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On March 11, 2016, the defendant rejected a plea offer of ten years incarceration, execution suspended after four years, in connection with those three charges and proceeded to trial. On April 27, 2017, the first day of jury selection, the state filed a substitute long form information in which it additionally charged the defendant with sexual assault in the fourth degree for "subject[ing] another person, under sixteen (16) years of age, to sexual contact without such person's consent" in violation of General Statutes § 53a-73a (a) (2).[5] It was not until after court adjourned for the day on April 27, 2017, that the state confirmed that the victim was sixteen—not fourteen as it had previously erroneously believed—at the time of the incident.

On April 28, 2017, the second day of jury selection,[6] the state filed a substitute amended information that charged the defendant with sexual assault in the first degree in violation of § 53a-70 (a) (1), sexual assault in the fourth degree for in violation of § 53a-73a (a) (2),[7] and unlawful restraint in the first degree in violation of § 53a-95, correcting the charges as to the victim's age.

of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony . . . ."

[5] General Statutes § 53a-73a (b) provides: "Sexual assault in the fourth degree is a class A misdemeanor or, if the victim of the offense is under sixteen years of age, a class D felony."

[6] We note that on the first day of jury selection, three venirepersons were asked whether the fact that the victim was under the age of sixteen would create a problem for them. Of the three venirepersons, the state and defense each exercised a preemptory challenge, and one venireperson was accepted as the first juror.

On appeal, the defendant raises an "incidental" claim that the error in the victim's age "*may*" have affected the exercise of peremptory challenges. (Emphasis in original.) Because defense counsel did not raise this issue in the trial court, and the record before us regarding the preemptory challenges is inadequate for review, we do not address it.

[7] The state later withdrew the charge of sexual assault in the fourth degree because the statute of limitations had expired.

Following a trial, the jury found the defendant guilty of sexual assault in the first degree and unlawful restraint in the first degree. The court sentenced the defendant to a total effective term of twelve years of incarceration, execution suspended after five years, two years of which were mandatory, and ten years of probation. The defendant appealed.

The defendant's overarching claim on appeal is that he was deprived of his right to effective assistance of counsel. "Our Supreme Court has held that, [a]lmost without exception . . . a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim. . . . *Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible.* The evidentiary hearing provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency. . . . [O]n the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal . . . we have limited our review to situations in which the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development. . . . Our role . . . is not to guess at possibilities, but to review claims based on a complete factual record developed by a trial court. Without a hearing . . . any decision of ours . . . would be entirely speculative." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Leon*, 159 Conn. App. 526, 531–32, 123 A.3d 136, cert. denied, 319 Conn. 949, 125 A.3d 529 (2015).

The defendant does not cite a single specific instance of deficient performance by his trial counsel. Rather, he argues that the plea offer was "probably more severe

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# Vol. 332

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT

OF THE

## STATE OF CONNECTICUT

# SYLVESTER TRAYLOR *v.* STATE OF CONNECTICUT ET AL. (SC 19977)

Robinson, C. J., and Palmer, Kahn, Ecker and Stevens, Js.

*Syllabus*

The plaintiff sought, inter alia, a judgment declaring unconstitutional the statute (§ 52-190a [a]) that requires a complaint sounding in medical malpractice to be accompanied by a good faith certificate and a letter authored by a similar health care provider opining that there appeared to be evidence of medical negligence. In 2006, following the suicide of his wife, the plaintiff had brought a medical malpractice action against his wife's treating psychiatrist, A, and his employer, C Co., but failed to append to the complaint the good faith certificate and opinion letter required by § 52-190a (a). Although the plaintiff subsequently obtained an opinion letter and amended his complaint, the trial court dismissed the counts of the amended complaint sounding in medical negligence on the ground that the original complaint failed to comply with § 52-190a (a). The trial court subsequently rendered judgment for A and C Co. on the remaining counts. Thereafter, in 2011, the plaintiff commenced two additional actions against A and C Co., their telephone answering service, T Co., and its owners, and other governmental officials, employees and entities, among others, in which he challenged the dismissal of his medical malpractice action. Those actions, both of which included the claim that § 52-190a is unconstitutional, ultimately were resolved against the plaintiff. In 2016, the plaintiff, representing himself, commenced the present action against A, C Co., T Co. and its owners, the state, the Appellate Court, and five Superior Court judges. Thereafter, the trial court granted A and C Co.'s motion for summary judgment on the ground that the claims directed against them were barred by the doctrine of res judicata, as the plaintiff previously had or could have raised and litigated those claims in one of the 2011 actions. The trial court granted the motion to dismiss filed by T Co. and its owners, concluding that the plaintiff's claims against them were barred by the prior pending action doctrine, the plaintiff previously having raised those claims in one of the 2011 actions. The trial court also granted the motion to dismiss filed by the state, the Appellate Court and the Superior Court judges, concluding, inter alia, that the plaintiff's claims for declaratory relief were barred by sovereign immunity and collateral estoppel, and that the claims against the judges were barred by absolute judicial immunity. Accordingly, the trial court rendered judgment for the defendants, and the plaintiff appealed, claiming that § 52-190a is unconstitutional because it imposes a financial burden and other obstacles on plaintiffs seeking to bring medical malpractice claims and, therefore, violated his rights to due process, equal protection, and access to the courts. *Held* that this court could not review the plaintiff's claim that

§ 52-190a is unconstitutional, as the plaintiff failed to address in his brief to this court any of the issues that provided the basis for the trial court's resolution of the plaintiff's action in favor of the defendants: the plaintiff's failure to challenge in his appellate brief the trial court's independent, alternative conclusions that the claims against the defendants were barred by, inter alia, res judicata, collateral estoppel, and the prior pending action doctrine operated as an abandonment of any challenge to the trial court's conclusions and thus effectively rendered the appeal moot because, even if this court were to agree that § 52-190a is unconstitutional, the trial court's conclusions would stand; moreover, the policy of this state's courts to be solicitous of self-represented litigants could not excuse the plaintiff's complete failure to challenge in his brief to this court the trial court's threshold conclusions.

Argued December 13, 2018—officially released August 27, 2019

*Procedural History*

Action seeking a judgment declaring, inter alia, that a certain medical malpractice statute is unconstitutional, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the case was transferred to the judicial district of Danbury and then to the judicial district of Hartford, Complex Litigation Docket; thereafter, the court, *Moll, J.*, granted the motions to dismiss filed by the named defendant et al. and the motion for summary judgment filed by defendant Bassam Awwa et al., and rendered judgment thereon for the defendants, from which the plaintiff appealed. *Affirmed.*

*Sylvester Traylor*, self-represented, the appellant (plaintiff).

*Jane R. Rosenberg*, former solicitor general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellees (named defendant et al.).

*William L. Stevens*, for the appellees (defendant Advanced Telemessaging, LLC, et al.)

*Donald E. Leone, Jr.*, with whom, on the brief, was *Anthony D. Sutton*, for the appellees (defendant Bassam Awwa et al.)

*Opinion*

STEVENS, J. This appeal arises from the most recent in a series of civil actions that the plaintiff, Sylvester Traylor, has brought in state and federal court relating to the suicide of his wife, Roberta Mae Traylor (Roberta). The plaintiff, who is self-represented, brought the present case against the defendants, who are (1) the state of Connecticut, numerous current and former Superior Court judges,[1] and the Appellate Court (state defendants); (2) Roberta's treating psychiatrist, Bassam Awwa, and his employer, Connecticut Behavioral Health Associates, P.C. (Awwa defendants); and (3) Robert Knowles and Neil Knowles, and their business, Advanced Telemessaging (Knowles defendants). The plaintiff now appeals[2] from the judgment of the trial court, *Moll*, *J.*,[3] rendered in accordance with its granting of the defendants' motions to dismiss and for summary judgment. On appeal, the plaintiff claims that General Statutes § 52-190a,[4] which requires a plaintiff to

[1] The plaintiff named the following current and former Superior Court judges as defendants: James W. Abrams, Emmet L. Cosgrove, Kari A. Dooley, Thomas F. Parker, and Terence A. Zemetis.

[2] The plaintiff appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[3] Given the multiplicity of Superior Court judges involved in this case in both adjudicative and party capacities, for the sake of simplicity, all references herein to the trial court are to Judge Moll unless otherwise noted.

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

append a good faith certificate and supporting opinion letter to the complaint in cases of medical negligence, is unconstitutional. Although the plaintiff fully briefed his attack on the constitutionality of § 52-190a, we cannot reach the merits of that claim because of his failure to challenge the trial court's threshold conclusions that his claims against all of the defendants are barred by, inter alia, the doctrines of res judicata and collateral estoppel. Accordingly, we affirm the judgment of the trial court.

The record reveals the following facts relevant to the plaintiff's claim on appeal,[5] as pleaded in his complaint,[6]

attorney, and any apportionment complainant or the apportionment complainant's attorney, shall obtain a written and signed opinion of a similar health care provider, as defined in section 52-184c, which similar health care provider shall be selected pursuant to the provisions of said section, that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion. Such written opinion shall not be subject to discovery by any party except for questioning the validity of the certificate. The claimant or the claimant's attorney, and any apportionment complainant or apportionment complainant's attorney, shall retain the original written opinion and shall attach a copy of such written opinion, with the name and signature of the similar health care provider expunged, to such certificate. . . .

* * *

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

[5] We note that the vast majority of the allegations in the plaintiff's 105 page complaint consists of facts supporting his various due process claims arising from the handling of his first medical malpractice action, with particular attention to the actions of Judge Thomas F. Parker, judge trial referee, both on and off the bench, along with the fact that Judge Parker ultimately was not renominated to his position as a judge trial referee. Because the plaintiff's sole claim on appeal concerns the constitutionality of § 52-190a, which the trial court did not reach, we need not discuss those other allegations in any detail.

[6] "The standard of review for a court's decision on a motion to dismiss [under Practice Book § 10-30] is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable

and the complex procedural history of this case. Beginning in 2002, Awwa and his employer, Connecticut Behavioral Health Associates, P.C., provided psychiatric treatment to Roberta. In 2002, the plaintiff attended a treatment session with Roberta, at which time Awwa became aware of her suicidal thoughts. In early 2004, Awwa prescribed medication for Roberta to treat her major depressive disorder, despite the existence of manufacturers' warnings that (1) the medications should not be prescribed to anyone with suicidal thoughts, (2) "the possibility of a suicide attempt is inherent in depression and may persist until [a] significant remission occurs," and (3) "[c]lose supervision of high risk patients should accompany initial drug therapy." Awwa changed Roberta's medication on several occasions during the period of time leading up to March 1, 2004. The plaintiff contacted the Awwa defendants on nine different occasions to inform them that Roberta was having adverse reactions to the medications that Awwa had prescribed. Roberta also sent Awwa a letter dated December 23, 2003, to that effect. Awwa did not return the plaintiff's telephone calls or otherwise indicate that he appreciated the danger of the situation. On March 1, 2004, Roberta tragically committed suicide.

On June 2, 2006, the plaintiff, acting as a self-represented party, filed a medical malpractice action in New

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. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . In undertaking this review, we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Footnote omitted; internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614, 109 A.3d 903 (2015); see also *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 789 n.5, 873 A.2d 965 (2005) (noting that motion for summary judgment, which was treated as "equivalent of a common-law motion for judgment on the pleadings," requires court to "accept as undisputed the facts pleaded in the complaint").

London Superior Court against the Awwa defendants in his own name and as administrator of Roberta's estate, claiming wrongful death, medical malpractice, loss of chance, and loss of consortium. See *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-06-5001159-S (2006 action). At the time the plaintiff filed the complaint, he had not attached the certificate of good faith and written opinion of a similar health care provider, which are required by § 52-190a. On July 27, 2006, the Awwa defendants moved to dismiss the 2006 action for lack of personal jurisdiction; the trial court, *Hon. D. Michael Hurley*, judge trial referee, denied that motion on December 14, 2006. Subsequently, on October 19, 2006, the plaintiff filed a certificate of good faith and supporting written opinion letter authored by Howard Zonana, a professor of psychiatry at Yale University School of Medicine, opining that there was a good faith basis for the action.

On December 26, 2006, the plaintiff, now represented by counsel, filed a request to amend the complaint pursuant to Practice Book § 10-60. On December 29, 2006, the Awwa defendants objected to the request, and Judge Hurley sustained their objection on January 16, 2007. On January 8, 2007, the Awwa defendants moved to dismiss the 2006 action, claiming that the complaint as originally filed lacked the certificate of merit and written opinion of a similar health care provider required by § 52-190a. Subsequently, on June 1, 2007, Judge Hurley denied that motion to dismiss and thereafter issued numerous discovery orders.

The Awwa defendants did not comply with Judge Hurley's discovery orders. Eventually, counsel for the Awwa defendants stated in court that his clients had destroyed all relevant medical and telephone records that were within their exclusive possession and control, despite their knowledge of their obligation to preserve those records given a pending or impending civil action

dating back to Roberta's death in March, 2004. Similarly, the Knowles defendants, acting at the direction of the Awwa defendants, destroyed relevant records in their possession. The plaintiff and his expert witnesses never had an opportunity to examine those records. Subsequently, the case was reassigned to Judge Thomas F. Parker, judge trial referee, who the plaintiff later named as a defendant in the present case. See footnote 5 of this opinion.

On July 12, 2010, the plaintiff, represented by counsel, filed an amended complaint that became the operative complaint in the 2006 action, adding claims of spoliation and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., arising from the destruction of the records.[7] On July 16, 2010, the Awwa defendants moved to dismiss the amended complaint on the ground that the plaintiff's original June 1, 2006 complaint initiating the action failed to comply with § 52-190a because the required certificate of good faith and opinion letter had not been

[7] We note that, in 2009, the plaintiff also brought a separate mandamus action in the New London judicial district under docket number CV-09-4009523-S, challenging an earlier decision of the trial court, *Abrams J.*, to open a judgment of default that had been rendered against the Awwa defendants in the 2006 action on the ground that they had violated discovery orders previously rendered by Judge Hurley. See *Traylor* v. *State*, 128 Conn. App. 182, 183, 15 A.3d 1173, cert. denied, 301 Conn. 927, 22 A.3d 1276 (2011). Judge Abrams granted the Awwa defendants' motion to open because he had rendered the default judgment without reviewing their properly filed objection and subsequently determined that they had not violated any discovery orders. Id., 184. Judge Parker subsequently granted the motion to dismiss the mandamus action "because the plaintiff did not claim that any of the discovery orders could not be subject to an appeal once the malpractice action had concluded." Id., 184–85. The Appellate Court affirmed that judgment denying the writ of mandamus "because the plaintiff has failed to demonstrate that there is no other specific adequate remedy available to review the court's actions. Moreover, because the actions of the court that are complained of here may be made an issue in the plaintiff's appeal from the final judgment of the medical malpractice action, mandamus is not warranted." Id., 186.

attached. Judge Parker granted the Awwa defendants' motion, concluding that, although Judge Hurley had denied an earlier motion to dismiss filed by these defendants, that denial preceded the Appellate Court's decisions in *Rios* v. *CCMC Corp.*, 106 Conn. App. 810, 943 A.2d 544 (2008), and *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009).[8] See *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-06-5001159-S, 2010 WL 3584285, *3–4 (August 11, 2010). Relying on *Rios* and *Votre*, Judge Parker concluded that the plaintiff's failure to obtain and file the written opinion letter required by § 52-190a (a) at the initiation of the 2006 action was not remedied by the eventual filing of Zonana's letter, and that Judge Hurley's ruling to the contrary was inconsistent with this appellate precedent. Id., *5.

Judge Parker next determined that Judge Hurley's earlier decision was not entitled to preclusive effect under the doctrines of law of the case or collateral estoppel. Id., *5–6. Judge Parker then concluded that other specifications in the complaint against Connecticut Behavioral Health Associates, P.C., were barred by the statute of limitations in General Statutes § 52-555 (a). Id., *9–10. Accordingly, on August 11, 2010, Judge Parker rendered judgment dismissing counts one through six of the complaint in the 2006 action. Id., *10.

On August 27, 2010, the plaintiff appealed from the judgment of dismissal to the Appellate Court under docket number AC 32641; the Appellate Court subse-

[8] In *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 30–31 n.17, 12 A.3d 865 (2011), this court discussed, but took no position regarding, the continued viability of the holding in *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, supra, 113 Conn. App. 585–86, that the opinion letter requirement of § 52-190a (a) cannot be satisfied through an opinion of a similar health care provider filed with an amended pleading that was not filed at the commencement of the action.

quently granted the Awwa defendants' motion to dismiss the appeal for lack of jurisdiction on January 5, 2011.[9]

In a subsequent memorandum of decision, Judge Parker rendered judgment dismissing the two remaining counts in the 2006 action, namely, spoliation and CUTPA violations, concluding that the earlier dismissal of the underlying medical malpractice claims for failure to file a good faith certificate and opinion letter meant that the defendants had rebutted the presumption that the plaintiff could have prevailed on those claims in the absence of the acts of spoliation. See *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-06-5001159-S, 2011 WL 1025029, *9–10 (February 15, 2011). Accordingly, Judge Parker rendered judgment for the defendants in the 2006 action. Id., *10.

On February 23, 2011, the plaintiff, as a self-represented party, appealed from that judgment to this court under docket number SC 18754; that appeal later was transferred to the Appellate Court pursuant to Practice Book § 65-4. The Appellate Court docketed the plaintiff's appeal under docket number AC 33038, along with another appeal, docket number AC 33039, which had been filed by the plaintiff's then attorney in this case on behalf of the estate. The appeal in docket number AC 33039 subsequently was withdrawn as derivative. After the plaintiff's counsel was granted leave to withdraw from the case on June 30, 2011, the Awwa defendants subsequently moved to dismiss the appeal for lack of a justiciable controversy between the parties, on the ground that the plaintiff's claims were deriva-

[9] In their motion to dismiss, the Awwa defendants claimed that the Appellate Court lacked jurisdiction because there was (1) no appealable final judgment and (2) no justiciable controversy between the parties to the appeal. The Appellate Court granted the Awwa defendants' motion in an order without an opinion.

tive of those of the estate, with the estate's appeal having previously been dismissed.[10] The Appellate Court granted that motion to dismiss on December 16, 2011. On December 29, 2011, the plaintiff filed a petition for certification to appeal from that judgment of dismissal, which this court denied on January 25, 2012. *Traylor* v. *Awwa*, 303 Conn. 931, 36 A.3d 242 (2012).

In 2011, the plaintiff filed a new action in New London Superior Court against the Awwa and Knowles defendants, their attorneys and insurers, then Attorney General Richard Blumenthal, court officials, and several New London prosecutors. *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-11-5014139-S (first 2011 action). The first 2011 action, which was later removed to federal court, included in its fifteen count complaint a claim that § 52-190a violated the state and federal constitutions. See *Traylor* v. *Awwa*, Docket No. 3:11CV00132 (AWT), 2014 WL 555358, *1 (D. Conn. February 10, 2014). In a series of rulings, the plaintiff's claims in the first 2011 action, including his claim challenging the constitutionality of § 52-190a, were resolved against him.[11]

[10] The Appellate Court granted the attorney's motion to withdraw, which was filed in accordance with the plaintiff's wishes as stated during the preargument conference, and sua sponte ordered that his appeal as administrator of the estate would be dismissed unless he obtained new counsel within thirty days. The plaintiff did not obtain new counsel. The Appellate Court subsequently dismissed that portion of the appeal on August 2, 2011. On August 4, 2011, the plaintiff filed a petition for certification from that portion of the order, which this court dismissed for lack of a final appellate judgment; see General Statutes § 51-197f; on September 28, 2011. See *Traylor* v. *Awwa*, 302 Conn. 937, 28 A.3d 989 (2011).

[11] More specifically, the claims against the state defendants in the first 2011 action were dismissed by the District Court on the ground that the plaintiff's complaint failed to state a claim under each count or each count was barred by sovereign immunity. *Traylor* v. *Awwa*, supra, 2014 WL 555358, *12. The plaintiff appealed from this judgment to the United States Court of Appeals for the Second Circuit but withdrew that appeal on April 15, 2014.

The District Court also dismissed the plaintiff's claims in the first 2011 action against the Awwa defendants. The plaintiff also appealed from this judgment to the Second Circuit, but withdrew that appeal on April 15, 2014. The District Court denied the motion to dismiss with respect to CUTPA and spoliation allegations against the Awwa defendants' insurer and attorney; see *Traylor* v. *Awwa*, 899 F. Supp. 2d 216, 224–27 (D. Conn. 2012); but

While the first 2011 action was pending, the plaintiff instituted a second action in 2011, this time in the Hartford judicial district under docket number CV-11-5035895-S (second 2011 action). The complaint in the second 2011 action also included the claim that § 52-190a is unconstitutional, and all of the claims raised in this complaint were resolved against the plaintiff.[12] See

subsequently granted a motion for summary judgment filed by these defendants. See *Traylor* v. *Awwa*, 88 F. Supp. 3d 102, 109–10 (D. Conn. 2015). The plaintiff appealed from the granting of that motion for summary judgment to the Second Circuit; the Second Circuit dismissed that appeal on November 19, 2015.

The District Court remanded the remaining claims against the Knowles defendants in the first 2011 action to New London Superior Court, where they were transferred to the Complex Litigation Docket in the judicial district of Waterbury. The first 2011 action was then transferred again to the Stamford-Norwalk judicial district, where Judge Genuario granted the Knowles defendants' motion for summary judgment on October 26, 2016. On June 21, 2017, this court dismissed the plaintiff's writ of error challenging the granting of summary judgment in the first 2011 action, and the Appellate Court subsequently denied the plaintiff's motion for permission to file a late appeal from that granting of summary judgment.

[12] Specifically, the second 2011 action was instituted against numerous judges, legislators, and court employees, and the Awwa defendants' insurer, challenging rulings in the plaintiff's other cases as violations of the state and federal constitutions, along with the constitutionality of § 52-190a. See generally *Traylor* v. *Gerratana*, 148 Conn. App. 605, 88 A.3d 552, cert. denied, 312 Conn. 901, 91 A.3d 908, and cert. denied, 312 Conn. 902, 112 A.3d 778, cert. denied, U.S. , 135 S. Ct. 444, 190 L. Ed. 2d 336 (2014). The Appellate Court upheld the dismissal of the second 2011 action on the ground that it was barred by the doctrines of qualified and absolute judicial and legislative immunity. Id., 612–15; see id., 615 (concluding that claims against insurer were abandoned because of inadequate briefing). Particularly pertinent to the present case, the Appellate Court held that the plaintiff's claims in the second 2011 action seeking declaratory and injunctive relief against the legislative defendants on the ground that § 52-190a is unconstitutional were barred by sovereign immunity because "[n]one of the claims raised by the plaintiff allege[s] a substantial claim that clearly demonstrate[s] an incursion upon [his] constitutionally protected interests." (Internal quotation marks omitted.) Id., 611.

While litigation continued in the first and second 2011 actions, the plaintiff continued to apply for fee waivers in the New London judicial district to allow him to reopen the original 2006 action and to file new actions. The trial court, *Cosgrove*, *J.*, denied two of these applications pursuant to General Statutes § 52-259b (c) after a hearing, on the ground that the plaintiff "has repeatedly filed actions with respect to the same or similar matters; that these filings demonstrate an extended pattern of frivolous filings that have been without merit; that this filing is consistent with the [plaintiff's] previous pattern of frivolous filings; and that the granting of the fee waiver would constitute a flagrant misuse of [J]udicial [B]ranch resources." *Traylor* v. *Awwa*, Superior Court, judicial district of New London, Docket No. CV-06-

generally *Traylor* v. *Gerratana*, 148 Conn. App. 605, 88 A.3d 552, cert. denied, 312 Conn. 901, 91 A.3d 908, and cert. denied, 312 Conn. 902, 112 A.3d 778, cert. denied, U.S. , 135 S. Ct. 444, 190 L. Ed. 2d 336 (2014).

The plaintiff filed the present action in April, 2016, in the Stamford-Norwalk judicial district, seeking declaratory and injunctive relief, as well as damages in excess of $15 million. The plaintiff's lengthy complaint pleaded claims for relief under six separate counts, namely (1) violations of his constitutional rights to due process and equal protection of the laws by the state defendants in connection with their handling of his previous actions, (2) fraudulent concealment by the Awwa and Knowles defendants, (3) spoliation by the Awwa and Knowles defendants, (4) violation of CUTPA by Advanced Telemessaging and Connecticut Behavioral Health Associates, P.C., (5) intentional infliction of emotional distress by the Awwa and Knowles defendants and Judge Parker, and (6) loss of consortium as to the Awwa and Knowles defendants. The case subsequently was transferred to the Danbury judicial district, and later to the Complex Litigation Docket in the judicial district of Hartford.

After the case was transferred to the Hartford Complex Litigation Docket, the Awwa defendants moved for summary judgment, and the Knowles defendants and the state defendants each moved to dismiss the amended complaint. The plaintiff did not oppose these motions or appear at the February 6, 2017 hearing on them.[13]

5001159-S, 2016 WL 823033, *4 (February 5, 2016). Ultimately, however, Judge Povadator, sitting in the Stamford-Norwalk judicial district where this case originally was filed, granted the fee waiver on March 14, 2016, which allowed the plaintiff to pursue the present action.

[13] We note that the plaintiff's conduct in responding to the motions and appearing in court was at issue before the trial court. After giving the plaintiff an additional month of time to file responsive briefs, in addition to a previous ninety day extension before its assignment to the case, the trial court then granted the plaintiff an extension of an additional sixty days, ultimately

With respect to the Awwa defendants' motion for summary judgment, the trial court agreed with their argument that they are entitled to judgment as a matter of law under the doctrine of res judicata. After comparing the complaints, the trial court concluded that res judicata barred the plaintiff's claims of fraudulent concealment, CUTPA violations, and intentional infliction of emotional distress because they previously had been raised and litigated to conclusion in the first 2011 action. The trial court concluded similarly with respect to the plaintiff's claim of loss of consortium because he had

setting January 23, 2017, as a due date for briefs and February 6, 2017, as the hearing date. On February 1, 2017, the plaintiff moved for continuance of a " 'February 23' status conference" on the ground that he needed more time to prepare and represented therein that he had contacted the defendants' attorneys regarding his request but they had not responded to him. The plaintiff also indicated in a separate filing that he required a continuance because he had vision problems resulting from medication.

Because there was no status conference scheduled for February 23, 2017, the trial court presumed that the plaintiff sought a continuance of the only scheduled event, namely, the February 6 hearing. On February 2, 2017, the trial court issued an order denying a continuance of the February 6 hearing, but directed the plaintiff to appear at that hearing to argue in support of his request for more time to respond, and to submit for in camera review medical documentation supporting his arguments that he "was physically unable" to participate. On February 3, 2017, the plaintiff obtained his medical records from a Veterans Affairs (VA) office and then had them sent from the New London courthouse to a court officer in Hartford via e-mail. The plaintiff then filed a "notice of compliance" stating that he would not attend the February 6 hearing, "claiming for the first time that he was unable to drive as a result of prescribed medication."

At the February 6 hearing before the trial court, the court officer confirmed on the record that, on the afternoon of February 3, the plaintiff had "called him and said that he had *driven to a VA office* that day to obtain his medical records and that he had *driven to the New London courthouse* that day to have those records e-mailed to [Judge Moll's] chambers." (Emphasis in original.) Given that the plaintiff had driven a car that day and his medical records did not support any claims of vision problems, the trial court found that the plaintiff was "flagrantly disregarding the court's deadlines and the court's February 3, 2017 order denying his request to continue the February 6, 2017 hearing. Accordingly, the [trial] court proceeded with the February 6, 2017 hearing, which [the plaintiff] failed to attend." The plaintiff has not challenged that finding or the denial of additional extensions in this appeal. See footnote 18 of this opinion.

an adequate opportunity to raise that claim in the first 2011 action. The trial court further determined that the plaintiff could have challenged the lower courts' conclusions on these issues by way of appealing the first 2011 action. Accordingly, the trial court granted the Awwa defendants' motion for summary judgment.

The trial court addressed the state defendants' motion to dismiss as follows. The trial court first observed that the plaintiff's complaint sought no monetary damages against either the state, the Appellate Court, or any individual state defendant in his or her official capacity. The court further concluded that any claim against any state defendant in his or her individual capacity was, in effect, against the state and, therefore, barred by sovereign immunity. See, e.g., *Spring* v. *Constantino*, 168 Conn. 563, 568–69, 362 A.2d 871 (2012).

As to the plaintiff's claims for declaratory and injunctive relief against the state defendants, the trial court concluded that these claims were barred by sovereign immunity because the plaintiff failed to allege sufficient facts showing that he had suffered a substantial violation of his constitutional rights or that the defendants had acted in excess of their statutory authority.[14] Specifically, the trial court observed that these claims were identical to those raised by the plaintiff in the second 2011 action, and the trial court relied on the Appellate Court's holding in that case that the plaintiff had not sufficiently pleaded "a substantial claim that the state or one of its officers [had] violated [his] constitutional

[14] As explained in *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009), this court has recognized three exceptions to sovereign immunity: "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citations omitted; internal quotation marks omitted.)

rights." (Internal quotation marks omitted.) The trial court reasoned that, in this context, the plaintiff's claim for declaratory relief was "barred on the independent grounds of sovereign immunity and collateral estoppel." The trial court also concluded that "the plaintiff [lacked] standing to challenge the constitutionality of § 52-190a because he, in fact, obtained the opinion letter required by the statute." The trial court next determined that the plaintiff's claims against the individual judges were barred by absolute judicial immunity, and that his claims were nonjusticiable to the extent that they sought an order to overturn or reverse the decisions of the Appellate Court or the Superior Court. Accordingly, the trial court granted the state defendants' motion to dismiss.

Finally, the trial court granted the Knowles defendants' motion to dismiss. The trial court agreed with their argument that the plaintiff's spoliation and CUTPA claims against them were barred by the prior pending action doctrine because they also were raised in the first 2011 action. The trial court determined that dismissal was warranted given that the actions are "virtually alike" and that the first 2011 action could have provided the plaintiff with the same remedy, given that "the claims in the two actions so obviously overlap that the plaintiff moved to consolidate the matters."

The trial court rendered judgment for all of the defendants in accordance with its decisions on their motions for summary judgment and dismissal. This appeal followed.[15]

On appeal, the plaintiff has filed a brief claiming that § 52-190a is unconstitutional because the "certificate of merit requirement burdens access to the courts by

[15] On January 7, 2019, the plaintiff filed a motion asking us to take judicial notice of certain misrepresentations that he claimed counsel for the state and the Awwa defendants had made during oral argument in this appeal on December 13, 2018. By order dated February 27, 2019, we denied this motion.

imposing an expensive and unnecessary prerequisite to having one's day in court." Arguing that access to the courts is a fundamental right under both the state and federal constitutions, the plaintiff contends that the certificate requirement "creates an improper and often impossible obstacle to access to the courts," citing internal pressure from within the medical community not to support plaintiffs in general, as well as the expense of obtaining the relevant medical records and hiring an appropriate expert to review them. In particular, the plaintiff relies heavily on a line of decisions from the Oklahoma Supreme Court invalidating various iterations of that state's certificate of merit statute. See, e.g., *John* v. *Saint Francis Hospital, Inc.*, 405 P.3d 681, 691 (Okla. 2017); *Wall* v. *Marouk*, 302 P.3d 775, 778 (Okla. 2013); *Zeier* v. *Zimmer, Inc.*, 152 P.3d 861, 874 (Okla. 2006). The plaintiff further argues that § 52-190a violates his right to equal protection under the state and federal constitutions.

In response, the defendants contend that review of the merits of the plaintiff's constitutional claims is precluded by his failure to brief challenges to the trial court's threshold conclusions that his claims in the present case are barred by the doctrines of res judicata, collateral estoppel, and sovereign and judicial immunity, as well as the prior pending action doctrine. The state defendants further argue that, other than his challenge to the constitutionality of § 52-190a, the defendant has abandoned his other constitutional claims against the state defendants challenging various actions taken by the courts, and particularly Judge Parker, during the handling of his cases, both on and off the bench. We agree with the defendants and conclude that the plaintiff's failure to brief a challenge to the trial court's conclusions in its memoranda of decision abandons any such challenge to those conclusions, in essence mooting his constitutional attack on § 52-190a.

"We repeatedly have stated that [w]e are not required to review issues that have been improperly presented

to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim is asserted in the statement of issues but thereafter receives only cursory attention in the brief without substantive discussion or citation of authorities, it is deemed to be abandoned." (Internal quotation marks omitted.) *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 124, 956 A.2d 1145 (2008); see id., 124–25 (claim abandoned when party "devotes little more than a page of her original and reply briefs combined to the discussion of her claim, limiting her argument to the bare assertion that she should not be held legally liable for offer of judgment interest because she was not specifically named in the offer and no unified offer was made to all four defendants," and cites one case "entirely unrelated to the issue on appeal").

In the present case, the plaintiff's complete failure to challenge what the trial court actually decided in its memoranda of decision operates as an abandonment of his claims. "An unmentioned claim is, by definition, inadequately briefed, and one that is generally . . . considered abandoned." (Internal quotation marks omitted.) *State* v. *Saucier*, 283 Conn. 207, 223, 926 A.2d 633 (2007). Indeed, when an appellant entirely fails to challenge the trial court's conclusions with respect to the merits of the case, thus leaving them intact despite the briefing of other issues, the appeal is, in essence, rendered moot. See, e.g., *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018) ("[u]ndoubtedly, if there exists an unchallenged, independent ground to support a decision, an appeal from that decision would be moot, as this court could not afford practical relief even if the appellant were to prevail on the issue raised on appeal"); *Middlebury* v. *Connecticut Siting Council*, 326 Conn. 40, 53, 161 A.3d 537 (2017) (declining to review claim that trial court

improperly determined that claims were abandoned by inadequate briefing because "the plaintiffs have failed to challenge the trial court's alternative conclusions rejecting the claims on the merits"); *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 379 n.23, 119 A.3d 462 (2015) ("where alternative grounds found by the reviewing court and unchallenged on appeal would support the trial court's judgment, independent of some challenged ground, the challenged ground that forms the basis of the appeal is moot because the court on appeal could grant no practical relief to the complainant" [internal quotation marks omitted]).

We acknowledge that the plaintiff is a self-represented party and that it "is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party. . . . The courts adhere to this rule to ensure that [self-represented] litigants receive a full and fair opportunity to be heard, regardless of their lack of legal education and experience . . . .

"This rule of construction has limits, however. Although we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law. . . . A . . . court does not have the discretion to look beyond the pleadings and trial evidence to decide claims not raised." (Citations omitted; internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 569–70, 877 A.2d 761 (2005); see also *Costello* v. *Goldstein & Peck, P.C.*, 321 Conn. 244, 257–58, 137 A.3d 748 (2016) ("[t]his court has always been solicitous of the rights of [self-represented] litigants and, like the trial court, will endeavor to see that such a litigant shall

have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party" [internal quotation marks omitted]).

The solicitous treatment we afford a self-represented party does not allow us to address a claim on his behalf when he has failed to brief that claim. See, e.g., *Deutsche Bank National Trust Co.* v. *Pollard*, 182 Conn. App. 483, 487, 189 A.3d 1232 (2018) ("Other than a broad and conclusory claim that the court too narrowly construed the transaction test, the defendant has provided this court with no argument specific to any count of his counterclaim; nor has he set forth any reasoning in support of the notion that his pleadings fall within the parameters of the transaction test. Although we recognize and adhere to the well-founded policy to accord leeway to self-represented parties in the appeal process, our deference is not unlimited; nor is a litigant on appeal relieved of the obligation to sufficiently articulate a claim so that it is recognizable to a reviewing court." [Footnote omitted.]); *Tonghini* v. *Tonghini*, 152 Conn. App. 231, 239–40, 98 A.3d 93 (2014) ("declin[ing] to enter into the statutory thicket of the family support magistrate laws without any meaningful assistance from the parties" and observing that "the fact that the defendant is self-represented cannot excuse or cure . . . obvious inadequacies in the record"); *In re Nicholas B.*, 135 Conn. App. 381, 384, 41 A.3d 1054 (2012) (declining to review self-represented respondent's claim that his trial counsel rendered ineffective assistance because his "argument is devoid of any legal analysis, let alone citation to any authority," and determining solicitude to self-represented parties was unwarranted because "[t]he major deficiencies in the presentation of this claim, which undeniably interfere with the petitioners' right to respond adequately to the claim, fall well outside of that degree of latitude afforded self-represented parties"); but cf. *State* v.

*Brown*, 310 Conn. 693, 698 n.4, 80 A.3d 878 (2013) (noting policy of solicitous treatment of self-represented parties and treating defendant's motion to correct illegal sentence filed pursuant to nonexistent " 'Practice Book Rule § 93-22' " as properly filed "pursuant to Practice Book § 43-22").

In the present case, the plaintiff has not addressed any of the issues, including res judicata, collateral estoppel, standing,[16] and the prior pending action doctrine,

[16] Although the plaintiff does not address the issue of standing, we note—sua sponte, because it implicates our subject matter jurisdiction; see, e.g., *Fairfield Merrittview Ltd. Partnership* v. *Norwalk*, 320 Conn. 535, 548, 133 A.3d 140 (2016)—that the trial court concluded that the plaintiff lacked standing because he had failed to allege a substantial claim that the opinion letter requirement of § 52-190a was an incursion on his constitutionally protected interests. In so concluding, the trial court relied upon the Appellate Court's decision in *Traylor* v. *Gerratana*, supra, 148 Conn. App. 605, in which the Appellate Court simply concluded that the plaintiff's amended complaint in that action had made "only conclusory allegations that § 52-190a violated his constitutional rights to equal access to court, separation of powers, equal protection, due process, and a trial by jury. None of the claims raised by the plaintiff alleges a substantial claim that clearly demonstrate[s] an incursion upon [his] constitutionally protected interests." (Internal quotation marks omitted.) Id., 611. We disagree with the trial court's reliance on this reasoning as applied to the present case. Having reviewed the operative complaint in this case, we conclude that the allegations in the plaintiff's complaint, taken as true—and particularly the allegation that § 52-190a creates an "economic barrier" to access to the courts, given that "[t]he average burden of cost for the prelitigation certificate of merit is $10,000 to $20,000," with a disproportionate effect on African American litigants like the plaintiff—are sufficiently specific allegations of economic injury to demonstrate an incursion upon constitutionally protected interests. See, e.g., *Allco Finance Ltd.* v. *Klee*, 861 F.3d 82, 95 (2d Cir. 2017) (allegation that state's request for proposal charged unlawful fees was injury "sufficiently 'concrete' and 'particularized' to qualify as injur[y]-in-fact"), cert. denied, U.S. , 138 S. Ct. 926, 200 L. Ed. 2d 203 (2018); *E.M.* v. *Dept. of Education*, 758 F.3d 442, 459 (2d Cir. 2014) (parent had standing to bring claim under Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., when she became "subject to a contractual obligation to pay [private school] tuition . . . and . . . incurred that obligation as a direct result of the [d]epartment's alleged failure to provide her child a [free and adequate public education]"). Given the significant expense allegedly incurred by the plaintiff, and the fact that his failure to obtain the letter at the outset of the 2006 action led to its dismissal, we also disagree with the trial court's conclusion that "the plaintiff lacks standing to challenge the constitutionality of § 52-190a because he, in fact, obtained the opinion letter required by the

which provided the dispositive bases for the trial court's memoranda of decision.[17] The plaintiff's status as a self-represented party does not permit us to overlook that complete omission. Because this omission operates as an abandonment of any challenge to what the trial court

statute." Nevertheless, the plaintiff's failure to challenge the state defendants' other grounds for dismissal renders this standing conclusion harmless error not requiring reversal.

We further note that, because the plaintiff's standing to challenge the constitutionality of § 52-190a emanates from his interests in the claims relating to the 2006 action, his opportunity to assert this constitutional challenge was in the lengthy proceedings before the trial court in the 2006 action and during the subsequent appeals. "[I]t is well settled that [f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings." (Citation omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771, 143 A.3d 578 (2016).

Put differently, under the circumstances presented in this case, any claims by the plaintiff that § 52-190a should not be applied to him because of its unconstitutionality were matters required to be asserted in the action in which the decision to apply the statute to him was made, and any challenges to the decision applying the statute to him were matters subject to direct appeal. "[I]t is now well settled that, [u]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal *entirely invalid*, he or she must resort to direct proceedings to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal." (Emphasis in original; internal quotation marks omitted.) Id., 771–72; see also, e.g., *In re Shamika F.*, 256 Conn. 383, 406–407, 773 A.2d 347 (2001).

[17] We acknowledge that the plaintiff touched on issues of standing, collateral estoppel, and res judicata briefly during the principal and rebuttal portions of his oral argument before this court. Raising a claim at oral argument is not, however, a substitute for adequately briefing that claim. See, e.g., *Studer* v. *Studer*, 320 Conn. 483, 493 n.11, 131 A.3d 240 (2016) ("[i]t is well settled that claims on appeal must be adequately briefed, and cannot be raised for the first time at oral argument before the reviewing court" [internal quotation marks omitted]).

actually decided in this case,[18] we cannot address the single substantive issue that the plaintiff has raised, namely, his challenge to the constitutionality of § 52-190a.[19] Accordingly, we are required to affirm the judgment of the trial court.

The judgment is affirmed.

In this opinion the other justices concurred.

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## STATE OF CONNECTICUT *v.* TONY M.*
## (SC 19934)

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

*Syllabus*

Convicted, after a jury trial, of the crimes of murder and risk of injury to a child in connection with the death of his seven month old baby, the defendant appealed, claiming that the trial court improperly denied his motion to suppress certain evidence arising from statements that he had made to the police and improperly excluded a letter to the state in which he offered to plead guilty to the charge of manslaughter. The defendant's conviction stemmed from an incident in which he threw the baby off a bridge and into a river. On his way to the bridge, the defendant had a text message exchange with the baby's mother, with

[18] We note that the plaintiff's appeal form specifies both "[f]inal judgment" and "the decision regarding [the plaintiff's] motion for an extension of time due to illness"; see footnote 13 of this opinion; as the challenged actions of the trial court. The plaintiff has not, however, addressed the denial of his requested extensions of time in his brief. Accordingly, we deem any challenges to that discretionary decision similarly abandoned.

[19] We note that the Appellate Court has previously rejected a similar constitutional challenge to the good faith certificate requirement of § 52-190a under the open courts provision of the state constitution; see Conn. Const. art. I, § 10; and the due process clauses of the federal and state constitutions. See *Lohnes* v. *Hospital of Saint Raphael*, 132 Conn. App. 68, 81–84, 31 A.3d 810 (2011), cert. denied, 303 Conn. 921, 34 A.3d 397 (2012).

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault and the crime of risk of injury to a child, we decline to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e; *State* v. *Jose G.*, 290 Conn. 331, 963 A.2d 42 (2009).

whom he had a troubled relationship and shared custody of the baby, stating, inter alia, "[y]ou won't talk to me tomorrow or any other day," "[t]here [are] no more days," "[e]njoy your new life without us," and that he would not be delivering the baby to her on her next scheduled day of custody. After the defendant arrived at the bridge, he called his own mother and told her to "tell everyone I'm sorry." A few minutes later, the defendant wrote and deleted a message on his phone stating "[t]o everyone, I'm sorry." The defendant then sent additional text messages to the baby's mother stating, inter alia, "[e]njoy your life without us now," "[you're] not a parent anymore," and "[the baby is] dead . . . ." The police arrived at the bridge and discovered the defendant there alone. When the police approached the defendant, he jumped from the bridge into the river. After the defendant was rescued, he was transported to a hospital, where the police subsequently interviewed him for approximately thirty-five minutes. Seven minutes of that interview were video recorded, and, during that time, the defendant responded to questions with only silence, brief verbal answers, shrugs, nods, or shakes of his head. A police officer, using a basketball analogy, asked the defendant whether the baby's trajectory off the bridge was more like a half-court shot, a three pointer, or a free throw. The defendant responded by saying "free throw." Before trial, defense counsel sent a letter to the state indicating that the defendant was willing to plead guilty to manslaughter in exchange for a sentence of twenty-five years imprisonment. The state rejected that offer, and defense counsel subsequently made an oral motion seeking to introduce that letter into evidence, claiming that the defendant's offer was a conclusive admission that he accepted criminal responsibility for the death of the baby but with the mental state associated with manslaughter. The trial court ultimately excluded that letter from evidence, concluding that it was irrelevant and would raise unnecessary collateral issues. The defendant also filed a motion to suppress evidence relating to the hospital interview, including the defendant's "free throw" statement and testimony by the police officers conducting the interview that the defendant had not asked about the baby's welfare during the interview. The defendant claimed, inter alia, that any waiver of his rights under *Miranda* v. *Arizona* (384 U.S. 436) was involuntary and that any statements made during the interview were inadmissible pursuant to the statute (§ 54-1o) governing the admissibility of statements made in the course of an unrecorded custodial interrogation by the police at a place of detention. The court denied the defendant's motion to suppress, concluding that he had voluntarily waived his *Miranda* rights and that his statements to the police had been voluntary. On appeal from the judgment of conviction, *held*:

1. The defendant could not prevail on his claim that the trial court improperly denied his motion to suppress because, even if the challenged evidence had been improperly admitted, any such error was harmless: the state satisfied its burden of proving that any error in admitting the challenged

evidence was harmless beyond a reasonable doubt, as that evidence, which was cumulative of other evidence and was not highlighted by the state, was inconsequential in light of overwhelming, independent evidence of the defendant's intent to kill the baby, including, inter alia, the text messages he sent to the baby's mother and statements he made to his own mother, the deleted message, testimony by a psychiatry resident that the defendant had told him in an interview conducted shortly after the hospital interview that the defendant told her that he had intended to take the baby's life, and the defendant's own testimony that he brought the baby to the bridge with the intention of committing suicide; moreover, even if the police had violated § 54-1o by failing to record portions of the hospital interview, the defendant failed to meet his burden of proving that the admission of the challenged evidence substantially affected the verdict in light of the same overwhelming, independent evidence of his intent to kill the baby.

2. The trial court did not abuse its discretion in excluding from evidence the letter containing the defendant's plea offer: the trial court correctly concluded that the defendant's offer to plead guilty to the lesser offense of manslaughter, a tactical decision made before trial, was irrelevant to the issue of whether the defendant intended to kill the baby when he committed the charged crimes, the only contested issue at trial for the jury to consider; moreover, in light of the infinitely variable and complex considerations involved in plea bargaining, such evidence could inject collateral issues that could have confused the jury.

Argued January 17—officially released August 27, 2019

*Procedural History*

Amended information charging the defendant with the crimes of murder and risk of injury to a child, brought to the Superior Court in the judicial district of Middlesex, where the court, *Vitale*, *J.*, denied the defendant's motions to preclude and to admit certain evidence; thereafter, the case was tried to the jury before *Vitale*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

*Norman A. Pattis*, with whom, on the brief, was *Brittany Paz*, for the appellant (defendant).

*Robert J. Scheinblum*, senior assistant state's attorney, *Peter A. McShane*, former state's attorney, and *Eugene R. Calistro, Jr.*, former senior assistant state's attorney, for the appellee (state).

*Opinion*

MULLINS, J. The defendant, Tony M., appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a and risk of injury to a child in violation of General Statutes § 53-21 (a) (1). On appeal, the defendant makes three claims. First, he claims that the trial court improperly denied his motion to suppress certain evidence arising from statements that he had made to the police while in the hospital on the ground that any waiver of his *Miranda*[1] rights prior to making those statements was involuntary. In connection with that claim, he argues that his statements were made involuntarily due to his weakened physical condition at the time he made them. Second, he claims that evidence regarding his statements was also inadmissible because the interview was not recorded, as required by General Statutes § 54-1o. Third, he claims that the trial court improperly precluded him from introducing into evidence a letter in which he offered to plead guilty to manslaughter in exchange for twenty-five years incarceration. We disagree with the defendant's claims and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On July 5, 2015, the defendant threw the victim, his seven month old baby, from the Arrigoni Bridge into the Connecticut River in Middletown. The defendant then jumped off the bridge himself. The defendant survived the fall; the baby did not. In the weeks leading up to the murder, the defendant's relationship with the baby's mother became increasingly troubled, and they separated. As a result, the baby's mother decided to move out of the house where they had been living

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

together for almost two years. At the same time, the baby's mother applied for, and was granted, a temporary restraining order against the defendant. In her application, she explained that the defendant had told her that he could make her and the baby disappear at any time. This caused her to fear for the safety of herself and the baby. At a subsequent hearing, on June 29, 2015, the court dissolved the temporary restraining order, and the defendant and the mother reached an agreement to share joint legal custody of their baby.

Within days of this agreement, on July 5, 2015, the defendant had custody of the baby at his mother's house, where he lived. At around 11 p.m., the defendant woke the baby from his sleep, put him in the stroller along with some blankets, a pacifier, his phone, an iPod, and a knife, and went for a walk. He soon began walking toward the Arrigoni Bridge with the intention of killing his baby and committing suicide. En route to the bridge, the defendant initiated the following exchange of text messages with the baby's mother:

"[The Defendant]: I hope you had fun bullshitting, I really needed to talk to you . . . .

"[The Baby's Mother]: I was trying to talk to my friend. She just broke up with her boyfriend and wanted to talk to me. Sorry I'm trying to be a good friend . . . .

"[The Defendant]: Well, I'm sorry there was a problem regarding our son . . . .

"[The Baby's Mother]: What's going on . . . . Why didn't you say that instead of saying I need to talk to you.

"[The Defendant]: Clearly nothing that matters to you. And why would I say I NEED to talk to you if it wasn't important . . . .

"[The Baby's Mother]: What was the matter?

"[The Defendant]: Don't worry, you'll see later. Just remember I tried [to] contact you first . . . .

"[The Baby's Mother]: Just tell me! Are you in the hospital?

"[The Defendant]: No, and again it doesn't matter now. Just remember you wanted to play games and lie and be childish when I tried to reach out . . . .

"[The Baby's Mother]: Okay Tony. Good night I'll talk to you tomorrow or Tuesday . . . .

"[The Defendant]: No you won't . . . .

"[The Baby's Mother]: What do you mean no?!

"[The Defendant]: You won't talk to me tomorrow or any other day . . . .

"[The Baby's Mother]: Tuesday is my day. So yes I'll text you in the morning to see when you'll be dropping off [the baby].

"[The Defendant]: I won't be . . . .

"[The Baby's Mother]: Tuesday is my day.

"[The Defendant]: There is no more days . . . .

"[The Baby's Mother]: Wtf you mean?!

"[The Defendant]: Enjoy your new life without us . . . .

"[The Baby's Mother]: You can't just decide not to bring him back . . . . It says in the agreement that Tuesday is my day. You can't just not bring him! Tony!!!! Seriously. Don't play around like that. Please don't try and take him from me!!!!"

During the course of this exchange, the defendant arrived at the bridge with the baby. Shortly thereafter, he called his own mother, told her where he was, and began crying. While on the phone with the defendant, his mother could hear the baby cooing and then briefly crying in the background. Assuming the defendant was

going to jump from the bridge, his mother pleaded with him to walk away. He responded that he couldn't and told her to "tell everyone I'm sorry." He then asked her to come to the bridge to get the stroller, iPhone, and iPod so that she would have pictures of the baby. He did not ask her to come get the baby. His mother and brother immediately drove to the bridge, calling the police on the way. Around this same time, a witness drove over the bridge on the way home from work. That witness saw the defendant holding the baby out in front of him and walking toward the railing. A few minutes later, the defendant wrote and deleted a message in his phone that stated: "To everyone, I'm sorry."

The defendant resumed exchanging text messages with the baby's mother:

"[The Defendant]: You tried to take him away from me. You failed. I didn't . . . . Enjoy your life without us now . . . .

"[The Baby's Mother]: Where are you . . . I'm trying to make this co-parent thing work!

"[The Defendant]: Your not a parent anymore . . . .

"[The Baby's Mother]: I'm trying to get along with you for [the baby] and [you] do this?! You can't just up and leave with [the baby]. Where are you! Where's [the baby]?

"[The Defendant]: He's dead . . . [a]nd soon I will be too . . . .

"[The Baby's Mother]: Don't [say] that!!!! Your playing right now! Please tell me you're kidding!!!!!!!!! You're fucking kidding me!!!!!! Don't fucking talk like that . . . . You couldn't kill your own son! [P]lease don't hurt [the baby]!!! Please!!!!!!!!!"

At that point, police officers and the defendant's mother arrived at the bridge where they saw the defen-

dant but not the baby. As officers approached the defendant, he threw himself over the railing and into the Connecticut River. The fall did not kill the defendant. He proceeded to wade in the water for approximately twenty minutes before being rescued. Shortly thereafter, he was airlifted to Hartford Hospital where he was placed in the intensive care unit. Two days later, the baby's body was found in the river by a kayaker.

The defendant was arrested and charged with murder and risk of injury to a child. At trial, the defendant testified that he was responsible for his baby's death but claimed that he had accidentally dropped him from the bridge. Thus, the only question before the jury was whether the defendant intended to kill the baby. Following a weeklong trial, the jury returned a verdict, finding the defendant guilty on both charges. The trial court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of seventy years of incarceration. This appeal followed.[2] Additional relevant facts will be set forth as necessary.

I

The defendant claims that the trial court improperly denied his motion to suppress evidence regarding certain statements that he made to the police while in the hospital. In particular, he claims that any statements made while he was in the hospital were obtained in violation of his *Miranda* rights and that those statements also were not voluntarily given as a result of his weakened physical condition. In response, the state contends that the defendant voluntarily waived his *Miranda* rights and that his statements to officers were made voluntarily.

[2] The defendant appealed to the Appellate Court, and that appeal was subsequently transferred to this court pursuant to General Statutes § 51-199 (b) (3) and Practice Book § 65-4.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant filed a motion to suppress "any and all statements made by the defendant" while at the hospital on the basis that the statements were obtained in violation of the fifth amendment to the United States constitution, the due process clauses of the United States and Connecticut constitutions, § 54-1o, and the psychiatrist-patient privilege.[3] The parties submitted briefs and made oral arguments. The trial court held a three day evidentiary hearing on the motion.

At that hearing, two officers from the Middletown Police Department, Detective Dane Semper and Officer Lee Buller, testified regarding the interrogation of the defendant that Semper conducted at the hospital on July 6, 2015. Around noon that day, Buller, who had been stationed inside of the defendant's hospital room, saw that the defendant was awake. Semper was notified and then went to the hospital in order to speak with the defendant about the events of the preceding night. Before speaking with the defendant, Semper gave Buller a video camera and instructed him to record the interrogation. The parties disagree as to whether Semper read the defendant his *Miranda* warnings prior to questioning him. See footnote 6 of this opinion. Semper then proceeded to question the defendant regarding the manner in which he threw his baby from the bridge.[4] This topic was of paramount importance because the baby had not yet been found at the time the interview took place.

[3] The defendant does not pursue his claim regarding the psychiatrist-patient privilege on appeal.

[4] We note that a nurse who attended to the defendant in the intensive care unit testified that the defendant wore "mitts," or medical restraints, which tethered his hands to the hospital bed, so that he would not pull at the various medical apparatuses that were connected his body. She clarified that these restraints were not requested by the police officers and that they solely served a medical purpose.

During this initial conversation, Buller was having trouble getting the video camera to record, and Semper briefly stopped speaking with the defendant to help get the camera working. Eventually, Buller got the video camera working but was only able to record about seven minutes of the thirty-five minute interview. The recording began with Semper's asking the defendant about the manner in which he threw the baby off of the bridge. Throughout the seven minute video, the defendant either made no response to Semper's questions or responded with brief verbal answers, shrugs, nods, or shakes of his head.

At one point, Semper made a basketball analogy to further his efforts to determine the baby's trajectory when he was thrown from the bridge. He asked the defendant whether he threw the baby off the bridge in a manner more like a half-court shot, three pointer, or free throw. In response, the defendant asked Semper to turn off the camera. Semper then moved the camera to the hallway but continued to record the conversation. Semper returned to the defendant's room and asked him again how the baby was thrown from the bridge. This time, the defendant responded by saying "free throw." Buller also testified that the defendant never asked about his baby while he was at the hospital.

The trial court also heard evidence regarding the defendant's medical condition at the time of the police interview. A nurse who attended the defendant in the intensive care unit on the day of the interview testified that the defendant had last been given short acting pain medicine at least two hours prior to the interview. She further testified that he was lucid, able to communicate, speak, and follow commands appropriately. A physician who did not personally examine the defendant, but reviewed his chart several hours prior to the interview, initially testified that he did not think a patient who was given the same medications as the defendant could

make complex judgments. He later testified, however, that he did not know if a patient in that situation could make complex judgments and that a psychiatric consultation would be needed to know for sure. A physician's assistant, who performed a brief assessment of the defendant about ninety minutes prior to the interview, testified that he could follow commands well at that point and that he had not had any medication administered to him at least thirty minutes prior to her examination. Finally, just after Semper's interview, the defendant spoke clearly and coherently with Samira Solomon, a psychiatry resident who interviewed him.

The trial court denied the defendant's motion to suppress. In making its ruling, the court determined that the defendant voluntarily, intelligently, and knowingly waived his *Miranda* rights. It also concluded that, on the basis of testimonial evidence of medical personnel regarding the defendant's physical and mental condition, the defendant's statements to Semper were made voluntarily.[5] Accordingly, at trial, the video recording was introduced into evidence. The state also introduced testimony from Semper regarding the interrogation, including the "free throw" statement made by the defendant and the testimony from Buller that the defendant never asked about his baby's welfare while he was in the hospital. These pieces of evidence—the defendant's response to Semper's question about the manner in which he threw his baby off the bridge and Buller's testimony that the defendant never asked about his baby while he was in the hospital—are the focus of the defendant's challenge in this appeal.

On appeal, the defendant first claims that the trial court improperly denied his motion to suppress because any waiver of his *Miranda* rights while speaking with

[5] The trial court was free to discredit the defendant's claim of a weakened physical condition.

the officers at the hospital was involuntary.[6] As a result, the defendant asserts that the trial court improperly admitted the officers' testimony regarding the interrogation. He also claims that any statements made to officers also were involuntary as a result of his weakened physical condition.[7] He further argues that the error was harmful because the challenged evidence was used to impeach his trial testimony that his baby had slipped from his hands.

The state counters that the trial court correctly concluded that the defendant had waived his *Miranda* rights and agreed to speak with Semper. In particular, it claims that the trial court properly credited the testimony from Semper and Buller that the defendant waived his *Miranda* rights, that the defendant was familiar with his rights from a prior arrest unrelated to the present case, and that the defendant was not under

[6] The defendant states in his brief that "the only warnings [he] received were the following . . . Semper asked (1) if [the defendant] would like to have a lawyer present . . . and (2) whether it is okay to talk to him without a lawyer . . . ." To the extent the defendant intends to challenge the trial court's finding that *Miranda* warnings were, in fact, given to him, we defer to the trial court's determination that Semper and Buller credibly testified that they gave the warnings. See *State* v. *Whitaker*, 215 Conn. 739, 757, 578 A.2d 1031 (1990) (whether police officer truthfully testified that *Miranda* warnings were given is "question of credibility, and as such, is for the trier of fact to determine"); *State* v. *Madera*, 210 Conn. 22, 36–37, 554 A.2d 263 (1989) (whether police advised defendant of *Miranda* rights is question of credibility of witness for trier of fact).

[7] The defendant also claims that, upon receiving a letter from the public defender's office notifying him of the availability of its legal assistance, an attorney-client relationship was established so that further interrogation by officers with no action on behalf of the defendant was precluded. See *State* v. *Stoddard*, 206 Conn. 157, 169–70, 537 A.2d 446 (1988). In response, the state asserts that the defendant abandoned this claim at oral argument before the trial court. In its memorandum of decision on the defendant's motion to suppress, the trial court states that, "at oral argument, the defendant withdrew any claims made pursuant to . . . *Stoddard* . . . ." Therefore, we will not consider this claim on appeal. See, e.g., *State* v. *Saucier*, 283 Conn. 207, 222–23, 926 A.2d 633 (2007) (declining to review previously abandoned claim).

the influence of any medications that would impair his ability to freely and rationally decide to waive his rights at the time of the interview. The state also contends that the defendant's statements were made voluntarily because he suffered only minor injuries, was lucid and alert, and was able to communicate appropriately at the time of the interview. Finally, the state claims that, even if the trial court improperly admitted the challenged evidence, any error was harmless beyond a reasonable doubt. We agree with the state that, even if we assume that the trial court improperly admitted the challenged evidence, any error in that regard was harmless beyond a reasonable doubt.

It is well settled that, "[i]f statements taken in violation of *Miranda* are admitted into evidence during a trial, their admission must be reviewed in light of the harmless error doctrine. . . . [W]hether an error is harmful depends on its impact on the trier of fact and the result of the case. . . . This court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt. . . . When an [evidentiary] impropriety is of constitutional proportions, the state bears the burden of proving that the error was harmless beyond a reasonable doubt. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless. . . . That determination must be made in light of the entire record . . . ." (Citations omitted; internal quotation marks omitted.) *State* v. *Mitchell*, 296 Conn. 449, 459–60, 996 A.2d 251 (2010). "Whether [an] error is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

otherwise permitted, and, of course, the overall strength of the prosecution's case." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 805, 91 A.3d 384 (2014).

We turn to the first factor—namely, the importance of the challenged testimony to the state's case. The defendant claims that the challenged testimony was important to the state's case because it contradicted his own testimony at trial that he accidentally dropped his baby off the bridge and the state used the testimony to impeach him. He also asserts that the state emphasized Buller's testimony that he never asked about his baby while he was in the hospital. We disagree that the challenged testimony was important to the state's case.

In the present case, there was overwhelming, independent evidence of the defendant's intent to kill his baby that the jury could have credited. The text messages sent by the defendant to the baby's mother on the night of the murder were arguably the most persuasive evidence of the defendant's intent. In those messages, prior to throwing his baby off the bridge, he taunted and threatened the baby's mother, saying, *inter alia*, "there was a problem regarding our son," "[y]ou won't talk to me tomorrow or any other day," "[t]here is no more days," and "[e]njoy your new life without us . . . ."

Then, after throwing the baby off the bridge, the defendant told the baby's mother through text messages that "[y]ou tried to take him away from me. You failed. I didn't . . . . Enjoy your life without us now," "[y]our not a parent anymore," and "[the baby is] dead . . . [a]nd soon I will be too . . . ."

These text messages were powerful evidence demonstrating the defendant's intent to kill his baby. Additionally, Solomon, a psychiatry resident who interviewed the defendant the same day that he spoke with Semper,

testified at trial that the defendant told her that he intended to take his baby's life that night. Specifically, Solomon testified that the defendant stated "he became more clear about things last night after he got off the phone with [the baby's mother] and decided he had to take his son's life and his own because he was so afraid of his son living in his current life situation." This evidence further demonstrated that killing his baby was decidedly not accidental. Rather, the defendant specifically intended to kill his baby.

Solomon's testimony also was corroborated and augmented by Buller. After the defendant had consented to Buller's presence in the room while Solomon interviewed him, Buller heard the defendant say that, on the night of the murder, "he wasn't even emotional as he approached the bridge" and that "he knew what he needed to do." Buller further testified that the defendant said that "[h]e needed to kill his son and then himself" because "he was uncertain about what would happen to his son once he was gone." The defendant "didn't want [the baby's maternal family] raising him with all their bullshit," and "the only way he knew that his son would be safe was to kill his son and then himself." The foregoing represents potent evidence of the defendant's intent to kill his baby and his reasons for wanting to do so.

Other evidence contributing to the strength of the state's case was testimony by the defendant's mother that the defendant called her from the bridge and told her to pick up the stroller, iPhone, and iPod so that she would have pictures of the baby, yet he made no mention of picking up the baby. He also told his mother to "tell everyone I'm sorry" close to the time that he threw the baby from the bridge and just before he jumped off the bridge himself. Finally, the defendant testified that he woke his baby up at 11 p.m., packed him in a stroller without any diapers or bottles, and

brought him to the bridge with him with the intention of committing suicide.

The state also did not highlight the challenged evidence, thus minimizing its importance. During its cross-examination of the defendant, the state never asked him about the "free throw" statement or emphasized that it was at variance with any part of his testimony. Furthermore, in the state's summation, the state only briefly mentioned the "free throw" statement.[8] With regard to Buller's testimony that the defendant never asked about his baby, the state did emphasize this for the jury in summation.[9] Significantly, however, the defendant himself admitted to this when he testified, and, in summation, the state did not specifically attribute that testimony to Buller.

Additionally, the challenged evidence was cumulative of other evidence of the defendant's intent that had been presented by the state. The text messages and the testimonies of Solomon and Buller were all evidence of the defendant's intent to kill his baby. The state also presented evidence that the defendant himself admitted to the jury that he chose not to call for help after his baby fell from the bridge and that he never once asked about his baby's welfare the following day. Thus, to the extent that the challenged evidence indicates that he intended to kill his baby by throwing him from the bridge, the free throw statement and lack of concern

[8] In reminding the jury about the testimony of the witness who saw the defendant on the bridge that night, the state argued that, "had she looked at that rearview mirror, she would have seen the free throw that the defendant talks about later." The state mentioned the challenged testimony a second time when it stated: "While at Hartford Hospital, [the defendant] gave two statements. One to [Semper], where the defendant admitted throwing his son off the bridge. Now counsel may . . . show you the video and say, really, does it say anything. Granted, the quality is poor."

[9] The state argued that "what's important and this is a big piece of evidence that's very important, not once . . . does the defendant ask for his son, ask for the whereabouts of his son."

are essentially inconsequential in light of the foregoing overwhelming, independent evidence establishing his intent to kill.

We conclude that, even without the challenged evidence, there was overwhelming, independent evidence of the defendant's intent to kill his baby. The state's case was strong, the challenged evidence was cumulative of other evidence, and the defendant was able to cross-examine the state's witnesses. Given the strength of the state's other evidence, the challenged evidence did not influence the jury. Accordingly, we conclude that, even if the trial court improperly admitted the challenged evidence, the state has met its burden of demonstrating that any error in that regard was harmless beyond a reasonable doubt.

## II

The defendant next claims that the trial court improperly denied his motion to suppress because officers conducted a custodial interrogation that was not electronically recorded, as required by § 54-1o.[10] Specifically, the defendant claims that his hospital room was a "place of detention,"[11] as defined in § 54-1o, and that he was in custody for purposes of that statute. He further contends that the presumption of inadmissibility that attaches to unrecorded custodial interrogations in places of detention cannot be overcome because the

[10] General Statutes § 54-1o (b) provides: "An oral, written or sign language statement of a person under investigation for or accused of a capital felony or a class A or B felony made as a result of a custodial interrogation at a place of detention shall be presumed to be inadmissible as evidence against the person in any criminal proceeding unless: (1) An electronic recording is made of the custodial interrogation, and (2) such recording is substantially accurate and not intentionally altered."

[11] General Statutes § 54-1o (a) (4) defines " '[p]lace of detention' " as "a police station or barracks, courthouse, correctional facility, community correctional center or detention facility . . . ."

statements are not reliable and were not made voluntarily. See General Statutes § 54-1o (d).[12]

In response, the state claims that the trial court properly denied the defendant's motion to suppress because police officers had no obligation to record the interrogation pursuant to § 54-1o. In particular, the state does not challenge that the defendant was in custody or that it was an interrogation but instead contends that a hospital room is not a "place of detention" for purposes of the statute. Alternatively, the state claims that any error in denying the defendant's motion to suppress was harmless.

The electronic recording requirement expressed in § 54-1o applies only to custodial interrogations conducted at a place of detention. See footnote 10 of this opinion. In denying the defendant's motion to suppress, the trial court concluded that § 54-1o was inapplicable because the defendant's hospital room was not a "place of detention" as defined in the statute. It is not necessary for us to decide in this case, however, whether a hospital room qualifies as a place of detention under the statute because, even if we assume that a hospital room is a place of detention, the admission of the challenged evidence in the present case was harmless. Thus, we conclude that, even if the trial court incorrectly denied his motion to suppress on this basis, any error was harmless.

Where, as here, "an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the [impropriety] was harmful. . . . [A] nonconstitutional [impropriety] is

[12] General Statutes § 54-1o (h) provides: "The presumption of inadmissibility of a statement made by a person at a custodial interrogation at a place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances."

harmless when an appellate court has a fair assurance that the [impropriety] did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 265, 49 A.3d 705 (2012). Moreover, "[w]hether [the improper admission of evidence] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative . . . the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Randolph*, 284 Conn. 328, 364, 933 A.2d 1158 (2007).

We already have concluded in part I of this opinion that the state met its burden of proving that any improper admission of the challenged evidence was harmless beyond a reasonable doubt. For similar reasons, we further conclude that the defendant has not met his burden of proving that the admission of that evidence substantially affected the verdict.

As discussed previously, the state's case was strong because, even without the challenged evidence, there was overwhelming, independent evidence of the defendant's guilt. Specifically, the state presented the following evidence: (1) the incriminating text messages that had been sent by the defendant to the baby's mother on the night of the murder; (2) testimony from both Solomon and Buller that the defendant had stated that he intended to kill his baby that night on the bridge because he didn't want the baby's maternal family "raising him with all their bullshit"; (3) testimony from the defendant's mother that the defendant had called her from the bridge and told her to pick up the stroller, iPhone, and iPod so that she would have pictures of the baby but that he had not mentioned picking up the

baby; (4) testimony that the defendant had asked his mother to "tell everyone I'm sorry"; and (5) the deleted note that the defendant had written in his phone to the same effect shortly after killing his baby and before attempting to take his own life. The defendant also admitted to the jury how he chose not to call for help that night on the bridge, that he never asked about his baby's welfare the following day, and that he brought his baby with him to the bridge with the intention of committing suicide.

In light of this overwhelming, independent evidence demonstrating the defendant's intent to murder his baby, the "free throw" statement to Semper and Buller's testimony that the defendant never asked about his baby were inconsequential and did not substantially affect the verdict. Consequently, on the basis of the foregoing, even if we assume that the trial court improperly admitted the defendant's statements made during the interview with Semper in violation of § 54-1o, any such error was harmless.

III

The defendant also claims that the trial court's refusal to permit him to introduce into evidence a letter in which he offered to plead guilty to a lesser offense deprived him of his right to present a defense under the sixth amendment to the United States constitution.[13] He further claims that evidence of the offer was relevant and not self-serving. The state counters that the trial court did not abuse its discretion in precluding the defendant from introducing the letter into evidence because it was not relevant, it was self-serving, and it

[13] We note that the right to present a defense has been made applicable to the states through the fourteenth amendment to the United States constitution. See *Washington* v. *Texas*, 388 U.S. 14, 17–19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) (incorporating right to compulsory process); *State* v. *Perkins*, 271 Conn. 218, 252–53, 856 A.2d 917 (2004) (sixth amendment right to compulsory process includes right to present defendant's version of the facts).

was inadmissible hearsay. We conclude that the trial court properly exercised its discretion in prohibiting the defendant from introducing the letter into evidence because it was not relevant.

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to trial, the defendant offered to plead guilty to the lesser offense of manslaughter in exchange for a prison term of twenty-five years incarceration. The defendant conveyed the plea offer to the state in a letter. The state rejected the offer. Thereafter, the defendant made an oral motion seeking to introduce the letter into evidence at trial as a judicial admission on the basis that the offer was a conclusive admission that he accepted criminal responsibility for the death of his child but with the mental state associated with manslaughter. The defendant did not reveal the specific contents of the letter to the trial court during the hearing on the motion. He further claimed that evidence of his offer to plead to a lesser offense was a verbal act and that it was not self-serving. In response, the state objected to the admission of any evidence of his offer to plead to a lesser offense because of the inability to cross-examine the letter. The trial court denied the defendant's motion on the basis that it was not a judicial admission and was instead self-serving hearsay.

At the close of the state's presentation of evidence and just prior to the defendant's testimony, the defendant again sought the court's permission to introduce evidence of his offer to plead to a lesser offense, this time in the form of testimony from the defendant. Again, the specific details of the offer were not revealed to the trial court. The state objected on grounds that the evidence was neither relevant nor material. The trial court denied the defendant's request to introduce evidence of his plea offer, concluding that it was not relevant or material, and that it would inject collateral

issues into the jury's determination of whether the state had met its burden of proving that the defendant acted with intent. The defendant immediately moved for a mistrial, claiming that the denial of the opportunity to present evidence of his willingness to enter a plea deprived him of his right to present a defense pursuant to the sixth amendment of the United States constitution. The trial court then denied his motion for a mistrial.

We begin by setting forth the standard of review and the principles of law governing the defendant's claim. "The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Dehaney*, 261 Conn. 336, 354–55, 803 A.2d 267 (2002), cert. denied, 537 U.S. 1217, 123 S. Ct. 1318, 154 L. Ed. 2d 1070 (2003).

Furthermore, "[t]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment right to compulsory process includes the right to . . . present the defendant's version of the facts . . . to the jury so that it may decide where the truth lies. . . . The defendant's sixth amendment right, however, does not require the trial court to forgo completely restraints on the admissibility of evidence. . . . A defendant, therefore, may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right is not violated." (Internal quotation marks omitted.) *State* v. *Perkins*, 271 Conn. 218, 252–53, 856 A.2d 917 (2004).

It is well settled that "[t]he trial court has broad discretion in determining the relevancy of evidence." *State* v. *Lombardo*, 163 Conn. 241, 243, 304 A.2d 36 (1972). "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree." (Internal quotation marks omitted.) *State* v. *Perkins*, supra, 271 Conn. 253.

Conversely, "[e]vidence is irrelevant or too remote if there is 'such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in . . . proof of the latter.' " *State* v. *Prioleau*, 235 Conn. 274, 305, 664 A.2d 743 (1995), quoting *State* v. *Kelly*, 77 Conn. 266, 269, 58 A. 705 (1904). "Evidence that is not relevant is inadmissible." Conn. Code Evid. § 4-2.

Because irrelevant evidence is not admissible, we must first address whether the trial court abused its discretion in concluding that the evidence was not relevant to any issue before the jury. It is undisputed that the only contested issue at trial for the jury to determine was whether the defendant intended to murder his baby or whether the baby's death was accidental. The proffered evidence was of no assistance to the jury in carrying out this task. We conclude, therefore, that evidence of the defendant's offer to plead guilty was not relevant.

In an analogous context, our rules of evidence prohibit the admission of evidence related to settlement negotiations. Indeed, in civil cases, it is well settled that

offers to compromise or settle are inadmissible with very few exceptions. See Conn. Code Evid. § 4-8. This is because settlement offers are of little probative value with respect to the central issues of liability or the amount of the claim. See Conn. Code Evid. § 4-8, commentary. Part of the reason for this prohibition, as stated in the commentary to § 4-8, is that "a party, by attempting to settle, merely may be buying peace instead of conceding the merits of the disputed claim." Conn. Code Evid. § 4-8, commentary. Another reason for the prohibition is that the admission of settlement evidence supports the important policy of encouraging parties to engage in settlement negotiations. See Conn. Code Evid. § 4-8, commentary. We find these same reasons equally applicable to criminal cases with respect to plea bargaining and the use of evidence related thereto.[14]

Indeed, plea bargaining "is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Santobello* v. *New York*, 404 U.S. 257, 260, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). "[I]t is essential that plea negotiations remain confidential to the parties if they are unsuccessful. Meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence." *United States* v. *Verdoorn*, 528 F.2d 103, 107 (8th Cir. 1976). As the Ohio Court of Appeals aptly stated in *State* v. *Davis*, 70 Ohio App. 2d 48, 51, 434 N.E.2d 285 (1980), "[i]f the prosecutor must bargain with a defendant whose responses are framed with an eye toward their self-serving use at trial, we see little profit to be antici-

[14] We note that the Connecticut Code of Evidence recently was amended to include § 4-8A, which addresses the admissibility of pleas and related statements in civil or criminal cases. See Conn. Code Evid. § 4-8A. The application of that rule is, however, limited to situations in which evidence of the plea is offered against the defendant.

pated from their discussions . . . . Destroy confidentiality, and negotiators tend to make speeches and assume postures, tendencies inherently inimical to compromise."

Moreover, similar to settlement negotiations in the civil context, "[t]he considerations involved in plea bargaining are infinitely variable and complex. For instance, considerations may include: the seriousness of the offense, the availability or suitability of lesser included offenses, the record of the accused, the quality and quantity of the evidence on both sides, the availability and cooperativeness of witnesses or accomplices, unresolved legal issues, probable length of trial and difficulty of trial preparation, and a host of other no-less-significant factors, very few of which bear directly upon the only question the triers of fact will be called upon to decide, i.e., the guilt or innocence of the accused of the crime charged. . . . It seems obvious that any testimony concerning such negotiations will far more likely than not reflect . . . legally extraneous considerations, rather than anything relevant to, or probative of, the ultimate issue on trial." (Citations omitted.) Id.

Due to the myriad reasons a defendant may offer to plead guilty, there is simply no open and visible connection between an offer to plead guilty to a lesser offense, made months after the crime, and the defendant's state of mind at the time of the crime, which is what the jury needed to decide in this case. The defendant made his plea offer just prior to his trial on the charges of murder and risk of injury to a child when he was facing a potential sentence of seventy years incarceration. His offer to plead to the lesser offense of manslaughter in exchange for twenty-five years incarceration likely was a tactical decision and does not reflect on his intent to kill his baby on the night of the murder.

In any event, given that there are so many considerations involved in plea bargaining, we are unpersuaded that evidence of the defendant's willingness to plead guilty to a lesser offense in exchange for a significantly shorter period of incarceration was relevant to the issue before the jury, i.e., the defendant's state of mind at the time that the crime was committed. Knowing that there are many reasons why a defendant would choose to plead guilty, we also agree with the trial court that admission of the evidence would inject collateral issues that could confuse the jury.[15]

Because we conclude that the evidence was not relevant, it was not admissible.[16] Therefore, under the circumstances of this case, we cannot conclude that the trial court abused its discretion by precluding the admission of the defendant's offer to plead guilty.

Our conclusion finds support in other jurisdictions that have considered a similar issue—namely, whether a defendant may present evidence regarding an offer made by the state and rejected by the defendant. Those

[15] We also note that the defendant never identified, and the trial court was not aware of, whether his offer indicated a willingness to plead guilty under *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), to enter a plea of nolo contendere, or an unqualified plea. Pursuant to the former two types of guilty pleas, the defendant would not even be admitting any of the elements of the crime but, rather, would be conceding only that there is sufficient evidence for the state to obtain a conviction. See *State* v. *Palmer*, 196 Conn. 157, 169 n.3, 491 A.2d 1075 (1985) ("[a] guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless"); *State* v. *Godek*, 182 Conn. 353, 364, 438 A.2d 114 (1980) ("[t]hroughout its history . . . the plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency" [internal quotation marks omitted]), cert. denied, 450 U.S. 1031, 101 S. Ct. 1741, 68 L. Ed. 2d 226 (1981).

[16] In light of our conclusion that the evidence was not relevant and, thus, was inadmissible, we need not address his additional claim that the evidence was not self-serving.

courts have concluded that evidence of plea bargaining is not relevant and that its admission is outweighed by possible confusion of the issues. See *State* v. *Woodsum*, 137 N.H. 198, 201–202, 624 A.2d 1342 (1993) (explaining "a defendant's posture in plea negotiations at a date after the alleged offense . . . is at best weak evidence of the defendant's state of mind at the time of the alleged crime, and is not relevant to any other element of a chargeable offense"); see also *United States* v. *Goffer*, 721 F.3d 113, 129 (2d Cir. 2013) (concluding that evidence of defendant's rejection of plea offer, which he sought to admit to show "consciousness of innocence," had no probative value), cert. denied, U.S. , 135 S. Ct. 63, 190 L. Ed. 2d 60 (2014); *State* v. *Orji*, 277 N.J. Super. 582, 587–88, 649 A.2d 1368 (App. Div. 1994) (concluding that evidence of defendant's rejection of state's offer to enter pretrial intervention program was not relevant because no logical connection existed between his rejection of state's offer and his professed innocence); *State* v. *Pearson*, 818 P.2d 581, 584 n.6 (Utah App. 1991) ("[The court] seriously question[s] whether plea negotiations are relevant evidence in a criminal prosecution. The negotiation strategy and positioning of either the defense or the prosecution is not evidence of the elements of the crimes charged."). While the aforementioned cases are factually distinguishable, we find their reasoning persuasive to our resolution of the issue before us.

On the basis of the foregoing, we conclude that the trial court did not abuse its discretion in excluding evidence of the defendant's offer to plead to the lesser offense of manslaughter in exchange for twenty-five years incarceration because it was not relevant to the issue before the jury, namely, whether the defendant intended to cause his baby's death.

The judgment is affirmed.

In this opinion the other justices concurred.

# CATHERINE LEDERLE *v.* STEVAN SPIVEY
## (SC 20016)

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

*Syllabus*

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the Appellate Court, which reversed the trial court's award of appellate attorney's fees to the plaintiff. Following the dissolution of the parties' marriage, the defendant filed a motion to open the dissolution judgment, which the trial court denied. The defendant appealed to the Appellate Court, which upheld the denial of the motion. In his appeal from the denial of the motion to open, the defendant claimed that the trial court conducted part of the hearing on the motion to open in chambers and off the record and improperly denied the motion without hearing testimony or taking evidence. The plaintiff thereafter filed a motion for attorney's fees incurred in defending that appeal. The trial court, finding that the defendant's appeal from the denial of the motion to open was taken in bad faith and was entirely without color, awarded the plaintiff attorney's fees under the bad faith exception to the American rule that a prevailing party may not recover attorney's fees from the opposing party in the absence of a statutory exception or certain exceptional circumstances. On appeal from the trial court's award of attorney's fees, the Appellate Court concluded that the trial court had abused its discretion in awarding attorney's fees to the plaintiff on the basis of the bad faith exception because its decision lacked the requisite high degree of specificity as to its finding that the defendant's appeal from the denial of the motion to open was entirely without color. Subsequently, the plaintiff, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court incorrectly concluded that the trial court had abused its discretion in awarding attorney's fees to the plaintiff under the bad faith exception to the American rule, the trial court's subordinate findings having been sufficiently specific to support its ultimate findings that the defendant acted in bad faith in knowingly bringing appellate claims that were entirely lacking in color; the trial court's findings that there was no evidence in the record to support the defendant's claim that part of the hearing on the motion to open was conducted in chambers and off the record, that the defendant was physically present at all court proceedings and did not object on the ground that the court was holding part of the hearing in chambers and off the record, and that the parties expressly agreed in open court to a bifurcated process by which the trial court would hear evidence only if it made a certain legal conclusion that it ultimately did not make established the defendant's firsthand

knowledge regarding the basis of his appellate claims and supported the ultimate finding that the defendant knew that his claims lacked merit and, therefore, acted in bad faith in pursuing those claims on appeal.

2. The defendant could not prevail on his claim that, even if the trial court did not abuse its discretion in determining that an award of attorney's fees was warranted under the bad faith exception to the American rule, the amount of the award was unreasonable and excessive: the trial court acted within its discretion in awarding the plaintiff $30,000 in attorney's fees, the evidence from the record of the multiday hearing having indicated that the court, in awarding the plaintiff less than one half of the fees requested, considered the testimony of the plaintiff's attorney regarding his fee affidavit, the fee affidavit itself, the relative rates charged by the attorneys for the parties, and the challenges raised by the defendant regarding certain charges; moreover, a reasonable reading of the transcripts and the fee affidavit supported the conclusion that the trial court had discounted all but the fees for the services rendered by the plaintiff's attorney himself.

Argued January 24—officially released August 27, 2019

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, and referred to the judicial district of Middlesex, Regional Family Trial Docket; thereafter, the case was tried to the court, *Abery-Wetstone, J.*; judgment dissolving the marriage and granting certain other relief; subsequently, the court, *Emons, J.*, denied the defendant's motion to open the judgment, and the defendant appealed to the Appellate Court, *DiPentima, C. J.*, and *Alvord* and *Harper, Js.*, which affirmed the trial court's judgment; thereafter, the court, *Emons, J.*, granted the plaintiff's motion for attorney's fees, and the defendant appealed to the Appellate Court, *DiPentima, C. J.*, and *Beach* and *Danaher, Js.*, which reversed the trial court's award of attorney's fees and remanded the case for further proceedings, from which the plaintiff, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

*Tara C. Dugo*, with whom, on the brief, was *Norman A. Roberts II*, for the appellant (plaintiff).

*David V. DeRosa*, for the appellee (defendant).

*Opinion*

KAHN, J. In this dissolution of marriage action, the plaintiff, Catherine Lederle, appeals, following our grant of certification,[1] from the judgment of the Appellate Court reversing the decision of the trial court, which had awarded appellate attorney's fees to the plaintiff under the bad faith exception to the American rule.[2] The plaintiff contends that the Appellate Court did not accord the proper level of deference in determining that the trial court's findings lacked sufficient specificity. The defendant, Stevan Spivey, responds that the Appellate Court properly applied the abuse of discretion standard and also correctly concluded that, in determining that the appellate claims lacked color, the trial court improperly assessed the conduct of the defendant's attorney rather than that of the defendant. The defendant claims that the amount of the award was unreasonable and excessive because (1) the plaintiff's success in the appeal for which fees were awarded was not due to the efforts of the plaintiff's counsel, and (2) the defendant's attorney charged him a significantly lower amount of fees for representing him in that appeal.[3]

[1] This court granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly apply the abuse of discretion standard of review in holding that the trial court's memorandum of decision lacked 'factual findings with a high degree of specificity' when the trial court found that the defendant's claims on appeal lacked any indicia of color?" *Lederle* v. *Spivey*, 327 Conn. 954, 171 A.3d 1050 (2017).

[2] Pursuant to the American rule, "except as provided by statute or in certain defined exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable [attorney's] fee from the loser." (Internal quotation marks omitted.) *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 393, 685 A.2d 1108 (1996), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 155, 735 A.2d 333 (1999).

[3] Although the defendant's claim is outside the scope of the certified issue, the plaintiff has had the opportunity to brief that issue. Therefore, in the interests of judicial economy, we address the defendant's claim. We observe, however, that, even if we agreed with the defendant that the trial court abused its discretion in setting the amount of the award, that conclusion would not serve as an alternative ground to affirm the judgment of the

We reverse the judgment of the Appellate Court and conclude that the trial court did not abuse its discretion in setting the amount of the fees.

The Appellate Court opinions in the present case have set forth the following relevant facts and procedural history. "The parties were married in Darien on December 31, 1998. One child was born of the marriage in 2000. Thereafter, the marriage broke down irretrievably, and, in March, 2005, the plaintiff commenced an action seeking to dissolve the marriage. On May 2, 2007, the court, *Abery-Wetstone*, *J.*, rendered a judgment of dissolution [2007 decision]. As part of this decision, the court acknowledged the plaintiff's claim that she needed to move to Virginia in order to remain competitive in her employment with Lexmark, and found that it was in the best interest of the child to relocate with her to Virginia. The defendant appealed from the judgment, arguing, inter alia, that the court improperly permitted the plaintiff to relocate with their minor child to Virginia. [The Appellate Court] affirmed the judgment of the court, and [the] Supreme Court denied certification to appeal. *Lederle* v. *Spivey*, 113 Conn. App. 177, 965 A.2d 621 [(*Lederle I*)], cert. denied, 291 Conn. 916, 970 A.2d 728 (2009)." *Lederle* v. *Spivey*, 151 Conn. App. 813, 814–15, 96 A.3d 1259 (*Lederle II*), cert. denied, 314 Conn. 932, 102 A.3d 84 (2014). The defendant subsequently learned that the plaintiff had not started her employment at Lexmark because she lost that position but had started a position at a different company in Virginia.

"The defendant subsequently filed an amended motion to open the judgment, in which he claimed that

Appellate Court, which held that the trial court had abused its discretion in awarding attorney's fees *at all*. Our decision in the present case concludes that the trial court did not abuse its discretion in determining that attorney's fees were warranted under the bad faith exception. The Appellate Court did not reach the issue of whether the trial court had abused its discretion as to the amount of the award.

[t]he plaintiff, in her trial testimony committed fraud with respect to the issue of her Lexmark employment and specifically whether or not [her Lexmark employment position] was available in Virginia on the dates testified to. . . . According to the defendant, [t]he plaintiff had a continuing duty to disclose the status of her job situation with Lexmark after [the May 2, 2007] judgment [of the trial court], and before the Appellate Court issued a . . . decision in [March] 2009. . . . The defendant further argued that the plaintiff's failure to disclose the status of her job situation with Lexmark constituted fraud with respect to a material fact or facts which ultimately led to [the trial] court's conclusion that [the] plaintiff and the minor child should be permitted to relocate from the state of Connecticut to the state of Virginia for primarily employment purposes. . . .

"The court, *Emons*, *J.*, heard oral argument on the motion and, after receiving a memorandum of law from counsel for each party in support of their position, issued a memorandum of decision denying the motion to open on January 28, 2013 [2013 decision]. In reaching its decision, the court found that [a]fter the May 2, 2007 judgment, on June 5, the plaintiff lost her employment at Lexmark. . . . On or about August 20, 2007, the plaintiff relocated to Virginia and at or about the same time, began a new job at Xerox, also located in Virginia. The court noted that Judge Abery-Wetstone found numerous reasons why relocation was in the best interest of the minor child and that no single factor controlled the decision of the court. On the basis of the foregoing, the court held that while the plaintiff did have a duty to disclose that she lost her Lexmark job and procured a new one at Xerox, prior to the Appellate [Court's] decision, her failure to disclose [did] not constitute fraud." (Citations omitted; internal quotation marks omitted.) *Lederle* v. *Spivey*, 174 Conn. App. 592, 594–95, 166 A.3d 636 (2017) (*Lederle III*).

The defendant appealed from the judgment of the trial court to the Appellate Court, claiming that the court "(1) improperly held a portion of the hearing on the motion to open in chambers and off the record; and (2) abused its discretion by deciding the motion to open, which was based on a claim of fraud and therefore involved a question of material fact, without the benefit of sworn testimony or other evidence."[4] *Lederle II*, supra, 151 Conn. App. 814. The Appellate Court did not directly address either of the defendant's claims. It held that the record was inadequate to review the defendant's first claim. Id., 816. The court rejected the defendant's second claim on the basis of its conclusion that, once the final judgment of dissolution had been rendered, as a matter of law, the plaintiff had no continuing duty to disclose the loss of her Lexmark employment.[5] Id., 819.

While the defendant's appeal from the denial of his motion to open was pending before the Appellate Court, the plaintiff filed the motion that gave rise to the present appeal, seeking appellate attorney's fees for the then

[4] In his brief to this court, the defendant asserts that he raised a third claim on appeal in *Lederle II*, contending that, because "a decision on the motion to [open] was made behind closed doors and without a court reporter, the court effectively sealed the hearing from the public in violation of the public's right to access." Rather than a separate claim, the defendant identifies an additional theory in support of his claim that the court improperly held a portion of the hearing in chambers and off the record.

[5] In his brief to this court, the defendant takes issue with the conclusion of the Appellate Court that the plaintiff had no continuing duty to disclose the loss of her Lexmark employment. That issue, however, is not within the scope of the certified question and, therefore, is not before us in the present appeal.

We further note that we find unpersuasive the defendant's argument that, because the Appellate Court sua sponte concluded that there was no continuing duty to disclose, his claim on appeal that the trial court improperly decided the motion to open without taking evidence was a colorable claim. The fact that the Appellate Court resolved the case on a different ground has no bearing on the merits—or the complete lack thereof—of the claim that the defendant raised before that court.

pending appeal. The trial court held a hearing on the motion on October 30, 2013, but, because the appeal before the Appellate Court was still pending, continued the matter until after the defendant's appeal was resolved. On February 10, 2015, after the Appellate Court had affirmed the judgment of the trial court denying the motion to open the judgment of dissolution; *Lederle II*, supra, 151 Conn. App. 814; the trial court resumed the hearing on the motion for appellate attorney's fees and, subsequently, issued a memorandum of decision, granting the plaintiff's motion for attorney's fees on the basis of its finding that the defendant's appeal was taken in bad faith and was entirely without color (2015 decision).[6]

The defendant appealed from the judgment of the trial court to the Appellate Court, which held that the trial court had abused its discretion in awarding attorney's fees because "its decision lacked the 'high degree of specificity' as to its finding that the defendant's appeal was entirely without color." *Lederle III*, supra, 174 Conn. App. 598. Specifically, the Appellate Court explained that the trial court, in its 2015 decision, (1) did not properly set forth separate, subordinate findings to support each of its ultimate findings as to lack of colorability and bad faith; id., 603–604; and (2) in determining that the defendant's claims lacked color, improperly failed to apply the proper standard for colorability, which, according to the Appellate Court, should have been the standard that applies to a party rather than an attorney. Id., 604. This appeal followed.

We begin by setting forth the general principles governing the application of the bad faith exception to the American rule. "[T]his state follows the general rule that, except as provided by statute or in certain defined

[6] The court in that decision also granted the plaintiff's motion for termination of the stay of proceedings, which she had filed in January, 2015.

exceptional circumstances, the prevailing litigant is ordinarily not entitled to collect a reasonable [attorney's] fee from the loser. . . . That rule does not apply, however, where the opposing party has acted in bad faith. . . . It is generally accepted that the court has the inherent authority to assess attorney's fees when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. . . . This bad faith exception applies, not only to the filing of an action, but also in the conduct of the litigation. . . . It applies both to the party and his counsel." (Citations omitted; internal quotation marks omitted.) *Maris* v. *McGrath*, 269 Conn. 834, 844–45, 850 A.2d 133 (2004).

We have explained that, in order to impose sanctions under the bad faith exception, "the trial court must find *both* that the litigant's claims were entirely without color *and* that the litigant acted in bad faith." (Emphasis in original.) *Berzins* v. *Berzins*, 306 Conn. 651, 663, 51 A.3d 941 (2012). The court must make these findings with "a high degree of specificity . . . ." (Internal quotation marks omitted.) Id., 662. The requirement of an independent finding that the challenged actions or claims are entirely without color ensures that "fear of an award of [attorney's] fees against them will not deter persons with colorable claims from pursuing those claims . . . ." (Internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 845. The requirement of that independent finding means that, if a court concludes that a claim is colorable, it cannot award attorney's fees, even if the court were to conclude that the person against whom sanctions are sought acted in bad faith. When, as in the present case, the actor's bad faith is predicated on the theory that he knowingly brought claims entirely lacking in color, colorability and bad faith are, by necessity, closely linked. For that reason, we take the opportunity to clarify the distinction between colorability and bad faith.

Colorability is measured by an objective standard, whereas bad faith is measured by a subjective one. Colorability focuses on the merits of the claim. A "colorable claim" is defined as one "that is legitimate and that may reasonably be asserted, given the facts presented and the current law (or a reasonable and logical extension or modification of the current law)." Black's Law Dictionary (9th Ed. 2009) p. 282. Put another way, a claim is colorable if, given the facts presented and the current law (or a reasonable extension thereof), the claim arguably has merit. Although we have stated that the standard for colorability varies depending on whether the person against whom sanctions are sought is a party or the party's attorney; see *Maris* v. *McGrath*, supra, 269 Conn. 847; we now clarify that the inquiry is the same in either case. As the United States Court of Appeals for the Second Circuit has explained, "[a] claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim." *Nemeroff* v. *Abelson*, 620 F.2d 339, 348 (2d Cir. 1980). Put simply, the colorability inquiry asks whether there is a *reasonable* basis, given the facts, for bringing the claim, regardless of whether it is brought by an attorney or a party.

A determination of bad faith, by contrast, rather than focusing on the objective, reasonable beliefs of the person against whom sanctions are sought, focuses on subjective intent. We have emphasized that, in determining whether a party has engaged in bad faith, "[t]he appropriate focus for the court . . . is the conduct of the party in instigating or maintaining the litigation." (Internal quotation marks omitted.) *Maris* v. *McGrath*, supra, 269 Conn. 847. From that conduct, the court may infer the subjective intent of the person against whom sanctions are sought. Some examples of evidence that would support a finding of bad faith

include "a party's use of oppressive tactics or its wilful violations of court orders"; id., 845–46; or a finding that the challenged actions "[are taken] for reasons of harassment or delay or for other improper purposes . . . ." *CFM of Connecticut, Inc.* v. *Chowdhury*, 239 Conn. 375, 394, 685 A.2d 1108 (1996), overruled in part on other grounds by *State* v. *Salmon*, 250 Conn. 147, 155, 735 A.2d 333 (1999). When, as in the present case, the claim that an individual has brought or maintained an action in bad faith is predicated on the individual's personal knowledge that there is no factual support for the claim or claims at issue, in order to infer that the individual acted in bad faith, the court must make a finding that the individual knew of the absence of that factual basis.

Applying these principles to the present case, we disagree with the Appellate Court's conclusion that the trial court, in its 2015 decision, abused its discretion in awarding attorney's fees to the plaintiff. In arriving at our conclusion, we are mindful that, in applying the abuse of discretion standard, our "review of the trial court's decision is a deferential one. First, we observe that, [w]here the trial court reaches a correct decision but on [alternative] grounds, this court has repeatedly sustained the trial court's action if proper grounds exist to support it. . . . [W]e . . . may affirm the court's judgment on a dispositive [alternative] ground for which there is support in the trial court record. . . . Additionally, [i]t is well established that we review the trial court's decision to award attorney's fees for abuse of discretion. . . . This standard applies to the amount of fees awarded . . . and also to the trial court's determination of the factual predicate justifying the award." (Citation omitted; internal quotation marks omitted.) *Berzins* v. *Berzins*, supra, 306 Conn. 661.

In its 2015 decision, the trial court found that the defendant acted in bad faith in taking an appeal in

*Lederle II* and that his appellate claims were entirely lacking in color. The court accordingly awarded sanctions against the defendant, as opposed to his attorney. See *Lederle III*, supra, 174 Conn. App. 602. The trial court predicated its ultimate findings on the following subordinate factual findings. As to the defendant's claim on appeal that the trial court improperly held a portion of the hearing on the motion to open in chambers and off the record, the court found that nothing in the record provided support for that claim. The trial court found that the record demonstrated only two instances in which the court conducted any business related to this matter in chambers: first, prior to the start of the hearing to discuss procedural issues with counsel for both parties and, second, to read two decisions as requested by counsel. The court further found that, although the defendant was physically present at all court proceedings, neither he nor his attorney raised any objection on the basis that the court was holding a portion of the hearing in chambers and off the record.

As to the defendant's claim on appeal that the trial court, in its 2013 decision, abused its discretion by ruling on the motion to open—which was predicated on the basis of a claim of fraud—without hearing testimony or taking evidence, the court, in its 2015 decision, predicated its ultimate determination that the claim lacked any indicia of color on two independent findings, either of which on its own would support the court's ultimate finding. First, the court found that the parties agreed to a two part procedure by which the court would first determine whether, but-for the plaintiff's job with Lexmark, the trial court, in its 2007 decision, would not have granted her motion for permission to relocate with the minor child to Virginia. If, and only if, the court answered that question in the affirmative, would it consider whether an evidentiary hearing would be required to resolve the motion to open. The court

found that it had explained the proposed bifurcated procedure not only to counsel, but also to both the plaintiff and the defendant.[7] Second, the court found that the transcript of the October 24, 2012 hearing clearly revealed that, in lieu of an evidentiary hearing, the parties agreed to proceed by filing simultaneous briefs with factual stipulations.

The trial court's subordinate findings were sufficiently specific to support its ultimate findings that the defendant acted in bad faith in knowingly bringing appellate claims that were entirely lacking in color.[8] As to the defendant's first appellate claim—that the court conducted part of the hearing in chambers and off the record—the court's findings were sufficiently specific to support the conclusion that the claim was entirely lacking in color. The court found not only that there was no evidence to support the claim, but also found that the record reflected the purpose of the two instances during the hearing when the court retired to chambers. The first instance was prior to the hearing and related to purely procedural matters and the second instance was when the court retired to chambers to

[7] We find unpersuasive the defendant's contention that, because the trial court also found that the defendant's attorney was aware of the complete lack of any merit to both of the defendant's appellate claims, the trial court failed to make the requisite finding as to the defendant. The mere fact that the trial court made the additional, irrelevant finding that the defendant's attorney was aware that the defendant's appellate claims were completely lacking in color has no bearing on the fact that the trial court also found that the defendant knew that his claims lacked any indicia of color.

[8] Although we have stated that the findings must have a high degree of specificity; *Berzins* v. *Berzins*, supra, 306 Conn. 662; we have never stated that the trial court must separately indicate which factual findings relate to which prong, colorability or bad faith, and we reject that proposition. Frequently, the subordinate factual findings that support bad faith will also provide support for lack of colorability. Rather than requiring a rigid structure in the trial court's analysis, we merely examine the court's findings to determine whether they are sufficiently specific to support the conclusion that the court did not abuse its discretion in arriving at its ultimate findings of bad faith and lack of colorability.

read decisions provided to it by counsel. It is difficult to imagine what more *could* be said, once a court has found that no evidence supports the claim and that the only relevant evidence in the record expressly contradicts the claim. The court further found that the defendant was physically present to observe that lack of evidence. That finding establishes the defendant's first-hand knowledge and supports the ultimate finding that the defendant knew that his claim lacked merit and, therefore, acted in bad faith in pursuing the claim on appeal.

As to the defendant's second appellate claim—that the trial court, in its 2013 decision, improperly denied the motion to open without hearing testimony or taking evidence—the court found, in its 2015 decision, that, during the hearing on the motion to open, the parties had agreed that the court would first resolve the threshold legal issue of materiality and would subsequently hold an evidentiary hearing only if it concluded that the plaintiff's employment with Lexmark was a material fact. Excerpts of the transcripts of the October 24, 2012 hearing on the defendant's motion to open were attached in an appendix to the trial court's 2015 decision. During the October 24, 2012 hearing, after some initial colloquy regarding disputed facts, counsel for both parties proposed that the court decide the motion to open in two steps. As the attorney for the plaintiff explained to the court, they proposed "a methodology [that] perhaps [would result in the court] *not having to sort through these and other important facts* . . . ." (Emphasis added.) The parties had engaged in a series of discussions in an attempt to "boil this down to a nut." As a result of those discussions, they agreed that the defendant could prevail on his motion to open the judgment only if the trial court would not have granted the plaintiff's motion for permission to relocate—and the Appellate Court would not have upheld that ruling—

if she had not been employed by Lexmark in Virginia. Accordingly, they both agreed that the court should first resolve the purely legal determination of whether the plaintiff's employment with Lexmark was the "but-for" cause underlying both the trial court's decision granting the plaintiff's motion for permission to relocate and the Appellate Court decision upholding that ruling. The trial court would proceed to the evidentiary phase only if it answered that legal question in the affirmative. The parties therefore requested that, prior to hearing any evidence, the court first review both the 2007 decision rendering final judgment of dissolution and granting permission to the plaintiff to relocate to Virginia and the Appellate Court decision in *Lederle I* that affirmed the judgment of the trial court. See *Lederle I*, supra, 113 Conn. App. 177.

Before the court took a recess to read the two decisions, it clarified in open court, in the presence of both parties and their counsel, its understanding of the agreed upon procedure as requiring the court to "make an initial determination as to whether this is a 'but-for' situation." The court further clarified the parties' agreement that, if the court resolved the motion to open on the threshold issue, "we're done and you can do whatever you want to do with your motions and everything like that." Finally, the trial court made clear to the parties its understanding that, if the court were unable to resolve the motion on the initial legal issue, then "correct me if I'm wrong . . . we would have to schedule a lengthy factual hearing . . . ."

Following the court's review of the decisions of the trial court and the Appellate Court, in its 2013 decision, the court concluded that the plaintiff's employment with Lexmark was not the "but-for" cause of the decision granting the plaintiff permission to relocate. To the contrary, the court explained, the plaintiff's employment was only one among "numerous reasons" that the

2007 decision had determined that relocation was in the best interest of the minor child. The court quoted from the 2007 decision, which specifically stated that "[n]o single factor has controlled the decision of the court" and that the court had weighed "all the evidence" and considered "all the factors relevant to the child's best interest" in determining to grant the plaintiff permission to relocate. The 2007 decision also noted that, in granting permission to relocate, the court had considered "the body of case law regarding best interest, the specific facts of this case, the testimony and credibility of the various witnesses here, and the court's assessment and evaluation of the best interest of this specific child. The court has considered the recommendations of both the [guardian ad litem] and the family relations counselor of sole custody to the mother and approval of the relocation." On the basis of its review of the Appellate Court's decision in *Lederle I*, the trial court also concluded that the plaintiff's employment with Lexmark was not material to that court's affirmance of the trial court's 2007 decision.[9]

The trial court's findings as to the defendant's second appellate claim are sufficiently specific to support its ultimate findings that the claim lacked any colorability, and that the defendant acted in bad faith by knowingly pursuing a claim entirely lacking in color. The essence of the defendant's claim on appeal in *Lederle II* was that the court improperly decided the motion to open without taking any evidence. As to the colorability of that claim, the trial court found that the parties expressly agreed in open court to the bifurcated procedure by which the court would hear evidence only if it

[9] We note that the 2007 decision *could* reasonably be read to suggest that the plaintiff's employment with Lexmark was material to the court's decision granting relocation. Because the defendant, however, did not challenge the trial court's legal conclusion to the contrary, we need not consider whether the trial court's interpretation of the 2007 decision was correct.

determined that the plaintiff's employment with Lexmark was a fact that was material to both the trial court's 2007 decision and the Appellate Court's decision in *Lederle I*. The trial court also found that it concluded, in its 2013 decision, that the plaintiff's Lexmark employment was not material to either of those decisions. The trial court's resolution of the motion to open, therefore, rested entirely on a legal conclusion and did not require any evidence—which is precisely how the parties had agreed to proceed. Those findings support the trial court's ultimate determination in its 2013 decision that this claim lacked any indicia of color.[10] The court further found that it had clarified in open court, in the presence of the parties and their attorneys, that this procedure was in accordance with the agreement between the parties. The defendant therefore had firsthand knowledge that his appellate claim lacked any indicia of color. That finding supports the court's ultimate finding in its 2013 decision that the defendant acted in bad faith in pursuing this claim on appeal.[11] For the foregoing

[10] As an alternative ground for affirmance, the defendant contends that there was a colorable basis for the two claims that he raised on appeal in *Lederle I*. As we have discussed, the trial court's subordinate findings are sufficiently specific to support the court's ultimate determination that both of his claims were entirely lacking in color. Accordingly, we need not address the defendant's alternative ground for affirmance. We note, however, that our review of the record confirms the trial court's determination that neither of the defendant's appellate claims had any indicia of color.

[11] As we already have stated in this opinion, the trial court predicated its ultimate finding as to the defendant's appellate claim that the court improperly decided the motion to open without hearing evidence on two, independent bases: the parties' agreement to the bifurcated proceeding and an alleged stipulation of facts entered into by the parties in lieu of an evidentiary hearing. Our conclusion that the trial court's finding that the parties agreed to the bifurcated proceeding—which resulted in the motion to open being resolved under the purely legal question—renders it unnecessary for us to consider the alternative ground for affirmance relied on by the defendant, namely, that the trial court's second subordinate finding in support of its ultimate finding of lack of colorability—that the parties entered into a stipulation of facts—was clearly erroneous.

We observe, however, that our review of the October 24, 2012 transcript suggests, to the contrary, that there was no agreement between the parties in

reasons, we conclude that the Appellate Court incorrectly concluded that the trial court had abused its discretion in awarding attorney's fees to the plaintiff on the basis of the bad faith exception to the American rule.

Finally, we address the defendant's claim that, even if the trial court did not abuse its discretion in determining that an award was warranted under the bad faith exception to the American rule, the amount of the award was unreasonable and excessive because (1) the plaintiff's success at the Appellate Court in *Lederle II* was not due to the efforts of plaintiff's counsel, and (2) the fees sought by the plaintiff were significantly higher than the fees charged by the defendant's attorney for his work on the appeal. We first set forth the applicable standard of review. "[T]he amount of attorney's fees to be awarded rests in the sound discretion of the trial court and will not be disturbed on appeal unless the trial court has abused its discretion: A court has few duties of a more delicate nature than that of fixing counsel fees. The degree of delicacy increases when the matter becomes one of review on appeal. The principle of law, which is easy to state but difficult at times

court that they would proceed by way of stipulation in lieu of an evidentiary hearing. Although it was later suggested that the parties had exchanged e-mails in which they agreed that their statements of facts in their briefs would serve as a joint stipulation of facts for purposes of the motion to open, there is no mention during the October 24, 2012 hearing of any stipulation entered into by the parties. In fact, the transcript of the October 24, 2012 hearing suggests that, if the trial court had concluded that the plaintiff's employment with Lexmark was material to the 2007 decision granting her permission to relocate, the court would have proceeded to an evidentiary hearing. The court expressly stated that expectation to the parties, and neither party contradicted the court. Moreover, during the course of the hearing, the parties identified various issues that remained contested, including credibility issues, the date when the plaintiff learned that she no longer had a job with Lexmark, and whether she had left that position voluntarily. Because, however, it is clear from the record that the parties agreed to the bifurcated proceeding, it is immaterial that the record does not support the court's finding that the parties entered into a stipulation of facts.

to apply, is that only in case of a clear abuse of discretion by the trier may we interfere. . . . The trier is always in a more advantageous position to evaluate the services of counsel than are we." (Internal quotation marks omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, 265 Conn. 210, 258–59, 828 A.2d 64 (2003).[12]

"It is well established that a trial court calculating a reasonable attorney's fee makes its determination while considering the factors set forth under rule 1.5 (a) of the Rules of Professional Conduct. *Sorrentino* v. *All Seasons Services, Inc.*, [245 Conn. 756, 775, 717 A.2d 150 (1998)] ('[r]ule 1.5 [a] of the Rules of Professional Conduct lists the factors that ordinarily determine the reasonableness of an attorney's fee'); *Andrews* v. *Gorby*, 237 Conn. 12, 24, 675 A.2d 449 (1996) ('[t]ime spent is but one factor in determining the reasonableness of an attorney's fee'). A court utilizing the factors of rule 1.5 (a) considers, inter alia, the time and labor spent by the attorneys, the novelty and complexity of the legal issues, fees customarily charged in the same locality for similar services, the lawyer's experience and ability, relevant time limitations, the magnitude of the case and the results obtained, the nature and length of the lawyer-client relationship, and whether the fee is fixed or contingent." (Footnote omitted.) *Schoonmaker* v. *Lawrence Brunoli, Inc.*, supra, 265 Conn. 259.

The fee hearing took place over the course of four days. The trial court began the hearing on October 30, 2013, but postponed the proceedings until the resolu-

[12] We reject the defendant's suggestion that we should not accord deference to the trial court's decision because the fees incurred were in connection with proceedings before the Appellate Court. The applicable standard of review is deferential because the trial court has heard the testimony and received evidence regarding the reasonableness of the fees and, accordingly, is in the best position to evaluate the evidence and to make the necessary factual findings. The fact that the proceedings giving rise to the claim for attorney's fees took place on appeal does not change the standard of review.

tion of the appeal in *Lederle II*. The final three days of the hearing were held in February, 2015, at which time the court heard testimony and took evidence concerning the amount of the plaintiff's attorney's fees. The court heard the testimony of the plaintiff's attorney, Norman A. Roberts II, who was questioned extensively regarding his fee affidavit as well as the attached, detailed invoices for his firm's services. Roberts claimed that his reasonable fees for the services rendered as a result of the defendant's bad faith claims on appeal amounted to $61,625.90. Included in that total were fees for services rendered by two associate attorneys and a paralegal employed by the firm. Slightly less than one half of the total fees were for services rendered directly by Roberts, who asserted in the fee affidavit that he rendered 60.3 hours of service at a rate of $500 per hour, resulting in fees of $30,150.[13]

The defendant's examination of Roberts and testing of the fee affidavit were thorough. He questioned Roberts concerning the propriety of charging for the services of the paralegal, on the basis that some of those services could be classified as clerical. He also highlighted portions of each of the twenty attached individual invoices, probing the necessity of the time spent on various tasks. For example, with respect to the invoice dated May 31, 2013, the defendant questioned the need to charge for two attorneys, Roberts and an associate, to attend a preargument conference, resulting in a bill for more than ten hours of time. The defendant further questioned Roberts concerning the charges for services rendered in connection with the plaintiff's attempt to recover attorney's fees from the defendant.

[13] Our review of the invoices reveals a slight error in the calculation of Roberts' total hours. The invoices show that he devoted a total of 59.5 hours as a result of the defendant's appellate claims.

The defendant focused particular attention on two issues in his questioning of Roberts. First, he challenged the propriety of the plaintiff's recovering attorney's fees from him for the appeal on the basis that the Appellate Court granted the defendant's motion to strike the portions of the plaintiff's appellate brief that referenced and relied on the October 30, 2013 hearing. In closing argument to the trial court, the defendant contended that, because the Appellate Court rendered judgment in favor of the plaintiff on the basis of theories other than those advanced by Roberts, and because the court granted the defendant's motion to strike portions of the plaintiff's brief, Roberts did not actually "win" the appeal for the plaintiff. Accordingly, the defendant argued, he should not be charged for the time that Roberts spent on the appeal.[14]

Second, the defendant introduced evidence of the fees charged by the defendant's previous appellate counsel, Paul Greenan, which amounted to $9700. The trial court admitted that evidence, over the plaintiff's objection, on the ground that it was relevant to the question of the reasonableness of the plaintiff's fees. The defendant later asked Roberts why his fees were six times higher than his counsel's fees. Roberts explained that the difference was due, in part, to the different rates charged: Roberts' rate is $500 per hour, whereas the defendant's counsel charges $200 per hour. Roberts also testified that the discrepancy was due, in part, to the conduct of the defendant's counsel, which required Roberts to expend more time on the appeal than he otherwise would have. For example, Roberts testified that the defendant's counsel "would come to court and have other business and [Roberts] was forced to stand there and wait while [the defendant's counsel] attended [to] other business . . . ."

[14] The defendant claims that the clean hands doctrine bars recovery on this basis. That argument is without merit.

During the course of the fee hearing, the trial court stated its view that it considered the amount that Roberts sought, approximately $61,000, to be "way . . . too much." At one point, the court stated that it "had a hard time figuring out" how it was possible to justify that amount of fees in connection with the present case.

Ultimately, the court awarded the plaintiff approximately one half of what Roberts had claimed, $30,000. Although the court did not specify the particular facts on which it relied, it is evident from the record that, in awarding the plaintiff less than one half of the fees requested, the court considered Roberts' detailed testimony regarding the fee affidavit, the fee affidavit itself, the relative rates charged by Greenan and Roberts, and the challenges raised by the defendant regarding certain charges. A reasonable reading of the transcripts and the fee affidavit supports the conclusion that the trial court discounted all but the fees for the services rendered directly by Roberts himself. On the basis of the foregoing, we conclude that the trial court acted within its discretion in awarding the plaintiff $30,000 in attorney's fees.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the trial court's award of attorney's fees.

In this opinion the other justices concurred.

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*Conflict of laws; unjust enrichment; statutes of limitations (§§ 52-576 and 52-577); motion for summary judgment on ground that plaintiff failed to timely commence action; claim that plaintiff failed to commence action within three year limitation period set forth in § 17-607 (c) of Delaware Revised Uniform Limited Partnership Act; claim that trial court incorrectly determined that Delaware law rather than Connecticut law governed issue of whether plaintiff's unjust enrichment claims were time barred; whether statute of limitations for unjust enrichment claims properly is characterized as substantive or procedural for choice of law purposes;*

*claim, as alternative ground for affirming trial court's judgment, that plaintiff's unjust enrichment claims were barred by three year limitation period in § 52-577 generally applicable to tort actions or under doctrine of laches.*

Rockstone Capital, LLC *v.* Sanzo . . . . . 306
*Foreclosure; certification from Appellate Court; whether Appellate Court had jurisdiction over appeal from trial court's denial of request to foreclose on mortgage; whether Appellate Court had jurisdiction over defendants' cross appeal; whether certification was improvidently granted as to issue concerning Appellate Court's jurisdiction over cross appeal; whether Appellate Court correctly concluded that statutory (§ 52-352b [t]) homestead exemption did not apply to mortgage that secured preexisting judgment debt; whether mortgage was enforceable; claim that mortgage securing judgment debt was not consensual lien within meaning of § 52-352b (t).*

Snell *v.* Norwalk Yellow Cab, Inc.. . . . . 720
*Negligence; doctrine of superseding cause; claim that defendant taxicab driver negligently left taxicab unattended in high crime area with key in ignition; certification from Appellate Court; whether Appellate Court correctly concluded that doctrine of superseding cause applies in cases in which intervening action of third party is criminally reckless; whether Appellate Court correctly determined that jury's responses to interrogatories were legally consistent; whether plaintiff was entitled to new trial.*

Stamford Hospital *v.* Schwartz (Order). . . . . 911

State *v.* Bethea (Order) . . . . . 904

State *v.* Dudley. . . . . 639
*Petition, pursuant to statute (§ 54-142d), to erase records relating to finding that defendant had violated terms of his probation; whether trial court improperly denied defendant's petition; claim that defendant was entitled to erasure of records because they purportedly pertained to conviction of offense that subsequently was decriminalized by legislature.*

State *v.* Gonzalez (Order). . . . . 901

State *v.* Jacques . . . . . 271
*Murder; whether trial court improperly denied defendant's motion to suppress; claim that defendant's right to be free from unreasonable searches and seizures under federal constitution was violated when police conducted warrantless search of defendant's apartment five days after lapse of defendant's month-to-month lease; whether trial court correctly concluded that defendant lacked subjective expectation of privacy in apartment at time of search; whether defendant's expectation of privacy in apartment was reasonable; expectation of privacy in relationship to leasehold interests, discussed.*

State *v.* Marcus H. (Order) . . . . . 910

State *v.* Montanez (Order) . . . . . 907

State *v.* Petion . . . . . 472
*Assault first degree; claim of evidentiary insufficiency; certification from Appellate Court; physical injury and serious physical injury, distinguished; disfigurement and serious disfigurement, distinguished; whether Appellate Court correctly concluded that evidence was sufficient for jury reasonably to have found that scar on victim's forearm constituted serious disfigurement for purposes of first degree assault; whether* State *v.* LaFleur *(307 Conn. 115), which requires that judgment of acquittal must be rendered if evidence is insufficient to support conviction of greater offense and jury was not instructed on lesser included offense, should be overruled in favor of rule under which judgment of conviction suffering from evidentiary insufficiency would be modified to reflect conviction of highest lesser included offense supported by evidence, unless defendant can prove that absence of jury instruction on that lesser included offense was prejudicial.*

State *v.* Sinclair . . . . . 204
*Possession of narcotics with intent to sell by person who is not drug-dependent; claim that defendant's constitutional right to confrontation was violated; claim of prosecutorial improprieties; certification from Appellate Court; whether certain statements to which police officer testified at trial in discussing public motor vehicle inspection record constituted testimonial hearsay resulting in constitutional violation or were nontestimonial and evidentiary in nature; testimonial statements and nontestimonial statements, distinguished; whether Appellate Court correctly concluded that certain improper remarks by prosecutor during closing argument did not deprive defendant of due process right to fair trial.*

State *v.* Tony M. . . . . 810
*Murder; risk of injury to child; whether trial court properly denied defendant's motion to suppress evidence arising from statements that he had made to police during interview at hospital; claim that defendant did not voluntarily waive his rights under* Miranda *v.* Arizona *(384 U.S. 436); claim that statements made during partially unrecorded hospital interview were inadmissible pursuant to statute (§ 54-1o); whether any error in admission of defendant's statements was harmless; claim that trial court had abused its discretion in excluding letter from defense counsel containing pretrial plea offer from defendant.*
State *v.* Walker. . . . . 678
*Felony murder; manslaughter first degree with firearm; attempt to commit robbery first degree; criminal possession of pistol or revolver; certification from Appellate Court; claim that Appellate Court incorrectly concluded that defendant's constitutional right to confrontation was not violated; whether testimony from forensics analyst relating to numerical DNA profile generated by another analyst or other analysts constituted testimonial hearsay; standard for determining whether hearsay statement is testimonial in nature, discussed.*
State *v.* Weatherspoon . . . . . 531
*Sexual assault in cohabiting relationship; assault third degree; unpreserved claim that prosecutor's generic tailoring argument that jury should discredit defendant's testimony because it had been made "with the benefit of hearing all the testimony that came before" in closing argument to jury violated defendant's right to confrontation under state constitution; generic and specific tailoring arguments, discussed; whether prosecutor's tailoring argument was generic or specific; unpreserved claim that prosecutor's generic tailoring argument constituted prosecutorial impropriety; whether defendant's conviction should be reversed under plain error doctrine; claim that court should exercise its supervisory authority and adopt rule prohibiting generic tailoring arguments; claim that prosecutor engaged in prosecutorial impropriety when he purportedly conveyed to jury that it must find that police lied in order to find defendant not guilty.*
Sutera *v.* Natiello (Order) . . . . . 908
Traylor *v.* State . . . . . 789
*Action seeking declaration that statute (§ 52-190a) requiring complaint sounding in medical malpractice to be accompanied by good faith certificate and opinion letter authored by similar health care provider is unconstitutional; claim that § 52-190a violated plaintiff's rights to due process, equal protection, and access to courts because it imposed financial burden and other obstacles on plaintiffs seeking to bring medical malpractice claims; summary judgment; motion to dismiss; reviewability of plaintiff's claim that § 52-190a is unconstitutional; whether plaintiff's claim that § 52-190a is unconstitutional was effectively moot because plaintiff failed to challenge in his appellate brief trial court's conclusions that claims against defendants were barred by res judicata, collateral estoppel, and prior pending action doctrine.*
U.S. Bank National Assn. *v.* Blowers . . . . . 656
*Mortgage foreclosure; motion to strike special defenses and counterclaims; certification from Appellate Court; whether Appellate Court correctly concluded that trial court's application of provision in rules of practice (§ 10-10) that dictates that counterclaims must arise out of transaction that is subject of plaintiff's complaint, required, in foreclosure context, consideration of whether special defense or counterclaim has some reasonable nexus to making, validity or enforcement of note or mortgage; whether Appellate Court incorrectly concluded that mortgagor's allegations, made in connection with special defenses and counterclaims, did not provide legally sufficient basis for those special defenses and counterclaims; whether mortgagor's allegations involved types of misconduct on part of mortgagee that bore sufficient connection to enforcement of note or mortgage; whether breach of binding loan modification may provide sufficient basis to withstand motion to strike in foreclosure action.*
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# CONNECTICUT APPELLATE REPORTS

# Vol. 192

CASES ARGUED AND DETERMINED

IN THE

## APPELLATE COURT

OF THE

## STATE OF CONNECTICUT

# STATE OF CONNECTICUT *v.* RASHAD MOON (AC 42130)

Lavine, Elgo and Pellegrino, Js.

*Syllabus*

Convicted of the crimes of felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree, the defendant appealed. The defendant's conviction stemmed from an incident in which the defendant and M attempted to rob the victim, F, of two computer tablets he had advertised for sale via an internet posting. Upon meeting the defendant and M to sell the tablets, F was shot while he was sitting in his car near the defendant's home and, subsequently, died from his injuries. On appeal, the defendant claimed, inter alia, that the trial court erred in providing the jury with a supplemental instruction regarding the use of force element of robbery in response to a question from the jury. *Held:*

1. The court did not err when it provided the jury with a supplemental instruction in response to its question regarding the use of force element of robbery in the first degree: the defendant's claim that the court introduced a new theory of liability, namely, accessorial liability, when it added the phrase "another participant" to the instructions on the use of physical force element of robbery in the first degree was unavailing, as the statute (§ 53a-134 [a]) governing robbery in the first degree, which provides that a person may be guilty of robbery in the first degree if he or another participant in the crime uses or threatens the use of a dangerous instrument, provides for both principal and accessorial liability, and, thus, the court, by adding the phrase "another participant," tailored the instruction so that it more closely mirrored the statute, and its supplemental instruction was adapted to the state's theory of the case that the defendant was a participant in the robbery; moreover, the supplemental instruction did not invade the province of the jury or suggest a preferred verdict, as it appropriately clarified an element of an existing charge against the defendant, was a proper statement of the law and used permissive language, which made it clear that the court was not instructing the jury to find that the defendant was a participant in the robbery.

2. The defendant could not prevail on his claim that the court erred when it declined to poll the jurors on his affirmative defense to the felony murder charge, which was based on his claim that the applicable rule of practice (§ 42-31) requires the court to poll jurors on affirmative defenses, as the mandatory language of that provision expressly provides that the rule applies only to the jurors' verdict: where, as here, the court did not direct the jury to return any verdict other than a general one, the court was required only to poll the jurors concerning whether they found the defendant unanimously guilty or not guilty of the charges against him and not whether they found that he had proved the affirmative defense, and because the jury instructions made clear that, to find the defendant guilty of felony murder, the jury had to find, unanimously, that he did not prove the affirmative defense, the clerk, in polling the jurors on felony murder, necessarily polled them on the affirmative defense; moreover, requiring that jurors be polled regarding the affirmative defense was analogous to providing the jurors with interrogatories, which was not generally recognized as a part of Connecticut's criminal procedure.
3. The trial court did not abuse its discretion by admitting into evidence two spent shell casings that were found in the defendant's house two days after the shooting; although the defendant claimed that because there was no connection between the shell casings and the shooting, the casings were impermissible evidence of his criminal propensity, the state introduced evidence connecting the shell casings to the shooting death of the victim, including testimony that the shell casings came from a .22 caliber gun, a statement from a witness that the witness had seen the defendant with a .22 or .25 caliber gun, and testimony that the victim's wound was consistent with the type of wound created by a bullet fired from a small caliber gun, and the shell casings were relevant to the crime charges because they had a tendency to prove that the defendant owned a firearm and, therefore, had the means to commit a crime involving a small caliber gun.
4. The defendant could not prevail on his unpreserved claim that the trial court improperly instructed the jury on conspiracy to commit robbery in the first degree when it omitted the intent element required for the underlying crime of robbery in the first degree by failing to instruct the jury that it had to find that the defendant intended to commit a robbery while he or another participant was armed: because the court provided counsel with a meaningful opportunity to review the jury instructions when it gave the parties a copy of the proposed jury instructions two days prior to instructing the jury, defense counsel did not express any concerns regarding the instructions on conspiracy to commit robbery in the first degree and stated that the defendant did not need more time to review the proposed jury instructions, and defense counsel failed to object after the court instructed the jury on conspiracy, the defendant waived his instructional claim; moreover, the defendant's claim that the court's instruction on conspiracy to commit robbery in the first degree

constituted plain error was unavailing, as the court instructed the jury on the intent requirement for conspiracy to commit robbery in the first degree when it read from the conspiracy statute and set forth the elements of the crime, and it provided the jury with detailed instructions on the intent element of conspiracy to commit robbery in the first degree, which made clear that the intent required for the charge was the intent to commit the underlying crime of robbery in the first degree and that the defendant had to intend for a participant in the crime to be armed with a deadly weapon.

Argued April 11—officially released August 27, 2019

*Procedural History*

Information charging the defendant with the crimes of felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, and tried to the jury before *Baldini*, *J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

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

*Laurie N. Feldman*, special deputy assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

*Opinion*

PELLEGRINO, J. The defendant, Rashad Moon, appeals from the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (2), and conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 and 53a-134 (a) (2). On appeal, the defendant claims that the trial court improperly (1) instructed the jury on accomplice liability, (2) failed to poll the jurors on the defendant's affirmative defense, (3) admitted into evidence two spent shell casings that were unconnected to the crime, and (4)

instructed the jury on conspiracy to commit robbery in the first degree without instructing it on the intent required for robbery in the first degree. We disagree and, accordingly, affirm the judgment of the trial court.

On the basis of the evidence adduced at trial, the jury reasonably could have found the following facts. In May, 2013, the victim, Felix DeJesus, and his fianceé posted two T-Mobile Springboard tablets for sale on Craigslist. The Craigslist posting stated that the tablets were being sold for $300 each or $500 for both of them and included the victim's phone number. On May 8, 2013, at approximately 7 p.m., a prospective buyer of the tablets called the victim. The prospective buyer said that he did not have a car and asked the victim to meet him in Hartford so that he could purchase the tablets. The victim agreed to travel to Hartford and, shortly after 7 p.m., the victim left his home in Cromwell with the tablets.

At approximately 7:45 p.m., a resident of the neighborhood where the crime occurred, Gloria Therrien, observed the victim park his car in front of 16 Allendale Road. From inside her home, Therrien saw two men approach the car and stand at its driver's side window. One of the men spoke to the victim through the front driver's side window while the other man stood next to him. Therrien heard a gunshot and saw the two men run away from the car, using a cut through that connected Allendale Road to Catherine Street. Therrien then went outside and walked toward the victim's car. She observed that the car windows were open and that the victim was in the driver's seat of the car "jerking . . . and gurgling." Therrien asked some children who were nearby to call 911 and report that someone had been shot.

The police arrived at the scene at approximately 8 p.m. When Jeffrey Moody, an officer with the Hartford

Police Department (department), arrived, he saw the victim's car and noticed that its engine was running and that the victim was inside. Moody approached the car and found the victim unresponsive. Thereafter, emergency services took the victim to Hartford Hospital, where he died of a single gunshot wound to the head at approximately 3:46 a.m.

Chris Reeder, a detective with the department, arrived at the scene at approximately 8:30 p.m., after the victim had been taken to Hartford Hospital. Reeder searched the interior of the victim's car and found a T-Mobile Springboard Tablet and a white Samsung cell phone. The police took possession of both items.

On May 9, 2013, the police extracted data from the cell phone, which they determined had belonged to the victim. The data extracted from the cell phone included a series of text messages and phone calls between the victim and a cell phone number that belonged to Marvin Mathis, an individual who resided near the scene of the crime. Around the time of the murder, there were text messages between Mathis and the victim in which Mathis instructed the victim to meet him at 16 Allendale Road.

That same day, Reeder went to speak with Mathis at his home on Allendale Road. Mathis denied having any knowledge of the shooting and stated that he was asleep at home when the crime occurred. Mathis also stated that he was with the defendant from approximately 6 to 7:30 p.m. on the night of the shooting and that while they were together, the defendant borrowed his phone.

Mathis allowed Reeder to view his cell phone and the text messages on the device. The text messages on Mathis' cell phone matched the text messages that the police had extracted from the victim's cell phone. Mathis, however, denied sending the messages and stated that the defendant must have sent them. Reeder

also observed that the call log on Mathis' cell phone revealed that, at approximately the time of the shooting, there were calls between Mathis and the defendant. On May 8, 2013, there were calls between the defendant and Mathis at 6:02, 7:51, 7:52 and 9:53 p.m.

On May 12, 2013, Reeder spoke with the defendant and the defendant's girlfriend, Brittany Hegwood. Hegwood informed the police that on the night of the shooting, she witnessed Mathis and the defendant walk "down Catherine Street toward Hillside [Avenue]" together and that when the defendant returned approximately five minutes later he stated "[Mathis] just shot somebody."

The defendant also provided the police with a statement in which he admitted that he was with Mathis on the night of the shooting and that he went with Mathis to meet the victim. The defendant stated that Mathis told the defendant that he was going to buy "some stuff" from the victim. The defendant further stated that he stood approximately thirty feet away from the victim's car while Mathis spoke with the victim through the driver's side window. The defendant stated that he looked away from Mathis and heard a gunshot, at which point he and Mathis ran away from the car to the defendant's house on Catherine Street.

As part of their investigation, the police obtained a search warrant for the defendant's cell phone records. The defendant's cell phone records revealed calls between the defendant and a phone number belonging to an individual by the name of Jahvon Thompson on May 10 and 14, 2013.

On May 23, 2014, approximately one year after the shooting, Thompson, who was under arrest at the time, spoke with Reeder. Thompson informed Reeder that he and the defendant initially had planned to rob the victim because they "were broke." Thompson further

stated that "a day or two" before the crime he, the defendant, and Mathis were together and that the defendant was texting the victim on Mathis' phone. Thompson stated that ultimately he did not participate in the robbery because "something came up."

Additionally, in May of 2014, an individual by the name of Tyrell Hightower left three messages on a police tip line, in which he indicated that he had information about a homicide that had occurred on Allendale Road one year earlier. On June 2, 2014, Reeder met with Hightower at Hartford Correctional Center, where Hightower was incarcerated. During the meeting, Hightower informed Reeder that the defendant had confessed to him that he and Mathis were involved in the murder of the victim. Hightower further stated that the defendant had informed him that it was a "robbery that went bad" and that Mathis had shot the victim.

In late June of 2014, the police arrested the defendant. After a jury trial, the defendant was convicted of felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree. The court sentenced the defendant to a total effective sentence of forty-nine years of incarceration. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that "[t]he trial court committed harmful error when, for the first time during deliberations, [in response to a question from the jury] it instructed the jurors that [the] defendant could be convicted of robbery even if another person was the one to use force . . . ." The defendant argues that the court's supplemental instruction suggested a verdict in favor of the state, deprived him of the opportunity to defend against this theory of liability and violated his right to have the jurors properly instructed on the law. We disagree.

We begin with the applicable standard of review and the legal principles relevant to this claim. "[I]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge. . . . 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. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury. . . . A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." (Internal quotation marks omitted.) *State* v. *Berrios*, 187 Conn. App. 661, 705–706, 203 A.3d 571, cert. denied, 331 Conn. 917, 204 A.3d 1159 (2019). This standard of review also applies to supplemental instructions. *State* v. *Miller*, 36 Conn. App. 506, 515, 651 A.2d 1318, cert. denied, 232 Conn. 912, 654 A.2d 357 (1995).

Practice Book § 42-27 provides: "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."

The following additional facts and procedural history are relevant to this claim. Count two of the information

charging the defendant alleged: "[O]n or about May 8, 2013 at 8:00 p.m. on Allendale Road in Hartford . . . while in the course of the commission of a robbery and in immediate flight therefrom, [the defendant] or another participant in the crime was armed with a deadly weapon."

During closing argument, the state argued that the defendant was one of the two participants in the robbery and that it was legally irrelevant whether he or Mathis shot the victim. The prosecutor stated: "The one issue you have to analyze . . . is was [the defendant] a participant in the robbery . . . ."

After closing arguments, the court instructed the jury on the law relevant to the case, including the charge of robbery in the first degree.[1] The court began its instruction on robbery in the first degree by providing: "The defendant is charged in count two with robbery in the first degree in violation of General Statutes § 53a-134 (a) (2). The statute defining this offense reads in pertinent part as follows: A person is guilty of robbery in the first degree when in the course of the commission of the crime of robbery, or immediate flight therefrom, he, or another participant in the crime, is armed with a deadly weapon."

The court stated the following with regard to the elements of robbery: "[T]he following are elements of robbery: (a) that the defendant was committing a larceny; (b) that the larceny was accomplished by the use, or threatened immediate use, of physical force upon another person; (c) for the purpose of preventing or overcoming resistance to the taking of the property, or to the retention thereof immediately after the taking, or compelling the owner of such property or another person to deliver up the property."[2]

[1] Neither the state nor the defendant requested that the court give an instruction on accessorial liability.

[2] This instruction was set forth on page 13 of the jury instructions.

Under the heading "(b) Use or Threat of Use of Physical Force," the court provided: "The second element of robbery is that the larceny was accomplished by the use or threatened use of physical force."[3]

Under the heading "conclusion," the court provided: "In summary, the state must prove beyond a reasonable doubt the following elements of robbery in the first degree: (1) the defendant was committing a larceny, and (2) that he used physical force or threatened the use of physical force for the purpose of preventing or overcoming resistance to the taking of property or to the retention of property immediately after the taking or compelling the owner of the property or another person to deliver up the property or to engage in other conduct that aids in the commission of larceny; and (3) that in the course of the commission of the robbery or immediate flight from the crime, the defendant or another participant in the crime was armed with a deadly weapon."[4] (Emphasis added.)

The court provided the jurors with a paper copy of the jury instructions for their use during deliberations. During deliberations, the jury sent the court the following note: "Does 'the use or threat of use of physical force' element of robbery in the first degree require a finding that the defendant personally used or threatened the use of force or is it sufficient as to the 'use or threat of use of physical force' element if, in the course of the larceny, force was threatened by any party to the larceny?

"*Explanation*. The conclusion on [page] 17 of the jury charge says '(2) that *he* used physical force or threatened the use of physical force.' On [page] 13, element I and [page] 15, section (b) use or threat of use of physical force, it says . . . 'that the larceny *was*

[3] This instruction was set forth on page 15 of the jury instructions.

[4] This instruction was set forth on page 17 of the jury instructions.

*accomplished by* the use or threatened immediate use, of physical force upon another person.' " (Emphasis in original.)

Upon receiving the note from the jury, the court discussed the matter with counsel. Although the court stated that it believed that the instruction on robbery in the first degree was proper, it nonetheless proposed responding to the jury's note by adding the phrase "another participant" to the use of force instruction on pages 15 and 17. The court explained that it was its belief that the addition of this language would clarify that the jury could find the defendant guilty of robbery in the first degree if he or another participant in the crime used or threatened the use of physical force.

Defense counsel objected, stating that the proposed clarification would serve as an "unfair invasion of the province of the jury" and improperly introduce the concept of accomplice liability. Defense counsel argued that the original instruction properly stated the law and that there was nothing the court needed to clarify or correct. Instead of providing the jury with additional clarifying instructions, defense counsel proposed rereading the original instructions or, alternatively, adding the proposed language and rereading the entirety of the instructions.

Over the defendant's objection, the court decided to provide the jury with the proposed clarification. The court explained that pursuant to *State* v. *Davis*, 255 Conn. 782, 791 n.8, 772 A.2d 559 (2001), it did not need to separately instruct on accessorial liability for robbery in the first degree because the statute, on its face, extends to principals and accessories. Furthermore, the court stated that it believed simply rereading the charge would not respond to the jury's question.

The court called the jury to the courtroom and stated: "First, I believe that the instruction that I have given

you on page 13 is the correct recitation of the law. I further believe that the law that I instructed on page 15 and page 17 is also the correct recitation of the law. I do want to give you, by point of clarification, language that you can consider which would be consistent with all of the instructions that I gave you. With regard to page 15, under paragraph (c) 'Purpose of use of force.'[5] You may consider another participant of the crime. So the language would enable you to consider, if you find that the defendant *or another participant* of the crime used physical force or threatened . . . immediate use of force in committing a larceny you must then determine whether such physical force was used or threatened for the purpose of and the language continues from there. . . .

"On page 17, consistent with the instructions that I gave you, and the clarification that I just gave you, under 'conclusion,' under paragraph two the law allows you to consider another participant in the crime. The language under the conclusion by way of clarification, therefore, enables you to consider that he, meaning the defendant, *or another participant* in the crime used physical force or threatened the use of physical force for the purpose of preventing or overcoming resistance to the taking of property, or to the retention of property immediately after the taking or compelling the owner of the property or another person to deliver up the property or to engage in other conduct that aids in the commission of larceny." (Emphasis added.)

On appeal, the defendant concedes that the court was required to address the jury's question, but argues that the supplemental instruction improperly introduced a new theory of liability, namely, accessorial

[5] Although the note from the jury asked about the instruction in section (b) of page 15, the court clarified the language in section (c) of page 15. Both sections of the instructions, however, addressed the use of force element of robbery.

liability.[6] In support of his argument, the defendant cites numerous cases from other jurisdictions, which, he argues, demonstrate that it is error for a court to introduce a different theory of liability, and in particular accessorial liability, for the first time in a supplemental instruction. See, e.g., *United States* v. *Gaskins*, 849 F.2d 454 (9th Cir. 1988); *People* v. *Millsap*, 724 N.E.2d 942 (Ill. 2000); *People* v. *Jamison*, 566 N.E.2d 58 (Ill. App. 1991); *State* v. *Hover*, 362 P.3d 1125 (Kan. App. 2015); *State* v. *Johnson*, 795 S.E.2d 171 (S.C. App. 2016); *State* v. *Ransom*, 785 P.2d 469 (Wash. App. 1990). In citing these cases, the defendant presupposes that the court, introduced a new theory of liability when it added the phrase "another participant" to the instructions on the use of physical force element of robbery in the first degree. We disagree.

General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of

[6] In his brief, the defendant argues that the introduction of this theory was improper because it deprived him of the opportunity to argue against the theory at closing argument and, therefore, defend against the theory at trial. At oral argument, however, the defendant stated "the issue here is not notice." Even if we assume that the defendant did not intend to concede the issue of notice, we conclude that the defendant was on notice of his potential liability for the acts of Mathis.

The allegations in the information provided notice to the defendant that he could be found liable for Mathis' acts. The information, in charging the defendant with robbery in the first degree, alleged that the defendant was liable because "he *or another participant in the crime* was armed with a deadly weapon" while in the course of the commission of a robbery and immediate flight therefrom. (Emphasis added.) Additionally, throughout trial, the state's theory was that the defendant was a participant in the crime, even though he might not have been the one who shot the victim. Thereafter, during closing argument, the state made clear that it was arguing that the defendant might not have been the shooter, but that he was a participant in the crime. Moreover, our case law makes clear that "a defendant, charged with an offense, is on notice that he may be convicted as an accessory to that offense." *State* v. *Walton*, 34 Conn. App. 223, 230, 641 A.2d 391, cert. denied, 230 Conn. 902, 644 A.2d 916 (1994).

robbery as defined in section 53a-133 or of immediate flight therefrom, he *or another participant in the crime* . . . (2) is armed with a deadly weapon . . . ." (Emphasis added.) The plain language of the statute states that an individual may be guilty of robbery in the first degree if he or another participant in the crime uses or threatens the use of a dangerous instrument. In *State* v. *Davis*, supra, 255 Conn. 791, n.8, our Supreme Court concluded that § 53a-134 applies to both principals and accessories, stating: "[O]ur robbery statute, § 53a-134, includes explicit accessory language within the text of the statute. . . . Because the robbery statute applies to principals *and* accessories on its face, the court did not need to explain the concept of accessorial liability to the jury as it relates to the robbery charge." (Emphasis added.) Our Supreme Court also noted that our law makes no "practical distinction between the terms 'accessory' and 'principal' for the purposes of determining criminal liability." Id., 789.

The defendant argues that *Davis* does not control in the present case because it is factually distinguishable. The defendant points to the fact that the court in *Davis* instructed on accessorial liability with regard to another statute, whereas the court in the present case did not instruct on accessorial liability at all. The lack of such an instruction with regard to another charge in the present case, however, is not a significant distinction because § 53a-134 provides for both principal and accessorial liability. *Davis* recognized this, stating that an accessory instruction with regard to robbery in the first degree was unnecessary because the robbery statute "includes explicit accessory language within the text of the statute." Id., 791, n.8. Thus, we conclude that the defendant's efforts to distinguish *Davis* are unavailing.

Moreover, even if we assume that *Davis* is distinguishable, other cases from our appellate courts recognize that § 53a-134 applies to both principals and

accomplices. *State* v. *Crump*, 201 Conn. 489, 495, 518 A.2d 378 (1986) (concluding "fact that the defendant was not formally charged as an accessory does not preclude his being so convicted" and defendant could be convicted of robbery because evidence supported "conclusion of the trial court of the defendant's complicity as either a principal or an accessory"); *State* v. *Harper*, 184 Conn. App. 24, 32, 194 A.3d 846 ("the offense of robbery in the first degree in violation of § 53a-134 [a] [2] does not require proof that a defendant intended to possess a deadly weapon"), cert. denied, 330 Conn. 936, 195 A.3d 386 (2018); *State* v. *Latorre*, 51 Conn. App. 541, 552, 723 A.2d 1166 (1999) (evidence was sufficient to convict defendant of robbery, despite lack of instruction on accomplice liability, because defendant acted in concert with another).

In the present case, because § 53a-134 provides that a defendant can be found guilty in the first degree if he or another participant in the crime uses force, the court, by adding the phrase "another participant," tailored the instruction so that it more closely mirrored the statute. Additionally, the court's supplemental instruction was adapted to the state's theory of the case. Throughout trial, the state's theory of the case was that the defendant was a participant in the robbery. The state explicitly so stated during closing argument when it repeatedly argued that it was legally irrelevant whether the defendant or Mathis shot the victim because there was ample evidence that the defendant was a participant in the crime and had conspired with the defendant to plan the robbery. Specifically, the state argued: "Who actually killed [the victim] is not important. . . . You don't need that issue to resolve the elements of the charges that you have before you."

Finally, we are unpersuaded by the defendant's argument that the supplemental instruction invaded the province of the jury or suggested a preferred verdict.

In support of this argument, the defendant cites to the concurrence in *State* v. *Devoid*, 188 Vt. 445, 453–54, 8 A.3d 1076 (2010). *Devoid*, however, is factually distinguishable from the present case in that it involved a supplemental instruction that introduced the crime of attempt when the defendant had not, in any way, been charged with attempt. Id. Furthermore, the court in *Devoid* noted that the supplemental instruction did *not* clarify an element of an existing charge, which would have been within the trial court's discretion. Id., 455. By contrast, the supplemental instruction in the present case appropriately clarified an element of an existing charge against the defendant. Moreover, the supplemental instruction in the present case was a proper statement of the law. *State* v. *Turner*, 181 Conn. App. 535, 571, 187 A.3d 454 (declining to review claim that legally correct response to jury question intruded on function of jury), cert. granted on other grounds, 330 Conn. 909, 139 A.3d 48 (2018). Finally, the supplemental instruction in the present case used permissive language, making it clear that the court was not instructing the jury to find that the defendant was a participant in the robbery.[7]

On the basis of the foregoing, we conclude that the court did not err when it provided the jury with a supplemental instruction in response to its question regarding the use of force element of robbery in the first degree.[8]

II

The defendant's second claim is that the court erred by refusing to poll the jurors on the affirmative defense

[7] The court stated: "You *may consider* another participant of the crime. So the language would enable you to *consider*, *if* you find that the defendant or another participant of the crime used physical force . . . in committing a larceny you must then *determine whether* such physical force was used . . . ." (Emphasis added.)

[8] The defendant also argues that he was prejudiced by the court's error. Although we conclude that the court did not err in providing the jury with the supplemental instruction, even if we assume, arguendo, that it did, any error was harmless given the strength of the evidence against the defendant.

to felony murder. The defendant argues that the court's refusal to poll the jurors on the affirmative defense to felony murder violated Practice Book § 42-31 and his right to a unanimous verdict. We disagree.

We begin with the applicable standard of review and the legal principles relevant to this claim. "The interpretation and application of a statute, and thus a Practice Book provision, involve a question of law over which our review is plenary. . . . 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." (Citation omitted; internal quotation marks omitted.) *Garvey* v. *Valencis*, 177 Conn. App. 578, 583, 173 A.3d 51 (2017).

Practice Book § 42-31 provides: "After a verdict has been returned and before the jury has been discharged, the jury shall be polled at the request of any party or upon the judicial authority's own motion. The poll shall be conducted by the clerk of the court by asking each juror individually whether the verdict announced is such juror's verdict. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or it may be discharged."

The following additional facts and procedural history are relevant to this claim. On December 2, 2016, after

closing arguments, the court instructed the jury on the elements of felony murder: "One, that the defendant with one or more . . . other persons committed the crime of robbery. Two, that the defendant or another participant in the crime of robbery as instructed caused the death of another person. Three, that the defendant or another participant caused the death while in the course of and in furtherance of the commission of the crime of robbery or an immediate flight therefrom. . . . If you unanimously find that the state has proved all elements, as I've instructed you, beyond a reasonable doubt, your verdict would be guilty to one count felony murder."

Immediately thereafter, the court instructed the jury on the affirmative defense to felony murder, stating: "The evidence in this case raises what the law calls an affirmative defense. This affirmative defense applies only to count one felony murder. An affirmative defense constitutes a separate issue or circumstances that mitigate the degree of or eliminate[s] criminality or punishment. . . .

"For you to find the defendant not guilty of this charge the defendant must prove the following elements by a preponderance of evidence. . . .

"The first element is the defendant did not commit the homicidal act or in any way solicit, request, command, importune, cause or aid in the commission of it. . . .

"The second element is that the defendant was not armed with a deadly weapon or any dangerous instrument. . . .

"The third element is that the defendant had no reasonable grounds to believe that any other participant was armed with such a weapon or instrument. A reasonable ground to believe means that a reasonable person in the defendant's situation viewing the circumstances

from the defendant's point of view would have shared that belief. . . .

"The fourth element is that the defendant had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury."

On December 5, 2016, the court informed the parties that the jury had reached its verdict. Defense counsel asked the court to poll the jurors "with respect to each count as well as with respect to the affirmative defense [to the charge of felony murder]." The state's attorney stated that he did not see any reason for the jurors to be polled on the affirmative defense. In response, defense counsel argued that it was proper to poll the jurors on the affirmative defense because they had been instructed that the affirmative defense requires unanimity. The court concluded that the jury would be polled only with regard to the three counts charged and not the affirmative defense because the defendant had not previously submitted a request for the jury to be polled on the affirmative defense and because "the verdicts whatever they may be will resolve the issues with regard to the affirmative defense."

The jury foreperson stated when polled by the clerk that the jury had found the defendant guilty of felony murder, robbery in the first degree and conspiracy to commit robbery in the first degree. The clerk of court accepted the verdict and polled each juror individually with regard to the three counts. Each juror stated that he or she had found the defendant guilty of felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree.

The defendant argues that Practice Book § 42-31 requires the court to poll jurors on affirmative defenses. Although the defendant argues that "verdict announced" includes affirmative defenses, he has failed

to direct our attention to any support for this assertion. Indeed, the mandatory language of the provision expressly provides that the rule applies only to the jurors' verdict. Moreover, in *State* v. *Pare*, 253 Conn. 611, 617, 755 A.2d 180 (2000), the case on which the defendant relies in support of his assertion that the court was required to poll the jury on the affirmative defense, the court did *not* take issue with the trial court's failure to poll the jurors on the defense of extreme emotional distress. Although the court in *Pare* concluded that the trial court committed reversible error when it failed to poll the jurors, the basis of its conclusion was the court's failure to poll each juror individually, not the court's failure to poll the jurors with regard to the defense of extreme emotional distress. Id., 638. By contrast, in the present case, the clerk individually polled each juror with regard to all three of the charges against the defendant.

Moreover, requiring that jurors be polled regarding the affirmative defense is analogous to providing the jurors with interrogatories, which is not generally recognized as a part of Connecticut's criminal procedure. See Practice Book § 42-29 ("[t]he verdict shall be general unless otherwise directed by the judicial authority, but if the judicial authority instructs the jury regarding the defense of mental disease or defect, the jury, if it so finds, shall declare the finding in its verdict"); *State* v. *Anderson*, 158 Conn. App. 315, 333, 118 A.3d 728 ("we will not probe into the logic or reasoning of the jury's deliberations or open the door to interminable speculation"), cert. granted, 319 Conn. 907, 123 A.3d 438 (2015) (appeal withdrawn on May 5, 2015), and cert. granted on other grounds, 319 Conn. 908, 123 A.3d 437 (2015) (appeal withdrawn May 4, 2016); *State* v. *Blake*, 63 Conn. App. 536, 543–44, 777 A.2d 709 (concluding trial court properly denied defendant's request to submit to jury interrogatory on affirmative defense), cert.

denied, 257 Conn. 911, 782 A.2d 134 (2001). In the present case, because the court did not direct the jury to return any verdict other than a general one, the court was required only to poll the jurors on whether they found the defendant unanimously guilty or not guilty of the charges against him and not whether they found that the defendant had proved the affirmative defense.

Finally, the jury instructions made clear that, in order to find the defendant guilty of felony murder, the jury had to find, unanimously, that the defendant did not prove the affirmative defense. "[I]t is well established that, [i]n the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 401, 3 A.3d 892 (2010). The defendant does not argue that the jury failed to follow any instructions, therefore, we must assume that the jury followed the court's instructions on felony murder. Because the court instructed the jury that it had to find that the defendant did not satisfy the elements of the affirmative defense before finding the defendant guilty of felony murder, the clerk, in polling the jurors on felony murder, necessarily polled them on the affirmative defense.

On the basis of the foregoing, we conclude that the court did not err when it declined to poll the jurors on the affirmative defense.

III

The defendant's third claim is that the court abused its discretion by admitting into evidence two spent shell casings that were unconnected to the shooting. The defendant argues that the court's error allowed the jury to assume that the defendant was a violent person who must have possessed the murder weapon. We disagree.

We begin with the standard of review and legal principles relevant to this claim. "Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree. . . . Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend[s] to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative. . . .

"Although relevant, evidence may be excluded by the trial court if the court determines that the prejudicial effect of the evidence outweighs its probative value. . . . Of course, [a]ll adverse evidence is damaging to one's case, but it is inadmissible only if it creates undue prejudice so that it threatens an injustice were it to be admitted. . . . The test for determining whether evidence is unduly prejudicial is not whether it is damaging to the defendant but whether it will improperly arouse the emotions of the jury. . . . Reversal is required only [if] an abuse of discretion is manifest or [if an] injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Gray-Brown*, 188 Conn. App. 446, 460–61, 204 A.3d 1161, cert. denied, 331 Conn. 922, 2015 A.3d 568 (2019).

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . [O]ur determination [of whether] the defendant was harmed by the trial court's . . . [evidentiary ruling] is guided by the various factors

that we have articulated as relevant [to] the inquiry of evidentiary harmlessness . . . such as the importance of the . . . testimony in the [state's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony . . . on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the [state's] case. . . . Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) *State* v. *Grant*, 179 Conn. App. 81, 90, 178 A.3d 437, cert. denied, 328 Conn. 910, 178 A.3d 1042 (2018).

The following additional facts and procedural history are relevant to this claim. During trial, Reeder testified that no gun was recovered and that the bullet fragment removed from the victim was not suitable for ballistics analysis. Reeder did testify, however, that the victim's wound was consistent with its having been made by a bullet fired from a small caliber weapon.[9]

During Reeder's testimony, the state sought to introduce into evidence two spent .22 shell casings found in the defendant's house two days after the shooting and argued that it had laid a foundation sufficient for their admission. In support of its proffer, the state pointed to Thompson's statement that the defendant owned a .22 or .25 caliber gun and that the defendant had told Thompson that he gave Mathis the gun. The state also argued that these casings were relevant on

[9] As part of this claim that the testimony was inadmissable, the defendant, with respect to Reeder's testimony that the victim's gunshot wound was consistent with having been being caused by a bullet from a small caliber weapon, refers to the fact that Reeder was not qualified as a ballistics expert. Although Reeder was not qualified as a ballistics expert, the defendant failed to timely object to this testimony and, therefore, this argument is not reviewable on appeal. *State* v. *Fernando*, 331 Conn. 201, 211–12, 202 A.3d 350 (2019).

the basis of Reeder's statement that a firearm of the kind the defendant allegedly possessed would eject a casing, yet no casings were found at the scene of the crime.

Defense counsel objected to the admission of the shell casings, arguing that there was nothing to tie them to the crime, other than the statement by Thompson that he had seen the defendant with a .22 or .25 caliber gun. He further argued that because no evidence had been presented as to when the casings were fired, they could have been fired years before the commission of the crime.

After hearing both parties, the court allowed the casings to be admitted as an exhibit, stating: "[R]obbery in the first degree and the conspiracy to commit robbery in the first degree . . . [require the state] to prove beyond a reasonable doubt . . . that the individual or any individual who participated in the crime was armed with a deadly weapon. Certainly the possession of casings in the defendant's home would be relative to the issue of whether or not the defendant may have possessed or had access to a firearm. . . . I've considered the fact that the testimony not only on direct and on cross-examination has discussed the issue of the type of gun that may have been used in this incident as well as the statement that has just come in with regard to witness Thompson addresses the issue of a revolver, specifically a low caliber revolver. . . . I am going to allow the admissibility of those casings, and allow those introduced into evidence through this witness."

Thereafter, Reeder resumed testifying and read a statement Thompson made to the police on May 23, 2014.[10] Thompson stated in relevant part: "[The defendant] told me he gave [Mathis] his gun. I had seen [the

[10] The court admitted Thompson's statement for substantive purposes as a prior inconsistent statement under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct 597, 93 L. Ed. 2d 598 (1986).

defendant] with this gun before. It is a revolver, a little .22 or maybe a .25." Reeder then testified that he executed a search warrant of the defendant's home on May 10, 2013, in search of "the stolen tablet, ammunition . . . firearms, [and] cellular phones." During the search, he found two .22 caliber shell casings in a "small closet or pantry at the backside of the kitchen . . . sitting on top of [a] shelf." At this point, the state introduced the casings as a full exhibit.

The defendant argues on appeal that because there was no connection between the shell casings and the shooting, the casings are impermissible evidence of the defendant's criminal propensity. "Evidence as to articles found in the possession of an accused person subsequent to the time of the commission of a crime for which he is being tried is admissible only if it tends to establish a fact in issue or to corroborate other direct evidence in the case; otherwise the law does not sanction the admission of evidence that the defendant possessed even instruments or articles adapted to the commission of other crimes. . . . The reason is analogous to that applicable to evidence of other crimes committed by a defendant but unrelated to the offense under investigation." *State* v. *Acklin*, 171 Conn. 105, 114, 368 A.2d 212 (1976) (concluding masks and ropes seized from defendants' car were unrelated to crime because "state offered no evidence to show that the defendants used the masks and rope in the commission of the robbery with which they were charged, or that they had contemplated their use in that robbery"); see *State* v. *Girolamo*, 197 Conn. 201, 205–209, 496 A.2d 948 (1985) (court erred by admitting into evidence two automatic handguns seized at defendant's home that "ha[d] no direct relevance to the issues in the case"); *State* v. *Maner*, 147 Conn. App. 761, 768–69, 83 A.3d 1182 (trial court abused its discretion by admitting into evidence firearm determined not to be firearm used in

crime charged), cert. denied, 311 Conn. 935, 88 A.3d 550 (2014); *State* v. *Llera*, 114 Conn. App. 337, 339, 969 A.2d 225 (2009) (trial court erred by allowing testimony about defendant's possession of Glock handgun when weapon used in crime charged was Lugar handgun).

The cases identified by the defendant, however, are distinguishable from the present case. In *Maner* and *Llera*, this court concluded that the trial court abused its discretion in admitting guns that were found in the respective defendants' possession because the guns were not the weapons used in the commission of the crime charged. In *Acklin* and *Girolamo*, the court determined that there was no evidence connecting the exhibits to the crimes charged. In the present case, forensic scientists were unable to determine the type of gun used in the shooting, but their testimony did not rule out the use of a small caliber gun in the commission of the crime. Additionally, in the present case, the state introduced evidence connecting the shell casings to the shooting death of the victim. The state introduced testimony that the shell casings came from a .22 caliber gun and Thompson's statement that he had seen the defendant with a .22 or .25 caliber gun. There was also testimony that the victim's wound was consistent with the type of wound created by a bullet fired from a small caliber gun.

Moreover, the casings are relevant to the crime charged because they show that the defendant had the means to commit the shooting. "Evidence indicating that an accused possessed an article with which the particular crime charged may have been accomplished is generally relevant to show that the accused had the means to commit the crime. The state does not have to connect a weapon directly to the defendant and the crime. It is necessary only that the weapon be suitable for the commission of the offense." (Emphasis omitted; citation omitted; internal quotation marks omitted.)

*State* v. *Franklin*, 162 Conn. App. 78, 96, 129 A.3d 770 (2015) (testimony about defendant confronting witness with gun three weeks before shooting relevant because it indicated defendant had means to commit crime), cert. denied, 321 Conn. 905, 138 A.3d 281 (2016); see *State* v. *Gray-Brown*, supra, 188 Conn. App. 461–62 (empty nine millimeter Remington ammunition tray found in defendant's home was relevant to murder committed using nine millimeter bullets made by different manufacturer); *State* v. *VanAllen*, 140 Conn. App. 689, 696, 59 A.3d 888 (shell casings found at scene of shooting where defendant was present were relevant despite lack of evidence of type of gun used), cert. denied, 308 Conn. 921, 62 A.3d 1134 (2013); *Langston* v. *Commissioner of Correction*, 104 Conn. App. 210, 217–18, 931 A.2d 967 (silencer found in defendant's home was relevant because it indicated defendant possessed gun), cert. denied, 284 Conn. 941, 937 A.2d 697 (2007).

Like the evidence in those cases, the shell casings in the present case indicate that the defendant had the means to commit the crime. The shooting was committed with a firearm, and there is evidence that the firearm used was a small caliber gun. Thus, the .22 caliber shell casings, which were found in the defendant's home, have a tendency to prove that the defendant owned a firearm and, therefore, that he had the means to commit a crime involving a small caliber gun. See, e.g., *Edward M.* v. *Commissioner of Correction*, 186 Conn. App. 754, 762–63, 201 A.3d 492 ("The well settled standard for relevance of evidence is extremely low. . . . [W]hether to give such evidence no weight, little weight or much weight, is up to the jury." [Citations omitted; internal quotation marks omitted.]), cert. denied, 305 Conn. 914, 46 A.3d 172 (2012).

On the basis of the foregoing, we conclude that the trial court did not abuse its discretion by admitting into evidence the spent shell casings.

IV

The defendant's final claim is that the trial court's instruction on conspiracy to commit robbery in the first degree was improper because it omitted the intent element required for the underlying crime of robbery in the first degree.The defendant argues that the court failed to instruct the jury that it had to find that he intended to commit a robbery while he or another participant was armed. We disagree.

The following additional facts and procedural history are relevant to this claim. After closing arguments, the court reviewed with counsel its proposed jury instructions, which it had provided to counsel two days earlier. When the court asked whether counsel approved of the instructions with regard to conspiracy to commit robbery in the first degree, defense counsel stated that they were acceptable. After going over the instructions, the court asked whether there was anything else counsel would like to discuss. Both counsel responded, "no." The court then inquired: "Does counsel need any more time to review these jury instructions except for the final copy that I will give to you?" Counsel responded that they did not require any additional time.

Thereafter, the court instructed the jury. The instruction on conspiracy to commit robbery in the first degree provided in relevant part: "The statute defining conspiracy reads in pertinent part as follows: A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy. . . . The state must prove the following elements beyond a reasonable doubt: (1) the defendant intended to commit the crime of robbery in the first degree; (2) the defendant agreed with one or more persons to engage in or cause the

performance of the crime of robbery in the first degree; [and] (3) the commission of an overt act in pursuance of the conspiracy, by any one or more of the persons who made the agreement."

With regard to the intent element of conspiracy to commit robbery in the first degree, the court further instructed: "The first element is that the defendant had the intent that conduct constituting [robbery in the first degree] be performed . . . . The defendant must be proven to have been [motivated] by criminal intent. The defendant may not be found guilty, unless the state has proven beyond a reasonable doubt that he had specific intent to violate the law, when he entered into an agreement to engage in the conduct constituting a crime. You are referred to the court's previous instructions on intent, which are incorporated here with the same force and effect."

On appeal, the defendant concedes that this claim was not raised at trial, but argues that it can be reviewed under *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). The state argues that the defendant is not entitled to *Golding* review because he waived his claim regarding the jury instructions on conspiracy. We agree with the state that the defendant waived this claim.

"[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 . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial." *State* v. *Kitchens*, 299 Conn. 447, 467, 482–83, 10 A.3d 942 (2011).

"[W]hen 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. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case. (Footnote omitted; internal quotation marks omitted.) *State* v. *Bellamy*, 323 Conn. 400, 409, 147 A.3d 655 (2016).

In the present case, the court provided counsel with a meaningful opportunity to review the instructions when it gave the parties a copy of the proposed jury instructions two days prior to instructing the jury. Thereafter, the court solicited comments from counsel regarding the proposed jury instructions. At this point, defense counsel did not express any concerns regarding the instructions on conspiracy to commit robbery in the first degree and stated that he did not need more time to review the proposed jury instructions. Moreover, defense counsel failed to object after the court instructed the jury on conspiracy. Thus, defense counsel had various opportunities to object to the instruction and failed to do so. Accordingly, we conclude that the defendant waived his instructional claim.

Alternatively, the defendant argues that his claim can be reviewed under the plain error doctrine. Although a *Kitchens* waiver does not preclude claims of plain error; see *State* v. *McClain*, 324 Conn. 802, 815, 155 A.3d 209 (2017); we disagree that the instruction was plain error.

We first note that plain error is a doctrine of reversibility, not reviewability. See *State* v. *Jamison*, 320 Conn. 589, 595–97, 134 A.3d 560 (2016). "It is well established that the plain error doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by

appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernible] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . This determination clearly requires a review of the plain error claim presented in light of the record.

"Although a complete record and an obvious error are prerequisites for plain error review, they are not, of themselves, sufficient for its application. . . . [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. . . . In *State* v. *Fagan*, [280 Conn. 69, 87, 905 A.2d 1101 (2006), cert. denied, 549

U.S. 1269, 127 S. Ct. 1491, 167 L.Ed.2d 236 (2007)], [our Supreme Court] 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 reverse the judgment would result in manifest injustice." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Jamison*, supra, 595–97. The standard of review relevant to claims of instructional error is set forth in part I of this opinion.

The defendant argues that the court committed plain error when it instructed the jury on conspiracy to commit robbery in the first degree because it failed to instruct the jury on the requisite intent. Contrary to this argument, the record reveals that the court instructed on the intent requirement for conspiracy to commit robbery in the first degree when it read from the conspiracy statute and set forth the elements of the crime. Indeed, the court provided the jury detailed instructions on the intent element of conspiracy to commit robbery in the first degree, which made clear that the intent required for the charge was the intent to commit the underlying crime of robbery in the first degree and referenced the immediately preceding five page charge on robbery in the first degree.

The defendant relies on our Supreme Court's decision in *State* v. *Pond*, 315 Conn. 451, 453, 108 A.3d 1083 (2015), in support of its argument that the court committed plain error by failing to adequately instruct on the intent requirement for conspiracy to commit robbery in the first degree. In *Pond*, the defendant appealed his conviction of conspiracy to commit robbery in the second degree in violation of General Statutes (Rev. to 2007) §§ 53a-135 (a) (2) and 53a-48 (a), claiming that the trial court improperly failed to instruct the jury that, to find the defendant guilty of the conspiracy charge,

it must find that he specifically had intended that the planned robbery would involve the display or threatened use of what the defendant's coconspirator represented to be a deadly weapon or dangerous instrument. The instruction with which the defendant took issue began with a recitation of the conspiracy statute and then provided: "The third element is that the defendant has the intent to commit robbery in the second degree. The intent for that crime is that at the time of the agreement he intended to commit *larceny*." (Emphasis added.) *State* v. *Pond*, supra, 456.

*Pond* is distinguishable from the present case. In *Pond*, the trial court improperly instructed the jury that the requisite intent for conspiracy to commit robbery in the second degree was intent to commit larceny, a crime that does not require that the defendant intended that a participant be armed. By contrast, in the present case, the court made clear that the defendant had to intend for a participant in the crime to use a deadly weapon when it stated that the intent required for conspiracy to commit robbery in the first degree is the intent to agree to commit the underlying crime of robbery in the first degree. Moreover, the court's instructions on robbery in the first degree, which it incorporated by reference into its instruction on conspiracy, provided that a participant in the crime had to be armed with a deadly weapon in order to find the defendant guilty of robbery in the first degree. The court's instruction on robbery in the first degree provided: "The second element of robbery in the first degree is that in the course of the commission of the crime of robbery, or immediate flight therefrom, the defendant, or another participant of the crime is armed with a deadly weapon." The court also instructed: "To be armed with a deadly weapon means to be knowingly *engaged with*, or knowingly carrying such an item." (Emphasis added; internal quotation marks omitted.) With regard to the term knowingly, the court provided:

"An act is done knowingly if done voluntarily and purposely, and not because of mistake, inadvertence or accident. . . . The inference may be drawn if the circumstances are such that a reasonable person of honest intention, in the situation of the defendant, would have concluded that he, or another participant, was armed with a deadly weapon." (Internal quotation marks omitted.) Because the court's instruction informed the jury that it needed to find that the defendant intended that a participant in the crime be armed with a deadly weapon, we are unpersuaded that the court erred when it instructed the jury on conspiracy to commit robbery in the first degree, let alone that its instruction constituted plain error such that it would cause the public to lose faith in the judicial system or result in manifest injustice.

The judgment is affirmed.

In this opinion the other judges concurred.

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## HEATHER WILSON *v.* MICHAEL Di IULIO
## (AC 41240)

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

*Syllabus*

The defendant appealed to this court from the judgment of the trial court dissolving his marriage to the plaintiff and issuing certain financial orders. The defendant claimed that the trial court improperly failed to award him more than nominal alimony despite the substantial disparity in the parties' incomes and ability to pay expenses, and abused its discretion by making a property award enforceable by a modifiable alimony award. *Held*:

1. The trial court did not abuse its discretion in failing to award more than nominal alimony to the defendant; that court created an effectively equal division of the parties' marital assets by ordering the plaintiff to discharge the mortgage on the marital property, in which the defendant continues to reside, and to convey funds from her retirement plan to the defendant.
2. The defendant could not prevail on his claim that the trial court erred in its property division by making a property award enforceable by a

modifiable alimony award; the court, which entered orders designating the defendant as the alternate payee pursuant to a domestic relations order but recognized that a decision by the plaintiff to remarry could divest the defendant of that award because a new spouse would have to consent to the designation of the defendant as the survivor beneficiary under the terms of the plaintiff's retirement plan, acted within its discretion in fashioning the award, as it considered the restrictions in the plaintiff's retirement plan and, to account for them, ordered nominal alimony of $1 per year to the defendant as security for the award, and the court did not retain jurisdiction to modify the property award in the future but, rather, issued an award of nominal alimony for the protection of the defendant, which was not an abuse of discretion.

Argued March 11—officially released August 27, 2019

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Olear*, *J.*; judgment dissolving marriage and granting certain other relief; thereafter, the court denied the defendant's motion for an articulation, and the defendant appealed to this court. *Affirmed.*

*John F. Morris*, for the appellant (defendant).

*Steven R. Dembo*, with whom were *Caitlin E. Kozloski* and, on the brief, *P. Jo Anne Burgh*, for the appellee (plaintiff).

*Opinion*

MOLL, J. The defendant, Michael Di Iulio, appeals from the judgment of the trial court dissolving his marriage to the plaintiff, Heather Wilson, and entering related financial orders. On appeal, the defendant claims that the court erred by (1) failing to award him more than nominal alimony despite the substantial disparity in the parties' incomes and ability to afford expenses and (2) making a property award enforceable by a modifiable alimony award. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The following facts, as set forth in the court's memorandum of decision,[1] and procedural history are relevant to our discussion. The parties began dating in 1991, when they both were employed by the Office of the Attorney General. The plaintiff was, and continues to work as, an assistant attorney general; the defendant worked as an accountant until 2002 or 2003, when he retired. The parties were married on October 6, 1999. By complaint dated June 7, 2016, the plaintiff commenced the present action seeking dissolution of the parties' marriage.

The parties have two children, a daughter born in 2000, and a son born in 2004. The parties agreed to share joint legal custody of the children and, during trial, asked the court to incorporate their parenting plan into the court's decision. The parties' daughter resided with the plaintiff, and the parties' son shared time with both parents by staying with each parent alternating weeks. The parties agreed that the children have attended and may continue to attend private schools and that the parties would pay these expenses from the assets that they had accumulated for the children. The parties also agreed, and the court ordered, that the children's postsecondary education expenses would be paid from the funds in certain specified accounts and that the plaintiff would pay any costs remaining after the application of such funds.

At the time of trial, the plaintiff was fifty-seven years old and generally was healthy. She has a bachelor's degree, as well as a juris doctor and has worked at the Office of the Attorney General since 1986.[2] The

[1] The court's memorandum of decision also addressed a motion for contempt filed by the defendant. This part of the court's ruling is not at issue in the present appeal.

[2] The court found that the plaintiff had worked at the Office of the Attorney General since 1988. The plaintiff testified, however, that she met the defendant in 1988 when they both were employed at the Office of the Attorney General but that she had started working in that office in September, 1986.

plaintiff's biweekly salary was $5968 and her net weekly income after mandatory deductions was $1991. The plaintiff is fully vested in the Connecticut state employee retirement system. The court found that until recently, the plaintiff had withheld funds from her biweekly paycheck for investment in her 457 retirement plan. The plaintiff also has premarital assets and assets inherited from her mother.

At the time of trial, the defendant was seventy years old. He has a bachelor's degree and retired from the Office of the Attorney General in 2002 or 2003. Prior to his employment with the Office of the Attorney General, the defendant worked for various entities doing accounting and cost analysis. The court found that the defendant was not advancing in his position with the Office of the Attorney General and was working for a difficult supervisor. The parties mutually decided that the defendant would retire, enabling him to provide care to the parties' young children and allowing the plaintiff to continue working.

The defendant took an early retirement package and elected, irrevocably, the 50 percent option form of reduced retirement income for the plaintiff's benefit.[3] The defendant's current pension payment is $393 per week, and he receives social security income in the amount of $249 per week. The court found the defendant's net income to be $842 per week, based on a gross income of $982 per week.[4] The court declined the plaintiff's request to impute $27,105 in annual retirement income withdrawals to the defendant from his retirement investment accounts; the court stated, however, that it had considered the availability of funds in

[3] By making that election, the defendant's base allowance of $16,640.10, which would have been payable monthly in the amount of $1,386.68, was reduced to $14,109.14, payable monthly in the amount of $1,175.76. The plaintiff's retained benefit is $588 per month.

[4] In arriving at these figures, the court also included, in the defendant's income, a $340 per week social security dependency benefit paid to the parties' children.

the defendant's accounts in structuring its orders. The court found that the defendant had premarital assets and assets inherited from his family and that he had contributed to a deferred compensation plan when he was employed. Finally, the court found that, upon retirement and against the plaintiff's wishes, the defendant rolled over the funds from his state managed retirement fund into a Charles Schwab account that he could manage.

Prior to the marriage, the plaintiff owned a home in Meriden, and the defendant owned a home in Winsted. In 1995, the plaintiff moved into the Winsted home and thereafter sold her home in Meriden. The parties refinanced the mortgage on the Winsted property using a portion of the proceeds of the sale of the Meriden home and thereafter owned the Winsted property as joint tenants. In January, 2011, the parties purchased the marital residence located in New Hartford. They did not move into that home until November, 2011, as they wanted to make some improvements to the home prior to moving in. In October, 2012, the parties sold the Winsted home.

In March, 2016, the plaintiff informed the defendant that she was moving out. In May, 2016, the plaintiff purchased a home in Unionville, where she continues to reside. The plaintiff valued the Unionville home at $280,000. The court found that the majority of funds utilized to acquire this home were premarital and/or inherited funds, that this home was subject to a mortgage of $45,000, and that the plaintiff had $235,000 of equity therein. The defendant continues to reside in the New Hartford home. According to the financial affidavits of both parties, the mortgage on the New Hartford property had a principal balance of $162,000. The court found that the fair market value of the home was $350,000 and that the parties had $188,000 in equity in the home.

In its memorandum of decision dissolving the parties' marriage, the court did not attribute significantly greater fault for the breakdown of the marriage to either party. It ordered the plaintiff to make the monthly payments on the New Hartford mortgage from and after the date of the judgment and to discharge the mortgage encumbering the property within six months from the date of the judgment. The court further ordered that the plaintiff convey to the defendant the sum of $126,000 from her 457 retirement account. With regard to the plaintiff's pension, the court noted that, pursuant to the plaintiff's Connecticut state employee retirement plan, the plaintiff could not elect a survivor beneficiary of her retirement benefits until she retired and that, if the plaintiff is remarried when she retires, the new spouse would have to consent to the designation of the defendant as the survivor beneficiary. The court entered orders designating the defendant as the alternate payee pursuant to a domestic relations order.[5] The court further ordered that no alimony was payable by one party to the other except as set forth in section G.4 of the dissolution judgment, which governed the distribution of the parties' respective retirement accounts. Pursuant to section G.4 (v) of the dissolution judgment, the defendant was awarded $1 per year in alimony "modifiable only to enforce the rights called for in this provision."

[5] Specifically, the court ordered that "the defendant as the alternate payee shall receive, by a [domestic relations order], and the plaintiff is directed to pay benefits to the alternate payee as a marital property settlement under the following formula: fifty (50) percent of the gross monthly benefit payable at the date of distribution to the plaintiff (member) multiplied by the 'service factor.' The numerator of the service factor is the number of years accumulated during the marriage period and the denominator is the member's total years of service covered by the plan and used in calculating the member's benefit. The amount payable to the defendant shall include a proportionate share of any cost-of-living adjustments (COLAs) payable to the plaintiff.

"This award of 50 percent of the gross monthly benefit payable at the date of distribution to the plaintiff (member) multiplied by the 'service factor' entitles the defendant to rights of joint survivor benefits, which are herewith ordered as his, and the plaintiff is ordered to so continue that designation to his benefit. The plaintiff's retained right of designation of the alternate payee is limited by this order."

Following the denials of the defendant's postjudgment motion for articulation and motion to reargue, the defendant filed the present appeal.[6]

I

The defendant first claims that the court erred by failing to award him more than nominal alimony despite the substantial disparity in the parties' incomes and ability to pay expenses.[7] He contends that the plaintiff's financial affidavit reveals a surplus of income over expenses while the defendant's affidavit reveals a shortfall.[8] Specifically, the defendant points out that the

[6] The defendant also filed a motion for articulation after filing this appeal, asking the trial court to articulate the factual and legal basis for several of its financial orders. The trial court declined to articulate as requested. The defendant did not file a motion for review of that articulation with this court. See Practice Book § 66-7.

[7] In support of his argument, the defendant contends, in part, that none of the usual reasons used to justify time limited alimony applies. See *Kovalsick* v. *Kovalsick*, 125 Conn. App. 265, 273–75, 7 A.3d 924 (2010); *de Repentigny* v. *de Repentigny*, 121 Conn. App. 451, 460–61, 995 A.2d 117 (2010). We note, however, that the defendant did not request, and the court did not order, time limited alimony.

[8] As part of this argument, the defendant claims that this shortfall can only increase, as he has been left solely responsible for the private school expenses of the parties' son. Specifically, the defendant contends that although the parties agreed that their children would continue to attend private schools and that they had agreed to fund such costs from the assets they had accumulated for the children, the court never entered this agreement as an order. The only order in the court's decision concerning education expenses pertained to postmajority education, in which the court ordered the plaintiff to assume and pay for all college costs remaining after application of certain specified accounts.

We note, however, that the defendant did not submit a proposed order with regard to the payment of private school tuition. Further, when the plaintiff attempted to question the defendant during cross-examination about the private school tuition, the defendant objected on the ground that the question went beyond the scope of direct examination. Finally, although the defendant filed a motion asking the trial court to articulate the factual and legal basis for several of its orders, the motion did not reference the payment of private school tuition.

"As the appellant, the defendant has the burden of providing this court with a record from which this court can review any alleged claims of error. . . . It is not an appropriate function of this court, when presented with an inadequate record, to speculate as to the reasoning of the trial court or to presume error from a silent record." (Internal quotation marks omitted.) *United Amusements & Vending Co.* v. *Sabia*, 179 Conn. App. 555, 561, 180 A.3d 630 (2018). In the present case, in addition to failing to submit a

plaintiff's net income, as reflected on her financial affidavit, was $1966 per week and her expenses were $1178 per week, while he had a weekly income of $642 and weekly expenses of $1270. In addition to the disparity in the parties' incomes, the defendant notes that he has been retired for fifteen years and is seventy years of age. He points out that he retired by agreement of the parties, enabling him to care for the parties' children and allowing the plaintiff to focus on her career. Finally, the defendant notes that the court did not attribute any fault to either party in its decision. The plaintiff counters that the court did not abuse its discretion in declining to award additional alimony to the defendant. We agree with the plaintiff.

We first set forth the standard of review applicable to the defendant's claim on appeal. "We review financial awards in dissolution actions under an abuse of discretion standard. . . . In order to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Citation omitted; internal quotation marks omitted.) *Horey* v. *Horey*, 172 Conn. App. 735, 740, 161 A.3d 579 (2017). "That standard of review reflects the sound policy that the trial court has the unique opportunity to view the parties and their testimony, and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, including such factors as the demeanor and attitude of the parties." (Internal quotation marks omitted.) *Mensah* v. *Mensah*, 167 Conn. App.

proposed order regarding private school tuition, the defendant objected to questioning on this issue and failed to include, in his motion for articulation, a request that the court address this issue. Because we are left to speculate with regard to the defendant's claim of increased educational expenses for the parties' son, we decline to review this claim.

219, 228, 143 A.3d 622, cert. denied, 323 Conn. 923, 150 A.3d 1151 (2016).

"General Statutes § 46b-82 governs awards of alimony. That section requires the trial court to consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 . . . . In awarding alimony, [t]he court must consider all of these criteria. . . . It need not, however, make explicit reference to the statutory criteria that it considered in making its decision or make express findings as to each statutory factor. . . . The trial court may place varying degrees of importance on each criterion according to the factual circumstances of each case." (Citations omitted; internal quotation marks omitted.) *Emerick* v. *Emerick*, 170 Conn. App. 368, 379–80, 154 A.3d 1069, cert. denied, 327 Conn. 922, 171 A.3d 60 (2017). "There is no absolute right to alimony." *Weinstein* v. *Weinstein*, 18 Conn. App. 622, 637, 561 A.2d 443 (1989).

At trial, the defendant testified that he received his bachelor's degree in accounting from Central Connecticut State University in 1976. Upon graduation, the defendant worked as a cost analyst, first at Waring Products in New Hartford and later at Ensign Bickford in Simsbury. He then worked as a plant accountant for UNC Naval Products in New London for six years before going to the Attorney General's Office, where he worked as an accountant for approximately fifteen years before retiring in 2002 or 2003. Once the defendant retired, he took over household and childcare responsibilities and never again obtained full- or part-time employment in the accounting field.

The defendant testified that his current annual income, consisting of his pension and social security, is approximately $32,000 and that he uses his pension payments to pay the mortgage on the property in New Hartford. In his amended proposed orders,[9] the defendant proposed that the plaintiff be ordered to pay him $650 per week, or approximately $34,000 annually, in permanent alimony. He testified that he based his request for alimony on the cost of running the household. He further testified that it was his position that the plaintiff should pay this expense in its entirety and that the court should order that this award be permanent and nonmodifiable, even if the plaintiff retired or became disabled or ill.[10]

The plaintiff testified that she received her law degree from Boston College Law School and has been

[9] Although the caption of this document is "Plaintiff's Amended Proposed Orders," the document was filed by counsel for the defendant.

[10] The defendant also testified that he should receive 50 percent of the plaintiff's pension at the time of the final dissolution, even though it was not in pay status, and speculated that the plaintiff would be able to comply with the court's order from her current assets. The defendant testified as follows on cross-examination:

"[The Plaintiff's Counsel]: Now if the court orders the amount of money you're requesting, and to be clear . . . you are requesting that the court order a transfer to you from [the plaintiff] of $883,690 on the day of the divorce.

"[The Defendant]: Okay, yes.

"[The Plaintiff's Counsel]: Do you have an understanding of, from what assets [the plaintiff] would be able to meet such an order?

"[The Defendant]: Mm-hmm.

"[The Court]: You have to say yes or no.

* * *

"[The Plaintiff's Counsel]: Okay, how would you—how do you see her doing that?

"[The Defendant]: Well, she could take out a loan on her house.

"[The Plaintiff's Counsel]: Mm-hmm.

"[The Defendant]: She has substantial savings.

"[The Plaintiff's Counsel]: Mm-hmm.

"[The Defendant]: My understanding [is] she has over a million dollars in assets, financial assets."

employed at the Attorney General's Office since 1986. She started as an assistant attorney general 1 and is now an assistant attorney general 4, which is the highest civil service level in the Attorney General's Office. The plaintiff's financial affidavit reflected a gross weekly income of $2996, although she conceded at trial that the income as shown on a pay stub admitted into evidence reflected a gross weekly income of $3357. The plaintiff proposed using approximately $139,000 of her solely held assets to pay off the mortgage on the New Hartford property where the defendant lived with the parties' son. She testified that she wanted to have the defendant "in a more comfortable financial position by not having a mortgage to be concerned about." She also thought it was important that the parties' son continue to reside in that house because he had friends in the neighborhood. According to the plaintiff, the monthly mortgage payment on the house was approximately $1900 per month in principal and interest, and she indicated that she would consider the $139,000 payoff of the mortgage "as essentially sort of being in place of alimony in a lump sum, that will reduce his need for alimony because it will you know bring his expenses down significantly."

In its decision, other than the nominal alimony award set forth in section G.4 (v) of the dissolution judgment, the court declined to award alimony to either party and ordered, inter alia, that the plaintiff discharge the mortgage on the New Hartford property within six months from the date of judgment. The court stated that, after considering General Statutes §§ 46b-81 and 46b-82, it had "fashioned the additional property settlement by the plaintiff to the defendant in lieu of the payment of periodic alimony and further to allow the plaintiff to be removed from liability from the mortgage presently encumbering the marital residence." The court further awarded each party the assets they respectively held and ordered that the plaintiff convey to the

defendant the sum of $126,000 from her 457 retirement plan with the state. In his brief, the defendant concedes that these transfers "created an effectively equal division of the parties' marital assets."

The trial court stated that its decision not to award alimony beyond the nominal alimony set forth in section G.4 (v) of the dissolution judgment was "based on the statutory factors, including the age, education, earnings, cause of the breakdown, the estate and needs of the parties, and the division of assets . . . ." Although the court did not attribute significantly greater fault for the marital breakdown to either party, it indicated that the defendant's testimony was often sarcastic and frequently not credible and that, despite being an accountant, he claimed not to understand the proposed orders and certain questions related to financial and/or retirement matters. The court indicated that it found the plaintiff's testimony to be more credible. See *Mensah* v. *Mensah*, supra, 167 Conn. App. 228 (trial court in best position to assess circumstances surrounding dissolution action, including demeanor and attitude of parties). The defendant acknowledges that the court created an effectively equal division of the parties' marital assets by ordering the plaintiff to discharge the mortgage on the New Hartford property and to convey $126,000 from her 457 retirement plan to him. On the basis of our review of the record, and in light of these orders, we cannot conclude that the court abused its discretion in declining to award the defendant more than nominal alimony. Accordingly, the defendant's claim fails.

II

The defendant next argues that the court erred in its property division by making a property award enforceable by a modifiable alimony award. We disagree.

As previously stated, "[w]e review financial awards in dissolution actions under an abuse of discretion standard. . . . In order to conclude that the trial court

abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action." (Citation omitted; internal quotation marks omitted.) *Horey* v. *Horey*, supra, 172 Conn. App. 740.

The court entered orders designating the defendant as the alternate payee pursuant to a domestic relations order. See footnote 5 of this opinion. Recognizing that a decision by the plaintiff to remarry could divest the defendant of this award, because the new spouse would have to consent to the designation of the defendant as the survivor beneficiary, the court ordered $1 per year in alimony to the defendant "modifiable only to enforce the rights called for in this provision." According to the defendant, this solution conflates the nonmodifiable nature of a property division with the modifiable nature of an alimony award.

The plaintiff agrees that a property award pursuant to § 46b-81 cannot be modified after judgment. She argues, however, that there is nothing in the court's decision that seeks, orders, or retains jurisdiction to modify a property settlement in the future. The plaintiff argues, rather, that the court was within its discretion to award alimony of $1 per year as security in favor of the defendant given the terms of the plaintiff's retirement plan. We agree with the plaintiff.

In *Utz* v. *Utz*, 112 Conn. App. 631, 963 A.2d 1049, cert. denied, 291 Conn. 908, 969 A.2d 173 (2009), this court considered an order similar to the order at issue in the present case. In *Utz*, the trial court ordered the defendant to pay the plaintiff, inter alia, $1 per year in alimony "until such time as the property settlement [entered by the court was] paid in full and the liens

and encumbrances on the [marital home], which the defendant is obligated to indemnify on account of [the property settlement was] paid in full and, or, released, or he exercises his option to purchase the residence and acreage." (Internal quotation marks omitted.) Id., 633 n.1. The trial court further stated that the order of $1 per year in alimony would be "modifiable to the extent necessary to ensure that the defendant satisfies all of his obligations under the property settlement, periodic alimony and lump sum alimony orders." (Internal quotation marks omitted.) Id. On appeal, the defendant argued that the court's order of $1 per year in nominal alimony was evidence of the court's knowledge that he would be unable to comply with the court's order. Id., 634–35. This court rejected the defendant's claim, concluding that the court acted within its discretion in entering the order. Id., 636.

As in *Utz*, we conclude that the court in the present case acted within its discretion in fashioning the award as it did. The court considered the restrictions in the plaintiff's retirement plan, which require that a future spouse of the plaintiff consent to the designation of the defendant as a survivor beneficiary. To account for this scenario, the court ordered nominal alimony of $1 per year to the defendant as security for the award.[11] The court did not retain jurisdiction to modify the property award in the future but, rather, issued an award of nominal alimony for the protection of the defendant. On the basis of our review of the record, we cannot conclude that the court abused its discretion in entering this order.

The judgment is affirmed.

In this opinion the other judges concurred.

[11] "Nominal alimony, commonly $1 per year, is typical when the court chooses to preserve for a future date the power to ascertain and to determine the appropriate amount of periodic alimony." *Utz* v. *Utz*, supra, 112 Conn. App. 633 n.1.

# STATE OF CONNECTICUT *v.* JOSE LUIS RODRIGUEZ (AC 40837)

Lavine, Moll and Bishop, Js.

*Syllabus*

Convicted of the crimes of public indecency, breach of the peace, improper use of a marker, registration or license, and illegal operation of a motor vehicle while his driver's license was under suspension, and of two counts of the crime of failure to appear in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he allegedly exposed his penis and appeared to be masturbating while at a diner. On appeal, he claimed, inter alia, that the trial court improperly admitted certain evidence of uncharged prior misconduct, which pertained to incidents in which he was arrested but not charged for exposing himself to a waitress at either a diner or restaurant. *Held*:

1. The defendant's claim that the trial court improperly admitted evidence of prior uncharged misconduct was not reviewable, the defendant having failed to preserve the claim by objecting to the court's admission of the uncharged misconduct evidence, and the court did not commit plain error by admitting the uncharged misconduct evidence, as the alleged error was not so obvious that it affected the fairness and integrity of and public confidence in the judicial proceedings.
2. The defendant's claim that he was entitled to plain error reversal because the trial court improperly instructed the jury on the uncharged misconduct evidence was unavailing; the defendant failed to file a request to charge or to object to the court's proposed instructions, and the jury instructions pertaining to the uncharged misconduct evidence did not rise to the level of egregiousness and harm that would warrant reversal under the plain error doctrine, as the uncharged misconduct evidence had been admitted without objection from the defendant and, thus, the court was required to instruct the jury as to how to consider that evidence, and the defendant failed to articulate in what precise respect the jury instructions at issue were flawed and caused harm.
3. The trial court did not abuse its discretion in denying the defendant's motion to sever the failure to appear counts from the other counts in the information; although the conduct for which the defendant was convicted could be perceived as deeply offensive, the crimes involved did not rise to the level of shocking so as to warrant severance, and even if the public indecency and breach of the peace charges shocked or aroused the passions of the jurors, any prejudice that might have resulted was ameliorated by the trial court's curative instructions, and the evidence was overwhelming as to all charges against the defendant.

Argued March 14—officially released August 27, 2019

*Procedural History*

Substitute information charging the defendant with the crimes of public indecency, breach of the peace, improper use of a marker, registration or license, and illegal operation of a motor vehicle while his driver's license was under suspension, and with two counts of failure to appear in the second degree, brought to the Superior Court in the judicial district of Danbury, geographical area number three, where the court, *Russo*, *J.*, denied the defendant's motion to sever the failure to appear charges; thereafter the matter was tried to a jury; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

*Conrad Ost Seifert*, assigned counsel, for the appellant (defendant).

*Jennifer F. Miller*, assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Deborah Mabbett*, senior assistant state's attorney, for the appellee (state).

*Opinion*

LAVINE, J. The defendant, Jose Luis Rodriguez, appeals from the judgment of conviction, rendered following a jury trial, of public indecency in violation of General Statutes § 53a-186 (a) (2), breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (5), improper use of a marker, registration, or license in violation of General Statutes § 14-147 (c), illegal operation of a motor vehicle while his driver's license was under suspension in violation of General Statutes § 14-215 (a), and two counts of failure to appear in the second degree in violation of General Statutes § 53a-173 (a) (1). The defendant claims on appeal that the court improperly (1) admitted evidence of uncharged misconduct, (2) instructed the jury on the uncharged misconduct evidence, and (3) denied his motion to sever the public indecency, breach of the

peace, and motor vehicle charges from the failure to appear charges. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts beyond a reasonable doubt. At 2 a.m. on September 14, 2006, a waitress at Blue Colony Diner (diner) in Newtown called the police because the defendant had exposed his penis and appeared to be masturbating. When police officers arrived at the diner, the waitress directed them to the table where the defendant was seated. Although the defendant told police that someone named "Steve" dropped him off at the diner, the police found a set of keys on his person that matched an Oldsmobile in the diner parking lot. The police ran the license plate on the Oldsmobile through their database system and discovered that it belonged to a different vehicle and was registered to another individual. The police also learned that the operator's license of the defendant had been suspended indefinitely.

The defendant was charged with public indecency, breach of the peace in the second degree, and motor vehicle violations. He failed to appear on May 2, 2007, and July 17, 2009, and was arrested and charged for both failures.

The public indecency, breach of the peace, and motor vehicle charges were consolidated with the failure to appear charges for trial. The defendant filed a motion to sever the failure to appear charges from the other charges; the motion was heard and denied by the court. Trial commenced on June 6, 2017. The defendant was convicted of all charges and sentenced to a total effective sentence of two years of imprisonment, execution suspended after one year and two days, and three years of probation. The defendant then appealed from the judgment of conviction.

I

The defendant first claims that the court improperly admitted evidence of three instances in which he was arrested but not charged for exposing himself to a waitress at either a diner or restaurant. The state argues that the defendant did not preserve this evidentiary claim. We agree with the state. Alternatively, the defendant claims that he is entitled to plain error reversal. We disagree.

At trial, the state offered evidence of the defendant's uncharged misconduct pursuant to § 4-5 (c) of the Connecticut Code of Evidence and argued that it was admissible to prove his intent to expose himself for sexual gratification, the lack of mistake or accident, motive, and a common plan or scheme involving a pattern of sexual behavior. The state also offered the uncharged misconduct under § 4-5 (b) of the Connecticut Code of Evidence to show propensity for sexual misconduct. The defendant's counsel did not object; in response to the state's proffer of uncharged misconduct evidence, he stated: "I would have to leave it to the court's discretion, in that regard . . . ."

"[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law not made at the trial. . . . In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of [the] objection, any appeal will be limited to the ground asserted. . . .

"These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning

error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush. . . . [A] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . . For this court to . . . consider [a] claim on the basis of a specific legal ground not raised during trial would amount to trial by ambuscade, unfair both to the [court] and to the opposing party. . . . Thus, because the sina qua non of preservation is fair notice to the trial court; see, e.g., *State* v. *Ross*, 269 Conn. 213, 335–36, 849 A.2d 648 (2004) (the essence of the preservation requirement is that *fair notice* be given to the trial court of the party's view of the governing law [emphasis in original]); the determination of whether a claim has been properly preserved will depend on a careful review of the record to ascertain whether the claim on appeal was articulated below with sufficient clarity to place the trial court on reasonable notice of that very same claim." (Citations omitted; internal quotation marks omitted.) *State* v. *Jorge P.*, 308 Conn. 740, 753–54, 66 A.3d 869 (2013).

The defendant argues on appeal that his counsel "somewhat ambiguously objected and, inter alia, stated that 'propensity evidence is, extremely, potent evidence.' " Leaving an evidentiary ruling to the court's judgment falls well short of making an objection. So does an observation about the potency of evidence. On the basis of our review of the record, we conclude the defendant did not object to the court's admission of the uncharged misconduct evidence at all, and certainly not with sufficient clarity so as to provide fair notice to the trial court. We therefore decline to review the defendant's claim.

The defendant further argues that even if his claim is unpreserved, he is entitled to plain error reversal on the ground that the uncharged misconduct evidence

was not otherwise admissible and the prejudicial impact of the evidence outweighed its probative value. We disagree.

"[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review." (Internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 76–77, 60 A.3d 271 (2013).

The trial court's admission of the uncharged misconduct evidence in this case does not warrant relief under the plain error doctrine because the alleged error is not so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. On the record, the court explained to counsel why it concluded that the uncharged misconduct evidence was admissible[1] and also addressed any possible prejudice by instructing the jury regarding the manner in which

[1] On June 6, 2017, the court explained to counsel: "The court has reviewed the state's notice of intent to offer evidence of uncharged misconduct and,

specifically, has reviewed the proffer attached to it of three separate incidences, one on May 21, 2006, one on March 9, 2005, and a third on June 17, 2009.

"And . . . the court, after reviewing those documents, arrives at the following ruling, with respect to the state's notice of intent to offer evidence of uncharged misconduct:

"The fact that such evidence tends to prove the commission of other crimes by an accused does not render it inadmissible, if it is otherwise relevant and material. That's from [*State* v. *Figueroa*, 235 Conn. 145, 665 A.2d 63 (1995)].

"Such evidence is admissible for other purposes such as to show intent, an element in the crime, identity, malice, motive or a system of criminal activity.

"Whether evidence of the uncharged misconduct is admissible is two-pronged.

"First, the evidence must be relevant and material to, at least, one of the circumstances encompassed by the exceptions to the rule.

"Second, the probative value of such evidence must outweigh the prejudice or affect of the other crimes evidence, and that's at [*State* v. *Figueroa*, supra, 235 Conn. 162].

"A review of [*State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008)] assists the court, with respect to the relevancy standard for this type of misconduct.

"[*State* v. *DeJesus*] holds as follows:

"Relevancy is established by satisfying the liberal standard, pursuant to which evidence previously was admitted under the common scheme or plan exception.

"Accordingly, evidence of uncharged misconduct is relevant to prove that the defendant had a propensity or a tendency to engage in the crime charged, only if it is one, not too remote in time; two, similar to the offense charged; and three, committed upon persons similar to the prosecuting witness.

"Under the first prong of the court's analysis the evidence of the three other public indecency incidences are relevant to the identity of the person who allegedly performed the public indecency incident, in connection with this trial, as well as the common plan or scheme.

"The first threshold for the use of evidence of other crimes or misconduct, on the issue of identity, is that the methods used are sufficiently unique to more—a reasonable inference that the person who performed one misdeed also did the other, so as to be the handiwork of the accused.

"A comparison of the three crimes sought to be introduced discloses the following similarities to the present crime: one, all three offenses, including this one, which would make it four, occurred at nighttime or early morning hours; in each instan[ce] the venue, including this one, was a diner or restaurant; three, in each instance the . . . indecency began from under a table, including the present case; four, in each instance the event began with a request for a beverage; five, in each instance the indecency was observed, when the waitress returned with a beverage; six, in each instance the waitress was a female; seven, in each instance the waitress was a younger rather than older employee; and, eight, each victim described the person performing the . . . indecent act, as a Hispanic male with similar features to that of the defendant. The same or similar identifiers are so common to one another that they do form a criminal logo, which justifies the inference that the individual who committed the first offense also committed the second and third and so on.

"Under these facts and circumstances this court concludes that the characteristics of the incidences offer[ed] by the state were sufficiently distinctive

it was allowed to consider the evidence.[2] We therefore reject the defendant's claim that the court committed plain error by admitting the uncharged misconduct evidence.

II

The defendant claims that he is entitled to plain error reversal for a second reason—that the court improperly instructed the jury on the uncharged misconduct evidence. We disagree.

The defendant concedes that he failed to file a request to charge or object to the court's proposed instructions and acknowledges waiver pursuant to *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011). The defendant argues, however, that he is nonetheless entitled to plain error reversal pursuant to *State* v. *McClain*, 324 Conn.

and unique to be like a signature, and, thus, the defendant's participation in those incidences are highly probative on the issue of the identity of a complainant's offender in this case, as well as the common plan or scheme and, therefore, outweigh any prejudicial effect of its admittance.

"However, the court will issue a . . . limiting instruction before the first witness is presented by the state and the court has gone over that instruction with the parties and the parties are satisfied with the instruction that the court is prepared to give."

[2] The court instructed the jury on June 6, 2017: "Ladies and gentlemen, the state is going to call a witness, who's going to testify to certain acts of . . . misconduct of the defendant. And, now, they're going to be offering that evidence through one, two or three separate witnesses, during this trial and I want to give you now a limiting instruction on how to use that type of evidence.

"That type of evidence is not being admitted to prove the bad character, propensity or criminal tendency of the defendant, it's being admitted solely to show or establish the identity of the person who committed the crime alleged, that the commission of the crimes may have followed a common plan or scheme or a system of criminal activity engaged in, by the defendant. You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity.

"Evidence of a prior offense, on its own, is not sufficient to prove the defendant guilty of the crimes charged in this information.

"Bear in mind, as you consider this evidence that, at all times, the state does have the burden of proving that the defendant committed each of the elements of the offenses charged, in the present case. And, I remind you that the defendant is not on trial for any act, conduct or offense not charged in the present information."

On June 7, 2017, the court gave substantially similar instructions to the jury on two separate occasions.

802, 815, 155 A.3d 209 (2017). We have reviewed the record and conclude that the defendant is not entitled to plain error reversal because the jury instructions pertaining to the uncharged misconduct evidence do not rise to the level of egregiousness and harm that would warrant reversal under 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 reverse the judgment would result in manifest injustice." (Emphasis omitted; internal quotation marks omitted.) Id., 812. The defendant's apparent claim, that no jury instructions were proper given that the uncharged misconduct evidence ought not to have been admitted, is misguided. The uncharged misconduct evidence was admitted without objection from the defendant, and, accordingly, the court was required to instruct the jury as to how to consider that evidence. Moreover, the defendant fails to articulate in what precise respect the jury instructions at issue were flawed and caused harm. We reject the defendant's claim for plain error reversal.

III

The defendant's third claim is that the trial court abused its discretion in denying his motion to sever the public indecency, breach of the peace, and motor vehicle charges from the failure to appear charges. We disagree.

"The principles that govern our review of a trial court's ruling on a motion for joinder or a motion for severance are well established. Practice Book § 41-19 provides that, [t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together. . . . In deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of

manifest abuse, an appellate court may not disturb. . . . The defendant bears a heavy burden of showing that [joinder] resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 543–44, 34 A.3d 370 (2012).

"The court's discretion regarding joinder . . . is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial. Consequently, we have identified several factors that a trial court should consider in deciding whether a severance may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Internal quotation marks omitted.) Id., 545. "[A]lthough a curative instruction is not inevitably sufficient to overcome the prejudicial impact of [inadmissible other crimes] evidence . . . where the likelihood of prejudice is not overwhelming, such curative instructions may tip the balance in favor of a finding that the defendant's right to a fair trial has been preserved." (Internal quotation marks omitted.) *State* v. *McKethan*, 184 Conn. App. 187, 198, 194 A.3d 293, cert. denied, 330 Conn. 931, 194 A.3d 779 (2018).

Prior to trial, the defendant filed a motion to sever the public indecency, breach of the peace, and motor vehicle charges from the failure to appear charges. In support of that motion, the defendant argued that if he were to testify as to the failure to appear charges, possible misconduct evidence may be used for impeachment purposes or used substantively with respect to

the public indecency charge. Therefore, the defendant asserted that a joinder of the charges would implicate his constitutional right to remain silent.

The trial court addressed the defendant's motion to sever under the three part analysis set forth in *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987). The court first determined that the charges against the defendant related to distinct factual scenarios and that the state would be able to present its evidence in an orderly manner. Second, it found that the crimes charged against the defendant were not of a violent, brutal or shocking nature, given that all charges brought against the defendant were misdemeanor charges. Third, it found that the trial would be short and "not terribly complex." The court concluded that all three factors weighed against severance and denied the motion to sever.

The court, however, expressed concern that if the jury learned that the failure to appear charges were associated with the date of trial for the public indecency and breach of the peace charges, the jury could infer a consciousness of guilt on the part of the defendant. It also was concerned that if the defendant were to testify as to certain charges but not others, the jury may infer an admission of guilt from the defendant's selective silence. The court thus gave curative instructions to the potential jurors prior to jury selection, on April 25, 2017, and before the start of evidence, on June 6, 2017, to address any possible prejudice caused by the consolidation of charges.[3]

[3] On April 25, 2017, the court instructed the potential jurors as follows: "[W]hen the state calls witnesses to elicit information, in other words, evidence, to support its allegation that [the defendant] failed to appear in court on two separate dates, those charges ha[ve] absolutely nothing to do with the other four charges alleged by the state, there is no connection whatsoever. You may be sitting there and asking yourself; well, then why are they included in this trial? The answer is; judicial economy. We're going to try them all together, but you must be certain, I can't express in strong enough terms, that the evidence presented to support the state's case for

On appeal, the defendant argues that "[t]he repulsive and shocking nature of the [public indecency and breach of the peace] crimes prejudiced [his] ability to receive a fair trial on the failure to appear charges." The defendant further argues that he chose to testify as to all charges, even though he wanted to testify only as to the failure to appear charges, because his silence would be damaging in the face of his express denial of the failure to appear charges. The defendant also argues that his right to remain silent was impermissibly burdened; however, he waived this constitutional claim by testifying as to all charges. More specifically, the defendant argues that the court erred in finding that the second *Boscarino* factor—whether the crimes were of a violent nature or concerned brutal or shocking conduct on his part—weighed against severance because his conduct in the diner was shocking. We disagree.

The defendant relies on *State* v. *Payne*, supra, 303 Conn. 538, for the standard of whether the crimes were of a violent nature or concerned brutal or shocking

possible failures to appear on [the defendant's] behalf have absolutely nothing to do and no connection with any allegations the state may have made on [the defendant] in count one, in count two, in count three, in count four.

"Therefore, there is the possibility that [the defendant] does not testify on his own behalf in connection with any of the six charges. Likewise, there's the possibility that [the defendant] may elect to testify on his own behalf, only with respect to some of the charges. Or, the possibility also exists that [the defendant] may elect to testify on his own behalf, with respect to all six charges. We don't know what his election will be yet, because the case has not [begun] yet. However, I must caution you; should [the defendant] testify on his own behalf, in connection with some of the charges, but not with respect to all of the charges, you are to draw absolutely no negative inference, but the fact that he's chosen to address and defend himself on some of the charges, but not all of the charges. He has a constitutional right not to testify and that remains with him throughout the entirety of this trial."

On June 6, 2017, the trial court again instructed the jury: "The defendant may or may not testify in this case. An accused person has the option to testify or not to testify at the trial. He is under no obligation to testify. He has a constitutional right not to testify. You must draw no unfavorable inference from the defendant's choice not to testify, if that is his election."

conduct on the defendant's part. In *Payne*, our Supreme Court concluded that the defendant's felony murder of a victim was significantly more brutal and shocking than an attempt to tamper with jurors and, therefore, weighed in favor of severance. Id., 552. In reaching that conclusion, our Supreme Court determined that "[w]hether one or more offenses involved brutal or shocking conduct likely to arouse the passions of the jurors must be ascertained by comparing the relative levels of violence used to perpetrate the offenses charged in each information." (Internal quotation marks omitted.) Id., 551.

In the present case, the public indecency and breach of the peace charges are not crimes of violence such as murder. Although the conduct for which the defendant was convicted could certainly be perceived as deeply offensive, none of the crimes rise to the level of "shocking" so as to warrant severance. See id., 551–52 (murder by shooting victim at close range was brutal and shocking as compared to jury tampering where no violence was involved); *State* v. *McKethan*, supra, 184 Conn. App. 197–98 (killing victim in middle of night in isolated location was brutal and shocking as compared to drug and firearm possession case where no violence was involved); contra *State* v. *LaFleur*, 307 Conn. 115, 160–61, 51 A.3d 1048 (2012) (assault by punching victim in face twenty to thirty times was not so shocking or brutal that another assault by punching victim once in face was compromised by joinder); *State* v. *Jennings*, 216 Conn. 647, 651–52, 659, 583 A.2d 915 (1990) (assault by cutting victim's neck with box cutter and punching, kicking, and throwing victim around parking lot, and assault by cutting victim's finger and arm with knife were not brutal and shocking because "[t]he physical harm that was inflicted on the victim, although serious, was not disabling, and the element of sexual derangement present in *Boscarino* was absent"); *State* v. *Santaniello*, 96 Conn. App. 646, 657, 902 A.2d 1 (charges of

sexual assault and attempted murder were not so brutal or shocking that they would inflame passions of jury given that victim was not child and details of crimes were not so brutal and shocking as to "impair the jury's ability to consider the charges set forth in the informations in a fair manner"), cert. denied, 280 Conn. 920, 908 A.2d 545 (2006); *State* v. *Smith*, 88 Conn. App. 275, 279, 869 A.2d 258 (robberies in which defendant threatened use of force by implying that he had firearm were not particularly brutal or shocking), cert. denied, 273 Conn. 940, 875 A.2d 45 (2005). Even if the public indecency and breach of the peace charges shocked or aroused the passions of the jurors, any prejudice that might have resulted was ameliorated by the trial court's curative instructions.[4] Further, the evidence was overwhelming as to all charges against the defendant. We conclude, therefore, that the court did not abuse its discretion by denying the defendant's motion to sever.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* REGGIE BATTLE (AC 40578)

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

*Syllabus*

The defendant, who had been convicted of carrying a pistol without a permit, criminal trespass and violation of probation, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. In November, 2005, the defendant had been sentenced to twenty years of incarceration, execution suspended after nine years, and five years of probation, in connection with a guilty plea to conspiracy to commit assault in the first degree and his admission to violating his probation. In January, 2014, he admitted to a violation of probation and pleaded guilty to various crimes regarding the carrying and possession of a pistol. The trial court sentenced him to five years of incarceration and six years of special parole, and revoked his probation. Thereafter,

[4] See footnote 3 of this opinion.

the defendant filed a motion to correct an illegal sentence, which the trial court dismissed. Although the trial court concluded that the defendant's claim did not fall within the ambit of the rule of practice (§ 43-22) governing motions to correct an illegal sentence, it proceeded to consider and reject the merits of the defendant's motion, and concluded that a sentence that included a period of special parole was authorized by our statutes and case law. On appeal to this court, the defendant claimed that the trial court improperly dismissed his motion to correct an illegal sentence. *Held*:

1. The trial court improperly determined that it lacked jurisdiction to consider the defendant's motion to correct an illegal sentence and dismissed the motion, in which the defendant alleged that special parole cannot be imposed following a violation of probation; because the defendant challenged the sentence imposed, rather than the events leading to his conviction, he set forth a colorable claim regarding the legality of the sentence imposed for violation of his probation, and the trial court, therefore, had jurisdiction to consider the merits of the defendant's motion.
2. The defendant could not prevail on his claim that the imposition of special parole, following a determination that he had violated his probation, constituted an illegal sentence: the statute governing violation of probation (§ 53a-32 [d] [4]) specifically authorizes the trial court to revoke a sentence of probation and, in the event that the probation has been revoked, provides that the court shall require the defendant to serve the sentence imposed or impose any lesser sentence, and the defendant's sentence in 2014, including the use of special parole, fell within the "any lesser sentence" language of § 53a-32 (d); accordingly, the use of special parole following a finding of a violation of probation is authorized by § 53a-32, and the imposition of special parole did not result in an illegal sentence.
3. The defendant could not prevail on his unpreserved claim that he was denied due process of law when his motion to correct an illegal sentence was not acted on by the specific judge who had sentenced him; the defendant cited no appellate authority holding that a motion to correct an illegal sentence or a sentence imposed in an illegal manner must be heard and adjudicated by the particular judge who imposed the sentence, the case law cited by the defendant, at most, suggested that the sentencing judge may be the judicial authority who entertains such a motion, and because there was nothing that suggested that the defendant was deprived of a full and fair proceeding with regard to the motion to correct and the defendant did not suffer a due process violation, his unpreserved claim failed under the third prong of *State* v. *Golding* (213 Conn. 233).

Argued March 11—officially released August 27, 2019

*Procedural History*

Information charging the defendant with the crimes of carrying a pistol without a permit and criminal pos-

session of a pistol, and with violation of probation, brought to the Superior Court in the judicial district of Hartford, where the defendant was presented to the court, *Alexander*, *J.*, on a plea of guilty; judgment of guilty in accordance with plea; thereafter, the court, *Dewey*, *J.*, dismissed the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment; judgment directed.*

*Temmy Ann Miller*, with whom were *Aimee Lynn Mahon* and, on the brief, *Nicholas A. Marolda*, for the appellant (defendant).

*Mitchell S. Brody*, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Elizabeth Tanaka*, former assistant state's attorney, for the appellee (state).

*Opinion*

DiPENTIMA, C. J. The defendant, Reggie Battle, appeals from the judgment of the trial court dismissing his motion to correct an illegal sentence. On appeal, the defendant claims that (1) the court improperly concluded that it lacked jurisdiction to consider his motion to correct an illegal sentence, (2) the court improperly concluded that the use of special parole following the finding of a probation violation did not constitute an illegal sentence and (3) he was denied due process of law when his motion to correct an illegal sentence was not acted upon by the judge who had sentenced him. We conclude that the trial court had jurisdiction to consider the defendant's motion to correct an illegal sentence but are not persuaded by his second and third claims. Accordingly, the form of the judgment is improper, and we reverse the judgment dismissing the defendant's motion to correct an illegal sentence and remand the case with direction to render judgment denying the defendant's motion.

The following facts and procedural history are relevant to this appeal. On November 7, 2005, the defendant

appeared before the court, *Miano*, *J.*, and pleaded guilty to conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (1) and admitted a violation of probation pursuant to General Statutes § 53a-32. After hearing the prosecutor's recitation of the facts[1] and conducting a plea canvass, the court accepted the defendant's guilty plea and admission. The defendant waived a presentence investigation report, and the court sentenced him in accordance with the parties' agreement. Specifically, the court sentenced the defendant to twenty years incarceration, execution suspended after nine years, and five years of probation[2] for the conspiracy to commit assault in the first degree charge. The court also terminated the defendant's probation.[3]

On January 13, 2014, the defendant appeared before the court, *Alexander*, *J.*, and admitted a violation of probation, pursuant to § 53a-32, and pleaded guilty to carrying a pistol without a permit in violation of General Statutes § 29-35 (a) and criminal possession of a pistol in violation of § 53a-217c. The prosecutor set forth the

[1] The prosecutor made the following statement at the hearing: "The factual basis for the conspiracy to commit assault in the first degree, [the defendant and Bryon Taylor] along with a Lionel Gardner on November 18, 2004, got into an altercation, a verbal altercation with a William Hardy at the Westfarms Mall. These three gentlemen then chased Mr. Hardy on the highway, Mr. Hardy got off of the highway, both [the defendant] and Mr. Taylor fired shots at Mr. Hardy's car, one of them struck the car.

"They were subsequently—this car that Mr. Gardner was driving with these two defendants in it, was subsequently stopped by the Farmington Police and these two were captured right there. A short time later Mr. Gardner was captured. They found guns in their car, the casings that were found in the area where the shots were fired were, in fact, fired from those guns that they took out of the cars. . . .

"With respect to [the defendant's] violation of probation, on March 26 of 2003 . . . Judge Ward convicted him of larceny in the fourth degree, his sentence was one year suspended, two years probation."

[2] The court ordered, as a condition of probation, that the defendant not possess any handguns, firearms or long guns.

[3] The prosecutor nolled two other charges pending against the defendant.

underlying facts[4] and, following a canvass, the court accepted the defendant's guilty plea and admission. The court then sentenced the defendant as follows: "[The] court will impose the agreement as indicated. On the violation of probation, it is ordered revoked; five years to serve, six years of special parole. On the charge of [carrying a] pistol without [a] permit, it is the sentence of the court that you receive five years to serve, which will run concurrent with the previous sentence. On the charge of criminal possession of a firearm, five years to serve, also concurrent."

On April 7, 2016, the self-represented defendant filed a motion to correct an illegal sentence pursuant to Practice Book § 43-22.[5] On November 1, 2016, the defendant, then represented by counsel, filed an amended motion to correct, arguing that General Statutes § 54-125e expressly limits the use of special parole to those

[4] Specifically, the prosecutor stated: "[T]he defendant was sentenced on November 7, 2005, on a conspiracy [to commit] assault in the first degree to twenty years suspended after nine years, five years of probation. He began his probation on December 26, 2012, and he was arrested for the gun case on September 1, 2013. . . . He was arrested at 2:30 in the morning. Police had received a tip from a confidential informant giving a lengthy description of an individual carrying a gun in his waistband. They went to the area where the confidential informant said he would be. They saw this defendant acting—matching the description and acting in a way that made them believe that he was carrying a weapon.

"He was near the inside of Paul's Ranch House and they had some concerns about people inside the business, and they asked him, for the safety of the others, whether or not he was in possession of a firearm without a permit—without a firearm basically, and he said he was and he explained to them, the police officers, you know it's crazy out here, which is kind of ironic since his original conviction was for shooting out of a car.

"And they patted him down and found a Smith & Wesson 9 mm with eleven live rounds in it. They did a search and found out he did not have a permit for it, and since he is a convicted felon from his prior felony he was—should not have been in possession of this weapon either . . . ."

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

convicted of a crime and that a violation of probation is not a crime. Accordingly, the defendant claimed that his sentence was illegal. On December 23, 2016, the state filed an objection to the defendant's amended motion to correct.

On March 16, 2017, the court, *Dewey*, *J.*, issued a memorandum of decision dismissing the defendant's motion to correct an illegal sentence. Although the court concluded that the defendant's claim did not fall within the ambit of Practice Book § 43-22, it proceeded to consider, and reject, the merits of his motion. Specifically, the court reasoned that, in connection with disposing of a charge of violation of probation, a sentence that includes a period of special parole was authorized by the General Statutes and our case law. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly concluded that it lacked jurisdiction to consider his motion to correct an illegal sentence. Specifically, he argues that his claim that a sentence of special parole on a violation of probation was not permitted under our statutes fell within the limited jurisdiction authorized for a motion to correct an illegal sentence. We agree with the defendant.

This claim presents a question of law subject to the plenary standard of review. *State* v. *Mukhtaar*, 189 Conn. App. 144, 148, 207 A.3d 29 (2019). It requires us to "consider whether the defendant has raised a colorable claim within the scope of Practice Book § 43-22 that would, if the merits of the claim were reached and decided in the defendant's favor, require correction of a sentence. . . . In the absence of a colorable claim requiring correction, the trial court has no jurisdiction to modify the sentence. . . . A colorable claim is one that is superficially well founded but that may ultimately

be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he might prevail. . . . The jurisdictional and merits inquiries are separate; whether the defendant ultimately succeeds on the merits of his claim does not affect the trial court's jurisdiction to hear it." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 783–84, 189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

"[Our Supreme Court] has held that the jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act. . . . Practice Book § 43-22, which provides the trial court with such authority, provides that [t]he judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner. An illegal sentence is essentially one which either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . We previously have noted that a defendant may challenge his or her criminal sentence on the ground that it is illegal by raising the issue on direct appeal or by filing a motion pursuant to § 43-22 with the judicial authority, namely, the trial court." (Citations omitted; internal quotation marks omitted.) *State* v. *Tabone*, 279 Conn. 527, 533–34, 902 A.2d 1058 (2006); see also *State* v. *Evans*, supra, 329 Conn. 778. Simply stated, "a challenge to the legality of a sentence focuses not on what transpired during the trial or on the underlying conviction. In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence

has been executed, the sentencing proceeding, and not the trial leading to the conviction, must be the subject of the attack." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Evans*, supra, 779.

The defendant argued in his motion to correct an illegal sentence that special parole cannot be imposed following a violation of probation. Specifically, he contended that the text of § 54-125e establishes that special parole may be imposed only for the conviction of a crime and that a violation of probation hearing is not a stage of a criminal prosecution. Further, he claimed that § 53a-32 (d), which sets forth the court's options following a finding of a probation violation, does not include special parole. In other words, the defendant challenged the sentence imposed, rather than the events leading to his conviction. Because the defendant set forth a colorable claim regarding the legality of the sentence imposed for violating his probation, the trial court had jurisdiction to consider the merits of the defendant's motion. We conclude, therefore, that the court improperly dismissed the motion to correct an illegal sentence filed by the defendant.

II

Having concluded that the court had jurisdiction to decide the defendant's claim, we turn to the defendant's contention that the imposition of special parole, following the determination that he had violated his probation, constituted an illegal sentence. Specifically, he argues that the use of special parole is not authorized by § 53a-32 (d) (4) under the facts of this case. We are not persuaded by the defendant's restrictive interpretation of the relevant statutes and principles relating to sentencing in probation violation proceedings. Accordingly, we disagree with the defendant's claim.[6]

[6] We note that "[o]nce the [trial] court found that it lacked subject matter jurisdiction, any ruling on the merits of the defendant's motion was improper." *State* v. *Abraham*, 152 Conn. App. 709, 724, 99 A.3d 1258 (2014). Nevertheless, "[i]f the record . . . was adequate for review of the court's

In the court's decision, it reviewed the relevant statutes, namely, General Statutes §§ 53a-28 and 53a-32 (d). Next, it observed that "[t]he provisions relating to alternatives to incarceration, special parole and probation, must be read in harmony." The court further stated that "[i]n *State* v. *Santos T.*, 146 Conn. App. 532, 535–36, 77 A.3d 931, [cert. denied, 310 Conn. 965, 83 A.3d 345] (2013), the Connecticut Appellate Court implicitly recognized a trial court's authority to impose a term of special parole after a parole violation hearing and sentencing."[7] Finally, it reasoned that the dispositional phase of a probation revocation proceeding, in substance, generally is indistinguishable from that following a conviction and that our law affords the same discretion to the court in both instances. Ultimately, the court rejected the defendant's argument that the imposition of special parole following a finding of a probation violation constituted an illegal sentence.

On appeal, the defendant maintains that the imposition of special parole following the determination of a probation violation is not authorized by § 53a-32 and, therefore, constitutes an illegal sentence. He argues that § 53a-32 does not include specifically special parole and that its omission cannot be rectified by judicial

ruling, or if our determination as to the propriety of [the trial court's] ruling was solely dependent on our resolution of an issue of law, we could, in the interest of judicial economy, consider the ruling at a party's request or sua sponte after determining that our review would not prejudice the defendant and the appellee was entitled as a matter of law to a ruling in its favor." Id., 724–25. Here, the record is adequate for our review, the court's determination that the imposition of special parole did not constitute an illegal sentence involves a question of law, the state is entitled as a matter of law to a ruling in its favor, and the defendant will not be prejudiced by our review. We also note that both parties addressed the issues in their briefs. Accordingly, we proceed to review the court's ruling on the merits of the defendant's motion.

[7] In *State* v. *Santos T.*, supra, 146 Conn. App. 533–34, the defendant did not challenge the propriety of the imposition of special parole following a finding of a probation violation.

interpretation, but rather only by legislative action. After consideration of the relevant statutes and case law, we disagree with the defendant's view of § 53a-32.

The defendant's claim requires us to engage in statutory construction. "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . 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 . . . . 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. . . . Issues of statutory construction raise questions of law, over which we exercise plenary review." (Citation omitted; internal quotation marks omitted.) *State* v. *Hearl*, 182 Conn. App. 237, 252, 190 A.3d 42, cert. denied, 330 Conn. 903, 192 A.3d 425 (2018). "Included in the threshold inquiry are our prior interpretations of the statutory language, which we have stated are encompassed in the term 'text' as used in § 1-2z. See *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 497–99, 923 A.2d 657 (2007)." *State* v. *Daniel B.*, 331 Conn. 1, 13, 201 A.3d 989 (2019); see also *State* v. *Boyd*, 272 Conn. 72, 78, 861 A.2d 1155 (2004) (relevant legislation and precedent guide process of statutory interpretation).

We begin with the relevant statutory language. Section 53a-32 (d) provides: "If [a violation of probation] is established, the court may: (1) Continue the sentence of probation or conditional discharge; (2) modify or

enlarge the conditions of probation or conditional discharge; (3) extend the period of probation or conditional discharge, provided the original period with any extensions shall not exceed the periods authorized by section 53a-29; or (4) revoke the sentence of probation or conditional discharge. *If such sentence is revoked*, the court shall require the defendant to serve the sentence imposed or *impose any lesser sentence.* Any such lesser sentence may include a term of imprisonment, all or a portion of which may be suspended entirely or after a period set by the court, followed by a period of probation with such conditions as the court may establish. No such revocation shall be ordered, except upon consideration of the whole record and unless such violation is established by the introduction of reliable and probative evidence and by a preponderance of the evidence." (Emphasis added.)

Section 53a-32 is a part of a larger statutory framework applicable to sentences and sentencing procedure. Our Supreme Court has recognized "that our rather intricate sentencing scheme is not always a model of clarity and that sometimes it is difficult to ascertain the rationale underlying all of its components. Nevertheless, it is our duty to seek to reconcile that scheme into a coherent system, in a manner that effectuates, to the greatest extent possible, the legislative intent behind the scheme." *State* v. *Victor O.*, 320 Conn. 239, 259, 128 A.3d 940 (2016); see also *State* v. *Ferdinand R.*, 132 Conn. App. 594, 600, 33 A.3d 793 (2011) ("When we interpret statutory text, the legislature, in amending or enacting statutes, always [is] presumed to have created a harmonious and consistent body of law . . . . Thus, we are required to read statutes together when they [are] related to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure

the coherency of our construction" [internal quotation marks omitted]), aff'd, 310 Conn. 686, 82 A.3d 599 (2013); see generally *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 552, 46 A.3d 112 (2012). We, therefore, also must consider § 53a-28,[8] which provides the authorized sentencing options for those convicted of an offense, which include imprisonment, probation, conditional discharge and special parole as provided under § 54-125e.[9]

A brief summary of the history of special parole is informative. "[I]n 1998, [t]he legislature created the concept of special parole as a new sentencing option . . . by enacting § 54-125e. . . . The legislative history surrounding § 54-125e indicates that it was intended to operate as a sentencing option in cases [in which] the judge wanted additional supervision of a defendant after the completion of his prison sentence. Michael Mullen, the chairman of the Connecticut [B]oard of

[8] General Statutes § 53a-28 provides in relevant part: "(a) . . . [E]very person convicted of an offense shall be sentenced in accordance with this title.

"(b) Except as provided in section 53a-46a, when a person is convicted of an offense, the court shall impose one of the following sentences: (1) A term of imprisonment; or (2) a sentence authorized by section 18-65a or 18-73; or (3) a fine; or (4) a term of imprisonment and a fine; or (5) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a period of probation or a period of conditional discharge; or (6) a term of imprisonment, with the execution of such sentence of imprisonment suspended, entirely or after a period set by the court, and a fine and a period of probation or a period of conditional discharge; or (7) a fine and a sentence authorized by section 18-65a or 18-73; or (8) a sentence of unconditional discharge; or (9) a term of imprisonment and a period of special parole as provided in section 54-125e, except that the court may not impose a period of special parole for convictions of offenses under chapter 420b."

[9] General Statutes § 54-125e (a) provides in relevant part: "Any person convicted of a crime committed on or after October 1, 1998, who received a definite sentence of more than two years followed by a period of special parole shall, at the expiration of the maximum term or terms of imprisonment imposed by the court, be automatically transferred to the jurisdiction of the chairperson of the Board of Pardons and Paroles . . . ."

[P]arole, testified before the [J]udiciary [C]ommittee and described special parole as a sentencing option [that] ensures intense supervision of convicted felons after they're released to the community and allows the imposition of parole stipulations on . . . released inmate[s] to ensure their successful incremental [reentry] into society or if they violate their stipulations, speedy [reincarceration] before they commit [other] crime[s]. . . .

"At the same time that it enacted § 54-125e, the legislature amended § 54-128 to provide that a sentence consisting of a term of imprisonment followed by a period of special parole shall not exceed the maximum sentence of incarceration authorized for the offense for which the person was convicted. . . . [T]he legislature, in enacting § 54-125e intended to permit the imposition of special parole as a sentencing option [that] ensures intense supervision of convicted felons after [they are] released to the community and allows the imposition of parole stipulations on the released inmate. At the same time, the legislature intended to prevent the trial court from sentencing a defendant to a term of imprisonment and to a period of special parole, the total combined length of which exceeds the maximum sentence of imprisonment for the offense [of] which the defendant was convicted. . . . It is clear, therefore, that the legislature intended that special parole, as a form of supervised release, should be available to trial courts, provided that its imposition, in combination with a term of incarceration, does not exceed the maximum statutory period of incarceration permitted by law." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Victor O.*, supra, 320 Conn. 252–53.

Our Supreme Court has explained the difference between probation and special parole. "Pursuant to § 54-128 (c), when a defendant violates special parole,

he is subject to incarceration only for a period equal to the unexpired portion of the period of special parole. Thus, for a violation that occurs on the final day of the defendant's special parole term, the defendant would be exposed to one day of incarceration. *Special parole, therefore, exposes a defendant to a decreasing period of incarceration as the term of special parole is served.* On the other hand, when a defendant violates his probation, the court may revoke his probation, and if revoked, the court shall require the defendant to serve the sentence imposed or impose any lesser sentence. General Statutes (Rev. to 1999) § 53a-32 (b) (4). Accordingly, if the defendant in the present case were to violate his probation on the final day of his ten year term, he would be exposed to the full suspended sentence of ten years incarceration. Thus, in contrast to a term of special parole, the defendant is exposed to incarceration for the full length of the suspended sentence, with no decrease in exposure as the probationary period is served, for the entirety of the probationary period." (Emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Tabone*, 292 Conn. 417, 429, 973 A.2d 74 (2009).

The defendant argues that because § 53a-32 (d) does not mention special parole specifically, it therefore prohibits its imposition following the revocation of probation. We disagree with the defendant's contention.

As noted by the trial court, § 53a-28 (d) provides in relevant part that "[*a*] *sentence to a period of probation . . . shall be deemed a revocable disposition, in that such sentence shall be tentative to the extent that it may be altered or revoked in accordance with said sections* but for all other purposes it shall be deemed to be a final judgment of conviction." (Emphasis added.) Section 53a-32 (d) (4) specifically authorizes the court to revoke the sentence of probation. In the event that the probation has been revoked, the court shall require

the defendant to serve the sentence imposed or impose any lesser sentence. Id.

As noted by our Supreme Court in *State* v. *Tabone*, supra, 292 Conn. 429, special parole, as distinct from probation, exposes a defendant to a decreasing period of incarceration as the term of special parole is served. In the present case, the defendant, in November, 2005, was sentenced to twenty years of incarceration, execution suspended after nine years, and five years of probation. Following his release from custody, he faced the possibility of eleven years of incarceration in the event he violated his probation. In 2014, the court concluded that he had violated his probation and had the option of imposing a sentence of up to eleven years of incarceration. Instead, the court imposed a sentence of five years of incarceration and six years of special parole. The 2014 sentence, including the use of special parole, falls within the "any lesser sentence" language of § 53a-32 (d). Accordingly, we are persuaded that the use of special parole following a finding of a violation of probation is authorized by § 53a-32. For these reasons, we conclude that, in the present case, the imposition of special parole did not result in an illegal sentence.

III

Finally, the defendant claims that he was denied due process of law when his motion to correct an illegal sentence was not acted upon by the specific judge who had sentenced him. Specifically, he argues that Judge Alexander, who found that the defendant had violated his probation and sentenced him to a period of special parole, should have acted upon the motion to correct instead of Judge Dewey because "the sentencing court . . . was in a better position to evaluate the merits of the defendant's claims in his motion to correct." According to the defendant, the failure to refer the motion to correct to Judge Alexander constituted a violation of his right to due process. We are not persuaded.

As previously noted, Judge Miano sentenced the defendant following his conviction in 2005. Subsequent to his release from custody, Judge Alexander found, in 2014, that the defendant had violated his probation, and sentenced him, inter alia, to a period of special parole. The defendant filed an amended motion to correct on November 1, 2016. On January 17, 2017, Judge Dewey conducted a hearing[10] on the defendant's motion to correct an illegal sentence and issued a memorandum of decision on March 16, 2017.

The defendant did not raise his due process claim[11] in his motion to correct an illegal sentence or at the January 17, 2017 hearing. Accordingly, he requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).[12] We agree with

[10] At the outset of the January 17, 2017 hearing, the following colloquy occurred:

"[Defense Counsel]: Prior to the commencement of argument on this case, the state and I have had some discussions with respect to a resolution of this case, and I know we brought this to the court's attention on a prior occasion. And just for the benefit of [the defendant], Judge Alexander had indicated to me that she would be conferring with the court concerning this, I don't know if that's taken place, but, for the record, [the defendant] is—desires of taking advantage of the offer that the state has conveyed.

"The Court: The difficulty is if the position of the parties is that it's an illegal sentence I can't accept the offer that was made. I did discuss it with Judge Alexander; she's not inclined.

"[Defense Counsel]: All right. Very well."

The defendant argues that this situation could have been avoided if Judge Alexander had been assigned to hear and decided the defendant's motion to correct. Assuming, arguendo, that to be true, the defendant nevertheless failed to establish a due process violation.

[11] In his appellate brief, the defendant has not raised or briefed any claims pursuant to the state constitution. Accordingly, we treat his claim as limited to the federal constitution. See, e.g., *State* v. *Delgado*, 323 Conn. 801, 805 n.4, 151 A.3d 345 (2016).

[12] "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (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

the defendant that the record is adequate and that his claim is of constitutional magnitude, and therefore his claim is reviewable pursuant to the *Golding* doctrine. *State* v. *Jerrell R.*, 187 Conn. App. 537, 543, 202 A.3d 1044 (first two *Golding* prongs address reviewability of claim while last two pertain to merits of claim), cert. denied, 331 Conn. 918, 204 A.3d 1160 (2019); see also *State* v. *Ayala*, 183 Conn. App. 590, 594, 193 A.3d 710 (2018).[13]

"We begin by noting that [b]ecause the claim presents an issue of law, our review is plenary." (Internal quotation marks omitted.) *State* v. *Culver*, 97 Conn. App. 332, 336, 904 A.2d 283, cert. denied, 280 Conn. 935, 909 A.2d 961 (2006). "Due process requires a fair hearing before a fair tribunal . . . ." *Petrowski* v. *Norwich Free Academy*, 199 Conn. 231, 235, 506 A.2d 139, appeal dismissed,

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. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; internal quotation marks omitted.) *State* v. *Washington*, 186 Conn. App. 176, 193, 199 A.3d 44 (2018), cert. denied, 330 Conn. 958, 198 A.3d 585 (2019).

[13] The defendant also argues that we should conclude that the fact that Judge Dewey, rather than Judge Alexander, decided the motion to correct an illegal sentence constituted plain error. Practice Book § 60-5 provides in relevant part: "The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court."

We disagree with the defendant that this issue rises to the level of plain error. "[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 reverse the judgment would result in manifest injustice."

479 U.S. 802, 107 S. Ct. 42, 93 L. Ed. 2d 5 (1986). "[D]ue process . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." (Internal quotation marks omitted.) *Merchant* v. *State Ethics Commission*, 53 Conn. App. 808, 826, 733 A.2d 287 (1999).

Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." We note that the predecessor to § 43-22, Practice Book (1982) § 935, provided in relevant part: "The judicial authority *who sentenced the defendant* may, within ninety days, correct an illegal sentence . . . or . . . a sentence imposed in an illegal manner . . . ." (Emphasis added.) The rule was amended in 1982 to its present form, which does not limit the "judicial authority" empowered to correct an illegal sentence or a sentence imposed in an illegal manner to the sentencing court.[14]

The defendant has cited no appellate authority, and we are aware of none, holding that a defendant's motion to correct an illegal sentence or a sentence imposed in an illegal manner *must* be heard and adjudicated by the particular judge who imposed the sentence. The defendant relies on a number of cases to support his assertion that Judge Alexander, as the sentencing judge, was the only judicial authority permitted to consider

(Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017).

[14] The defendant argues that "[t]he Supreme Court, in *State* v. *Pina*, 185 Conn. 473, 481–82, [440 A.2d 962] (1981), interpreted 'the judicial authority' in the predecessor to Practice Book § 43-22, to mean 'the sentencing court.' " We emphasize that *Pina* was published prior to the passage of the 1982 amendment to the Practice Book § 43-22, and, thus, does not support the defendant's contention that a motion to correct must be decided by the particular sentencing judge.

the motion to correct. See *State* v. *Francis*, 322 Conn. 247, 259–60, 140 A.3d 927 (2016) (stating that motion to correct illegal sentence "is directed to the sentencing court, which can entertain and resolve the challenge most expediently" [internal quotation marks omitted]), citing *State* v. *Casiano*, 282 Conn. 614, 624–25, 922 A.2d 1065 (2007); *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 39, 779 A.2d 80 (2001) (concluding that direct appeal or motion to correct illegal sentence is proper means to challenge illegal sentence, rather than raising challenge for first time in petition for writ of habeas corpus, and observing that "to correct an illegal sentence, only the trial court can: reconstruct the sentence to conform to *its original intent* or the plea agreement; eliminate a sentence previously imposed for a vacated conviction; or resentence a defendant if it is determined that the original sentence was illegal" [emphasis added]); *State* v. *Raucci*, 21 Conn. App. 557, 558, 565, 575 A.2d 234 (affirming judgment rendered by sentencing court reimposing sentence after granting defendant's motion to correct illegal sentence), cert. denied, 215 Conn. 817, 576 A.2d 546 (1990). None of the cases cited by the defendant establishes that the sentencing judge *must* adjudicate a motion to correct an illegal sentence or a sentence imposed in an illegal manner; at most, the cases suggest that the sentencing judge *may* be the judicial authority who entertains such a motion.[15]

Due process does not mandate that a motion to correct an illegal sentence or a sentence imposed in an illegal manner be heard by the judge whom the defendant prefers or who has the greatest familiarity with the defendant. "Due process seeks to assure a defendant

[15] In his dissenting opinion in *State* v. *McGee*, 175 Conn. App. 566, 597 n.11, 168 A.3d 495 (*Bishop*, *J.*, dissenting), cert. denied, 327 Conn. 970, 173 A.3d 953 (2017), Judge Bishop observed that, in only one of fifteen cases that were selected at random for a survey, the judge who had heard and adjudicated a motion to correct an illegal sentence was the original sentencing judge.

a fair trial, not a perfect one." (Internal quotation marks omitted.) *State* v. *Boutilier*, 144 Conn. App. 867, 877 n.4, 73 A.3d 880, cert. denied, 310 Conn. 925, 77 A.3d 139 (2013). There is nothing before us that suggests that the defendant was deprived of a full and fair proceeding with regard to the motion to correct as a result of Judge Dewey, rather than Judge Alexander, adjudicating the motion to correct.

In sum, we conclude that the defendant did not suffer a due process violation when Judge Dewey, rather than Judge Alexander, heard and ruled on the motion to correct. Accordingly, the defendant's claim fails under the third prong of *Golding*.

The form of the judgment is improper, the judgment dismissing the defendant's motion to correct an illegal sentence is reversed, and the case is remanded with direction to render judgment denying the defendant's motion.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* KENYA BROWN (AC 41845)

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

*Syllabus*

The defendant, who had been convicted, on pleas of guilty, of the crimes of assault in the second degree and threatening in the first degree, appealed to this court from the judgment of the trial court denying his motion to correct an illegal sentence. In 2006, the defendant had pleaded guilty to assault in the second degree and was sentenced to eighteen months of imprisonment to run consecutively to a sentence he was serving for a 2003 conviction. In 2012, the defendant pleaded guilty to threatening in the first degree and was sentenced to fifteen months of imprisonment to run consecutively to his sentences for the 2003 and 2006 convictions. His motion to correct an illegal sentence challenged the sentences from his 2006 and 2012 convictions. On appeal, the defendant claimed that the statutes governing concurrent and consecutive sentences (§ 53a-37) and addressing the method of calculation of sentences (§ 53a-38) were ambiguous and contradictory in violation of his constitutional rights. *Held:*

1. The defendant's claim that §§ 53a-37 and 53a-38 (b) were ambiguous and contradictory was unavailing: § 53a-37 clearly and unambiguously provides that, where a person is subject to an undischarged term of imprisonment and is sentenced to an additional term of imprisonment, the sentences imposed by the court shall run either concurrently or consecutively, as the court directs at the time of sentence, and § 53a-38 (b), which governs the calculation of terms of imprisonment, provides an unambiguous method of calculation to determine the total duration of terms of imprisonment for concurrent and consecutive sentences, and, therefore, §§ 53a-37 and 53a-38 were neither ambiguous nor contradictory as applied to the defendant's sentence; moreover, the court lacked jurisdiction to adjudicate the defendant's claim that his aggregated sentence was illegal because policy changes by the Department of Correction regarding the calculation and structure of prison sentences negatively impacted his ability to seek or obtain an early release, as the defendant did not attack the legality of the sentence imposed by the court during the sentencing proceeding but, rather, the legality of his sentence as subsequently calculated by the department, and for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding itself must be the subject of the attack; accordingly, the court should have dismissed, rather than denied, that portion of the defendant's motion to correct.
2. The defendant could not prevail in his claim that § 53a-38 violated his constitutional rights to due process, to be free from double jeopardy, and to equal protection: the defendant's claim that his right to due process was violated because the aggregation of his sentences negatively impacted his eligibility for parole and risk reduction credits was not cognizable under a motion to correct an illegal sentence, and because the defendant did not receive multiple punishments for the same offense but, rather, received distinct sentences for separate offenses, his claim that the aggregation of his consecutive sentences adversely affected his eligibility for parole and risk reduction credits did not fall within the ambit of double jeopardy; moreover, the defendant's claim that § 53a-38 (b) (2) violated his right to equal protection was unavailing, as our Supreme Court has expressly stated that prisoners do not constitute a suspect class, and § 53a-38 (b) (2), which contains a plausible policy reason for the classification, meets the rational basis threshold.

Argued April 23—officially released August 27, 2019

*Procedural History*

Substitute information in the first case, charging the defendant with the crime of assault in the second degree, and two-part substitute information, in the second case, charging the defendant with the crime of

threatening in the first degree, brought to the Superior Court in the judicial district of Danbury, where the defendant was presented to the court, *Marano*, *J.*, on a plea of guilty as to the crime of assault in the second degree; judgment of guilty in accordance with the plea; thereafter, the defendant was presented to the court, *Blawie*, *J.*, on a plea of guilty as to the crime of threatening in the first degree; judgment of guilty in accordance with the plea; subsequently, the court, *Welch*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Improper form of judgment; affirmed in part; judgment directed in part.*

*Kenya O. Brown*, self-represented, the appellant (defendant).

*Bruce R. Lockwood*, supervisory assistant state's attorney, with whom, on the brief, were *Stephen J. Sedensky III*, state's attorney, and *Edward L. Miller*, assistant state's attorney, for the appellee (state).

*Opinion*

PER CURIAM. The self-represented defendant, Kenya Brown, appeals from the trial court's denial of his motion to correct an illegal sentence. On appeal, the defendant claims that (1) General Statutes §§ 53a-37[1]

[1] General Statutes § 53a-37 provides: "When multiple sentences of imprisonment are imposed on a person at the same time, or when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to each other and to the undischarged term or terms in such manner as the court directs at the time of sentence. The court shall state whether the respective maxima and minima shall run concurrently or consecutively with respect to each other, and shall state in conclusion the effective sentence imposed. When a person is sentenced for two or more counts each constituting a separate offense, the court may order that the term of imprisonment for the second and subsequent counts be for a fixed number of years each. The court in such cases shall not set any minimum term of imprisonment except under the first count, and the fixed number of years imposed for the second and subsequent

and 53a-38[2] are ambiguous and contradictory, and (2) § 53a-38 is unconstitutional because it violates his constitutional rights to due process, to be free from double jeopardy, and to equal protection. We reverse the judgment of the trial court only as it relates to the portion of the defendant's motion to correct that advances arguments that do not implicate the sentencing proceeding itself. The court should have dismissed, rather than denied, this portion of the motion. We affirm the judgment of the trial court in all other respects.

The following facts are relevant on appeal. In 2003, the defendant pleaded guilty to attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a, and robbery in the first degree in violation of General Statutes § 53a-134 (a) (2). The defendant was sentenced to a total effective term of twenty years imprisonment. In 2006, in connection with the assault of a fellow inmate, the defendant pleaded guilty to assault in the second degree in violation of General Statutes § 53a-60 (a) (2), and was sentenced to a term of eighteen months of imprisonment to run consecutively to the sentence he was serving for the 2003 convictions. In 2012, in connection with threats the defendant had made in a letter to a judge, the defendant pleaded guilty to threatening in the first degree in violation of General Statutes § 53a-61aa, and was sentenced to a term of fifteen months of imprisonment to run consecutively to his sentences for the 2003 and 2006 convictions.

counts shall be added to the maximum term imposed by the court on the first count."

[2] General Statutes § 53a-38 (b) provides: "A definite sentence of imprisonment commences when the prisoner is received in the custody to which he was sentenced. Where a person is under more than one definite sentence, the sentences shall be calculated as follows: (1) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run; (2) if the sentences run consecutively, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term."

On January 10, 2018, the self-represented defendant filed a motion to correct an illegal sentence challenging the sentences from his 2006 and 2012 convictions.[3] The defendant argued that § 53a-37, governing concurrent and consecutive sentences, and § 53a-38, addressing the method of calculation for those sentences, were ambiguous and contradictory, and violated his constitutional rights to due process, to be free from double jeopardy, and to equal protection. Pursuant to *State* v. *Casiano*, 282 Conn. 614, 922 A.2d 1065 (2007), Assistant Public Defender Jenna Carriero reviewed the defendant's motion and reported in writing to the court, *Welch*, *J.*, that "no sound basis exist[ed] for either the correction of the defendant's sentence in the manner he outline[d] in his motion, or an appeal of the trial court's denial of that motion." At a hearing on April 27, 2018, the court accepted Attorney Carriero's report and denied the defendant's motion to correct an illegal sentence. This appeal followed.

On appeal, the defendant claims the court erred in denying his motion to correct an illegal sentence. The defendant renews his argument that, as applied to his sentences, §§ 53a-37 and 53a-38 are ambiguous and contradictory and that § 53a-38 violated his constitutional rights to due process, to be free from double jeopardy, and to equal protection. We disagree with the defendant.

We begin by setting forth our standard of review. "A motion to correct an illegal sentence under Practice Book § 43-22 constitutes a narrow exception to the general rule that, once a defendant's sentence has begun, the authority of the sentencing court to modify that sentence terminates." *State* v. *Casiano*, supra, 282 Conn. 624. Practice Book § 43-22 states, "[t]he judicial

[3] In 2016, the defendant filed a motion to correct an illegal sentence, which was subsequently denied. This prior motion is not the subject of this appeal.

authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a sentence imposed in an illegal manner or any other disposition made in an illegal manner." "An illegal sentence . . . either exceeds the relevant statutory maximum limits, violates a defendant's right against double jeopardy, is ambiguous, or is internally contradictory. . . . Sentences imposed in an illegal manner have been defined as being within the relevant statutory limits but . . . imposed in a way which violates [a] defendant's right . . . to be addressed personally at sentencing and to speak in mitigation of punishment . . . or his right to be sentenced by a judge relying on accurate information or considerations solely on the record, or his right that the government keep its plea agreement promises . . . . [These examples are not exhaustive and will evolve to encompass rights or procedures] mandated by state law that are intended to ensure fundamental fairness in sentencing, which, if not followed, could render a sentence invalid." (Citations omitted; internal quotation marks omitted.) *State* v. *Parker*, 295 Conn. 825, 839–40, 992 A.2d 1103 (2010). Because the defendant's claims raise questions of statutory interpretation and the constitutionality of statutes, our review is plenary. See *State* v. *Meadows*, 185 Conn. App. 287, 302–303, 197 A.3d 464 (constitutionality of statutes subject to plenary review), cert. granted on other grounds, 330 Conn. 947, 196 A.3d 327 (2018); *State* v. *Holliday*, 118 Conn. App. 35, 39, 982 A.2d 268 (2009) (statutory interpretation subject to plenary review), cert. denied, 295 Conn. 909, 989 A.2d 605 (2010).

I

The defendant first claims that §§ 53a-37 and 53a-38 are "ambiguous and contradictory." Essentially, the defendant's argument on appeal is that because his 2006 and 2012 sentences run consecutively, they adversely affected his original 2003 plea agreement and, therefore,

he was not provided fair notice that his ability to seek an early release would be altered accordingly. The state responds that the plain language of the two statutes is neither ambiguous nor contradictory and that the Department of Correction's (department) "changing policies regarding the calculation and structure of prison sentences" is not a cognizable claim on a motion to correct an illegal sentence. We agree with the state.

"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." (Internal quotation marks omitted.) *Smith* v. *Rudolph*, 330 Conn. 138, 143, 191 A.3d 992 (2018).

Accordingly, we now turn to the language of §§ 53a-37 and 53a-38. Section 53a-37 provides: "When multiple sentences of imprisonment are imposed on a person at the same time, or *when a person who is subject to any undischarged term of imprisonment imposed at a previous time by a court of this state is sentenced to an additional term of imprisonment, the sentence or sentences imposed by the court shall run either concurrently or consecutively with respect to each other and to the undischarged term or terms in such manner as the court directs at the time of sentence.* The court shall state whether the respective maxima and minima shall run concurrently or consecutively

with respect to each other, and shall state in conclusion the effective sentence imposed. When a person is sentenced for two or more counts each constituting a separate offense, the court may order that the term of imprisonment for the second and subsequent counts be for a fixed number of years each. The court in such cases shall not set any minimum term of imprisonment except under the first count, and the fixed number of years imposed for the second and subsequent counts shall be added to the maximum term imposed by the court on the first count." (Emphasis added.) Additionally, § 53a-38 (b), which governs the calculation of terms of imprisonment, provides: "A definite sentence of imprisonment commences when the prisoner is received in the custody to which he was sentenced. Where a person is under more than one definite sentence, the sentences shall be calculated as follows: (1) If the sentences run concurrently, the terms merge in and are satisfied by discharge of the term which has the longest term to run; (2) *if the sentences run consecutively, the terms are added to arrive at an aggregate term and are satisfied by discharge of such aggregate term.*" (Emphasis added.)

Taken together, §§ 53a-37 and 53a-38 (b) are neither ambiguous nor contradictory. The relevant portion of § 53a-37 specifically addresses situations, like the defendant's, where a person is subject to an undischarged term of imprisonment and is subsequently sentenced to an additional term of imprisonment. The plain language of § 53a-37 clearly and unambiguously provides that, in such circumstances, the sentences imposed by the court shall run either concurrently or consecutively, as the court directs at the time of sentence. Additionally, § 53a-38 (b) provides an unambiguous method of calculation to determine the total duration for terms of imprisonment where sentences run concurrently and where sentences run consecutively. Section 53a-38 (b) (2) provides that "if the sentences run consecutively, the terms are added to arrive at

an aggregate term and are satisfied by the discharge of such aggregate term." The defendant's term of imprisonment reflects this calculation. Attorney Carriero indicated that the defendant was "currently serving an aggregate sentence of 20 years [and] 33 months." The defendant was sentenced to 20 years of imprisonment in 2003, 18 months of imprisonment in 2006, and 15 months of imprisonment in 2012, each sentence running consecutively. Adding the terms of these sentences together, as required under § 53a-38 (b) (2), equals an aggregate term of 20 years and 33 months. We conclude that §§ 53a-37 and 53a-38 are neither ambiguous nor contradictory as applied to the defendant's sentence.

As to the defendant's claim that his aggregated sentence is illegal because the department's changing polices regarding the calculation and structure of prison sentences have negatively impacted his ability to seek or obtain an early release, the court lacked jurisdiction. In order for the court to have jurisdiction over a motion to correct an illegal sentence after the sentence has been executed, the sentencing proceeding itself must be the subject of attack. See *State* v. *Casiano*, supra, 282 Conn. 625. Because the defendant does not attack the legality of the sentence imposed by the court during the sentencing proceeding but, rather, the legality of his sentence as subsequently calculated by the department, his claim is not cognizable under a motion to correct an illegal sentence. *State* v. *Carmona* 104 Conn. App. 828, 832–33, 936 A.2d 243 (2007), cert. denied, 286 Conn. 919, 946 A.2d 1249 (2008). Accordingly, the court should have dismissed this portion of the defendant's claim.

II

We turn now to the defendant's claims that § 53a-38 (b) (2) violated his constitutional rights to due process, to be free from double jeopardy, and to equal protection. The state argues that each of these claims are meritless

and not cognizable on a motion to correct an illegal sentence. We agree with the state.

"We begin with the well established proposition that [b]ecause a validly enacted statute carries with it a strong presumption of constitutionality, those who challenge its constitutionality must sustain the heavy burden of proving its unconstitutionality beyond a reasonable doubt. . . . In construing a statute, moreover, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent. . . . We also note that, [w]hen a question of constitutionality is raised, courts must approach it with caution, examine it with care, and sustain the legislation unless its invalidity is clear." (Internal quotation marks omitted.) *State* v. *Evans*, 329 Conn. 770, 809,189 A.3d 1184 (2018), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

The basis of the defendant's due process claim is that the aggregation of his 2003, 2006, and 2012 sentences pursuant to § 53a-38 (b) (2), violated his right to due process because it negatively impacted his eligibility for parole and risk reduction credits and, thereby, prevented the state from keeping its plea promises and deprived the defendant of fair notice "of these alterations that take place after the sentence . . . ." We reject the defendant's argument. As previously noted in part I of this opinion, the claims raised by the defendant concerning his sentence as subsequently calculated by the department are not cognizable under a motion to correct an illegal sentence. See *State* v. *Carmona*, supra, 104 Conn. App. 832–33.[4]

[4] Although this determination is dispositive of the defendant's due process claim, we note that the defendant does not have a cognizable liberty interest in either his parole eligibility or his risk reduction credits. See *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 371–72, 163 A.3d 597 (2017) ("This court previously has held that parole eligibility under [General Statutes] § 54-125a does not constitute a cognizable liberty interest sufficient to invoke habeas jurisdiction. . . . It follows that if an inmate has no vested liberty interest in the *granting* of parole, then the *timing* of when the board

The defendant next claims that § 53a-38 (b) (2) violated his right against double jeopardy because the aggregation of his consecutive sentences negatively impacted his eligibility for parole and risk reduction credits and, thereby, resulted in multiple punishments. The state argues that the defendant's claim is meritless because the constitutional guarantee against double jeopardy prohibits multiple punishments for the same offense and does not apply where a defendant's consecutive sentences are aggregated for purposes of determining parole eligibility. We agree with the state.

The United States Court of Appeals for the Second Circuit, in *Alessi* v. *Quinlan*, 711 F.2d 497, 501 (2d Cir. 1983), explained that "[a] denial of parole is a decision to withhold early release from the confinement component of a sentence. It is neither the imposition nor the increase of a sentence, and it is not punishment for purposes of the Double Jeopardy Clause, even though the [United States Parole] Commission's decision to set a later rather than an earlier parole release date may sometimes result in a longer period of confinement than might ultimately result from an increase in a court-imposed sentence. Nevertheless it is the sentence that is limited by the Double Jeopardy Clause, not the administrative decision to grant early release from confinement." This reasoning is applicable in the present case because the defendant had not received multiple punishments for the same offense but, rather, received three distinct sentences in 2003, 2006, and 2012 for separate offenses. The defendant's claim that the aggregation of these consecutive sentences adversely affected his eligibility for parole and risk reduction credits does not, therefore, fall within the ambit of double jeopardy.

could, in its discretion, grant parole does not rise to the level of a vested liberty interest either. . . . [T]he award of risk reduction credit itself is at the discretion of the respondent." [Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.]).

The defendant's last claim on appeal is that § 53a-38 (b) (2) violated his right to equal protection under the law. The defendant claims that prisoners sentenced to consecutive sentences are members of a "suspect class." We disagree. Our Supreme Court has expressly stated that "prisoners do not constitute a suspect class." *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 384, 163 A.3d 597 (2017). Accordingly, the defendant's equal protection claim is subject to rational basis review. See *State* v. *Wright*, 246 Conn. 132, 139, 716 A.2d 870 (1998) ("The equal protection clause does not require absolute equality or precisely equal advantages [between such similarly situated persons] . . . . To determine whether a particular classification violates the guarantees of equal protection, the court must consider the character of the classification . . . . Where . . . the classification at issue neither impinges upon a fundamental right nor affects a suspect group it will withstand constitutional attack if the distinction is founded on a rational basis." [Citations omitted; internal quotation marks omitted.]) "Rational basis review is satisfied so long as there is a plausible policy reason for the classification . . . . [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature." (Citations omitted; internal quotation marks omitted.) Id., 139–40. We conclude that § 53a-38 (b) (2), which clearly contains a plausible policy reason for the classification, meets the rational basis threshold and therefore withstands the defendant's constitutional challenge on equal protection grounds.

The form of the judgment is improper, the judgment denying the defendant's motion to correct an illegal sentence is reversed in part and the case is remanded with direction to dismiss the portion of the defendant's motion to correct an illegal sentence that advances arguments that do not implicate the sentencing proceeding itself; the judgment is affirmed in all other respects.

# WELLS FARGO BANK, N.A. *v.* NICOLE M. FRATARCANGELI ET AL.
## (AC 41593)

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

*Syllabus*

The named defendant, F, who had executed a mortgage on certain real property, appealed to this court from the judgment of strict foreclosure rendered in favor of the substitute plaintiff, M Co. On appeal, F claimed, inter alia, that the trial court erred in striking her special defenses of illegal attestation of the mortgage deed and unclean hands as to the illegal attestation of the mortgage deed, and concluded that the validating statute (§ 47-36aa) rendered the mortgage deed valid and enforceable. In her special defenses, F had claimed, inter alia, that S, an agent of W Co., the predecessor in interest to M Co., breached her oath of office as a public official in her capacity as a notary public and committed acts of fraud in the execution of the mortgage deed, rendering the deed invalid and unenforceable. Specifically, F claimed that S did not notarize the mortgage deed while at F's home and did not have a second attesting witness as required by statute (§ 47-5 [a]), and that S's husband was the second attesting witness to the mortgage deed outside F's presence and without her knowledge. *Held:*

1. The trial court properly granted M Co.'s motion to strike F's special defense of illegal attestation of the mortgage deed as legally insufficient: the plain and unambiguous language of § 47-36aa (a) (2) provides that any mortgage containing a conveyancing defect as a result of, inter alia, being attested by one witness only is as valid as if it had been executed without the defect, unless an action challenging the validity of the mortgage was commenced and a notice of lis pendens was recorded within two years after the mortgage was recorded, which did not occur here, and, therefore, the alleged witness attestation defect was automatically cured by the validating act; moreover, there was no language in § 47-36aa (a) (2) that limits its applicability or otherwise carves out a fraud exception for instances where it is alleged that the lack of a valid second attesting witness resulted from a fraudulent act.
2. The trial court properly granted M Co.'s motion to strike F's special defense of unclean hands as to the attestation of the mortgage deed, as the witnessing defect in the mortgage deed was cured by operation of § 47-36aa (a) (2), and M Co.'s claim of foreclosure neither depended on nor was inseparably connected with S's alleged fraudulent conduct; moreover, F did not allege that the conduct claimed to be unclean was done directly against her interests, and, therefore, the unclean hands doctrine was not available to F on the basis of the allegations made in support of her second special defense.

Argued March 18—officially released August 27, 2019

*Procedural History*

Action to foreclose a mortgage on certain real property of the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the defendant JPMorgan Chase Bank, N.A. was defaulted for failure to appear; thereafter, MTGLQ Investors, LP, was substituted as the plaintiff; subsequently, the named defendant filed an answer and special defenses; thereafter, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted in part the substitute plaintiff's motion to strike the named defendant's special defenses, and the named defendant appealed to this court, which dismissed the appeal; subsequently, the matter was tried to the court, *Hon. George N. Thim*, judge trial referee; judgment of strict foreclosure, from which the named defendant appealed to this court. *Affirmed.*

*Gary L. Seymour*, for the appellant (named defendant).

*Todd H. Lampert*, with whom, on the brief, was *Arthur C. Zinn*, for the appellee (substitute plaintiff).

*Opinion*

MOLL, J. The defendant, Nicole M. Fratarcangeli,[1] appeals from the judgment of strict foreclosure rendered after a court trial in favor of the substitute plaintiff, MTGLQ Investors, LP. On appeal, the defendant claims that the court erred when it granted the substitute plaintiff's motion to strike as to her first and second special defenses of (1) illegal attestation of the mortgage deed and (2) unclean hands as to the attestation of the mortgage deed. We disagree and, accordingly, affirm the judgment of the trial court.

[1] The complaint also named JPMorgan Chase Bank, N.A., as a defendant, but it was defaulted for failure to appear and is not participating in this appeal. Accordingly, we refer to Nicole M. Fratarcangeli as the defendant.

The following facts and procedural history are relevant to our resolution of the defendant's claims. In its complaint, the original plaintiff, Wells Fargo Bank, N.A., alleged the following relevant facts. On March 21, 2005, the defendant executed a promissory note, in the principal amount of $535,000, in favor of World Savings Bank, FSB (World Savings Bank). The note was secured by a mortgage executed by the defendant on real property located at 370 Wilson Road in Easton. On April 4, 2005, the mortgage deed was recorded on the Easton land records. Thereafter, the original plaintiff acquired Wachovia Mortgage, FSB, formerly known as World Savings Bank. Beginning in July, 2009, and each and every month thereafter, the defendant failed to make payments on the note. On or before April 21, 2015, the original plaintiff became the party entitled to collect the debt evidenced by the note and to enforce the mortgage. In connection with the defendant's default on the note, the original plaintiff exercised its option to declare the entire balance of the note due and payable. In July, 2016, the original plaintiff commenced this foreclosure action against the defendant.

On December 2, 2016, the original plaintiff filed a motion for a judgment of strict foreclosure. On March 2, 2017, the original plaintiff filed a motion to substitute party plaintiff, as well as an accompanying memorandum of law in support thereof and an appended copy of its assignment of the mortgage to the substitute plaintiff. On March 20, 2017, the court granted the motion to substitute.

On May 17, 2017, the defendant filed an answer and eight special defenses.[2] In support of her first and second special defenses, the defendant alleged the following facts. World Savings Bank procured and paid for,

[2] The defendant asserted the following special defenses: (1) illegal attestation of the mortgage deed (first special defense); (2) unclean hands as to the attestation of the mortgage deed (second special defense); (3) unconscionability (third special defense); (4) equitable estoppel (fifth special defense);

as part of the closing costs, the services of a notary public, Kathleen Salerno, who conducted the closing at the defendant's home in Easton. While at the defendant's home, Salerno had the defendant execute all of the necessary closing documents, including the mortgage deed, but Salerno did not notarize those documents while at the defendant's home and did not request or provide a second attesting witness to the mortgage deed as required by General Statutes § 47-5 (a).[3] Rather, Salerno subsequently had her husband "witness" the defendant's signature, outside of the defendant's presence and without the defendant's knowledge.

For her first special defense of illegal attestation of the mortgage deed, the defendant alleged that, on the basis of the foregoing factual allegations, Salerno, as an agent of World Savings Bank and a public official in her capacity as a notary public, breached her oath of office and committed acts of fraud in the execution of the mortgage deed, rendering the deed invalid and unenforceable. For her second special defense of unclean hands, relying on the same factual allegations, the defendant claimed that Salerno, as an agent of World Savings Bank, supplied a false witness in an effort to validate the mortgage and that such action constituted "a blatant dishonest attempt to validate an invalid mortgage . . . ." The remaining special defenses are not at issue in this appeal.

(5) statute of limitations (sixth special defense); (6) fraud as to the loan modification process (seventh special defense); (7) unclean hands as to the loan modification process (eighth special defense); and (8) equitable estoppel as to the loan modification process (ninth special defense). The defendant did not plead a fourth special defense.

[3] As a result of a typographical error, the special defense cites General Statutes § 47-5a, instead of General Statutes § 47-5 (a), which provides in relevant part: "All conveyances of land shall be: (1) In writing; (2) if the grantor is a natural person, subscribed, with or without a seal, by the grantor with his own hand . . . and (4) attested to by two witnesses with their own hands."

On May 31, 2017, the substitute plaintiff filed a motion to strike the defendant's special defenses, including the first and second special defenses, contesting the legal sufficiency thereof. On July 12 and 13, 2017, respectively, the defendant filed an objection and a memorandum of law in opposition to the motion to strike. On November 21, 2017, the court, inter alia, granted the substitute plaintiff's motion to strike as to the defendant's first and second special defenses.[4] With respect to the first special defense of illegal attestation of the mortgage deed, the court granted the motion on two grounds: (1) the defect of one invalid witness was cured by operation of General Statutes § 47-36aa (validating act); and (2) a defect in a mortgage cannot be used to defeat a foreclosure action as between the original mortgagor and mortgagee, as a mortgage deed that is not properly witnessed and acknowledged is nevertheless valid as between the parties to the instrument.[5] As to the defendant's second special defense of unclean hands, the court granted the motion to strike on the ground that the defect of one invalid witness was validated by § 47-36aa (a) (2), and Salerno's alleged fraudulent misconduct played no role in aiding the substitute

[4] In addition, the court denied the motion as to the third, fifth, seventh, eighth, and ninth special defenses and granted the motion as to the sixth special defense without prejudice to the defendant's right to plead a statute of limitations defense in response to any motion for a deficiency judgment that may have been filed later in the case.

On December 7, 2017, the defendant appealed from the court's November 21, 2017 order insofar as it granted the substitute plaintiff's motion to strike as to her first and second special defenses. On December 19, 2017, the substitute plaintiff filed a motion to dismiss the appeal for lack of subject matter jurisdiction and to sanction the defendant on the ground that her appeal was frivolous. On January 18, 2018, this court granted the substitute plaintiff's motion to dismiss on the basis that no final judgment had been rendered but denied its request for sanctions.

[5] In striking the defendant's first special defense, the court also rejected the defendant's contention that Salerno's failure to notarize the necessary closing documents, including the mortgage deed, while at the defendant's home rendered the mortgage deed invalid and unenforceable. On appeal, the defendant does not assert any claim with respect to that portion of the court's decision.

plaintiff's claim for foreclosure. On December 20, 2017, the substitute plaintiff filed a reply to the defendant's non-stricken special defenses.

On April 12, 2018, following a trial to the court, the court rendered a judgment of strict foreclosure in favor of the substitute plaintiff. This appeal followed. Additional facts and procedural history will be provided as necessary.

At the outset, we note the standard of review and legal principles that apply to the defendant's claims. "Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling on [a motion to strike] is plenary. . . . A party wanting to contest the legal sufficiency of a special defense may do so by filing a motion to strike. The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. . . . In ruling on a motion to strike, the court must accept as true the facts alleged in the special defenses and construe them in the manner most favorable to sustaining their legal sufficiency." (Citations omitted; internal quotation marks omitted.) *Barasso* v. *Rear Still Hill Road, LLC*, 64 Conn. App. 9, 12–13, 779 A.2d 198 (2001). "In determining whether a motion to strike should be granted, the sole question is whether, if the facts alleged are taken to be true, the allegations provide a cause of action or a defense." *County Federal Savings & Loan Assn.* v. *Eastern Associates*, 3 Conn. App. 582, 585, 491 A.2d 401 (1985). We now address the defendant's claims in turn.

I

The defendant first claims that the court erred in striking her first special defense of illegal attestation of the mortgage deed on the basis that § 47-36aa rendered the mortgage deed valid and enforceable despite

Salerno's alleged fraudulent use of her husband as a false witness.[6] Specifically, without relying on any specific language of § 47-36aa or any underlying legislative history, the defendant argues that "it is clear that the legislature never intended in enacting [§] 47-36aa to validate such fraudulent acts." In response, the substitute plaintiff contends that the relevant provisions of § 47-36aa (a) are clear and unambiguous and provide that, unless an action challenging the validity of a mortgage on the basis of one of the conveyancing defects or omissions enumerated in § 47-36aa (a) is commenced and a notice of lis pendens is recorded on the land records within two years after the mortgage is recorded, such mortgage is as valid as if it had been executed without the defect or omission. Therefore, the substitute plaintiff argues, in the absence of such procedure being followed in the present case, the alleged witnessing defect is cured by operation of § 47-36aa (a). We agree with the substitute plaintiff.

We briefly address the applicable standard of review. Resolution of the defendant's claims on appeal requires us to determine whether § 47-36aa (a) applies to cure an attesting witness defect or omission in the context of an allegation of fraud in the execution of a mortgage deed. Because statutory interpretation involves a question of law, our review is plenary. *Bell Atlantic NYNEX Mobile, Inc.* v. *Commissioner of Revenue Services*, 273 Conn. 240, 249, 869 A.2d 611 (2005).

[6] Additionally, the defendant sets forth a separate claim on appeal that the court erroneously struck her first special defense by finding that the mortgage deed is enforceable between the parties on the basis of case law applicable to a defect, omission, and/or mistake, as opposed to an intentional act, in the execution of a mortgage deed. Because the defendant does not analyze, or even cite, any of the case law that she claims was misapplied, we do not address this separate claim further. See, e.g., *Citibank, N.A.* v. *Stein*, 186 Conn. App. 224, 248, 199 A.3d 57 (2018) (appellate courts are not required to review issues that have been improperly presented through an inadequate brief), cert. denied, 331 Conn. 903, 202 A.3d 373 (2019).

"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. . . . Importantly, ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Footnote added; internal quotation marks omitted.) *Connecticut Housing Finance Authority* v. *Alfaro*, 328 Conn. 134, 141–42, 176 A.3d 1146 (2018).

We begin with the language of § 47-5, entitled in part "Requirements re conveyances of land," which provides in relevant part: "(a) All conveyances of land shall be: (1) In writing; (2) if the grantor is a natural person, subscribed, with or without a seal, by the grantor with his own hand . . . and (4) *attested to by two witnesses* with their own hands." (Emphasis added.) In the present case, the parties do not dispute that the mortgage deed was not "attested to by two witnesses" in accordance with § 47-5 (a) (4). That is, there is no dispute that (1) the defendant signed the note and the mortgage deed, (2) Salerno was a valid attesting witness to the mortgage deed, and (3) Salerno's husband was not a valid attesting witness to the mortgage deed.

We turn, therefore, to the language of the validating act, § 47-36aa, entitled "Validations re conveyancing defects of instrument recorded after January 1, 1997, insubstantial defects, defects re power of attorney,

defects re conveyance by fiduciary." Section 47-36aa provides in relevant part: "(a) Conveyancing defects. Any deed, mortgage . . . or other instrument made for the purpose of conveying, leasing, mortgaging or affecting any interest in real property in this state recorded after January 1, 1997, which instrument contains any one or more of the following defects or omissions is as valid as if it had been executed without the defect or omission unless an action challenging the validity of that instrument is commenced and a notice of lis pendens is recorded in the land records of the town or towns where the instrument is recorded within two years after the instrument is recorded . . . (2) The instrument is attested by one witness only or by no witnesses . . . ." As stated by our Supreme Court, the validating act "provides a mechanism for curing certain defects in instruments affecting interests in real property, including defective acknowledgements or a lack of attesting witnesses . . . . [T]hese defects are cured automatically by statute, in the absence of a timely filed action specifically challenging the validity of the instrument and a timely filed lis pendens . . . ." *Alexson* v. *Foss*, 276 Conn. 599, 607–608, 887 A.2d 872 (2006).

The express language of § 47-36aa (a) (2) provides, inter alia, that any mortgage containing a conveyancing defect as a result of being "attested by one witness only or by no witnesses" is "as valid as if it had been executed without the defect or omission" unless an action challenging the validity of the mortgage is commenced and a notice of lis pendens is recorded within two years after the mortgage is recorded. There is no language in § 47-36aa (a) that limits the applicability of subdivision (2) or otherwise carves out a fraud exception for instances where it is alleged that the lack of a valid second attesting witness resulted from a fraudulent act. We conclude that the meaning of the validating act with

regard to the question before us is plain and unambiguous and, therefore, our inquiry as to such meaning ends. See *In re Elianah T.-T.*, 326 Conn. 614, 624, 165 A.3d 1236 (2017) ("[i]f the legislature's intent is clear from the statute's plain and unambiguous language, our inquiry ends"). Simply put, § 47-36aa does not contain a fraud exception, and we do not write one into the statute. We further note that when the legislature wants to carve out a fraud exception, it knows how to do so. See, e.g., General Statutes § 12-415 (f) ("*[e]xcept in the case of fraud* . . . every notice of a deficiency assessment shall be mailed within three years after the last day of the month following the period for which the amount is proposed to be assessed or within three years after the return is filed, whichever period expires later" [emphasis added]).

Applying the language of § 47-36aa (a) (2) to the present case, we conclude that, in the absence of a timely filed action specifically challenging the validity of the mortgage at issue on the basis of an enumerated conveyancing defect, namely, the lack of a valid second witness as otherwise required by § 47-5 (a),[7] the validating act automatically cured such defect or omission. Cf. *Collard & Roe, P.C.* v. *Klein*, 87 Conn. App. 337, 350, 865 A.2d 500 (affirming trial court's determination that § 47-36aa did not cure invalidity of deed not signed by two witnesses because plaintiff brought action challenging conveyance and filed notice of lis pendens within statutory period), cert. denied, 274 Conn. 904, 876 A.2d 13 (2005); see also *Lupoli* v. *Lupoli*, 38 Conn. App. 639, 642–43, 662 A.2d 809 (special validating act cured any imperfection in execution of deed relating to second attesting witness), cert. denied, 235 Conn.

[7] It is undisputed that the defendant did not commence an action to challenge the validity of the mortgage based on the attesting witness defect within two years after the mortgage instrument was recorded (or at any other time).

907, 665 A.2d 902 (1995). In this connection, we make clear that § 47-36aa (a) (2) does not render valid the invalid signature of Salerno's husband; rather, § 47-36aa (a) (2) cures the lack of a valid second witness. In light of the foregoing, and construing the factual allegations in a manner most favorable to the defendant, we conclude that the defendant failed to plead a legally sufficient special defense, and the trial court properly granted the substitute plaintiff's motion to strike as to the defendant's first special defense.

II

The defendant next claims that the trial court erred in striking her second special defense of unclean hands as to the attestation of the mortgage. The substitute plaintiff argues, to the contrary, that the court properly struck the defendant's second special defense on the basis that the substitute plaintiff's claim of foreclosure neither depended on nor was inseparably connected with the alleged prior fraud of Salerno. We agree with the substitute plaintiff.

"[W]e note that an action to foreclose a mortgage is an equitable proceeding. . . . It is a fundamental principle of equity jurisprudence that for a complainant to show that he is entitled to the benefit of equity he must establish that he comes into court with clean hands. . . . The clean hands doctrine is applied not for the protection of the parties but for the protection of the court. . . . It is applied not by way of punishment but on considerations that make for the advancement of right and justice. . . . Because the doctrine of unclean hands exists to safeguard the integrity of the court . . . [w]here a plaintiff's claim grows out of or depends upon or is inseparably connected with his own prior fraud, a court of equity will, in general, deny him any relief, and will leave him to whatever remedies and defenses

at law he may have. . . . Though an obligation be indirectly connected with an illegal transaction, it will not thereby be barred from enforcement, if the plaintiff does not require the aid of the illegal transaction to make out his case. . . . In addition, the conduct alleged to be unclean must have been done directly against the interests of the party seeking to invoke the doctrine, rather than the interests of a third party." (Citations omitted; internal quotation marks omitted.) *Thompson* v. *Orcutt*, 257 Conn. 301, 310–11, 777 A.2d 670 (2001).

Mindful of these principles, and construing the factual allegations in a manner most favorable to the defendant, we conclude that the trial court properly granted the substitute plaintiff's motion to strike as to the defendant's second special defense. As discussed in part I of this opinion, the witnessing defect in the mortgage deed was cured by operation of the validating act, and the substitute plaintiff's claim of foreclosure neither depended on nor was inseparably connected with the alleged fraudulent conduct of Salerno. Moreover, the defendant did not allege that the conduct claimed to be unclean was done directly against her interests.[8] Id., 311 ("the conduct alleged to be unclean must have been done directly against the interests of the party seeking to invoke the doctrine"). Accordingly, the unclean hands doctrine was not available to the defendant on the basis of the allegations made in support of her second special defense.

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

In this opinion the other judges concurred.

[8] Indeed, during oral argument before this court, the following exchange occurred:

"The Court: What was the fraud on your client?

"[The Defendant's Counsel]: I don't think it's fraud on my client at all."

# ANDRZEJ KUSY *v.* CITY OF NORWICH ET AL.
## (AC 41721)

Keller, Prescott and Moll, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendants, the city of Norwich, its board of education and several city employees, for, inter alia, negligence in connection with injuries he sustained when he slipped and fell on snow or ice while delivering milk for his employer, G Co., at a city school. The plaintiff alleged in his complaint that the defendants acted negligently because the school's custodial staff had a ministerial duty to clear the snow and ice from the delivery ramp but failed to do so. The trial court granted the defendants' motion for summary judgment on the ground of government immunity, concluding that snow and ice removal is discretionary in nature as a matter of law and, thus, that the plaintiff failed to raise a genuine issue of material fact regarding whether the removal of snow and ice is a ministerial act for which the city could be held liable pursuant to statute (§ 52-557n [a] [2] [B]). The court also determined that the plaintiff was not an identifiable victim for purposes of the identifiable person-imminent harm exception to governmental immunity. On the plaintiff's appeal to this court, *held*:

1. The plaintiff could not prevail on his claim that the trial court improperly rendered summary judgment in favor of the defendants on the ground of governmental immunity, which was based on his claim that snow and ice removal by a municipality is a ministerial act as a matter of law: in the absence of a policy or directive prescribing the manner in which a municipal official is to remove snow and ice, such an act is discretionary in nature, and, therefore, the trial court properly determined that the removal of snow and ice at the school was discretionary in nature, as a city official provided an affidavit in which she averred that no such policy existed, the plaintiff provided no evidence that a snow and ice removal policy existed and he conceded in his memorandum of law in opposition to the defendants' motion for summary judgment that the defendants did not have a written snow and ice removal policy; moreover, contrary the plaintiff's contention that the issue of whether the removal of snow and ice is ministerial in nature is a factual question that is reserved for the jury and may not be decided by the trial court by way of summary judgment, our Supreme court has established that, where, as here, the plaintiff failed to raise a genuine issue of material fact that a policy or directive existed that could render the act ministerial in nature, the question of whether an act is ministerial in nature is to be determined by the trial court as a matter of law.
2. The trial court properly determined that the plaintiff failed to raise a genuine issue of material fact regarding whether he was an identifiable

victim for purposes of the identifiable person-imminent harm exception to governmental immunity; this court declined the plaintiff's request to expand the narrow identifiable class of foreseeable victims to include not only schoolchildren who are statutorily compelled to be on school grounds during regular school hours, but also a person, like the plaintiff, who was present on municipal property because his or her employer was required by contract to perform a service in that location, as the plaintiff, unlike schoolchildren, was not required by law to be on the school's grounds, G Co. could have met its contractual obligation to deliver milk to the school by waiting or returning at a later time after the school had an opportunity to ensure that the delivery ramp was free of snow and ice, our courts have not treated other classes of individuals, apart from schoolchildren, who are present on school grounds during school hours as identifiable victims because there is always an aspect of voluntariness to their presence on school grounds, and even when schoolchildren are on school grounds, our courts have not classified them as identifiable victims if they are on school property as part of voluntary activities.

Argued April 16—officially released August 27, 2019

*Procedural History*

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

*Matthew T. Wax-Krell*, with whom was *Andrew W. Krevolin*, for the appellant (plaintiff).

*Jeffrey G. Schwartz*, for the appellees (defendants).

*Opinion*

PRESCOTT, J. This is a personal injury action brought by the plaintiff, Andrzej Kusy, against the defendants, the city of Norwich, its board of education, and certain municipal employees,[1] seeking to recover damages for

[1] In addition to the city of Norwich and the Norwich Board of Education, the defendants are Abby Dolliver, the superintendent of Norwich public schools; William Peckrul, the principal of Kelly Middle School; and Edward Gunter, the head custodian of Kelly Middle School.

injuries he sustained after he slipped and fell on snow or ice while delivering milk for his employer, Guida's Dairy (Guida's), at a Norwich school. The plaintiff appeals from the trial court's summary judgment rendered in favor of the defendants on the ground that they are entitled to governmental immunity.

On appeal, the plaintiff claims that the trial court improperly rendered summary judgment in favor of the defendants on the ground of governmental immunity because he adequately raised a genuine issue of material fact as to whether (1) the removal of snow and ice at a school is a ministerial rather than a discretionary act, and (2) the plaintiff was an identifiable victim because he had a contractual duty to deliver milk to the school. We disagree with both claims and, therefore, affirm the judgment of the trial court.

The record before the court, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following facts and procedural history. On February 24, 2015, the plaintiff delivered milk to Kelly Middle School in Norwich for Guida's. The plaintiff had been making these deliveries to the school "[t]wo times a week for at least seven months." On the day of the injury, the plaintiff was delivering milk in the area designated for such deliveries. The weather was "sunny but cold" during the morning of February 24, 2015, and it last snowed a few days prior. The plaintiff, nevertheless, noticed ice on the delivery ramp and notified the supervisor of the school's kitchen, who contacted the maintenance person for the school.

The plaintiff also contacted his employer to alert it to the icy conditions. The plaintiff had a brief conversation with John Guida at Guida's and explained the conditions to him. Despite his report, Guida ordered him to complete the delivery. Approximately twenty-five minutes after speaking to Guida and traveling up and down the ramp multiple times, the plaintiff slipped and fell.

No one removed the snow and ice during the period between the time the plaintiff reported the icy conditions to the school employee and when he fell.

The plaintiff commenced this action on February 21, 2017. The complaint contains three counts: the first two counts contain allegations of negligence against the defendants and the third count is against the city of Norwich (city) for indemnity pursuant to General Statutes § 7-465.[2] The plaintiff alleged that the defendants acted negligently because, inter alia, the school's custodial staff had a ministerial duty to clear the snow and ice from the delivery ramp and failed to do so. The plaintiff also alleged that he was a member of "a foreseeable class of identifiable victims" and was subjected to "a risk of imminent harm."

On December 6, 2017, the defendants filed a motion for summary judgment. They asserted that governmental immunity barred them from being held liable because the plaintiff could not demonstrate a genuine issue of material fact regarding any exception to governmental immunity. The trial court granted the motion for summary judgment on May 21, 2018, and issued a memorandum of decision setting forth its reasoning.

[2] In rendering summary judgment, the trial court did not explicitly address count three of the plaintiff's complaint. "[Our Supreme Court] previously . . . recognized that [General Statutes] §§ 7-465 and 52-557n are coextensive . . . and . . . concluded that the availability of indemnification under § 7-465 (a) for municipal employees' torts may be constrained by § 52–557n (a)." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Grady* v. *Somers*, 294 Conn. 324, 346–47, 984 A.2d 684 (2009).

"Under § 7-465, the municipality's duty to indemnify attaches only when the employee is found to be liable and the employee's actions do not fall within the exception for wilful and wanton acts." *Myers* v. *Hartford*, 84 Conn. App. 395, 401, 853 A.2d 621, cert. denied, 271 Conn. 927, 859 A.2d 582 (2004).

Because the city's obligation to indemnify the other defendants arises only if the principal tortfeasors are liable for the plaintiff's injuries, we construe the trial court's summary judgment on the negligence counts to encompass count three. If governmental immunity bars liability on the first two counts, then there is no underlying liability for which the municipality must indemnify.

In its memorandum of decision, the trial court concluded that the defendants were entitled to summary judgment because General Statutes § 52-557n (a) (2) (B) prevents a municipality from being held liable for the discretionary acts of its employees, even if the acts are performed negligently. The trial court indicated that an act is discretionary as a matter of law in the absence of a directive limiting the discretion of a municipal employee's performance of the act. The trial court stated that the defendants presented evidence showing that they had no policy concerning snow and ice removal and that the plaintiff provided no evidence tending to demonstrate the existence of such a policy. On this record, the trial court concluded that snow and ice removal is discretionary in nature as a matter of law, and, thus, the plaintiff failed to raise a genuine issue of material fact regarding whether the removal of snow and ice is a ministerial act for which the city could be held liable.

The trial court also addressed the plaintiff's contention that, even if snow and ice removal is discretionary in nature, the defendants were not entitled to governmental immunity because the identifiable person-imminent harm exception to discretionary act immunity applies. The trial court, however, determined that the plaintiff was not an identifiable victim because "he was not a child attending a public school during school hours." This appeal followed.

This court's standard of review for a motion for summary judgment is well established. "Practice Book § [17-49] provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving

party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact. . . . [I]ssue-finding, rather than issue-determination, is the key to the procedure. . . . [T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist. . . . Our review of the decision to grant a motion for summary judgment is plenary. . . . We therefore must decide whether the court's conclusions were legally and logically correct and find support in the record." (Internal quotation marks omitted.) *DiMiceli* v. *Cheshire*, 162 Conn. App. 216, 221–22, 131 A.3d 771 (2016).

I

The plaintiff first claims that snow and ice removal by a municipality is a ministerial act as a matter of law. In the alternative, the plaintiff contends that whether the removal of snow and ice is ministerial in nature is a factual question that is reserved for the jury and may not be decided by the court by way of summary judgment. We disagree.

In *Ventura* v. *East Haven*, 330 Conn. 613, 629, 199 A.3d 1 (2019), our Supreme Court restated the well established principles that govern the statutory distinction between ministerial and discretionary acts: "The law pertaining to municipal immunity is . . . well settled. [Section] 52-557n abandons the common-law principle of municipal sovereign immunity and establishes the circumstances in which a municipality may be liable for damages. . . . One such circumstance is

a negligent act or omission of a municipal officer acting within the scope of his or her employment or official duties. . . . [Section] 52-557n (a) (2) (B), however, explicitly shields a municipality from liability for damages to person or property caused by the negligent acts or omissions [that] require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law." (Internal quotation marks omitted.)

Accordingly, a municipality is entitled to immunity for discretionary acts performed by municipal officers or employees but may be held liable for those acts that are not discretionary but, rather, are ministerial in nature. "[O]ur courts consistently have held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion." (Internal quotation marks omitted.) Id., 631; see also *Violano* v. *Fernandez*, 280 Conn. 310, 323, 907 A.2d 1188 (2006) (holding that "the plaintiffs . . . have failed to allege that the acts or omissions complained of were ministerial in nature because . . . the plaintiffs have not alleged that [the defendant] was required by any city charter provision, ordinance, regulation, rule, policy, or any other directive to secure the property in any prescribed manner" [citation omitted]). Furthermore, this court held previously that evidence of a policy that merely states general responsibilities without "provisions that mandate the time or manner in which those responsibilities are to be executed, leaving such details to the discretion and judgment of the municipal employees," is insufficient to show that the act is ministerial. *Northrup* v. *Witkowski*, 175 Conn. App. 223, 238, 167 A.3d 443

(2017), aff'd, 332 Conn. 158, A.3d (2019). Therefore, if there is no directive setting forth the manner in which a municipal official is to perform the act, then the act is not ministerial and is therefore discretionary in nature.

This court has already concluded that, in the absence of a directive prescribing the manner in which an official is to remove snow and ice, such an act is discretionary in nature. *Beach* v. *Regional School District Number 13*, 42 Conn. App. 542, 553–55, 682 A.2d 118, cert. denied, 239 Conn. 939, 684 A.2d 710 (1996). In *Beach*, like in the present case, the plaintiff, whose employment with a private company required her to be on school property, slipped and fell on an icy sidewalk on school grounds. See id., 544–45, 545 n.1.[3]

Despite our decision in *Beach*, the plaintiff relies on *Koloniak* v. *Board of Education*, 28 Conn. App. 277, 281–82, 610 A.2d 193 (1992), for the proposition that the act of removing snow and ice is ministerial in nature. *Koloniak*, however, is inapplicable for at least two reasons. In *Koloniak*, this court relied on a written policy issued by the board of education that "all custodians . . . were to keep the walkways clear of snow and ice." Id., 281. In the present case, however, neither the plaintiff nor the defendants produced any statute, ordinance, policy, or other directive setting forth a clear

[3] *Beach* predates our Supreme Court's recent decision in *Ventura* v. *East Haven*, supra, 330 Conn. 629, 632, in which the court reiterated the well established principles regarding ministerial and discretionary acts and unequivocally determined that whether an act is discretionary in nature is a question for the court to decide as a matter of law.

The plaintiff in his appellate brief all but ignores this court's decision in *Beach*. With respect to *Beach*, he simply contends that it stands for the proposition that the question of whether the removal of ice and snow is discretionary belongs to the jury rather than the court. We reject this contention in light of our Supreme Court's decision in *Ventura*, in which the court plainly held that the determination of whether an act is discretionary is a question of law for the court. Id., 636–37.

snow and ice removal policy.[4] *Koloniak* also has been superseded by decisions of our Supreme Court, in which it has held that even a general written policy, like the one in *Koloniak*, is insufficient to create a ministerial duty if the written policy does not prescribe the manner in which an official is to carry out the act. See *Northrup* v. *Witkowski*, 332 Conn. 158, 169–70, A.3d (2019); *Violano* v. *Fernandez*, supra, 280 Conn. 323–24. Thus, the present case and *Koloniak* are dissimilar.

The plaintiff also relies on dicta from a recent trial court decision as supporting a conclusion that, even in the absence of a policy, snow and ice removal is nevertheless a ministerial act. In *Finn* v. *Hamden*, Superior Court, judicial district of New Haven, Docket No. CV-16-6060769-S (September 13, 2017), 2017 WL 5056259, *5, Judge (now Justice) Ecker stated that snow and ice removal is ministerial in nature because "[w]hen it snows, *common sense and routine experience* tell us that every landowner must remove snow and ice from any sidewalk that is likely to be used by a pedestrian. . . . At least as a general matter, it seems fair to posit that no one with responsibility for sidewalk upkeep should need a written rule, or any explicit directive at all, to realize that the sidewalks must be cleared when there is any accumulation of snow, ice, or slush." (Emphasis added; footnotes omitted.) We respectfully disagree for two reasons.

First, our Supreme Court in *Ventura* stated that, in order for an act to be classified as ministerial, there

[4] Furthermore, the defendants submitted an affidavit in support of their motion for summary judgment from a city official denying the existence of any snow and ice removal policy. The same city official denied the existence of a snow and ice removal policy in response to the plaintiff's request for production. Moreover, the plaintiff admits that the defendants do not have a written snow and ice removal policy.

must be evidence of a directive that "compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion." (Internal quotation marks omitted.) *Ventura* v. *East Haven*, supra, 330 Conn. 631. Thus, the existing standard is more demanding than the one articulated in *Finn*, which relies simply on "common sense and routine experience." See *Finn* v. *Hamden*, supra, 2017 WL 5056259, *5.

Second, the trial court's statement in *Finn* that the act of snow and ice removal is ministerial in nature is belied by an examination of the act itself. The act of snow and ice removal, absent a directive strictly imposing the time and manner in which it is to be done, is inherently a discretionary act because it requires the exercise of judgment. Clearing walkways of snow and ice requires the municipal official performing the act to exercise judgment regarding the amount of snow and ice that must accumulate before it must be removed; the frequency with which the official decides to inspect the walkways to ensure that new patches of ice have not formed on surfaces previously salted, sanded, or cleared; the method that the official decides to use to clear the snow and ice or to eliminate the hazard (i.e., whether to use salt, sand, or neither; the amount of salt or sand that is applied; and the frequency with which salt or sand is applied); which areas to prioritize, including whether to focus on areas of the school grounds frequented by schoolchildren in attendance; and whether a walkway is sufficiently clear for use.[5]

Our analysis accords with *Ventura*, in which our Supreme Court resolved confusion in our case law

[5] Indeed, in a recent case involving whether a municipality's maintenance of storm drains is a ministerial act, our Supreme Court stated that "a municipality necessarily makes discretionary policy decisions with respect to the timing, frequency, method and extent of inspections, maintenance and repairs." (Internal quotation marks omitted.) *Northrup* v. *Witkowski*, supra, 332 Conn. 170.

regarding the question of whether an act is ministerial should be determined by the trier of fact or by the trial court as a matter of law. See *Ventura* v. *East Haven*, supra, 330 Conn. 632–37. The court decided that it is the responsibility of the latter.[6] Id., 636–37. "[T]he ultimate determination of whether . . . immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues material to the applicability of the defense . . . [in which case] resolution of those factual issues is properly left to the jury." (Internal quotation marks omitted.) Id., 632.

In the absence of unresolved issues of fact, a court may render summary judgment in favor of the defendant if "it is apparent from the complaint that the [defendant's] allegedly negligent acts or omissions necessarily involved the exercise of judgment, and thus, necessarily were discretionary in nature . . . ." (Internal quotation marks omitted.) *Coley* v. *Hartford*, 312 Conn. 150, 162, 95 A.3d 480 (2014); see also *Grignano* v. *Milford*, 106 Conn. App. 648, 655, 943 A.2d 507 (2008). Indeed, this court has held that it is appropriate for a trial court to grant a municipal defendant's motion for summary judgment if the plaintiff is unable to proffer a directive that would impose a ministerial duty. See generally *DiMiceli* v. *Cheshire*, supra, 162 Conn. App. 225–29 (holding that none of evidence plaintiff proffered at summary judgment stage created ministerial duty and, therefore, trial court properly rendered summary judgment).

It is true that our Supreme Court and this court have determined that evidence of an unwritten but otherwise clear oral mandate that an act be performed in a particular manner could be sufficient to establish the existence

[6] "[Our Supreme Court], on numerous occasions, has stated unequivocally that the determination of whether a governmental or ministerial duty exists gives rise to a question of law for resolution by the court." *Ventura* v. *East Haven*, supra, 330 Conn. 634.

of a directive that would support a conclusion that the act was ministerial in nature. See *Gauvin* v. *New Haven*, 187 Conn. 180, 186–87, 445 A.2d 1 (1982); *Wisniewski* v. *Darien*, 135 Conn. App. 364, 374, 42 A.3d 436 (2012). These cases, however, do not excuse a plaintiff from his or her obligation, upon a proper burden shifting, to proffer such evidence in opposition to a motion for summary judgment. As we have held previously, a plaintiff must raise a genuine issue of material fact that a policy or directive exists that could render a particular act ministerial in nature. See *DiMiceli* v. *Cheshire*, supra, 162 Conn. App. 228.

In the present case, a city official provided an affidavit in which she averred that no such policy existed. Also, as the trial court observed, the plaintiff provided no evidence that a snow and ice removal policy existed. Furthermore, the plaintiff conceded in his memorandum of law in opposition to the motion for summary judgment that the defendants do not have a written snow and ice removal policy. In light of the undisputed averment by the city official that no snow and ice removal policy existed, the trial court properly determined under the circumstances of this case that the removal of snow and ice at the school was discretionary in nature.

II

The plaintiff also claims the trial court improperly determined that he failed to raise a genuine issue of material fact regarding whether he was an identifiable victim within the meaning of our governmental immunity jurisprudence. We disagree.

"[Our Supreme Court] has recognized an exception to discretionary act immunity that allows for liability when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm. . . .

This identifiable person-imminent harm exception has three requirements: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. . . . All three must be proven in order for the exception to apply. . . . [T]he ultimate determination of whether [governmental] immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues . . . properly left to the jury." (Citation omitted; internal quotation marks omitted.) *Martinez* v. *New Haven*, 328 Conn. 1, 8, 176 A.3d 531 (2018).

"[Our Supreme Court has] stated previously that this exception to the general rule of governmental immunity for employees engaged in discretionary activities has received very limited recognition in this state." (Internal quotation marks omitted.) *Strycharz* v. *Cady*, 323 Conn. 548, 573, 148 A.3d 1011 (2016). "[T]he question of whether a particular plaintiff comes within a cognizable class of foreseeable victims for purposes of this exception to qualified immunity is ultimately a question of policy for the courts, in that it is in effect a question of duty. . . . This involves a mixture of policy considerations and evolving expectations of a maturing society . . . . [T]his exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims. . . . Our [Supreme Court's] decisions underscore, however, that whether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims. . . . [The court has] interpreted the identifiable person element narrowly as it pertains to an injured party's compulsion to be in the place at issue . . . . In fact, [t]he only identifiable class of foreseeable victims

that [the court has] recognized . . . is that of schoolchildren attending public schools during school hours . . . .'' (Citations omitted; footnote omitted; internal quotation marks omitted.) Id., 575–76.

The plaintiff claims that he is an identifiable victim for the following reasons: (1) ''he was contractually bound to deliver milk to the [s]chool''; (2) ''[the plaintiff], like all other vendors of the school, was using the access way provided to him by the school to fulfill his employer's contractual obligation''; and (3) ''[a]t the time of the incident, [he] was making a scheduled delivery, as he had done twice a week for seven months prior thereto.'' The plaintiff argues that the combination of these factors is sufficient to give rise to a genuine issue of material fact as to whether he was an identifiable victim because, in a recent case, our Supreme Court stated that ''a party is an identifiable person when he or she is compelled to be somewhere. . . . [W]hether the plaintiff was compelled to be at the location where the injury occurred remains a paramount consideration in determining whether the plaintiff was an identifiable person or member of a foreseeable class of victims . . . .'' (Citation omitted; internal quotation marks omitted.) *St. Pierre* v. *Plainfield*, 326 Conn. 420, 436, 165 A.3d 148 (2017).

The plaintiff takes the language in *St. Pierre* out of context. In fact, the court in *St. Pierre* elaborated, ''[with the exception of] one case that has since been limited to its facts . . . [our Supreme Court has] addressed claims that a plaintiff is an identifiable person or member of an identifiable class of foreseeable victims in a number of cases, [and it has] not broadened [its] definition [beyond schoolchildren attending public schools during school hours].'' (Footnote omitted.) Id., 436–37.

Students attending public school during school hours are afforded this special designation as ''identifiable

victims" because "they were intended to be the beneficiaries of particular duties of care imposed by law on school officials; they [are] legally required to attend school rather than being there voluntarily; their parents [are] thus statutorily required to relinquish their custody to those officials during those hours; and, as a matter of policy, they traditionally require special consideration in the face of dangerous conditions." (Internal quotation marks omitted.) Id., 436. Our Supreme Court applied these same factors to determine that a parent, who attended his son's high school football game and was injured on the bleachers, is not a member of an identifiable class of foreseeable victims. See *Prescott* v. *Meriden*, 273 Conn. 759, 763–65, 873 A.2d 175 (2005).

Nevertheless, the plaintiff asks us to extend the identifiable victim classification to encompass a plaintiff who is present on municipal property because his or her employer is required *by contract* to perform a service in that location. We decline to do so for the following reasons.

First, unlike schoolchildren, the plaintiff was not required by law to be on school grounds. A contractual duty to deliver milk at the school falls far short of the legal compulsion imposed by our statutes that require a child's attendance at school.

Second, Guida's may meet its contractual obligation to deliver milk to the school by waiting or returning at a later time after the school has had an opportunity to ensure that the delivery ramp is free of hazards.[7] Indeed, it is difficult to imagine that Guida's would be deemed

[7] Our courts have construed the compulsion to be somewhere requirement narrowly. In one case, this court concluded that a plaintiff did not satisfy the requirement because "[t]he plaintiff [did] not [cite] any statute, regulation or municipal ordinance that compelled her to drive her car on the stretch of [the] [s]treet where the accident occurred." *DeConti* v. *McGlone*, 88 Conn. App. 270, 275, 869 A.2d 271, cert. denied, 273 Conn. 940, 875 A.2d 42 (2005). This court also noted that the plaintiff in *DeConti* failed to satisfy the requirement because "[s]he [did] not [show] that her decision to take [the] particular route was anything but a voluntary decision that was made as a

to have breached its contract to the defendants by failing to deliver milk at that precise time and if the school had not provided a clear and safe means of access for the delivery.

Third, our courts have not treated other classes of individuals, apart from schoolchildren, who are present on school grounds during school hours as identifiable victims because there is always an aspect of voluntariness to their presence on school grounds.[8] See *Durrant* v. *Board of Education*, 284 Conn. 91, 100–108, 931 A.2d 859 (2007) (holding that mother who slipped on puddle and sustained injuries while picking up her daughter from after school daycare at city's elementary school is not identifiable victim); *Prescott* v. *Meriden*, 80 Conn. App. 697, 698–701, 703, 836 A.2d 1248 (2003) (holding that parent injured on bleachers during son's high school football game is not identifiable victim), aff'd, 273 Conn. 759, 873 A.2d 175 (2005).

matter of convenience." Id. In another case, our Supreme Court determined that a person is not an identifiable victim if he is not legally required to be somewhere and could have assigned someone else to go to the location to complete the task in his place. See *Grady* v. *Somers*, 294 Conn. 324, 355–57, 984 A.2d 684 (2009). In *Grady*, the municipality did not provide refuse pickup service, and residents could either obtain a transfer station permit and discard their own refuse, or hire private trash haulers to come to their home. Id., 328 n.4. Because the plaintiff in *Grady* had the option of hiring an independent contractor to dispose of his refuse, the court did not classify him as an identifiable victim for injuries he sustained when he slipped on an ice patch at the transfer station. Id., 355–56.

[8] In his appellate brief, the plaintiff relies on *Tryon* v. *North Branford*, 58 Conn. App. 702, 755 A.2d 317 (2000), as support for his assertion that he is an identifiable victim. *Tryon*, however, was decided nineteen years ago, and our Supreme Court has more recently focused its analysis regarding whether a plaintiff is an identifiable victim on whether the plaintiff is compelled to be somewhere. See *St. Pierre* v. *Plainfield*, supra, 326 Conn. 436–37. The court has, therefore, not extended the classes of identifiable victims beyond schoolchildren who are statutorily required to attend school during school hours. See id. Thus, *Tryon* is distinguishable because the court in that case did not consider whether the plaintiff was required by statute to be at the parade as part of its analysis concerning whether the plaintiff was an identifiable victim. *See Tryon* v. *North Branford*, supra, 710–11.

Fourth, even when schoolchildren are on school grounds, our courts have not classified them as identifiable victims if they are on school property as part of voluntary activities. See *Coe* v. *Board of Education*, 301 Conn. 112, 118–22, 19 A.3d 640 (2011) (holding that student, who was injured at school dance that occurred after school hours and that she *voluntarily* attended, was not identifiable victim); *Costa* v. *Board of Education*, 175 Conn. App. 402, 408–409, 167 A.3d 115 (holding that student was not identifiable victim for injuries sustained during senior class picnic because "[he] was not required to attend the senior picnic, but did so voluntarily" and he "voluntarily participated in pick-up basketball game in which he was injured"), cert. denied, 327 Conn. 961, 172 A.3d 801 (2017).

In sum, we decline to extend the classes of individuals who may be identifiable victims beyond the narrow confines of children who are statutorily compelled to be on school grounds during regular school hours.[9] Accordingly, having conducted a plenary review of the trial court record, we conclude the plaintiff has failed to raise a genuine issue of material fact regarding the defendants' entitlement to governmental immunity. With regard to both issues—whether snow and ice removal is ministerial or discretionary and whether the plaintiff is an identifiable victim—the trial court properly determined that the defendants were entitled to judgment as a matter of law.

The judgment is affirmed.

In this opinion the other judges concurred.

[9] Because we agree with the trial court's decision to render summary judgment on the basis that the plaintiff is not an identifiable victim, we need not address whether he was subject to imminent harm under the circumstances. See *Martinez* v. *New Haven*, supra, 328 Conn. 8 (holding that "[a]ll three [elements] must be proven in order for the exception to apply" [internal quotation marks omitted]).

# ISHA SEN *v.* KOSTAS TSIONGAS
## (AC 40963)

Prescott, Elgo and Pellegrino, Js.

*Syllabus*

The plaintiff sought to recover damages from the defendant, who was the landlord and owner of the apartment building in which she lived, for negligence in connection with personal injuries the plaintiff sustained when she was bitten in the building's common stairway by a dog owned by one of the other tenants. Specifically, the plaintiff alleged, inter alia, that the defendant was negligent in failing to maintain the building premises in a reasonably safe condition by allowing the dog's owner to keep a vicious animal and failing to investigate the animal's history of viciousness. The defendant moved for summary judgment on the ground that he did not have any knowledge of the alleged vicious propensities of the dog. The trial court granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held* that the trial court improperly rendered summary judgment in favor of the defendant, as there was a disputed issue of material fact as to whether the defendant should have known that the dog had vicious propensities: on the basis of the plaintiff's averments that the dog acted viciously toward her when she approached the building and displayed vicious tendencies that were visible to all those who observed it, a jury could reasonably infer that the defendant, who came to the building on a weekly basis, would likely have observed the dog's aggressive tendencies, and the defendant's claim that there was no dispute as to a material fact was further undermined by the existence of additional circumstantial evidence indicating that the defendant should have known that the dog had vicious propensities, as there was evidence that the dog, prior to biting the plaintiff, scratched the plaintiff's husband and bit the son of the dog's owner, that the dog's owner spoke openly about how the dog had been used as bait in dog fighting, and that the defendant had constructive knowledge of the dog's vicious propensities in the form of the defendant's own testimony that the dog once barked at him through the window while he was mowing the lawn and that he observed the dog pull toward him when the dog was walked on a leash; moreover, although the defendant testified that he never saw the dog display vicious tendencies, the trial court was presented with conflicting facts and was required to make a credibility determination, which the court was not permitted to make at the summary judgment stage, and, thus, the existence of those contradictory accounts of the dog's behavior thwarted summary judgment.

*(One judge concurring separately)*

Argued March 19—officially released August 27, 2019

*Procedural History*

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

*Matthew C. Eagan*, with whom was *James P. Sexton*, for the appellant (plaintiff).

*Audrey B. Staropoli*, for the appellee (defendant).

*Opinion*

PELLEGRINO, J. In this premises liability action, the plaintiff, Isha Sen, appeals from the summary judgment rendered in favor of the defendant, Kostas Tsiongas. On appeal, the plaintiff claims that the trial court erred in rendering summary judgment in favor of the defendant, who was the landlord of the apartment building in which the plaintiff lived, because there was a disputed issue of material fact as to whether the defendant should have known that the dog of one of the other tenants had vicious propensities. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. At the relevant times, the plaintiff resided in the second floor apartment of a two unit apartment building at 396 Washington Street in Bristol (building). The defendant was the owner and landlord of the building. On September 18, 2015, at approximately 3:30 p.m., a dog that was owned by the building's first floor tenant bit the plaintiff in the building's common stairway. The plaintiff was taken by ambulance to

the University of Connecticut Medical Center in Farmington, where she was treated for her injuries, which included lacerations to and numbness of her right hand.

On May 4, 2016, the plaintiff commenced the present action. In her operative complaint, the plaintiff alleged, inter alia, that the defendant was negligent in failing to maintain the building premises in a reasonably safe condition by allowing the first floor tenant to keep a vicious animal, failing to investigate the animal's history of viciousness, and failing to enforce a provision of the lease that prohibited pets on the premises.

On July 13, 2017, the defendant filed a motion for summary judgment, which was accompanied by an affidavit in which he averred in relevant part: "At no time prior to September 18, 2015, did I have any knowledge of the alleged vicious propensities of the dog involved in the incident. . . . At no time prior to September 18, 2015, did I observe the dog involved in the incident engage in vicious behavior, nor did [the dog's owner] or anyone else inform me that the dog had a propensity toward viciousness."

On August 30, 2017, the plaintiff filed an objection to the defendant's motion for summary judgment. In support of her objection, the plaintiff attached an affidavit in which she averred in relevant part: "[The first floor tenant] spoke openly about how the [dog] had been used as bait in dog fighting. . . . It is my opinion that the [dog] exhibited vicious qualities and that these qualities were apparent to any reasonable person who observed the dog. . . . The [dog] demonstrated aggression by barking, growling, and trying to escape the first floor porch whenever I walked up the stairs. . . . In June of 2015, the [dog] broke out of the porch and advanced toward my husband, trying to bite him. The [dog] managed to scratch him before it was brought under control. . . . Before I was attacked, [the first floor tenant] informed me that the [dog] had bitten his seven year old son."

In support of her objection to the defendant's motion for summary judgment, the plaintiff also submitted a transcript of her deposition of the defendant, which was taken on July 31, 2017. During the deposition, the following exchange occurred between the plaintiff's counsel and the defendant:

"Q. You have a rule [in your lease agreement] that says, 'You will not have pets.' Why do you have that rule?

"A. Well, I have that rule more like for . . . pets cause damage . . . sometimes.

"Q. What kind of damage can pets cause?

"A. Well, going to the bathroom in the house, this and that, but if somebody asks me, can I get [a pet], or if [they] have a pet, and they're a good tenant . . . I'd say okay. You know.

* * *

"Q. What kind of damage [other than property damage] is that?

"A. Well, I mean, if a dog or a cat scratches, you know, another human, yes.

"Q. And do you have that rule to protect other humans?

"A. No. It's mostly, I put it in, like I said, for more damage.

* * *

"Q. All right. And can you tell me about [the first floor tenant] asking you about getting a dog?

"A. Yes. He asked me, he wanted to get a dog from The Humane Society and, then I said, okay.

* * *

"Q. Do you know approximately when [the first floor tenant] got the dog?

"A. Probably 2014 . . . .

"Q. And . . . did you see the dog on the property?

"A. Well, I had seen the dog on the property when they had it out, walking the dog, but I [had] seen the dog inside when I'd go in to do any repairs in the apartments or collect rent.

* * *

"Q. Approximately how often were you at the [building] after they got the dog in 2014?

"A. Well, I don't know. Probably, I'd say, once a week. . . .

"Q. Can you tell me about the dog, about what the dog was like?

"A. Well, like I said, when I was there, I would go into their apartment and the dog wouldn't bark, or growl, or anything like that to me. I'd see the dog outside when they . . . [had] it on the leash. You know, it pulled, like you know, of course, dogs come and want to see you, but that's about it. I mean, otherwise . . . one time when I was cutting the grass, the dog barked at me through the window, but all dogs do that, you know."

On September 5, 2017, the court held a hearing on the defendant's motion for summary judgment. On September 28, 2017, the court granted the defendant's motion for summary judgment and rendered judgment in favor of the defendant. In its memorandum of decision, the court stated: "The plaintiff has not put forth any evidence that the [defendant] had actual or constructive knowledge of the dog's alleged vicious propensities prior to the alleged attack." This appeal followed. Additional facts will be set forth as necessary.

The plaintiff claims that the trial court erred in rendering summary judgment in favor of the defendant because there was a disputed issue of material fact as to whether the defendant should have known that the

dog had vicious propensities. Specifically, the plaintiff argues that the evidence, viewed in the light most favorable to her as the nonmoving party, demonstrates the existence of a disputed factual issue. We agree with the plaintiff.

"We begin our analysis with the standard of review applicable to a trial court's decision to grant a motion for summary judgment. 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. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Anderson* v. *Dike*, 187 Conn. App. 405, 409–10, 202 A.3d 448, cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019).

The following legal principles are also relevant to the plaintiff's claim. "As a matter of well settled common law, [i]t is, of course, the duty of a landlord to use reasonable care to keep in a reasonably safe condition the parts of the premises over which he reserves control. . . . The ultimate test of the duty is to be found in the reasonable foreseeability of harm resulting from a failure to exercise reasonable care to keep the premises reasonably safe. . . . The prevailing common-law conception of the dangerous conditions implicated in this duty, moreover, certainly is capacious enough readily to encompass threats from animals, including known vicious dogs. . . . [A] landlord, in exercising the closely analogous duty to alleviate dangerous conditions in areas of a premises over which it retains control, must take reasonable steps to alleviate the dangerous condition created by the presence of a dog with known vicious tendencies in the common areas of the property." (Citations omitted; internal quotation marks omitted.) *Giacalone* v. *Housing Authority*, 306 Conn. 399, 407–408, 51 A.3d 352 (2012).

"We note . . . that our conclusion that the traditional common-law duty of landlords to keep common areas in a reasonably safe condition applies to dangers posed by known dangerous dogs accords with the identical conclusion reached by courts in numerous other jurisdictions. See, e.g., *Fouts ex rel. Jensen* v. *Mason*, 592 N.W.2d 33, 40 (Iowa 1999) ('When the landlord knows or has reason to know of the existing dangerous condition, the landlord—to avoid liability—must act to protect those using the common area. . . . [H]ere, although she may not have had control over the dog, [the landlord] knew or *had reason to know* that the dog posed a danger to those in the common backyard. She therefore had a duty to take reasonable precautions to protect those lawfully in the common area.' . . .) . . . ." (Citations omitted; emphasis added.) *Giacalone* v. *Housing Authority*, supra, 306 Conn. 409–11.

The test for common-law premises liability looks to whether the landlord had actual *or* constructive knowledge of the dangerous condition on the premises. See, e.g., *Noebel* v. *Housing Authority*, 146 Conn. 197, 201, 148 A.2d 766 (1959) ("the test is: would the ordinarily prudent [person] in the position of the defendants, knowing what they knew or *should have known*, anticipate that harm of the general nature of that suffered was likely to result" [emphasis added]). Thus, in order to prevail on his motion for summary judgment, the defendant in the present case was required to demonstrate the absence of any genuine issue of material fact as to whether he knew, or *should have known*, of the dog's vicious propensities. *Giacalone* v. *Housing Authority*, supra, 306 Conn. 409–10.

In her affidavit, the plaintiff averred that the dog "demonstrated aggression by barking, growling, and trying to escape the first floor porch whenever [she] walked up the stairs." Additionally, the plaintiff averred: "It is my opinion that the [dog] exhibited vicious qualities and that these qualities were apparent to any reasonable person who observed the dog."[1] On the basis of the plaintiff's averments that the dog acted viciously toward her when she approached the building and displayed vicious tendencies that were visible to all those who observed it, a jury could reasonably infer that the defendant, who came to the building on a weekly basis,

[1] We do not believe that this statement constitutes inadmissible evidence. Although a lay witness is generally not permitted to give opinion testimony, "[t]he use of such words as 'I think,' 'probably,' or 'it is my impression' are not uncommon in lay testimony and do not make such evidence opinion unless it is clearly so from all the circumstances." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 7.1.2, p. 434. Because evidence is to be construed in favor of the nonmoving party in considering a motion for summary judgment, and because the aforementioned principle is relevant to this issue, we conclude that, although the plaintiff prefaced her statement by stating "[i]t is my opinion," the statement constituted a factual assertion regarding the dog's behavior rather than an opinion.

would likely have observed the dog's aggressive tendencies. See *Tuccio Development, Inc.* v. *Neumann*, 111 Conn. App. 588, 594, 960 A.2d 1071 (2008) (at summary judgment stage, "court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion" [internal quotation marks omitted]); *Solesky* v. *Tracey*, 198 Md. App. 292, 325, 17 A.3d 718 (2011) ("[T]here was uncontroverted evidence that the landlord had visited the property and had seen these particular pit bulls [firsthand]. In light of a neighbor's testimony that 'anybody' who walked near these dogs would experience aggression from the dogs, the jury could have rationally inferred that the landlord, too, observed vicious behavior when she . . . visited the premises."), aff'd on other grounds, 427 Md. 627, 50 A.3d 1075 (2012), superseded by statute as stated in *Phillips* v. *J Bar W, Inc.*, Docket No. 1167, 2017 WL 4876762, *4 (Md. Spec. App. October 27, 2017). Although a jury could reasonably infer that the defendant had the opportunity to observe the dog's aggressive tendencies, the defendant testified that he never saw the dog display vicious tendencies. Thus, the trial court in the present case was presented with conflicting facts and was required to make a credibility determination. Because the court is not permitted to make such a credibility determination at the summary judgment stage, the existence of these contradictory accounts of the dog's behavior thwarts summary judgment. See, e.g., *Straw Pond Associates, LLC* v. *Fitzpatrick, Mariano & Santos, P.C.*, 167 Conn. App. 691, 710, 145 A.3d 292 ("In summary judgment, the court's role is not to weigh the credibility of the parties, which falls within the province of the finder of fact. . . . When a court, in ruling on a motion for summary judgment, is confronted with conflicting facts, resolution and interpretation of which would require determinations of credibility, summary judgment is not appropriate." [Citation omitted.]), cert. denied, 323 Conn. 930, 150 A.3d 231 (2016).

The defendant's argument that there was no dispute as to a material fact before the trial court is further undermined by the existence of additional circumstantial evidence indicating that the defendant should have known that the dog had vicious propensities. "Circumstantial evidence is, of course, also available on the question of notice or knowledge of the specific defects . . . ." *Cruz* v. *Drezek*, 175 Conn. 230, 235–36, 397 A.2d 1335 (1978). In the present case, there was evidence that, prior to biting the plaintiff on September 18, 2015, the dog scratched the plaintiff's husband and bit the first floor tenant's son.

Moreover, the plaintiff averred that the dog's owner "spoke openly about how the [dog] had been used as bait in dog fighting." Although this evidence came in through the plaintiff's affidavit, dismissing these statements out of hand amounts to a credibility determination and, therefore, runs afoul of the well established rule that "[w]hen deciding a summary judgment motion, a trial court may not resolve credibility questions raised by affidavits or deposition testimony submitted by the parties." *Doe* v. *West Hartford*, 328 Conn. 172, 197, 177 A.3d 1128 (2018); see id., 196 (concluding that trial court erred when it dismissed "out of hand" deposition testimony that created genuine issue of material fact).

Moreover, there was evidence that the defendant had constructive knowledge of the dog's vicious propensities in the form of the defendant's own testimony that the dog once barked at him through the window while he was mowing the lawn and that he observed the dog pull toward him when the dog was walked on a leash. Although the defendant described these behaviors as things "all dogs" do, this evidence, in conjunction with the evidence described in the preceding paragraphs of this decision, could reasonably be viewed by the jury as indicating that the defendant had constructive notice of the dog's vicious propensities. On the basis of the

foregoing, we conclude that there is a disputed issue of material fact and, therefore, that summary judgment was improper.[2]

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

In this opinion, ELGO, J., concurred.

PRESCOTT, J., concurring. I agree with the opinion of the majority that the trial court improperly rendered summary judgment in favor of the defendant, Kostas Tsiongas. In reaching this conclusion, however, I conclude, unlike the trial court, that the fact that the dog that bit the plaintiff, Isha Sen, in this case is a pit bull is a relevant factual consideration in assessing whether the landlord-defendant had constructive knowledge of the dog's vicious propensities.[1] Because the question of whether, in the absence of any consideration of the breed of the dog in this case, the trial court properly rendered summary judgment in favor of the defendant is a close one, I am of the view that it is appropriate to address the relevance of the breed of the dog.

[2] Because we reached this conclusion without considering the breed of the dog, we need not address the defendant's argument that the trial court should have considered the fact that the dog was a pit bull in assessing whether the defendant had constructive notice of the dog's viciousness. We, therefore, see no reason to determine the breed issue and do not agree with Judge Prescott's concurrence that the breed of the dog should be considered in assessing premises liability, in the absence of the articulation of such a rule by our Supreme Court or legislature.

[1] With respect to the fact that the dog in this case is a pit bull or a mixed breed pit bull, the trial court stated that it "is not about to make a global finding that if a dog bite case involves a pit bull and/or bait pit bull, the landlord is on notice for vicious tendencies." (Internal quotation marks omitted.) The trial court's statement incorrectly suggests that it was being asked to decide whether the fact that the dog in the case was a pit bull establishes, by itself, as a matter of law, that the landlord had constructive knowledge of its vicious tendencies. The plaintiff has made no such claim. Instead, she merely asserts that it is one relevant fact, among others, that raises a genuine issue of material fact regarding the landlord's constructive knowledge.

Numerous courts have concluded that pit bulls or mixed breed pit bulls pose dangers to people greater than most, if not all, other breeds of dogs. See, e.g., *Altman* v. *High Point*, 330 F.3d 194, 206 (4th Cir. 2003) ("pit bulls . . . are a dangerous breed of dog"); *Vanater* v. *South Point*, 717 F. Supp. 1236, 1241 (S.D. Ohio 1989) ("[w]hile [p]it [b]ulls are not the only breed of dog which can be dangerous or vicious, it is reasonable to single out the breed to anticipate and avoid the dangerous aggressiveness which may be undetectable in a[n] [individual] [p]it [b]ull"); see also *Tracey* v. *Solesky*, 427 Md. 627, 644 n.18, 50 A.3d 1075 (2012), superseded by statute as stated in *Phillips* v. *J Bar W, Inc.*, Docket No. 1167, 2017 WL 4876762, *4 (Md. Spec. App. October 27, 2017).[2]

Many localities have banned or highly regulated ownership of pit bulls, against constitutional challenge, because of the pit bull's vicious tendencies and ability to cause severe injuries. See, e.g., *American Dog Owners Assn., Inc.* v. *Dade County*, 728 F. Supp. 1533, 1538–43 (S.D. Fla. 1989); *Starkey* v. *Chester*, 628 F. Supp. 196, 197–98 (E.D. Pa. 1986); *Holt* v. *Maumelle*, 307 Ark. 115, 117–19, 817 S.W.2d 208 (1991); *Colorado Dog Fanciers, Inc.* v. *Denver*, 820 P.2d 644, 650–54 (Colo. 1991) (en banc); *State* v. *Peters*, 534 So. 2d 760, 763–65 (Fla. App.

[2] The Court of Appeals of Maryland in *Tracey* concluded that a landlord should be held strictly liable for injuries caused by a tenant's pit bull. The Maryland legislature subsequently overturned the decision in *Tracey* by enacting Md. Code Ann., Cts. & Jud. Proc. § 3-1901 (b) (West 2014). This statute, however, only abrogated Maryland common law to the extent that it imposed strict liability on a landlord for injuries caused by a tenant's pit bull. It did not overturn Maryland common law as it existed on or prior to April 1, 2012. Maryland common law prior to April 1, 2012, provided that it is a relevant factual consideration in determining a landlord's liability for injuries caused by a tenant's dog that the animal was a pit bull. See, e.g., *Matthews* v. *Amberwood Associates Ltd. Partnership, Inc.*, 351 Md. 544, 561, 719 A.2d 119 (1998) (noting that "[t]he extreme dangerousness of this breed, as it has evolved today, is well recognized").

1988), review denied, 542 So. 2d 1334 (Fla. 1989); *American Dog Owners Assn., Inc.* v. *Des Moines*, 469 N.W.2d 416, 417–19 (Iowa 1991); *Hearn* v. *Overland Park*, 244 Kan. 638, 647–50, 772 P.2d 758, cert. denied, 493 U.S. 976, 110 S. Ct. 500, 107 L. Ed. 2d 503 (1989); *Bess* v. *Bracken County Fiscal Court*, 210 S.W.3d 177, 181–83 (Ky. App. 2006); *Garcia* v. *Tijeras*, 108 N.M. 116, 118–24, 767 P.2d 355 (App.), cert. denied, 107 N.M. 785, 765 P.2d 758 (1988); *Toledo* v. *Tellings*, 114 Ohio St. 3d 278, 281–84, 871 N.E.2d 1152 (2007), cert. denied, 552 U.S. 1225, 128 S. Ct. 1302, 170 L. Ed. 2d 140 (2008); *Greenwood* v. *North Salt Lake*, 817 P.2d 816, 818–21 (Utah 1991); *Dog Federation of Wisconsin, Inc.* v. *South Milwaukee*, 504 N.W.2d 375 (Wis. Ct. App.), review denied, 508 N.W.2d 423 (Wis. 1993). Furthermore, several branches of our military ban pit bulls from housing facilities on military bases because of concerns regarding the breed's tendency toward viciousness. See, e.g., D. Conkright, Department of the Army, "Memorandum for See Distribution: United States Army Garrison Humphreys, Policy Letter #34, Ownership and Control of Pets," (July 21, 2013), available at https://www.army.mil/e2/c/downloads/328371.pdf (last visited August 12, 2019).

In light of the pit bull breed's vicious tendencies, at least two courts have held that it is "objectively reasonable" for a person to assume an approaching pit bull is vicious even though that individual pit bull is, in fact, "a friendly, nonviolent dog who would not have harmed [others] . . . ." *Warboys* v. *Proulx*, 303 F. Supp. 2d 111, 118 and n.13 (D. Conn. 2004); see also *United States* v. *Sutton*, 336 F.3d 550, 551, 554 (7th Cir. 2003) (holding that less than full compliance with knock and announce rule was reasonable under circumstances, in part, because "pit bull dogs [known for their hostility to strangers] had been seen on the property," which police identified as "[a] potential [threat] to officer safety"); *Pickens* v. *Wasson-Hunt*, United States

District Court, Docket No. 04-0678-CV-W-HFS (W.D. Mo. August 7, 2006) (determining that police officers were not unreasonable in directing their weapons at pit bull who was not acting aggressively because "it is clear that the unquantifiable, unpredictable aggressiveness and gameness of pit bulls make them uniquely dangerous").

In *Warboys*, the court determined that a police officer was not required to wait until the pit bull leaped toward him to take protective action. *Warboys* v. *Proulx*, supra, 303 F. Supp. 2d 118. In making this determination, the court considered extensively the vicious tendencies of the pit bull breed. See id., 118–19 n.13. On the basis of this information, the court concluded that "it is reasonable to single out the [pit bull] breed to anticipate and avoid the dangerous aggressiveness [that] may be undetectable in a[n] [individual] [p]it [b]ull." (Internal quotation marks omitted.) Id., 119 n.13. Thus, the court in *Warboys* determined that the officer did not need to know about the behavioral characteristics or propensities of the *individual* pit bull approaching him; the fact that the pit bull breed itself is known for violent behavior was a sufficient basis for the officer to determine how to treat the approaching dog.

Although breed does not establish by itself a prima facie case of constructive knowledge of danger, it is a relevant factual consideration to be evaluated along with the other evidence. In light of the danger some pit bulls pose to people, some courts have held that evidence regarding the vicious tendencies of the pit bull breed may be considered by a jury as part of its determination of whether a defendant had reason to know of an individual pit bull's dangerousness.[3] See,

[3] At least one court has held that if a dog breed is known for "vicious tendencies," then "knowledge of vicious propensities can be implied due to the type of dog involved . . . ." *Plue* v. *Lent*, 146 App. Div. 2d 968, 969, 537 N.Y.S.2d 90 (1989). If, however, the breed is not known for vicious tendencies, then such an inference cannot be made. See id. *Plue*, however,

e.g., *Drake* v. *Dean*, 15 Cal. App. 4th 915, 923–24, 19 Cal. Rptr. 2d 325 (1993) (determining that evidence of pit bulls historically being bred for aggressiveness may be considered by jury to consider dangerousness of individual pit bull); *Giaculli* v. *Bright*, 584 So. 2d 187, 188, 189 (Fla. App. 1991) (holding that landlord could be held liable for injuries to plaintiff's son caused by neighbor's pit bull because "it is not necessary that pit bulls be declared vicious per se under the law in order for the landlord and owners to be placed on notice that a tenant has a vicious dog" and, therefore, "[t]he fact that the dog was barking and lunging, particularly in light of the characteristics of pit bulls, is sufficient for a jury to reasonably conclude that the landlord was on notice of the vicious propensity of the dog"); *Hampton ex rel. Hampton* v. *Hammons*, 743 P.2d 1053, 1056, 1061 (Okla. 1987) (holding that "evidence relating to the nature of pit [bulls] as a breed is properly admissible" because it is relevant in determining whether defendant is liable for common-law negligence).

Moreover, an animal's type has been a consideration our Supreme Court has used to determine whether the owner of the animal is liable for the injuries it caused.[4]

did not involve a pit bull. See id. Instead, it involved an Afghan hound, which the court described as "a noble and dignified animal, which, when properly treated, is aloof to strangers and characteristically gentle with everyone." Id. The court contrasted this dog with a German Shepherd, which the court described as "a breed said to have inherited vicious tendencies from its ancestor, the wolf . . . ." (Citation omitted.) Id.

[4] In a case involving a horse at a commercial farm, our Supreme Court stated, "[i]n making the determination as to whether, as a matter of public policy, the owner or keeper of a domestic animal that has not previously exhibited mischievous propensities may be held liable for injuries that were foreseeable because the animal belonged to a class of animals with naturally mischievous propensities, we consider the following four factors: (1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." (Internal quotation marks omitted.) *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 322, 87 A.3d 546 (2014).

The court has held that, even in the absence of evidence purporting to show the vicious tendencies of an *individual animal*, an owner may be held liable for negligence for the foreseeable harms[5] of an animal that is a part of a "*class of animals* that is naturally inclined to cause such injuries . . . ."[6] (Emphasis added.) *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 306, 87 A.3d 546 (2014); see id. (holding that "the owner or keeper of a domestic animal has a duty to take reasonable steps to prevent injuries that are foreseeable because the animal belongs to a class of animals that

[5] The court addressed what a plaintiff must show to prove that the harm caused by a domestic animal was foreseeable to the defendant. "[T]o establish that an injury caused by a domestic animal was foreseeable, the plaintiff need not prove that the *species as a whole* has a natural tendency to inflict such harm, but only that the *class of animals* to which the specific animal belongs has such a tendency. . . . Conversely, if a plaintiff presents evidence that an entire species has naturally mischievous propensities, the defendant may rebut this evidence by producing evidence that the mischievous propensities of the specific animal, or of the particular class of animals to which the specific animal belongs, are less severe than the mischievous propensities of the species as a whole." (Citations omitted; emphasis added.) *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 333–34, 87 A.3d 546 (2014).

Thus, the court in *Vendrella* suggests that "class" is a subset of "species." As applied to the present case, this might mean that although all dogs do not have vicious propensities, certain breeds, like pit bulls, may possess such propensities.

[6] The common-law rule for negligence "has been modified substantially as it pertains to dogs. Specifically, General Statutes § 22-357 imposes strict liability on the 'owner or keeper' of a dog for harm caused by the dog, with limited exceptions." *Giacalone* v. *Housing Authority*, 306 Conn. 399, 405, 51 A.3d 352 (2012). This statute, however, does not impose strict liability on a landlord if a dog that lives in his or her building bites someone. As our Supreme Court observed, "a landlord is not the keeper of a dog for purposes of § 22-357 merely because the landlord acquiesces in the presence of the dog on leased premises, or because the landlord has the authority to require that the dog be removed from the premises in the event that it becomes a nuisance, or even because the landlord has the authority to require that certain conditions be placed on the use of the dog by its owner." *Auster* v. *Norwalk United Methodist Church*, 286 Conn. 152, 162, 943 A.2d 391 (2008). Thus, the statute did not abrogate a plaintiff's ability to sue a landlord for dog bite injuries under theories of common-law negligence or premises liability. See *Giacalone* v. *Housing Authority*, supra, 401–403.

is naturally inclined to cause such injuries, regardless of whether the animal had previously caused an injury or was roaming at large and, accordingly, the owner may be held liable for negligence if he or she fails to take such reasonable steps and an injury results''); see also *Hope* v. *Valente*, 86 Conn. 301, 303–305, 85 A. 541 (1912) (holding that, even in absence of evidence concerning behavioral tendencies of defendant's horse, defendant may be liable for negligence based on manner in which horse was left in street while feeding).

Our Supreme Court in *Vendrella*, however, declined to classify a horse as presumptively dangerous and refused to hold its keeper strictly liable for the harms it caused. *Vendrella* v. *Astriab Family Ltd. Partnership*, supra, 311 Conn. 307–308. Instead, the court determined that because "the plaintiffs' evidence . . . created a genuine issue of material fact as to whether horses have a natural inclination to bite humans, the case must be submitted *to the trier of facts so that it may decide as a matter of fact* whether the plaintiffs have met their burden of proof on that issue and, if so, whether the defendants were negligent in controlling [the horse]." (Emphasis in original.) Id., 308. Hence, the court held that it was for the trier of fact to determine whether the "plaintiff's injuries were foreseeable and, if so, what the appropriate standard of care was, whether the defendants breached that standard of care and, if they did, whether the breach was a proximate cause of the minor plaintiff's injuries." Id.; see also *Hope* v. *Valente*, supra, 86 Conn. 304–305 (holding that "[u]nder the facts claimed to have been proved it was proper to leave it to the jury to determine whether, regardless of the viciousness of the defendant's horse, he was negligent in leaving it in the street in the manner claimed").

I arrive at a conclusion similar to that of our Supreme Court in *Vendrella*. I do not posit that all pit bulls are vicious, nor do I contend that a landlord is or should be strictly liable for injuries caused by a tenant's pit

bull. Indeed, if the pit bull in the present case was known to lick affectionately every passerby and the defendant had observed such behavior, then it is unlikely that the trier of fact would find that the defendant had constructive knowledge that the dog posed a danger to the other tenants.

Furthermore, I agree with the court in *Vendrella* and other courts that the fact that an animal is of a certain class—or, in the present case, breed—may create a genuine issue of material fact as to whether a landlord, who owed a plaintiff a duty of care, had constructive knowledge of the vicious propensities of the animal that caused harm. In the present case, whether the defendant had constructive knowledge that *this* dog had vicious propensities must be determined by the totality of the circumstances presented by the case. In making the factual determination regarding whether the defendant knew or should have known that the dog was vicious, I am not prepared to say that it is irrelevant as a matter of law that the dog is a member of a breed that presents heightened danger to others.[7]

In the present case, the defendant conceded at his deposition that pit bulls are widely known to be aggressive and dangerous dogs.[8] In my view, the behavioral

[7] I disagree with the majority's suggestion that I am somehow intruding on a policy decision that should be left to our Supreme Court or the legislature. See footnote 2 of the majority opinion. Although either of those institutions is free to weigh in as a matter of policy on this issue, there simply is nothing inappropriate in this court determining, as a matter of common sense and factual relevance, that the breed of the dog is a fact that bears upon the question of whether the landlord had constructive knowledge of the dog's vicious tendencies.

[8] The following exchange occurred between the plaintiff's counsel and the defendant:

"[The Plaintiff's Counsel]: Mr. Tsiongas, I mean, do you agree that pit bulls are widely known to be aggressive and dangerous dogs?

* * *

"[The Defendant]: Well, I mean, I'm sure they are. A lot of people think so. I mean, I don't know. I guess it depends on the dog.

"[The Plaintiff's Counsel]: Do you know that pit bulls have been banned on U.S. military bases?

* * *

characteristics of the pit bull breed, along with other evidence before the court, create a genuine issue of material fact as to whether the defendant had constructive knowledge of the vicious propensities of the dog that harmed the plaintiff. Accordingly, I concur in the decision to reverse the summary judgment rendered in favor of the defendant.

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"[The Defendant]: No, I didn't know that.

"[The Plaintiff's Counsel]: All right. Did you know that the New York City Housing Authority, which is responsible for providing safe housing for 400,000 New Yorkers [in] around 328 housing projects bans pit bulls from its properties?

* * *

"[The Defendant]: No.

"[The Plaintiff's Counsel]: Do you know why [it] might do that?

* * *

"[The Defendant]: Okay. I don't know.

"[The Plaintiff's Counsel]: Do you have any idea?

* * *

"[The Defendant]: Well, I mean, I'm sure because [it has] problems with them. I mean, I don't know.

"[The Plaintiff's Counsel]: What kind of problems?

* * *

"[The Defendant]: All right. Well, I mean, I don't know what problems.

"[The Plaintiff's Counsel]: You don't know what problems pit bulls—

"[The Defendant]: Well, I'm sure some problems. Maybe they're considered a mean dog, or people abuse them. I don't know. I mean—

"[The Plaintiff's Counsel]: You said something, they may be a mean dog because people abuse them. What do you know about abused dogs?

* * *

"[The Defendant]: Well, I mean, from what I know is what I hear in the news, you know, people use them for fighting, you know, this and that. That's about it.

"[The Plaintiff's Counsel]: What happens to a dog, do you know what happens to a dog if it's been used in fighting?

"[The Defendant]: Well, any dog that's been, you know, abused or used in fighting, it's probably going to be mean, or hurt, or, I don't know. I mean—

* * *

"[The Plaintiff's Counsel]: Do you agree that dogs that are used in fighting might be mean?

"[The Defendant]: Sure. Yes. I'm sure, yes."

# STATE OF CONNECTICUT *v.* JACEK TARASIUK (AC 41362)

Alvord, Prescott and Eveleigh, Js.

*Syllabus*

Convicted, after a jury trial, of the crimes of assault of public safety personnel and criminal trespass, the defendant appealed to this court. He claimed that the court improperly permitted the state to introduce evidence of a prior felony conviction of the defendant for criminal violation of restraining order for the purpose of impeaching the defendant's credibility. *Held* that although the trial court abused its discretion by admitting into evidence the defendant's prior felony conviction, as it had no bearing on his truthfulness and was more than ten years old, the defendant failed to demonstrate that the admission of that evidence constituted harmful error entitling him to a new trial; the state's case against the defendant ultimately did not turn on the defendant's credibility, the state offered proof of each essential element, including testimony from the police officer that while the defendant was resisting being seated in the police cruiser, the police officer was kicked by the defendant, who did not contest that testimony and denied only intentionally kicking the police officer, and the state was not required to prove an intent to physically harm the police officer by the defendant, who testified that the police officer was reasonably identifiable as a peace officer and that although he was too drunk that day to remember whether he was kicking his legs, he did resist being seating in the police cruiser and was thrashing around, and in light of those admissions, which supported a jury finding that the defendant intended to prevent the police officer from performing his duties, the jury reasonably could have found any ameliorative aspects of the defendant's testimony to be not credible and could have credited the police officer's version of the events, and, therefore, the improper admission of the prior felony conviction did not substantially affect the verdict.

Argued March 12—officially released August 27, 2019

*Procedural History*

Two part substitute information charging the defendant, in the first part, with the crimes of assault of public safety personnel, threatening in the second degree and criminal trespass in the first degree, and, in the second part, with having committed an offense while on release, brought to the Superior Court in the judicial

district of New Britain, geographical area number fifteen, where the first part of the information was tried to the jury before *Keegan, J.*; verdict of guilty of assault of public safety personnel and criminal trespass in the first degree; thereafter, the second part of the information was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

*S. Max Simmons*, assigned counsel, for the appellant (defendant).

*Linda F. Currie-Zeffiro*, assistant state's attorney, with whom, on the brief, were *Brian W. Preleski*, state's attorney, and *David Clifton*, assistant state's attorney, for the appellee (state).

*Opinion*

ALVORD, J. The defendant, Jacek Tarasiuk, appeals from the judgment of conviction, rendered following a jury trial, of one count of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (1) and one count of criminal trespass in the first degree in violation of General Statutes § 53a-107 (a) (1).[1] On appeal, the defendant claims that the trial court abused its discretion by admitting into evidence the defendant's May 24, 2006 unnamed felony conviction for the limited purpose of impeaching the defendant's credibility. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On August 8, 2016, the defendant had been drinking alcohol in the parking lot of the Pulaski Democratic Club (club), a social, members only club. Raymond

[1] The defendant was acquitted of one count of threatening in the second degree in violation of General Statutes § 53a-62 (a) (2). After a separate jury trial on a part B information, he was found to have committed a crime while on release, which subjected him to a sentence enhancement pursuant to General Statutes § 53a-40b.

Szajkowski, the president of the club, confronted the defendant and told him that "he's trespassing and that he's not wanted on the property."

On September 22, 2016, the day at issue in this case, the defendant was unemployed and residing at the Friendship Center, a shelter in the City of New Britain. The defendant met his friend, Skawinski,[2] and the two began drinking between 8 and 8:30 a.m.[3] The two had spent the entire day drinking together, splitting a half gallon of vodka. By 5 or 6 p.m., the two had finished drinking the vodka and had ventured out to purchase more alcohol. The two walked down Grove Street and, eventually, arrived in front of the club. Posted on club property were "no trespassing" signs, written in both English and Polish.[4]

Once in front of the club, the defendant made a "beeline" toward Szajkowski as he exited his vehicle in the club parking lot. The defendant first asked Szajkowski why he was "harassing [him] and not allowing him to be on the property . . . ." Szajkowski informed the defendant that he was not welcome on the club's property and asked him to leave. The defendant appeared drunk to Szajkowski. The defendant, however, stated that he had engaged Szajkowski after "[Szajkowski] tried [to] drive over [him] in the parking lot." The defendant called the police to report the incident and awaited their arrival. After waiting some time, Szajkowski also contacted the police to verify whether the defendant had indeed made a complaint. Szajkowski was told that the defendant had made a complaint and that officers were on the way.

[2] Skawinski's first name could not be found within the record.

[3] According to the defendant, those staying at the Friendship Center are not permitted to remain on-site during the day. The defendant left the center and was joined by Skawinski in some bushes adjacent to train tracks in New Britain. The two commenced drinking there.

[4] The defendant was born in Poland and has resided in Connecticut for the past thirteen years. English is his second language.

Two members of the New Britain Police Department, Officers Jakub Lonczak and Coleman,[5] responded to the reported disturbance fifteen to twenty minutes later. The defendant was in the club parking lot when the officers arrived. Officer Lonczak observed the defendant to be intoxicated. The defendant gave his account to Officer Lonczak but was told to "let it go, get out of here, go." The defendant left the property.

While Officer Lonczak was with the defendant, Officer Coleman spoke with Szajkowski. Szajkowski told Officer Coleman that the defendant and Skawinski "approached his car, began yelling at him, inquiring why they were kicked out of the establishment earlier that year . . . ." Szajkowski made a trespassing complaint. After interviewing the defendant and Szajkowski, Officers Lonczak and Coleman determined that probable cause existed to arrest the defendant and Skawinski for trespassing.

By the time Officers Lonczak and Coleman determined that there was probable cause to arrest the defendant and Skawinski, they were across the street. The officers returned to their police cruiser, proceeded after the defendant and Skawinski in the cruiser, exited the vehicle and advised both individuals that they were under arrest for trespassing. The defendant was handcuffed without resistance by Officer Lonczak. Simultaneously, Officer Coleman was handcuffing Skawinski, who was not complying. After the defendant was handcuffed and seated on the ground, Officer Lonczak assisted Officer Coleman. At this time, the defendant began screaming profanities at the officers and claiming "police brutality." The officers immediately sought to place the defendant in the police cruiser to avoid "a bigger disturbance."

[5] Officer Coleman's first name could not be found within the record.

The defendant resisted being placed in the cruiser. The officers each took one of the defendant's legs to lift him into the cruiser. The defendant, with his rear on the seat, braced his back against the Plexiglas divider within the cruiser.[6] The defendant "began thrashing and kicking with his feet." The defendant kicked Officer Lonczak in the center of his chest trauma plate, causing him to take a few steps back. Officer Coleman struck the defendant's face to effectuate compliance. The defendant continued to thrash about and kick, eventually kicking Officer Lonczak's left thumb, jamming it. Officer Lonczak struck the defendant in his right torso, and the defendant became compliant. The officers were able to fully seat the defendant in the police cruiser and close the door. The officers transported the defendant to the police station. During the drive to the station, the defendant screamed profanities at the officers.[7]

On June 28, 2017, the defendant was charged in a substitute long form information with one count of assault of public safety personnel in violation of General Statutes § 53a-167c (a) (1), one count of threatening in the second degree in violation of General Statutes § 53a-62 (a) (2) and one count of criminal trespass in the first degree in violation of General Statutes § 53a-107 (a) (1). In a part B information, the defendant was charged with committing a crime while on release in violation of General Statutes § 53a-40b. The defendant pleaded not guilty to all counts in both the substitute long form information and the part B information, and elected a jury trial.

At the defendant's trial on June 27, 2017, the defendant elected to testify in his own defense. Prior to his

[6] The police cruiser contains a "Plexiglas wall surrounding the seat [in the rear] so individuals can be sat in that little compartment, but the other side is open for officers to place other items that can be used for [their] duty."

[7] The defendant spoke in both English and Polish. Officer Lonczak, who was born in Poland and raised there until age ten, understood all of what the defendant uttered.

testimony, the state indicated its intention to offer evidence of the defendant's prior felony conviction from May 24, 2006, for criminal violation of a restraining order,[8] in order to impeach the defendant's credibility.[9] The sentence imposed for that conviction was three years of incarceration, execution suspended after nine months, followed by five years of probation. The state acknowledged that felony convictions that are more than ten years old are generally not admissible but argued that the rule is not hard and fast and that "we're only a couple of months beyond it at this point once you consider the nine month jail sentence." The defendant objected to the admission of the evidence, arguing "it's not relevant to this case and it's beyond the ten year period."

The court admitted the prior felony conviction into evidence for purposes of impeachment. The court stated that "the ten year rule is not a bright line but it's a suggestion. So based on all the information that I've heard on the timing of it, the court feels that it is relevant, it is a felony conviction, however, it must be unnamed and in accordance with [*State* v. *Geyer*, 194 Conn. 1, 16, 480 A.2d 489 (1984)]."

During his direct examination, the defendant testified that he had previously been convicted of a felony. On cross-examination, when the state asked about the prior felony conviction, the defendant responded, unsolicited, "[y]es, violation of protection of my wife . . . ." During closing argument, the state highlighted the defendant's prior felony conviction as a factor the jury

[8] The record does not provide the specific statute violated by the defendant for his prior felony conviction. The state referred to the defendant's prior felony conviction as a criminal violation of a restraining order. The defendant did not contest the state's characterization.

[9] The state indicated its intention to offer the defendant's prior felony conviction into evidence during an in-chambers discussion, which was later repeated on the record.

could consider in assessing his credibility during its deliberations: "Again, consider the defendant's unique position in this case. I mean, first of all, he's a convicted felon. That's something you can assess when you're determining how credible he is." The defendant did not request, and the court did not provide, a contemporaneous limiting instruction to the jury regarding their consideration of the defendant's prior felony conviction during either direct examination or cross-examination. The court did provide a limiting instruction in its charge to the jury.[10]

On June 29, 2017, the jury found the defendant guilty of assault of public safety personnel and criminal trespass in the first degree. The jury acquitted the defendant of threatening in the second degree. After a separate jury trial on the part B information, the jury found that the defendant committed the crimes of which he had just been convicted while on release. The jury's finding that he had committed crimes while on release subjected him to a sentence enhancement pursuant to General Statutes § 53a-40b.

On July 10, 2017, the defendant filed a motion for a new trial pursuant to Practice Book § 42-53 (a), claiming that the court erred in admitting into evidence the defendant's prior felony conviction for impeachment purposes. The defendant argued that the "prior felony conviction, which was more than [ten] years old . . .

[10] The court instructed: "In this case, evidence was introduced to show that in 2006 the defendant was convicted of a felony, which is any crime for which a person may be incarcerated for more than one year. Evidence of a commission of a crime other than the one charged is not admissible to prove the guilt of the defendant in this case. The commission of another crime by the defendant has been admitted into evidence for the sole purpose of affecting his credibility. You must weigh the testimony and consider it along with all the other evidence in the case. You may consider the conviction of the defendant only as it bears upon his credibility and you should determine that credibility upon the . . . same consideration as those given to any other witness."

was more prejudicial than probative." The court denied that motion in a memorandum of decision dated October 2, 2017. The court stated that under § 6-7 of the Connecticut Code of Evidence, remoteness is "one of the factors to be weighed by the trial court in exercising its discretion whether to admit a particular conviction for impeachment purposes." The court stated that "[t]he age of a conviction goes to its weight and not its admissibility," citing *State* v. *Robington*, 137 Conn. 140, 144–45, 75 A.2d 394 (1950), and that "[o]ur Supreme Court has never ruled that a felony conviction greater than ten years is an absolute bar to admissibility," citing *State* v. *Skakel*, 276 Conn. 633, 738–42, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). The court concluded that "[i]n light of the issue in the case upon which the conviction was permitted to be used, the fact that it was admitted in the sanitized version and the fact that the conviction was slightly over ten years, the court continues to find that the evidence was properly admitted."

The court rendered judgment in accordance with the jury verdict and imposed a total effective sentence of fifteen years of incarceration followed by five years of special parole. This appeal followed.

The defendant claims that the court abused its discretion by admitting into evidence his May 24, 2006 felony conviction for the purpose of impeaching his credibility as a witness. The defendant argues that the court admitted the over ten year old conviction without properly considering its potential prejudice to the defendant, the significance of the age of the conviction and how the prior conviction bears on the defendant's veracity. The defendant argues further that had the court undertaken the correct analysis, the court would not have admitted the prior conviction into evidence. The defendant claims that the court's error was not harmless: "The risk that the harm to the defendant's credibility created

by the improperly admitted impeachment evidence sufficed to tip the jury's opinion in [Officer] Lonczak's favor was thus highly prejudicial to the defendant on a matter of the most central importance in the proceedings."

The state argues that the court did not abuse its discretion in admitting the evidence. Additionally, the state contends that even if it was improper to admit the prior conviction into evidence, the court's error was harmless because the defendant's credibility had already been impeached by other evidence. Moreover, the defendant's account of his arrest did not "meaningfully differ" from that of Officer Lonczak's. The defendant states that he had been drinking on September 22, and he could not remember if he kicked Officer Lonczak.

We conclude that the court abused its discretion by admitting into evidence the prior felony conviction of criminal violation of a restraining order because that prior conviction was greater than ten years old and was not probative of truth and veracity. We conclude, however, that the error was harmless.

We first set forth the applicable principles of law and our standard of review. "It is well settled that evidence that a criminal defendant has been convicted of crimes on a prior occasion is not generally admissible. . . . There are, however, several well recognized exceptions to this rule, one of which is that [a] criminal defendant who has previously been convicted of a crime carrying a term of imprisonment of more than one year may be impeached by the state if his credibility is in issue. . . . In its discretion a trial court may properly admit evidence of prior convictions provided that the prejudicial effect of such evidence does not far outweigh its probative value. . . . [Our Supreme Court] has identified

three factors which determine whether a prior conviction may be admitted: (1) the extent of the prejudice likely to arise; (2) the significance of the commission of the particular crime in indicating untruthfulness; and (3) its remoteness in time. . . . A trial court's decision denying a motion to exclude a witness' prior record, offered to attack his credibility, will be upset only if the court abused its discretion. . . . Those three factors have been incorporated in [the Connecticut] [C]ode of [E]vidence. Conn. Code. Evid. § 6-7 (a)." (Internal quotation marks omitted.) *State* v. *Young*, 174 Conn. App. 760, 768–69, 166 A.3d 704, cert. denied, 327 Conn. 976, 174 A.3d 195 (2017).

"[U]nless a conviction had some special significance to untruthfulness, the fact that it [is] more than ten years old [will] most likely preclude its admission under our balancing test." (Emphasis omitted.) *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 309, 852 A.2d 703 (2004) (interpreting *State* v. *Nardini*, 187 Conn. 513, 526, 447 A.2d 396 [1982]). "[T]he danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence." (Internal quotation marks omitted.) *State* v. *Cooper*, 227 Conn. 417, 435, 630 A.2d 1043 (1993). "With respect to the remoteness prong of the balancing test, we have endorsed a general guideline of ten years from conviction or release from confinement for that conviction, whichever is later, as an appropriate limitation on the use of a witness' prior conviction." *State* v. *Skakel*, supra, 276 Conn. 738–39. The ten year marker is not, however, a rigid threshold. "That benchmark . . . is not an absolute bar to the use of a conviction that is more than ten years old, but, rather, serves merely as a guide to assist the trial judge in evaluating the conviction's remoteness." *State* v. *Askew*, 245 Conn. 351, 364–

65, 716 A.2d 36 (1998). "[R]emoteness in time, like relevance of the crime to veracity, is a factor to be weighed by the trial court in exercising its discretion." *State* v. *Nardini*, supra, 526. Nevertheless, "[t]he probative value for credibility purposes of . . . [a conviction is] greatly diminished by the extended period of time which ha[s] elapsed since [its] occurrence." Id., 528.

Not all felony crimes bear equally on a defendant's veracity. "[Our Supreme Court] has recognized that crimes involving larcenous intent imply a general disposition toward dishonesty or a tendency to make false statements. . . . [I]n common human experience acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects on a man's honesty and integrity . . . . [Furthermore] larceny, which is the underlying crime in any robbery, bears directly on the credibility of the witness-defendant." (Internal quotation marks omitted.) *State* v. *Banks*, 58 Conn. App. 603, 616, 755 A.2d 279, cert. denied, 254 Conn. 923, 761 A.2d 755 (2000). "[C]onvictions having some special significance upon the issue of veracity surmount the standard bar of ten years . . . ." (Internal quotation marks omitted.) *State* v. *Cooper*, supra, 227 Conn. 436.

The defendant's conviction of criminal violation of a restraining order resulted in a three year sentence of imprisonment, suspended after nine months. As that offense is a felony, it falls within one of the exceptions to the general rule that prohibits evidence of prior crimes. See *State* v. *Young*, supra, 174 Conn. App. 768. In overruling the defendant's objection to the admission of the prior felony conviction, the court stated: "Well, in the court's opinion, based upon case law, the ten year rule is not a bright line but it's a suggestion. So based on all the information that I've heard on the timing of it, the court feels that it is relevant, it is a

felony conviction, however, it must be unnamed and in accordance with [*State* v. *Geyer*, supra, 194 Conn. 16]."[11]

The defendant's prior felony conviction of criminal violation of a restraining order is not one of deceit, fraud, cheating, or stealing. The criminal violation is not larcenous. See *State* v. *Banks*, supra, 58 Conn. App. 616. As such, the prior felony conviction has no particular bearing on the defendant's truthfulness.[12] Because the defendant's prior felony conviction was more than ten years old when offered by the state and has no bearing on his veracity, it was an abuse of the court's discretion to admit the prior felony conviction into evidence.

Our conclusion that the court erred in admitting the defendant's prior felony conviction into evidence does not end our analysis. The defendant concedes that the court's error is nonconstitutional. For the defendant to be entitled to a new trial, it is incumbent on the defendant to show that the trial court's evidentiary error was harmful. *State* v. *Clark*, 137 Conn. App. 203, 211, 48 A.3d 135 (2012), aff'd, 314 Conn. 511, 103 A.3d 507 (2014). "[A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Sawyer*, 279 Conn. 331, 357, 904 A.2d 101 (2006), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008).

The defendant contends that, because there was no dispute as to whether Officer Lonczak was a readily identifiable police officer in the performance of his duties, the state's ability to convict the defendant of

[11] The defendant's precise date of release for his May 24, 2006 conviction is not clear from the record. The parties do agree, however, that he was released more than ten years prior to the trial in the present case.

[12] Even though the record does not contain the specific statute that was violated, the conduct necessary to be convicted of violating a restraining order does not speak to truthfulness.

violating General Statutes § 53a-167c (a) (1) hinged on whether the defendant kicked Officer Lonczak to cause physical injury. The defendant maintains that he and Officer Lonczak gave conflicting testimony as to the kicking, and neither of their accounts were corroborated. Thus, the defendant argues, the prior conviction's admission into evidence tipped the scales too favorably in the state's favor, which was "highly prejudicial" to the defendant.[13]

The state asserts that, although there was no evidence to corroborate Officer Lonczak's testimony that the defendant kicked him, the defendant's testimony was ambiguous. Pointing to the defendant's concession that he resisted arrest and was "thrashing around" while the officers attempted to seat him in the cruiser, the state argues that the defendant's testimony did not deviate meaningfully from Officer Lonczak's. The state also emphasized that the defendant was drunk when arrested, affecting his recollection of the events, which was reflected in his testimony.

We find that there is fair assurance that the jury verdict was not substantially affected by the admission of the prior conviction into evidence. To convict the defendant of assault of public safety personnel under General Statutes § 53a-167c (a) (1), the state was required to prove "(1) intent to prevent a reasonably identifiable peace officer from performing his duties; (2) the infliction of physical injury to the peace officer; and (3) the victim must be a peace officer." (Citation omitted; internal quotation marks omitted.) *State* v. *Turner*, 91 Conn. App. 17, 22, 879 A.2d 471, cert. denied, 276 Conn. 910, 886 A.2d 424 (2005). The state was not

[13] The defendant also appealed from his criminal trespass conviction, but failed to brief any argument that the admission of the felony conviction affected the jury's verdict on the trespassing charge. Accordingly, we deem any argument that the court's error was harmful to be abandoned as to the criminal trespass conviction.

required to show that the defendant had intended to kick Officer Lonczak or that he intended to cause him physical injury. See id.

The essential elements that the state was required to prove ultimately did not turn on the defendant's credibility. Instead, the state offered proof of each essential element and the defendant did not seriously contest that proof. First, the defendant could not remember whether he was kicking his legs, but admitted to resisting being seated in the police cruiser and "thrashing around."[14] The defendant's admission supports a jury finding that the defendant intended to prevent Officer Lonczak from performing his duties. Second, Officer Lonczak testified that in the course of the defendant resisting being seated in the police cruiser, the defendant kicked Officer Lonczak and jammed his thumb. The defendant did not deny kicking Officer Lonczak, the defendant denied only *intentionally* kicking Officer Lonczak.[15] Third, the defendant admitted on cross-examination that Officer Lonczak was a reasonably identifiable peace officer.

Furthermore, the defendant testified that he was too drunk to remember key events from that day, such as

[14] During cross-examination by the prosecutor, the defendant testified as follows:

"Q. So you just don't remember whether you were kicking your legs or not, but you were thrashing around.

"A. Yes."

* * *

"Q. You're doing everything you can to . . . stop them from getting you in that car.

"A. I'm trying resisting or whatever they call it, yeah.

"Q. And you don't remember kicking the officer.

"A. No.

* * *

"Q. Okay. And you're still thrashing around. You're still kicking those legs.

"A. I don't know."

[15] During his direct examination by defense counsel, the defendant testified as follows:

"Q. Okay. Did you ever intentionally kick either of these gentlemen?

"A. No."

cursing at the officers during the transport to the police station.[16] In light of this admission, the jury reasonably could have found any ameliorative aspects of the defendant's testimony to be not credible and could have credited Officer Lonczak's version of events. Thus, the strength of the state's proof on each of the essential elements of the offense, not the defendant's impeachment by his prior felony conviction, leaves us unpersuaded that the improper admission of his felony conviction substantially affected the verdict. Accordingly, the defendant has not satisfied his burden of demonstrating harmful error.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* MICHAEL FOX
## (AC 41009)

Lavine, Keller and Bishop, Js.

*Syllabus*

Convicted of the crimes of home invasion, conspiracy to commit home invasion, assault in the first degree, and conspiracy to commit assault in the first degree in connection with the assault of the victims, H and E, the defendant appealed to this court. The defendant, along with two others, allegedly broke into H's apartment and assaulted H and E. A police officer, A, testified that he took certain photographs of the scene, including photographs of certain doors of the premises, but while some of the photographs resulted in discernable images, others did not. On appeal, the defendant claimed, inter alia, violations of the federal and state constitutions. *Held*:

1. The trial court violated the defendant's right against double jeopardy by sentencing him on two counts of conspiracy pursuant to a single agreement with multiple criminal objectives, as the defendant's conviction of both conspiracy charges stemmed from a single unlawful agreement to enter the premises and harm E; accordingly, the proper remedy

[16] During re-direct examination, the defendant admitted that he was drunk at the time of arrest and did not remember that he used profane language toward the officers while in the cruiser on the drive to the station:

"Q. You don't know exactly what you said that day because you were . . . drunk. Right?

"A. Yes."

was to remand the case with direction to vacate the defendant's conviction of conspiracy to commit assault in the first degree, and resentencing was not necessary, where, as here, vacatur of the defendant's conviction and sentence for conspiracy to commit assault in the first degree would not alter his total effective sentence.

2. The defendant could not prevail on his claim that the state violated his right to due process under the Connecticut constitution as a result of the destruction or loss of photographs depicting the crime scene, which was based on his claim that the police failed to preserve potentially exculpatory evidence in the form of photographs of the doors of H's apartment, the defendant having failed to meet the balancing test set forth in *State* v. *Asherman* (193 Conn. 695), which was applicable to his due process claim: the defendant could not establish the materiality of the indiscernible photographs from the apartment, as the weight of the evidence established that the defendant unlawfully entered or remained in H's apartment, forced entry was not a necessary element of the home invasion charge, although it could be probative of unlawful entry, and there was not a reasonable probability that, had the photographs been discernable, the result of the proceeding would have been different; moreover, the likelihood of mistaken interpretation of the missing evidence by the witnesses or jury was low given the ample testimony regarding the photographs, nothing in the record indicated that the state's failure to preserve useful photographic evidence of the condition of the doors was the result of any bad faith or improper motive on the part of the state or law enforcement, and the defendant failed to show that he was prejudiced as a result of the unavailable evidence, as the court found that the defendant received all evidence available to the state, including any indiscernible photographs, and the state had a strong case with regard to the home invasion charge.

3. The trial court did not err when it denied the defendant's request for an adverse inference jury instruction related to the failure of the police to produce discernable photographs of the apartment doors; no factual basis existed for the specific charge requested by the defendant, as the record was devoid of any evidence that the police investigation was incomplete or that, in their investigation, the police had acted negligently or in bad faith, and even if the trial court should have delivered the requested instruction, in light of the evidence as a whole, its failure to do so was harmless because the defendant failed to show that it was more probable than not that the failure to give the requested instruction affected the result of the trial.

Argued May 16—officially released August 27, 2019

*Procedural History*

Substitute information charging the defendant with the crimes of home invasion, conspiracy to commit

home invasion, assault in the first degree, and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, and tried to the jury before *Markle, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed in part*; *judgment directed.*

*Megan L. Wade*, assigned counsel, with whom was *Emily Graner Sexton*, assigned counsel, for the appellant (defendant).

*Kathryn W. Bare*, assistant state's attorney, with whom, on the brief, was *Kevin D. Lawlor*, deputy chief state's attorney, for the appellee (state).

*Opinion*

KELLER, J. The defendant, Michael Fox, appeals from the judgment of conviction, rendered after a jury trial, of home invasion in violation of General Statutes § 53a-100aa (a) (1), conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 and 53a-100aa (a) (1), assault in the first degree in violation of General Statutes § 53a-59 (a) (4), and conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-48 and 53a-59 (a) (4). On appeal, the defendant claims that (1) the trial court violated the double jeopardy clause of the United States constitution by sentencing the defendant on two counts of conspiracy on the basis of a single agreement with multiple criminal objectives, (2) the state violated the defendant's right to due process under the Connecticut constitution as a result of the destruction or loss of photographs depicting the crime scene, and (3) the trial court erred in denying the defendant's request for an adverse inference jury instruction. We agree with the defendant's first claim only and, accordingly, affirm in part and reverse in part the judgment of the trial court.

The jury reasonably could have found the following facts. Nicole Hart resided in Milford in an in-law apartment (apartment) connected to a main residence. The apartment consists of a bedroom, bathroom, kitchen, and living room. An interior door separates the apartment from the main residence. At the time of the incident in question, Nicole Hart's grandmother, Dorothy Hart, owned the dwelling and lived in the main residence, along with Nicole Hart's cousin, Thomas Hart, and Nicole Hart's father. Nicole Hart's cousin, Christopher Hart, also lived in the main residence at the time of the incident. Nicole Hart and Joe Fox, the defendant's brother, were involved romantically, intermittently from 2007 through October, 2014, and they share a child together. Joe Fox lived with Nicole Hart in the apartment for several weeks, from late September through mid-October, 2014, until the two ended their relationship in the second week of October, 2014.

On October 26, 2014, Thomas Hart texted Joe Fox, alerting him that Nicole Hart's new boyfriend, Anthony Esposito, was at the apartment. Later in the day, Thomas Hart drove to a park near the dwelling where he met Joe Fox, who was driving a vehicle with two passengers: the defendant and Zachary Labbe. Joe Fox then followed Thomas Hart to the dwelling where Thomas Hart, Joe Fox, the defendant, and Labbe exited their vehicles. At approximately 11:30 p.m., the four men entered the main residence through the front door on the left-hand side of the dwelling and proceeded into the apartment. The defendant, Joe Fox, and Labbe then entered Nicole Hart's bedroom where she was in bed asleep with Esposito. Joe Fox dragged Nicole Hart, by her neck, from the bedroom into the adjoining kitchen where he directed expletives at her and strangled her, causing her to lose control of her bladder. From the kitchen, Nicole Hart could hear crashing noises coming from the bedroom where the defendant,

Labbe, and Esposito were located. Joe Fox returned to the bedroom where he, the defendant, and Labbe punched and kicked Esposito. Nicole Hart went to the main residence to call 911 from the residence's landline telephone. Meanwhile, Joe Fox, the defendant, Thomas Hart, and Labbe exited the apartment and left in the same cars in which they had arrived.

Police arrived at the residence at approximately 11:45 p.m. where they found Esposito, who was bleeding and bruised about his head and face. Police also observed blood on the floor of the entry way of Nicole's bedroom as well as on the mattress in Nicole's bedroom. An ambulance took Esposito to the hospital where he was treated for orbital wall fractures of both eyes, a nasal bone fracture, a closed head injury, and lacerations to the inside of his mouth.

Later that same night, police located the vehicle that Joe Fox had used to transport himself, the defendant, and Labbe to and from the dwelling. Law enforcement found Esposito's blood on the steering wheel, exterior driver's side door handle, and exterior driver's side door of the vehicle in question. Lieutenant Richard Anderson, of the Milford Police Department, obtained an arrest warrant for the defendant. The defendant was arrested on October 31, 2014, and subsequently charged with home invasion in violation of § 53a-100aa (a) (1), conspiracy to commit home invasion in violation of §§ 53a-48 and 53a-100aa (a) (1), assault in the first degree as to Esposito in violation of § 53a-59 (a) (4), and conspiracy to commit assault in the first degree as to Esposito in violation of §§ 53a-48 and 53a-59 (a) (4).

Following a jury trial, the defendant was found guilty of home invasion, conspiracy to commit home invasion, assault in the first degree, and conspiracy to commit assault in the first degree. The defendant received a

total effective sentence of ten years of incarceration.[1] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court violated the double jeopardy clause of the United States constitution by sentencing him on two counts of conspiracy pursuant to a single agreement with multiple criminal objectives. Specifically, he argues that the court committed plain error when it rendered judgment and sentenced him on the charges of conspiracy to commit home invasion and conspiracy to commit assault in the first degree because both of those counts stemmed from a single unlawful agreement to enter the apartment and harm Esposito. In its reply brief, the state agrees with the defendant that there was only one conspiracy and therefore the defendant's conviction of two counts of conspiracy constitutes a violation of the defendant's right against double jeopardy. We, too, agree that a double jeopardy violation exists and that the appropriate remedy is to reverse the judgment of conspiracy to commit assault in the first degree and remand the case to the trial court with direction to vacate the defendant's conviction of conspiracy to commit assault in the first degree.

The defendant concedes, and the state agrees, that his double jeopardy claim was not preserved at trial and thus seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by

[1] Pursuant to statutory mandatory minimum sentence provisions, the trial court imposed a sentence of ten years of incarceration for the count of home invasion, ten years for the count of conspiracy to commit home invasion, and one year to serve for the counts of assault in the first degree and conspiracy to commit assault in the first degree. The court ordered each of the sentences to run concurrently to each other, for a total effective sentence of ten years of incarceration.

*In re Yasiel R.*, 317 Conn. 773, 120 A.3d 1188 (2015).[2] The first *Golding* prong is met because the record is adequate for review. There is a clear record of the allegations underlying the defendant's convictions, as well as a clear record of the offenses of which he was convicted. "A defendant may obtain review of a double jeopardy claim, even if it is unpreserved, if he has received two punishments for two crimes, which he claims were one crime, arising from the same transaction and prosecuted at one trial . . . ." (Internal quotation marks omitted.) *State* v. *Urbanowski*, 163 Conn. App. 377, 386–87, 136 A.3d 236 (2016), aff'd, 327 Conn. 169 (2017). Additionally, "claims of double jeopardy involving multiple punishments in the same trial present a question of law to which we afford plenary review." *State* v. *Kurzatkowski*, 119 Conn. App. 556, 568, 988 A.2d 393, cert. denied, 296 Conn. 902, 991 A.2d 1104 (2010); see also *State* v. *Burnell*, 290 Conn. 634, 642, 966 A.2d 168 (2009); *State* v. *Culver*, 97 Conn. App. 332, 336, 904 A.2d 283, cert. denied, 280 Conn. 935, 909 A.2d 961 (2006).

Further, the second *Golding* prong is met because a claim of a double jeopardy violation is of constitutional magnitude. The double jeopardy clause of the fifth amendment to the United States constitution provides that no person shall "be subject for the same [offense] to be twice put in jeopardy of life or limb . . . ." U.S. Const., amend. V.

[2] "[A] defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (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." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see also *In re Yaisel R.*, supra, 317 Conn. 781 (modifying third prong of *Golding* by eliminating word "clearly" before words "exists" and "deprived").

The third *Golding* prong is also met because in the present case, the trial court convicted and sentenced the defendant on separate charges of conspiracy to commit home invasion in violation of §§ 53a-48 and 53a-100aa (a) (1), and conspiracy to commit assault in the first degree in violation of §§ 53a-48 and 53a-59 (a) (4) that were based on a single conspiratorial agreement. "Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. . . . The single agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute . . . ." (Citations omitted; internal quotation marks omitted.) *Braverman* v. *United States*, 317 U.S. 49, 53–54, 63 S. Ct. 99, 87 L. Ed. 23 (1942). "[U]nder Connecticut law; see, e.g., *State* v. *Ortiz*, 252 Conn. 533, 559, 747 A.2d 487 (2000); it is a double jeopardy violation to impose cumulative punishments for conspiracy offenses if they arise from a single agreement with multiple criminal objectives." *State* v. *Wright*, 320 Conn. 781, 829, 135 A.3d 1 (2016). Here, both conspiracy convictions arose from the single agreement reached by the defendant, Joe Fox, Labbe, and Hart to enter the apartment and inflict serious injury to Esposito. Therefore, the charges in question arise out of the same act or transaction.

The fourth *Golding* prong is met because the state has failed to demonstrate that the alleged constitutional violation was harmless beyond a reasonable doubt. To the contrary, the state has conceded that the two conspiracy convictions violate the double jeopardy clause of the fifth amendment. Although the sentence imposed for conspiracy to commit assault in the first degree did not lengthen the total effective sentence imposed in

this case; see footnote 1 of this opinion; other adverse consequences may result from the sentence. The Supreme Court has concluded that a cumulative conviction has "potential adverse collateral consequences"[3] that can independently qualify as a punishment. (Internal quotation marks omitted.) *Rutledge* v. *United States*, 517 U.S. 292, 302, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996).

When a defendant's double jeopardy rights have been violated because the court has imposed multiple sentences for conspiracy offenses that arose out of the same agreement, the proper remedy is for this court to reverse the judgment of conviction for the lesser offense of conspiracy, remand the case to the trial court with direction to vacate the conviction for the lesser offense of conspiracy, and to resentence the defendant accordingly. See *State* v. *Wright*, supra, 320 Conn. 829 (holding vacatur of lesser conspiracy offense, rather than merger, was proper remedy in case involving multiple punishments for cumulative conspiracy convictions arising from single agreement);[4] *State* v. *Steele*, 176 Conn. App. 1, 38, 169 A.3d 797, cert. denied, 327 Conn. 962, 172 A.3d 1261 (2017) (holding vacatur of lesser conspiracy offense, rather than merger, was proper remedy in case involving multiple punishments for cumulative conspiracy convictions arising from single agreement).

[3] The United States Supreme Court recognized potential adverse collateral consequences stemming from cumulative convictions such as delaying a defendant's eligibility for parole, increasing a sentence under a recidivist statute for a future offense, impeaching a defendant's credibility, or stigmatizing the defendant. *Rutledge* v. *United States*, 517 U.S. 292, 302, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996)

[4] The court in *Wright* extended our Supreme Court's holding in *State* v. *Polanco*, 308 Conn. 242, 61 A.3d 1084 (2013), which established vacatur as the proper remedy for double jeopardy violations resulting from the imposition of multiple sentences related to greater and lesser included offenses. *State* v. *Wright*, supra, 320 Conn. 829.

At oral argument, both parties agreed that it is not necessary to resentence the defendant because the requested remedy will not alter the defendant's total sentence. We agree that, while the trial court retains the authority to restructure the defendant's sentence if that court determines that doing so is necessary to retain its original sentencing intent, it is unnecessary for this court to remand the case to the trial court for resentencing because vacatur of the defendant's conviction and sentence for conspiracy to commit assault in the first degree will not alter his total effective sentence. See footnote 1 of this opinion; see also *State* v. *Johnson*, 316 Conn. 34, 42–43, 111 A.3d 447 (2015); *State* v. *Steele*, supra, 176 Conn. App. 38–39.

II

The defendant next claims that the state violated his right to due process under the Connecticut constitution as a result of the "destruction or loss" of photographs depicting the crime scene. Despite the fact that the defendant refers to the photographs as destroyed or lost, the state counters, and we agree, that the photographs exist, but are merely indiscernible. The state contends that the record is inadequate to review this claim because the trial court did not make any factual findings concerning the indiscernible photographs. In the alternative, the state argues that, even if the record is adequate for review, the defendant's claim fails because the defendant cannot show that a constitutional violation exists and deprived him of a fair trial. We disagree with the state that the record is inadequate to review the claim, but agree with the state that, although the record is adequate for review and the defendant raises a constitutional claim, his claim ultimately fails because the alleged constitutional violation does not exist and did not deprive the defendant of a fair trial.

The following facts are relevant to our conclusion. At trial, Nicole Hart testified to the following facts: Joe

Fox lived in the apartment with her for several weeks around October, 2014. Nicole Hart and Joe Fox ended their relationship around the second week of October, 2014, at which time Nicole Hart asked Joe Fox to leave the apartment and he moved out. Joe Fox took his belongings from the apartment and he did not have keys to the apartment or the main residence. Nicole Hart routinely locked the doors to her apartment and to her bedroom, "for sleeping purposes," and the doors were locked on the night of October 26, 2014, when she and Esposito went to sleep in her bedroom.

On the night of October 26, 2014, Nicole Hart awoke to the sound of two loud bangs, followed by the defendant, Joe Fox, and Labbe entering her bedroom. While the defendant, Joe Fox, and Labbe were punching and kicking Esposito, Nicole Hart asked them what they were doing in her house and to leave. Following the incident at the apartment, Nicole Hart observed damage to the apartment's entrance door and her bedroom door. Specifically, she observed that the apartment entrance door was "kicked in" and a screw was missing from the locking mechanism. She also observed that the right-hand frame of her bedroom door had broken during the incident and the bedroom door did not lock as of the time of trial.

Other witnesses testified as to the condition of the apartment entrance door and bedroom door following the incident on October 26, 2014. Erika Berrios, then girlfriend of Nicole Hart's cousin, Christopher Hart, testified that Nicole Hart routinely locked and closed the apartment entrance door when she had visitors. Berrios further testified that the day following the incident, she observed damage to the apartment entrance door and noted that the lock was out of place. She also testified that Nicole Hart's bedroom door was "completely . . . damaged" and not "even worth fixing."

Thomas Hart testified that on the night of October 26, 2014, he observed Joe Fox trying to enter the apartment, but not being able to open the locked door. He further testified that he then left Joe Fox, entered the main residence, and subsequently heard a loud bang.

Anderson testified that he responded to the residence on October 26, 2014, following the incident, and observed damage to the apartment's entrance door and Nicole Hart's bedroom door. Specifically, he observed a broken door jamb and "some locking mechanism on the floor" with regard to the apartment's entrance door. With regard to Nicole Hart's bedroom door, he testified that it "looked like it was forced open," the door jamb was broken, and a locking mechanism was on the floor.

Susan Delgado, a Hart family friend and the sole defense witness, testified that the apartment entrance door was "never locked." She further testified that she spoke with Anderson by phone and went to the apartment the day following the incident and she did not observe damage to any of the doors in the apartment. On cross-examination, however, Delgado provided conflicting testimony regarding how many days following the incident she spoke with Anderson and visited the apartment.

Anderson testified to the following facts: As part of his investigation of the scene, he photographed relevant areas of the main residence and the apartment including the outside of the main residence, the entrance door to the apartment, the apartment bedroom door, the apartment bedroom, kitchen areas, and blood on the floor of the entryway to the apartment bedroom. For unknown reasons, some of the photographs Anderson took resulted in discernable images while others did not. Anderson noted, "[i]t's electronic equipment, sometimes it works, most of the time it works, but this time all the pictures did [not] come out." It was not until

a later date that Anderson realized that some of the photographs taken on October 26, 2014, did not "come out." Three of the seven photographs taken by Anderson on October 26, 2014, were discernable and were entered into evidence as State's Exhibits 6A, 6B, and 6C (photographs of blood on the floor of the entryway to the bedroom, blood on Nicole Hart's mattress, and exterior of the main residence, respectively).[5] Anderson took the photographs of the main residence and the apartment using a police issued Nikon digital camera. He did not know how old the camera was and he did not know whether the camera had a memory chip. Anderson testified that he took the photographs according to procedure and he thought he performed diligently. Anderson also testified on cross-examination that he only takes the photographs at the scene, while an evidence technician at the ID bureau extracts the photographs from the camera and prints the photographs. On cross-examination, when asked whether someone could have deleted photographs of the doors in question, Anderson responded, "[t]hey could have, yes." On redirect examination, Anderson reiterated that some of the photographs from October 24, 2016, did not come out and that he personally observed damage to both the apartment entry door and Nicole Hart's bedroom door.

On the last day of the state's case-in-chief, the defendant argued to the court that the state had failed to turn over all potentially exculpatory material in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, the defendant argued that the state, or other governmental agencies, failed

[5] The state also entered into evidence twenty-two photographs of the crime scene, which were taken at a later date following the October 24, 2016 incident. Anderson did not take the twenty-two additional photographs of the crime scene. The clarity of these photographs, State's Exhibits 1A-1U and 3A, was not in dispute at trial.

to turn over a video recording of inventory of a vehicle seized in connection with the case. The defendant also argued that he was not aware that photographs taken at the scene were missing and that he should have been provided with the opportunity to review the memory card from the police department's digital camera, if one so existed. In response, the state argued that, during discovery, it had provided the defendant with the video recording of the vehicle, as well as the seven photographs taken at the scene on October 24, 2016.[6] The state noted that three of the seven photographs, which presumably would have included images of the apartment doors, were "barely legible," did not "come out," and were "overexposed." At a later point in trial, the state described one of the photographs as "completely white," one as "completely dark," several as "grainy," and noted "that you can't see what they are." The state further noted that the photographs of the doors were not lost, rather, Anderson did not notice "until a later date that they did not come out." The state noted that it had provided all seven photographs to the defendant and that he had access to the ones that did not "come out."

The court noted that it was satisfied that the state had turned over all available evidence to the defendant, and that before the trial, the defendant was aware of the issue with the indiscernible photographs. Later in the trial, the court independently raised the defendant's claim of a *Brady* violation and again concluded that the defendant had received all evidence available to the state, that the defendant had the ability to cross-examine Anderson as to the indiscernible photographs, and that no *Brady* violation existed.

On appeal, the defendant claims that his conviction of home invasion and conspiracy to commit home invasion

[6] The state entered into evidence only three of the seven photographs taken at the scene on October 26, 2014 (State's Exhibits 6A, 6B, and 6C).

violates his right to due process because the police failed to preserve potentially exculpatory evidence in the form of photographs of the doors of the apartment.[7] It is not disputed that the defendant did not raise a due process violation at trial, and therefore the defendant seeks review of the unpreserved claim pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. See footnote 2 of this opinion.

Under the first *Golding* prong, we conclude that we have a sufficient record on appeal to consider the claim. Anderson testified at length about the photographs he took at the scene on October 26, 2014, and the fact that some of the photographs were indiscernible. He noted that he took photographs of the apartment's entryway door and Nicole Hart's bedroom door, but that neither of these photographs produced clear images. The defendant had ample opportunity to cross-examine Anderson as to the indiscernible photographs and did in fact question him at length about the camera used, the witness's camera training, the procedure for extracting photographs from the camera, and the reason the photographs did not come out. In addition to both parties questioning Anderson, the court ruled on the defendant's oral motion in which he claimed that he was not aware that some of the photographs taken at the scene were indiscernible and that he should have been given an opportunity to review the camera's memory card. The court concluded that the defendant had access to all evidence in the possession of the state, and that the state had no further obligation to provide the defendant with information to which it did not itself have access. The state claims that the record is inadequate for review

[7] At trial, the defendant claimed that, had the photographs been discernible, they could have been exculpatory because they may have shown lack of forced entry into the apartment. The state noted that forced entry is not an element of a home invasion claim. The court noted that the defendant had not provided any evidence in support of the fact that the photographs would have been exculpatory.

because the trial court did not weigh "the reasons for the unavailability of the evidence against the degree of prejudice to the accused." (Internal quotation marks omitted.) *State* v. *Joyce*, 243 Conn. 282, 301, 705 A.2d 181 (1997), cert. denied, 523 U.S. 1077, 118 S. Ct. 1523, 140 L. Ed. 2d 674 (1998). We conclude, on the basis of the testimony adduced at trial and the trial court's ruling with regard to the indiscernible photographs, that the record is adequate to review the claim and, therefore, the first *Golding* prong is met.[8]

The second *Golding* prong is also met because the defendant's claim is of constitutional magnitude alleging the violation of a fundamental right. Specifically, the defendant claims a due process violation in derogation of his rights under article first, § 8, of the constitution of Connecticut.[9]

The defendant's claim fails, however, on the third *Golding* prong because the defendant's alleged due process violation does not exist and the defendant was not deprived of a fair trial. "With respect to a due process violation for failure to preserve under the federal constitution, the United States Supreme Court has held that the due process clause of the fourteenth amendment requires that a criminal defendant . . . show bad faith on the part of the police [for] failure to preserve potentially useful evidence [to] constitute a denial of due

[8] In response to the defendant's oral claim of a *Brady* violation, the court noted, "if they handed over the discovery and you fully reviewed the discovery, and you saw that there were not pictures, something that you felt was important, you didn't address it with the state's attorney?" The court further noted, "[y]ou have what they have. You have an explanation, you may not like what happened or you may feel that that's wrong, you know, that you cross-examined the police officer as to how did it happen, why did it happen. You had that ability. You asked the questions. And so, I'm not left with any evidence of any type of *Brady* violations at this point in time."

[9] The due process clause provides in relevant part: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ." Conn. Const., art. I, § 8.

process of law." (Internal quotation marks omitted.) *State* v. *Smith*, 174 Conn. App. 172, 182, 166 A.3d 691, cert. denied, 327 Conn. 910, 170 A.3d 680 (2017); see also *Arizona* v. *Youngblood* 488 U.S. 51, 57–58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

In *State* v. *Morales*, 232 Conn. 707, 720–21, 657 A.2d 585 (1995), our Supreme Court rejected the federal bad faith requirement and instead held that, when a due process claim is advanced under the Connecticut constitution, our courts should employ the balancing test set forth in *State* v. *Asherman*, 193 Conn. 695, 724, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). In determining whether the reasons for the unavailability of the evidence outweigh the degree of prejudice to the accused, the *Asherman* test reviews the totality of the circumstances surrounding the missing evidence. *State* v. *Morales*, supra, 720–21. Specifically, the *Asherman* test considers "the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its unavailability to the defense and the prejudice to the defendant caused by its unavailability . . . ." Id., 722–23. The reason for the missing evidence's nonavailability factor concerns the state's involvement and the remaining three factors scrutinize the impact of the missing evidence on the trial. Applying this test, we conclude that the defendant's right to due process under the state constitution was not violated.

The first *Asherman* factor is the materiality of the missing evidence. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Internal quotation marks omitted.) *State* v. *Estrella*, 277 Conn. 458, 485, 893 A.2d 348 (2006). On the other hand, "[t]he defendant's mere speculation that the [lost evidence] could have been beneficial *or not* does not meet the standard necessary

to prove materiality." (Emphasis in original.) *State* v. *Barnes*, 127 Conn. App. 24, 33, 15 A.3d 170 (2011), aff'd, 308 Conn. 38, 60 A.3d 256 (2013).

Under this standard, the defendant cannot establish the materiality of the indiscernible photographs from the apartment. As a preliminary matter, the photographs in question were not lost or missing, but rather, the photographs of the apartment doors were indiscernible. The trial court ruled that the state turned over all evidence in its possession to the defendant, including the photographs that did not produce clear images. Nevertheless, the defendant contends that his conviction of home invasion and conspiracy to commit home invasion should be reversed and remanded as a result of the alleged due process violation.

In light of the language of the home invasion statute under which the defendant was convicted, there is not a reasonable probability that the result of the proceeding would have been different, even if the photographs were discernable. Section 53a-100aa (a) provides in relevant part: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling . . . ." The express language of the statue does not require that the defendant enter the dwelling using force, or that he cause any damage upon entering. Nicole Hart's testimony established that the defendant did not have permission to enter the apartment, and also that he remained unlawfully in the apartment on October 26, 2014, after she told him and the other perpetrators to leave. Although forced entry is not a necessary element to prove home invasion, evidence of forced entry may be probative of unlawful entry and, thus, three witnesses testified as to the damaged doors of the apartment. Even though the defendant's witness, Susan Delgado, testified that the doors were not damaged, the defendant is incorrect in his assertion that had the photographs been discernable, the result of the

proceeding would have been different. The weight of the evidence presented at trial established that the defendant unlawfully entered or unlawfully remained in the apartment. We are not persuaded, in light of the evidence in its entirety and the essential elements of the offense, that there is a reasonable probability that had the photographs of the doors been discernible, the result of the proceeding would have been different.

"In further examining the materiality of potentially exculpatory evidence under the *Asherman* test, a critical factor that our courts have considered is the defendant's lack of interest in the evidence." *State* v. *Morales*, 39 Conn. App. 617, 625, 667 A.2d 68, cert. denied, 235 Conn. 938, 668 A.2d 376 (1995). "The fact that a defendant failed to request the evidence goes to the issue of materiality and whether the defendant deemed it significant." *State* v. *Morales*, supra, 232 Conn. 712 n.7. Here, the defendant failed to raise the issue of the indiscernible photographs, or his ability to review the camera from which they were taken, until the last day of the state's case-in-chief. Outside the presence of the jury, the defendant maintained that he did not learn of the missing photographs until Anderson's testimony. The state, however, claimed that, during discovery, it had turned over all photographs to the defendant, including the three that were indiscernible. The prosecutor also claimed that he and the defendant had discussed the issue of the photographs "numerous times" prior to trial. The court ruled that it was satisfied that the state had turned over the evidence in its possession and that the defendant should have raised the issue during discovery, rather than on the last day of the state's case-in-chief. Therefore, because there is not a reasonable probability that the evidence would have changed the outcome of the trial, and because the defendant showed a lack of interest in the evidence prior to

trial, the defendant is unable to establish the materiality of the indiscernible photographs.

The second *Asherman* factor considers the likelihood of mistaken interpretation of the missing evidence by witnesses or the jury. Mistaken interpretation can be "minimized at the trial by permitting testimony on the issue . . . ." *State* v. *Leroux*, 18 Conn. App. 223, 233, 557 A.2d 1271, cert. denied, 212 Conn. 809, 564 A.2d 1072 (1989). In this case, the likelihood of mistaken interpretation of the missing evidence by witnesses or the jury is low. Anderson testified, on both direct and cross-examination, that he took photographs on the scene and that some of the photographs did not come out. Given the ample testimony regarding the missing photographs, the likelihood of mistaken interpretation by the witnesses or jury is low.

The third *Asherman* factor concerns the reasons for the nonavailability of the evidence, namely, the motives underlying the loss of the evidence. In analyzing this factor, courts examine "whether the destruction was deliberate and intentional rather than negligent . . . or done in bad faith or with malice . . . or calculated to hinder the defendant's defense, out of other animus or improper motive, or in reckless disregard of the defendant's rights." (Internal quotation marks omitted.) *State* v. *Weaver*, 85 Conn. App. 329, 353, 857 A.2d 376, cert. denied, 271 Conn. 942, 861 A.2d 517 (2004). Here, nothing in the record indicates that the state's failure to preserve useful photographic evidence of the condition of the doors was the result of any bad faith or improper motive on the part of the state or law enforcement. Anderson testified that, as part of routine procedure, he took photographs of the main residence and the apartment, including the apartment entry and bedroom doors. He further testified that, for an unknown reason, some of the photographs did not come out, but that he had followed procedure and performed his duties

diligently. In ruling on the defendant's oral motion regarding the photographs, the court observed that the defendant had received all evidence available to the state, including any indiscernible photographs. Therefore, the defendant is unable to establish that the indiscernible photographs are the result of improper motive or animus on the part of the state.

The final *Asherman* factor concerns the prejudice caused to the defendant as a result of the unavailability of evidence. "In measuring the degree of prejudice to an accused caused by the unavailability of the evidence, a proper consideration is the strength or weakness of the state's case, as well as the corresponding strength or weakness of the defendant's case." (Internal quotation marks omitted.) *State* v. *Joyce*, supra, 243 Conn. 303. Under this analysis, the state had a strong case with regard to the home invasion claim. Nicole Hart testified that the defendant did not have permission to be in the apartment, that the doors were locked when she and Esposito went to sleep on October 26, 2014, and that she awoke to the sound of her doors being forcefully opened. Nicole Hart also testified that she told the defendant, Joe Fox, and Labbe to leave the apartment as they were punching and kicking Esposito. Further, she testified that her doors sustained physical damage on the night in question. In addition to Nicole Hart's testimony, Anderson, Thomas Hart, and Erika Berrios all testified that they observed physical damage to the doors of the apartment. Given the testimony of the state's witnesses, the state's case was strong with regard to whether the defendant unlawfully entered or unlawfully remained in the apartment. In contrast, the defendant presented one witness, Susan Delgado, who testified that she did not observe damage to the doors on the day following the incident. The defendant also extensively questioned Anderson on cross-examination as to the reason for the indiscernible photographs. As

a result of the foregoing evidence, we cannot conclude that the defendant was prejudiced as a result of the unavailable evidence.

For the foregoing reasons, we conclude that the defendant has failed to demonstrate that his right to due process under the Connecticut constitution has been violated by the state's failure to produce discernible photographs of the doors at issue.

III

The defendant next claims that the trial court erred in denying his request for an adverse inference jury instruction related to the failure of the police to produce discernable photographs of the apartment doors. We disagree.

The following additional facts are relevant to our analysis. At trial, the defendant filed a request to charge, including a proposed instruction as to the indiscernible photographs of the doorways and the investigation by the police as a whole. The proposed instruction read as follows: "Investigation which is thorough and conducted in good faith may be more credible while an investigation which is incomplete, negligent, or in bad faith may be found to have lesser value or no value at all. In deciding the credibility of the witnesses and the weight, if any, to give the prosecution evidence, consider whether the investigation was negligent and/or conducted in bad faith. If the police inadequately investigated one matter, you may infer that the prosecution also inadequately investigated other matters. Based on this inference alone you may disbelieve the prosecution witnesses and evidence. This may be sufficient by itself for you to have a reasonable doubt as to the defendant's guilt." The court heard from the parties before the defendant presented his witness, Susan Delgado, and noted that "I don't know if it was negligent or not that the picture didn't come out because there are no facts

underlying it. . . . I can't find an evidentiary basis to say that it's negligent that something didn't come out."[10] After hearing from Delgado, the court revisited the defendant's adverse inference instruction request and noted that the defendant's requested instruction "would have to be based on some sort of evidence . . . that the police were negligent in some way. [Susan Delgado's] testimony does not in any way indicate anything about the police investigation really. . . . I'm going to decline giving that instruction. I just don't think there's any evidence there."

"[T]o prevail on appeal, [the defendant] must show both that the trial court abused its discretion in refusing to give the adverse inference instruction on the [missing evidence] and that it was more probable than not that the failure to give the requested instruction affected the result of the trial." (Internal quotation marks omitted.) *State* v. *Johnson*, 67 Conn. App. 299, 314, 786 A.2d 1269 (2001), cert. denied, 259 Conn. 918, 791 A.2d 566 (2002). "Although an adverse inference instruction may be appropriate under certain circumstances, a trial court is not required to give an adverse inference instruction in every case involving missing evidence." (Internal quotation marks omitted.) Id.

We agree with the court's determination that no factual basis existed for the specific charge requested by the defendant. The record is devoid of any evidence that the police investigation was incomplete or that, in

[10] During the court's colloquy with defense counsel, the court asked whether the police have a duty to take photographs of a crime scene or if they can use their discretion. The court appeared to draw a distinction between whether the issue with the photographs was the result of negligent conduct by the police or whether it was attributable to unknown technical reasons, or in the court's words, a "technical snag." Defense counsel did not appear to have a response as to whether a mere technical failure was the cause of the indiscernible photographs, but responded that it was his position that the police, through their training and experience, have a duty to take and review on-scene photographs.

their investigation, the police had acted negligently or in bad faith. Anderson testified that the police department taught him how to take photographs using the camera. He further testified that his responsibilities did not include transferring the digital images for printing. Anderson testified that he followed procedure, believed he was diligent, and that sometimes the photographs from investigations did not come out. He also testified that part of his due diligence as a police officer includes ensuring that photographs have been taken by reviewing them. In this case, Anderson reviewed the photographs at a later date, at which point he realized three were indiscernible. The reason for the indiscernibility of the photographs remains unknown, but none of the evidence adduced at trial attributes their condition to an incomplete, negligent, or bad faith police investigation.

Even if we were to conclude that the court should have delivered the requested instruction, we are persuaded in light of the evidence as a whole that its failure to do so was harmless because the defendant has failed to show that it was more probable than not that the failure to give the requested instruction affected the result of the trial. The state's case included three eyewitnesses who testified that the apartment doors were damaged after the incident. Additionally, Nicole Hart and Esposito both positively identified the defendant as one of the intruders and perpetrators of the assault. In light of the ample evidence that the defendant entered and remained unlawfully in the apartment, had the court delivered the requested adverse inference instruction to the jury, we do not agree that it is more probable than not that the outcome of the trial would have been different. Accordingly, we conclude that the court did not err in denying the defendant's requested adverse inference jury instruction regarding the police investigation.

The judgment is reversed only as to the conviction of conspiracy to commit assault in the first degree and the case is remanded with direction to vacate the defendant's conviction of that offense. The judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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# NOTICES OF CONNECTICUT STATE AGENCIES

## State of Connecticut
## Connecticut State Board of Examiners for Physical Therapists

### Notice of Hearing

The Connecticut State Board of Examiners for Physical Therapists will hold a hearing on October 1, 2019, at the Legislative Office Building, 300 Capitol Avenue, Hartford, Connecticut commencing at 9:15 a.m., in Hearing Room 1-B, for the purpose of issuing a declaratory ruling. The subject of the declaratory ruling is as follows:

1. Is acupuncture, as defined in Section 20-206aa(3) of the General Statutes, within the scope of practice of a physical therapists?

2. Is dry needling*, provided that the practitioner is trained and competent to do so, within the scope of practice of a physical therapist as defined in Section 20-66(2) of the General Statutes?

*For purposes of this declaratory ruling, ''dry needling'' may be defined as an intervention that uses a thin filiform needle to penetrate the skin and stimulate underlying myofascial trigger points, muscular, and connective tissues for the management of neuromusculoskeletal pain and movement impairments.

The Connecticut State Board of Examiners for Physical Therapists (''the Board'') has prepared this notice in accordance with the Uniform Administrative Procedure Act (''UAPA''), Connecticut General Statute § 4-166 *et seq.*, and specifically Conn. Gen. Stat. § 4-176.

By law, a declaratory ruling constitutes a statement of agency law which is binding upon those who participate in the hearing, and may also be utilized by the Connecticut State Board of Examiners for Physical Therapists, on a case by case basis, in future proceedings before it.

August 16, 2019

Mary Lou Sanders, MS, BSN
*Chairperson*
Connecticut State Board of Examiners
for Physical Therapists

# NOTICES

## Notice of Reprimand of Attorneys

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

**Reviewing Committee Reprimands**

April 12, 2019: John J. Evans, Norwalk, Connecticut – 405794

April 18, 2019: PHV Peter A. Clarkin – Providence, RI – 436587

April 26, 2019: Leo E. Ahern, New Haven, Connecticut – 102231
Jason Gaston Doyon, East Windsor, Connecticut - 425744

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

Attest:

Michael P. Bowler
*Statewide Bar Counsel*

## Notice of Reprimand of Attorney

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

**Reviewing Committee Reprimand**

June 14, 2019: Chris Gauthier, Uncasville, Connecticut - 429959

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

Attest:

Michael P. Bowler
*Statewide Bar Counsel*

## Notice of Suspension of Attorney Misconduct and Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that on July 30, 2019, in Docket Number HHD-CV17-6084919 David V. Chomick (juris# 428595) of Glastonbury, CT was suspended from the practice of law for a period of 6 months, commencing on July 31, 2019.

Attorney Linda Hadley, Juris No. 302693, of West Hartford, Connecticut, is appointed Trustee to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondents' files, and to take control of Respondent's clients' funds accounts. The respondent shall cooperate with the Trustee in this regard.

The Respondent shall not deposit to, or disburse any funds from, his clients' funds accounts.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

At the completion of his period of suspension, the Respondent shall provide certificates of attendance to the Disciplinary Counsel demonstrating that he has complied with all 2019 Minimum Continuing Legal Education requirements by attending, *in person*, continuing legal education courses. Unless otherwise ordered by the court, correspondence, on-line or video courses will not suffice to satisfy this requirement.

David Sheridan
*Presiding Judge*

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**STATE OF CONNECTICUT**
**DIVISION OF CRIMINAL JUSTICE**
*(Affirmative Action/Equal Opportunity Employer)*

**STATE'S ATTORNEY**
**JUDICIAL DISTRICT OF LITCHFIELD**

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of Litchfield (PCN 4858). The successful applicant shall hold office from the date of appointment through June 30, 2025, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position please visit our website at:
https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at:
https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en.
A job description for this position may also be viewed on this website.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to**:** The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-Litchfield JD (PCN 4858) and must be postmarked no later than **September 10, 2019**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.

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