsel, and defense counsel affirmatively stated that the defendant's only exceptions concerned other portions of the charge, and after the jury sent its note to the court with respect to the accessorial liability instruction, defense counsel agreed with the court's proposed response to the note, which was to ask the jury for further clarification regarding what it was asking in the note, did not ask the court to take further action when the jury did not provide the court with another note concerning the instruction at issue, and specifically stated that further instruction was not necessary.

b. The defendant's claim that the court's jury instruction on accessorial liability constituted plain error was unavailing, as the defendant failed to demonstrate the existence of an instructional error that was so obvious that it affected the fairness and integrity of and public confidence in the judicial proceedings; the court's instruction did not create the possibility of confusion in the minds of the jurors as to what evidence the state relied on in support of the murder counts or with respect to the mental state required for the commission of murder as an accessory, as the court repeatedly instructed the jury that it must find that, if the defendant intentionally aided others in the commission of the crime of

murder, he acted with the mental state necessary for the commission of murder and that this mental state consisted of the intent to kill another person.

Argued March 5—officially released August 6, 2019

Procedural History

Substitute information charging the defendant with two counts each of the crimes of murder and criminal possession of a firearm, and with the crime of conspiracy to commit murder, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; verdict of guilty of two counts of murder and one count of criminal possession of a firearm; thereafter, the court denied the defendant's motion for a mistrial and rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed.*

Jennifer Bourn, supervisory assistant public defender, for the appellant (defendant).

Bruce R. Lockwood, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Robin D. Krawczyk* and *Donna Mambrino*, senior assistant state's attorneys, for the appellee (state).

Opinion

KELLER, J. The defendant, Angel Carrasquillo, appeals from the judgment of conviction, rendered following a jury trial, of two counts of murder as an accessory in violation of General Statutes §§ 53a-8 and 53a-54a, and one count of criminal possession of a firearm in violation of General Statutes § 53a-217.[1] The defendant claims that the trial court (1) deprived him of his right

[1] The jury found the defendant not guilty of one count of conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a, and one count of criminal possession of a firearm in violation of § 53a-217. The court imposed a total effective sentence of eighty years of incarceration.

to due process and his right to a jury trial by coercing the jury to reach a verdict, (2) improperly denied his motion for a mistrial and his request for a postverdict inquiry into jury coercion, and (3) deprived him of his right to due process by failing to provide the jury with additional guidance with respect to the principle of accessorial liability. We affirm the judgment of the trial court.

On the basis of the evidence presented at trial, the jury reasonably could have found that prior to and during the events underlying this appeal, the defendant, Luis Quintero, and Josue Burgos were members of a street gang that was involved in the sale of illegal drugs. On October 13, 2009, the defendant, Quintero, and Burgos discovered that Luis Rodriguez, who was not a gang member, was selling illegal drugs at a home on Wethersfield Avenue in Hartford. Rodriguez engaged in this activity despite the fact that one or more gang members had warned him not to sell drugs in this area, as the gang considered it to be part of its territory.

The defendant, Quintero, and Burgos confronted Rodriguez at the home on Wethersfield Avenue. Leida Franqui, who was not a gang member, was with Rodriguez. The defendant wanted a .25 caliber handgun that he knew was in Rodriguez' possession. He physically struck Rodriguez, rendering him unconscious. He took possession of Rodriguez' cell phone and handgun. The defendant was driven to and from the scene by his girlfriend, Nicole Rodrick. After Rodriguez regained consciousness, he called his cell phone and asked the defendant to return it to him. The defendant agreed to meet with Rodriguez to return his cell phone but not his handgun.

In the early morning hours of October 14, 2009, Rodrick drove the defendant, Quintero, and Burgos, all of whom were armed, to Benton Street in Hartford to

meet with Rodriguez and Franqui, both of whom were unarmed. At or about 2 a.m., as the group of five was walking in the vicinity of the intersection of Franklin Avenue and Whitmore Street in Hartford, an argument ensued. The defendant, Quintero, and Burgos shot Rodriguez and, soon thereafter, Franqui. By the time that police arrived on the scene, Rodrick had driven the defendant and his accomplices away from the scene of the shooting, and Rodriguez and Franqui had died as a result of multiple gunshot wounds, including gunshot wounds to the head. Medical examiners subsequently recovered nine millimeter and .22 caliber bullet fragments from the victims' bodies.

Rodrick drove the defendant to her East Hartford residence. There, the defendant, who was still in possession of Rodriguez' handgun, accidentally discharged the handgun and thereby caused an injury to his left leg. Rodrick tended to his injury, which was not significant. Later that morning, the defendant went to the residence of a fellow gang member, Rosemary Pinto. There, he asked a fellow gang member, Juan Gonzalez, to hold the gun for him, and he commented that he "killed them mothafuckers."

The defendant subsequently made additional incriminating statements concerning the shooting. On multiple occasions, a police detective, Luis Poma, questioned the defendant about the events at issue. On October 15, 2009, the defendant denied that he was involved in the shooting and stated that he had an alibi. On October 23, 2009, the defendant admitted that he had taken Rodriguez' gun and cell phone, and then stated that Burgos was the shooter. On June 22, 2010, the defendant asked Poma whether three guns had been used in the shooting, thereby referring to information about the shooting that was not made public. Then, the defendant stated to Poma that he was at the scene of the shooting, but that Quintero and Burgos had shot the victims. The

defendant admitted that he took Rodriguez' handgun, accidentally shot himself in the leg, and gave the handgun to Gonzalez to dispose of it. On February 7, 2013, the defendant contradicted his earlier statement that he was present at the scene of the shooting, and that Quintero and Burgos were the shooters. He admitted, however, that he had taken Rodriguez' gun and cell phone, had accidentally shot himself with the gun, and later had given the gun to Gonzalez.

In 2011, the defendant was incarcerated in connection with an unrelated incident. He admitted to a fellow gang member and inmate, Luis Rojas, that the events surrounding the shooting of Rodriguez and Franqui did not go as he had planned. He admitted to Rojas that he had shot Rodriguez because it appeared to him that Rodriguez was reaching for a gun, and that he had shot Franqui because she witnessed him shoot Rodriguez. With respect to his shooting of Franqui, the defendant explained to Rojas that "it was part of the game . . . . She had to go because she seen it." Additional facts will be set forth as necessary.

I

First, the defendant claims that the court deprived him of his right to due process and his right to a jury trial by coercing the jury to reach a verdict. We disagree.

The following additional facts are relevant to this claim. After jury selection was completed,[2] the jury

[2] During the first few days of jury selection, the court informed potential jurors, including three persons who were chosen to serve on the jury, that it expected the trial to commence on October 22, 2015, and be completed by November 6, 2015. During the later days of jury selection, the court informed potential jurors, including nine persons who were ultimately chosen to serve on the jury, that it expected the trial to commence on October 26, 2015, and be completed by November 13, 2015. At no time did the court state to potential jurors that its anticipated trial schedule was not subject to change.

heard evidence over the course of seven days. The presentation of evidence began on October 26, 2015, and concluded on November 4, 2015. Following closing arguments and the jury charge, the jury began its deliberations on November 5, 2015, and the deliberations took place over the course of six days. The jury announced its verdict on November 13, 2015. Using written notes, the jury or members of the jury communicated with the court on many occasions during the jury deliberations. On November 5, 2015, the first day of the jury's deliberations, the jury requested additional copies of the court's written instructions and asked for clarification with regard to the court's instructions. In another note, the jury also asked to see an exhibit that was marked for identification purposes only or, in the alternative, to rehear certain testimony. On November 6, 2015, the second day of the jury's deliberations, the jury asked to rehear the testimony of three witnesses. The court responded to these requests.

On November 10, 2015, the fourth day of the jury's deliberations, the jury asked the court for clarification with respect to the court's instructions and to rehear certain testimony. The court responded to these requests. At 4:13 p.m., the jury sent the court two notes. In the first note, the jury asked whether it could begin its deliberations at 10:45 a.m. on November 12, 2015, to accommodate a personal commitment made by a juror to speak at a high school. The second note stated: "The jury, while willing to deliberate, is getting very heated, and would do well with a short stop for today. We are willing to continue deliberating but at this time it is not beneficial." The court responded to these requests by adjourning for the day and permitting the jury to resume its deliberations at 10:45 a.m. on November 12, 2015.[3]

[3] The trial did not resume on November 11, 2015, because the Veterans Day holiday was observed that day.

On November 12, 2015, the fifth day of the jury's deliberations, the jury sent the court three notes. In the first note, the jury asked the court to rehear certain testimony. The court complied with the request. In the second note, the jury asked for further guidance with respect to accessorial liability and "the separate theories of liability." The court responded to the jury's inquiry by noting that it already had provided the jury with an instruction concerning accessorial liability, but invited the jury to make additional inquiries as necessary. The third note was from a juror, M.P.[4] During jury selection, the court had informed M.P. that it expected the trial to be completed by November 13, 2015. At that time, M.P. stated that he would not be available to serve as a juror after November 10, 2015. The court responded that there was a "very strong likelihood" that the trial would be completed by November 10, 2015, and M.P. was selected as a juror. In the note that M.P. sent to the court on November 12, 2015, however, M.P. stated that he would be available to participate in the trial on November 13, 2015. Before the court excused the jury for the day, it explained to the jury that Attorney J. Patten Brown III, who had represented the defendant during the trial until this point in time, would not be present in court on November 13, 2015, but that Brown's associate, Attorney Alex Glomb, would be present.[5]

[4] In this opinion, we will refer to individual jurors by their initials to protect their legitimate privacy interests.

[5] On November 10, 2015, Brown reminded the court outside of the jury's presence that, due to a family medical matter that required him to travel out of the state, he would be unable to be present in court on November 13, 2015. Brown stated that he planned on having Glomb attend the trial in his absence and that he preferred to have an opportunity to weigh in on any substantive issues that might arise during his absence from the trial. The court said that it would attempt to accommodate Brown.

On November 12, 2015, the court revisited the issue of Brown's absence. Brown explained that Glomb would attend the trial on November 13, 2015, and that, due to Brown's travel plans, Glomb could reach him if necessary by phone no earlier than 11:30 a.m. on November 13, 2015. The court stated that it planned to have the jury resume its deliberations at 10:30 a.m. on November 13, 2015. The court stated that if it received a note from the jury

On November 13, 2015, the sixth and final day of the jury's deliberations, the court received five notes from the jury. The court received the first three notes at 10:57 a.m. In the first note, the jury stated: "We are at a place where we are not able to come to a unanimous decision. We have on one count but are not able to on [counts] 1-4. We would [like] guidance." In the second note, juror D.N. indicated that because of a medical emergency involving a close relative, he would be unable to continue to serve on the jury after November 13, 2015.[6] In the third note, juror J.D. stated in relevant part: "I am unable to be at court for jury deliberations on Monday, [November 16, 2015] due to prior engagement in NC. I

between 10:30 a.m. and 11:30 a.m. in which it either stated that it had reached a verdict or requested to hear additional playback, the court would take action with respect to such notes without affording Glomb an opportunity to consult with Brown. The court also stated that it would be helpful for Brown to consult with Glomb with respect to its accessorial liability instruction so that, if it received an additional note from the jury related to the instruction, Glomb would be "kind of up to speed on the instruction . . . ." The court stated, however, that Glomb would have the opportunity to consult with Brown if he desired to do so. The court stated that if, during this brief period of time, it received "any other notes" from the jury, it would delay the proceeding if Glomb wanted an opportunity to consult with Brown. The court stated that "if there's any other notes that come up . . . that Attorney Glomb doesn't feel comfortable addressing, then we'll wait until he can reach you by phone." The court, however, asked Brown to prepare Glomb for the possibility of a verdict during his absence. Brown replied: "Yeah. Yeah. That's fine. It is what it is."

At the end of the proceeding on November 12, 2015, at Brown's request, the court alerted the jury to the fact that Brown would not be present on November 13, 2015, due to "family responsibilities." The court informed the jury that Glomb would "be here" in Brown's absence.

[6] The note sent by D.N. states in relevant part: "I . . . will not be able to continue with Jury Service beyond this Friday [November 13, 2015].

"While I have been in attendance, my mother who lives in Chandler, AZ, has had two emergency surgeries to address Breast Cancer. Monday [November 16, 2015] she has to start high dose radiation treatments [two times] daily. I have booked a flight this weekend to arrive in Arizona to care for her during her treatment.

"I apologize for the inconvenience to the court, defendant, and the co-jurors. However, I do not intend to be back for continuing deliberations next week."

can return for Tuesday, [November 17, 2015] for deliberations if necessary. If this is not possible, I would ask to be excused from the jury. Thank you."

Upon receipt of these notes, the court, in the absence of the jury, conferred with counsel. The court made a general observation that, if the jury's deliberations were to go beyond November 13, 2015, there would be an issue concerning juror availability. Then, in response to the jury's note concerning its inability to reach a verdict, it proposed delivering the standard Chip Smith[7] instruction to the jury, providing the jury with copies of the instruction, and asking the jury to continue its deliberations. The court provided counsel with a copy of the instruction. The court also stated that it would "indicate to the jurors who have conflicts after today that we'll take that up later in the day." The court asked counsel if there was any objection to proceeding in this manner, and both the prosecutor and defense counsel replied that there was no objection.

The court summoned the jury to the courtroom and stated: "We've received three notes from the jury this morning, and I just want to go over those and explain what the next steps in the process are.

"The first note has been marked as court exhibit 25, and it reads: We are at a place where we are not able to come to a unanimous decision. We have on one count but are not able to on count one through four. And then it says, I'm assuming, we would like guidance. The jury instruction that you've been provided with is the additional guidance that I'm going to provide.

"We have also received two other notes from . . . individual jurors, which have been marked as court

[7] "A Chip Smith instruction reminds the jurors that they must act unanimously, while also encouraging a deadlocked jury to reach unanimity." (Internal quotation marks omitted.) *State* v. *O'Neil*, 261 Conn. 49, 51 n.2, 801 A.2d 730 (2002).

exhibit 26 and court exhibit 27. At this point we'll address that issue later today, after I give you this instruction and ask that you continue with your deliberations.

"So, this is . . . the instruction to give when the jury is having difficulty agreeing as to a verdict:

"The instructions that I shall give you now are only to provide you with additional information so that you may return to your deliberations and see whether you can arrive at a verdict. Along these lines I would like to state the following to you:

"The verdict to which each of you agrees must express your own conclusion, and not merely the acquiescence and the conclusion of your fellow jurors. Yet, in order to bring your minds to a unanimous result you should consider the question you have to decide not only carefully but also with due regard and deference to the opinions of each other. In conferring together you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments.

"If the much greater number of you reach a certain conclusion, dissenting jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, [and] who have heard the same evidence with an equal desire to arrive at the truth and under the sanctions of the same oath.

"But please remember this: do not ever change your mind just because the other jurors see things differently or to get the case over with. As I told you before, in the end your vote must be exactly that: your own vote. As important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.

"What I have said to you is not intended to rush you into agreeing on a verdict. Take as much time as you need to discuss the matter. There is no need to hurry.

"All right. So, at this point I'm going to ask that you return to the jury room to continue with your deliberations and then we'll await any additional notes. Thank you." Both the prosecutor and defense counsel affirmatively stated that they did not have any further comments.

At 11:30 a.m., the court received the fourth note of the day. The note was from juror L.D. and stated: "I would like the court to know that I am feeling attacked as a juror. Thank you for giving us guidelines. I am willing to keep an open mind and continue talking but I felt very attacked yesterday." The court shared the note with the prosecutor and defense counsel, both of whom indicated that they did not want the court to canvass L.D. Glomb did not state that he needed to discuss the matter with Brown. The court did not take any further action with respect to the note.

At 2:39 p.m., the court received the fifth note of the day, which stated: "We have the verdict! All counts 1-5." The court summoned the jury to the courtroom, and the foreperson announced the jury's finding of guilt with respect to counts one (murder), two (murder), and five (criminal possession of a firearm). The foreperson announced the jury's finding of not guilty with respect to counts three (conspiracy to commit murder) and count four (criminal possession of a firearm). The court accepted the verdict and ordered that it be recorded. At the defendant's request, the jurors were individually polled, and each juror affirmatively expressed his or her agreement with the verdict. The court asked the prosecutor and defense counsel if they were in agreement that a unanimous verdict had been reached. The prosecutor and defense counsel replied affirmatively.

For the first time on appeal, the defendant claims that in light of the unique circumstances that existed at the time that the court delivered the Chip Smith instruction, the court's use of the instruction was impermissibly coercive and, thus, denied him his right to due process and his right to a jury trial. His claim does not necessarily focus on the propriety of the court's Chip Smith instruction, but he contends that, in the present case, "the court's response to the deadlock note created pressure and exacerbated existing pressures on the jury, particularly the minority view juror(s), and that all the coercive circumstances denied [him of] his right to a fair jury trial." The defendant argues that the claim is reviewable pursuant to the bypass doctrine set forth in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[8] Additionally, the defendant invites us to conclude that reversal of the judgment is warranted under the plain error doctrine.[9] See Practice Book § 60-5.

[8] Pursuant to *Golding*, a defendant may prevail on a claim of constitutional error not preserved at trial only if all four of the following conditions are satisfied: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yasiel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding* by eliminating word "clearly" before words "exists" and "deprived").

[9] "[T]he 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. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. A party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice. . . . [Previously], we described the two-pronged nature of the plain error doctrine: [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

In the defendant's view, the court put undue pressure on the jury to reach a verdict[10] because (1) the court "used a particularly coercive anti-deadlock instruction, directing only minority view jurors to reconsider their position in light of the opinion of the majority"; (2) during jury selection, the court told prospective jurors that it did not believe that the trial would continue beyond Friday, November 13, 2015, and it delivered the Chip Smith instruction following five days of deliberations and without first responding to the notes sent by D.N. and J.D., who had informed the court that they would be unable to continue to serve as jurors if the trial continued to Monday, November 16, 2015; (3) "[t]he jury was left to wonder if the court would require deliberations to continue beyond [November 13, 2015] and whether it must reach a verdict to be excused"; (4) D.N. informed the court that he would be unable to serve after November 13, 2015, but the court did not respond or determine whether his circumstance was causing him pressure to ensure that a verdict was reached; (5) L.D. informed the court that she had felt "attacked" during the deliberations, but the court's lack of response to L.D. and its Chip Smith instruction likely indicated to the jury that "such pressures" placed on minority view jurors were "sanctioned by the court"; and (6) the jury had deliberated for more than five days and was unable to reach a verdict but, following the Chip Smith instruction, the jury deliberated for only two additional hours before reaching a verdict.

reverse the judgment would result in manifest injustice." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017). "It is clear that an appellate court addressing an appellant's plain error claim *must* engage in a review of the trial court's actions and, upon finding a patent error, determine whether the grievousness of that error qualifies for the invocation of the plain error doctrine and the automatic reversal that accompanies it." (Emphasis in original.) *State* v. *Myers*, 290 Conn. 278, 288–89, 963 A.2d 11 (2009).

[10] We observe that the defendant does not claim that the court coerced the jury to reach a verdict of guilt.

We begin our analysis under *Golding* by observing that the record affords us the ability to review the instructions provided to the jury as well as the relevant circumstances under which the court's instructions were given. Moreover, the defendant's claim is based on a violation of his rights to due process and a jury trial under the federal constitution and, thus, is constitutional in magnitude. Because the claim is reviewable under *Golding*, we turn to an examination of whether the alleged constitutional violation exists and whether it deprived him of a fair trial. Because the claim presents a question of law, our review is plenary. See, e.g., *State* v. *Brown*, 299 Conn. 640, 650, 11 A.3d 663 (2011) (questions of law afforded plenary review).

"A jury that is coerced in its deliberations deprives the defendant of his right to a fair trial under the sixth and fourteenth amendments to the federal constitution, and article first, § 8, of the state constitution. Whether a jury [was] coerced by statements of the trial judge is to be determined by an examination of the record. . . . The question is whether in the context and under the circumstances in which the statements were made, the jury [was], actually, or even probably, misled or coerced." (Citations omitted; internal quotation marks omitted.) *State* v. *Pinder*, 250 Conn. 385, 427, 736 A.2d 857 (1999); accord *State* v. *Daley*, 161 Conn. App. 861, 866, 129 A.3d 190 (2015), cert. denied, 320 Conn. 919, 132 A.3d 1093 (2016). We recognize that "a defendant is not entitled to an instruction that a jury may hang . . . [but] he is entitled to a jury unfettered by an order to decide." (Internal quotation marks omitted.) *State* v. *Breton*, 235 Conn. 206, 239, 663 A.2d 1026 (1995).

"Since 1881, our Supreme Court has approved of instructing deadlocked juries that they should continue to deliberate, with minority view jurors considering the logic of the majority view jurors as they did so. . . . In *State* v. *O'Neil*, 261 Conn. 49, 59, 801 A.2d 730 (2002),

although our Supreme Court continued to uphold such instructions, it also recognized the potential for the coercion of minority view jurors. Specifically, our Supreme Court concluded that instructing jurors to consider the opinions of majority view jurors is an acceptable method of facilitating the deliberative process when faced with a deadlocked jury, but that the court must balance the instruction with a cautionary reminder to jurors of their obligation as individuals to give their own verdict without surrendering their conscientiously held views. Id., 73. Although reaching a unanimous verdict is an important public policy goal; id., 74; the defendant's due process rights also must be protected, and the defendant has the right to 'have each and every juror vote his or her conscience irrespective of whether such vote results in a hung jury.' Id., 76.

"To ensure that such a cautionary reminder be given by our trial courts in future cases, our Supreme Court adopted the following language as a model instruction: 'The instructions that I shall give you now are only to provide you with additional information so that you may return to your deliberations and see whether you can arrive at a verdict.

" 'Along these lines, I would like to state the following to you. The verdict to which each of you agrees must express your own conclusion and not merely the acquiescence in the conclusion of your fellow jurors. Yet, in order to bring your minds to a unanimous result, you should consider the question you have to decide not only carefully but also with due regard and deference to the opinions of each other.

" 'In conferring together, you ought to pay proper respect to each other's opinions and listen with an open mind to each other's arguments. If the much greater number of you reach a certain conclusion, dissenting

jurors should consider whether their opinion is a reasonable one when the evidence does not lend itself to a similar result in the minds of so many of you who are equally honest and equally intelligent, who have heard the same evidence with an equal desire to arrive at the truth and under the sanctions of the same oath.

" 'But please remember this. Do not ever change your mind just because other jurors see things differently or to get the case over with. As I told you before, in the end, your vote must be exactly that—your own vote. As important as it is for you to reach a unanimous agreement, it is just as important that you do so honestly and in good conscience.

" 'What I have said to you is not intended to rush you into agreeing on a verdict. Take as much time as you need to discuss the matter. There is no need to hurry.' . . . Id., 74–75.

"Since *O'Neil*, our courts have used such cautionary language in what has become known as a Chip Smith charge when instructing a deadlocked jury to consider the majority view. Such language is not required, however, when the court merely tells jurors to continue deliberating without instructing them in a potentially coercive manner." *State* v. *Mitchell*, 170 Conn. App. 317, 324–25, 154 A.3d 528, cert. denied, 325 Conn. 902, 157 A.3d 1146 (2017). "[A] Chip Smith charge, while encouraging a continued search for unanimity, also stresses that each juror's vote must be his [or her] own conclusion and not a mere acquiescence in the conclusions of his [or her] fellows . . . . The language of the charge does not direct a verdict, but encourages it." (Citation omitted; internal quotation marks omitted.) *State* v. *Feliciano*, 256 Conn. 429, 440, 778 A.2d 812 (2001).

With respect to the court's Chip Smith instruction, the defendant argues both that the instruction is "[not] always unduly coercive" but that he nonetheless

"believes *O'Neil* was wrongly decided and [that] the better approach would be not to give an instruction singling out minority view jurors . . . ." We observe that the court's Chip Smith instruction mirrored that approved by our Supreme Court in *State* v. *O'Neil*, supra, 261 Conn. 59. Moreover, defense counsel did not object to the court's instruction.[11] To the extent that the defendant urges this court to conclude that *O'Neil* was wrongly decided, we unequivocally decline to do so. See, e.g., *State* v. *LaFleur*, 156 Conn. App. 289, 302–303, 113 A.3d 472 (this court is unable to overrule, reevaluate, or reexamine controlling precedent of our Supreme Court), cert. denied, 317 Conn. 906, 114 A.3d 1221 (2015).

To the extent that the defendant argues that the circumstances in which the court delivered the Chip Smith instruction resulted in the court's having applied improper pressure on the jury to reach a verdict, we reject this argument. The defendant focuses on the fact that the court delivered the instruction on a Friday morning, following five days of deliberations, and that two jurors had notified the court that they would be unable to deliberate on Monday. Moreover, the defendant focuses on the fact that, during jury selection, the court informed the jurors that it anticipated that the

[11] With respect to the notes sent by the jury on November 13, 2015, the defendant states in his appellate brief: "Although the notes came during the period when Attorney Brown was not available, the court did not delay in deciding to give the Chip Smith instruction, both orally and in writing." (Internal quotation marks omitted.) The defendant, however, has not raised a claim of error in this regard. As we have observed previously in this opinion, Brown informed the court that Glomb would be present on November 13, 2015, and the court made clear to Brown that, in Brown's absence, it would afford Glomb an opportunity to consult with Brown if Glomb wanted to do so. See footnote 5 of this opinion. The record reflects that, after the court proposed responding to the jury's deadlock note by providing the jury with a Chip Smith instruction, Glomb did not ask for an opportunity to consult with Brown, but merely stated that he did not have an objection to the court's proposal.

trial would be completed by November 13, 2015, the day on which the court delivered the Chip Smith instruction and the jury reached its verdict. The court's statements during jury selection plainly were intended to determine whether prospective jurors were available to serve as jurors during the dates of the trial and, in light of all of the court's later instructions to the jury concerning its deliberations, may not reasonably be interpreted to suggest that a verdict by November 13, 2015, was expected or required by the court. The court neither instructed the jury nor implied that it was required to reach a verdict or that it was required to reach a verdict at a particular time. See, e.g., *United States* v. *Badolato*, 710 F.2d 1509, 1514–15 (11th Cir. 1983) (fact that court did not instruct jury that it was required to reach verdict or that it was required to do so at that time weighed against conclusion that jury had been coerced).

Any concern that the jury may have believed that it was expected or required to reach a verdict on November 13, 2015, was readily addressed by the court in its Chip Smith instruction. The court did not state, in that instruction or prior to that instruction, that the jury was expected or required to reach a verdict on November 13, 2015, or at any particular time. Instead, the court emphasized that each juror was expected to honestly and in good conscience reach a conclusion, and that no juror should change his or her mind "to get the case over with." Moreover, the court concluded its instruction by stating: "What I have said to you is not intended to rush you into agreeing on a verdict. Take as much time as you need to discuss the matter. There is no need to hurry." There is no basis in the record to suggest that the jury either did not understand or did not follow this plain instruction.

The defendant argues that "[t]he jury was left to wonder if the court would require deliberations to continue

beyond [November 13, 2015] and whether it must reach a verdict in order to be excused." He submits that the circumstances were coercive because "[t]he court did not advise the jury that it need not reach a verdict in order to be excused at the end of the day. To the contrary, it suggested that the court would wait as long as it took to reach a unanimous verdict." The defendant's argument is undermined by the fact that, prior to November 13, 2015, the jury had deliberated for five days. The jury did not reach a verdict on any of these prior days, yet it was excused at the end of each day. On November 10, 2015, the court received a note from the jury in which it stated that deliberations were "getting very heated" and that continued deliberations would not be "beneficial." In response to this note, the court permitted the jury to be excused for the day. In light of this prior experience of the jury, the defendant's argument that the jury would have believed that it would not be excused if it did not reach a verdict is not persuasive.

The defendant correctly observes that, in its jury charge, the court stated that the jury's "task" was to return a verdict and stated that, with respect to each count, the jury had the option of finding the defendant guilty or not guilty. Additionally, the defendant focuses on the fact that, during its charge, the court stated that the jury was "duty bound" to return a verdict of guilty or not guilty with respect to each count.

These statements in the court's charge, however, did not impermissibly suggest that the jury was required to reach a unanimous verdict. Reviewing the court's use of the phrase, "duty bound," in greater context reflects that the court did not suggest that it would not accept the jury's failure to reach a unanimous verdict, but merely that a verdict of guilty or not guilty must be unanimous. The court stated: "I impress upon you that you are duty bound as jurors to determine the facts

on the basis of the evidence as it has been presented, to apply the law as I have outlined it, and then to render a verdict of guilty or not guilty as to each of the crimes charged. *When you reach a verdict, it must be unanimous.* It is the duty of each juror to discuss and consider the opinions of the other jurors. *Despite that, in the last analysis, it is your individual duty to make up your own mind and to decide this case upon the basis of your own individual judgment and conscience.*" (Emphasis added.) In light of the fact that the jury sent several notes to the court during the course of its deliberations, including several notes in which it requested further instruction, we observe that, after it had received the Chip Smith instruction, the jury did not ask the court for any further clarification with respect to the instruction.

The defendant also focuses on the content of the note sent to the court by juror D.N. See footnote 6 of this opinion. The defendant argues that D.N.'s "circumstances suggest distraction, worry and pressure to finish to take care of this important and emotional family matter. The court did not respond, determine whether this was having a coercive effect on [D.N.] during deliberations—distracting or agitating him, pressuring him to agree, or causing him to pressure others to agree with him—or assure him that he would be excused at the end of the day on [November 13, 2015], whether or not there was a unanimous decision."

The defendant incorrectly states that the court did not respond to D.N.'s note. The record reflects that, after it had received the note and had summoned the jury to the courtroom to deliver its Chip Smith instruction, the court observed that it had received notes from D.N. and J.N., had marked them as court exhibits, and that it would "address that issue later today, after I give you this instruction and ask that you continue with your deliberations." The court asked the prosecutor

and defense counsel if there was any objection to informing the jurors who had informed the court about scheduling conflicts that it would address the issue later that day. The prosecutor and defense counsel replied, "No, Your Honor."

Setting aside the fact that defense counsel agreed to the court's response to D.N.'s note, and that defense counsel did not ask the court to conduct any further inquiry, we are not persuaded that D.N.'s note suggests that he was distracted, agitated, or likely to have felt pressured to agree or to cause others to agree with his view of the case. D.N.'s note simply alerted the court to the existence of a family emergency that would require D.N.'s absence beginning on November 16, 2015, not sooner.

The defendant also focuses on the note that L.D. sent to the court, after the court delivered its Chip Smith instruction, in which she stated that she "felt very attacked [as a juror] *yesterday*." (Emphasis added.) The defendant argues that, by failing to address the note, the court somehow sanctioned the pressure that L.D. was under by other members of the jury and that its inaction "served to increase the pressures on the [other] minority view jurors."

After the court received L.D.'s note, it shared it with the prosecutor and defense counsel. Defense counsel expressly declined the opportunity to canvass L.D. with respect to the note. Setting aside the fact that defense counsel thereby prompted the court's alleged "inaction" with respect to the note, we are not persuaded that the note reflects that, at the time L.D. sent the note to the court, it was evidence of continued undue pressure on L.D. or any other minority view jurors. As we have stated previously in this opinion, L.D. began the note by stating that she was "feeling attacked as a juror." Then, alluding to the court's Chip Smith instruction,

she thanked the court for providing the deadlocked jury with additional guidance and indicated that she would "keep an open mind and continue talking . . . ." L.D. ended the note by using the past tense, stating that she "felt very attacked *yesterday*." (Emphasis added.) Viewing the note in its entirety, we conclude that the court reasonably could have interpreted the note to reflect that, after it delivered its Chip Smith instruction, L.D. felt better about continuing her deliberations with the rest of the members of the jury. Nothing about L.D.'s note reflects that she was unwilling to follow the court's Chip Smith instruction. To the contrary, consistent with the Chip Smith instruction, L.D. expressed her willingness to keep an open mind and to continue engaging in a dialogue with her fellow jurors. She did not state that she was unwilling to continue to serve as a juror or that she was inclined to abandon her conscience or to rush into agreeing on a verdict. Accordingly, we are not persuaded that L.D.'s note suggests that L.D. or any other member of the jury felt coerced into arriving at a verdict.

Finally, the parties agree that, following the Chip Smith instruction, the jury deliberated for approximately two hours before arriving at a verdict. Prior to the Chip Smith instruction, the jury indicated that it was deadlocked with respect to counts one through four of the state's information (in which the defendant was charged with two counts of murder, conspiracy to commit murder, and criminal possession of a firearm). The defendant argues that, because the jury deliberated for all or part of five days prior to the Chip Smith instruction, "the short time of additional deliberation [following the Chip Smith instruction] suggests coercion."

The defendant's argument is based on a comparison of the time that the jury spent deliberating following the Chip Smith instruction and the time it spent deliberating

and listening to the playback of testimony during the five prior days of deliberation. It suffices to observe that, during the prior days of deliberation, the jury spent a lengthy amount of time listening to the playback of testimony from Rojas, Gonzalez, Rodrick, Poma, Detective Reginald Early, and Quintero. Our case law does not furnish a mathematical formula for this court to apply to determine whether the amount of time that has lapsed between a jury's additional deliberation following a Chip Smith instruction and its verdict indicates that the jury was coerced into reaching a verdict. We are not persuaded that the two hours of additional deliberation following the court's Chip Smith instruction reflected that impermissible coercion had been brought to bear by the court in the present case.

In conclusion, we are not persuaded that the court's Chip Smith instruction or the circumstances in which it was given reflect that the court coerced the jury into reaching a verdict.[12] Our conclusion is bolstered by the

[12] The state argues that the mixed verdict returned by the jury further supports a finding that the jury was not coerced. The state properly observes that, in rejecting claims involving prosecutorial impropriety and evidentiary error, Connecticut courts, in concluding that it was not likely that prosecutorial impropriety or evidentiary error affected the jury's verdict, have relied on the fact that the jury had reached a mixed verdict. See, e.g., *State* v. *Ancona*, 270 Conn. 568, 618, 854 A.2d 718 (2004) (mixed verdict proof that prosecutor's improper argument did not affect verdict), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005); *State* v. *Gallo*, 135 Conn. App. 438, 461–62, 41 A.3d 1183 (2012) (mixed verdict proof that defendant not harmed by improper admission of evidence), appeal dismissed, 310 Conn. 602, 78 A.3d 854 (2013) (certification improvidently granted). A mixed verdict helps to shed light on the prejudicial effect, if any, of prosecutorial impropriety or the improper admission of evidence because a not guilty verdict on *any* charges against a defendant reflects that the argument or evidence at issue did not so unfairly pervade the jury's deliberations that it affected the jury's deliberations as a whole.

In the context of a coerciveness claim, however, a reviewing court reasonably could interpret a mixed verdict as evidence that the jury simply felt pressure to reach a verdict and, thus, found the defendant guilty on some counts but not others simply to conclude the deliberations. In other words, in the context of a coerciveness claim, a verdict of not guilty with respect to one or more counts does not necessarily shed light on the source of the

fact that, at the defendant's request, the members of the jury were individually polled with respect to their verdicts and that no juror expressed hesitation or disagreement with respect to the verdicts.

In light of the foregoing, we are not persuaded that the alleged constitutional violation exists and that the defendant was deprived of a fair trial. The claim fails under *Golding*'s third prong.[13]

II

Next, the defendant claims that the court improperly denied his motion for a mistrial and his request for a postverdict inquiry into juror coercion. We disagree.

The following additional facts are relevant to the present claim. On January 21, 2016, the defendant filed a handwritten letter with the court in which he asked the court to set aside the verdict prior to the time of sentencing.[14] At the sentencing hearing on February 4, 2016, defense counsel, Brown, moved orally for a mistrial on several grounds. Defense counsel clarified that his arguments were based on the defendant's letter to

jury's disagreement or whether the verdict of one or more jurors was the result of coercion rather than conscience. See, e.g., *Phelps* v. *Smith*, 517 Fed. Appx. 379, 384 (6th Cir. 2013) (declining to apply mixed verdicts rationale in context of claim of jury coercion).

[13] In light of our analysis under *Golding*, including our determination that the defendant has not demonstrated that the court coerced the jury into reaching its verdict, we conclude that the defendant has failed to demonstrate that plain error exists in connection with the present claim.

[14] The letter stated in relevant part: "I am writing this missive in regards to a situation that has taken place before you in the matter of my trial. I am sure you are aware of it because my counsel has now put it into the attention of all involved. I ask that you as the leader of your courtroom put my verdict aside and put me, my counsel, State Attorney and the (2) jurors whom were intimidated in your presence to get this right. My counsel is to put the proper motions before you before my sentencing date on [February 4, 2016]. I ask that you give me the authorization to put my motions in a timely manner in case he does not because he tells me he is overwhelmed with other cases. Thank you for your consideration."

the court, stating that he was discussing "things my client wanted me to state . . . all as a basis for a mistrial."

First, defense counsel stated, "[a]s you know, there was an issue with a juror note. My client doesn't feel that was fully explored." Although defense counsel did not explicitly state before the trial court that he was referring to the note sent to the court from L.D. on November 13, 2015, it appears from the prosecutor's arguments that she understood defense counsel's argument to be based on L.D.'s note. Moreover, in his appellate brief, the defendant has clarified that his argument was, in fact, based on L.D.'s note, which we have discussed more fully in part I of this opinion. Defense counsel admitted that he did not remember many of the details concerning "the juror note," such as whether it was sent before or after the court delivered its Chip Smith instruction, but he recalled that he "was consulted and . . . did speak with the court about that . . . . I just don't remember the substance of the conversation." The prosecutor reminded the court and Brown that Brown's associate, Glomb, was present at the time the note was sent to the court and that, at that time, Brown was available by phone. The prosecutor also reminded the court that, after it received the note, it did not believe any action needed to be taken with respect to the note and that, shortly thereafter, the jury sent a note to the court in which it indicated that it had reached a verdict.

Second, defense counsel argued that the defendant was of the opinion that the jury's verdict with respect to the murder and conspiracy counts was inconsistent. Third, defense counsel raised a claim seemingly based on prosecutorial impropriety by arguing that both he and the defendant believed that he had been "subject[ed] to many frivolous personal attacks both on and off the record, in and out of the court's presence, by

the prosecutors alleging ethical violations that are nonexistent." With respect to these alleged attacks, defense counsel stated that although the defendant believed that they were "done intentionally to affect [his] performance," he disagreed with the defendant that the attacks affected his representation of the defendant. Defense counsel stated that the first two grounds were "viable issues" in support of his motion for a mistrial. After hearing argument from the prosecutor, the court summarily denied the motion for a mistrial.

The defendant, relying solely on the ground related to the court's response to the jury note sent by L.D., now claims that the court abused its discretion in denying the motion for a mistrial. He also argues that the court abused its discretion in denying his request for a postverdict inquiry into jury coercion. The defendant argues that "the court failed to conduct any inquiry on the record following L.D.'s note . . . . Given the coercive factors here, there are substantial grounds showing that [the] defendant was denied a fair trial."

As a preliminary matter, we observe that although the defendant couches the present claim as one in which the court improperly denied his motion for a mistrial and "abused its discretion in denying . . . [his] request for postverdict inquiry," we do not interpret the defendant's handwritten letter to the court, nor the arguments advanced by defense counsel at the time he argued for a mistrial, to have constituted a request for a further inquiry of one or more members of the jury. Likewise, the court did not explicitly state that it was denying a motion for a further inquiry of one or more jurors. Instead, the court stated: "If I'm going to treat this as a motion for a mistrial and any other postconviction motion, pursuant to Practice Book §§ 42-50 through 42-56, I'm going to deny the motion." Furthermore, in light of the arguments set forth in the defendant's appellate brief, we do not interpret the defendant's analysis of

the present claim to be based on the court's failure to conduct a further inquiry of L.D., either at the time of the jury's deliberations or following the jury's verdict, but rather the court's denial of the defendant's motion for a mistrial *based on its failure to conduct a further inquiry of L.D.* at the time of trial. Because we are unable to review a ruling that does not exist, we will limit our review to the court's denial of the motion for a mistrial.

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

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . Therefore, [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal

is required." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 628, 175 A.3d 514 (2018).

We discussed the circumstances surrounding L.D.'s note in part I of this opinion. This includes the fact that Glomb was present during the proceeding on behalf of the defendant on November 13, 2015. We now set forth more fully the colloquy that transpired between the court, the prosecutor, and Glomb after the court received the note:

"The Court: Good afternoon. We've received some notes from the jury. The first is court exhibit 28, and it was received from one of the jurors, [L.D.] and I have shared it with both sides. Does either side want to canvass [L.D.] before we go any further?

"[The Prosecutor]: No, Your Honor.

"[Defense Counsel]: No, Your Honor.

"The Court: Both parties have indicated that they don't see a need to canvass [L.D.], so we won't do that at this point.

"Then, we've also received another note from the jury, it's been marked as court exhibit 30, and it indicates that, we have the verdict on all counts, one through five.

"Anything before we bring the jury in?

"[The Prosecutor]: No, Your Honor.

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

The foregoing colloquy reflects that Glomb waived any claim that the court failed to conduct a further inquiry of L.D. on November 13, 2015. "The mechanism by which a right may be waived . . . varies according to the right at stake. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal." (Internal quotation marks

omitted.) *State* v. *Foster*, 293 Conn. 327, 337, 977 A.2d 199 (2009).

The state urges us to conclude that defense counsel waived any claim that the court should have granted his motion for a mistrial on the basis of L.D.'s note. We disagree. At trial, the defendant waived any claim that the court failed to canvass L.D. at the time it received her note. In exercising its discretion on the motion for a mistrial, however, the court was obliged to determine whether, in light of the trial proceedings as a whole, the defendant received a fair trial. Given that defense counsel, in his role at trial, had an immediate duty to protect the defendant's rights, the fact that counsel expressly agreed with the court's response to L.D.'s note undoubtedly was compelling evidence that the defendant's right to a fair trial had not been violated. Yet, having been presented with the motion for a mistrial on the basis of L.D.'s note, the court could well have decided upon its consideration of all the proceedings over which it had presided, including events that transpired after it had received L.D.'s note, that despite defense counsel's waiver, the defendant was entitled to a new trial on the basis of the note. Thus, in connection with the present claim, we interpret the effect of the waiver more narrowly than does the state.

As we have discussed in part I of this opinion, L.D.'s note appears to have memorialized the fact that L.D. felt "attacked" as a juror but, following the court's Chip Smith instruction, she was ready and willing to continue to deliberate with her fellow jurors. Importantly, L.D. thanked the court for providing the jury with additional guidance and did not make any request of the court. Therefore, it was reasonable to infer that her note was a strong indication that the court's Chip Smith instruction was effective and that, despite any hostility during deliberations, she was open-minded and ready to continue talking with the other members of the jury. After the

court's Chip Smith instruction, the jury deliberated for two additional hours before reaching its verdict. At the defendant's request, the jurors, including L.D., were polled individually—and, obviously, in the court's presence—and no juror expressed even the slightest reservation or disagreement concerning the verdict announced by the foreperson.

Despite the difficulty experienced by the jury in reaching its verdict, we are mindful that "[t]he alleged demeanor of the jury during its deliberations is not an appropriate basis on which to assess the coercive effect of a jury instruction. More relevant is the manner in which the jurors individually announced their unanimous verdict." (Footnote omitted.) *State* v. *Feliciano*, supra, 256 Conn. 444. The fact that the jury had difficulty reaching a unanimous verdict but, following further instruction and deliberation, was able to reach a unanimous verdict does not in and of itself give rise to a concern that the jury was coerced into reaching its verdict. "Changes of positions by jurors as a consequence of deliberations are an appropriate feature of the deliberative process." *United States* v. *Badolato*, supra, 710 F.2d 1515. In light of the foregoing, we are not persuaded that the court abused its discretion in denying the motion for a mistrial.

III

Finally, the defendant claims that the court deprived him of his right to due process by failing to provide the jury with additional guidance with respect to the principle of accessorial liability. We disagree.

The following additional facts are relevant to this claim. As we stated previously in this opinion, the state charged the defendant with two counts of murder as a principal or as an accessory in violation of §§ 53a-54a

and 53a-8.[15] It does not appear that either party filed requests to charge. On November 3, 2015, two days prior to delivering its jury charge, the court provided a copy of its draft jury charge to the parties. Although the court made some further revisions to the instructions pertaining to counts one and two, it suffices to observe that the deficiencies that the defendant now claims to have existed in the court's charge were reflected in the court's proposed charge that it provided to the parties.

On November 4, 2015, the court held a lengthy charging conference during which the prosecutor and defense counsel raised a number of issues concerning specific instructions in the court's proposed charge. With respect to the accessorial liability instruction at issue in the present claim, the prosecutor stated: "The thing I was questioning is the principal versus accessory. So, in the beginning of the murder charge, it says that [the defendant is] charged under the accessory liability statute and . . . it says separate theories of liability, but it's not clear what the other theory [of liability] is. Like, later on in the instruction, it says you can find him [guilty] as a principal or an accessory, so I was just wondering if there's a way that that could be kind of explained up front." The court stated that it had based its instruction on the standard criminal jury instruction and that it was not inclined to make any change to it. The court noted that although the instruction was "not as clear . . . as you hope it could be," it nonetheless believed that it was "an accurate statement of the law." Defense counsel did not raise any objection to this portion of the court's charge. Thereafter, after the court made additional revisions to its

[15] General Statutes § 53a-8 (a) provides: "A person, acting with the mental state required for commission of an offense, who solicits, requests, commands, importunes or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender."

proposed charge on the basis of its conversations with the parties, the court provided the parties with revised instructions. After reviewing the revised instructions, neither the prosecutor nor defense counsel raised any additional objection to the court's murder instruction. At the conclusion of the charging conference, defense counsel noted that he had "[j]ust one final point" to make with respect to the court's cooperating witness instruction, noting that it was his "only thing . . . [his] exception" to the charge.

In its jury charge, the court instructed the jury with respect to the essential elements of the murder charges and with respect to principles of accessorial liability.[16]

[16] The court instructed the jury in relevant part: "The defendant is charged in count one with the murder of Leida Franqui. The state has charged the defendant under the accessory liability statute. This statute does not define a separate crime, but separate theories of liability.

"The statute defining the offense of murder reads in pertinent part as follows:

"A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person.

"For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt: (1) the defendant intended to cause the death of another person, and (2) in accordance with that intent, the defendant caused the death of Leida Franqui by discharge of a firearm.

"The first element is that the defendant specifically intended to cause the death of another person. There is no particular length of time necessary for the defendant to have formed the specific intent to kill. A person acts intentionally with respect to a result when his conscious objective is to cause such result.

"The concept of specific intent applies to the offense of murder. Please refer to the instructions on specific intent and evidence of intent.

"The intent to cause death may be inferred from circumstantial evidence. The type and number of wounds inflicted, as well as the instrument used, may be considered as evidence of the perpetrator's intent, and from such evidence an inference may be drawn that there was intent to cause a death. Any inference that may be drawn from the nature of the instrumentality used and the manner of its use is an inference of fact to be drawn by you upon consideration of these and other circumstances in the case in accordance with my previous instructions.

"Declarations and conduct of the accused before or after the infliction of wounds may be considered if you find they tend to show the defendant's intent. This inference is not a necessary one; that is, you are not required

to infer intent from the defendant's alleged conduct, but it is an inference you may draw if you find it reasonable and logical and in accordance with my instructions on circumstantial evidence.

"The second element is that the defendant, acting with the intent to cause the death of another person, caused the death of Leida Franqui by discharge of a firearm.

"This means that the defendant's conduct was the proximate cause of the decedent's death. You must find it proved beyond a reasonable doubt that Leida Franqui died as a result of the actions of the defendant. Please refer to the instruction on proximate cause and firearm.

"In this case, the defendant is charged under the accessorial liability statute. The statute does not define a separate crime, but a separate theory of liability.

"A person is criminally liable for a criminal act if he directly commits it or if he is an accessory in the criminal act of another. The statute defining accessory liability reads in pertinent part as follows:

"A person, acting with the mental state required for the commission of an offense, who intentionally aids another person to engage in conduct which constitutes an offense, shall be criminally liable for such conduct and may be prosecuted and punished as if he were the principal offender.

"A person is an accessory if he intentionally aids another person to engage in conduct that constitutes an offense. Aid means to assist, help or support. A person acts intentionally with respect to a result when his conscious objective is to cause such result. Intentionally aid, therefore, means to act in any manner, the conscious objective of which is to assist, help or support. Please refer to the instructions on specific intent and evidence of intent.

"If the defendant intentionally aided as specified in the statute, he is guilty of murder as though he had directly committed it or participated in its commission. To establish the guilt of a defendant as an accessory for assisting in the criminal act of another, the state must prove criminality of intent and community of individual purpose. That is, for the defendant to be guilty as an accessory, it must be established that he acted with the mental state necessary to commit murder, and that in furtherance of that crime, he intentionally aided the principal to commit murder.

"Evidence of mere presence as an inactive companion, or passive acquaintance, or the doing of innocent acts, which, in fact, aid in the commission of a crime, is insufficient to find the defendant guilty as an accessory under the statute. Nevertheless, it is not necessary to prove that the defendant was actually present or actively participated in the actual commission of the crime of murder.

"Where it cannot be determined who fired the fatal shot, beyond a reasonable doubt, the element of murder as to who caused the death has not been proved beyond a reasonable doubt. However, persons acting with the mental state required for the commission of murder, who intentionally aid one another to engage in such conduct and cause the death, are accessories to one another, and would be criminally liable for such conduct as accessories to murder.

As we stated previously in this opinion, on November 12, 2015, the fifth day of the jury's deliberations, the court received a note from the jury, stating: "Could we please have clarification or the definition of the accessory liability statute? And the separate theories of liability. Bottom pg. 25."[17] Outside of the presence of the jury, the court shared the contents of the jury's note with the prosecutor and defense counsel, and stated: "What I would propose is that we bring the jury

"For you to find the defendant guilty of this charge, you must unanimously find that the state has proved all the elements of murder beyond a reasonable doubt. If you conclude that the defendant is guilty as a principal or as an accessory, you do not need to be unanimous regarding whether you believe he was a principal or accessory as long as all twelve jurors agree that at least one method (i.e., principal or accessory) has been proved beyond a reasonable doubt.

"If you find that the state has proved beyond a reasonable doubt each of the elements of the crime of murder, then you shall find the defendant guilty of murder.

"On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall then find the defendant not guilty of murder.

"The defendant is charged in count two with the murder of Luis Rodriguez.

"The state has charged the defendant under the accessory liability statute. I have already defined for you the crime and all the elements of murder. I refer to the instruction on murder, and that instruction applies equally here.

"In summary, the state must prove beyond a reasonable doubt that (1) the defendant intended to cause the death of another person, and (2) in accordance with that intent, the defendant caused the death of Luis Rodriguez by means of a discharge of a firearm.

"In addition, I have already instructed you on the accessory liability statute. I refer you to the instruction on accessory liability, and that instruction applies equally here.

"For you to find the defendant guilty of this charge, you must unanimously find that the state has proved all the elements of murder beyond a reasonable doubt. If you conclude that the defendant is guilty as principal or as an accessory, you do not need to be unanimous regarding whether you believe he was a principal or accessory as long as all twelve jurors agree that at least one method (i.e., principal or accessory) has been proved beyond a reasonable doubt.

"If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of murder, then you shall find the defendant guilty of murder.

"On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements, you shall then find the defendant not guilty of murder."

[17] The court's instruction for count one began on page twenty-five of its charge.

in and . . . tell them that we received the note, and we need them to be more specific as to what they're asking. Because I think this is basically a very general request and it's hard to know . . . how to answer it otherwise. Is that agreeable?" The prosecutor stated: "Yes, sir." Defense counsel stated: "Yes."

In the presence of the jury, the court read the note aloud and stated in relevant part: "I've had a chance to consult with the attorneys regarding the note, and at this point we're not sure what you're asking exactly. So, we would ask that you think about it some more, and if you can provide us with another note indicating if you have specific questions.

"The jury instructions that were provided are considered the jury instructions for accessory liability. So, that's the standard criminal jury instructions. So, if you have specific questions regarding the standard criminal jury instructions, if you can put that in a note and then we'll have a better idea as to how to respond. Okay?

"So . . . what I would ask that you do is, if you can return to the jury room, consider that. If you do want to provide us with another note, do that; otherwise, at about . . . 4:45 or so we're going to have to adjourn until tomorrow."

After the jury exited the courtroom, the court stated: "What I would suggest is just to wait at this point; we'll just kind of be on standby and hopefully get a note back from the jury." Thereafter, the jury did not provide the court with another note concerning the instruction at issue, neither the prosecutor nor defense counsel asked the court to take any further action with respect to the note, and the court did not sua sponte take any further action with respect to the note.[18]

[18] As we discussed previously in this opinion, after the jury exited the courtroom, the court addressed defense counsel, Brown, with respect to the issue of his anticipated absence from the trial on the following day, Friday, November 13, 2015. The court asked Brown to prepare his associate, Glomb, for the possibility that, in his absence, the jury might seek more

For the first time on appeal, the defendant claims that the court's response to the jury's note denied him his right to due process and created a reasonable possibility that the jury was misled about the state's burden of proof. The defendant correctly acknowledges that this claim is unpreserved. He seeks review under the bypass doctrine set forth in *State* v. *Golding*, supra, 213 Conn. 239–40, and the plain error doctrine. See Practice Book § 60-5.

The state asserts, and we agree, that the defendant waived any claim of error regarding the court's response to the jury's note. "[W]aiver is [t]he voluntary relinquishment or abandonment—express or implied—of a legal right or notice. . . . In determining waiver, the conduct of the parties is of great importance. . . . [W]aiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. . . . Thus, [w]aiver . . . involves the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy. . . . Connecticut courts have consistently held that when a party fails to raise

guidance with respect to the accessorial liability instruction. Without objecting to the manner in which the court had responded to the jury's note earlier that afternoon, Brown stated that he "would just have . . . an objection to any further instruction at this point because I don't think that there's any evidence of [the defendant] providing a firearm to the actor or testimony or any argument to that point. I mean, *as far as just repeating the instructions, obviously, I don't have any problem with that.*" (Emphasis added.) The court replied that, without knowing what questions the jury might present, it was not sure if any further instructions, beyond those already provided to the jury, would be necessary.

in the trial court the constitutional claim presented on appeal and affirmatively acquiesces to the trial court's order, that party waives any such claim." (Citation omitted; internal quotation marks omitted.) *State* v. *Grasso*, 189 Conn. App. 186, 225–26, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019).

This court addressed a procedurally similar issue in *Grasso*, in which the defendant claimed that, during jury deliberations, the trial court had not adequately responded to a jury note, thereby violating her right to due process and her right to the effective assistance of counsel. Id., 222. This court concluded that, at trial, the defendant waived the constitutional claim raised on appeal because defense counsel had not merely failed to object to the trial court's response, but had expressly stated to the trial court that he did not object to the court's responding to the note in the manner that it did. Id., 223. This court stated that "[p]ermitting the defendant now to object to the court's proposed response, after defense counsel acquiesced in it at the time of trial, would constitute an ambuscade of the trial court." Id., 227. The waiver analysis set forth in *Grasso* applies to the claim at issue in the present case, as well.

Having concluded that the claim was waived, we likewise conclude that the defendant is unable to prevail under *Golding*.[19] "[A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Hampton*, 293 Conn. 435, 448–49, 988 A.2d 167 (2009); see also *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 70, 967 A.2d 41 (2009); *State* v. *Frazier*, 181 Conn. App. 1, 36, 185 A.3d 621, cert. denied, 328 Conn. 938, 184 A.3d 268 (2018).

[19] See footnote 8 of this opinion.

To the extent that the defendant seeks reversal under the plain error doctrine,[20] we are not persuaded that plain error exists. Generally, "[t]his court has adhered to the view that waiver thwarts a finding that plain error exists." *State* v. *Bialowas*, 160 Conn. App. 417, 430, 125 A.3d 642 (2015), remanded, 325 Conn. 917, 163 A.3d 1204 (2017). Nonetheless, our Supreme Court has observed that "there appears to be some tension in our appellate case law as to whether reversal on the basis of plain error could be available in cases where the alleged error is causally connected to the defendant's own behavior." *State* v. *Darryl W.*, 303 Conn. 353, 371–72 n.17, 33 A.3d 239 (2012); see also *State* v. *McClain*, 324 Conn. 802, 805, 812, 155 A.3d 209 (2017) (waiver of claim of instructional error under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 [2011], does not "necessarily foreclose" or "preclude" reviewing court from affording relief under plain error doctrine).

Even if we assume that consideration of plain error is proper, the defendant has not demonstrated that plain error exists. "If the jury, after retiring for deliberations, requests additional instructions, the judicial authority, after providing notice to the parties and an opportunity for suggestions by counsel, shall recall the jury to the courtroom and give additional instructions necessary to respond properly to the request or to direct the jury's attention to a portion of the original instructions." Practice Book § 42-27; see also *State* v. *Fletcher*, 207 Conn. 191, 193, 540 A.3d 370 (1988). Logically, the court's obligation in this regard is limited by its ability to understand the jury's request. The facts at issue are not in dispute. The court received a note in which the jury asked for "clarification or the definition of the accessory liability statute . . . [a]nd the separate theories of liability." We agree with the court that this request is not a model of clarity. The court did not, however,

[20] See footnote 9 of this opinion.

disregard the note due to its lack of clarity. Instead, it proposed asking for further clarification from the jury, which had a considerable track record of communicating with the court by means of written notes. After counsel agreed with this reasonable course of action, the court informed the jury that it had provided it with the standard criminal jury instruction, and asked the jury to spend some more time thinking about the issue and to provide it with any specific questions that it had about the instruction. The court did not reiterate its prior instruction, a written copy of which the jury already had in its possession, or attempt to clarify its prior instruction because, as it indicated, the jury had not yet set forth with specificity questions that it had about the instruction. The court's appropriate response was to ask the jury to be more specific in terms of what, if anything, it did not understand. The court encouraged the jury to seek whatever further guidance it deemed necessary and, absent any indication to the contrary, we presume that the jury followed the court's instructions and did not have need of further guidance. See, e.g., *State* v. *Helmedach*, 125 Conn. App. 125, 136–37, 8 A.3d 514 (2010), aff'd, 306 Conn. 61, 48 A.3d 664 (2012).

In light of the foregoing facts, we conclude that, with respect to the manner in which the court responded to the jury's note, the defendant has failed to demonstrate the existence of an error that is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings.

We also observe that, in the context of challenging the court's response to the jury's note concerning accessorial liability, the defendant appears to raise a distinct challenge to the court's charge with respect to accessorial liability. Specifically, the defendant argues that "[t]he state did not, in the information or summation, articulate for the jury (or for [the] defendant or the

court) its theory of what constituted intentional aid in the murders. The court did not mention any facts or specify any alleged act in its accessory charge. The jury was left to determine without guidance how the law was to be applied to this evidence."

To the extent that the defendant challenges the court's instructions under *Golding*, the claim of instructional error fails under *Golding*'s third prong because the defendant impliedly waived any objection to the instructions under the rule set forth in *State* v. *Kitchens*, supra, 299 Conn. 482–83. In *Kitchens*, our Supreme Court concluded 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. As our discussion of the relevant procedural history reflects, the court provided counsel with a copy of its proposed jury instructions, including its instructions on the murder counts, allowed a meaningful opportunity for review of its instructions, solicited comments from counsel, and defense counsel affirmatively stated that the defendant's only exceptions concerned other portions of the charge. Moreover, after the jury sent its note to the court with respect to the accessorial liability instruction, defense counsel, Brown, indicated in relevant part that, if the jury sought further guidance with respect to the instruction in his absence on November 13, 2015, he did not object to the court simply reiterating the instruction that it had provided to the jury in its charge. Brown specifically stated that "further instruction" was unnecessary in light of the evidence. See footnote 18 of this opinion. On this record, we conclude that the defendant implicitly waived any claim of error

related to the court's jury instruction concerning accessorial liability.

Finally, in light of the defendant's invocation of the plain error doctrine, we consider whether the court's accessorial liability instruction reflects plain error.[21]

[21] Although we review this claim for plain error, we are mindful that the defendant's claim concerns not merely whether the court misled the jury by failing to marshal the evidence sufficiently, such that the jury was left to speculate about the evidence that could have constituted proof beyond a reasonable doubt of his guilt as an accessory, but that it likely misled the jury with respect to the mental state required for the commission of the crime of murder as an accessory. Our consideration of whether plain error exists is informed by well established principles.

"A trial court has broad discretion to comment on the evidence adduced in a criminal trial. . . . A trial court often has not only the right, but also the duty to comment on the evidence. . . . The purpose of marshaling the evidence, a more elaborate manner of judicial commentary, is to provide a fair summary of the evidence, and nothing more; to attain that purpose, the [trial] judge must show strict impartiality. . . . To avoid the danger of improper influence on the jury, a recitation of the evidence should not be so drawn as to direct the attention of the jury too prominently to the facts in the testimony on one side of the case, while sinking out of view, or passing lightly over, portions of the testimony on the other side, which deserve equal attention. . . .

"On review, we do not evaluate the court's marshaling of the evidence in isolation. Rather, [t]o determine whether the court's instructions were improper, we review the entire charge to determine if, taken as a whole, the charge adequately guided the jury to a correct verdict. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . [I]n appeals involving a constitutional question, [the standard is] whether it is reasonably possible that the jury [was] misled." (Citation omitted; internal quotation marks omitted.) *State* v. *Dixon*, 62 Conn. App. 643, 647–48, 772 A.2d 166 (2001).

"A jury instruction is constitutionally adequate if it provides the jurors with a clear understanding of the elements of the crime charged, and affords them proper guidance for their determination of whether those elements were present. . . . An instruction that fails to satisfy these requirements would violate the defendant's right to due process of law as guaranteed by the fourteenth amendment to the United States constitution and article first, § 8, of the Connecticut constitution. . . . The test of a charge is whether it is correct in law, adapted to the issues and sufficient for the guidance of the jury. . . . The primary purpose of the charge is to assist the jury in applying the law correctly to the facts which they might find to be established. . . . The purpose of a charge is to call the attention of the members of the jury, unfamiliar with legal distinctions, to whatever is necessary and proper to guide them to a right decision in a particular case." (Internal quotation marks omitted.) *State* v. *Johnson*, 165 Conn. App. 255, 288–89, 138 A.3d 1108, cert. denied, 322 Conn. 904, 138 A.3d 933 (2016).

The defendant argues in relevant part: "The instructions in this case had to provide sufficient guidance on the law to convey to the jury what [the] state had to prove beyond a reasonable doubt and to allow the jury to apply the law to the facts in order to prove accessorial liability. When the jury asked for additional guidance during deliberations, the court erred in failing to provide it. Without any theory articulated as to what conduct allegedly aided in the murders, or more specifically, what conduct [the] defendant perpetrated with the intent to aid and that did aid in the commission of murder, the jurors were left to create their own theories about what [the] defendant could have done to aid in the murders. Under the circumstances, it is reasonably possible that the jury resorted to speculation, failed to understand that [the] defendant had to have the intent to kill, failed to connect whatever action it decided that [the] defendant took with intent to kill at the time of the shooting, or accepted the state's invitation to assume intent to kill based on the earlier robbery, gang affiliation and presence [at the scene of the shooting]."

The defendant also argues in relevant part: "The only evidence of any act on the defendant's part was [his] setting up the meeting on Benton Street, asking Rodrick to take [Quintero and Burgos] to their homes [following the shooting], and [his] taking home [Rodriguez'] cell phone . . . . The jury needed to understand that it had to find that when [the] defendant set up the meeting, he did so with [the] intent to kill the victims. An exchange gone wrong, or an encounter turned sour, would not suffice. Alternatively, the jury needed to understand that it had to find that any acts that occurred after the shooting were conducted because [the] defendant had the intent to kill and [that he] committed those acts to aid in the commission of the murders at the time [that] the murders occurred. The temporal nexus is never mentioned at all in the accessory instruction,

and [the] 'intent to kill' is never explicitly mentioned, either. . . . Rather, the court repeatedly used the phrase, 'acting with the mental state required for commission of murder,' and left the jury to understand that the intent to kill is the mental state required for murder. The jurors could have understood the proximate cause instruction to find that if the defendant robbed the victims or set up the meeting on Benton [Street], and either of those incidents led to the shooting and the victims' deaths, then [the] defendant is responsible even if he did not intend for the deaths to occur."

Essentially, the defendant's claim of plain error relates to what he views as the court's failure to marshal the evidence such that the jury was made aware of what evidence, if any, the state relied on to demonstrate that he had intentionally aided one or more other persons in connection with the victims' murders. This argument is advanced on appeal despite the fact that, at trial, defense counsel voiced his agreement with the instruction delivered in the court's charge and argued that, on the basis of the evidence, "further instruction" was unnecessary. See footnote 18 of this opinion. The defendant asserts that, during argument, the prosecutor failed to provide the jury with any evidentiary theory of accessory liability, as well. Although the defendant's argument is based on the premise that the "only evidence" on which the jury might have relied in finding guilt as an accessory consisted of his arranging the meeting with the victims, asking Rodrick to drive Quintero and Burgos home following the shooting, and his possession of Rodriguez' gun, there was compelling evidence of the defendant's statements to others following the shooting. These statements reflected that the defendant was present at the scene of the shooting, had participated in the shooting, and believed that he was responsible for the victims' deaths.

During the state's closing argument, the prosecutor discussed the evidence surrounding the meeting between the victims, the defendant, Quintero, and Burgos. The argument focused on the fact that the defendant, Burgos, and Quintero, were gang members and that, on the night of the shootings, they were attempting to prohibit Rodriguez from selling drugs in territory controlled by their gang. Also, the prosecutor drew the jury's attention to the evidence that, after the defendant physically struck Rodriguez, and deprived him of his gun and cell phone, the defendant, joined by Quintero and Burgos, all of whom were armed, returned to the scene of the shooting to meet with Rodriguez.

There was evidence that three guns were used in the shootings, including a nine millimeter handgun, a .22 caliber handgun, and a shotgun. There was evidence that the victims were struck with nine millimeter bullets and .22 caliber bullets. The evidence was not conclusive, however, with respect to whether the defendant, Quintero, or Burgos had fired the fatal gunshots. On the basis of the evidence, the prosecutor argued in relevant part: "There's no need for all of you to agree as to whose gun fired the fatal shot or shots to other victims when a person's charged like this. The fact that you have three men armed with a nine millimeter, a .22 caliber, and shotgun shooting at two unarmed, defenseless people at least nineteen times and kill[ing] them with many of those bullets shows that these three individuals intentionally aided each other in the murders of . . . Rodriguez and . . . Franqui."[22]

[22] There was evidence that the police recovered nine millimeter shell casings, a .22 caliber bullet fragment, and two live shotgun rounds from the shooting scene. Moreover, there was evidence that the victims died as a result of multiple gunshot wounds, which included gunshots fired at their heads. Medical examiners subsequently recovered nine millimeter and .22 caliber bullet fragments from the victims' bodies. The defendant argues that there was no evidence, however, to support the state's theory that either the defendant, Quintero, or Burgos was armed with a shotgun or had used a shotgun.

Although there may have been evidence of other conduct by the defendant that intentionally aided others in the commission of the murders, the court, like the prosecutor, appears to have drawn the jury's attention not only to the evidence supporting a finding that the defendant was an armed participant in the shootings, but to the fact that the evidence was not conclusive with respect to whether he had actually fired a fatal gunshot. The court stated: "Where it cannot be determined who fired the fatal shot, beyond a reasonable doubt, the element of murder as to who caused the death has not been proved beyond a reasonable doubt. However, persons acting with the mental state required for the commission of murder, who intentionally aid one another to engage in such conduct and cause the death, are accessories to one another, and would be criminally liable for such conduct as accessories to murder." See id.

On this record, we are not persuaded that there was the possibility of any confusion in the minds of the jurors with respect to what evidence the state relied on in support of the murder counts. Moreover, we are not persuaded that there was the possibility of any confusion in the minds of the jurors with respect to the requisite mental state required for the commission of murder as an accessory. The court repeatedly instructed the jury that it must find that, if the defendant intentionally aided others in the commission of the

The state's theory of the case, which was that all three men were armed and had either used or attempted to use a firearm during the shooting, was reasonably based on the presence of the nine millimeter and .22 caliber bullet fragments recovered from the victims' bodies, as well as the presence of the live shotgun rounds found near the victims. The evidence permitted the jury to infer, as well, that someone had attempted to fire the live shotgun rounds, without success. In any event, the present claim does not require us to consider whether the state's evidentiary theory was supported by the evidence. Instead, in resolving the present claim, we must consider whether, as the defendant argues, neither the prosecutor nor the court set forth a theory of liability that was based on the alleged facts of the state's case.

crime of murder, the defendant had acted with the mental state necessary for the commission of murder. The court clearly instructed the jury that this mental state consisted of the intent to kill another person. See footnote 16 of this opinion.

With respect to the accessorial liability instruction, the defendant has failed to demonstrate the existence of an instructional error that is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings.

The judgment is affirmed.

In this opinion the other judges concurred.

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sented, jury reasonably could have inferred that defendant had been selling subject narcotics from porch of house during time in question; whether jury reasonably could have concluded that defendant was aware of nature and presence of narcotics and had dominion and control over them; claim that trial court committed evidentiary error and deprived defendant of his constitutional right to present defense by improperly excluding certain photographs of front and back of house; whether exclusion of photograph of front of house rose to level of constitutional violation or substantially affected jury's verdict; whether trial court properly excluded photograph of rear of house on ground that defendant failed to authenticate it; claim that trial court improperly prevented defendant from showing scar on his back to jury, thereby depriving him of his constitutional right to present misidentification defense; whether trial court abused its discretion by excluding demonstration of scar as needlessly cumulative.

State *v.* Scott 315

Robbery in first degree; whether trial court denied defendant right to due process under federal and state constitutions when court denied motion to suppress out-of-court and subsequent in-court identifications of defendant by victim; whether trial court properly determined that out-of-court identification of defendant at arraignment proceeding was sufficiently reliable under federal constitution on basis of factors in Neil *v.* Biggers *(409 U.S. 188); whether trial court's findings as to* Biggers *factors were supported by evidence; claim that victim's failure to identify defendant in police photographic arrays undermined reliability of subsequent identification at arraignment; whether trial court correctly denied motion to suppress victim's in-court identification of defendant; whether trial court improperly failed to suppress victim's identifications of defendant under article first, § 8, of state constitution on basis of Supreme Court's modification in* State *v.* Harris *(330 Conn. 91) of reliability standard in* Biggers *with respect to admissibility of eyewitness identification testimony; whether trial court's application of* Biggers *factors was harmless; claim that unconscious transference—mistaken identity of face seen in one context as face seen in another context—was fatal to trial court's application of* Biggers*; whether evidence was sufficient to support defendant's conviction as against deceased victim; claim that jury could not have reasonably inferred that second victim knew that deceased victim had cash and cell phone in car prior to search of vehicle by defendant and accomplice, and that defendant, his accomplice or both had taken deceased victim's cash and cell phone; claim that defendant could have been convicted of robbery in first degree only as accessory; whether evidence was sufficient to prove that defendant acted as principal during robbery; whether trial court abused its discretion in denying motion to disqualify trial judge, who had presided at prior trial of defendant's accomplice, ruled on accomplice's motion to suppress and indicated admiration for victim who testified against accomplice and against defendant.*

Stone *v.* East Coast Swappers, LLC 63

Unfair trade practices; alleged violation of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); attorney's fees; claim that this court should recognize rebuttable presumption in context of attorney's fees for CUTPA violations, whereby prevailing plaintiff should ordinarily recover attorney's fees unless special circumstances would render such award unjust; whether trial court abused its discretion in declining to award plaintiff attorney's fees pursuant to statute (§ 42-110g [d]); claim that trial court erred by conflating analyses for awarding attorney's fees and punitive damages under CUTPA.

NOTICES OF CONNECTICUT STATE AGENCIES

Notice of Application for Affordable Housing Certificate of Completion

Town of Suffield

Notice of intent to apply for a State certificate of affordable housing completion; moratorium on applicability of section 8-30g of the Connecticut General Statutes to certain affordable housing applications. The application is available for inspection and comment and can be viewed in its' entirety in the office of the Town Clerk, 83 Mountain Road, Suffield, CT during normal office hours, Mon-Thurs 8-4:30, Fri 8-1. Written comments can be directed to Bill Hawkins, Director of Planning & Development, Planning & Zoning Department, 230 C Mountain Road, Suffield, CT 06078 or email bhawkins@suffieldct.gov.

NOTICES

Notice of Disbarment of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on July 9, 2019, in Docket Number HHD-CV-19-6110236, Lurlyn A. Winchester, juris number 407992, was ordered disbarred for a period of five years effective immediately. Respondent must comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys). Should respondent seek reinstatement to the Connecticut bar he must do so pursuant to Practice Book Section 2-53 but shall not be eligible to do so until he is eligible for reinstatement in the Supreme Court of the State of New York Appellate Division: Second Judicial Department. Prior to reinstatement in Connecticut, Respondent will satisfy any Connecticut bar requirements and will be otherwise in good standing.

Kevin Dubay
Judge

Notice of Interim Suspension of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given that on July 9, 2019, in Docket Number HHD-CV-19-6108796, Stephanie Czap (juris# 426477) of Enfield, CT was placed on interim suspension from the practice of law, effective immediately, until further order of the court.

Upon suspension, the Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys). The Respondent shall comply with Practice Book § 2-53 if the Respondent remains suspended for one (1) year or more.

Kevin Dubay
Judge

ASSIGNMENT OF JUDGES

September 2, 2019 through September 6, 2020

Pursuant to Section 51-164t of the General Statutes, the Chief Court Administrator has made the following assignments to the Divisions and Parts thereof established in Chapter 1 of the Practice Book.

Divisions and Parts

The Divisions, Parts thereof, and abbreviation of each Part are:

Division	Part	Abbreviation of Part in Assignments
Family Division	Part J (Juvenile matters including neglect, dependency, delinquency, families with service needs and termination of parental rights.)	juvenile
	Part S (Support and paternity actions.)	support
	Part D (All other family relations matters, including dissolution of marriage or civil union cases.)	dissolution
Civil Division	Part H (Summary process cases and all other landlord and tenant matters returnable to the judicial districts.)	summary process
	Part S (Small claims actions.)	small claims
	Part A (Administrative appeals.)	adm. appeals
	Part J (Jury matters.)	jury
	Part C (Court matters.)	G.A. court or J.D. court
Criminal Division	Part A (Capital felonies, class A felonies, and unclassified felonies punishable by sentences of more than twenty years.)	A

	Part B (Class B felonies and unclassified felonies punishable by sentences of more than ten years but not more than twenty years.)	B
	Part C (Class C felonies and unclassified felonies punishable by sentences of more than five years but not more than ten years.)	C
	Part D (Class D felonies and all other crimes, violations, motor vehicle violations, and infractions.)	D
Housing Division* (in judicial districts specified by statute)	Part H (Housing matters as defined by Section 47a-68 of the General Statutes.)	H

*NOTE: Housing matters (including certain civil actions, summary process actions, and certain small claims) in those judicial districts without a Housing Session, as specified by a statute, must be made returnable to a judicial district and not to a geographical area.

Family Division

All judges assigned to geographical area (G.A.) courthouses are authorized to adjudicate Family Division Part S (support) actions, notwithstanding the omission of any such specific assignment.

Civil Division

In addition to the specific assignments hereinafter made, all judges may adjudicate civil short calendar matters, administrative appeals, and small claims.

Criminal Division

The Presiding Judges in the judicial district (J.D.) and the associated geographical area court locations shall be exclusively responsible for the transfer of cases from G.A. to J.D. court locations in accordance with the following general policy.

1. All cases involving charges which are to be heard by judges assigned to the Criminal Division at the J.D. courthouse shall be ordered transferred from the G.A. to the J.D. as soon as possible after arraignment. At the time of transfer, the court shall set a date for the appearance of the defendant in the J.D. courthouse.

2. All cases charging factually supported class A or class B felonies, Part A Failure to Appear charges or Part A Violation of Probation charges shall be automatically ordered transferred by the court to the J.D. court location.

- Exceptions to the automatic transfer of these cases may be made by agreement of the Presiding Judges based upon local custom and criteria (e.g., cases involving larceny of a motor vehicle, welfare or agency fraud, etc.).

3. All other cases charging any unclassified felony offense, class C felony, class D felony, misdemeanor offense, motor vehicle charge and infraction shall be retained for disposition in the G.A. courthouse.

- Exceptions to the foregoing shall be considered by the Presiding Judges based upon the severity and nature of the crime, the past record of the defendant, etc., as well as particular local considerations (e.g., narcotics cases involving substantial quantities of narcotics, weapons, cash or other aggravating factors). The transfer of these cases shall not be ordered unless the Presiding Judges (J.D. and G.A.) have previously agreed upon any such transfer.

4. Cases involving defendants with simultaneous pending charges in both the J.D. and G.A. court locations shall be retained for final disposition in each respective courthouse unless a transfer of all cases to the J.D. is otherwise agreed upon by the J.D. Presiding Judge. In the absence of the transfer of all such files to the J.D. court location, the Presiding Judges shall confer and coordinate any ultimate disposition, taking into consideration all pending charges.

5. Any case not otherwise qualifying for transfer, for which prior approval of the Presiding Judges (J.D. and G.A.) has not been given, shall be returned to the forwarding G.A.

6. Preliminary hearings under Section 54-46a of the General Statutes to determine probable cause for crimes punishable by death, life imprisonment without the possibility of release or life imprisonment shall be heard, unless waived, at judicial district court locations.

Chief Administrative Judge

There are four Chief Administrative Judges: one each for the Criminal Division, Civil Division, Family Division, and Juvenile Division. They have the following responsibilities:

- Represent the Chief Court Administrator on matters of policy affecting their respective divisions.
- Solicit advice and suggestions from the judges and others on matters affecting their respective divisions, including legislation, and advise the Chief Court Administrator on such matters.
- Advise and assist Administrative Judges in the implementation of policies and caseflow programs.

- Periodically meet and confer with judges assigned to their divisions to discuss and exchange information and developments affecting the operations of the division.

- Solicit from Administrative Judges information on the assignment of judges and advise and participate with the Chief Court Administrator in the assignment of judges.

- Coordinate with the Education Committee annual orientation programs for judges as assignments change.

Administrative Judge

Administrative Judges (A.J.s) have the following responsibilities and powers:

- Assign judges within the judicial district as necessary.

- Assume, as necessary, any assignment within the judicial district.

- In the event it is necessary to cover for vacation, illness, or an emergency, reassign any judge assigned within the judicial district to another division, part or court location. Such reassignment shall be temporary and shall not exceed two weeks. Prompt notice of the assignment shall be given to the Office of the Chief Court Administrator.

- Keep informed on the policies of the Judicial Branch.

- Subject to the prior approval of the Chief Court Administrator, determine the courthouse(s) to which jurors shall be initially summoned within the judicial district.

- When required, order that the trial of any case, jury or non-jury, be held in any courthouse facility within the judicial district.

- Represent the Chief Court Administrator in the efficient management of their respective judicial districts on matters affecting the fair administration of justice and the disposition of cases (C.G.S. § 51-5a (3)).
- Solicit advice and suggestions from the judges and others on matters affecting their respective judicial districts, including legislation, and advise the Chief Court Administrator on such matters.
- Implement and execute programs and methods for disposition of cases and administrative matters within their respective judicial districts in accordance with policies and directives of the Chief Court Administrator.
- Ensure nondiscriminatory treatment of all persons affected by the court's operations.
- Promote the overall well-being of the judges and be mindful of their needs.
- Provide information to Chief Administrative Judges regarding their assignment needs.
- Keep Chief Court Administrator advised of unusual activity or problems within the judicial district.
- Oversee the daily assignment of a judge to address jurors. This important daily appearance by a judge underscores the importance of citizen participation in the system and serves to reinforce positive public perceptions about the Judicial Branch.
- Oversee the activities of the Judicial Marshal Services.

Assistant Administrative Judge

An Assistant Administrative Judge (A.A.J.) shall have all of the aforementioned responsibilities and powers of the Administrative Judge for such judicial district, provided the A.A.J., in exercising powers, shall not issue orders contravening the orders of the Administrative Judge.

Presiding Judge

Presiding Judges (P.J.s) have the following responsibilities and powers:

- Expediting the disposition, fairly, of the court business to which such judge has been entrusted.
- Reporting to the Administrative Judge and conferring with the Administrative Judge and the appropriate Chief Administrative Judge concerning problems and accomplishments in achieving the aforementioned objective.
- Apportioning among the judges the judicial business to which such judge and other judges have been assigned.

COURT SESSIONS

Court will be in session five days per week except as otherwise directed by the Chief Court Administrator and as hereinafter set forth. Civil Division short calendars will commence at 9:30 a.m. on Monday of each week unless they are rescheduled due to a holiday or an exception is granted by the Chief Court Administrator. All other court sessions shall begin promptly at 10:00 a.m. or earlier.

HOLIDAYS

Monday, September 2, 2019	Labor Day
Monday, October 14, 2019	Columbus Day
Monday, November 11, 2019	Veterans' Day
Thursday, November 28, 2019	Thanksgiving Day
Wednesday, December 25, 2019	Christmas Day
Wednesday, January 1, 2020	New Year's Day
Monday, January 20, 2020	Martin Luther King, Jr. Day
Wednesday, February 12, 2020	Lincoln's Birthday
Monday, February 17, 2020	Washington's Birthday
Friday, April 10, 2020	Good Friday
Monday, May 25, 2020	Memorial Day
Friday, July 3, 2020	Independence Day

Dates When Trials May Be Suspended

- The day of the Connecticut Bar Association Legal Conference in June 2020.
- Days Judicial Branch educational programs are scheduled.

September 2, 2019 through September 6, 2020

JUDGES	ASSIGNMENT
AARON	Waterbury Courthouse for Juvenile Matters
ABERY-WETSTONE	New Britain J.D.
ABRAMS (C.A.J. for Civil Division Parts H (Summary Process); S (Small Claims); J (Jury Matters) and C (Court Matters))	New Haven J.D. Courthouse
AGATI	Waterbury J.D.
ALANDER	New Haven J.D. Courthouse
ALBIS (C.A.J. for Family Division Parts S (Support) and D (Dissolution))	Middlesex J.D.
ALEXANDER (C.A.J. for Criminal Division Parts A, B, C and D)	Bridgeport J.D. Courthouse
ARMATA	Tolland J.D.
AUGER	Windham J.D.
BAIO	New Haven J.D. Housing and Waterbury J.D. Housing
BALDINI	Hartford J.D. and G.A. 14 Courthouse
BELLIS	Waterbury – Complex Litigation Docket
BENTIVEGNA	Manchester G.A. 12
BHATT	Tolland J.D.
BLAWIE	Stamford-Norwalk J.D.
BOZZUTO	Deputy Chief Court Administrator
BRAZZEL-MASSARO	Danbury J.D.
BRILLANT	Bridgeport Courthouse for Juvenile Matters

BROWN	Ansonia-Milford J.D.
BRUNO	Waterbury J.D.
BUDZIK	Hartford J.D. Courthouse
BURGDORFF	Meriden J.D. and G.A. 7 Courthouse
CALISTRO	Bridgeport G.A. 2
CALMAR	New London J.D.
CARBONNEAU	Willimantic Courthouse for Juvenile Matters
CARON	New Britain J.D.
CARRASQUILLA	Hartford J.D. Courthouse
CARROLL	Chief Court Administrator
CHAPLIN	Tolland J.D.
COBB	Hartford J.D. Courthouse
COLEMAN	Waterbury J.D.
CONNORS	Hartford J.D. Courthouse
CONWAY (C.A.J. for Family Division Part J (Juvenile))	New Haven Courthouse for Juvenile Matters
CORDANI	New Britain J.D. (UAPA & State Tax Appeals)
CRADLE	New Haven G.A. 23
CRAWFORD (until 4/28/20)	Middletown – Regional Child Protection Session
DANAHER (until 8/22/20)	Litchfield J.D.
D'ANDREA	Danbury J.D.
DANNEHY	Hartford Courthouse for Juvenile Matters
DAYTON	Bridgeport G.A. 2
DENNIS	Ansonia-Milford J.D.

DEWEY	Middlesex J.D.
DIANA	Middletown – Regional Family Trial Docket
DOYLE	Bridgeport G.A. 2
DRISCOLL (until 8/12/20)	Waterford Courthouse for Juvenile Matters
DRONEY	New London J.D.
DUBAY	Hartford J.D. Courthouse
EGAN	Bridgeport J.D. Courthouse
FARLEY	Tolland J.D.
FICETO	Waterbury J.D.
FISCHER, J.	Windham J.D.
FRECHETTE	Middlesex J.D.
GEATHERS	New Britain J.D.
GENUARIO	Stamford-Norwalk J.D.
GOLD	Hartford J.D. and G.A. 14 Courthouse
GOODROW	New Haven J.D. Courthouse
GORDON	Waterbury J.D.
GOULD	Ansonia-Milford J.D.
GRAHAM	Hartford J.D. and G.A. 14 Courthouse
GRAZIANI	Windham J.D.
GREEN	Windham J.D.
GROGINS	Waterbury Courthouse for Juvenile Matters
GROSSMAN	Bridgeport J.D. Courthouse
HARMON	Meriden J.D. and G.A. 7 Courthouse
HELLER	Stamford-Norwalk J.D.

HERNANDEZ	Bridgeport J.D. Courthouse
HOFFMAN	New Britain Courthouse for Juvenile Matters
HUDDLESTON	New Britain Courthouse for Juvenile Matters
HUDOCK	Stamford-Norwalk J.D.
IANNOTTI	Waterbury J.D.
JACOBS	Bridgeport J.D. Courthouse
JOHNSON	Hartford J.D. and G.A. 14 Courthouse
JONGBLOED	New London J.D.
KAMP	New Haven J.D. Courthouse
KAVANEWSKY	Stamford-Norwalk J.D. (subject to Stamford Juvenile)
KEEGAN	New Britain J.D.
KLATT	Waterbury J.D.
KLAU	New Haven J.D. Courthouse
KNOX	New London J.D.
KOWALSKI	Danbury J.D.
KRUMEICH (until 6/22/20)	Stamford-Norwalk J.D.
KWAK	New London J.D.
LEE (until 2/20/20)	Stamford – Complex Litigation Docket
LOBO	Hartford – Community Court
LYNCH	Hartford J.D. and G.A. 14 Courthouse
MACIEROWSKI	Tolland J.D.
MARCUS	New Haven Courthouse for Juvenile Matters
MARONICH	Bridgeport Courthouse for Juvenile Matters
McLAUGHLIN	Stamford-Norwalk J.D.

McNAMARA	Manchester G.A. 12
McSHANE	Ansonia-Milford J.D.
MOORE, J.	Litchfield J.D.
MOORE, M.	Stamford-Norwalk J.D.
MORGAN	New Britain J.D.
MOUKAWSHER	Hartford – Complex Litigation Docket
MURPHY, K.	Middlesex J.D.
MURPHY, MARGARET	Hartford J.D. Courthouse
MURPHY, MAUREEN (until 5/8/20)	New Haven J.D. Courthouse
MURPHY, S.	New London J.D.
NASTRI	Hartford J.D. Courthouse
NEWSON	New London J.D.
NGUYEN	Hartford J.D. Courthouse
NOBLE	Hartford J.D. Courthouse
OLEAR	Hartford Courthouse for Juvenile Matters
OLIVER	New Britain J.D.
OZALIS	New Haven J.D. Courthouse
PAVIA	Danbury J.D.
PIERSON	Ansonia-Milford J.D.
PRATS	Hartford J.D. and G.A. 14 Courthouse
PRICE-BORELAND	New Haven J.D. Courthouse
RADCLIFFE (until 9/16/19)	Bridgeport J.D. Courthouse
RANDOLPH	Norwalk G.A. 20
RICHARDS, E.	Bridgeport J.D. Courthouse

RICHARDS, S.	New Haven J.D. Courthouse
RORABACK	Waterbury J.D.
ROSEN	Enfield G.A. 13
RUSSO	Bridgeport J.D. Courthouse
SANCHEZ-FIGUEROA	Middletown Courthouse for Juvenile Matters
SCHUMAN	Hartford – Complex Litigation Docket
SCHWARTZ	Waterbury J.D.
SEELEY	Tolland J.D.
SHABAN	Litchfield J.D.
SHAH	Hartford J.D. Housing and New Britain J.D. Housing
SHERIDAN	Hartford J.D. Courthouse
SHLUGER	New London J.D.
SICILIAN	Tolland J.D.
SIZEMORE	Meriden J.D. and G.A. 7 Courthouse
SPADER	Bridgeport J.D. Housing and Norwalk G.A. 20 Housing
SPALLONE	New Haven G.A. 23
SPELLMAN	Windham J.D.
STEVENS	Bridgeport J.D. Courthouse
STEWART	Bridgeport J.D. Courthouse
STRACKBEIN	New London J.D.
SUAREZ	Middlesex J.D.
TAYLOR, C.	New Britain Courthouse for Juvenile Matters
TAYLOR, M.	Hartford J.D. Courthouse
TINDILL	Meriden J.D. and G.A. 7 Courthouse

TRUGLIA	Danbury J.D.
TYMA	Ansonia-Milford J.D.
VITALE	New Haven J.D. Courthouse
WAHLA	New Haven J.D. Courthouse
WELCH	Bridgeport J.D. Courthouse
WENZEL	Norwalk G.A. 20
WESTBROOK	Tolland J.D. (subject to Rockville Courthouse for Juvenile Matters)
WHITE	Stamford-Norwalk J.D.
WIESE	New Britain J.D.
WILLIAMS	Hartford J.D. and G.A. 14 Courthouse
WILSON	New Haven J.D. Courthouse
WOODS	Middletown – Regional Child Protection Session
WU	Litchfield J.D.
YOUNG	New Haven J.D. Courthouse

SENIOR JUDGES	**ASSIGNMENT**
AURIGEMMA	New Britain J.D.
CLIFFORD (until 2/20/20)	New Haven J.D. Courthouse
D'ADDABBO	New Britain J.D.
DOMNARSKI (until 12/28/19)	Middlesex J.D.
ESCHUK	Danbury J.D.
FISCHER, B.	New Haven J.D. Courthouse
GINOCCHIO (until 3/17/20)	Waterbury – Mediation Center – Family Matters
GLEESON	New Britain J.D.
HADDEN	New London J.D.
HANDY (until 10/26/19)	New London J.D.
LAGER	Waterbury – Complex Litigation Docket
MARKLE	New Haven G.A. 23
MATASAVAGE	Litchfield J.D.
MINTZ	Bridgeport J.D. Courthouse
MOORE, S.	Meriden J.D. and G.A. 7 Courthouse
SCHOLL (until 6/19/20)	Hartford J.D. Courthouse
SOLOMON (until 9/7/19)	Hartford – Mediation Center – Family Matters
SWIENTON	New London J.D.
SWORDS	Windham J.D.

Unless otherwise specifically assigned below, all Judge Trial Referees are assigned to their resident district to perform such responsibilities as may be assigned to them by their respective Administrative Judge.

JUDGE TRIAL REFEREES	**ASSIGNMENT**
ADELMAN	Middletown – Regional Family Trial Docket
ARNOLD	Bridgeport J.D. Courthouse
ARONSON	New Britain J.D.
BERGER	Hartford – Land Use Docket
COHN	New Britain J.D. (UAPA and State Tax Appeals)
COLE-CHU	Windham J.D.
CREMINS	Waterbury Courthouse for Juvenile Matters
CUTSUMPAS	Waterbury J.D. – Family Matters
DEVINE	New London J.D.
DOHERTY	Torrington Courthouse for Juvenile Matters
DOLAN	New Britain J.D. – Family Matters
FASANO	Waterbury J.D.
FRAZZINI	New Britain J.D.
GILLIGAN	Hartford Courthouse for Juvenile Matters
HARTMERE	Bridgeport J.D. Courthouse – Civil Matters
HOLDEN	Bridgeport G.A. 2
KAPLAN, B.	New Haven Courthouse for Juvenile Matters
KENEFICK	New Haven J.D. Courthouse
MACK	Waterford Courthouse for Juvenile Matters
O'KEEFE	Meriden J.D. and G.A. 7 Courthouse
PECK	Hartford J.D. Courthouse

POVODATOR	Stamford-Norwalk J.D. – Civil Matters
RESHA	Waterbury J.D. – Family Matters
RODRIGUEZ	Bridgeport J.D. Courthouse – Family Matters
SCARPELLINO	New Haven G.A. 23
SCHOFIELD	Waterbury J.D. – Family Matters
SEQUINO	Ansonia-Milford J.D.
SHORTALL	New Britain J.D.
TANZER	New Britain J.D.
TROMBLEY	Waterbury J.D.
TURNER	Waterbury Courthouse for Juvenile Matters

ASSIGNMENTS

FAMILY DIVISION PARTS S (SUPPORT) AND D (DISSOLUTION), CIVIL DIVISION AND CRIMINAL DIVISION

ANSONIA-MILFORD JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Milford J.D. and G.A. 22 Courthouse (14 West River Street) Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division:	Brown (A.J.) (P.J. for Criminal & Family Divisions) Tyma (A.A.J.) (P.J. for Civil Division) Dennis Gould Pierson McShane Sequino, Judge Trial Referee
Derby G.A. 5 (106 Elizabeth Street) Civil Division Part C (G.A. court); Criminal Division:	

DANBURY JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Danbury J.D. and G.A. 3 Courthouse (146 White Street) Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division:	Pavia (A.J.) (P.J.) Eschuk, Senior Judge (A.A.J.) Brazzel-Massaro Truglia Kowalski D'Andrea

FAIRFIELD JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Bridgeport J.D. Courthouse (1061 Main Street)	
Family Division Parts S (support) and D (dissolution):	Grossman (P.J.) Stewart Egan Rodriguez, Judge Trial Referee
Civil Division Parts A (adm. appeals), J (jury), C (J.D. court) and S (small claims):	Welch (A.A.J.) Stevens (P.J.) Radcliffe (until 9/16/19) Jacobs Mintz, Senior Judge Arnold, Judge Trial Referee Hartmere, Judge Trial Referee
Bridgeport J.D. Courthouse (1061 Main Street)	
Criminal Division:	Alexander (A.J.) (P.J. for Part A) E. Richards Russo Hernandez
Bridgeport G.A. 2 (172 Golden Hill Street)	
Civil Division Part C (G.A. court); Criminal Division:	Doyle (P.J.) Calistro Dayton Holden, Judge Trial Referee

HARTFORD JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Hartford J.D. Courthouse (90 Washington Street)	
Family Division Parts S (support) and D (dissolution):	Connors (P.J.) Nastri Margaret Murphy Nguyen Carrasquilla
Hartford J.D. Courthouse (95 Washington Street)	Sheridan (A.J.) (P.J.)
Civil Division, except Part H (summary process):	Dubay M. Taylor Cobb Noble Budzik Scholl, Senior Judge (until 6/19/20) Peck, Judge Trial Referee
Hartford J.D. and G.A. 14 Courthouse (101 Lafayette Street)	Baldini (A.A.J.) (P.J. for Part A)
Criminal Division:	Williams (P.J. for G.A. 14) Graham Gold Johnson Prats Lynch
Community Court (80 Washington Street)	Lobo (P.J.)
Manchester G.A. 12 (410 Center Street) Civil Division Part C (G.A. court); Criminal Division:	McNamara (P.J.) Bentivegna
Enfield G.A. 13 (111 Phoenix Avenue) Civil Division Part C (G.A. court); Criminal Division:	Rosen (P.J.)

LITCHFIELD JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Litchfield J.D. and G.A. 18 Courthouse (50 Field Street, Torrington)

Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division:

J. Moore (A.J.) (P.J.)
Shaban (A.A.J.)
Danaher (until 8/22/20)
Wu
Matasavage, Senior Judge

MIDDLESEX JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Middlesex J.D. & G.A. 9 Courthouse (One Court Street, Middletown)

Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division:

Suarez (A.J.) (P.J. for Civil & Criminal Divisions)
Albis (A.A.J.) (P.J. for Family Division)
Dewey
Frechette
K. Murphy
Domnarski, Senior Judge (until 12/28/19)

NEW BRITAIN JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

New Britain J.D. and G.A. 15 Courthouse (20 Franklin Square)

Family Division Parts S (support) and D (dissolution); Civil Division, except Part H (summary process); Criminal Division:	Morgan (A.J.) (P.J. for Civil Division) Oliver (A.A.J.) Abery-Wetstone (P.J. for Family Division) Keegan (P.J. for Criminal Division) Wiese Geathers Caron Aurigemma, Senior Judge D'Addabbo, Senior Judge Gleeson, Senior Judge Aronson, Judge Trial Referee Dolan, Judge Trial Referee Frazzini, Judge Trial Referee Shortall, Judge Trial Referee Tanzer, Judge Trial Referee
(G.A. 15 handles motor vehicle cases for the towns of Avon, Berlin, Bristol, Burlington, Canton, East Granby, Farmington, Granby, Hartford, New Britain, Newington, Plainville, Plymouth, Rocky Hill, Simsbury, Southington, Suffield, West Hartford, Wethersfield, Windsor and Windsor Locks.)	

NEW HAVEN JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

New Haven J.D. Courthouse (235 Church Street)	
Family Division Parts S (support) and D (dissolution):	Goodrow (P.J.) Maureen Murphy (until 5/8/20) Klau Price-Boreland Kenefick, Judge Trial Referee
Civil Division, except Part H (summary process):	Abrams (A.J.) Young (P.J.) Wilson Ozalis Wahla S. Richards Kamp
New Haven J.D. Courthouse (235 Church Street) Criminal Division:	B. Fischer, Senior Judge (A.A.J.) Clifford, Senior Judge (P.J. for Part A) (until 2/20/20) Alander Vitale
New Haven G.A. 23 (121 Elm Street) Civil Division Part C (G.A. court); Criminal Division:	Cradle (P.J.) Spallone Markle, Senior Judge Scarpellino, Judge Trial Referee
Meriden J.D. and G.A. 7 Courthouse (54 West Main Street) Family Division Parts S (support) and D (dissolution); Civil Division; Criminal Division: (All contested motor vehicle and criminal infractions and violations from G.A. 7 are handled at 165 Miller Street.)	Harmon (A.A.J.) (P.J.) Burgdorff Tindill Sizemore S. Moore, Senior Judge O'Keefe, Judge Trial Referee

NEW LONDON JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

New London J.D. Courthouse (70 Huntington Street)	
Civil Division Parts A (adm. appeals), J (jury), H (summary process), C (J.D. court) and S (small claims); Criminal Division:	Strackbein (A.J.) (P.J. for Criminal Division) Hadden, Senior Judge (A.A.J.) Shluger (P.J. for Family Division) Calmar (P.J. for Civil Division) Jongbloed Kwak Newson Knox S. Murphy Droney Handy, Senior Judge (until 10/26/19) Swienton, Senior Judge Devine, Judge Trial Referee
New London G.A. 10 (112 Broad Street)	
Civil Division Part C (G.A. court); Criminal Division:	
Norwich J.D. and G.A. 21 Courthouse (1 Courthouse Square)	
Family Division Parts S (support) and D (dissolution); Civil Division Parts H (summary process) and C (court matters); Criminal Division:	
(G.A. 21 handles motor vehicle cases for the towns of Bozrah, Colchester, East Lyme, Franklin, Griswold, Groton, Lebanon, Ledyard, Lisbon, Lyme, Montville, New London, North Stonington, Norwich, Old Lyme, Preston, Salem, Sprague, Stonington, Voluntown, and Waterford.)	

STAMFORD-NORWALK JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Stamford J.D. and G.A. 1 Courthouse (123 Hoyt Street) Family Division Parts S (support) and D (dissolution); Civil Division, except Part H (summary process); Criminal Division:	Genuario (A.J.) (P.J. for Civil Division) Blawie (A.A.J.) White (P.J. for Criminal Division) Heller (P.J. for Family Division) Kavanewsky (subject to Stamford Juvenile) Hudock Krumeich (until 6/22/20) McLaughlin M. Moore Povodator, Judge Trial Referee
Norwalk G.A. 20 (17 Belden Avenue) Civil Division Parts J (jury), C (G.A. & J.D. court) and S (small claims); Criminal Division; Family Division Part S (support):	Randolph (P.J.) Wenzel

TOLLAND JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Tolland J.D. Courthouse (69 Brooklyn Street, Rockville)	
Family Division Parts S (support) and D (dissolution); Civil Division:	Westbrook (A.J.) (P.J.) (subject to Rockville Courthouse for Juvenile Matters) Seeley (A.A.J.) Farley Armata Bhatt Chaplin Sicilian Macierowski
Rockville G.A. 19 (20 Park Street)	
Criminal Division:	
(G.A. 19 handles motor vehicle cases for the towns of Andover, Bloomfield, Bolton, Columbia, Coventry, East Hartford, East Windsor, Ellington, Enfield, Glastonbury, Hebron, Manchester, Mansfield, Marlborough, Somers, South Windsor, Stafford, Tolland, Union, Vernon and Willington.)	

WATERBURY JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Waterbury J.D. Courthouse (300 Grand Street)	
Family Division Parts S (support) and D (dissolution); Civil Division, except Part H (summary process):	Ficeto (A.J.) (P.J. for Family Division) Roraback (A.A.J.) Iannotti (P.J. for Criminal Division) Agati (P.J. for Civil Division) Klatt Bruno Gordon Coleman Schwartz Cutsumpas, Judge Trial Referee Fasano, Judge Trial Referee Resha, Judge Trial Referee Schofield, Judge Trial Referee Trombley, Judge Trial Referee
Waterbury J.D. and G.A. 4 (400 Grand Street)	
Criminal Division:	

WINDHAM JUDICIAL DISTRICT

(Administrative Judges can reassign judges to other assignments within a Judicial District when necessary.)

Windham J.D. Courthouse (155 Church Street, Putnam)	Graziani (A.J.) (P.J.)
Family Division Parts S (support) and D (dissolution); Civil Division Parts A (adm. appeals), J (jury), C (J.D. court), H (summary process) and S (small claims):	J. Fischer (A.A.J.) Spellman Green Auger Swords, Senior Judge Cole-Chu, Judge Trial Referee
Danielson G.A. 11 (120 School Street)	
Civil Division Part C (G.A. court); Criminal Division:	

ASSIGNMENTS

FAMILY DIVISION PART J (JUVENILE) AT FOLLOWING COURTHOUSES FOR JUVENILE MATTERS

Bridgeport (60 Housatonic Avenue)	Maronich (P.J.) Brillant
Hartford (920 Broad Street)	Dannehy (P.J.) Olear Gilligan, Judge Trial Referee
Middletown (One Court Street)	Sanchez-Figueroa (P.J.)
New Britain (20 Franklin Square)	C. Taylor (P.J.) Huddleston Hoffman
New Haven (239 Whalley Avenue)	Marcus (P.J.) Conway B. Kaplan, Judge Trial Referee
Rockville (25 School Street)	Westbrook (P.J.) (subject to Tolland J.D.)
Stamford (123 Hoyt Street)	Kavanewsky (P.J.) (subject to Stamford-Norwalk J.D.)
Torrington (50 Field Street)	Doherty, Judge Trial Referee (P.J.)
Waterbury (7 Kendrick Avenue)	Aaron (P.J.) Grogins Cremins, Judge Trial Referee Turner, Judge Trial Referee
Waterford (978 Hartford Turnpike)	Driscoll (P.J.) (until 8/12/20) Mack, Judge Trial Referee
Willimantic (81 Columbia Avenue)	Carbonneau (P.J.)

ASSIGNMENTS

HOUSING DIVISION PART H

Bridgeport (1061 Main Street) Norwalk (17 Belden Avenue)	Spader (P.J.)
Hartford (80 Washington Street) New Britain (20 Franklin Square)	Shah (P.J.)
Meriden (54 West Main Street)	All Judges assigned to such Courthouse
New Haven (121 Elm Street) Waterbury (300 Grand Street)	Baio (P.J.)

ADMINISTRATIVE APPEALS UNDER THE UNIFORM ADMINISTRATIVE PROCEDURE ACT AND APPEALS FROM DECISIONS OF COMMISSIONER OF REVENUE SERVICES (C.G.S. § 12-39*l*)

New Britain (20 Franklin Square)	Cordani (P.J.) Cohn, Judge Trial Referee

ASSIGNMENTS

COMPLEX LITIGATION DOCKETS

Hartford (95 Washington Street)	Moukawsher Schuman
Stamford (123 Hoyt Street)	Lee (until 2/20/20)
Waterbury (400 Grand Street)	Bellis Lager, Senior Judge

LAND USE DOCKET

Hartford J.D. Courthouse (95 Washington Street)	Berger, Judge Trial Referee (P.J.)

MEDIATION CENTERS

Hartford J.D. Courthouse (95 Washington Street)	Solomon, Senior Judge, Family Matters (until 9/7/19)
Waterbury J.D. Courthouse (400 Grand Street)	Ginocchio, Senior Judge, Family Matters (until 3/17/20)

REGIONAL CHILD PROTECTION SESSION

Middletown J.D. Courthouse (One Court Street)	Crawford (P.J.) (until 4/28/20) Woods

REGIONAL FAMILY TRIAL DOCKET

Middletown J.D. Courthouse (One Court Street)	Diana (P.J.) Adelman, Judge Trial Referee