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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* VINCENTE AYALA (SC 19888)

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

Syllabus

Convicted of the crimes of murder and conspiracy to commit murder in connection with the shooting death of the victim, the defendant appealed to this court, claiming that the trial court had improperly admitted certain testimony. At trial, the state introduced evidence indicating that the defendant and the victim had been members of a particular street gang and that the victim, prior to being murdered, was planning to leave that gang to join another gang. T, another gang member, testified that a gang leader, after learning about the victim's intent to leave the gang, ordered T to kill the victim and that, when T refused, the defendant volunteered to do so. Another member of the gang, R, testified that he had been in the victim's vehicle with, among others, the gang leader, the defendant, and the victim on the night of the victim's death. R testified that he had heard a gunshot shortly after leaving the vehicle and that, about one-half hour later, the defendant admitted to him that he had killed the victim. R testified that he then went back to the vehicle and saw the victim's lifeless body. R also testified that, a few days later, the gang leader told him that the defendant had killed the victim at his direction. In addition, T testified that he had told the victim prior to the murder about the threat to the victim's life and that the defendant had later expressed remorse to T for having killed the victim. Another witness, W further testified that the victim had made statements to him on the night of the murder in which the victim expressed fear of the gang. The defendant moved to preclude R's testimony regarding the statement made by the gang leader to R that the defendant had killed the victim at the gang leader's direction and W's testimony regarding the victim's fear of the gang. The trial court denied the defendant's motions, concluding, inter alia, that R's testimony regarding the gang leader's statement to him was admissible under the hearsay exception for statements made by a coconspirator and that W's testimony was relevant evidence of the victim's state of mind. On appeal from the judgment of conviction, *held*:

1. This court declined to address the substance of the defendant's claim that the trial court improperly had admitted R's testimony regarding the gang leader's statement to R that the defendant had killed the victim at the gang leader's direction because, even if the admission of that testimony was improper, the defendant failed to meet his burden of demonstrating harm; even if the trial court improperly admitted that portion of R's testimony under the coconspirator exception to the hearsay rule, this court had a fair assurance that the admission of the chal-

lenged testimony did not substantially affect the verdict because it was not highlighted in the state's closing argument and was largely cumulative of, and corroborated by, other evidence presented by the state at trial, including the defendant's own admissions to R and T that he killed the victim, R's testimony regarding his observation of the victim's body in the car immediately after the defendant admitted to R that he had killed the victim, and T's testimony that the defendant had volunteered to kill the victim and had expressed remorse for having done so.

(*Three justices dissenting in one opinion*)

2. The trial court did not abuse its discretion in determining that the victim's state of mind with respect to his fear of the gang was relevant evidence of the deteriorating nature of the victim's relationship with the gang, from which the jury could reasonably infer the defendant's motive to kill the victim and also in determining that the admission of W's testimony regarding the victim's statements of fear was not unduly prejudicial; the victim's statements to W that he feared the gang provided a sufficient link to the defendant to warrant the admissibility of W's testimony, and independent, corroborating evidence, including testimony regarding the circumstances surrounding the gang leader's order, the defendant's agreement to follow that order, and the victim's knowledge of the threat made on his life, allowed the jury to infer motive from the victim's expression of fear without resorting to impermissible speculation.

Argued September 20, 2018—officially released September 24, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder, conspiracy to commit murder, criminal possession of a firearm and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the court, *Alander*, *J.*, denied the defendant's motion in limine; thereafter, the charges of murder and conspiracy to commit murder were tried to the jury before *Alander*, *J.*; verdict of guilty; subsequently, the defendant was tried to the court, *Alander*, *J.*, on the charges of criminal possession of a firearm and carrying a pistol without a permit; finding of not guilty; thereafter, the court, *Alander*, *J.*, denied the defendant's motion for a new trial and rendered judgment of guilty in accordance with the verdict and the finding, from which the defendant appealed to this court. *Affirmed.*

Christopher Y. Duby, assigned counsel, with whom, on the brief, was *Robert L. O'Brien*, assigned counsel, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom were *John P. Doyle, Jr.*, senior assistant state's attorney, and, on the brief, *Patrick J. Griffin*, state's attorney, for the appellee (state).

Opinion

MULLINS, J. This appeal arises from a judgment of conviction against the defendant, Vincente Ayala, on the charges of murder in violation of General Statutes § 53a-54a and conspiracy to commit murder in violation of General Statutes §§ 53a-48 and 53a-54a.[1] On appeal, the defendant raises two evidentiary claims.[2] First, he claims that the trial court improperly admitted testimony implicating him in the murder under the coconspirator exception to the hearsay rule. Second, he claims that the trial court improperly admitted certain state of mind evidence. We disagree with both 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. The victim, Thomas L. Mozell, Jr., and the defendant were members of Piru, a nationwide street gang affiliated with the Bloods that has a local presence in New Haven. An individual known as "Terror," a gang leader, believed that the victim had disrespected the gang. In particular, Terror and the members of Piru believed that the victim was planning to leave Piru to join a dif-

[1] The state also charged the defendant with criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). The defendant elected to be tried by the court on these charges, and the court acquitted him on both.

[2] We note that the defendant does not claim that the admission of evidence violated any of his constitutional rights. Therefore, we review his claims solely for evidentiary error.

ferent gang and that he would retaliate against them once he left. As a result, in a meeting that included Terror, Timothy Thomas, the defendant, and several other gang members, Terror ordered Thomas, as the "hood enforcer" of the gang, to kill the victim.[3] Thomas refused, however, because he was close friends with the victim. At that point, the defendant volunteered to carry out Terror's order to kill the victim. Later that day, Thomas spoke to the victim and warned him of the threat the gang now posed to his life.

Not long after the meeting, the defendant carried out Terror's order by shooting the victim in the head while he, Terror, and several other gang members were smoking marijuana inside of the victim's vehicle. Thirty minutes after the shooting, the defendant admitted to another gang member, Jordan Richard,[4] that he had shot the victim.

The next day, the police found the victim dead in his vehicle with a fatal gunshot wound to his head. Also on the day following the murder, the defendant told Thomas that he felt badly about what he had to do but that Terror had ordered him to kill the victim.

Following the defendant's arrest and a weeklong trial, the jury returned a verdict of guilty on charges of murder and conspiracy to commit murder. The trial court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of 55 years of

[3] Thomas explained that the Piru gang has a hierarchical structure and that, if a lower ranking member does not follow the orders of a higher ranking member, the hood enforcer is the member that has the duty of imposing discipline on the lower ranking member. He also testified that, as newer members of the Piru gang, both he and the defendant were expected to try to rise up in ranks of the gang. One way to rise up in the ranks was following orders to kill. At the time of Terror's order, Thomas had been a member of the Piru gang for six or seven months.

[4] We note that Richard's name is spelled incorrectly in various written motions and transcripts. We refer to him as Richard because that spelling is consistent with the manner in which he identified himself at trial.

incarceration. This appeal followed.[5] Additional relevant facts will be set forth as necessary.

I

The defendant first claims that the trial court incorrectly admitted certain testimony from Richard under the coconspirator exception to the hearsay rule. This claim relates specifically to Richard's testimony that, several days after the murder, Terror told him that the defendant had killed the victim at Terror's direction. The defendant contends that this testimony does not fall within the coconspirator exception because there was insufficient evidence that (1) a conspiracy existed between Terror and the defendant at the time Terror made those statements, and (2) Terror made the statements in furtherance of the conspiracy.

The state counters that the trial court properly admitted Richard's testimony pursuant to the coconspirator exception. The state argues that Terror's statements were made during, and in furtherance of, the conspiracy because, notwithstanding the fact that the murder had occurred several days before Terror relayed the details to Richard, the conspiracy still was ongoing. The state further claims that Terror's statements were made in furtherance of the conspiracy because they embroiled Richard deeper into the conspiracy in order to prevent him from going to the police. The state also contends that, even if the trial court improperly admitted Richard's testimony regarding Terror's statements, any error was harmless. We agree with the state's latter contention and, therefore, do not address the substance of the defendant's evidentiary claims regarding the coconspirator exception. Specifically, we conclude that any error in admitting the testimony under the coconspirator exception to the hearsay rule was harmless.

[5] The defendant appealed directly to this court pursuant to General Statutes § 51-199 (b) (3).

The following additional facts and procedural history are relevant to our resolution of this claim. Prior to the start of the second day of trial, the defendant filed a motion in limine in anticipation of the state's calling Richard as a witness. The defendant sought to preclude Richard's testimony regarding statements made to Richard by Terror detailing the killing, including how the defendant shot the victim. The trial court heard argument by counsel. Relying on evidence that already had been presented at trial and on the state's representations of Richard's expected testimony, the court determined that the state had established, by a preponderance of the evidence, the requirements for admission under the coconspirator exception. The court, therefore, denied the motion and allowed Richard to testify regarding Terror's statements.

Richard testified as follows at trial. On the evening of the murder, he and other members of Piru were at the house of fellow gang member, Davon Youmans, when he saw Youmans hand Terror a .40 caliber handgun. Terror put the gun in his waistband. Shortly thereafter, Terror, the victim, Richard and another gang member, Montese Gilliams, went to smoke marijuana in the victim's vehicle, which was parked just down the street from Youmans' house. Richard testified that they got into the victim's car and that the victim sat in the driver's seat, Gilliams sat in the front passenger seat, Terror sat behind the victim, and Richard sat behind Gilliams. They soon were joined by the defendant at which point Richard moved to the rear middle seat and the defendant sat behind Gilliams on the passenger side of the car. The others then told Richard to get out of the vehicle. Obeying those orders, Richard got out of the vehicle and went back to Youmans' house where he began playing cards. About twenty minutes later, Richard heard a gunshot. He remained inside the house playing cards.

About thirty minutes after Richard heard the gunshot, the defendant came inside Youmans' house wearing dif-

ferent clothes and acting cocky and arrogant. The defendant then told Richard that he had shot the victim. At first, Richard did not believe him, so the defendant told Richard to "go see for yourself." Richard then went back to the victim's vehicle, got inside the vehicle and saw the victim's lifeless body.

Richard also testified that, a couple of days later, Terror asked Richard to accompany him to New York City. He went with Terror and stayed there for five or six days. It was during this time in New York City that Terror made the statement to Richard that is at issue in this appeal. In particular, Terror reportedly said that he, the defendant, and the victim had been inside of the victim's vehicle, he had handed the gun to the defendant, he had looked over at the defendant, and the defendant then shot the victim. The defendant asserts that it was error for the trial court to admit this statement under the coconspirator exception to the hearsay rule because Terror made the statement days after the murder occurred and the conspiracy had ended. As a result, the defendant argues, the statement could not have been made in furtherance of a conspiracy. The defendant further argues that this evidentiary error was harmful.

We assume, without deciding, that it was improper for the trial court to admit Richard's testimony regarding Terror's statements under the coconspirator exception to the hearsay rule. Nevertheless, we conclude that the defendant has failed to meet his burden of establishing harm under the circumstances of this case.

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the . . . 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. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, 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. *Bouknight*, 323 Conn. 620, 626–27, 149 A.3d 975 (2016).

As the harmless error standard requires, we must examine the impact that the challenged statements had on the jury and the result of the trial. Our review of the evidence assures us that this evidence did not substantially sway the jury. To be sure, although Richard's testimony was generally important to the state's case, particularly in light of limited physical evidence, the specific statement at issue was largely cumulative of other evidence and also corroborated by other evidence on material points.

Indeed, perhaps the most significant evidence was the defendant's own admission. Richard testified that, on the night of the murder, he heard a gunshot shortly after he left the victim's vehicle. Thirty minutes later, the defendant admitted to Richard that he had just shot the victim. The defendant then told Richard to go back to the vehicle. When Richard did, he saw the victim's dead body with a gunshot wound, which was consistent with how the defendant had admitted to killing him. The police also found the victim dead in his vehicle from a gunshot wound the next day. Forensic evidence

revealed that the victim was shot behind his right ear, which was consistent with Richard's testimony regarding the fact that the defendant was sitting in the rear of the vehicle on the passenger side of the car. Thus, Terror's statement that the defendant was the person who killed the victim was cumulative of Richard's other, unchallenged testimony that the defendant had admitted to killing the victim.

Additionally, testimony from another Piru gang member, Thomas, also corroborated the challenged testimony. Thomas testified that Terror and other gang members had held a meeting to address what to do with the victim, whom they believed betrayed the gang, and that Terror had ordered him to kill the victim. After Thomas refused to comply with Terror's order, the defendant volunteered to kill the victim. This testimony clearly demonstrates both the defendant's agreement to be part of the conspiracy and his intent to commit the murder. Thomas further testified that, during a conversation with the defendant about the victim on the day after the murder, the defendant told him that he felt badly about what he had to do but that Terror had ordered him to kill the victim.

Although this was not an ironclad case, it certainly was sufficiently strong, even without considering the challenged testimony, so that we have a fair assurance that admission of the challenged statements did not substantially affect the verdict. Indeed, two separate witnesses implicated the defendant as the killer, and, notably, one of them testified that the defendant had confessed to the crime minutes after he committed it. The other witness testified that the defendant, after killing the victim, said that he felt remorse for having done so. This remorse further established the defendant's own acknowledgment of his involvement in the killing. The evidence also showed that the defendant was sitting in the rear of the vehicle on the passenger

side and that the victim was shot behind his right ear. Therefore, this physical evidence demonstrated that the person who shot the victim was sitting in the seat in which the defendant sat. Thus, on the material points of whether the defendant committed the murder, Richard's testimony about Terror's statement was corroborated by other evidence.[6]

The defendant claims that Terror's statement was not corroborated by, or cumulative of, other evidence introduced by the state because the statement was the only evidence that described exactly *how* the murder occurred inside the victim's car. He argues that the remainder of Richard's testimony and the testimony of Thomas only described the fact that the murder occurred, not how it happened. We are unpersuaded by the defendant's argument.

As we already have explained, the defendant's agreement with Terror to commit the murder and the defendant's subsequent commission of that murder were already established by Thomas' testimony and Richard's other testimony. In this case, the precise details of how the murder occurred were not necessary to establishing either the identity of the killer or the elements of the crimes charged. Notwithstanding the dissent's wholesale attack on hearsay evidence in general, the defendant's admissions were competent, unchallenged evi-

[6] The dissent contends that the credibility of Thomas and Richards "was subject to significant challenge" and that Terror's statements were "critical corroboration" evidence that improperly bolstered their credibility. We disagree. Terror's statement was introduced through Richard. Terror did not testify. Therefore, if the jury believed Terror's statement, they must have found Richard credible in relaying it, and, therefore, it was not needed to bolster his testimony. Rather, if the statement regarding Terror was believed, it was because the jury found Richard credible on this point. As to Thomas, to the extent that Terror's statement could have bolstered the testimony of Thomas with respect to the fact that the defendant confessed to killing the victim, as we have explained in this opinion, Terror's statement was not critical but, instead, was simply cumulative of other evidence that corroborated that portion of Thomas' testimony.

dence before the jury. The challenged statements added very little, and, thus, we do not believe that the jury's verdict was substantially swayed by their admission. The other evidence already had established that the defendant had volunteered to kill the victim, had admitted to shooting the victim inside the victim's vehicle, and that the victim had been discovered by the police in his vehicle, dead from a gunshot wound. Certainly, on this record, even without Terror's statement that he handed the gun to the defendant inside the car, the identity of the killer and all of the elements of murder and conspiracy to commit murder were established.[7] We think it significant in evaluating harm to look to see how the state used this evidence in its closing argument. In doing so, we find it telling that the state did not specifically mention, and certainly did not emphasize, the challenged statement during its closing argument, thus diminishing the importance of the statement to the state's case.[8] See *State* v. *Thompson*, 266 Conn. 440, 456, 832 A.2d 626 (2003) (concluding that admission of challenged testimony was harmless error, in part, because state did not emphasize or rely on challenged testimony during closing argument). Rather, the state focused its argument on the other unchallenged evidence highlighted in this opinion. Stated succinctly, Terror's statement simply was not pivotal to the state's case.

[7] We note that part II B of the dissenting opinion recognizes and relies in its analysis upon the fact that Terror's statements offered very little new information in comparison to what Richard already knew, yet part I of the dissenting opinion asserts that Terror's statements "played a prominent part in the case against the defendant." We think that the dissent's characterization of Terror's statements as providing little additional information is correct and, thus, conclude that the admission of evidence regarding those statements was harmless.

[8] Although the state mentioned that the defendant killed the victim by "pointing a gun at the back of [the victim's] head and pulling the trigger and putting a bullet through the back of his skull," the state never attributed this evidence to Terror, and that evidence was also supported by the forensic evidence demonstrating that the victim was shot on the back, right side of the head.

The defendant also claims that the admission of Terror's statement was harmful because the state's case was weak.[9] In support of his claim, the defendant points to a lack of physical evidence connecting him to the murder. It is well established, however, that a lack of physical evidence does not necessarily equate to a weak case. See *State* v. *Fauci*, 282 Conn. 23, 53, 917 A.2d 978 (2007) (concluding that state's case was strong on basis of witness testimony despite lack of physical evidence linking defendant to crime). In the present case, although we acknowledge that there was no physical evidence linking the defendant to the murder and that physical evidence providing that link would have made the state's case stronger, the unchallenged testimonial evidence of Richard and Thomas demonstrated that the defendant agreed to kill the victim and later admitted to doing the same.

The defendant asserts that Richard's testimony was the only testimony that the jury believed, so any part of it that was improperly admitted could not be harmless. In support of his claim, the defendant points to the

[9] As one basis to support this claim, the defendant argues that the trial court's acquittal on the other related charges; see footnote 1 of this opinion; is an indication that the state's case was weak. The state, however, accurately points out that the trial court, in rejecting the defendant's posttrial motion for a judgment of acquittal, explained that "clearly, there was evidence that, if credited by the jury, [the defendant] was guilty of the two crimes for which he was found guilty. . . . There is nothing before [the court] that would indicate that the jury did anything other than conscientiously review the evidence and credit the testimony of . . . Thomas . . . and Richard, and [determine] that the state has proved [the defendant's] guilt beyond a reasonable doubt." For these reasons, we cannot conclude that the state's case was weak on the basis of the judgment of the trial court regarding the related charges.

The dissent also relies upon the trial court's acquittal in its analysis. We disagree that the trial court's view on separate charges that were part of a bench trial should be considered in our analysis of the issues in this case. The defendant exercised his constitutional right to have the jury be the ultimate fact finder in this case and, like the trial court correctly recognized, that is the fact finder to whose judgment we defer in evaluating the credibility of the state's witnesses.

fact that Richard's testimony and Thomas' testimony conflicted on the issue of whether the defendant was present at the meeting where he allegedly volunteered to kill the victim. As a result, the defendant claims that the jury had to believe either Richard's testimony in its entirety or Thomas' testimony in its entirety, but it could not believe both.[10] The defendant further reasons that, because the jury asked to have Richard's testimony read back but did not ask to have Thomas' testimony read back, it must have believed Richard's testimony in its entirety and rejected Thomas' testimony in its entirety.

Contrary to the defendant's contention, it is not accurate that the jury had only two choices: either entirely believe Richard or entirely believe Thomas. The jury did not have to believe either Richard's testimony or Thomas' testimony in its entirety. In fact, this court repeatedly has explained that "[i]t is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony." (Internal

[10] As we explained previously in this opinion, Thomas testified that, on the day of the murder, he attended a meeting at Youmans' house and that, at that meeting, Terror ordered Thomas to kill the victim, Thomas refused, and the defendant volunteered to do it. Thomas also testified that this meeting took place "later on in the day." Thomas testified that he, Youmans, Terror, Richard, and the defendant were present at the meeting. Thomas further stated that "I believe there might have been more, but I just don't remember who."

Richard testified that, on the day of the murder, he attended a meeting at Youmans' house where the individuals present were "discussing" the victim. He further testified that the meeting took place at "10:30, 11 in the morning." He stated that he, Youmans, Terror, and "a couple of . . . other members" were present but that he could not "remember everybody's name who was there." He also stated that the defendant was not present.

At first glance, the testimony of Thomas and Richard regarding the meeting seem to conflict. We are, however, not convinced that their testimonies are irreconcilable. It is entirely possible that there were two meetings and Thomas could have been mistaken that Richard was present at the meeting he attended, particularly given his own admission that he could not remember everyone who was present at the meeting.

quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 223, 100 A.3d 821 (2014).[11] The jury could have believed portions of testimony from each of these two witnesses. Therefore, we cannot accept the defendant's claim that Thomas' testimony was wholly rejected by the jury and only Richard's testimony supported the jury's verdict. Instead, we conclude that the jury was free to believe those portions of each witness' testimony that it found credible. It is also clear to us that portions of both Thomas' and Richard's testimony supported the verdict.

In sum, even without considering Terror's statement regarding the details of what happened inside the victim's vehicle, the state's case consisted of testimony from two witnesses that not only corroborated, but also was cumulative of the challenged statement implicating the defendant as the killer. The defendant performed extensive cross-examinations of the state's witnesses highlighting inconsistencies in their testimony. The jury was free to make its credibility determination, and we do not second-guess that determination.[12]

[11] In the present case, the members of the jury were instructed in relevant part: "You are also not bound to accept a fact as true simply because a witness testifies to a fact and no one contradicts it. The credibility of the witness and the truth of the fact is for you to determine. You may disbelieve all or any part of a witness' testimony. . . . You should decide what portion, all, some, or none of a witness' testimony you will believe."

[12] The dissent asserts that, "[a]lthough for some issues raised on appeal, we must defer to the jury's credibility determinations, our cases make clear that we may consider witness credibility in a harmless error analysis," and cites several cases in support of that position. To the extent that the dissent asserts that we do not defer to the credibility determinations of the fact finder, we disagree and find the dissent's reliance on the cases misplaced. The cases cited by the dissent do not demonstrate that we do not defer to the fact finder's credibility determinations. Instead, the cases cited by the dissent address impeachment evidence of which the jury was unaware, not corroborating evidence. See *State* v. *Ritrovato*, 280 Conn. 36, 57–58, 905 A.2d 1079 (2006) (concluding that exclusion of impeachment evidence of alleged victim's prior sexual conduct rebutting her testimony that she was a virgin was not harmless error with respect to sexual assault charges); *State* v. *Cortes*, 276 Conn. 241, 885 A.2d 153 (2005) (concluding that exclusion

The dissent also asserts that "deference to the fact finder is most appropriate when an 'assessment of the credibility of the witnesses . . . is made on the basis of its firsthand observation of their conduct, demeanor and attitude.' . . . Here, however, the evidence undermining the witness' credibility—namely, various forms of self-interest, including the desire to lessen or eliminate their criminal liability—is apparent not from subjective firsthand observation, but objectively from the transcript and exhibits offered by the parties." (Citation omitted; emphasis omitted.) We disagree. It is axiomatic that "[w]e do not sit as a thirteenth juror who may cast a vote against the verdict based upon our

of evidence of sexual relationship between complainant and defendant was not harmless error when presenting such evidence was "the most effective method of impeaching the state's witnesses"). Therefore, we find those cases to be inapposite.

In the present case, defense counsel performed extensive and thorough cross-examinations of Richard and Thomas, emphasizing for the jury the witnesses' potential biases and motivations for testifying. Unlike the juries in the cases cited by the dissent, the jury in the present case was fully informed and was not deprived of critical evidence regarding the witnesses' credibility.

The dissent relies on *Holmes* v. *South Carolina*, 547 U.S. 319, 330, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), for the proposition that "where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case." The principle annunciated in *Holmes* is not applicable here. *Holmes* does not involve a harmless error analysis.

In *Holmes*, the United States Supreme Court was examining South Carolina's evidentiary rule that evidence of third-party culpability may be ruled inadmissible at trial "where there is strong evidence of [a defendant's] guilt, especially where there is strong forensic evidence." Id., 324. The United States Supreme Court rejected South Carolina's evidentiary rule, in part, because it did not require the trial court to consider the credibility of the prosecution's witnesses or the reliability of its evidence before deciding whether to exclude third-party culpability evidence during the course of the trial, i.e. before a jury has made any credibility determinations itself. This is wholly different from allowing an appellate court to substitute its judgment for the fact finder after the fact finder has made its credibility determinations, which is what the dissent is suggesting we should do here.

feeling that some doubt of guilt is shown by the cold printed record. . . . Rather, we must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Bush*, 325 Conn. 272, 304–305, 157 A.3d 586 (2017). Importantly, the jury heard and evaluated all of the objective evidence offered to impeach the witnesses. It also observed firsthand each of the witness' conduct, demeanor, and attitude upon being confronted with that impeachment evidence. The jury was free to make its credibility determination on the basis of what it heard in testimony and observed from watching the witnesses testify. The fact that the transcript and exhibits reveal biases and motives of the witnesses does not allow us to substitute our judgment of witness credibility for the jury's determination. As aptly stated by the trial court, "[t]here is nothing before [the court] that would indicate that the jury did anything other than conscientiously review the evidence and credit the testimony of . . . Thomas . . . and Richard, and [determine] that the state has proved [the defendant's] guilt beyond a reasonable doubt."

On the basis of the foregoing, even if we assume that the trial court incorrectly admitted the evidence under the coconspirator hearsay exception, the defendant has not met his burden of demonstrating that the admission of Richard's testimony regarding Terror's statement had a substantial impact on the jury's verdict. We conclude, therefore, that we have a fair assurance that, under the circumstances of this case, the jury's verdict was not substantially affected by any such error. Thus, the alleged error was harmless.

II

The defendant next claims that the trial court improperly admitted testimony of Tavaris Wylie regarding statements made to him by the victim in which the vic-

tim expressed fear of the gang. In particular, the defendant asserts that the trial court abused its discretion in admitting the victim's statements as state of mind evidence because they were irrelevant, misleading, and unfairly prejudicial.

The state counters that the trial court properly admitted the statements as evidence of the victim's state of mind. Specifically, it asserts that the victim's statements illustrated his deteriorating relationship with, and fear of, the Piru gang and, therefore, were relevant to the defendant's motive to kill the victim. We agree with the state.

The following additional facts and procedural history are relevant to our resolution of this claim. At trial, the defendant filed a motion in limine seeking to preclude Wylie from testifying about statements made by the victim in which the victim expressed fear of the Piru gang. At the hearing on the motion, both the state and the defendant agreed that the state intended to introduce Wylie's testimony regarding the victim's statements to show that the victim was fearful of the gang.

The defendant argued that Wylie's testimony regarding the victim's fear of the Piru gang should be precluded on the basis that it was not relevant and that it was inadmissible hearsay. In response to that argument, the trial court remarked: "Well there's the state of mind exception, right? I mean that he's fearful, that's state of mind, right? But the state of mind only comes in if it's relevant." Rather than explain why the statements failed to satisfy the state of mind exception, or that the statements could not be considered admissible as nonhearsay,[13] the defendant focused his argument on challenging the relevance of the statements. He argued

[13] We note that out-of-court statements demonstrating the defendant's state of mind can be admissible (1) as nonhearsay when they are not offered to prove the truth of the matter asserted; see *State* v. *Wargo*, 255 Conn. 113, 138, 763 A.2d 1 (2000); or (2) under the state of mind exception to the hearsay rule. See *State* v. *Smith*, 275 Conn. 205, 219–20, 881 A.2d 160 (2005).

that the victim's fear of the gang was irrelevant and prejudicial because fear of the gang in general does not help to identify the defendant as the shooter.

After hearing the defendant's argument, the court asked the prosecutor if he wanted to be heard on the relevance issue. The prosecutor confirmed that he was offering Wylie's testimony as state of mind evidence—although he did not specify whether he was offering it as an exception to the hearsay rule or as nonhearsay—and that it was relevant because it demonstrated that the victim had specific concerns about the Piru gang, his relationship with the gang, and the gang's behaviors toward him.

The trial court ruled as follows: "Well, here's my ruling. You know, there's an interesting case, [*State* v. *Duntz*, 223 Conn. 207, 613 A.2d 224 (1992), in which] the Supreme Court ruled it inadmissible, the statement of a victim, that—I think it was a woman—that she feared the defendant, and that, without more, isn't probative of—or isn't relevant and isn't probative of anything. But then there's a subsequent case, [*State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 (2005)] while recognizing *Duntz*, distinguished it in that case, because . . . the statements regarding fear were circumstantial evidence of a deteriorating relationship. I think that's similar here. I think it's relevant for two reasons. One, is it potentially corroborates . . . Thomas' testimony that he told [the victim] that the gang was going to kill him, and, secondly, it shows the nature of the—or is probative of the nature of the deteriorating relationship between [the victim] and the gang. The state's claim here is the gang ordered this hit. So his relationship with the gang is certainly relevant, and whether it was deteriorating is certainly relevant, and his fear of the gang is evidence of that. So, for those reasons, the motion in limine is denied."

Wylie proceeded to testify that, on the night of the victim's death, he had a conversation with the victim

during which the victim expressed his fear of the Piru gang. Wylie stated that he and the victim were discussing the gang when the victim said that he "just had a funny vibe about everybody." He further stated that the victim "felt like they [were] rocking him to sleep." Wylie explained that "rocking him to sleep" meant that they were "sheep in wool's clothing"[14] and that they were "coming for you." The defendant declined to cross-examine Wylie.

We begin by setting forth the standard of review and legal principles applicable to this claim. "To the extent [that] a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary." *State* v. *Saucier*, 283 Conn. 207, 218–19, 926 A.2d 633 (2007). "We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion. . . . [O]nly after a trial court has made the legal determination that a particular statement is or is not hearsay, or is subject to a hearsay exception, is it vested with the discretion to admit or to bar the evidence based upon relevancy, prejudice, or other legally appropriate grounds related to the rule of evidence under which admission is being sought." (Citation omitted.) Id.

"It is axiomatic that [if premised on a correct view of the law, the] trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence . . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Furthermore, [i]n determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's

[14] Presumably, Wylie meant that the gang members were "wolves in sheep's clothing."

ruling, and we will upset that ruling only for a manifest abuse of discretion." (Internal quotation marks omitted.) *State* v. *Popeleski*, 291 Conn. 769, 774, 970 A.2d 108 (2009).

In the present case, the trial court did not clearly specify whether it was admitting Wylie's testimony regarding the victim's statements of fear as hearsay satisfying the state of mind exception or as nonhearsay. In the trial court, neither the state nor the defendant challenged the trial court's legal determination regarding whether the statements satisfied the state of mind exception to the hearsay rule or were nonhearsay but, instead, focused on relevancy and prejudice.[15] Accord-

[15] Although the defendant refers to the victim's statements as inadmissible hearsay in his brief, he does not assert that the trial court made an incorrect legal determination that they fit within the state of mind exception to the hearsay rule or were nonhearsay. For its part, the state, although it asserts that the statements were nonhearsay, does not engage in an analysis of the trial court's legal determination because, as the state points out, the defendant has not argued that the court had an incorrect view of the law. The defendant focuses solely on whether the trial court abused its discretion in admitting the statements because they were not relevant and were unduly prejudicial given that the victim's fear was of the gang generally and not of him specifically. Accordingly, because the defendant does not adequately challenge whether the trial court's decision was premised on a correct view of the law, i.e., whether the statements were hearsay but satisfied the state of mind exception or were nonhearsay, we need not review that issue.

Therefore, our examination—like the parties' briefs—focuses on whether the trial court abused its discretion in determining that the statements were relevant. The relevancy determination is the same regardless of whether statements of the victim's fear of the defendant were admitted under the state of mind exception to the hearsay rule or as nonhearsay. Compare *State* v. *Smith*, 275 Conn. 205, 217–20, 881 A.2d 160 (2005) (concluding that statements of victim's fear of defendant admitted under state of mind exception to hearsay rule are relevant to issues of defendant's motive and intent where there was corroborative evidence of victim's fear), and *State* v. *Duntz*, supra, 223 Conn. 233 (concluding that hearsay statements regarding victim's state of mind were not relevant to defendant's motive to kill victim where there was no corroborative evidence of victim's fear), with *State* v. *Patterson*, supra, 276 Conn. 487 (concluding that nonhearsay statements regarding victim's state of mind were relevant to defendant's motive to kill victim where there was corroborative evidence of victim's fear), and *State* v. *Wargo*, 255 Conn. 113, 138–40, 139, 763 A.2d 1 (2000) (concluding that nonhearsay statements regarding victim's state of mind were relevant to establish defendant's motive to kill where there was corroborative evidence of victim's fear).

ingly, we do not address the trial court's legal determination but examine only whether the trial court abused its discretion in determining that these statements were relevant.

"Evidence is relevant only if it has some tendency to establish the existence of a material fact." (Internal quotation marks omitted.) *State* v. *Duntz*, supra, 223 Conn. 233. "Whether the victim's state of mind is relevant depends . . . on the nature of the issues at trial. . . . We previously have held that evidence of a victim's mental state may be relevant to establish the defendant's motive to kill the victim." (Citation omitted; internal quotation marks omitted.) *State* v. *Patterson*, supra, 276 Conn. 485–86; see also *State* v. *Hull*, 210 Conn. 481, 502, 556 A.2d 154 (1989) ("[t]he victim's mental state was relevant both to show the victim's fear of the defendant . . . and to establish the defendant's motive for committing the crime").

In order for a victim's fear of the defendant to be relevant to motive, the state must demonstrate (1) a preexisting relationship between the victim and the defendant, and (2) independent evidence corroborating the victim's fear. As to the first requirement, "[i]t is well established in our jurisprudence that, where a marital or romantic relationship existed between a homicide victim and the defendant, evidence of the victim's fear of the defendant suggests a deterioration of that relationship, which is relevant to the issues of motive and intent. . . . This view finds support in the case law of multiple jurisdictions as well as common experience." (Citations omitted.) *State* v. *Smith*, 275 Conn. 205, 217, 881 A.2d 160 (2005). We have also applied this rule, however, to encompass other preexisting relationships between the victim and the defendant that are not marital or romantic in nature. See *State* v. *Patterson*, supra, 276 Conn. 485–86 (concluding that trial court did not abuse its discretion by admitting evidence of victim's fear of group of people that included defendant to dem-

onstrate motive); cf. E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.16.2 (b), p. 561 (cautioning that, "[u]nless there was a [preexisting] relationship . . . between the declarant and the defendant, bald statements that the declarant feared the defendant should not be admitted to prove the defendant was the cause of that fear").

With respect to the second requirement, this court also consistently has required that the state present independent evidence of the victim's fear in order for a victim's out-of-court statement of fear to be admissible. For instance, in *State* v. *Duntz*, supra, 223 Conn. 233, this court concluded that the trial court had abused its discretion in admitting statements of the victim's fear of the defendant to establish the defendant's motive when the only evidence of the victim's fear was the victim's uncorroborated statements to other people that he was in fear. In *Duntz*, the state asserted that the victim's alleged fear of the defendant was relevant because it showed that the victim and the defendant did not have a good relationship which, in turn, showed that the defendant had a motive to kill the victim. Id.

This court explained that "the jury could not have drawn such an inference *solely from the statements of the victim* without resorting to impermissible speculation. Indeed, the victim's expressed fear may have been subjective and unfounded. Particularly in view of the tremendous potential for this evidence of subjective fear to prejudice the defendant unfairly, we conclude that it was not admissible under the state of mind exception to the hearsay rule." (Emphasis added.) Id.

Subsequently, in *State* v. *Patterson*, supra, 276 Conn. 487, this court concluded that the trial court did not abuse its discretion in admitting out-of-court statements of the victim's fear of the defendant. Unlike in *Duntz*, however, in *Patterson*, there was independent evidence corroborating the victim's fear in the form of testimony

from another witness about the deteriorating relationship between the victim and the defendant. Id. On that basis, this court distinguished *Duntz* and explained that, "in light of . . . corroborative testimony, the trial court reasonably determined that [the witness'] testimony regarding the victim's state of mind shortly before his death was probative of the defendant's motive to kill the victim." Id. This court further explained that, because of the independent evidence, "the jury was not required to draw an inference of motive solely on the basis of the victim's uncorroborated statement." Id.; see also *State* v. *Wargo*, 255 Conn. 113, 139, 763 A.2d 1 (2000) ("[T]he state adduced ample evidence tending to show that the defendant had decided to kill the victim because he was extremely angry and upset that she had intended to divorce him and that, consequently, his contact with his children would be limited. We, therefore, conclude that the trial court did not abuse its discretion in determining that the testimony evidencing the victim's state of mind was relevant to establish, circumstantially, the extent to which the defendant's marriage had broken down, a state of affairs that the jury reasonably could have determined provided the defendant with a motive to kill the victim." [Footnote omitted.]).

Accordingly, in order to determine whether the trial court abused its discretion in determining that the victim's statements expressing fear of the gang, and thereby the defendant, were relevant, we must consider whether the state demonstrated that the defendant and the victim had a preexisting relationship and whether the state presented independent evidence to corroborate the victim's fear.[16] We conclude that it has.

[16] In the present case, the defendant does not challenge whether the state has demonstrated that he and the victim had a preexisting relationship. The evidence established that the defendant and the victim were closely connected through their membership in the Piru gang.

This case is controlled by our decision in *State* v. *Patterson*, supra, 276 Conn. 484–89. In *Patterson*, the defendant challenged the trial court's admission of testimony regarding certain statements made by the victim shortly before his death in which he expressed fear of a group of people that he knew. Id., 484. The defendant was a part of that group. The victim believed that this group was blaming him for shooting their mutual friend, Aki Johnson. Id., 455, 484–85. The victim's statement that was at issue was " 'they're trying to put this thing about [Johnson] on [me].' " Id., 456. The defendant argued that the victim's statement was vague and ambiguous with respect to the identity of those who, in the victim's view, blamed him for shooting Johnson. Id., 487. This court concluded that the victim's statement of fear was relevant because the state had presented independent evidence in the form of testimony of another witness corroborating the victim's fear. Id. Specifically, in *Patterson*, the state presented another witness who testified that the group, which included the defendant, had blamed the victim for shooting Johnson and that the defendant had killed the victim in retaliation for that shooting. Id.

Consequently, this court concluded that the jury was not required to draw an inference of motive solely on the basis of the victim's uncorroborated statement because the victim's fear was corroborated by other, independent evidence. Id. Accordingly, this court concluded that the trial court had not abused its discretion in finding that the state of mind evidence of the victim's fear was relevant because the jury could infer the defendant's motive, without impermissible speculation. Id. This court also concluded that, even though the victim did not specifically identify the defendant as one of the persons who harbored the belief that the victim had shot Johnson, his reference to the group of people, which included the defendant, who harbored that belief,

was a sufficient link between the victim's statement and the defendant to warrant the admissibility of the victim's statement. Id.

We find *Patterson* particularly instructive on two points. First, *Patterson* teaches that the victim's statements reflecting fear of the defendant will be considered sufficiently probative if the state presents corroborating evidence of that fear.

In the present case, the state presented independent corroborating evidence of the victim's fear and the defendant's motive to kill the victim. In particular, starting with the evidence of a deteriorated relationship, Richard testified that members of the Piru gang felt the victim had disrespected them because they believed that he was planning on switching to a different gang. Thomas also testified that he knew that there were issues between members of the Piru gang and the victim. Thomas further testified that Terror had said that he wanted the victim "taken care of" and that the defendant then volunteered to kill the victim. From this testimony, which was independent and corroborative of the victim's statements to Wylie, the jury could infer that the victim's relationship with the gang had deteriorated and, thus, the defendant had a motive to kill the victim.

Furthermore, Thomas testified about the hierarchical structure of the Piru gang and how lower gang members, like the defendant and Thomas, were expected to rise up in the ranks. Indeed, the testimony offered at trial indicates that following orders to kill was a way to rise up in the ranks. Thomas also stated that, shortly after the defendant volunteered to kill the victim, Thomas made the victim aware of the threat that had been made on his life. Accordingly, we conclude that, as in *Patterson*, the existence of independent, corroborating evidence allowed the jury in the present case to

infer motive from the victim's expression of fear without resorting to impermissible speculation.

Second, *Patterson* also instructs that the victim's statement of fear of the group, of which the defendant was a member, was admissible even though the victim did not identify the defendant specifically. In the present case, the victim's statement of fear related to a group to which the defendant belonged, although he did not identify the defendant specifically. The evidence demonstrated that the leader of the gang wanted the victim dead and that the defendant was not only a member of the gang but also had volunteered to commit the killing. We conclude, consistent with *Patterson*, that the victim's statement of fear of the Piru gang provided a sufficient link to the defendant to warrant the admissibility of the victim's statements.

The defendant asserts that the trial court abused its discretion in admitting the statements regarding the victim's fear of the Piru gang because the victim's state of mind was not relevant. He argues that the victim's state of mind was not relevant because (1) Thomas' testimony was not corroborative because the defendant asserts that Thomas' testimony was not credible and did not identify the defendant as the person the victim feared, and, relatedly, (2) the actual statement of the victim's fear itself did not address the victim's relationship with the defendant specifically but only related to the gang as a whole. In support of his claim, the defendant relies on *State* v. *Duntz*, supra, 223 Conn. 232–33. Specifically, the defendant asserts that *Duntz*, rather than *Patterson*, controls the outcome of the present case. We disagree.

In *Duntz*, this court concluded that statements by a victim regarding his fear of the defendant were inadmissible as state of mind evidence because the state presented no other evidence indicating that the victim and

the defendant had an antagonistic relationship. Id., 233. This court explained that "the jury could not have drawn such an inference [that an antagonistic relationship and, hence, a motive existed] solely from the statements of the victim without resorting to impermissible speculation." Id. The sole evidence of motive was the victim's expressions of fear.

Neither of the defendant's arguments has merit. The present case does not involve a situation in which the victim's expressions of fear constituted the only evidence of his deteriorating relationship with the gang and, therefore, motive. To the contrary, the testimony of Thomas that the leader of the gang wanted him dead and that the defendant had volunteered to kill him is independent evidence corroborating the victim's fear. That type of evidence did not exist in *Duntz*. Thus, we find *Duntz* inapplicable to the present case.

Additionally, the defendant's argument that Thomas' testimony is not corroborative because it does not specifically identify the defendant as the person the victim fears must also fail. Again, as we pointed out in *Patterson*, fear of a group that includes the defendant may serve as a sufficient link even if the victim does not identify the defendant specifically. See *State* v. *Patterson*, supra, 276 Conn. 487. Because there was sufficient, independent evidence corroborative of the defendant's fear, we conclude that *Patterson* controls the outcome of this case, not *Duntz*.

To the extent that the defendant asserts that there is no corroborating evidence in the present case because Thomas' testimony was not credible, we cannot review that claim. As we have explained previously in this opinion, "[q]uestions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the

witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Kendrick*, supra, 314 Conn. 223. It is not our role to question whether the jury believed Thomas' testimony. The fact is that, if believed, Thomas' testimony provided independent evidence corroborating the victim's fear of the gang. Our inquiry must end there.

The defendant finally argues that the trial court abused its discretion in admitting the state of mind evidence because the evidence was unduly prejudicial. We disagree. As this court recognized in *State* v. *Duntz*, supra, 223 Conn. 233, state of mind evidence has the potential to unfairly prejudice a defendant. Nevertheless, this court consistently has concluded that a trial court does not abuse its discretion when it admits state of mind evidence of the victim's fear as long as the state has demonstrated a preexisting relationship between the defendant and the victim and has produced independent, corroborating evidence of the victim's fear. As we have explained in this opinion, in the present case, the state both demonstrated a preexisting relationship between the victim and the defendant and produced independent evidence to corroborate the victim's fear.

Accordingly, we conclude that the trial court did not abuse its discretion in determining that the victim's state of mind was relevant as evidence of the deteriorating nature of his relationship with the Piru gang from which the jury could reasonably infer the defendant's motive to kill him.

The judgment is affirmed.

In this opinion ROBINSON, C. J., and McDONALD and KAHN, Js., concurred.

D'AURIA, J., with whom PALMER and ECKER, Js., join, dissenting. Lawyers learn early in law school what

we all know instinctively to be true: conclusions built on hearsay can be inherently unreliable and unfair. When a witness testifies to what another has said—unsworn and out of court—there is a heightened potential that the evidence is inaccurate, fabricated or lacking context. In criminal cases particularly, when the out-of-court declarant is unavailable for cross-examination, admitting certain hearsay testimony against a defendant can render the trial constitutionally infirm. See *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (sixth amendment confrontation clause bars admission of testimonial hearsay against criminal defendant unless defendant had prior opportunity for cross-examination and witness is unavailable); see also *Michigan* v. *Bryant*, 562 U.S. 344, 370 n.13, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011) (due process clauses of fifth and fourteenth amendments may bar admission of "unreliable evidence").

As a general matter, then, in pursuit of their truth-seeking function, courts do not permit hearsay. See Conn. Code Evid. § 8-2. Under certain circumstances, however, and also in pursuit of the truth-seeking function, our evidence code makes exceptions to this general rule and permits courts to admit hearsay. These exceptions are most often justified when the statements at issue were made "under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination." *Chambers* v. *Mississippi*, 410 U.S. 284, 299, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).[1]

[1] In some instances, courts have made exceptions because the hearsay declarant was a party and, under our adversary system, "it was thought that a party could not complain of the deprivation of the right to cross-examine himself (or another authorized to speak for him) or to advocate his own, or his agent's, untrustworthiness." *Bourjaily* v. *United States*, 483 U.S. 171, 190, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (Blackmun, J., dissenting). Although such exceptions generally do not require an independent showing of reliability; e.g., Fed. R. Evid. 801, advisory committee notes, 28 U.S.C. app., p. 1063 ("[n]o guarantee of trustworthiness is required in the case of an admission"); they nonetheless are justified, at least in part, by their

In the present case, both the victim, Thomas L. Mozell, Jr., and the defendant, Vincente Ayala, were members of a street gang known as Piru, which had a presence in the New Haven area. No physical evidence or firsthand eyewitness evidence linked the defendant to the victim's murder in 2012. It is therefore no understatement to say that *all* of the pertinent testimony identifying the defendant as the murderer was either hearsay or hearsay statements ostensibly offered to prove something other than the truth of the matter asserted. Moreover, each of the hearsay statements was testified to by two other gang members, Timothy Thomas and Jordan Richard, whom the trial court determined were "significantly compromised individuals" who provided "extremely limited and self-serving" testimony. None of this testimony was corroborated by anything other than more hearsay. In the trial court's words, there was a "complete lack of any evidence supporting" their claims. In my view, these are hardly "circumstances that tend to assure reliability . . . ." *Chambers* v. *Mississippi*, supra, 410 U.S. 299.

At issue in this appeal is a particular hearsay statement delivered to the court through Richard, in which one of the gang's leaders, known as "Terror," claimed to have seen the defendant shoot the victim. The trial court admitted the statement under the coconspirator exception to the rule against hearsay. See Conn. Code Evid. § 8-3 (1) (E). The majority assumes that this was error but concludes that it was not harmful.

Given the scant evidence in this case, including the state's heavy reliance on uncorroborated hearsay that came into evidence through witnesses the trial court found to be unreliable, I am left without "a fair assurance" that the admission of the coconspirator evidence "did not substantially affect the verdict." *State* v. *Favoc-*

supposed trustworthiness. See 4 C. Mueller & L. Kirkpatrick, Federal Evidence (4th Ed. 2019) § 8:44 ("important is the fact that the party himself is present and can explain, deny, or rebut any such statement").

cia, 306 Conn. 770, 808, 51 A.3d 1002 (2012). I must therefore confront the question of whether the trial court erroneously admitted Terror's statement, as the majority assumes. I conclude it did because there is a lack of evidence that the statement was made "in furtherance" of an ongoing conspiracy, as required by the coconspirator exception. I would therefore reverse the trial court's judgment. Accordingly, I respectfully dissent.[2]

[2] I ask the reader to forgive my reversal of the usual order in opinion writing. Because the majority affirms the judgment of conviction on the coconspirator issue by assuming error and finding harmlessness, I meet the majority on its terms by addressing harm first. Because I conclude that the trial court erroneously admitted the coconspirator evidence and that this error was harmful, I do not reach the question of whether the trial court abused its discretion in admitting, under the state of mind exception to the hearsay rule, the victim's statement to his friend, Tavaris Wylie, that he feared Piru. See part I A of this dissenting opinion. I note, however, that this court and other courts have traditionally viewed such statements skeptically. See, e.g., *State* v. *Smith*, 275 Conn. 205, 218, 881 A.2d 160 (2005). In my view, the facts of this case provide even more reason to doubt the worth of the victim's hearsay. Therefore, in considering the strength of the state's case, I consider the victim's statement to be of limited value as proof of the defendant's motive to murder him.

The theory of admissibility in this context reasons that a victim's statement of fear of a defendant is evidence that their relationship is collapsing. If the jury infers that their relationship is indeed collapsing, it may further infer that the defendant is so affected by the collapse that he has a plausible motive to commit murder. See, e.g., *State* v. *Thomas*, 205 Conn. 279, 285, 533 A.2d 553 (1987) ("the purpose of the evidence was to show that the relationship had broken down, and that . . . the victim's estrangement from the defendant supplied the motive for him to commit murder"). A jury is likely to misunderstand or go beyond this permissible inference. See E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 8.16.2, p. 560 ("[t]he failure to connect a declarant's subjective state of mind to the issues in the case is not an uncommon error in logical analysis"); see also 2 K. Broun, McCormick on Evidence (7th Ed. 2013) § 276, pp. 401–402 ("the most likely inference that jurors may draw from the existence of fear, and often the only logical inference that could be drawn, is that some conduct of the defendant, probably mistreatment or threats, occurred and caused the fear"). We have also recognized "the heightened potential for prejudice in cases such as this," in which we "[allow] surrogates to speak for the victim pointing back from the grave." (Internal quotation marks omitted.) *State* v. *Smith*, supra, 275 Conn. 218.

In this case, any inference connecting the victim's statement of fear to the defendant is particularly tenuous. We know almost nothing about the nature of the relationship between the victim and the defendant other than

I

Clearly, someone in the Piru gang wanted the victim dead. He was believed to be thinking of leaving the Piru gang to join another gang and would perhaps retaliate against Piru. The main question at trial was which Piru member carried out the victim's murder. I have no disagreement with the majority's recitation of facts that the jury could have reasonably found to be true. I simply summarize them here to explain why I cannot agree with the majority that the state's case was "sufficiently strong" so as to leave me with a fair assurance that admission of the challenged statements did not substantially affect the verdict. In light of this conclusion, I further explain why I do not find the defendant's claim of error harmless, if indeed it was error.

A

The victim apparently knew he was not in good standing with Piru. We know this from a statement he supposedly made to his friend, Tavaris Wylie, on the night of the murder. Wylie testified that the victim told him he had a "funny vibe about everybody" in the gang; he "felt like they was rocking him to sleep"; acting like "a sheep in [wolf's] clothing"; and that he had to "[w]atch [his] back" because "[t]hey was playing [him]" and "[c]oming for [him]." Although the victim expressed that he had this "vibe" about everybody in the gang, never mentioning the defendant individually, the defendant was the only one on trial. As many as forty members of Piru were in the New Haven area at that time, however. The trial court nonetheless determined that

that they were members of the same gang. Moreover, because the victim had no apparent reason to fear the defendant specifically, the victim's statement—that he feared "everybody" in the gang—was equally applicable to all forty members of Piru in New Haven at that time. Thus, although I do not reach the question of whether the trial court abused its discretion in admitting the statement, in assessing the strength of the state's case, I believe it does little to prove that the defendant had a motive to murder the victim.

Wylie's testimony was relevant to establish the defendant's motive to kill the victim and admitted it into evidence under either the state of mind exception to the hearsay rule or as nonhearsay. See Conn. Code Evid. §§ 8-3 (4) and 8-1 (1). The defendant has challenged this ruling on appeal. See part II of the majority opinion.

The victim's fear of the gang appears to have been well founded. We know this because Terror apparently had ordered him murdered. Terror did not testify, and we know virtually nothing about him other than that he was a leader of an out-of-state faction of the Piru gang. And yet, despite this detachment, what Terror supposedly said both before and after the murder—namely, his order that the victim be murdered and his statement recounting how the murder happened—played a prominent part in the case against the defendant. In particular, Terror's purported description of how the murder occurred was the only eyewitness evidence of the killing. No testifying witness saw the murder, nor could a testifying witness say the defendant committed it, without relying on the alleged admissions from the defendant himself. Terror's description of the killing is unquestionably at issue in this appeal.

Thomas testified that Terror had initially ordered him to kill the victim. This hearsay statement was admitted under either the coconspirator exception to the hearsay rule or as nonhearsay, and its admissibility is not challenged on appeal. See Conn. Code Evid. §§ 8-3 (1) (E) and 8-1 (1). Thomas refused the order because the victim was a close friend. According to Thomas, the defendant then volunteered to carry out the murder. This hearsay statement is an admission by the defendant, and its admissibility is not challenged on appeal. See Conn. Code Evid. § 8-3 (1) (A). Later that evening, Thomas claimed, he warned the victim that the gang posed a threat to his life, although he did not mention the defendant specifically.

The police found the victim dead in his vehicle the next morning, a bullet to the back of his head. There seems little doubt that someone in the gang committed the murder, but because none of the testifying witnesses claimed to have seen the shooting, it is less clear which gang member pulled the trigger.

Richard gave the most contemporaneous firsthand testimony, although he claimed to have no personal knowledge as to who shot the victim. He testified that on the evening of the murder, the victim sat in the driver's seat of his vehicle smoking marijuana with Terror, Richard and one other gang member, Montese Gilliams. Richard claimed that the defendant then showed up and entered the vehicle. At that point, Richard said, the other occupants all told him to leave, which he did.

No one who remained in the vehicle testified at trial. Rather, the evidence that it was the defendant who killed the victim came in the form of three other hearsay statements. The first two statements allegedly came from the defendant. Years after the murder, when Thomas and Richard faced unrelated criminal charges, each pointed the finger at the defendant. Both testified that the defendant had admitted to them that he had shot the victim. Richard said that the defendant had confessed on the night of the murder that he had shot the victim. Thomas said that the defendant had told him the next day that he felt badly about killing the victim but that Terror had ordered him to do so. These hearsay statements are also party admissions and are not challenged on appeal. See Conn. Code Evid. § 8-3 (1) (A).

The third statement is the subject of this appeal. It allegedly came from Terror, a leader of the New York faction of the gang. Richard testified that he and Terror went to the home of Terror's mother in the Bronx, New York, the day after the murder and remained there for about one week. At some point while they were in New

York, Richard claimed, Terror described to him how the defendant had murdered the victim: "[Terror] told me that all four of them were in the car smoking. . . . And in the midst of, you know, the joint being passed around, he somehow handed [the defendant] the weapon, and the entire time while [the defendant] is, you know, playing with the—you know, fixing the gun, cocking it back or whatever, Terror is blocking [the defendant] so [the victim] can't see him in the rearview mirror, and Terror sat—[a]fter that, Terror sat back, he looked at [the defendant], and he fired." The trial court admitted Terror's hearsay statement, over the defendant's objection, under the coconspirator exception to the hearsay rule. See Conn. Code Evid. § 8-3 (1) (E).

The state's case against the defendant can therefore, I believe, be fairly summarized as follows: The victim said that he feared the entire gang. Members of that gang, who were themselves involved in the victim's murder, then blamed the defendant for the murder via hearsay statements. One gang member (Thomas) testified that the defendant agreed to kill the victim. Two gang members (Thomas and Richard) claimed the defendant admitted that he killed the victim. And a leader of the gang (Terror) told the second gang member (Richard) how the defendant had killed the victim. This evidence was perhaps sufficient to convict the defendant.[3] But in a case in which every member of the Piru gang—including everyone who was in the vehicle with the victim that night—had the same motive (to carry out the gang leader's order), in my view, the evidence was hardly overwhelming.

I am not the only one who thinks so. The defendant was acquitted of the charges of carrying a pistol without a permit and criminal possession of a firearm, which

[3] On appeal, the defendant does not challenge the sufficiency of the evidence to convict him.

he elected to have tried to the court. Although these charges differ from those the jury considered, the court's finding turned on precisely the same factual issue. As the court stated: "The only real issue in the dispute before me is whether the defendant shot [the victim] on March 16, 2012, and therefore was carrying and possessing a pistol when he did so." The court explained that the "evidence against the defendant rested primarily on the testimony of two witnesses," Thomas and Richard, "significantly compromised individuals" who gave testimony that was "extremely limited and self-serving." The court further stated: "The testimony of the two gang members [Thomas and Richard] who had pointed the finger at the defendant—that testimony was simply unconvincing to me." In light of the "complete lack of any evidence supporting" their claims, the court concluded: "After considering all the evidence, and most importantly in this case the lack of evidence, I am left with an honest and reasonable uncertainty in my mind that the defendant sat in the backseat of the victim's motor vehicle, held a pistol in his hand, and shot [the victim]."

In ruling on the defendant's postverdict motion for a judgment of acquittal on the jury's guilty verdict on the charges of murder and conspiracy to commit murder, the trial court appropriately observed that it could not substitute its assessment of the witnesses' credibility for that of the jury and therefore denied the motion, notwithstanding that the jury verdict was inconsistent with its own finding on the weapons charges. But the trial court sat through the trial and observed the witnesses, and, therefore, in my view, its assessment of the evidence should not be discounted in assessing the strength of the state's case without Terror's statement. E.g., *State* v. *Kendrick*, 314 Conn. 212, 223, 100 A.3d 821 (2014) (deference to fact finder appropriate when "assessment of the credibility of the witnesses . . . is

made on the basis of its firsthand observation of their conduct, demeanor and attitude" [internal quotation marks omitted]).

The majority apparently believes that in evaluating the strength of the state's case for harmless error purposes we must ignore this inconsistent verdict. I acknowledge that in evaluating the strength of the case, we must begin with the assumption that the jury found the state's witnesses credible, which the trial court did not. I further acknowledge the unique challenge of evaluating the "strength" of the state's case when the jury has found the defendant guilty beyond a reasonable doubt. Viewed in this light, *all* cases on appeal are strong cases. The question we confront—as required by our case law—is whether the case was strong enough to survive the removal of the contested evidence, which the majority assumes—and I conclude—to have been erroneously admitted. See *State* v. *Favoccia*, supra, 306 Conn. 809 (" 'overall strength of the prosecution's case' " among several factors considered in evaluating harmfulness). On the basis of my own review of the tenuous record of hearsay evidence in this case, including the fact that no forensic evidence implicated the defendant, that there was no firsthand testimony of any eyewitness who saw the shooting, and no other circumstantial evidence of any kind, I have no trouble concluding that this was not a strong case, notwithstanding that the jury returned a verdict against the defendant. And its strength would have diminished with the removal of the Terror statement, which, in addition to being the only evidence of a purported eyewitness who claimed the defendant committed the murder, served to corroborate the other hearsay that remained in this case. The majority will admit only that the case against the defendant was not "ironclad . . . ." Although the different conclusions reached by different fact finders is not dispositive to me in light of my own independent evalua-

tion, I can think of no better, objective example of a "close case"—and therefore, in my view, not a strong one—than a case in which two fact finders come to different conclusions, particularly where one of them found the state's main witnesses "simply unconvincing . . . ." I cannot agree with the majority that the state's case can objectively be described as strong, even when considering *all* of the evidence, let alone if Terror's statement to Richard is excluded.

B

The majority assumes error in the admission of Terror's out-of-court statement to Richard under the coconspirator exception to the hearsay rule; see Conn. Code Evid. § 8-3 (1) (E); but proceeds to find that the defendant has not carried his burden of proving that this error harmed him. In large part because I disagree with the majority that the state's case was sufficiently strong, I disagree with the majority's conclusion on harm.

An evidentiary error is harmless only "when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Favoccia*, supra, 306 Conn. 809. In searching for this fair assurance, we consider several factors, including "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.) Id.

"Perhaps the single most significant factor in weighing whether an error was harmful . . . is the strength of the case against the defendant. . . . [A] court should be especially loath to regard any error as harmless in a close case, since even the smallest error may have

been enough to tilt the balance in favor of a conviction." 3B C. Wright et al., Federal Practice and Procedure (4th Ed. 2019) § 854. For reasons previously detailed, I believe that, at best, this was a "close case." Four points persuade me that if Terror's out-of-court statement to Richard was erroneously admitted, the defendant has shown that its inclusion was harmful: the absence of physical or eyewitness evidence corroborating the testimony of both key witnesses; the state's admitted reliance on unreliable witnesses; the fact that Terror's statement was not entirely cumulative of other evidence; and the fact that the declarant was not subject to cross-examination.

First, no physical evidence connected the defen dant to the crime scene. Neither the defendant's fingerprints nor his DNA were found on or near the vehicle. Although "the absence of conclusive physical evidence . . . does not automatically render [the state's] case weak, that same absence surely does not strengthen the state's case against the defendant." *State* v. *Ceballos*, 266 Conn. 364, 416, 832 A.2d 14 (2003).

Physical evidence did, however, tie Richard to the crime scene. The police found Richard's fingerprint on the vehicle's rear right interior door handle—the handle next to the seat the shooter occupied. In fact, this evidence helped establish a sufficient connection to Richard as the culprit that the trial court permitted the defendant to make a third-party culpability argument and instructed the jury on that theory. To warrant a third-party culpability instruction, the evidence must "*directly* [connect] the third party to the crime." (Emphasis in original; internal quotation marks omitted.) *State* v. *Francis*, 267 Conn. 162, 174, 836 A.2d 1191 (2003). This is a "high standard." Id., 175; see also *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 564, 198 A.3d 52 (2019) ("proffered evidence [of third-party culpability] [must] establish a direct connection to

a third party, rather than raise merely a bare suspicion" [internal quotation marks omitted]).

According to the trial court, "a wealth" of evidence pointed to Richard. Apart from his fingerprint being found next to the shooter's seat, Richard's presence in the vehicle on the night of the murder and his membership in Piru meant he had the same opportunity and motive to kill the victim as the defendant did. Richard also tampered with evidence when he removed a cell phone from the victim's vehicle and destroyed it,[4] fled to New York after the murder, where he remained for one week, and lied to the police for several years about his involvement in the incident.

In evaluating the strength of the state's case, I simply do not find it impressive that Richard was able to deliver testimony consistent with Terror's hearsay and the testimony of the prosecution's forensics expert, James R. Gill, the state's chief medical examiner. Specifically, the majority finds it remarkable that Richard was able to place the defendant in the very seat in the car where, according to the expert's testimony, the killer must have sat when he fired the fatal gunshot. But if Richard were the killer—and a wealth of evidence suggested he was—

[4] Even Richard's explanation about retrieving the cell phone raised questions. Specifically, he testified that about thirty minutes after he heard a gunshot, he met up with the defendant at the home of Davon Youmans, another Piru member. According to Richard, the defendant claimed to have left his cell phone in the victim's car and asked Richard to get it for him. Richard went to the car, saw the victim, and removed a cell phone from the center console. On his way back to the house, he realized that he mistakenly had taken the victim's phone from the car and therefore destroyed it. When Richard arrived back at the house, the defendant was gone. The idea that Richard would not only risk going to the crime scene, but also would get into the vehicle, seems highly counterintuitive because he could not know when the police might arrive. Nor did Richard explain how he later realized he had taken the wrong phone, why the defendant had left the house without his phone without waiting for Richard to return, or, most notably, why the police never found the defendant's phone in the victim's car. The questionable nature of this testimony not only diminished Richard's credibility, but it also supported the defendant's third-party culpability defense by insinuating that Richard had fabricated this testimony in order to inculpate the defendant and exculpate himself.

of course he would know where the killer was sitting! He was in that very seat, by his own admission. His testimony would have been more remarkable if anyone besides Richard testified at trial that he left the car that night so the defendant could get in. Instead, he explains that his fingerprint was in the car (the defendant's wasn't) because he was in the car before and after the shooting. And the only corroboration for his story comes from hearsay—testified to by himself. In all, forensic evidence placed the killer in a particular seat. An admission and fingerprints placed Richard in that same seat. Unlike the majority, I make very little of the fact that Richard (a seriously compromised witness) claimed (without corroboration) that the defendant also occupied that seat.

In addition to the absence of physical evidence implicating the defendant, no firsthand eyewitness testimony implicated him, either. The only statement of an eyewitness to the murder was Terror's unsworn, out-of-court statement, delivered through Richard. Even if I assume that this statement was admitted in error, as the majority does for purposes of assessing harm, the state would be left with no physical evidence *or* eyewitness testimony connecting the defendant to the crime. Only one eyewitness, Richard, even placed the defendant in the vehicle with the victim near the time of the killing. This compels the state to concede that its case rested on the testimony of Thomas and Richard.[5] But as the trial court aptly observed, both suffered from serious credibility problems.

This leads to my second point: although Thomas' and Richard's testimony, if believed, was perhaps sufficient

[5] In closing argument to the jury, the prosecutor conceded that the state's case depended on the testimony of Thomas and Richard: "[T]his case is not about the physical evidence. . . . There are two crucial witnesses in this case, and there's no doubt about that. That is, Mr. Thomas and Mr. Richard. . . . [I]n this case, it's whether or not you find those two individuals to be believable and credible." On appeal, the state relies exclusively on their testimony as evidence of the defendant's guilt.

to uphold the verdict, the harmlessness inquiry is more searching than a sufficiency of the evidence inquiry. E.g., *Kotteakos* v. *United States*, 328 U.S. 750, 765, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946) ("[t]he [harmlessness] inquiry cannot be merely whether there was enough to support the result"); *United States* v. *Ince*, 21 F.3d 576, 583 (4th Cir. 1994) ("more [stringent]" harmless error inquiry "does not ask simply whether we believe that irrespective of the error there was sufficient untainted evidence to convict," but "whether we believe it highly probable that the error did not affect the judgment" [internal quotation marks omitted]).

In deference to the jury, the majority declines to "second-guess" the credibility of Thomas and Richard. Although for some issues raised on appeal, we must defer to the jury's credibility determinations, our cases make clear that we may consider witness credibility in a harmless error analysis.[6] E.g., *State* v. *Ritrovato*, 280 Conn. 36, 57, 905 A.2d 1079 (2006) (error not harmless when state's case lacked independent physical evidence or witnesses and "[victim's] credibility was crucial to successful prosecution of the case"); *State* v. *Cortes*, 276 Conn. 241, 256, 885 A.2d 153 (2005) (error not harmless "in a case that essentially turned on the jury's crediting [the complainant's] version of the events"). Indeed, we have acknowledged that cases that present the jury with a "credibility contest characterized by equivocal evidence . . . [are] far more prone to harm-

[6] We have also noted that deference to the fact finder is most appropriate when an "assessment of the credibility of the witnesses . . . is made on the basis of its *firsthand observation of their conduct, demeanor and attitude*." (Emphasis added; internal quotation marks omitted.) *State* v. *Kendrick*, supra, 314 Conn. 223. Here, however, the evidence undermining the witnesses' credibility—namely, various forms of self-interest, including the desire to lessen or eliminate their criminal liability—is apparent not from subjective firsthand observation, but objectively from the transcript and exhibits offered by the parties. We also have the determination of another fact finder—the trial judge—who observed the witnesses' testimony and determined that Thomas and Richard were not credible.

ful error." (Internal quotation marks omitted.) *State* v. *Favoccia*, supra, 306 Conn. 816–17.

Similarly, in other contexts, we have recognized the weakness of a case that is based largely on a defendant's own incriminating statements, when the veracity of the statements was questionable and the state presented little physical or eyewitness evidence to support the defendant's conviction. See, e.g., *State* v. *A. M.*, 324 Conn. 190, 213–14, 152 A.3d 49 (2016) (discussing weakness of state's case in adjudicating claimed violation of defendant's fifth amendment right to remain silent when state presented "no physical evidence," and key witness gave "inconsistent statements" and "refused to answer certain questions during her direct testimony"); *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 323, 112 A.3d 1 (2015) (discussing weakness of state's case in [context of claim pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)] when state presented minimal physical evidence and no eyewitnesses, and its case "rested almost entirely on [the petitioner's own] incriminating statements" that were made in unreliable circumstances); *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 691, 51 A.3d 948 (2012) (discussing weakness of state's case in context of claim pursuant to [*Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] when primary evidence implicating petitioner was testimony of two witnesses who relayed purposed admissions by petitioner, and witnesses were "subject to substantial impeachment evidence that they had implicated the petitioner only to serve their own needs—either by directing suspicion away from their own involvement in the murders or by procuring more favorable outcomes in their other, unrelated criminal matters").

Because of the broad language of our harmful error test, requiring that we examine the "overall strength

of the prosecution's case," and because of the wide variety of cases in which courts have considered ways in which a key witness' credibility has been undermined, I respectfully disagree with the majority to the extent it suggests we may consider witness credibility only when the claimed error relates to the admission or exclusion of impeachment evidence. Here, rather than impeachment, the claimed error relates to corroborative evidence. But both types of evidence bear on whether a jury would be likely to find the state's witnesses believable. That, I believe, is the larger point to consider when assessing the overall strength of the state's case and the ultimate question of whether we, as an appellate court, have "a fair assurance that the error" in admitting unreliable, corroborative evidence "did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Favoccia*, supra, 306 Conn. 809; accord *Holmes* v. *South Carolina*, 547 U.S. 319, 330, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) ("where the credibility of the prosecution's witnesses or the reliability of its evidence is not conceded, the strength of the prosecution's case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact"). Thus, although the jury still *could have* found the defendant guilty without Terror's hearsay statement by believing Thomas' and Richard's other testimony, that is not the question. Removing Terror's statement from the evidentiary calculus removes critical corroboration from Thomas' and Richard's testimony, thus making them even less believable than they already were. This leaves me, at least, without a fair assurance that the trial court's error in admitting Terror's hearsay statement did not substantially affect the verdict. See *State* v. *Favoccia*, supra, 809. On the basis of the self-serving nature of Thomas' and Richard's testimony and the discrepancies in material aspects of their stories, I am persuaded that their credibility was subject to significant challenge. The trial

court's specific conclusion that they were not credible fortifies me in my view.

Both witnesses' testimony was clearly self-serving. The jury heard that Thomas only came forward about the victim's murder two years later, just after he had been arrested in connection with other crimes and in exchange for a potential sentence reduction as part of a plea agreement with federal authorities. Similarly, Richard admitted he was an accomplice in the victim's murder and was seeking consideration from the state in return for his testimony. He apparently was never charged. Moreover, as previously described, Richard exhibited enough suspicious behavior to warrant a third-party culpability charge. He also conceded that he had lied about the incident several times, offering three versions of his story over the years.[7]

There were also material discrepancies in the testimony of Thomas and Richard regarding encounters that preceded the victim's murder. One encounter involved Terror's apparent desire to have the victim killed. In short, Thomas and Richard agreed that a meeting occurred in the bedroom of the home of Davon Youmans, another Piru member, at which the victim was discussed, but Thomas and Richard disagreed on the meeting's timing (morning versus evening), attendees (whether Thomas and the defendant were there), and results (whether Terror asked and whether the defendant volunteered to kill the victim).[8] In my view, these discrepancies cast doubt on material facts: whether

[7] Because Richard did not reside in Connecticut, he was flown here for trial by the state, which also provided him room and board.

[8] The majority concludes that these inconsistencies are not "irreconcilable" by speculating that there were perhaps two meetings. Or that Thomas was mistaken about Richard's presence. Anything is possible. But in considering the strength of the state's case, I cannot simply overlook multiple discrepancies on significant details in the testimony of two crucial witnesses because an innocent explanation is "entirely possible . . . ." This conjecture does not leave me, as it does the majority, with any more of a fair assurance that the erroneous admission of the Terror statement did not substantially affect the verdict.

and when the conspiracy to kill the victim formed, and whether and when the defendant formed the intent to kill him.

The other encounter involved the witnesses' final interaction with the victim. Both Thomas and Richard agreed that the victim showed up at Youmans' house in the early evening prior to the murder, but their stories diverged from there. Thomas testified that the victim walked to Youmans' front porch only and did not enter the house. Thomas said that he and Richard then went onto the front porch to warn the victim that his life was in danger. At that point, the victim became upset and later got into his vehicle and left. Thomas then left with Gilliams and went home for the night. Once again, however, Richard's version of this encounter substantially differed. Richard testified that the victim walked into Youmans' kitchen, purchased marijuana from someone in the house, and left with Richard, Terror, and Gilliams to smoke it in the victim's vehicle, where he ultimately was killed. Richard testified that the victim had not been to the house earlier in the day. Notably, Richard did not mention a conversation in which he and Thomas warned the victim of the threat on his life. In sum, either Thomas misremembered or fabricated Richard's presence at his last face-to-face interaction with his close friend or Richard hid his involvement in this meeting from the court. Either explanation bears on the witnesses' credibility.

Third, I consider the role Terror's hearsay statement (purporting to describe the murder from inside the vehicle as it occurred) played in relation to Thomas' and Richard's testimony (purporting to describe events from well before and after the murder occurred). Unlike the majority, I am not given a "fair assurance" that the erroneous admission of Terror's statement was harmless simply because it contained some of the information already testified to or because it came in through Richard. Certainly, Terror's statement was cumulative

of Thomas' and Richard's statements in a general sense —all three identified the defendant as the shooter. But to the extent their statements were cumulative, they were also corroborative. Because Thomas' and Richard's credibility was central to the case—and, as previously described, in doubt—I cannot say that having a third voice identify the defendant as the shooter did not make Thomas' and Richard's firsthand accounts more believable to the jury, even if they were not believable to the trial judge. Terror's statement was also distinct from Thomas' and Richard's, though. It brought the jury far closer to the murder in time and space. It provided the only account that allowed the jury to visualize the defendant receiving the gun, preparing it to fire and pulling the trigger. And the prosecutor alluded to it in closing argument to the jury: "Richard indicated to you he got kicked out [of the vehicle] because there was not enough room or not enough pot. The reality is, is Terror and the defendant do not want him there. They need to be able to be in the backseat and be able to maneuver . . . ."

Fourth, I note the absence of cross-examination. Although the defendant cross-examined Richard, the conduit, he could not question Terror, the declarant. Although no more was legally required, I cannot conclude that the defendant's inability to ask Terror himself about the out-of-court statement was irrelevant when considering its effect on the jury. The defendant was unable to probe Terror's veracity when the statement in question exonerated Terror at the expense of the defendant. Especially in a situation like this, I am mindful of Justice Marshall's admonition that "[t]he conspirator's interest is likely to lie in misleading the listener . . . . It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law." (Internal quotation marks omitted.) *United States* v. *Inadi*, 475 U.S. 387, 404–405, 106 S. Ct. 1121, 89 L. Ed. 2d 390 (1986) (Marshall, J., dissenting).

Ultimately, I disagree with the majority's assertions that Terror's firsthand account of the murder "added very little" and "simply was not pivotal" to the state's case. To summarize, Terror's statement was the sole eyewitness account of the murder in a case bereft of physical evidence pointing to the defendant. It served to counter "a wealth" of evidence pointing at Richard. It corroborated Thomas' and Richard's self-serving testimony, which, according to the trial court, otherwise went uncorroborated. It added details to the state's case, which the prosecutor referenced in closing argument, that Thomas' and Richard's secondhand accounts did not provide. Finally, because Terror's statement was hearsay, it largely went untested by cross-examination. Given my view that this was a close case, even when considering *all* of the evidence, I cannot agree that the erroneous admission of Terror's supposed statement to Richard was harmless. To the contrary, I would hold that the defendant carried his burden of demonstrating that the admission of this statement was harmful. In light of this conclusion, I must address the merits of the defendant's evidentiary claim.

II

The defendant challenges the admission of a certain hearsay statement allegedly made by Terror to Richard one week after the victim's murder. That statement, which purported to describe how the defendant carried out the murder, is recounted in part I A of this dissenting opinion. The trial court admitted the statement under the coconspirator exception to the hearsay rule. See Conn. Code Evid. § 8-3 (1) (E).[9] I conclude that this was an abuse of discretion because there was not a reasonable basis to determine whether the statement

[9] Section 8-3 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule . . . (1) . . . A statement that is being offered against a party and is . . . (E) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy . . . ."

was made "in furtherance" of a conspiracy, as required by our rules of evidence.

A

A hearsay statement of a party opponent is admissible on the basis of the very nature of the adversary system itself. "[O]ne cannot claim that his own statement should be excluded because it was not made under oath or subject to cross-examination or in view of the trier of fact. . . . [T]he party himself is present and can explain, deny, or rebut any such statement." 4 C. Mueller & L. Kirkpatrick, Federal Evidence (4th Ed. 2019) § 8:44; see also Fed. R. Evid. 801, advisory committee notes, 28 U.S.C. app., p. 1063 ("[a]dmissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system").

Evidence codes extend this theory in several ways. Most relevant here, they rely on agency concepts to justify admitting hearsay on the basis of the declarant's relationship to a party in the case at issue. See, e.g., Conn. Code Evid. § 8-3 (1) (C) (admissions of individual authorized, under substantive agency law, to speak on party's behalf); Conn. Code Evid. § 8-3 (1) (D) (admissions of party's agent or employee).

The coconspirator exception is one type of agency based extension. See J. Levie, "Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule," 52 Mich. L. Rev. 1159, 1163 (1954) ("[t]he usual reason given for the co-conspirators' exception is the classical agency rationale that conspirators are co-agents and, as such, liable for each other's declarations"). Its roots in agency theory are tenuous, though, making it "[t]he most controversial extension," according to some prominent commentators.[10] 30B C.

[10] Although agency is the most common justification offered for the coconspirator exception, other common justifications include reliability (i.e., a coconspirator's statement made to further a conspiracy is a verbal act in the best interests of the conspiracy and, therefore, likely true) and necessity.

Wright et al., Federal Practice and Procedure (2019 Ed.) § 6777. As another commentator has stated, "the exception is fraught with problems. In terms of theory, it is an embarrassment." C. Mueller, "The Federal Coconspirator Exception: Action, Assertion, and Hearsay," 12 Hofstra L. Rev. 323, 324 (1984). Even the drafters of rule 801 of the Federal Rules of Evidence conceded that agency theory only offers limited justification for a coconspirator statement: "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." Fed. R. Evid. 801, advisory committee notes, 28 U.S.C. app., p. 1064.

The "in furtherance" requirement plays an important role in justifying the coconspirator exception to the hearsay rule. It is meant to ensure that the hearsay statement at issue is sufficiently tied to a party in the case so that the agency theory plausibly holds: "To fall within the [coconspirator exception], the co-conspirator's statement had to be made 'in furtherance of' the conspiracy, a requirement that arose from the agency rationale that an agent's acts or words could be attributed to his principal only so long as the agent was acting within the scope of his employment." *Bourjaily* v. *United States*, 483 U.S. 171, 188–89, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987) (Blackmun, J., dissenting); 30B C. Wright et al., supra, § 6780 ("[o]nly when the conspirator is trying to further the conspiracy can the [agency] fiction be maintained"). Indeed, although the drafters of the Model Code of Evidence in 1942 eliminated the "in furtherance" requirement, the drafters of the Federal Rules of Evidence retained it "because they adjudged it a useful device for protecting defendants from the very real dangers of unfairness posed by conspiracy prosecutions." (Internal quotation marks omitted.)

See C. Mueller, "The Federal Coconspirator Exception: Action, Assertion, and Hearsay," 12 Hofstra L. Rev. 323, 335 (1984) ("[s]ince conspiracies are dangerous to society and hard to prove at trial, a relaxation of the hearsay doctrine is required").

United States v. *Perez*, 989 F.2d 1574, 1577–78 (10th Cir. 1993). This decision "should be viewed as mandating a construction of the 'in furtherance' requirement protective of defendants, particularly since the Advisory Committee was concerned lest relaxation of this standard lead to the admission of less reliable evidence." (Internal quotation marks omitted.) *United States* v. *Lang*, 589 F.2d 92, 100 (2d Cir. 1978). "[S]ome courts construe this aspect of the rule so broadly that anything related to the conspiracy is found to be in furtherance of its objectives. This, of course, is precisely the result the Advisory Committee sought to avoid by retaining the 'in furtherance' requirement." *Garlington* v. *O'Leary*, 879 F.2d 277, 283 (7th Cir. 1989); see also 30B C. Wright et al., supra, § 6777 ("the rule, and particularly its 'in furtherance' requirement, can best be viewed as an effort to limit the admission of co-conspirator statements, rather than an invitation to let such statements flow unchecked through the courthouse doors"). Thus, the "in furtherance" element of the exception "is a limitation on the admissibility of coconspirators' statements that is meant to be taken seriously." (Emphasis omitted.) *Garlington* v. *O'Leary*, supra, 283.[11]

To determine whether a statement is in furtherance of a conspiracy, courts ask "whether some reasonable

[11] "Case law suggesting that courts interpret the phrase in furtherance of the conspiracy broadly, should not be viewed as adding anything to the rule, but instead as respecting its broad verbiage. Indeed, the Advisory Committee's comments on the rule suggest the opposite intent. Courts, consequently, often interpret the rule's requirements, and particularly the in furtherance requirement, strictly." (Footnotes omitted; internal quotation marks omitted.) 30B C. Wright et al., supra, § 6780.

Even so, many argue that the "in furtherance" requirement "seems an imperfect measure" of reliability. C. Mueller, supra, 12 Hofstra L. Rev. 335. Justice Thurgood Marshall has written: "That a statement was truly made in furtherance of a conspiracy cannot possibly be a guarantee, or even an indicium, of its reliability. . . . The conspirator's interest is likely to lie in misleading the listener . . . . It is no victory for common sense to make a belief that criminals are notorious for their veracity the basis for law." (Citations omitted; internal quotation marks omitted.) *United States* v. *Inadi*, supra, 475 U.S. 404–405 (Marshall, J., dissenting); see also C. Mueller, supra, 357 ("[a] statement may actually further a conspiracy simply by being plausi-

basis exists for concluding that the statement furthered the conspiracy." (Internal quotation marks omitted.) *State* v. *Carpenter*, 275 Conn. 785, 845, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006). A statement furthers a conspiracy if it "in some way [has] been designed to promote or facilitate achievement of the goals of the ongoing conspiracy . . . ." (Internal quotation marks omitted.) Id., 844. This includes a statement "prompting the listener—who need not be a coconspirator—to respond in a way that promotes or facilitates the carrying out of a criminal activity . . . ." (Internal quotation marks omitted.) Id. The declarant does not have "to ask a third party expressly to do something to further the conspiracy"; (internal quotation marks omitted) id., 845; and the statement need not actually further the conspiracy. *State* v. *Peeler*, 267 Conn. 611, 631, 841 A.2d 181 (2004). Whether a statement was made "in furtherance" of the conspiracy is ultimately a question of the declarant's intent. See id., 632 ("[i]t is enough that [the statement is] intended to promote the conspiratorial objectives" [internal quotation marks omitted]).

Although, as stated, a statement from a coconspirator to a nonconspirator may be "in furtherance" of the conspiracy in some cases, "statements to non-conspirators informing them of the conspiracy will generally not qualify for admission because such statements are rarely in furtherance of the conspiracy." 30B C. Wright et al., supra, § 6780. "[A] statement that merely . . . spills the beans, with no intention of recruiting the [nonconspirator] into the conspiracy does not further the conspiracy . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Carpenter*, supra, 275 Conn. 845. Examples of statements that evidence a lack

ble to its audience, which means that it may well fit within the circumstances without being true"); D. Davenport, "The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis," 85 Harv. L. Rev. 1378, 1387 (1972) ("[m]any statements actually in furtherance of an alleged conspiracy will be quite unreliable in whole or in part").

of intent behind them include a "merely narrative" description of events underlying the conspiracy; e.g., *United States* v. *Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1199 (2d Cir.), cert. denied sub nom. *Lavery* v. *United States*, 493 U.S. 933, 110 S. Ct. 324, 107 L. Ed. 2d 314 (1989); idle chatter; e.g., id.; and bragging; e.g., *United States* v. *Warman*, 578 F.3d 320, 339 (6th Cir. 2009). In assessing a statement to a nonconspirator, a court must often undertake a "careful examination of the context in which it was made." *United States* v. *Shores*, 33 F.3d 438, 444 (4th Cir. 1994), cert. denied, 514 U.S. 1019, 115 S. Ct. 1365, 131 L. Ed. 2d 221 (1995).

B

At trial, the defendant argued that Terror's statement was not made "in furtherance" of the conspiracy because there was not enough evidence about Terror's intent in making the statement. The state offered several possible explanations, but little proof, of what Terror's intentions might have been. The trial court conceded the question was "problematic" but nonetheless admitted the statement. It inferred Terror's intent almost entirely from Richard's knowledge of incriminating information. In ruling on the defendant's objection, it noted that Richard was a member of Piru. Although the trial court determined, based on the evidence presented up to that point, that Richard was not a participant in the murder of the victim, it noted that he "was involved later in assisting the conspirators," thereby learning "extremely prejudicial information" about the circumstances surrounding the murder. From this, the court extrapolated that Terror more likely than not intended to make this statement "to further involve [Richard]" in the incident and "to discourage [Richard] from going to the police and revealing what he knew, thereby bringing him into the conspiracy to conceal the murder. In my view, on the basis of the very little we know about the statement itself, the context in which it was uttered and the actors involved, this is a huge leap of logic with

virtually no evidence to support it. I believe the trial court should have excluded the statement because there was not a reasonable basis to determine whether Terror intended it to "further" the conspiracy and other indicia of reliability were lacking.

In discerning a declarant's intent, our cases suggest that a third party's knowledge of incriminating information may be a factor. But we have typically relied on evidence more closely tied to the declarant himself, such as a declarant's requests for help with the conspiracy, the declarant's membership in a related conspiracy with the third party, the difficulty the declarant would have in hiding the conspiracy from the third party, a specific statement of intent by the declarant to bring the third party into the conspiracy, or a series of later events to suggest the declarant was ultimately successful in recruiting the third party to join or help with the conspiracy.

For instance, the state cites *State* v. *Camacho*, 282 Conn. 328, 924 A.2d 99, cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d 273 (2007), in which the declarant's statements to his live-in girlfriend were intended "to secure her continued cooperation in the concealment of the crimes," similar to Terror's alleged intention of convincing Richard not to go to the police. Id., 356. But in *Camacho*, we considered as evidence of this intent more than just the fact that the girlfriend had seen the declarant behave suspiciously after a murder (e.g., hiding a gun, scrubbing clothes). We also observed that the declarant had asked her to assist him in covering up the murder (e.g., to avoid talking to the police). Id. We noted the fact that the girlfriend was an active coconspirator with the declarant in a related drug-selling operation. Id. Finally, we relied on the fact that it would have been " 'difficult, if not impossible' " for the declarant to hide the conspiracy from his girlfriend any longer, given their romantic relationship and that they lived together. Id., 357.

The defendant points to two other cases, and in each we cited evidence of the declarant's intent beyond the third party's knowledge of incriminating evidence. In *State* v. *Pelletier*, 209 Conn. 564, 552 A.2d 805 (1989), the declarant's statements to his wife were intended "to lessen any emotional trauma the [conspiracy] would cause [his wife]," which would ensure her "further cooperation . . . ." Id., 578. As evidence of this intent, this court relied not only on the fact that the wife's house was being used as the base for hiding the fruits of the conspiracy, but also on the fact that the declarant had specifically "indicated that he wanted to tell [his wife] about the [conspiracy] before she heard about it on the news." Id., 577.

In *State* v. *Carpenter*, supra, 275 Conn. 785, the declarant's statements to his son were intended to be "the first step in gaining . . . cooperation, moral support, future assistance and guaranteed silence in the aftermath of the [conspiracy]." Id., 846. As evidence of this intent, we relied on the fact that it would have been "difficult, if not impossible, to conceal the conspiracy" because the declarant and his son lived together. Id., 847. Moreover, we could discern "no other logical explanation" for why the declarant would have made the statements. Id., 846. We also cited a series of "[s]ubsequent events" where the declarant and his son worked together to carry out the conspiracy, a contract murder (e.g., the son's knowing assistance in finding the intended victim of the conspiracy, the declarant's offer to let his son kill the victim, and the son's help in disposing of the murder weapon). Id., 847.

Notably, we also concluded in *Carpenter* that other statements by the declarant to his longtime girlfriend were not made in furtherance of the conspiracy. Id., 851–52. Initially, the declarant had disclosed the existence of the conspiracy to his girlfriend. Id., 849. In a later conversation, he told her that he felt threatened by the man who had hired him to commit the murder.

Id. Noting that the girlfriend did not portray the conversation as a "serious discussion" and that she did not believe him, we concluded that the declarant's comments in this later conversation were "more akin to a casual reference to what was happening in his life than an attempt to induce [her] to take part in the conspiracy." Id., 852. There appeared to be no other evidence of the declarant's intent in making the statement.

In the present case, the trial court based its inference about Terror's intent on Richard's membership in the gang and his knowledge of incriminating information. I do not believe this is a reasonable basis for concluding that Terror's statement was made with the intent to further the conspiracy. Three reasons persuade me that it is simply too far of an inferential leap: the statement largely repeated what Richard already knew, the statement was presented to the court without any context, and Richard himself declined to suggest that Terror intended to bring him further into the conspiracy. On this record, I believe any inference that Terror feared Richard would inform the police about the murder and told him details about the murder in an effort to pull him into the conspiracy is too speculative to be reasonable.

First, the statement itself did not give Richard any new material information and, thus, there was little reason to believe it would have actually drawn him any further into the conspiracy. There was evidence that Richard already knew of the plan to kill the victim, what the murder weapon was, where it had come from, and who had pulled the trigger. He admitted he was in the vehicle just before the murder, that he heard the defendant confess just after the murder, and that he went to the scene a few minutes after that, got into the vehicle with the victim's body and tampered with evidence. The trial court agreed with the defendant that this was enough evidence *against* Richard to charge the jury on third-party culpability. In this light, the only new facts in Terror's statement were that Terror leaned

over the defendant while he prepared the gun and looked at the defendant before he fired. I cannot conclude that, given Richard's already extensive knowledge of and involvement with the conspiracy, this new information was of such significance that we can reasonably infer that Terror's imparting it to Richard was "designed to promote or facilitate" the goal of preventing him from going to the police, thereby furthering the conspiracy.[12]

Second, context does not help the state's case here, either, because, in short, we have none. We know only that Terror supposedly made this statement at some point during Richard's five or six days in New York (anywhere from two to eight days after the murder) and that this was the only conversation they had regarding the murder. When asked what he and Terror did in New York the rest of the time, Richard testified: "Nothing. Just walked around, and that was pretty much it." None of this limited context suggests that Terror's statement was intended to further the conspiracy to kill the victim. To the contrary, if Terror had intended to bring Richard further into the conspiracy by telling him more about it, presumably he would have mentioned it more than once over the course of Richard's near weeklong stay.

Third, Richard did not provide any insight into what Terror might have been thinking. The state failed to show that Richard believed Terror wanted to bring him further into the conspiracy, which was part of its proffer to the trial court.[13]

[12] Unlike the majority, I consider there to be a fundamental difference between (1) evaluating, for evidentiary purposes, whether Terror's one hearsay statement describing the murder furthered the conspiracy by recruiting Richard, and (2) evaluating, for harmless error purposes, the weight Terror's two hearsay statements ordering the murder and describing the murder carried with the jury. See part I B of this dissenting opinion.

[13] In initially arguing against the defendant's motion in limine to preclude Terror's statement, the prosecutor suggested that bringing Richard to New York manifested Terror's concern that he might go to the police: "Richard, at this point, has left Connecticut and has now been in New York with the head Piru guy [Terror], and there's a concern on behalf of that head Piru guy. And, I think, it could be inferred, there's a concern on him on whether

In sum, we barely know anything about Terror, whose intent is the subject of the inquiry. And without any context, we know even less about his intent in making this statement to Richard—certainly nothing that would take Terror's statement beyond a "merely narrative" description of events, idle chatter or bragging. Instead, we know only that Richard already knew all of the material facts surrounding the murder and that he did not think Terror's conduct in New York was "in furtherance" of anything in particular. Because I believe the "in furtherance" requirement "is a limitation on the admissibility of coconspirators' statements that is meant to be taken seriously"; (emphasis omitted) *Garlington* v. *O'Leary*, supra, 879 F.2d 283; I conclude that this falls short of a reasonable basis on which to admit this evidence against the defendant.

Because of my previous conclusion that the defendant has demonstrated that the admission of this evidence harmed him, I would reverse the judgment of the trial court and remand the case for a new trial.

I therefore respectfully dissent.

or not they are going to let [Richard] go back to . . . Connecticut or whether he's going to talk to the police."

The state offered no proof at that time to support the inference that Terror was concerned about Richard going to the police. The next day, however, the state tried to bolster its claim by asking Richard about whether Terror and other members of Piru made Richard fear for his safety while in New York. The defendant renewed his objection. At this point, the state proffered that Richard would testify that he felt compelled to go to New York out of fear for his safety, which was connected to his loyalty to the gang: The prosecutor argued to the court: "The witness has been very clear that he felt pressured by the defendant to do certain acts and felt that he had to go to New York with Terror. It's [the] same sides of the same coin. It's this loyalty, but also concerns for his safety." But Richard never said this on the witness stand. Instead, when asked why he went to New York, he responded only that it was "to prove [his] loyalty" to Terror, his superior. When asked to draw the connection between gang loyalty and safety that the state had relied on, he did not do so and replied only in general terms: "Well, I mean, when you're in a gang, you know, or when you're in the streets, period; there's certain people, you know, you got to watch because it's dangerous." Contrary to the state's representation, at no point did Richard say or even imply that he felt frightened of Terror or that Terror tried to bring him further into the conspiracy.

ORDERS

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RONALD F. BOZELKO *v.* STATEWIDE CONSTRUCTION, INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 469 (AC 40459), is denied.

Ronald F. Bozelko, self-represented, in support of the petition.

Decided September 11, 2019

DEBRA COHEN *v.* STATEWIDE GRIEVANCE COMMITTEE

The plaintiff's petition for certification to appeal from the Appellate Court, 189 Conn. App. 643 (AC 40887), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that rule 3.3 (a) (1) of the Rules of Professional Conduct, which provides that '[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal,' applies when the lawyer makes the statement while acting in a capacity other than as a lawyer representing a client?

"2. Did the Appellate Court correctly conclude that the entry for fiduciary fees made by the plaintiff in the amended final accounting constituted a knowingly false statement within the meaning of rules 3.3 (a) (1) and 8.4 (3) of the Rules of Professional Conduct?"

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

Debra Cohen, self-represented, in support of the petition.

Decided September 11, 2019

DEUTSCHE BANK NATIONAL TRUST COMPANY, TRUSTEE *v.* PAUL SILADI

The defendant's petition for certification to appeal from the Appellate Court, 189 Conn. App. 902 (AC 41221), is denied.

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

Paul Siladi, self-represented, in support of the petition.

Pierre-Yves Kolakowski, in opposition.

Decided September 11, 2019

ANTONIO VITTI *v.* CITY OF MILFORD ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 190 Conn. App. 398 (AC 40399), is denied.

Scott Wilson Williams, in support of the petition.

David J. Morrissey, in opposition.

Decided September 11, 2019

ANGEL VILLAFANE *v.* COMMISSIONER OF CORRECTION

The petitioner Angel Villafane's petition for certification to appeal from the Appellate Court, 190 Conn. App. 566 (AC 40615), is denied.

Cheryl A. Juniewic, assigned counsel, in support of the petition.

Nancy L. Walker, assistant state's attorney, in opposition.

Decided September 11, 2019

U.S. BANK TRUST, N.A., TRUSTEE *v.*
GARY M. GIBLEN ET AL.

The petition by the named defendant and the defendant Anna-Marie L. Giblen for certification to appeal from the Appellate Court, 190 Conn. App. 221 (AC 40664), is denied.

Christopher G. Brown, in support of the petition.

Christopher J. Picard, in opposition.

Decided September 11, 2019

JOHN RAUSER *v.* PITNEY BOWES,
INC., ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 190 Conn. App. 541 (AC 41025), is denied.

Michael R. Kerin, in support of the petition.

Michael M. Buonopane, in opposition.

Decided September 11, 2019

J'VEIL OUTING *v.* COMMISSIONER
OF CORRECTION

The petitioner J'Veil Outing's petition for certification to appeal from the Appellate Court, 190 Conn. App. 510 (AC 41224), is denied.

Joshua C. Shulman, assigned counsel, and *David R. Kritzman*, assigned counsel, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided September 11, 2019

KEVIN JACKSON *v.* COMMISSIONER OF CORRECTION

The petitioner Kevin Jackson's petition for certification to appeal from the Appellate Court, 190 Conn. App. 901 (AC 41281), is denied.

Peter G. Billings, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided September 11, 2019

VIKING CONSTRUCTION, INC. *v.* 777 RESIDENTIAL, LLC, ET AL.

The petition by the cross claim plaintiffs, 777 Main Street, LLC, and 777 Residential, LLC, for certification to appeal from the Appellate Court, 190 Conn. App. 245 (AC 41450), is denied.

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

Theresa A. Guertin and *Jeffrey J. Vita*, in support of the petition.

Stephen E. Goldman and *Wystan M. Ackerman*, in opposition.

Decided September 11, 2019

ROGER R. *v.* COMMISSIONER OF CORRECTION

The petitioner Roger R.'s petition for certification to appeal from the Appellate Court, 190 Conn. App. 902 (AC 41605), is denied.

Michael D. Stonoha, assigned counsel, in support of the petition.

Melissa L. Streeto, senior assistant state's attorney, in opposition.

Decided September 11, 2019

BRYAN JORDAN *v.* COMMISSIONER OF CORRECTION

The petitioner Bryan Jordan's petition for certification to appeal from the Appellate Court, 190 Conn. App. 557 (AC 41750), is denied.

D'AURIA and MULLINS, Js., did not participate in the consideration of or decision on this petition.

Arthur L. Ledford, special public defender, in support of the petition.

Steven R. Strom, assistant attorney general, in opposition.

Decided September 11, 2019

BARRY A. *v.* COMMISSIONER OF CORRECTION

The petitioner Barry A.'s petition for certification to appeal from the Appellate Court, 190 Conn. App. 903 (AC 41779) is denied.

Michael W. Brown, assigned counsel, in support of the petition.

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

Decided September 11, 2019

STATE OF CONNECTICUT *v.* EARL V. THOMPSON

The defendant's petition for certification to appeal from the Appellate Court, 190 Conn. App. 660 (AC 41780), is denied.

Mark Diamond, assigned counsel, in support of the petition.

Jennifer F. Miller, assistant state's attorney, in opposition.

Decided September 11, 2019

TPF DEVELOPMENT CORP., ET AL. *v.* R & R POOL & HOME, INC., ET AL.

The defendants' petition for certification to appeal from the Appellate Court (AC 42504) is dismissed.

Abram Heisler, in support of the petition.

Lawrence F. Reilly, in opposition.

Decided September 11, 2019

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Risk of injury to child; violation of probation; certification from Appellate Court; whether Appellate Court incorrectly concluded that corpus delicti is rule of admissibility; resolution of defendant's claim controlled by this court's decision in State v. *Leniart* (333 Conn. 88).

State *v.* Thompson (Order) 906
TPF Development Corp. *v.* R & R Pool & Home, Inc. (Order) 906
U.S. Bank Trust, N.A. *v.* Giblen (Order) 903
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CONNECTICUT APPELLATE REPORTS

Vol. 193

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

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OF THE

STATE OF CONNECTICUT

SERGIO ECHEVERRIA *v.* COMMISSIONER OF CORRECTION (AC 40903)

Lavine, Keller and Harper, Js.

Syllabus

The petitioner, a citizen of Bolivia, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance by failing to advise him adequately as to the immigration consequences of his plea of guilty to certain offenses that subjected him to deportation. The petitioner initially was charged with offenses that exposed him to twelve years of imprisonment. After the petitioner received a plea offer from the state, the trial court indicated that it would allow the petitioner to enter an open guilty plea with no agreed upon sentence to two charges and offered to vacate the plea and grant the petitioner's application for accelerated rehabilitation if the petitioner paid a $10,000 fine. The petitioner then entered a guilty plea. It was subsequently determined that the petitioner was ineligible for accelerated rehabilitation, and the state and the petitioner agreed on a sentence of five years of imprisonment, execution suspended, with three years of probation. The petitioner did not ask to withdraw his guilty plea. After the petitioner was sentenced, deportation proceedings against him were initiated. At the habeas trial, the petitioner testified that, at the time he entered his plea, he understood that if it was determined that he was ineligible for accelerated rehabilitation, he could be deported. He also testified that he did not think he would be deported after he accepted a plea agreement that did not require him to serve any time in prison. The habeas court rendered judgment denying the habeas petition and granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court properly rejected the petitioner's ineffective

assistance of counsel claim and denied the habeas petition, that court having properly determined that the petitioner failed to demonstrate that he was prejudiced by his trial counsel's allegedly deficient performance: the habeas court credited the testimony of the petitioner's trial counsel that avoiding double digit incarceration was the petitioner's primary concern, that, on several occasions, he discussed with the petitioner the immigration issues associated with the case and that it was his understanding that the petitioner knew of the immigration consequences, the petitioner stated on the record during the plea canvass that he understood that his guilty plea may lead to his deportation and his claim that he would have proceeded to trial had he known of the immigration consequences of his guilty plea was belied by the testimony adduced at the habeas trial; accordingly, the habeas court's conclusion was legally and logically correct, and the petitioner failed to demonstrate a reasonable probability that he would not have pleaded guilty had he known that it would lead to certain deportation and that he, instead, would have proceeded to trial.

Argued May 13—officially released September 24, 2019

Procedural History

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

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

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *Jo Anne Sulik*, supervisory state's attorney, for the appellee (respondent).

Opinion

HARPER, J. The petitioner, Sergio Echeverria, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner's sole claim on appeal is that the habeas court improperly rejected his claim that he had received ineffective assistance of counsel due to his attorney's failure to advise him properly of the immigration consequences of his guilty plea pursuant to *Padilla* v. *Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). We disagree

and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to this appeal. The petitioner is a Bolivian citizen who entered the United States without authorization at the age of six. On February 7, 2014, police officers executed a search warrant on the petitioner's Stamford apartment. Pursuant to the executed warrant, the police officers found and subsequently seized 4.3 pounds of marijuana, a large sum of cash, and a semiautomatic pistol with the serial number removed. A police report admitted into evidence at the habeas trial also revealed that the police seized, inter alia, a marijuana grinder, a digital scale, and several plastic bags containing the drug commonly referred to as "Molly." The petitioner subsequently was arrested and charged with two counts of possession of a hallucinogenic substance other than marijuana or more than four ounces of marijuana in violation of General Statutes § 21a-279 (b); possession of marijuana with intent to sell in violation of General Statutes § 21a-277 (b); operation of a drug factory in violation of General Statutes § 21a-277 (c); possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b); and illegal alteration of a firearm identification mark in violation of General Statutes § 29-36.[1] Thereafter, the petitioner retained Attorney Michael Skiber to represent him.

Following the petitioner's arrest, the state and Skiber, on behalf of the petitioner, entered into pretrial negotiations. The state initially offered a plea deal by which the petitioner would plead guilty to a charge stemming from the sale of marijuana,[2] as well as alteration of a

[1] Although the parties did not disclose what crimes the petitioner was initially charged with, we may take judicial notice of the file in the underlying criminal case. See *St. Paul's Flax Hill Co-operative* v. *Johnson*, 124 Conn. App. 728, 739 n.10, 6 A.3d 1168 (2010), cert. denied, 300 Conn. 906, 12 A.3d 1002 (2011).

[2] The record does not disclose the exact charge to which the petitioner would have pleaded guilty.

firearm identification mark, and the state would recommend a sentence of five years of incarceration, execution suspended after three years, followed by three months of probation.[3] The petitioner did not accept the offer, and the case was placed on the jury list.

On June 3, 2015, after the petitioner received another plea offer from the state, the trial court indicated that it would allow the petitioner to enter an open guilty plea with no agreed upon sentence to possession of marijuana with intent to sell in violation of § 21a-277 (b) and alteration of a firearm identification mark in violation of § 29-36. If, however, the petitioner paid a $10,000 fine, the trial court offered to vacate the plea and grant the petitioner's application for accelerated rehabilitation. The petitioner subsequently entered a guilty plea. The trial court accepted the petitioner's plea, finding that it was made knowingly, intelligently, and voluntarily. After the trial court accepted his plea, the petitioner stated that he was unsure of whether he previously had been convicted of a crime, calling into question his ability to receive accelerated rehabilitation.[4] In light of the petitioner's statement, Skiber asked the trial court to let the petitioner withdraw his plea. The trial court declined Skiber's request, opting instead to determine whether the petitioner was in fact eligible for accelerated rehabilitation before allowing the petitioner to withdraw his plea.

After it was determined that the petitioner was ineligible for accelerated rehabilitation, the state and the petitioner agreed on a sentence of five years of incarceration, execution suspended, with three years of probation. The petitioner did not ask for his plea to be

[3] The petitioner testified at the habeas trial that his understanding of the offer was that he would receive two years of incarceration followed by three years of probation. The specific nature of this plea offer is immaterial to the resolution of this appeal.

[4] General Statutes § 54-56e (b) (2) provides in relevant part: "The court may, in its discretion, invoke [accelerated rehabilitation] on motion of the defendant or on motion of a state's attorney or prosecuting attorney with

withdrawn. On September 3, 2015, the trial court found the petitioner guilty and sentenced the petitioner in accordance with the agreed upon disposition.

After the petitioner was sentenced, the United States Department of Homeland Security (department) initiated proceedings to deport the petitioner. In its petition to remove the petitioner from the country, the department cited as grounds for removal (1) the petitioner's criminal conviction, (2) the petitioner's unlawful entry into the United States, and (3) that the petitioner did not possess any valid documentation to lawfully remain in the country. On February 18, 2016, the United States Immigration Court adjudicated the petitioner to be removable from the United States. On May 6, 2016, the petitioner filed the underlying petition for a writ of habeas corpus alleging, inter alia, that his trial counsel had provided ineffective assistance by failing to inform him of the immigration consequences of his guilty plea.

A trial on the petition for a writ of habeas corpus was conducted on April 17, 2017. The petitioner presented testimony from himself, Skiber, and an expert witness, Attorney Kevin Smith, a criminal defense attorney who had experience in representing defendants who faced immigration consequences stemming from criminal charges. The respondent did not present any evidence.

The petitioner testified that he had hired Skiber to represent him after posting bail. The petitioner testified that during their initial meeting, he informed Skiber that he was not a citizen of the United States. Further, the petitioner testified that when the state initially offered a plea deal which, according to the petitioner, included two years of incarceration, he did not accept the offer because he knew that it would lead to him being deported. The petitioner testified that he spoke with an immigration attorney upon receiving the plea

respect to a defendant . . . who has no previous record of conviction of a crime . . . ."

offer that included two years of jail time, but he was unable to identify with whom he spoke. According to the petitioner, the immigration attorney advised him to seek a plea deal with no jail time because any conviction that entailed more than a year in jail was likely to render him deportable.

The petitioner also testified that when he pleaded guilty to possession of marijuana with intent to sell and alteration of a firearm identification mark, he was unsure of what the immigration consequences were, but he understood that if it was determined that he was ineligible for accelerated rehabilitation, he was going to be deported. Later, the petitioner testified that, after he was deemed ineligible for accelerated rehabilitation, he did not think that he was going to be deported when he accepted the plea agreement providing for a sentence of five years of incarceration, execution suspended, with three years of probation because the agreement did not require him to serve any jail time. The petitioner testified that when he received the plea offer for three years' probation with no jail time, he told Skiber that he wanted to consult an immigration lawyer, and that Skiber represented to him that the deal was "as good as it would get" because, if he rejected the offer, he would have to proceed to trial, which would be risky considering that it would be the petitioner's word against that of the police officers. Further, the petitioner testified that he would not have accepted the plea offer if he knew that he was going to be deported and that he instead would have proceeded to trial.

Skiber testified that he had notified the petitioner early on in the case that a conviction for the offenses he faced would lead to his deportation. When the petitioner received the plea offer that included two years of jail time, Skiber testified that he recommended to the petitioner that he not take the offer because the petitioner "had some leverage" with a suppression issue and the

offer entailed jail time and certain deportation.[5] Skiber later reiterated in his testimony that he had told the petitioner early on in the case that "a felony of this magnitude was a definite deportation." Despite testifying that the petitioner's criminal case had a "great" suppression issue, he also testified that he did not file a motion to suppress because, in his opinion, motions to suppress were rarely granted in the Stamford criminal court, and, if the petitioner did not succeed on such a motion, he would have lost all leverage to negotiate a more favorable plea deal.

As to the plea offer made on June 3, 2015, pursuant to which which the petitioner was to enter an open guilty plea that would be vacated if he paid a $10,000 fine and was deemed eligible for accelerated rehabilitation, Skiber testified that he was unsure as to whether he notified the petitioner on that date that accepting the plea offer may impact his immigration status, but he once again reiterated that he did tell the petitioner early on in the criminal case that "a conviction of this sort would be a deportable offense, guaranteed." Later in his testimony, Skiber testified that before the petitioner pleaded guilty he went through the plea canvass with him, which included a question regarding the petitioner's understanding that the plea could result in his deportation. On the basis of several discussions with the petitioner, Skiber testified that the petitioner knew that he would be deported if he pleaded guilty.

When it was determined that the petitioner was ineligible for accelerated rehabilitation, Skiber testified that he negotiated a sentence that entailed a no jail resolution on the petitioner's behalf. Skiber testified that he again went over the plea canvass with the petitioner and that he "can't say . . . hundred percent sure that [he] told [the petitioner] it was going to—it was

[5] Skiber testified that he did not specifically tell the petitioner that this offer would cause him to be deported.

deportable . . . .” Further, Skiber again testified that it was his impression that the petitioner understood, from earlier conversations between the two of them, that he would be deported if he was ineligible for accelerated rehabilitation.

On July 26, 2017, the habeas court denied the petitioner’s petition for a writ of habeas corpus. In its memorandum of decision, the court first credited the testimony of Skiber in determining that his performance was not constitutionally deficient. Specifically, the court found that Skiber had informed the petitioner that a conviction for possession of marijuana with intent to sell would lead to certain deportation, and that “counsel was clear and unambiguous throughout the criminal litigation as to the certainty of deportation.” Moreover, the court determined that any erroneous advice given to the petitioner was provided by the immigration attorney that the petitioner was unable to identify.

The court also determined that the petitioner was not prejudiced by Skiber’s allegedly deficient performance because the petitioner failed to establish that avoiding deportation was the determinative issue in his case. In its memorandum of decision, the court noted that the petitioner was not asked if he would have accepted a plea deal that included a period of incarceration in exchange for pleading guilty to charges that were less likely to result in his deportation. The court also observed that the petitioner did not present any evidence to demonstrate that he would have been offered the opportunity to participate in another pretrial diversionary program. Finally, the court opined that, in the department’s petition to remove the petitioner from the United States, it cited two grounds justifying the removal of the petitioner that were irrelevant to his criminal conviction. The court subsequently granted the petitioner’s petition for certification to appeal, and the petitioner timely filed the present appeal. Additional facts will be set forth as necessary.

We begin our analysis by setting forth the relevant standard of review and legal principles that inform our analysis. "A criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. . . . This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. . . . It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . .

"A claim of ineffective assistance of counsel is governed by the two-pronged test set forth in *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. Under *Strickland*, the petitioner has the burden of demonstrating that (1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance. . . . For claims of ineffective assistance of counsel arising out of the plea process, the United States Supreme Court has modified the second prong of the *Strickland* test to require that the petitioner produce evidence that there is a reasonable probability that, but for counsel's errors, [the petitioner] would not have pleaded guilty and would have insisted on going to trial. . . . An ineffective assistance of counsel claim will succeed only if both prongs [of *Strickland*] are satisfied. . . . It is axiomatic that courts may decide against a petitioner on either prong [of the *Strickland* test], whichever is easier." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, 169 Conn. App. 266, 277–78, 149 A.3d 185 (2016), cert. denied, 324 Conn. 906, 152 A.3d 544 (2017). "In its analysis, a reviewing court may look to the performance prong or the prejudice prong, and the petitioner's failure to prove either is fatal to a

habeas petition." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018).

"A claim of ineffective assistance of counsel raised by a petitioner who faces mandatory deportation as a consequence of his guilty plea is analyzed more particularly under *Padilla* v. *Kentucky*, [supra, 559 U.S. 356] . . . ." *Noze* v. *Commissioner of Correction*, 177 Conn. App. 874, 885, 173 A.3d 525 (2017). "In *Padilla* v. *Kentucky*, [supra, 369], the United States Supreme Court concluded that the federal constitution's guarantee of effective assistance of counsel requires defense counsel to accurately advise a noncitizen client of the immigration consequences of a guilty plea. In reaching this conclusion, the Supreme Court acknowledged that the precise advice counsel must give depends on the clarity of the consequences specified by federal immigration law. . . . The precise consequences depend on a number of factors, including the crime committed, the client's criminal history and immigration status, and in some circumstances the exercise of discretion by federal authorities." (Citation omitted.) *Budziszewski* v. *Commissioner of Correction*, 322 Conn. 504, 511, 142 A.3d 243 (2016).

In *Budziszewski*, our Supreme Court specifically set forth the advice criminal defense counsel must provide to a noncitizen client who is considering pleading guilty to a crime in which deportation pursuant to federal law is a consequence of a conviction. "For crimes designated as aggravated felonies . . . federal law mandates deportation almost without exception. . . . We conclude that, for these types of crimes, *Padilla* requires counsel to inform the client about the deportation consequences prescribed by federal law. . . . Because noncitizen clients will have different understandings of legal concepts and the English language, there are no precise terms or one-size-fits-all phrases

that counsel must use to convey this message. Rather, courts reviewing a claim that counsel did not comply with *Padilla* must carefully examine all of the advice given and the language actually used by counsel to ensure that counsel explained the consequences set out in federal law accurately and in terms the client could understand. In circumstances when federal law mandates deportation and the client is not eligible for relief under an exception to that command, counsel must unequivocally convey to the client that federal law mandates deportation as the consequence for pleading guilty." (Citations omitted.) Id., 507.

"The [ultimate] conclusions reached by the [habeas] court in its decision [on a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record. . . . To the extent that factual findings are challenged, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous. . . . [A] finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . A reviewing court ordinarily will afford deference to those credibility determinations made by the habeas court on the basis of [the] firsthand observation of [a witness'] conduct, demeanor and attitude." (Citation omitted; internal quotation marks omitted.) *Flomo* v. *Commissioner of Correction*, supra, 169 Conn. App. 278–79. Mindful of these legal principles, we next turn to the petitioner's sole claim on appeal that the court improperly rejected his claim that he received ineffective assistance of counsel due to his attorney's failure to advise him properly of the immigration consequences of his

guilty plea. We need not examine Skiber's representation of the petitioner under the performance prong because the petitioner has failed to demonstrate that he was prejudiced by Skiber's allegedly deficient performance.

The petitioner argues that the court improperly concluded that he was not prejudiced as a result of Skiber's deficient performance. Specifically, he argues that, pursuant to the United States Supreme Court's decision in *Lee* v. *United States*, U.S. , 137 S. Ct. 1958, 198 L. Ed. 2d 476 (2017), he demonstrated at the habeas trial that he was prejudiced because there was a reasonable probability that he would not have pleaded guilty if he had known that it would lead to mandatory deportation. We disagree.

In order to assess the petitioner's claim on appeal, a review of *Lee* is necessary. In *Lee*, the defendant, a lawful permanent resident from South Korea, appealed from the denial of his motion to vacate his conviction, claiming that he had received ineffective assistance of counsel due to his defense counsel's failure to advise him of the immigration consequences of his guilty plea pursuant to *Padilla*. Id., 1962. It was undisputed that defense counsel deficiently performed because the defendant was erroneously advised that he would not be deported as a result of pleading guilty to possession of ecstasy with intent to distribute, an aggravated felony. Id., 1963. As a result, the sole issue on appeal was whether the defendant had been prejudiced by his defense counsel's deficient performance. Id., 1964.

The court, in accordance with its prior decision in *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), determined that "[w]hen a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial," "[w]e . . . consider whether the defendant was prejudiced by the denial of the entire judicial proceeding . . . to which

he had a right. . . . [W]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Citations omitted; internal quotation marks omitted.) *Lee* v. *United States*, supra, 137 S. Ct. 1965. The court recognized that a criminal defendant who faces deportation as a consequence of his or her guilty plea may instead insist on proceeding to trial even if the chances of success are remote because there remains a possibility at trial that the defendant will be acquitted and will not face the onerous punishment of deportation. Id., 1966–67. Nevertheless, the court emphasized that a post hoc assertion that an individual would not have pleaded guilty but for his or her attorney's deficient performance was not enough to establish prejudice absent contemporaneous evidence to support such an assertion. Id., 1967.

The court determined that the defendant's claim that he would not have accepted the plea agreement had he known that it would lead to deportation was "backed by substantial and uncontroverted evidence." Id., 1969. The court further explained that "[i]n the unusual circumstances of this case," the defendant adequately demonstrated a reasonable probability that he would not have pleaded guilty had he known that it would lead to mandatory deportation and that he instead would have proceeded to trial. Id., 1967. To support its conclusion, the court stated that there was "no question" that deportation was the determinative issue in the defendant's decision to enter a guilty plea. Id. The court noted that the defendant repeatedly asked his attorney if there was any risk of deportation, both the defendant and his attorney testified at a hearing on his motion to vacate his conviction that the defendant would have gone to trial had he known about the deportation consequences associated with his guilty plea, and

that the defendant, when asked during his plea canvass if the possibility that he could be deported affected his decision to plead guilty, answered in the affirmative and only proceeded to plead guilty once his defense counsel assured him that the judge's question was a "standard warning." Id., 1967–68.

Additionally, the court recognized that the defendant had strong connections to the United States since he had lived in the country for three decades and was caring for his elderly parents, and that the consequences of taking a chance at trial to avoid deportation were not significantly harsher than pleading guilty and facing certain deportation because the defendant faced only a year or two of additional prison time if he went to trial as opposed to pleading guilty. Id., 1968–69.

The court concluded "[w]e cannot agree that it would be irrational for a defendant in [the defendant's] position to reject the plea offer in favor of trial. But for his attorney's incompetence, [the defendant] would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the 'determinative issue' for an individual in plea discussions, as it was for [the defendant]; if that individual had strong connections to this country and no other, as did [the defendant]; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that [almost certainty of being deported] could make all the difference." (Emphases in original.) Id. Applying the rationale of *Lee*, we now turn to the petitioner's claim.

The petitioner argues that he was concerned about being deported during the duration of the criminal proceedings against him and that, like the defendant in *Lee*, there is substantial evidence to support his assertion that he would not have pleaded guilty if he had known that it would lead to mandatory deportation. We reject the petitioner's claim.

The habeas court credited Skiber's testimony that avoiding "double digit" incarceration was the petitioner's primary concern.[6] To support its conclusion, the habeas court found credible Skiber's testimony that proceeding to trial, even with a "good" suppression issue, was "extremely risky" given that the petitioner was facing a "double digit" period of incarceration if found guilty. The habeas court further cited Skiber's testimony that he needed to weigh the prospect of the petitioner accepting an offer and being exposed to no jail time versus losing at trial and facing "astronomical" criminal exposure.[7] Skiber described the petitioner's potential criminal exposure as a "huge consideration," along with the immigration consequences of his plea.[8] Additionally, as noted in the habeas court's memorandum of decision, there was no evidence presented at the habeas trial to suggest that the petitioner would have been willing to accept a plea deal that included a longer sentence in exchange for pleading guilty to offenses that were less likely to lead to his deportation. The record is also devoid of any evidence that the petitioner, after being deemed ineligible for accelerated rehabilitation, would have been offered an alternative pretrial diversionary program.

[6] We reiterate the well settled principle that "we must defer to the finder of fact's evaluation of the credibility of the witnesses that is based on its invaluable firsthand observation of their conduct, demeanor and attitude. . . . [The fact finder] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none or some—of a witness' testimony to accept or reject." (Citation omitted; internal quotation marks omitted.) *State* v. *Colon*, 117 Conn. App. 150, 154, 978 A.2d 99 (2009).

[7] The habeas court stated in its memorandum of decision that the petitioner would have faced at trial several felony charges, some of which required mandatory minimum periods of incarceration. According to the habeas court, once the petitioner agreed to a plea deal, the state did not pursue those charges.

[8] Skiber specifically testified that "if we weren't successful [on a motion to suppress], the maximum penalties he would be facing would be astronomical. And that was, you know, a huge consideration just as immigration issues were also our consideration . . . *if not more*." (Emphasis added.)

In addition, the petitioner's testimony that he would have proceeded to trial had he known the immigration consequences of his guilty plea was belied by testimony adduced at the habeas trial that the petitioner was at least aware of the potential immigration consequences he faced as a result of his guilty plea. See *United States* v. *Delhorno*, 915 F.3d 449, 454 (7th Cir. 2019) (defendant not prejudiced given likelihood of conviction and long sentence in addition to defendant's awareness of immigration issues); *Dodd* v. *United States*, 709 Fed. Appx. 593, 595 (11th Cir. 2017) (defendant who was aware of possibility of deportation and did not show concern about deportation at plea hearing or sentencing was not prejudiced by deficient performance). The habeas court noted in its memorandum of decision that "[o]f the utmost import," the petitioner testified that he understood that, after he entered his guilty plea and applied for accelerated rehabilitation, he would be deported if he was found ineligible for accelerated rehabilitation, but later stated that he did not think that he would be deported when he pleaded guilty. Moreover, Skiber testified that, on several occasions, the two of them had discussed the immigration issues associated with the petitioner's case and that it was his understanding that the petitioner knew of the immigration consequences.

Skiber also testified that he twice went through the plea canvass with the petitioner; once prior to the petitioner entering his guilty plea and once after the petitioner had agreed to a sentence of five years' incarceration, execution suspended, with three years of probation. The petitioner stated on the record during the trial court's canvass that he understood that his guilty plea may lead to his deportation. In contrast, as previously noted, the defendant in *Lee* expressed on the record during the plea canvass that the possibility that he could be deported affected his decision to plead guilty and he did not proceed to plead guilty until he

was reassured by his counsel that the judge's question was only a "standard warning." *Lee* v. *United States*, supra, 137 S. Ct. 1967–68.

Unlike the defendant in *Lee*, the punishment the petitioner in the present case faced if he went to trial was markedly harsher than the punishment he received as a result of his guilty plea. As previously discussed, the habeas court stated in its memorandum of decision that the petitioner faced several felony charges, some of which carried a mandatory minimum sentence, if he proceeded to trial. The trial court also remarked at the plea canvass that the petitioner faced twelve years of exposure for the charges to which he ultimately pleaded guilty. In contrast, the petitioner's plea agreement resulted in a suspended sentence and three years of probation.[9]

On the basis of our review of the record, we conclude that the habeas court's conclusion is legally and logically correct and is supported by the facts that appear in the record. Accordingly, we hold that the petitioner has failed to demonstrate that he was prejudiced by his counsel's allegedly deficient performance because he did not adequately demonstrate a reasonable probability that he would not have pleaded guilty had he known that it would lead to certain deportation and that he instead would have proceeded to trial.[10] Accordingly,

[9] We acknowledge that, like the defendant in *Lee*, the petitioner does have strong personal ties to the United States and nowhere else. Nevertheless, the ties to the United States are only one factor to consider in determining whether he was prejudiced by Skiber's allegedly deficient performance. As we have set forth in this opinion, aside from his ties to the United States, the petitioner's case is materially distinguishable from *Lee*.

[10] Additionally, the petitioner essentially argues in his appellate brief that the habeas court, while addressing the prejudice prong in its analysis, erroneously factored into its ruling the fact that the department listed other grounds besides his criminal conviction as justification for deporting him. Specifically, the petitioner states that this conclusion was erroneous because he was in the process of securing documentation to remain in the country at the time of his arrest and the United States had never tried to deport him before learning of his criminal conviction. Even if we were to agree with the petitioner that the habeas court erred in this respect, it does not affect the propriety of our decision.

the petitioner's claim of ineffective assistance of counsel must fail.

The judgment is affirmed.

In this opinion the other judges concurred.

AUTUMN VIEW, LLC, ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF EAST HAVEN
(AC 41220)

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

Syllabus

The plaintiffs appealed to the trial court from the decision of the defendant, the Planning and Zoning Commission of the Town of East Haven, denying their application for approval of an affordable housing development. The plaintiffs, owners of undeveloped real property in East Haven, submitted, pursuant to statute (§ 8-30g), an affordable housing application that sought to amend the zoning regulations to create a new mixed income housing zone and to construct 105 detached single-family homes. The defendant initially denied the plaintiffs' application on several grounds, including, inter alia, that it had insufficient drainage, and the plaintiffs subsequently revised their application to address those concerns. At a hearing on the revised application, the defendant presented the findings of an engineer, who had prepared a report on the plaintiffs' revised application that had not been made available to the plaintiffs until the day of the hearing and which raised concerns regarding the revised application's storm water drainage system. Despite the plaintiffs' requests to continue the hearing so they could review the engineer's report, the defendant concluded the hearing that night and denied the revised application on essentially the same grounds as the initial application. Thereafter, the plaintiffs appealed to the Superior Court, which sustained the appeal in part and remanded the case to the defendant with respect to five issues related to storm water drainage. To comply with the court's remand order, the plaintiffs hired an engineer to assist them in addressing the storm water drainage issues and resubmitted their application to the defendant with a revised storm drainage plan. Subsequently, the defendant denied the plaintiffs' resubmitted application on several grounds, including, inter alia, that the resubmission failed to address the concerns of the defendant's engineer and that the resubmitted application varied so much from the revised application that it was actually an entirely new application. Thereafter, the plaintiffs appealed to the Superior Court, which rendered judgment sustaining

the appeal, from which the defendant, on the granting of certification, appealed to this court. *Held:*

1. The Superior Court did not err in concluding that the affordable housing application resubmitted in response to the court's remand order was not a new application; that court properly reviewed the differences between the remand site plan and the modified site plan and determined that the changes made to the remand application were done in order to comply with concerns regarding storm drainage, as the layout of the plan was fundamentally unchanged, changes were made in order to address the storm water drainage issues raised by the report of the defendant's engineer, and, thus, because the site plan submitted with the remand application was an updated plan consistent with the Superior Court's remand order, it did not constitute a new plan.
2. The defendant could not prevail on its claim that the plaintiffs' remand application, which included a new storm water drainage system, was beyond the scope of the remand order; the essential purpose of the remand order, which required the defendant to provide the plaintiffs with an opportunity to respond to the concerns of the defendant's engineer regarding storm drainage issues, was fulfilled when the plaintiffs' engineer worked with the defendant's engineer to resolve the storm water management issues and reached a consensus on the technical elements of the drainage system, the record demonstrated how the remand application satisfied the reservations of the defendant's engineer about the storm water drainage and, therefore, the remand application was well within the scope of the remand order.
3. The defendant could not prevail on its claim that the Superior Court improperly concluded that evidence that the application failed to comply with town zoning regulations and that the storm water drainage system posed significant dangers to human health and safety did not support the defendant's denial of the applications: noncompliance with a zoning regulation alone was not sufficient to support the defendant's denial under § 8-30g (g), as the principal aim of the statute is to prevent a pretextual denial of an affordable housing application and § 8-30g (g) required the defendant to affirmatively prove that its decision to deny an affordable housing development was necessary to protect substantial public interests in health, safety, or other matters, that such public interests clearly outweighed the need for affordable housing, and that such public interests could not be protected by reasonable changes to the affordable housing development, and the defendant's listing of reasons why the affordable housing application was denied did not meet the standard required by § 8-30g (g); moreover, the defendant, in denying the different versions of the plaintiffs' applications, failed to demonstrate that there was any, much less sufficient, evidence in the record to showed that denying the affordable housing development was necessary to protect a substantial interest in health and safety, and the record indicated that the plaintiffs satisfactorily complied with the concerns of the defendant's engineer regarding the storm water management system.

Argued April 11—officially released September 24, 2019

Procedural History

Appeal from the decision of the defendant denying the plaintiffs' application for approval of an affordable housing development, brought to the Superior Court in the judicial district of New Haven and transferred to the judicial district of Hartford, Land Use Litigation Docket, where the matter was tried to the court, *Berger*, *J.*; judgment sustaining in part the plaintiffs' appeal and remanding the matter to the defendant for further proceedings; thereafter, the court rendered judgment sustaining the plaintiffs' appeal, from which the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Alfred J. Zullo, for the appellant (defendant).

Timothy S. Hollister, for the appellees (plaintiffs).

Opinion

DiPENTIMA, C. J. "[T]he key purpose of [General Statutes] § 8-30g is to encourage and facilitate the much needed development of affordable housing throughout the state." *West Hartford Interfaith Coalition, Inc.* v. *Town Council*, 228 Conn. 498, 511, 636 A.3d 1342 (1994). Accordingly, in passing the affordable housing statute, the legislature eliminated the deference traditionally given to commission judgments for affordable housing applications. See *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 716, 780 A.2d 1 (2001). This case exemplifies the significance of this aspect of the affordable housing statute enacted in 1989.

The defendant, the Planning and Zoning Commission of the Town of East Haven, appeals from the decision of the Superior Court, sustaining the appeal of the plaintiffs, Autumn View, LLC (Autumn View), Statewide Construction Corporation, and Vicki Imperato. On appeal, the defendant claims that the court improperly concluded that (1) the September 27, 2016 affordable housing application filed by the plaintiffs pursuant to § 8-30g was not a new application, (2) the September 27,

2016 application complied with a remand order issued by the Superior Court, (3) evidence regarding the failure to comply with town regulations did not support the defendant's denial of the application, and (4) evidence of how the storm water drainage aspects of the application posed significant dangers to human health and safety did not support the defendant's denial of the application.[1] We disagree and, accordingly, affirm the judgment of the Superior Court.

The record reveals the following facts and procedural history. The plaintiffs are the owners of 17.09 acres of undeveloped real property that includes frontage on Strong Street and South Strong Street and abuts the New Haven Municipal Golf Course. The property contains several abandoned structures but is otherwise undeveloped and contains no wetlands.

Pursuant to § 8-30g (b) (1), the plaintiffs submitted an affordable housing application on December 20, 2012, that sought to amend the East Haven zoning regulations to create a new "mixed income housing" zone, to rezone the property to the newly created zone and to approve a site plan to construct 105 detached single-family homes in common interest ownership with thirty-two homes deed restricted for forty years. To comply with the requirement of § 8-30g (a) (6) that at least thirty percent of the houses be price restricted, the plan set aside thirty-two homes to be offered at a reduced price. Sixteen homes were to be sold at sixty percent of the median price in East Haven, and the other sixteen would be sold at eighty percent of the median. Based on 2012 data, the reduced price homes would be offered at $155,175 and $222,084, respectively. The defendant held a public hearing on the plaintiffs' application on February 6 and 20, 2013. In response to concerns raised

[1] We address the defendant's third and fourth claims together as the issues are intertwined.

during the hearings, the plaintiffs submitted revisions to the application that included changes to the detention basins, sidewalks and lighting plan. Despite these revisions, the defendant denied the application at a hearing held on March 6, 2013.[2] The defendant also suggested that the plaintiffs make a number of changes to the site plan and zone change request in their application.[3]

In accordance with § 8-30g (h),[4] the plaintiffs submitted a modified application to the defendant on March 27, 2013. The modified application responded to the

[2] The defendant provided the following reasons for denying the application: (1) "[T]he project is simply too dense and almost quadruples the allowable development in [the] zone"; (2) "[t]he application is not consistent with the neighborhoods"; (3) "[t]he application fails to comply with [East Haven's] standard relative to roads and sidewalks," which require thirty foot roads and four and one-half feet sidewalks, (4) "[t]he plan has insufficient drainage"; (5) "[t]he application, because of its density, would put a severe strain on public services including, but not limited to, education"; (6) "[t]here are other larger sites in [East Haven] that would more readily accommodate the development with this number of units"; (7) "[t]he proposed application, as [a] § 8-30g proposal, fails to provide an adequate affordability plan in that [the plaintiffs] failed [to] present an accurate calculation of sales price[s] for both 60 [percent] and 80 [percent] median income units an[d] they have failed to designate an affordable manager that would manage the plan throughout the [forty] years of its life"; (8) the plan fails to comply with frontage guidelines and there should be at least 30 percent open space; and (9) "[t]he allowable zone definition gives rise to abuse as other large parcels in other parts of [East Haven] can be converted to a . . . mixed income housing development in contravention of [East Haven's] [p]lan of [d]evelopment."

[3] These suggested changes were as follows: (1) The project consist of no more than sixty units, (2) have thirty foot roadways and four and one-half foot sidewalks, (3) minimum road frontage of sixty feet, (4) minimum sidelines of fifteen feet, (5) minimum front yard setbacks of twenty-five feet, (6) minimum rear yard setbacks of thirty feet from the retention basin and twenty five feet otherwise, (7) retention basins in the middle of the development, (8) correct pricing calculations regarding the median price of the affordable homes, (9) amended dimensional standards, (10) sufficient off street overflow and visitor parking and (11) an agreement with an administrator that would be available after completion of the project to administer the program for the forty years of its term.

[4] General Statutes § 8-30g (h) provides, in relevant part, that an applicant whose affordable application is denied can "submit to the commission a proposed modification of its proposal responding to some or all of the objections or restrictions articulated by the commission, which shall be treated as an amendment to the original proposal. . . ."

defendant's reasons for denial[5] of the revised application and addressed the suggestions set forth by the defendant.[6]

On May 29, 2013, the defendant held a public hearing on the modified application. In preparation for this hearing, the defendant retained an engineer, Geoffrey Jacobsen, to review, criticize, and comment on the site plan submitted by the plaintiffs as part of the modified application. He prepared a report regarding the plaintiffs' plan submitted with their modified application, which was not made available to the plaintiffs until the public hearing on May 29, 2013. As a result, the plaintiffs were unable to review and respond to Jacobsen's criticisms.

[5] The modified application stated: (1) "Density, variation from an existing approval, and allegations regarding lack of consistency with the [p]lan of [c]onservation and [d]evelopment are not valid reasons for denial of an application pursuant to § 8-30g"; (2) "[t]he homes proposed are comparable in size and quality to many of those in the surrounding residential neighborhood"; (3) "[t]he application and related [mixed income housing] [d]istrict regulation have been revised to require and provide for roads [thirty] feet wide and sidewalks [four and one-half] feet wide"; (4) "[t]he development discharges to the public storm system, with no increase in the rate of runoff, and with appropriate storm water renovation"; (5) "[f]iscal zoning and, in particular, a desire to exclude school children, is not a valid reason to deny any application pursuant to § 8-30g"; (6) "[n]one of the owners of [other large parcels in East Haven] have proposed to develop them for affordable housing"; and (7) "[t]he affordability plan has been revised" to correct the sales prices and provides for an administrator.

[6] The plan submitted with the modified application also addressed the suggestions provided by the defendant in the following ways: (1) "Limiting the maximum number of units to [sixty] is not necessary to protect public health and safety"; (2) "[t]he plan has been revised to include [thirty] foot wide roadways and [four and one-half] foot wide sidewalks"; (3) "[m]inimum road frontage of [sixty] feet is not necessary to protect public health and safety"; (4) "[m]inimum sidelines of [fifteen] feet are not necessary to protect public health and safety"; (5) "[m]inimum front yard setbacks of [twenty-five] feet are not necessary to protect public health and safety"; (6) "[m]inimum rear yard setbacks of [thirty] feet from the detention basins and [twenty-five] feet otherwise are not necessary to protect public health and safety" but "[t]he minimum rear yard setback has been increased to [twenty] feet"; (7) "[r]elocation of the detention basins to the middle of the property is not necessary to protect public health and safety"; (8) "[r]evised calculations are provided"; and (9) "[t]he revised affordability plan provides for the designation of an [a]dministrator."

Despite repeated requests by the plaintiffs for a continuance in order to respond to the Jacobsen report, the hearing concluded that same night.

On June 5, 2013, the defendant denied the modified application for essentially the same reasons it had denied the plaintiffs' previous application.[7] On June 24, 2013, the plaintiffs appealed from the denial of the modified application to the Superior Court as provided in § 8-30g (h). On December 23, 2014, the Superior Court sustained the plaintiffs' appeal in part and remanded the case to the defendant for further proceedings. Specifically, the Superior Court remanded the modified application site plan and the corresponding proposed zone change to the defendant only with respect to five issues related to storm water management.[8] The court required the defendant to "schedule, as soon as reasonably possible, a meeting at which it will allow the plaintiffs to respond, comment and discuss with the

[7] Specifically, the defendant stated: (1) "The project remains too dense and is inconsistent with surrounding neighborhoods"; (2) "[t]he project fails to abide by [the plaintiffs'] own development standards as to setbacks and building location"; (3) "[t]he project fails to comply with [East Haven's] standards relative to [four and one-half] foot sidewalks on both sides of the street and street lights to ensure health and safety of the homeowners"; (4) "[t]he plan has insufficient off-street parking for residents and visitors to ensure health and safety in the event of fire or police emergency"; (5) "[t]he plan has insufficient drainage" and lacked an agreement to drain into Grannis Lake; (6) the application was conclusory and devoid of data concerning run-off; (7) "[t]he application, because of its density, would put a severe strain on public services including but not limited to education"; (8) "[t]he retention basin [number one] . . . is inappropriate and inconsistent with [East Haven's] zoning regulations and . . . [s]tate [g]uidelines for soil erosion" and is unsafe; (9) the dam is "a structure [that] cannot be located in a setback area"; and (10) "[t]he proposed application . . . fails to provide an adequate affordability plan . . . and fails to designate an affordable manager . . . ."

[8] The five issues involving storm water drainage were: (1) "[T]he plan has insufficient drainage"; (2) "the application is conclusory and devoid of data concerning runoff"; (3) "retention basin number one is inappropriate and fails to meet both the zoning regulations and the state guidelines for soil erosion"; (4) "the dam is unsafe"; and (5) "the dam is a structure that cannot be located in a setback area."

[defendant] Jacobsen's analysis with particular attention to storm water management . . . and storm water quality . . . ."

In order to effectuate the court's remand order, the plaintiffs submitted another application to the defendant on September 27, 2016 (remand application).[9] The defendant held hearings on November 30 and December 8, 2016. At the outset, the plaintiffs' counsel provided an overview of the procedural history involving the application and the changes that had been made in response to the Superior Court's remand order. He emphasized how the purpose of the hearing was to discuss the storm water issues on which the Superior Court's remand order had focused and to reach agreement about the technical comments on the storm water revisions in the remand application.

To prepare the site plan for the remand application, the plaintiffs retained an engineering firm, Milone and MacBroom, to develop the site plan and conduct storm water calculations. Ted Hart, an engineer from Milone and MacBroom, addressed the defendant and described how, in preparing the design work for the remand application, he and his team reviewed the 2013 site plan, the report by Jacobsen dated May 28, 2013, and the 2014 Superior Court's remand order. He explained in detail the new storm water system in the site plan for the remand application, emphasizing how this site plan addressed each of the five issues set forth in the remand order. Hart concluded by saying that "the plans and the storm water management design meets the comments in the 2013 review letter by Jacobsen Associates and . . . we have been back and forth with Jacobsen Associates and I believe we have addressed the comments.

[9] Prior to the plaintiffs' submission of the remand application, the defendant had filed with this court a petition for certification to appeal the decision of the Superior Court from December 23, 2014. The defendant also sought a stay from any action until this court rendered a decision on the petition on April 17, 2015. Both were denied on April 22, 2015.

I met with [Jacobsen] this morning quickly and went through our last comments and responses and he is going to be going through our responses probably one more time."

The hearing was continued to December 8, 2016, when Hart testified that Jacobsen had reviewed the storm water plans prepared by Hart and his firm for the remand application. He further described his communications with Jacobsen regarding the remand application site plan. Jacobsen also addressed the defendant at that hearing and described his communications with Hart's office since the November 30, 2016 hearing. Jacobsen noted that the plaintiffs had agreed to accept any additional comments or conditions that he may have on any of the outstanding aspects of the site plan.

During the December 8, 2016 hearing, members of the defendant questioned the plaintiffs' counsel about the scope of the remand application. Some commissioners thought these revisions had changed the site plan so substantially that it could not be considered a new iteration but, instead, required a new application. The plaintiffs' counsel disagreed and described the minor changes that had been made to the modified application, most of which were made in order for the site plan submitted with the remand application to meet Jacobsen's concerns regarding the 2013 application. The defendant provided the following reasons for its decision to deny the remand application: (1) "The [plaintiffs] failed to respond to the remand order of the court as [they] failed to address Jacobsen's analysis as to the resubmission dated March 27, 2013, with particular attention to storm water management . . . and storm water quality. . . as contained in his report dated May 28, 2013"; (2) "[t]he submission to the [defendant] constitutes an entirely new plan, which is not contemplated or allowed under . . . [§] 8-30g (h) or any other statute regulating affordable housing applications"; (3) "[t]he [plaintiffs] failed to prepare and resubmit hydrology reports, runoff calculations, and storm

water impact analyses in response to Jacobsen's requests as to the resubmission dated March 27, 2013, and instead prepared an entirely new plan for a new development with a new drainage system thus supporting the [defendant's] original decision that the drainage system proposed in the March 27, 2013 plan could not be built as designed and would not function as designed"; (4) "[t]he new plan did not comply with . . . § 8-30g and is not a valid . . . § 8-30g [application] insofar as it carelessly fails to meet the 30 [percent] affordable housing 'set aside' requirement specified in . . . § 8-30g [and] [t]he plan further violates the [plaintiffs'] own regulations as contained in the definition of its [mixed income housing district] as well as [their] own affordability plan by failing to provide for 30 [percent] of the units to be set aside for affordable housing"; (5) "[t]he plan violates [their] own [mixed income housing district] setback provisions as to the location of the culverts and [fifteen] of the units"; (6) "[t]he plan failed to address the adequacy and effectiveness of the natural mechanical filtration mechanisms intended to treat runoff and the prevention of a discharge of solids into nearby water sources"; (7) "[t]he new plan contemplates a huge infrastructure project to connect to the storm water system with a new sewer hookup being built on Strong Street and down onto Robby Lane [and] [t]here was no evidence before the [defendant] as to the true scope of that project and its impact on the adjoining neighborhoods"; and (8) "[t]he new plan did not comply in several respects with the provisions relative to affordable housing development and the [defendant] did not have sufficient information to develop the appropriate conditions that would be necessary to approve it."

The plaintiffs appealed from the denial of their remand application to the Superior Court. The court

heard argument on April 10, 2017, and issued its memorandum of decision on July 24, 2017. In sustaining the plaintiffs' appeal, the court concluded that the "record indicates that [the plaintiffs] satisfactorily complied with Jacobsen's concerns regarding the substantive water management modifications. Additionally, the [defendant] failed to comply with the mandatory review process of § 8-30g (g) and has not sustained its burden of proof under the statute." The defendant thereafter filed a petition for certification to appeal pursuant to General Statutes § 8-8a (o). We granted the defendant's petition, and this appeal followed.

We begin our analysis by setting forth the legal principles that guide our review. Section 8-30g is a remedial statute that exists outside of the traditional land use statutory scheme. See *Wisniowski* v. *Planning Commission*, 37 Conn. App. 303, 317–18, 655 A.2d 1146, cert. denied, 233 Conn. 909, 658 A.2d 981 (1995). The legislature enacted the statute to address what the traditional land use scheme had failed to do, namely, to confront the affordable housing crisis in Connecticut. See id., 316–17.

Section 8-30g (g) provides in relevant part: "Upon appeal . . . the burden shall be on the commission to prove, based upon the evidence in the record compiled before such commission that the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. The commission shall also have the burden to prove, based on the evidence in the record compiled before such commission, that (1) (A) the decision is necessary to protect substantial public interests in health, safety, or other matters which the commission may legally consider; (B) such public interests clearly outweigh the need for affordable housing; and (C) such public interests cannot be protected by reasonable changes to the affordable housing development."

Consistent with the remedial goals of this statute, § 8-30g (g) further provides that "[i]f the commission does not satisfy its burden of proof under this subsection, the court shall wholly or partly revise, modify, remand or reverse the decision from which the appeal was taken in a manner consistent with the evidence in the record before it." Accordingly, the statute authorizes the reviewing court "to employ much more expansive remedies than are available to courts in traditional zoning appeals." (Internal quotation marks omitted.) *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 162 Conn. App. 678, 710–11, 136 A.3d 24 (2016), aff'd, 326 Conn. 55, 161 A.3d 545 (2017); see also *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 320 ("§ 8-30g (c) takes away some of the discretion that local commissions have under traditional land use law and allows the reviewing trial court to effect a zone change if the local commission cannot satisfy the statutory requirements for its denial of an application"); R. Fuller, 9B Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 51.5, p. 192 (§ 8-30g grants "more authority than provided for in other administrative appeals, and court can direct agency to approve project as is or with suggested modifications"); M. Westbrook, "Connecticut's New Affordable Housing Appeals Procedure: Assaulting the Presumptive Validity of Land Use Decisions," 66 Conn. B.J. 169, 194 (1992) (describing how appeal procedure of § 8-30g provides the reviewing "court great latitude" and "several options for providing relief to the developer").

The standard of review embodied in § 8-30g (g) requires the court to engage in a two part analysis. See *JPI Partners, LLC.* v. *Planning & Zoning Board*, 259 Conn. 675, 690, 791 A.2d 552 (2002), citing *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, supra, 256 Conn. 726–27. First, a reviewing court must "determine

whether the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record. . . . Specifically, the court must determine whether the record establishes that there is more than a mere theoretical possibility, but not necessarily a likelihood, of a specific harm to the public interest if the application is granted." (Citation omitted; internal quotation marks omitted.) *River Bend Associates, Inc.* v. *Zoning Commission*, 271 Conn. 1, 26, 856 A.2d 973 (2004). If the record demonstrates that this standard is met, the reviewing court "must conduct a plenary review of the record and determine . . . whether the commission's decision was necessary to protect substantial interests in health, safety or other matters that the commission legally may consider, whether the risk of such harm to such public interest clearly outweighs the need for affordable housing, and whether the public interest can be protected by reasonable changes to the affordable housing development." Id. "Because the plaintiff[s'] appeal to the trial court is based solely on the record, the scope of the trial court's review of the [defendant's] decision and the scope of [an appellate court's] review of that decision are the same." (Internal quotation marks omitted). Id., 26–27, n.15.

I

The defendant first claims that the Superior Court erred by concluding that the affordable housing application filed by the plaintiffs pursuant to § 8-30g on September 27, 2016, was not a new application. The plaintiffs counter that the court properly determined that the remand application submitted on September 27, 2016, did not constitute a new site plan but, rather, was an updated plan submitted in accordance with its remand order pursuant to § 8-30g (g). We agree with the plaintiffs.

"Determining the scope of a remand [order] is a matter of law . . . [over which] our review is plenary." (Citations omitted.) *State* v. *Tabone*, 301 Conn. 708, 713–14, 23 A.3d 689 (2011). Accordingly, we review whether the Superior Court properly determined that the remand application was within the scope of the remand order under this standard.

The following additional facts are necessary for our discussion of this claim. At the December 8, 2016 hearing, defendant's chairman asked the plaintiffs' counsel: "After reading [this] . . . why wouldn't you with these major changes just supply us with a new application? . . . [T]here have been so many numerous changes, am I correct to state that, a modified site plan of this magnitude would have to come for a new hearing?" The plaintiffs' counsel responded: "[W]e actually considered that and the answer and the conclusion that we came to is . . . it's basically the same plan. The streets are in the same place; they are in the same location. We have reduced the number [of units] down twice . . . [t]he question that would cause you to think about a new application would be if there was some substantial off site impact that was not part of the first application, the previous application. And we have reduced the impacts. We have responded to . . . Jacobsen's concerns, but it's basically the same plan." The defendant, however, concluded that the remand application was an "entirely new" application. For that reason, among others, the defendant denied this application.

The Superior Court reviewed the differences between the remand site plan and the modified site plan and determined that the changes that were made to the remand application were done in order to comply with Jacobsen's concerns. Specifically, the court noted that while there are four fewer units in the remand plan, the layout of the plan is fundamentally unchanged. The road widths, curbs, sidewalks, utilities, open space,

parking, setbacks, landscaping and architecture are essentially the same as the March, 2013 modified application. The Superior Court further noted that the changes were made in order to address the storm water drainage issues raised by Jacobsen's report. These changes included modifications to detention ponds one and two and the addition of detention pond three in place of the club house and detention pond four in place of five units. We agree with the Superior Court's determination that these changes were made in response to Jacobsen's report. Thus, because the site plan submitted with the remand application was an updated plan consistent with the Superior Court's remand order; see General Statutes § 8-30g (g); it did not constitute a new plan. Further, on appeal to this court, the defendant provided limited analysis in support of its assertion that the remand application was truly a new application. Accordingly, we find no reason to reverse the Superior Court's determination that the remand application was not a new application.[10]

II

The defendant next claims that the Superior Court erred by concluding that the September 27, 2016 application submitted by the plaintiffs complied with the court's remand order. The defendant claims that the Superior Court's language was "clear and unequivocal" in that it directed the plaintiffs to present additional

[10] The defendant also argued sparingly in its brief and at oral argument that the remand application failed as an affordable housing application under § 8-30g because the site plan indicated that less than thirty percent of the units was set aside as affordable housing. The plaintiffs demonstrated that the number of units on the site plan was incorrectly marked due to a typographical error. The Superior Court agreed with the plaintiffs' explanation and also determined that the defendant could have approved the application on the condition that the development contain the statutorily required thirty percent affordable units. Here, the defendant has not demonstrated that there is any reason for us to overturn the Superior Court's determination that the error in the number of units marked on the remand site plan was no more than a typographical error.

evidence to the defendant about the modified application's storm water drainage system that had been submitted on March 27, 2013, before the remand order. Put another way, the defendant contends that the remand order allowed the plaintiffs to present additional information *only* about the storm water drainage plan as it was designed in the March, 2013 plan. Accordingly, the defendant claims that the remand application, which included the new storm water drainage system, is beyond the scope of the remand order. This is an incorrect interpretation of the Superior Court's remand order.

"When a case is remanded for a rehearing, the trial court's jurisdiction and duties are limited to the scope of the order." *Leabo* v. *Leninski*, 9 Conn. App. 299, 301, 518 A.2d 667 (1986), cert. denied, 202 Conn. 806, 520 A.2d 1286 (1987); see also *Tomasso Brothers, Inc.* v. *October Twenty-Four, Inc.*, 230 Conn. 641, 643 n.3, 646 A.2d 133 (1994) (discussing how claim exceeding scope of remand to trial court is not properly part of current appeal). Remands to an administrative agency are subject to the same limitations. *Garden Homes Management Corp.* v. *Planning & Zoning Commission*, 191 Conn. App. 736, 764–65, A.3d (2019). In reviewing remand applications, there must be some "give and take" between local planning and zoning boards and the applicants before them. See *Frito-Lay, Inc.* v. *Planning & Zoning Commission*, 206 Conn. 554, 567, 538 A.2d 1039 (1988) ("[T]he very purpose of [a] hearing [is] to afford an opportunity to interested parties to make known their views and to enable the board to be guided by them. It is implicit in such a procedure that changes in the original proposal may ensue as a result of the views expressed at the hearing." [Internal quotation marks omitted.]).

The remand order from the Superior Court required the defendant to provide the plaintiffs with an opportunity to respond to Jacobsen's comments about the

storm water drainage system. The exchanges between the defendant's and plaintiffs' experts over the course of a year exemplify the Superior Court's subsequent observation that "the lengthy administrative review process worked as intended; changes were made to an application as part of the review process with comments and further responses." As a result of this communication between Jacobsen and the plaintiffs' experts, the remand application contained a revised storm water drainage system that addressed the concerns contained in Jacobsen's report.

The record demonstrates how the remand application satisfied Jacobsen's reservations about the storm water drainage. At the November 30, 2016 hearing, Jacobsen discussed his communications with Hart, the plaintiffs' engineer, about the remand application site plan. He stated: "[T]here have been . . . some substantial improvements in the overall plan since 2013 . . . . [T]here has been a fair amount of back and forth between our office and . . . Hart's office in terms of addressing not only the 2013 comments, but the follow up comments that we had on November 11, [2016] and then an e-mail exchange with even additional follow up comments that we had over the course on December 2, [2016] and December 5, [2016]. Today we received I think probably . . . the third . . . revision of the storm water management report which we did look at today. We spent the better part of the day looking at [it]. We did not until this evening receive the actual plans. So, I haven't really looked at the plans. There were a number of, I would say, relatively minor comments that would have to be preferably looking at the plans and we haven't done that. The storm water management report addresses the three key criteria that are in the East Haven regulations and it has been designed in accordance with the guidelines established in the 2004 storm water quality manual. Now the basins that have [been] designed will retain the runoff."

Jacobsen continued: "So there's a substantial volume that's retained in these [storm water] basins before it ever overflows into the storm drainage system in Strong Street and then into Grannis Lake. So they have addressed the volume aspect that [is] in the regulations. They have addressed the peak discharge requirement in the regulations. And by virtue of the fact that there's no discharge from the basin until a 50 year . . . storm, they have addressed the suspended solids aspect because there will be no discharge. Now the state guidelines require what they called the water quality volume to be retained with the basin without overflowing it and that's the first inch . . . of runoff. And that's really to address what they call the first flush phenomenon which is the initial runoff on the site that falls on land, that falls on pavement and washes away that stuff off fairly quickly and if that deposits in the basin at the very beginning of the storm. And they have addressed that aspect." Jacobsen concluded his comments by saying that the plaintiffs had agreed to accept any new comments or conditions that Jacobsen may have going forward about the application.

Thus, the court correctly found that the plaintiffs had addressed and resolved Jacobsen's concerns regarding the drainage issues. This was in accordance with the remand order, which provided the plaintiffs with the opportunity to address Jacobsen's concerns. Thus, the essential purpose of the remand order was fulfilled when Hart, the plaintiffs' engineer, worked with Jacobsen to resolve the storm water management issues and the two parties reached a consensus on the technical elements of the storm water drainage system. Indeed, at oral argument before this court, the defendant's counsel stated that the remand application site plan, which includes the new drainage system, is "a better plan" than the site plan proposed in the 2013 applications. Jacobsen's concerns about the storm water drainage

system were remedied in the remand application, which was well within the scope of the Superior Court's remand order.

Accordingly, we agree with the Superior Court's determination that the remand application submitted by the plaintiffs on September 27, 2016, complied with the remand order.[11]

[11] This court recently decided *Garden Homes Management Corp.* v. *Planning & Zoning Commission*, 191 Conn. App. 736, A.3d (2019). That case also involved a denial of a § 8-30g application. Following the appeal by the plaintiffs to the Superior Court, the court issued a remand order for the "issue of the [plaintiffs'] most recent redesign of the access way and apartment building . . . for due consideration by the commission. Id., 744. The Superior Court also ordered that the plaintiffs "should submit to the commission a fully engineered site plan indicating the provision of the turning radii necessary to allow [firetrucks] and other large vehicles to turn around and exit the site with minimal reverse travel, both via elimination of four parking spaces and three units . . . and by other means." Id., 744–45. On remand, the plaintiffs submitted a revised site plan that proposed reducing the number or units and replacing four parking spaces with a fire lane that would serve as a turnaround for firetrucks. Id., 745. During the hearing before the defendant regarding the revised plan, the defendant reviewed a new report that repeated and expanded on concerns regarding the access way and lack of a secondary entrance, matters on which the Superior Court ruled, as well as additional information that had not been before the defendant previously. Id., 763. The defendant again denied the application. The plaintiffs subsequently appealed to the Superior Court, which sustained the plaintiffs' appeal. The Superior Court found that the defendant had gone outside the scope of the limited remand by "instead of focusing on the issue that was remanded, using the remand to bolster its previous objections, which had been ruled on and rejected." Id. This court agreed with the Superior Court and rejected the defendant's appeal. This court concluded that the "commission had its chance, and was not entitled to treat the court's limited remand as a second bite at the apple." Id., 765.

In *Garden Homes*, the defendant exceeded the scope of the remand order by reviewing additional information on issues that either the court previously had ruled on or had not been reviewed by the commission earlier, though they had the opportunity to do so. The commission did not find that there were new health and safety risks posed by the *revised* site plan. Rather, the defendant used the remand order as an opportunity to rehash past arguments that had been reviewed and rejected. Id., 763.

Here, the plaintiffs did not exceed the scope of the remand because the changes made to the remand site plan were done in furtherance of the court's remand and to address Jacobsen's concerns about storm water drainage.

Our conclusion that these revisions do not constitute a new plan does not foreclose the opportunity for planning and zoning commissions to challenge revisions in remand plans that pose substantial risks to health and safety.

III

The defendant next claims that the Superior Court erred by improperly concluding that (1) evidence regarding the application's failure to comply with town regulations did not support the defendant's denial of the revised and remand applications and (2) evidence of how the storm water drainage system described in the application submitted with the remand application posed significant dangers to human health and safety did not support the defendant's denial of the applications. Because the defendant failed to meet its burden to show that sufficient evidence existed in the record to support its denial of the revised and remand applications as necessary to protect health and safety, it cannot prevail on these claims.

The core requirement of § 8-30g requires a planning and zoning commission to prove that its decision to deny an affordable housing development is necessary to protect substantial public interests in health, safety, or other matters that the commission may legally consider; such public interests clearly outweigh the need for affordable housing; and such public interests cannot be protected by reasonable changes to the affordable housing development. General Statutes § 8-30g (g). There must be sufficient evidence in the record to support the commission's denial. General Statutes § 8-30g (g); see, e.g., *Brenmor Properties, LLC* v. *Planning &*

See § 8-30g (g). Just as the defendant in *Garden Homes* was unable to consider new information that was beyond the scope of the remand order, the plaintiffs here similarly would be barred from making significant changes to the site plan that were unrelated to the purpose of the remand order. An example of an unrelated change would be if the plaintiffs *added* four units to the site plan to increase the number of units, as opposed to removing four units in order to add another detention pond. In such an instance, the additional units had not been added in order to satisfy the remand order's focus on storm water drainage and the plaintiffs would have improperly gone beyond the scope of order. In addition, the defendant would have been able to apply the mandatory review of § 8-30g to see if the additional units pose a risk to the health and safety of the community.

Zoning Commission, supra, 162 Conn. App. 698–700. Sufficient evidence in the context of § 8-30g (g) is "less than a preponderance of the evidence, but more than a mere possibility. . . . [T]he zoning commission need not establish that the effects it sought to avoid by denying the application are definite or more likely than not to occur, but that such evidence must establish more than a mere possibility of such occurrence." (Internal quotation marks omitted.) *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 585, 735 A.2d 231 (1999). The defendant did not need to prove that there is a definite likelihood of a certain type of harm due to the development, but it did have to demonstrate that there is more than a mere theoretical possibility. See *River Bend Associates, Inc.* v. *Zoning Commission*, supra, 271 Conn. 26.

First, the defendant argues that the Superior Court should have considered the fact that the plaintiffs' applications did not comply with a particular East Haven zoning regulation[12] regarding the submission of a storm water management plan, including calculations of storm water runoff rates and inclusion of a hydrology report, with the modified plan on March 27, 2013, as support for the denial of the remand application submitted on September 27, 2013. At the January 11, 2017 hearing, Demayo, one of the defendant's members, argued that "the [plaintiffs'] decision not to prepare and submit hydrology reports, runoff calculations and storm water impact analysis in response to Jacobsen's analysis as to the resubmission dated March 27, 2013, and

[12] Section 48.5.7 of the East Haven Zoning Regulations requires "calculations of storm water runoff rates, suspended solids removal rates, and soil infiltration rates before and after completion of the activity being proposed in the application." Section 48.5.8 requires "a hydrology study of predevelopment site conditions. Said study shall be conducted at the level of detail commensurate with the probable impact of the proposed activity and should extend downstream to the point where the proposed activity causes less than a five (5) percent change in the peak flow rates."

rather to prepare an entirely new plan for a new development with a new drainage system supports the [defendant's] original decision that the drainage system contemplated in the March 27, 2013 plan could not be built as designed and would not function as designed." As noted by the Superior Court, by submitting the remand application with a revised storm water drainage system, however, the previous forms of the plaintiffs' application and any accompanying noncompliance with East Haven zoning regulations had been superseded. It may well be that the 2013 versions of the application did include an inadequate storm water drainage system, but with the submission of the remand application, any such deficiency had been remedied. The application submitted on September 27, 2016, replaced the 2013 applications, and accordingly, any zoning noncompliance issues with those applications were not pertinent to the consideration of the 2016 application. Hart also testified during the hearing on the remand application that relevant East Haven zoning regulations and DEEP water quality standards had been met.

Failing to comply with a zoning regulation that is directed to protect public health and safety *may* satisfy the sufficient evidence requirement under § 8-30g (g). *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 162 Conn. App. 698. The commission, however, must still demonstrate that denying an application on the basis of a failure to comply with a certain zoning ordinance is *necessary* under § 8-30g (g). Id. Noncompliance with a zoning regulation alone is not enough to support a commission's denial of an affordable housing development application under § 8-30g (g). See id., 698–99. The principal aim of § 8-30g (g) is to prevent pretextual denial of affordable housing applications. See id., 697. Section 8-30g (g) "does not allow a commission to use its traditional zoning regulations to justify a denial of an affordable housing application, but rather forces the commission to satisfy the

statutory burden of proof." *Wisniowski* v. *Planning Commission*, supra, 37 Conn. App. 317; see also *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, supra, 294 Conn. 716. In order for noncompliance of a zoning regulation to support a commission's denial of an affordable housing application filed pursuant to § 8-30g, the commission must further demonstrate, as part of its burden in an affordable housing application appeal, that compliance with such standards is necessary to protect the public interest, that the risk of harm clearly outweighs the need for affordable housing, and that there is no reasonable change to the affordable housing development that could be made to protect the public interest. *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, supra, 699–700. Here, the defendant failed to demonstrate how the plaintiffs' purported lack of compliance with a zoning regulation would meet this burden required under § 8-30 (g). Thus, even if any noncompliance of the 2013 plans with East Haven zoning regulations was pertinent to the court's review of the defendant's denial of the September 27, 2016 remand application, the defendant failed to carry its burden under § 8-30g (g).

In addition, the defendant argues that the court failed to consider evidence in the record about the risks to health and safety posed by both the March 27, 2013 modified application and the September 27, 2016 remand application. Here, too, the defendant failed to meet its burden under § 8-30g (g). The defendant argues that because it provided reasons why the plaintiffs' applications were denied, the defendant met its burden under § 8-30g (g). This is an inaccurate characterization of the defendant's statutory duties under § 8-30g (g). As noted by the Superior Court and discussed previously, § 8-30g (g) places an *affirmative* duty on a commission to demonstrate that its denial of an application is necessary to protect the public interest, that the

risk of harm clearly outweighs the need for affordable housing, and that there is no reasonable change to the affordable housing development that could be made to protect the public interest. Here, in denying the different versions of the plaintiffs' applications, the defendant failed to demonstrate that there is any, much less sufficient, evidence in the record that shows that denying the affordable housing development was necessary to protect a substantial interest in health and safety. Simply listing reasons why an affordable housing application was denied does not meet the standard of § 8-30g (g). Thus, the Superior Court correctly determined that the defendant failed to carry its burden pursuant to § 8-30g.

In conclusion, we agree with Superior Court's apt summary sustaining the plaintiffs' appeal: "The record indicates that [the plaintiffs] satisfactorily complied with Jacobsen's concerns regarding the substantive water management modifications. Additionally, the [defendant] failed to comply with the mandatory review process of § 8-30g (g) and has not sustained its burden of proof under the statute. Specifically, the [defendant's] decision on remand is not supported by sufficient evidence in the record. There is not even a theoretical possibility of harm articulated by the [defendant]. Even if there were and assuming arguendo that storm water management is a substantial public interest, a review of the record does not indicate how the [defendant's] denial on remand is necessary to protect the public interest, how the public interest outweighed the need for affordable housing, or that the public interest could not be protected by changes to the plan."

The judgment is affirmed.

In this opinion, the other judges concurred.

PUTNAM PARK APARTMENTS, INC., ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE TOWN OF GREENWICH ET AL.

(AC 41696)

Alvord, Bright and Bear, Js.

Syllabus

The plaintiffs appealed to the trial court from the decision of the defendant Planning and Zoning Commission of the Town of Greenwich approving the applications of the defendant N Co. for a special permit and a site plan to construct a new building on property owned by C and leased to N Co., which abuts the plaintiffs' properties. The trial court rendered judgment dismissing the appeal, from which the plaintiffs, on granting of certification, appealed to this court. They claimed, inter alia, that the trial court improperly agreed with the commission's interpretation of a certain building zone regulation (§ 6-94 [b] [1]) to allow the commission to permit a building closer than 100 feet from the plaintiffs' property lines if, after considering the proposed use and its specific location, the commission found that the closer distance would not produce any adverse impacts on the abutting properties. Specifically, the plaintiffs claimed that § 6-94 (b) (1) allows the commission to locate a building closer than 100 feet from their property lines only if that closer location affirmatively will protect the plaintiffs from whatever adverse impacts they would endure if the building were located 100 feet or more from their property lines. *Held*:

1. The trial court properly determined that the commission's construction of § 6-94 (b) (1) of the regulations was proper; the plain language of the regulation requires the commission to consider the particular use and specific location of charitable institutions applying for a permit to construct a building less than 100 feet from a neighboring property line, the requirement in the regulation that the permit may not be issued unless the lesser distance would protect the property owners from adverse impacts requires the commission to find by substantial evidence that there will be no adverse impacts on adjacent properties due to the building being closer than 100 feet, and the plaintiffs' construction implied a decision-making process not set forth in the regulation.
2. There was substantial evidence in the record from which the commission could have concluded that the proposed facility was in compliance with certain building zone regulations (§§ 6-15 and 6-17), which required the commission to take into account whether N Co.'s proposed facility was in conformity with the plan of conservation and development; the evidence demonstrated that N Co. has operated on C's property for approximately forty years, that it has been part of the residential neighborhood during that time, that it currently operates out of facilities that

are not adequate to meet the needs of the community, and that it serves an important function in the community, the proposed building, which will be located on C's property adjacent to where N Co. currently operates, is closer to the plaintiffs' properties to protect natural resources, including mature trees, and under N Co.'s proposal, exiting drainage would be improved, new trees and vegetation will be planted, and the proposed facility would complement existing buildings on the site and have no adverse impact on the historical nature of the area.

3. The trial court and commission properly concluded the provision (§ 6-95) of the building zone regulations governing accessory uses does not apply to N Co.'s special permit application; the proposed building meets a permitted use definition for special exceptions under a separate regulation (§ 6-94), which addresses nonresidential uses, and it was illogical to apply § 6-95 to § 6-94 uses such as N Co.'s proposed building.

Argued May 20—officially released September 24, 2019

Procedural History

Appeal from the decision by the named defendant approving the applications by the defendant Neighbor to Neighbor, Inc., to construct a new building on property owned by defendant the Parish of Christ Church, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Hon. Taggart D. Adams*, judge trial referee; judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to this court. *Affirmed.*

Stephen G. Walko, with whom, on the brief, was *Andrea C. Sisca*, for the appellants (plaintiffs).

Evan J. Seeman, with whom were *John K. Wetmore* and *Edward V. O'Hanlan*, for the appellees (named defendant et al.).

Opinion

BRIGHT, J. The plaintiffs, Putnam Park Apartments, Inc. (Putnam Park), and Putnam Hill Apartments, Inc. (Putnam Hill), appeal from the judgment of the Superior Court affirming the decision of the defendant Planning and Zoning Commission of the Town of Greenwich (commission), which had approved the special permit

and site plan applications of the defendant Neighbor to Neighbor, Inc. (Neighbor), to construct a new building on property, owned by the defendant Parish of Christ Church (Church) and leased to Neighbor, abutting the plaintiffs' properties.[1] On appeal, the plaintiffs claim that the court improperly (1) agreed with the commission's interpretation of § 6-94 (b) (1) of the Greenwich building zone regulations (regulations), (2) concluded that the commission properly found that the record contained substantial evidence that Neighbor's proposal was consistent with §§ 6-15 and 6-17 of the regulations, and (3) concluded that § 6-95 of the regulations did not apply to Neighbor's special permit application. We affirm the judgment of the Superior Court.

The following facts, as revealed by the record, and procedural history inform our review. Neighbor is a charitable corporation that has provided clothing and food to people in need within the Greenwich community for approximately forty years. Neighbor operates out of a 2300 square foot space in the basement of two buildings on Church's property, located at 248 East Putnam Avenue. That space, however, is not handicapped accessible, and it does not meet the needs of Neighbor and the people it serves. Because of the limitations of the space at 248 East Putnam Avenue, Neighbor has resorted to the use of approximately 600 square feet of onsite storage containers. To address these issues, Church and Neighbor reached an agreement whereby Neighbor will lease a portion of Church's property located at 220 East Putnam Avenue in order to construct a parking and loading area, and a new 6363 square foot building, which will provide Neighbor with administrative offices, a community room, and the necessary space for clothing and food intake and distribution (proposed facility).

[1] Church and the commission each have adopted the brief of Neighbor and have elected not to file their own briefs.

The property at 220 East Putnam Avenue is a trapezoidal shaped parcel consisting of 5.25 acres situated south of East Putnam Avenue approximately where Park Avenue and Park Place intersect with East Putnam Avenue from the north. The property is in an R-20 zone. This property also is the site of the Tomes-Higgins House, a nineteenth century residence designed by Calvert Vaux, and an associated carriage house, located in a setting with mature trees in downtown Greenwich. Putnam Hill's property is located and abuts on the southern end of 220 East Putnam Avenue's eastern boundary, and Putnam Park's property is located and abuts 220 East Putnam Avenue's southern boundary. Putnam Hill and Putnam Park are apartment complexes containing a total of 397 individually owned apartments between them. To the east of 220 East Putnam Avenue is 248 East Putnam Avenue, which is the location of Church's parish house, annex, and sanctuary, and is the location out of which Neighbor currently operates.

On October 14, 2015, Neighbor filed a special permit application and a preliminary site plan application with the commission to permit the construction of the proposed facility. During discussions, Neighbor and Church informed the commission that there would be no significant changes in Neighbor's present programs. After the submission of its preliminary application, the commission held public hearings on December 8, 2015, and February 2 and 23, 2016. The commission, thereafter, recognized that Neighbor's current needs were not being met, and it voted to have Neighbor submit a final site plan and special permit applications for its proposed facility. The commission noted that the proposed Neighbor building would be situated 100 feet from the rear (southern) property line and approximately thirty-eight feet from the eastern property line,[2]

[2] As a result of preliminary discussions with the commission, Neighbor had agreed previously to move the building ten feet north; and slightly more than 100 feet from the southern boundary line.

and it set forth specific items that Neighbor needed to address in its final application. Among those items were the relocation of the rear parking area for the new building, the hours of operation, the protection of all existing mature trees on the property, additional buffering from adjacent properties, and the outstanding comments from other town departments and commissions, as well as from the commission's traffic consultant, the BETA Group.

On May 27, 2016, Neighbor submitted its final site plan and special permit applications. Following public hearings held on September 8, 2016, and October 4, 2016, the commission voted, on October 18, 2016, to grant Neighbor's final site plan and special permit applications, with several conditions imposed. In a November 1, 2016 letter, the full decision of the commission, detailing its findings and conditions of approval, was sent to Neighbor's attorney.[3] The special permit certificate and the site plan approval certificate also were issued on that day. By complaint dated November 8, 2016, the plaintiffs appealed to the Superior Court from the commission's decision to approve the site plan and issue a special permit to Neighbor. On March 6, 2018, the Superior Court, *Hon. Taggart D. Adams*, judge trial referee, after determining that the plaintiffs properly had established aggrievement, which is not challenged on appeal to this court, concluded, in a thoughtful and thorough memorandum of decision, that the commission properly had interpreted its regulations and that there was substantial evidence in the record to support the commission's decision, and it dismissed the plaintiffs' appeal. Following our granting of the plaintiffs' petition for certification to appeal; see General Statutes

[3] The letter specifically stated that its contents had been reviewed by members of the commission and that the letter reflected the commission's October 18, 2016 decision.

§ 8-8 (o); this appeal followed. Additional facts will be set forth as necessary.

I

The plaintiffs first claim that the court erred in agreeing with the commission's interpretation of § 6-94 (b) (1) of the regulations. The plaintiffs argue: "In finding that the [c]ommission correctly interpreted and properly applied [§] 6-94 (b) (1) [of the regulations], the . . . [c]ourt necessarily interpreted [§] 6-94 (b) (1). Such interpretation was contrary to the plain language of the regulation and should be reversed." We disagree.

"Because the interpretation of the regulations presents a question of law, our review is plenary. . . . Additionally, zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Ordinarily, [appellate courts afford] deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when [an] agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference. . . . [I]t is for the courts, and not administrative agencies, to expound and apply governing principles of law." (Citation omitted; internal quotation marks omitted.) *Field Point Park Assn., Inc.* v. *Planning & Zoning Commission*, 103 Conn. App. 437, 439–40, 930 A.2d 45 (2007).

Section 6-94 (b) (1) of the regulations provides in relevant part: "The following uses shall be permitted in . . . R-20 . . . zones . . . when authorized by the

. . . [c]ommission by [s]pecial [p]ermit issued pursuant to [§] 6-17 [of the regulations] . . . philanthropic or charitable institutions not of a penal or correctional nature . . . provided that any building so permitted shall be located not less than one hundred (100) feet from any street or lot line *unless the [c]ommission finds in consideration of the particular use and its specific location that a lesser distance will protect adjacent property owners from adverse impacts*." (Emphasis added.)

The plaintiffs argue: "There is no dispute between the parties that . . . Neighbor is a qualified charitable institution as contemplated by [§] 6-94 (b) (1). The second part of [§] 6-94 (b) (1) [however] states that a special permit may be issued, 'provided that any building so permitted shall be located not less than one hundred (100) feet from any street or lot line unless the [c]ommission finds in consideration of the particular use and its specific location that a lesser distance will protect adjacent property owners from adverse impacts.' It is this limitation on the [c]ommission's authority that the [c]ommission, and subsequently the . . . [c]ourt, misinterpreted." Specifically, the plaintiffs contend that the language of § 6-94 (b) (1) "clearly required [d]efendant Neighbor to identify any adverse impacts to [the] [p]laintiffs' properties arising from locating the building 100 feet or more from the abutting property lines, then show that moving the building within the 100 foot setback will protect [the] [p]laintiffs from those adverse impacts."

The plaintiffs construe § 6-94 (b) (1) to allow the commission to locate a building closer than 100 feet from their property lines *only if* that closer location "affirmatively will protect" the plaintiffs from whatever

adverse impacts they would endure if the building were located 100 feet or more from their property lines. In other words, unless moving the proposed building location closer than 100 feet "affirmatively will protect" against adverse impacts on the plaintiffs created by the farther location, the commission does not have the authority to permit it; this would be true even if it would be impossible for the applicant to build at a distance of more than 100 feet and the closer location would have no adverse impacts on the plaintiffs whatsoever.

The Superior Court and the commission, on the other hand, construed § 6-94 (b) (1) to allow the commission to permit a building closer than 100 feet from the plaintiffs' property lines if, after considering the proposed use and its specific location, the commission finds that the closer distance would not produce any adverse impacts on the abutting properties. In other words, they concluded that the commission has the authority, after considering the specific proposed use and location of the area for which the special permit is sought, to permit a building closer than 100 feet from the property line if there would be no adverse impacts on the plaintiffs created by the closer location.[4] We agree with the court that the commission's interpretation was correct.

Section 6-94 (b) (1) of the regulations specifically requires the commission to consider "the particular use and its specific location" when it considers whether to permit a philanthropic or charitable institution to construct a building less than 100 feet from a neighboring property line, which, by its language, gives the

[4] When asked during oral argument what adverse impacts the plaintiffs believed were created by the closer location, the plaintiffs' attorney referenced one resident of Putnam Park who had stated that there would be asphalt where green grass used to be and his view of the Tomes-Higgins House would become obstructed.

commission some amount of discretion to grant the special permit after considering the use and location of the proposed building. The regulation also provides, however, that the commission may not permit such a building unless that "lesser distance will protect adjacent property owners from adverse impacts." We construe that restriction to mean that the commission must find, by substantial evidence, that there will be no adverse impacts on the adjacent property due to the building being closer than 100 feet.[5] This conclusion is based on the plain and straightforward wording of the regulation.

By contrast, the plaintiffs have offered a convoluted interpretation that implies a decision-making process not set forth in the regulation. According to the plaintiffs, the commission first would have to determine whether there were any adverse impacts on abutting property owners from permitting the building anywhere that was more than 100 feet from the lot line. Only if there is a determination that such adverse impacts exist could the commission then consider whether permitting the building within 100 feet of the lot line would

[5] The commission observed that the proposed building would be 100 feet from the rear property line and 38.8 feet from the eastern property line, but that this would have no adverse impacts on the plaintiffs because the only part of the plaintiffs' facilities less than 100 feet from the proposed building would be the caretaker's office at Putnam Hill, which, according to the commission, has people coming and going throughout the day. The commission also found that the closer distance was acceptable, in part, because moving the building to the west would require the elimination of mature trees that are part of the landscape environment of the neighborhood, and that the proposed landscaping between 220 East Putnam Avenue and the plaintiffs' properties would work to screen any potential impacts of the proposed facility. The commission, in the exercise of caution, also placed a number of restrictions on the proposed Neighbor facility, including the hours of operation, the number and schedule of deliveries, the hours of lighting for the building and the exterior, no night time meetings or activities, the times of trash pickup and no change in the current location of the dumpster, and compliance with municipal noise regulations.

protect the abutting owners from the adverse impacts they would have experienced had the building been located more than 100 feet from the lot line. Although the town may have been able to adopt a regulation that provided for such a process, it did not do so with its adoption of § 6-94 (b) (1). We will not read into a regulation words or limitations that are not there. See *Red Hill Coalition, Inc.* v. *Conservation Commission*, 212 Conn. 710, 726, 563 A.2d 1339 (1989) (absent direction from legislative body, court will not read into legislation requirement that is not expressed therein); *Point O' Woods Assn., Inc.* v. *Zoning Board of Appeals*, 178 Conn. 364, 366, 423 A.2d 90 (1979) ("courts cannot, by construction, read into statutes provisions which are not clearly stated"). Furthermore, we will adopt an interpretation of a regulation or statute consistent with its plain language over one that requires mental gymnastics to reach a desired result. See *Kobyluck Bros., LLC* v. *Planning & Zoning Commission*, 167 Conn. App. 383, 392, 142 A.3d 1236 ("[b]ecause zoning regulations are in derogation of common law property rights . . . the regulation[s] cannot be construed beyond the fair import of [their] language to include or exclude by implication that which is not clearly within [their] express terms . . . [and] doubtful language will be construed against rather than in favor of a [restriction]" [citations omitted; internal quotation marks omitted]), cert. denied, 323 Conn. 935, 151 A.3d 838 (2016). Accordingly, we conclude that the court properly determined that the commission's construction of § 6-94 (b) (1) was proper.

II

The plaintiffs also claim that the court improperly concluded that the commission properly found that the record contained substantial evidence that Neighbor's

proposal is consistent with §§ 6-15[6] and 6-17 (d)[7] of the regulations. We are not persuaded.

[6] Section 6-15 of the regulations, titled "standards," provides in relevant part: "(a) The [p]lanning and [z]oning [c]ommission may approve applications for preliminary site plans or deny applications for preliminary site plans according to the standards set forth in this [r]egulation. Alternatively, as a condition of approval, the [c]ommission may require such modifications of the proposed plans as it deems necessary to comply with [r]egulations. In determining whether to approve application for preliminary site plans, deny such applications, or approve such application with modifications, the [p]lanning and [z]oning [c]ommission shall take into consideration the public health, safety and general welfare and the comfort and convenience of the general public, taking into account whether the applicant has satisfied the following specific objectives:

"(1) Conformity of all proposals with the [p]lan of [d]evelopment. . . .

"(3) The protection of environmental quality and the preservation and enhancement of property values. At least the following aspects of the site plan shall be evaluated to determine the conformity of a site plan to this standard:

"(a) Adequacy of open spaces, screening and buffering between similar and dissimilar uses to assure light, air, privacy and freedom from nuisance or other disturbance.

"(b) The location, height and materials of walls, fences, hedges and plantings so as to ensure harmony with adjacent development, screen parking and loading areas, and conceal storage areas, utility installations and other such features, all in conformity with the requirements of [§] 6-176 of the [b]uilding [z]one [r]egulations;

"(c) The prevention of dust and erosion through the planting of ground cover or installation of other surfaces;

"(d) The preservation of natural attributes and major features of the site such as wetlands, highly erodible areas, historic structures, major trees and scenic views both from the site and onto or over the site;

"(e) The conformity of exterior lighting to the requirements of [§§] 6-151 to 6-153 of the [b]uilding [z]one [r]egulations;

"(f) The design and arrangement of buildings and accessory facilities and the installation of proper shielding so as to minimize noise levels at the property boundary;

"(g) The provision of adequate storm and surface water drainage facilities to properly drain the site while minimizing downstream flooding, yet not adversely affect water quality as defined by the State Department of Environmental Protection.

"(4) A high quality of building design, neighborhood appearance, and overall site design. At least the following aspects of the site plan shall be evaluated to determine the conformity of a site plan to this standard:

"(a) A design in harmony with existing and/or proposed neighborhood appearance, as shown by the exterior appearance of the buildings, their location on the site, and their relationship to the natural terrain and vegetation and to other buildings in the immediate area. . . ."

[7] Section 6-17 (d) of the regulations provides in relevant part: "In reviewing special permits, the [p]lanning and [z]oning [c]ommission shall consider all the standards contained in [§] 6-15 (a). In granting any special permit the [c]ommission shall consider in each case whether the proposed use will:

"(1) Be in accordance with the [p]lan of [d]evelopment. . . .

"General Statutes § 8-2 (a) provides in relevant part that local zoning regulations may provide that certain . . . uses of land are permitted only after obtaining a special permit or special exception . . . subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. . . . A special permit allows a property owner to use his property in a manner expressly permitted by the local zoning regulations. . . . The proposed use, however, must satisfy standards set forth in the zoning regulations themselves as well as the conditions necessary to protect the public health, safety, convenience and property values. . . . An application for a special permit seeks permission to vary the use of a particular piece of property from that for which it is zoned, without offending the uses permitted as of right in the particular zoning district. . . . When ruling upon an application for a special permit, a planning and zoning board acts in an administrative capacity. . . . [Its] function . . . [is] to decide within prescribed limits and consistent with the exercise of [its] legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. . . . Review of a special permit application is inherently fact-specific, requiring an examination of the particular circumstances of the precise site for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed facility would be built." (Citations omitted; internal quotation marks omitted.) *Meriden* v. *Planning & Zoning Commission*, 146 Conn. App. 240, 244–45, 77 A.3d 859 (2013).

"In reviewing a decision of a zoning board, a reviewing court is bound by the substantial evidence rule . . . .

"(11) Will not materially adversely affect residential uses, nor be detrimental to a neighborhood or its residents, nor alter a neighborhood's essential characteristics. . . ."

If [the reviewing] court finds that there is substantial evidence to support a zoning board's findings, it cannot substitute its judgment for that of the board. . . . If there is conflicting evidence in support of the zoning commission's stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The agency's decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given. . . .

"This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . The substantial evidence rule is a compromise between opposing theories of broad or de novo review and restricted review or complete abstention. It is broad enough and capable of sufficient flexibility in its application to enable the reviewing court to correct whatever ascertainable abuses may arise in administrative adjudication. On the other hand, it is review of such breadth as is entirely consistent with effective administration. . . . The corollary to this rule is that absent substantial evidence in the record, a court may not affirm the decision of the board." (Citation omitted; internal quotation marks omitted.) Id., 246–47.

Section 6-15 of the regulations sets forth the commission's standards for site plan review. See footnote 6 of this opinion. Section 6-17 (d) sets forth the standards to be considered when the commission acts on a special permit application. See footnote 7 of this opinion. The plaintiffs argue that Neighbor provided no evidence to the commission that the proposed facility met the

standards contained in § 6-17 (d) or in § 6-15 (a) (1), (3), or (4) of the regulations. We consider each of these standards.

Sections 6-15 (a) (1) and 6-17 (d) (1) require that the commission take into account whether Neighbor's proposed facility is in conformity with the plan of conservation and development (plan). The plan states that it is "an advisory document . . . [that] contains the recommendations for [t]own agencies, boards and departments." "Implementation of the [p]lan is an ongoing process," with some recommendations taking until "the end of the planning period or beyond." The specific portions of the plan that the plaintiffs raise in their brief are set forth in the goals synopsis section of the plan. Specifically, the plaintiffs cite to three of the goals, as to which, they claim, there is no evidence of compliance. The first goal cited by the plaintiffs is that the town "[b]e and remain primarily a well-maintained residential community for all of our current and future residents." The second goal cited is that the town "[p]rotect and enhance well-defined neighborhoods and village centers," and the third goal cited is that the town "[p]rotect and enhance water and land natural resources, pervious surfaces, open space, parklands, recreational facilities and areas in an environmentally sensitive manner." The defendants, on the other hand, argue that there was substantial evidence that the proposed facility is in accord with the plan, but, even if there was not substantial evidence that the proposal meets each goal of the plan, the plan is only an advisory document. We conclude that there was substantial evidence that the proposed facility is in keeping with the plan.

The evidence demonstrates that Neighbor has operated on Church's property for approximately forty years, and that it has been part of this residential neighborhood during that time. It also currently operates out of facilities that are not adequate to meet the needs of

the Greenwich community that Neighbor serves, including that the current facility is too small and not handicapped accessible. The proposed facility will be located on Church property, adjacent to where Neighbor currently operates. Although not cited by the plaintiffs, the plan also includes a goal to "provide and support facilities and services to meet community needs." The plan document explains: "Greenwich has many varied private organizations that provide services and community facilities for the [t]own. These organizations contribute to the overall quality of life in Greenwich and their efforts should be supported."

Another goal of the plan is to "preserve the natural landscape to protect resources . . . ." The proposed facility is closer to the plaintiffs' properties to protect the natural resources, including the mature trees, and the historical site located on 220 East Putnam Avenue. The plan sets forth various methods to help accomplish the goal of preserving the natural landscape, one of which is to address flooding and storm water management. The evidence before the commission was that the existing storm water basin in this area is prone to flooding, which will be remedied as part of Neighbor's proposal. Furthermore, additional trees and vegetation will be planted, including along the property lines that abut the plaintiffs' properties. On the basis of the evidence before the commission, we conclude that there was substantial evidence that the proposed facility was in keeping with the plan.

Section 6-15 (3) of the regulations requires that the commission take into account whether the proposed facility protects the "environmental quality and the preservation and enhancement of the property values," and it sets forth seven different aspects of the site plan that the commission must evaluate to determine the conformity of a site plan to this standard. Specifically, this subsection requires that the commission evaluate

the following: "(a) Adequacy of open spaces, screening and buffering between similar and dissimilar uses to assure light, air, privacy and freedom from nuisance or other disturbance . . . (b) [t]he location, height and materials of walls, fences, hedges and plantings so as to ensure harmony with adjacent development, screen parking and loading areas, and conceal storage areas, utility installations and other such features, all in conformity with the requirements of [§] 6-176 of the building zone regulations; (c) [t]he prevention of dust and erosion through the planting of ground cover or installation of other surfaces; (d) [t]he preservation of natural attributes and major features of the site such as wetlands, highly erodible areas, historic structures, major trees and scenic views both from the site and onto or over the site; (e) [t]he conformity of exterior lighting to the requirements of [§§] 6-151 to 6-153 of the [b]uilding [z]one [r]egulations; (f) [t]he design and arrangement of buildings and accessory facilities and the installation of proper shielding so as to minimize noise levels at the property boundary; and (g) [t]he provision of adequate storm and surface water drainage facilities to properly drain the site while minimizing downstream flooding, yet not adversely affect water quality as defined by the State Department of Environmental Protection." The plaintiffs contend that there was no evidence of compliance with this standard. Our review of the record reveals otherwise.

Neighbor's proposal addressed each of the aspects set forth in § 6-15 (a) (3), including: significant screening, buffering, planting of trees, and hiring a licensed arborist to oversee the area during construction; preserving mature trees on site; preserving the historic nature of the area surrounding the Tomes-Higgins House on site; redesigning the proposed building to address the concerns of the historic district commission; addressing the lighting of the site, including ensuring that outside lighting is on a timing mechanism;

requiring strict adherence to the town's noise ordinance; restricting delivery times and times of operation; and implementing a storm water management plan that improves existing drainage.

The plaintiffs also contend that there is no evidence that the proposed facility will comply with § 6-15 (a) (4), which requires the commission to consider the building design, the neighborhood appearance, and the overall site design, to ensure that the proposal is in harmony with existing buildings and the natural terrain and vegetation in the neighborhood. They also contend that there is no evidence that the proposal will comply with § 6-17 (d) (11), which, similar to § 6-15 (a) (4), requires the commission to consider whether the proposal will materially adversely affect residential uses in the neighborhood or be detrimental to the neighborhood or its essential characteristics.

There was evidence submitted to the commission from Neighbor's architect, who opined that the proposed facility would complement existing buildings on the site. There also was evidence that the town's historic district commission initially did not like the original building design that was proposed, so Neighbor changed the design, which then was approved by the state's Historic Preservation Office. There was evidence that in the immediate vicinity of 220 East Putnam Avenue are several religious, civic, and nonprofit institutions, including Temple Sholom, the local YWCA, the Junior League, and Putnam Cottage, along with a private office building called The Columns. Additionally, there was evidence that the mature trees will remain on site and new trees and vegetation will be planted.

There also was evidence that there would be no adverse impact to the historic nature of the area surrounding the Tomes-Higgins House, and that existing drainage will be improved in the area. Further evidence showed that Neighbor has been operating in this area

for approximately forty years, that it is a part of this neighborhood, and that it serves an important function, which the plaintiffs do not dispute. Accordingly, we conclude that there was substantial evidence from which the commission could conclude that the proposed facility was in compliance with these specific portions of §§ 6-15 and 6-17 (d) of the regulations.

III

The plaintiffs' final claim is that the court and the commission improperly concluded that § 6-95 of the regulations does not apply to Neighbor's special permit application. They argue that Neighbor applied to construct a second building at 220 East Putnam Avenue, which is in an R-20 zone, and, therefore, § 6-95 applies because the proposed building necessarily would be an accessory structure to the Tomes-Higgins House, which already is located on the property. According to the plaintiffs: "The record does not contain any evidence that allowing . . . Neighbor's proposal, in addition to the already existing Tomes-Higgins House and carriage house on the property, is permissible under the regulations in an R-20 zone, which allows only uses that are customary and secondary to a single family dwelling." The defendants argue that the proposed building is not an accessory structure, but, rather, a second principal structure, and, therefore, § 6-95 does not apply. Additionally, the defendants argue that pursuant to the plain language of § 6-95, that regulation applies only to the principal uses set forth in § 6-93, which do not include the uses at 220 East Putnam Avenue. We agree that § 6-95 does not apply to Neighbor's proposed building.

As set forth in part I of this opinion, the interpretation of a zoning regulation is a question of law, to which we apply plenary review. *Field Point Park Assn., Inc.* v. *Planning & Zoning Commission*, supra, 103 Conn. App. 439.

Section 6-95 of the regulations provides in relevant part: "(a) Customary uses *incident to the principal*

uses in [§] 6-93 shall be permitted in RA-4, RA-2, RA-1, R-20 and R-12 zones and R-7 zone (by the cross reference in [§] 6-97 (b) (1) to RA-4 zones permitted uses) and R-6 zone (by the cross reference in [§] 6-98 (b) (1) to R7 zones permitted uses)." (Emphasis added.)

Section 6-93 of the regulations provides: "(a) The following principal uses are permitted in RA-4, RA-2, RA-1, R-20 and R-12 Zones and all other principal uses are expressly excluded: (1) Detached single family dwellings, one (1) per lot. (2) Streets, parks, playgrounds, public school grounds and Town buildings and uses."

Section 6-95 (a) specifically states that it applies to the principal uses set forth in § 6-93. Section 6-93 lists several principal uses, none of which include the uses currently at or proposed at 220 East Putnam Avenue. Neighbor's proposed building is only permitted because it meets one of the permitted use definitions for special exceptions in § 6-94. Section 6-95 makes no reference to special permitted uses under § 6-94. This is not surprising given that the examples of permitted accessory buildings listed in § 6-95 (a) (2) (a) includes "[p]rivate garages, barns, sheds, shelters, silos, and other structures *customarily accessory to residential estates, farms or resident uses* . . . ." (Emphasis added.) The permitted special exceptions under § 6-94 are exceptions expressly because they are unquestionably not residential. Thus, based on the clear language of the regulations, it is illogical to apply § 6-95 to § 6-94 uses such as Neighbor's proposed building.[8] Therefore, we

[8] Even if § 6-95 did apply, we agree with the defendants that Neighbor's proposed building is not an accessory use or building. Section 6-5 (a) (6) of the regulations, which sets forth the common definitions used in the regulations, provides: "Building Accessory or Accessory Use shall mean, in a residential zone, any accessory building or use *which is subordinate and customarily incidental to the principal building or use* on the same lot. In a commercial zone, shall mean any accessory building, including shipping containers or other structure customarily incidental to the principal building or use on the same lot." (Emphasis added.) In no way is Neighbor's proposed building subordinate and incidental to the Tomes-Higgins House and its associated carriage house.

conclude that § 6-95 does not apply to those additional uses permitted by special exception or special permit under § 6-94.

The judgment is affirmed.

In this opinion the other judges concurred.

ROBERT KING *v.* COMMISSIONER OF CORRECTION (AC 40904)

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

Syllabus

The petitioner, who had been convicted of two counts of the crime of assault in the first degree in violation of statute (§ 53a-59 [a] [1] and [3]) in connection with an incident in which he stabbed the victim multiple times with a knife, sought a writ of habeas corpus, claiming that his trial counsel had provided ineffective assistance. The habeas court rendered judgment denying in part and dismissing in part the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly concluded that he failed to establish that he had received ineffective assistance from his trial counsel:

   a. The petitioner's claim that his trial counsel provided ineffective assistance by not objecting to the trial court's jury instructions or requesting an additional jury instruction regarding the difference between the intent elements of the two assault charges of which he was convicted, and that he was prejudiced thereby was unavailing; the habeas court reasonably concluded that the petitioner failed to establish both deficient performance and prejudice, as the petitioner, at the habeas trial, presented no proposed charge for which trial counsel could have advocated, the instructions were correct as given and, therefore, further elucidation was not required to satisfy the standard of reasonably competent representation, and there was nothing to suggest that instructions providing some unspecified greater detail would have made a difference in the outcome of the trial.

   b. The petitioner could not prevail on his claim that his trial counsel provided ineffective assistance by declining to object to the admission of a police detective's written summary of the petitioner's oral account of the incident; trial counsel's strategic decision to allow the written summary into evidence to present an alternative narrative, namely, that the petitioner had acted in self-defense, without the petitioner having to testify and subject himself to cross-examination about his criminal

history, was not unreasonable, and there was not a reasonable probability that the outcome of the trial would have been different if the written summary had been excluded.

c. The habeas court reasonably concluded that the petitioner failed to prove that he was prejudiced by his trial counsel's failure to request the trial court to place its rejection of his plea agreement with the state on the record, as there was no reasonable probability that the outcome of the criminal proceedings would have been different if trial counsel had made the request; even if trial counsel had requested the trial court to place its rejection of the plea agreement on the record, the court may or may not have done so, and either way, the plea agreement would have remained rejected, and any suggestion that the court would have reconsidered its rejection if it had been prompted to put the matter on the record was pure speculation.

2. The petitioner could not prevail on his claim that the habeas court improperly dismissed his claim that the trial court violated his right to due process by not stating on the record its reasons for refusing to accept the plea agreement, which he claimed prevented him from pursuing an appeal on that issue; there was nothing in the record to suggest that the petitioner had been harmed by the absence of a record of the rejection of the plea agreement, as the petitioner did not show that there would have been the slightest difference in the outcome of the trial if the rejection had been placed on the record.

Argued January 2—officially released September 24, 2019

Procedural History

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

Randall Bowers, with whom, on the brief, was *Walter C. Bansley IV*, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *Eva Lenczewski*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BEACH, J. The petitioner, Robert King, appeals from the judgment of the habeas court denying in part and

dismissing in part his amended petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly (1) concluded that the petitioner failed to establish that he had received ineffective assistance from his trial counsel, and (2) dismissed the petitioner's claims that his right to due process was violated by the trial court's not stating on the record its refusal to accept the petitioner's pretrial plea agreement.[1] We affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our decision. Following a jury trial, the petitioner was convicted of two counts of assault in the first degree in violation of subdivisions (1) and (3) of General Statutes § 53a-59 (a).[2] During pretrial proceedings and at trial, the petitioner was represented by Attorney Donald O'Brien.

The petitioner appealed to this court, which reversed his conviction and remanded the case for a new trial. *State* v. *King*, 149 Conn. App. 361, 376, 87 A.3d 1193 (2014), rev'd, 321 Conn. 135, 136 A.3d 1210 (2016). Our Supreme Court reversed this court's judgment and remanded the case to this court with direction to affirm the trial court's judgment. *State* v. *King*, 321 Conn. 135, 158, 136 A.3d 1210 (2016). The petitioner commenced this habeas action, and, after a trial, the habeas court denied in part and dismissed in part his amended habeas petition. The habeas court thereafter granted the petitioner's petition for certification to appeal, and the petitioner appealed to this court.

[1] The habeas court dismissed the due process claim pertaining to the plea process and denied the petitioner's claim of ineffective assistance of counsel in that regard.

[2] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third party by means of a deadly weapon or a dangerous instrument; or . . . (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . ."

In its decision on the direct appeal, our Supreme Court recited the following relevant facts, which the jury reasonably could have found. "On December 18, 2010, Kyle Neri and Angela Papp went to visit the victim, Kristen Severino, at her residence in Waterbury. Neri and Papp had spent the day getting high on crack cocaine and continued to do so with the victim once they arrived at her residence. While the three were sitting in the victim's apartment, the [petitioner] entered and began to argue with Neri over an unpaid $10 loan that Neri owed the [petitioner]. As the argument between Neri and the [petitioner] continued to escalate, the [petitioner] went to the apartment's kitchen and returned, brandishing a steak knife. The [petitioner] began waving the knife around and shouting at Neri and Papp as Neri attempted to physically wrest the knife from the [petitioner's] control.

"The victim then intervened in the altercation by attempting to persuade the [petitioner] that Neri should not die over a $10 debt. When her verbal entreaties proved unsuccessful, the victim attempted to physically separate the combatants as the [petitioner] continued to swing the knife at Neri. The [petitioner] then threw the victim against a wall and waved the knife in front of her face. The victim attempted to move and the [petitioner] rapidly stabbed her several times; he then fled the scene." Id., 138–39. Additional facts and procedural history will be set forth as necessary.

I

The petitioner claims that the habeas court improperly concluded that his trial counsel did not render ineffective assistance. He claims that trial counsel's performance was deficient because he did not cause the charges to be more clearly distinguished from each other, object to the admission of a written summary of the petitioner's account of the incident, and insist that

the trial court state on the record its rejection of the plea agreement.[3] We disagree.

"[T]he underlying historical facts found by the habeas court may not be disturbed unless the findings were clearly erroneous. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland* [v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], however, is a mixed question of law and fact subject to our plenary review." (Citation omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 716–17, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

"As enunciated in *Strickland* v. *Washington*, [supra, 486 U.S. 687] . . . [i]t is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . A claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . The claim will succeed only if both prongs are satisfied." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of*

[3] The petitioner has combined in part II of his appellate brief the due process claim and ineffective assistance claim regarding the lack of a record showing the rejection of the plea agreement. For convenience, we group the claims of ineffective assistance together.

Correction, 290 Conn. 502, 510, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Goodrum* v. *Commissioner of Correction*, 63 Conn. App. 297, 300–301, 776 A.2d 461, cert. denied, 258 Conn. 902, 782 A.2d 136 (2001).

A

The petitioner claims that his trial counsel provided ineffective assistance by not objecting to the jury instructions or requesting an additional jury instruction regarding the difference between the intent elements of the two assault charges of which he was convicted, and that he was prejudiced thereby. He contends that he was "improperly convicted under two conflicting theories of guilt, despite both theories being presented in an 'either/or' manner."[4] We are not persuaded.

Section 53a-59 (a) (1) requires an "intent to cause serious physical injury to another person," and § 53a-59 (a) (3) requires that "under circumstances evincing an extreme indifference to human life [the defendant] recklessly engages in conduct which creates a risk of death to another person . . . ." "Convictions are legally inconsistent when a conviction of one offense requires a finding that negates an essential element of another offense of which the defendant has also been

[4] The sentences on the two counts were concurrent.

convicted. . . . In examining a claim of legal inconsistency, we must closely examine the record to determine whether there is any plausible theory under which the jury reasonably could have found the defendant guilty of both offenses. . . . Additionally, in determining whether two mental states are mutually exclusive, the court must consider each mental state as it relates to the particular result described by the statute." (Citations omitted; internal quotation marks omitted.) *State* v. *King*, supra, 321 Conn. 140–41.

In the course of its decision in the direct appeal, our Supreme Court addressed the issue of whether the verdicts were legally inconsistent in the context of the facts of this case: "At [the petitioner's criminal trial], the jury heard two accounts of the assault. First, the [petitioner's] written statement, provided to a detective and introduced into evidence by the state without objection from the defense, described the stabbing as an accident that occurred when he was swinging the knife at Neri and the victim attempted to physically separate the combatants. In the [petitioner's] account, he and Neri 'got into a tussle. [Neri] was trying to take the knife from me. I know it was getting rough. That was when [the victim] got into the middle of us. She was trying to break us up.' While the victim was in between the [petitioner] and Neri, the [petitioner] began 'swinging the knife at [Neri]. In the middle of that, [the victim] started screaming . . . . That's when I realized she was hurt. At first, I ain't know what was wrong, but then I thought about it. That's when I knew that I had stabbed her.' Thus, if the jury credited the [petitioner's] statement, it could have found that [his] act of swinging a knife at Neri in close quarters while the victim was between them demonstrated 'an extreme indifference to human life,' and, that by doing so, [he] 'recklessly engage[d] in conduct which create[d] a risk of death

to another person,' as required by § 53a–59 (a) (3) for a conviction of reckless assault in the first degree.

"Second, the testimony of Neri, Papp, and the victim portrayed the [petitioner] as intentionally stabbing the victim after the victim interfered in the [petitioner's] altercation with Neri. According to Neri, the victim injected herself into the argument, stated that 'nobody's going to get stabbed over $10,' and offered to pay the [petitioner] the money herself. The [petitioner] then put 'the knife to her face and [told] her to shut . . . up.' After the victim attempted to move away, the [petitioner] 'stab[bed] her three times' on the 'left side' of her 'stomach area.' Consistent with Neri's account, Papp testified that the [petitioner] 'started swinging the knife on [the victim]' and 'stabbing her . . . over and over and over, just going into the [victim].' Likewise, the victim testified that she approached the [petitioner] and told him 'that nobody should die and I would get him the money, nobody needs to be killed tonight.' The victim stated that the [petitioner] then 'threw me up against the wall and put the knife in my face and was screaming at me . . . and yelling at me and calling [me] a [derogatory term]. . . .' The victim testified that the [petitioner] then 'stabbed me . . . [i]n my stomach right here, and three times over here on the side.' The jury reasonably could have credited the combined testimony of the victim, Papp, and Neri to conclude that the [petitioner] acted with 'intent to cause serious physical injury' in violation of § 53a-59 (a) (1) when he stabbed the victim at least three times with a steak knife.

"We therefore agree with the state that the jury reasonably could have found that the [petitioner's] conduct amounted to two separate acts. As the [petitioner] was charged with both reckless and intentional assault, the jury could have found that the [petitioner] was guilty of both crimes by stabbing the victim while recklessly

swinging the knife at Neri and then intentionally stabbing the victim after she intervened and the [petitioner] threw her against the wall. The state's exhibits 14 and 15 showed, and the Appellate Court noted, that the victim had *four* stab wounds, and as Neri testified that he only witnessed the [petitioner] stab the victim *three* times, the jury could have attributed the fourth stab wound to the [petitioner's] testimony describing the stabbing as an accident that occurred when the victim got in between the combatants. . . . Accordingly, the [petitioner's] convictions are not legally inconsistent under the state's argument that the assault occurred in two reckless and intentional phases, respectively.

"Additionally, we observe that under the [petitioner's] version that the assault only occurred in one intentional episode, the convictions are not legally inconsistent as the requisite mental states for the two convictions are not mutually exclusive. As is clear from our recent decision, a defendant may be convicted of crimes that require differing mental states, so long as those states relate to different criminal results. *State* v. *Nash*, [316 Conn. 651, 668–69 114 A.3d 128 (2015)]; cf. *State* v. *King*, 216 Conn. 585, 594, 583 A.2d 896 (1990). . . . [T]he [petitioner's] act of stabbing the victim is consistent with two different mental states, each related to two different results. Thus, even under the reasoning of the [petitioner's] argument, the reasoning of *Nash* controls and the verdict returned by the jury is not inconsistent." (Citation omitted; emphasis in original; footnotes omitted.) *State* v. *King*, supra, 321 Conn. 142–45.

At the habeas trial, the petitioner alleged that his trial counsel was ineffective by not requesting jury instructions that more clearly would have differentiated the counts and by not objecting to the instructions that were given. The habeas court rejected the claim on the grounds that the instructions were sufficient and

correct, that there was no indication that the trial court would have altered its instructions if prompted by the petitioner, that no proposed clarifying instructions had been suggested to the habeas court, and that the instructions were, in any event, clear as given. The court concluded that the petitioner failed to establish both deficient performance and prejudice as to this claim.

In the direct appeal, our Supreme Court discussed the clarity of the instructions that were given: "Following his arrest, the [petitioner] was charged in a two count substitute information with two crimes: assault in the first degree in violation of § 53a-59 (a) (1) and assault in the first degree in violation of § 53a-59 (a) (3). . . . At trial, the state did not present the evidence in a manner that related specifically to one charge or the other. After the state rested its case, the court discussed with the [petitioner] his decision not to testify and indicated the possible sentences he could face if convicted. The court specifically noted to the [petitioner] that he could be 'convicted under both sub[divisions]' and explained how that would affect his sentence. Prior to closing argument, the court informed the jury that 'to the extent that what [an attorney] says about the law differs from what I say, you have to follow my legal instructions . . . if there's any discrepancy you've got to follow my instructions.' During closing argument, the prosecutor stated to the jury: 'You may be wondering why there are two charges. You have a variety of evidence to draw from and I don't know what you'll find credible. If you find [the petitioner's] statement credible, he's saying he's waving the knife around, he's angry with [Neri], and [the victim] jumps in the middle, if you believe [the petitioner's] statement you would look more to the assault one, reckless indifference.'

"Following closing argument, the court instructed the jury and informed it that it 'must decide which testimony to believe and which testimony not to believe.

You may believe all, none or any part of any witness' testimony.' The court also reminded the jury that 'arguments and statements by the attorneys in final argument or during the course of the case are not evidence.' The court then explained the charges against the [petitioner] to the jury, noting that [he] was 'charged with two crimes.' The court next explained the elements of each crime to the jury. Following the delivery of the jury charge, the court asked whether counsel had any objection to the charge. Neither counsel objected. At no point in the court's instructions did it suggest that the jury could not convict the [petitioner] of both charges." Id., 146–47.

The petitioner maintains that in the absence of trial counsel's further distinguishing the charges, it is merely a "hypothetical possibility" that the jury plausibly might have pieced the evidence together in such a way as to logically convict the petitioner of both crimes. At the habeas trial, however, the petitioner presented no proposed charge for which trial counsel could have advocated. The habeas court's conclusion that the petitioner failed to establish both deficient performance and prejudice was reasonable. Because the instructions were correct as given, further elucidation was not required to satisfy the standard of reasonably competent representation. See *Walton* v. *Commissioner of Correction*, 57 Conn. App. 511, 524, 749 A.2d 666 (counsel did not render ineffective assistance by failing to object to jury instruction when jury instruction was correct statement of law), cert. denied, 254 Conn. 913, 759 A.2d 509 (2000). Further, there is nothing to suggest that instructions providing some unspecified greater detail would have made a difference in the outcome of the trial, and, therefore, our confidence in the result has not been undermined. See *Strickland* v. *Washington*, supra, 486 U.S. 687. We, therefore, agree with the conclusions of the habeas court.

B

The petitioner also claims that his trial counsel rendered ineffective assistance because he declined to object to the admission of a detective's written summary of the petitioner's oral account of the events that transpired on the night in question. The petitioner characterizes the statement as tantamount to a "confession" of his culpability and stresses that the statement was hearsay that could have been excluded. He contends that prejudice is apparent, referring to a general notion that "experience shows that a jury's ability to evaluate [the] evidence is biased dramatically by the introduction of a confession, no matter how incredible it appears in light of other evidence." *State* v. *Lawrence*, 282 Conn. 141, 204, 920 A.2d 236 (2007). The petitioner challenges the wisdom of the strategy in allowing the statement to be presented to the jury. We are not persuaded.

The following additional uncontested facts are relevant to this claim. Upon the petitioner's arrest, George Tirado, a police detective, advised the petitioner of his *Miranda* rights and then took the petitioner's oral statement regarding the events that occurred on the night in question. With the petitioner's permission, Tirado typed a summary of the statement that the petitioner had made to him. The petitioner signed the first page, but declined to sign the following two pages because he believed that Tirado's transcription "made it sound worse than it was."

At trial, the state called Tirado as a witness. Before Tirado testified, the jury was excused while the court addressed the extent to which Tirado would be permitted to testify as to the statement the petitioner provided to him. The court indicated that, although the document containing Tirado's typed summary of the petitioner's statement was inadmissible, Tirado would be permitted to testify as to his recollection of the petitioner's statement.

During Tirado's direct examination, the state moved to enter into evidence the document containing Tirado's typed summary. Trial counsel made the decision not to object to its admission.[5] It was entered into evidence as a full exhibit, and Tirado read it to the jury.[6]

At the habeas trial, trial counsel acknowledged that Tirado's typed summary was inadmissible and would not have become a full exhibit had he objected to it. He did not object, however, because he wanted to present an alternative narrative, that the petitioner had acted in self-defense, without the petitioner testifying and subjecting himself to cross-examination about his

[5] The following colloquy occurred when the state moved to enter into evidence Tirado's typed summary:

"[The Prosecutor]: I'm going to show [Tirado] what's being marked as state's exhibit 18 for identification purposes.

"The Court: Attorney O'Brien . . . do you have an objection to the admissibility of this document?

"[Defense Counsel]: No, Your Honor.

"The Court: Okay."

[6] The following unsigned portion of Tirado's transcription, as Tirado read into evidence, is relevant: "[Neri] started getting mouthy with me. He was cussing at me and telling me that he was gonna put a bullet in me. I got even more [angry] and that was when I started yelling back at him. I then walked back into the kitchen.

"As I walked into the kitchen, this guy came out of the room. I turned around and [Neri] had a gun in his hand and was pointing it at me. When he was pointing the gun at me, he was talking [smack]. . . . I couldn't tell if the gun was real or fake. But now, I was real [angry]. After pointing the gun at me, [Neri] walked back into his room. I was standing by the kitchen table, so when I looked down I saw a steak knife. I then grabbed the knife and went at [Neri]. I was telling him '. . . you got nerve pointing a gun at me!'

When I went at him, me and [Neri] got into a tussle. [Neri] was trying to take the knife from me. I know it was getting rough. That was when [the victim] got into the middle of us. She was trying to break us up. I remember that I was pushing [the victim] to get at [Neri], and I remember [Neri] pushing [the victim] to get at me. Like I said, it was getting stupid. At some point, I was swinging the knife at [Neri]. In the middle of that, [the victim] started screaming 'oh my . . . oh my . . . .' She was screaming real loud. That was when me and [Neri] backed up. We both stared at [the victim]. That's when I realized that she was hurt. At first I ain't know what was wrong, but then I thought about it. That's when I knew that I had stabbed her."

criminal history. Trial counsel had hoped that the jury would credit the self-defense theory so that the petitioner would be found not guilty of all the charges. Accordingly, he believed that allowing the summary into evidence was his best trial strategy.

Noting that the petitioner had not proposed an alternative strategy and recognizing the presumption that trial counsel's performance was reasonable, the habeas court found no deficiency in trial counsel's strategic decision not to object to the admission of Tirado's typed summary. The court concluded that the petitioner failed to establish both deficient performance and prejudice as to this issue.

A habeas court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." *Strickland* v. *Washington*, supra, 466 U.S. 689. "In *Strickland*, the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense, after it has proved unsuccessful, to conclude that a particular act or omission was unreasonable. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Martin* v. *Commissioner of Correction*, 155 Conn. App. 223, 227, 108 A.3d 1174, cert. denied, 316 Conn. 910, 111 A.3d 885 (2015).

The strategy of allowing Tirado's typed summary of the petitioner's statement into evidence was not unreasonable, and, in any event, there is not a reasonable probability that the outcome of the trial would have been different if the typed summary had been excluded.

C

The petitioner additionally claims that the habeas court erred in denying, for lack of prejudice, his claim that his trial counsel's failure to request the trial court to place its rejection of the plea agreement on the record constituted ineffective assistance of counsel. The petitioner contends[7] that the court was required by Practice Book §§ 39-7[8] and 39-10[9] to place its reasons on the record and that counsel's failure to prompt the court to do so constituted ineffective assistance. We agree with the conclusion of the habeas court that no prejudice has been shown.

The following additional facts, generally agreed to by the parties, are relevant to this claim. Prior to the start of evidence before the jury in the criminal case, the petitioner and the state reached a plea agreement,

[7] The petition alleged in relevant part: "Trial counsel's acts and omissions . . . fell below the level of reasonable competence required of habeas and/or criminal defense lawyers within the state of Connecticut for the following reasons . . . D. Failure to request that the trial court . . . create an adequate record regarding the court's refusal to permit a plea bargain offered by the prosecution and accepted by the petitioner, pursuant to the requirements of Practice Book § 39-10. E. Failure to object, on the record, to the trial court's refusal to permit a plea bargain offered by the prosecution and accepted by the petitioner, as an abuse of the court's discretion."

[8] Practice Book § 39-7 provides: "If a plea agreement has been reached by the parties, which contemplates the entry of a plea of guilty or nolo contendere, the judicial authority shall require the disclosure of the agreement in open court or, on a showing of good cause, in camera at the time the plea is offered. Thereupon the judicial authority may accept or reject the agreement, or may defer his or her decision on acceptance or rejection until there has been an opportunity to consider the presentence report, or may defer it for other reasons."

[9] Practice Book § 39-10 provides: "If the judicial authority rejects the plea agreement, it shall inform the parties of this fact; advise the defendant personally in open court or, on a showing of good cause, in camera that the judicial authority is not bound by the plea agreement; afford the defendant the opportunity then to withdraw the plea, if given; and advise the defendant that if he or she persists in a guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

prompted at least in part by the state's having encountered difficulty in producing witnesses. The prosecutor and trial counsel presented their agreement to the presiding judge, in chambers and off the record. The judge rejected the plea agreement, and trial counsel did not ask the judge to place on the record his reasons for rejecting the agreement. The judge did not sua sponte provide information on the record, and trial counsel did not raise the issue in postverdict motions. At the habeas trial, trial counsel acknowledged that, in hindsight, he had reason to ask the judge to place his rejection on the record, because he believed that "the [j]udge was acting as a prosecutor . . . [b]y telling the [s]tate what—what [the state] can and cannot prove based on . . . the file."

As noted previously, in order to show prejudice a petitioner must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 510. The standard, as applied to this case, requires a reasonable probability that the outcome of the criminal proceedings would have been different if trial counsel had requested the trial court to place its rejection of the plea agreement on the record.

Had trial counsel so requested, the court perhaps may have responded by putting its rejection on the record; it also may have declined the request. In either event, the outcome would not have been different—the plea agreement would remain rejected. There is no right to have any particular agreement accepted by the court; see *Missouri* v. *Frye*, 566 U.S. 134, 147–48, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012); see also *State* v. *Obas*, 147 Conn. App. 465, 481–82, 83 A.3d 674 (2014), aff'd, 320 Conn. 426, 130 A.3d 252 (2016); and any suggestion that the court would have reconsidered its rejection if it had been prompted to put the matter on the

record is pure speculation.[10] The habeas court reasonably concluded that the petitioner did not prove prejudice.

II

The petitioner finally claims that the habeas court improperly dismissed his claim that the trial court violated his right to due process by not placing on the record its reasons for refusing to accept the parties' plea agreement because "the petitioner was unable to seek judicial review of the court's refusal to accept the plea agreement." In his appellate brief, he stresses that he and the state were in agreement regarding the proposed plea, and he seems to suggest that the trial court constitutionally could reject the plea only if the rejection was made on the record. He suggests that his position is consistent with Practice Book § 39-10, although he expressly does not argue that a violation of § 39-10 by itself provides a sufficient ground for relief.

The respondent, the Commissioner of Correction, pleaded in his return that the constitutional claim

[10] The petitioner suggests that the trial court invaded the province of the prosecution by evaluating the strength of the state's case and the relative likelihood of procuring the appearance of witnesses. If a court should be of the opinion that the state's ability to prove a compelling case is strong, it may well reject an agreement manifesting unusual leniency; however, if the plea has been accepted conditionally by the court, the defendant must be afforded the opportunity to withdraw the plea. See *Santobello* v. *New York*, 404 U.S. 257, 263, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); see also *United States* v. *Skidmore*, 998 F.2d 372, 376 (6th Cir. 1993) (noting, in federal context, "Rule 11 [of the Federal Rules of Criminal Procedure] expressly permits a court to reject a proposed plea agreement, provided that the court allow the defendant to withdraw the plea and advise the defendant of the potential consequences of withdrawing a plea. Rule 11 does not limit the reasons for which the district court may reject the proposed plea agreement; rather, its terms permit a district court to reject a plea agreement either because the proposed agreement is too lenient or because it is too harsh.") Connecticut recognizes the same principle. See, e.g., *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 362, 53 A.3d 983 (2012) (noting one element necessary to show prejudice caused by trial counsel's deficient advice against accepting plea offer is that trial court would have accepted proposed agreement); see also Practice Book § 39-7 (court may accept or reject agreement of parties). We have been presented no authority for the proposition that a court's evaluation of the case impermissibly invades the province of the prosecution.

should be dismissed because it failed to state a ground on which relief could be granted.[11] The respondent argues that judges are free to reject proposed plea agreements even if both parties have agreed to the disposition and that the requirement that pleas be placed on the record arises only when the court has agreed as well. If a court rejects a previously accepted plea prior to sentencing, the defendant is entitled to withdraw the plea. The respondent suggests as well that merely placing the plea agreement and rejection on the record would have provided no actual benefit to the petitioner in any event.[12] The habeas court noted that the petitioner does not have a constitutional right to be offered a plea, nor a right to have any plea accepted by the court. The habeas court further observed that Practice Book § 39-10 applies only after a plea has been initially accepted by the court, and there was no showing that the trial court had abused its discretion.

This claim presents a mixed question of law and fact over which our review is plenary. See *Small* v. *Commissioner of Correction*, supra, 286 Conn. 717. The petitioner's claim does not implicate a fundamental right.[13] "A defendant has no right to be offered a plea . . . nor a federal right that the judge accept it . . . ." (Citation omitted.) *Missouri* v. *Frye*, supra, 566 U.S. 148. Although the parties presented a plea agreement to the court in chambers, the court did not accept their agreement.

There is nothing to suggest that the petitioner has been harmed by the absence of a record of the rejection of the plea agreement. The petitioner argues that the

[11] Presumably this defense was raised pursuant to Practice Book § 23-29 (2).

[12] The petitioner suggests that had the rejection been on the record, he would have been able to show that the court "had crossed a line" and acted in a prosecutorial role. Courts, however, exercise discretion in determining whether a proposed plea is appropriate, and independently assessing strengths and weaknesses of both sides is part of the process. See generally the discussion in *State* v. *Cruz*, 155 Conn. App. 644, 654–57, 110 A.3d 527 (2015); see also footnote 10 of this opinion.

[13] No independent state constitutional claim has been advanced.

absence of a record prevented him from pursuing an appeal on this issue. Because there is no right to have a plea accepted, however, and the court has discretion whether to accept a plea, there has been no showing that there would have been the slightest difference in the outcome of the trial if the rejection had been placed on the record. Without harm and any reasonable probability of prejudice, the petitioner cannot prevail. See *Small* v. *Commssioner of Correction*, supra, 286 Conn. 731 (constitutional claim of ineffective assistance of counsel fails because impossible for petitioner to demonstrate reasonable probability that verdict would have been different had omitted jury instruction been included; therefore, no prejudice demonstrated). Accordingly, the habeas court properly dismissed the petitioner's due process claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* WAGNER GOMES (AC 41364)

Alvord, Moll and Bear, Js.

Syllabus

Convicted of the crime of assault in the second degree in connection with his conduct in hitting the victim in the head with a bottle, the defendant appealed to this court. The defendant and another individual, M, had been fighting in a bar as a result of offensive remarks that M made to the defendant's girlfriend. After security guards separated the defendant and M, the victim asked M why he was fighting, and the defendant struck the victim with the bottle. On appeal, the defendant claimed that the trial court deprived him of his right to present a defense of investigative inadequacy when it omitted from its instructions to the jury certain language in his written request to charge that pertained to the police investigation into the incident as it might relate to weaknesses in the state's case. The defendant claimed that without the inclusion of the language he requested, the jury would not have understood how to use the evidence he elicited at trial about the inadequacies of the police

investigation. *Held* that the trial court did not mislead the jury or violate the defendant's right to present a defense by omitting the requested language from its instructions: that court's jury charge was identical to the model jury instruction provided on the Judicial Branch website and was in keeping with long-standing Connecticut law, nearly identical instructions have been upheld by our Supreme Court, the defendant presented his evidence to the jury and cross-examined the state's witnesses regarding the alleged inadequacy of the police investigation, and the court did not direct the jury to disregard that evidence or argument, and specifically instructed the jury to consider all of the evidence before it; moreover, the court, in its charge on investigative inadequacy, repeated to the jury its responsibility to determine whether the state, in light of all the evidence, had proved beyond a reasonable doubt that the defendant was guilty of the count with which he was charged.

Argued March 5—officially released September 24, 2019

Procedural History

Substitute information charging the defendant with the crime of assault in the second degree, brought to the Superior Court in the judicial district of Fairfield, geographical area number two, and tried to the jury before *Doyle*, *J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Lisa J. Steele, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John C. Smriga* and *Margaret E. Kelley*, state's attorneys, for the appellee (state).

Opinion

ALVORD, J. The defendant, Wagner Gomes, appeals from the judgment of conviction, rendered after a jury trial, of assault in the second degree in violation of General Statutes § 53a-60 (a) (2).[1] On appeal, the defendant claims that the trial court erred in omitting from

[1] General Statutes § 53a-60 (a) provides in relevant part: "A person is guilty of assault in the second degree when . . . (2) with intent to cause physical injury to another person, the actor causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm . . . ."

its jury instruction his proposed sentence, "[h]owever, you may consider evidence of the police investigation as it might relate to any weaknesses in the state's case,"[2] and, in doing so, deprived him of his right to present a defense of investigative inadequacy.[3] We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In the early morning hours of September 12, 2015, the victim, Edilene Brandao, along with several other persons, including Raphael Morais,[4] attended a birthday party at the Brazilian Sports Club (club), located at 29 Federal Street, in Bridgeport. Shortly after arriving, the victim had one drink, and Morais went to the bar to get a drink for himself. Morais confronted the defendant's girlfriend, who was at the bar, pushed her, and made offensive remarks to her. A fight then broke out inside

[2] Although the defendant framed his claim on appeal as one of plain error, the state does not argue that the defendant's claim was unpreserved. Thus, in this opinion, we address whether the court erred in omitting the defendant's proposed sentence from its charge to the jury.

[3] The defendant also requests that this court exercise its supervisory powers over the administration of justice to "craft a proper investigative evidence instruction." We decline the defendant's request. "Although [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle. . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstances where these traditional protections are inadequate to ensure the fair and just administration of the courts." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Coward*, 292 Conn. 296, 315, 972 A.2d 691 (2009). For the reasons set forth in this opinion, the defendant's request does not warrant the exercise of our supervisory powers.

[4] The trial transcripts in this case inconsistently refer to this individual as "Raphael" and "Rafael." The parties, in their appellate briefs, inconsistently refer to him as "Morais" and "Moais." For consistency and clarity, we refer to him in this opinion as Morais.

the club between the defendant and Morais. Security guards intervened and separated them. The defendant was taken outside, and Morais was taken to the patio.

The victim went to the patio with Morais. There was a fence at the back of the patio, and the victim had her back to that fence. The victim proceeded to ask Morais why he was fighting, and Morais responded, "it's him." The victim then turned to face the fence and saw the defendant standing approximately two feet away from her, on the outside of the fence, with a bottle in his hand. The defendant then struck the victim on the forehead with the bottle.

The club's owner, Demetrio Ayala, Jr., knew the defendant because he visited the club several times per month. Ayala observed the fight between the defendant and another person known to him as "Rafael."[5] Ayala, after hearing shouting on the patio, went to investigate and discovered that the victim was bleeding. Ayala then went out the front door of the club in order to try to find the defendant, whom he saw in the parking lot running away from the club. Ayala subsequently called the police.

Before the police arrived, the victim was transported to St. Vincent's Medical Center in Bridgeport by private car in the company of several persons who were in the club that night. She arrived at the hospital at about 12:30 a.m., where she was seen by a triage nurse and received treatment for the bleeding and pain. Several hours later, the victim was also treated by a plastic surgeon and then released.[6]

[5] It is not clear from the record whether the individual that Ayala knew as "Rafael" was Raphael Morais. Ayala did not know the last name of the individual whom he referred to as Rafael, and the spelling of the name, Raphael or Rafael, is inconsistent throughout the trial transcripts. Nevertheless, both parties concede in their briefs that the defendant and Morais were engaged in some form of altercation.

[6] The plastic surgeon who treated the victim testified regarding her injuries. Reading from an emergency department attending physician's note that was in evidence, the plastic surgeon stated: "The patient sustained a deep

John Topolski and Matthew Goncalves, officers with the Bridgeport Police Department, were among the first police officers to arrive at the club shortly after 1:30 a.m. Upon their arrival, they observed that "[the scene] was a mess" and that "there [were] maybe a hundred people scattered amongst the streets." Officer Topolski briefly spoke with Morais, who had, he observed, a swollen face, one eye that was swollen shut, profuse facial bleeding, clothes covered in blood, and an apparently dislocated shoulder.[7] Once the scene was secure, the officers departed for the hospital, intending to question Morais, who also had been taken to the hospital before the police completed their initial on-site investigation. While the officers were en route to the hospital, they received a radio dispatch informing them that a woman, who also had been injured at the club, was already at the hospital.

When the officers arrived at the hospital, Officer Topolski went in search of the injured woman, and Officer Goncalves went in search of Morais. Although Officer Goncalves located Morais, he was unable to speak with Morais because his wounds were being treated, and he was being prepared for surgery. Officer Topolski located the victim in the waiting area of the hospital's emergency department and identified her as the woman who had been injured at the club. The victim was in the company of approximately five other individuals. Officer Topolski observed that the victim was crying and visibly shaken. She had blood covering her face

laceration in the left eyebrow, and she was struck with a bottle on the face during the fight in the bar. . . . There is a five centimeter in length laceration that's deep with irregular borders and a small stellar portion [over] the left brow . . . ." The plastic surgeon also testified that the "stellar portion" referred to "where the skin . . . bursts open from contact where it stellates, so it just looks like a star. . . . It's not a clean laceration, like you get from a kitchen knife."

[7] There was evidence that, after the defendant struck the victim with the bottle, several other patrons of the club attacked Morais.

and was holding gauze to her head. Despite her physical and emotional condition, the victim was coherent enough to provide information to Officer Topolski. In her verbal statement to Officer Topolski, the victim denied that Morais may have been the aggressor in some type of altercation with her. Officer Topolski, while he was at the hospital, also obtained the name of the defendant, but it was not clear from whom he received that information.[8]

On October 2, 2015, the victim went to the Bridgeport police station with her attorney, where she was interviewed by Detective Paul Ortiz in the presence of Sergeant Gilbert Valentine about the events that occurred on September 12, 2015. Detective Ortiz reviewed Officer Topolski's report of the events. Through this report, Detective Ortiz learned that the defendant might be a suspect. Detective Ortiz prepared a photographic array that included a photograph of the defendant, which he showed to the victim. When the victim viewed the photograph of the defendant, she became emotional and started to cry. She examined the entire array and then selected the defendant's photograph, on which she wrote that she was "100 percent" confident that he was the person who had attacked her. The defendant was subsequently arrested.

At trial, the defendant sought to persuade the jury that reasonable doubt existed regarding the victim's identification of the defendant as the person who assaulted her. The main defense advanced by the defendant was that the police had conducted an inadequate investigation of the incident.

During closing arguments, defense counsel argued that "this case screams reasonable doubt. . . . [T]he

[8] The victim testified that she did not give the defendant's name to the police because she did not know the defendant prior to the night she was attacked.

police completely failed in this case, and they completely failed [the victim]. They didn't go back to that scene that night. They didn't identify the crime scene. They didn't take any photos so that you, ladies and gentlemen, could see how the scene looked that night. How the lighting looked. They never tried to get any surveillance video. . . . They didn't confirm what happened." Defense counsel also argued that the police "spent ninety minutes on this investigation," and that the case "boil[ed] down to one witness and what she saw in a split second, and she may very well believe that [the defendant] did this to her. But the police did nothing to confirm as to what Officer Goncalves said they needed to do."

In connection with his defense of inadequate police investigation, the defendant had filed a written request to charge the jury, which provided in relevant part: "[1] You have heard some arguments that the police investigation was inadequate and biased. [2] The issue for you to decide is not the thoroughness of the investigation or the competence of the police. [3] However, you may consider evidence of the police investigation as it might relate to any weaknesses in the state's case. [4] Again, the only issue you have to determine is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he is charged."[9]

On October 27, 2018, the court held a charge conference. In discussing the final charge, the court told defense counsel that it would be charging on the adequacy of the police investigation, in a form that was somewhat similar to the defendant's requested instruction, but that "[i]t may be a little bit different."

[9] In its brief, the state referenced the individual components of the defendant's requested jury instruction as points one, two, three, and four. For clarity, we adopt the same structure.

The court instructed the jury in relevant part: "You have heard some arguments that the police investigation was inadequate and that the police involved in the case were incompetent or biased. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty of the counts with which he was charged." Defense counsel objected to the court's omission of point three of his requested instruction.

The jury subsequently found the defendant guilty of assault in the second degree in violation of § 53a-60 (a) (2). The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of five years of imprisonment, execution suspended after two years, followed by three years of probation. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that the jury instructions, as given, deprived him of his right to present a defense of investigative inadequacy. Specifically, the defendant argues that the court erred in failing to include point three of his requested jury charge, which reads: "However, you may consider evidence of the police investigation as it might relate to any weaknesses in the state's case." The defendant argues that without the inclusion of this requested sentence, the jury would not "have understood how to use the evidence [the defendant] was able to elicit about the inadequacies of [the police investigation]." We conclude that the court did not err in omitting point three from the jury charge.

We begin by setting forth the standard of review and legal principles that guide our analysis. "[A] fundamental element of due process of law is the right of a

defendant charged with a crime to establish a defense. . . . Where, as here, the challenged jury instructions involve a constitutional right, the applicable standard of review is whether there is a reasonable possibility that the jury was misled in reaching its verdict. . . . In evaluating the particular charges at issue, we must adhere to the well settled rule that a charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is . . . whether it 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." (Internal quotation marks omitted.) *State* v. *Collins*, 299 Conn. 567, 598–99, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011).

"While a request to charge that is relevant to the issues in a case and that accurately states the applicable law must be honored, a court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the court's failure to give a charge in exact conformance with the words of the request will not constitute a ground for reversal. . . . As long as [the instructions] are correct in law, adapted to the issues and sufficient for the guidance of the jury . . . we will not view the instructions as improper." (Citations omitted; internal quotation marks omitted.) *State* v. *Aviles*, 277 Conn. 281, 309–10, 891 A.2d 935, cert. denied, 549 U.S. 840, 127 S. Ct. 108, 166 L. Ed. 2d 69 (2006); see *State* v. *Kendrick*, 314 Conn. 212, 225–26, 100 A.3d 821 (2014) (clarifying decision in *Aviles*). "A challenge to the validity of jury instructions presents a question of law over which [we exercise] plenary review." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 599.

We conclude that the instruction did not mislead the jury or violate the defendant's right to present a defense.

First, the court's charge as given was identical to the model jury instruction provided on the Judicial Branch website.[10] See Connecticut Judicial Branch Criminal Jury Instructions 2.6-14 (November 6, 2014), available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited September 18, 2019). As our Supreme Court has noted, "[w]hile not dispositive of the adequacy of the [jury] instruction, an instruction's uniformity with the model instructions is a relevant and persuasive factor in our analysis . . . ." (Internal quotation marks omitted.) *State* v. *Ebron*, 292 Conn. 656, 688 n.27, 975 A.2d 17 (2009), overruled in part on other grounds by *State* v. *Kitchens*, 299 Conn. 447, 472–73, 10 A.3d 942 (2011); see also *State* v. *Shenkman*, 154 Conn. App. 45, 75, 104 A.3d 780 (2014), cert. denied, 315 Conn. 921, 107 A.3d 959 (2015).

Moreover, the court's instruction was in keeping with long-standing Connecticut law. Nearly identical instructions were upheld by our Supreme Court in *State* v.

[10] Instruction 2.6-14, entitled "Adequacy of Police Investigation," was approved by the Judicial Branch's criminal jury instruction committee on November 6, 2014. It provides: "You have heard some arguments that the police investigation was inadequate and that the police involved in this case were incompetent. The issue for you to decide is not the thoroughness of the investigation or the competence of the police. The only issue you have to determine is whether the state, in light of all the evidence before you, has proved beyond a reasonable doubt that the defendant is guilty of the count[s] with which (he/she) is charged."

The commentary to instruction 2.6-14 states that " '[a] defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect.' *State* v. *Collins*, [supra, 299 Conn. 599–600] (finding that such an instruction as this does not preclude the jury from considering the evidence of the police investigation as it might relate to any weaknesses in the state's case). '*Collins* does not require a court to instruct the jury on the quality of police investigation, but merely holds that a court may not preclude such evidence and argument from being presented to the jury for its consideration.' *State* v. *Wright*, 149 Conn. App. 758, 773–74, [89 A.3d 458] cert. denied, 312 Conn. 917 [94 A.3d 641] (2014)." Connecticut Judicial Branch Criminal Jury Instructions, supra, 2.6-14, commentary.

Collins, supra, 299 Conn. 598,[11] and *State* v. *Williams*, 169 Conn. 322, 335 n.3, 363 A.2d 72 (1975),[12] as well as by this court in *State* v. *Nieves*, 106 Conn. App. 40, 57–58, 941 A.2d 358, cert. denied, 286 Conn. 922, 949 A.2d 482 (2008),[13] and *State* v. *Tate*, 59 Conn. App. 282, 284–85, 755 A.2d 984, cert. denied, 254 Conn. 935, 761 A.2d 757 (2000).[14]

[11] In *Collins*, the court instructed the jury in relevant part: "[T]he ultimate issue before you is not the thoroughness of the investigation or the competence of the police. The ultimate issue you have to . . . determine is whether the state in the light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty on one or more of the counts for which he is charged." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 600.

[12] In *Williams*, the court instructed the jury in relevant part: "Now, you have heard in the course of arguments discussion as to whether the police conducted a thorough search. You have also heard some discussion about the competency of the police in this arrest. Now, ladies and gentlemen, this question might be a matter of opinion, but the [s]tate has put its evidence before you, and the defense was entitled to make an investigation and put its evidence before you also, and, of course, not only the [s]tate but also the defense has put on evidence on behalf of the defendant. I say to you, ladies and gentlemen, that the issue before you is not the thoroughness of the investigation or the competence of the police. This issue you have to determine is whether the [s]tate in the light of all the evidence before you has proved beyond a reasonable doubt that the defendant is guilty on one or both counts with which he is charged." (Internal quotation marks omitted.) *State* v. *Williams*, supra, 169 Conn. 335–36 n.3.

[13] In *Nieves*, the relevant portion of the charge provided: "During the course of the case, you've heard some discussion or questioning as to whether the police conducted a thorough investigation and the competency of the police in this case. The issue before you in this case is not the thoroughness of the investigation or the competence of the police. The issue you have to determine is whether the state, in light of the evidence before you, has proven beyond a reasonable doubt [that] the defendant is guilty of the crimes charged." (Internal quotation marks omitted.) *State* v. *Nieves*, supra, 106 Conn. App. 57.

[14] In *Tate*, the court instructed the jury in relevant part: "You've heard questioning regarding the thoroughness of the police investigation in this case. This question might be a matter of opinion, but the state has put its evidence before you, and the defense is entitled to make an investigation and put its evidence before you also. And, of course, not only the state but also the defense has put on evidence in behalf of the defendant. I tell you that the issue before you is not the thoroughness of the investigation of the responding police officer; the issue you have to determine is whether the state, in light of all the evidence before you, has proved the defendant's guilt beyond a reasonable doubt as I have recited that to you. That is the sole issue." (Internal quotation marks omitted.) *State* v. *Tate*, supra, 59 Conn. App. 284.

In *State* v. *Collins*, supra, 299 Conn. 567, our Supreme Court considered and rejected the same arguments being made by the defendant in this case. The defendant in *Collins* claimed that the trial court's instruction with respect to the adequacy of the police investigation, which was nearly identical to the instruction in the present case; see footnote 11 of this opinion; misled the jury and deprived him of his right to present a defense. *State* v. *Collins*, supra, 598. Specifically, he argued that the instruction "destroyed [his] defense by precluding consideration of it and also by conveying the judge's impression that his defense was not worthy of consideration." (Internal quotation marks omitted.) Id. Our Supreme Court disagreed. It held that the instruction "did not mislead the jury or violate the defendant's right to present a defense because it did not direct the jury not to consider the adequacy of the investigation as it related to the strength of the state's case, or not to consider specific aspects of the defendant's theory of the case." Id., 600–601.

In reaching its conclusion, our Supreme Court explained: "In the abstract, whether the government conducted a thorough, professional investigation is not relevant to what the jury must decide: Did the defendant commit the alleged offense? Juries are not instructed to acquit the defendant if the government's investigation was superficial. Conducting a thorough, professional investigation is not an element of the government's case. . . . A defendant may, however, rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect." (Citations omitted; internal quotation marks omitted.) Id., 599–600.

Our Supreme Court nevertheless concluded that the instruction was not misleading because it "was phrased in neutral language and did not improperly disparage the defendant's claims, or improperly highlight or

endorse the state's arguments and evidence"; id., 602; and "properly reminded the jury that its core task was to determine whether the defendant was guilty of the charged offenses in light of all the evidence admitted at trial, rather than to evaluate the adequacy of the police investigation in the abstract." Id., 601.

In the present case, the defendant relies on *State* v. *Wright*, 322 Conn. 270, 140 A.3d 939 (2016), in support of his claim.[15] Specifically, he argues that the present case is distinguishable from *Collins*, *Williams*, *Nieves* and *Tate* "because of [*Wright*'s] clear recognition of

[15] The defendant also cites out-of-state authority and argues that "the instruction as given here is in conflict with . . . how similar instructions are phrased in federal courts and in other states." First, the defendant argues that the court's instruction implicates the same concerns as the instruction in *Stabb* v. *State*, 423 Md. 454, 31 A.3d 922 (2011), and *Atkins* v. *State*, 421 Md. 434, 26 A.3d 979 (2011). We are not persuaded. The present case is readily distinguishable from *Stabb* and *Atkins*. In those cases, the trial courts instructed the jury that there was "no legal requirement for the [s]tate to utilize any specific investigative technique or scientific test to prove its case." (Internal quotation marks omitted.) *Stabb* v. *State*, supra, 463; *Atkins* v. *State*, supra, 441–42. In both cases, the Court of Appeals of Maryland determined that the jury instruction invaded the province of the jury and effectively relieved the state of its burden to prove that the defendant was guilty beyond a reasonable doubt. *Stabb* v. *State*, supra, 472; *Atkins* v. *State*, supra, 455. The court in *Atkins* explained why the instruction was improper: "Basically, the instruction directed the jury to ignore the fact that the [s]tate had not presented evidence connecting the knife to the crime, implying that the lack of such evidence is not necessary or relevant to the determination of guilt, and to disregard any argument by defense to the contrary." *Atkins* v. *State*, supra, 453; see also *Stabb* v. *State*, supra, 472 ("[i]n giving the . . . instruction to the jury, the trial court directed effectively the jurors not to consider the absence of a [sexual assault forensics examination] or corroborating physical evidence").

The court's instruction in the present case does not implicate such concerns. The instruction does not imply that the evidence regarding inadequate police investigation was not necessary or relevant to the determination of guilt. Moreover, the court, in its instruction, clearly articulated the state's continuing obligation to prove the defendant's guilt beyond a reasonable doubt.

The defendant also cites to instructions used in federal courts, as well as state courts in Massachusetts. To the extent that the defendant argues that the court erred because its instruction was different from the instructions used in these other jurisdictions, we are not persuaded. Even if, as the defendant argues, the other instructions are "more balanced" or provide better guidance to a jury, we conclude that the instructions that the court provided in the present case were correct in law, adapted to the issues, and sufficient for the guidance of the jury.

investigative omission/adequacy defenses . . . .'' In addition, he argues that ''the instruction as given here is in conflict with the Supreme Court's decision in [*Wright*]'' and that ''the model jury instruction did not adequately tell the jury how it could use the investigative omission or inadequacy evidence in light of [*Wright*].'' We disagree.

First, the defendant's reliance on *State* v. *Wright*, supra, 322 Conn. 270, is misplaced. In *Wright*, our Supreme Court did not consider the adequacy of a jury instruction on an investigative inadequacy defense. Rather, it addressed a defendant's rights and obligations when he seeks to advance a theory of defense that the police investigation into the crime with which he was charged was inadequate. It concluded that ''defendants may use evidence regarding the inadequacy of the investigation into the crime with which they are charged as a legitimate defense strategy''; id., 282; but nevertheless, in that case, neither the ''defendant's proposed questions nor his offer of proof established the basis for a claim that the police, in not pursuing certain avenues of investigation, had failed to act in accordance with past established practices or standard police investigative procedures, [and therefore] he cannot establish that the trial court improperly precluded him from advancing an inadequate investigation defense on [that] basis.'' Id., 281–82. In *Wright*, our Supreme Court did not address, as it did in *Collins*, whether the absence of language instructing the jury on how it could use the evidence rendered the instructions constitutionally deficient.

The present case is distinguishable from *Wright* in that the defendant presented his evidence and cross-examined the state's witnesses regarding the alleged inadequacy of the police investigation. He utilized this evidence as the primary focus of his closing argument. The court did not preclude the defendant from presenting this evidence to the jury, nor did it preclude the

jury from considering this evidence. Instead, the court specifically instructed the jury to consider all of the evidence before it.

Moreover, our Supreme Court's decision in *Wright* is consistent with its decision in *Collins*.[16] Although the defendant argues that the significance of *Wright* is its "clear recognition of investigative omission/adequacy defenses," our Supreme Court had previously validated this defense in *Collins*. See *State* v. *Collins*, supra, 299 Conn. 599–600 ("[a] defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect"). In *Wright*, the court, citing *Collins*, stated: "[T]his court *has recognized* that defendants may use evidence regarding the inadequacy of the investigation into the crime with which they are charged as a legitimate defense strategy." (Emphasis added.) *State* v. *Wright*, supra, 322 Conn. 282. Accordingly, we are not persuaded by the defendant's argument that *Wright* distinguishes the present case from *Collins*, *Williams*, *Nieves* and *Tate*.[17]

Taking into consideration the charge as a whole, we conclude that the jury was not misled by the court's

[16] Our Supreme Court, in *Wright*, summarized its holding in *Collins*, including its conclusion that the instruction in *Collins* was not improper. See *State* v. *Wright*, supra, 322 Conn. 282. In doing so, the court did not indicate that its holding in *Wright* would render the instruction in *Collins* improper.

[17] The defendant also argues that "the first sentence of the instruction [in] the [present] case is a reason to distinguish it from the instructions in *Williams*, *Tate*, *Nieves* and *Collins*" because the instructions in those cases "[do not] include language similar to the first sentence of the trial court's instruction here . . . ." We disagree. The first sentence of the court's instruction in the present case with respect to investigative inadequacy provided: "You have heard some arguments that the police investigation was inadequate and that the police in this case were incompetent." The defendant argues that this sentence "implies that the defense is attacking the officers' character . . . ." The instructions in *Collins*, *Williams* and *Nieves*, however, each similarly mentioned the competence of the police. See footnotes 11, 12 and 13 of this opinion. We are, therefore, not persuaded

instructions. The defendant presented his evidence to the jury and cross-examined the state's witnesses regarding the alleged inadequacy of the police investigation. The primary focus of the defendant's closing argument was that the police investigation was inadequate and that the jury should, in light of that, find that the state had failed to prove that the defendant was guilty beyond a reasonable doubt.[18] The court did not direct the jury to disregard this evidence or argument. See *State* v. *Collins*, supra, 299 Conn. 600–601 (concluding that instruction did not mislead jury because "it did not direct the jury not to consider the adequacy of the investigation as it related to the strength of the state's case, or not to consider specific aspects of the defendant's theory of the case"); see also *State* v. *Wright*, 149 Conn. App. 758, 773–74, 89 A.3d 458 (holding that defendant's right to fair trial was not impinged, and jury was not misled by court's instruction, where defendant was given opportunity to present evidence and argued to jury regarding deficiencies in police investigation), cert. denied, 312 Conn. 917, 94 A.3d 641 (2014).

Moreover, in *Collins*, our Supreme Court explained that a defendant "may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt . . . ." *State* v. *Collins*,

that the first sentence of the court's instruction provides any basis for distinguishing this case from the case law in Connecticut. We conclude that the instruction in the present case, like the instruction in *Collins*, "was phrased in neutral language and did not improperly disparage the defendant's claims, or improperly highlight or endorse the state's arguments and evidence." *State* v. *Collins*, supra, 299 Conn. 602.

[18] As noted previously, defense counsel argued to the jury: "[T]his case screams reasonable doubt. . . . [T]he police completely failed in this case, and they completely failed [the victim]. They didn't go back to that scene that night. They didn't identify the crime scene. They didn't take any photos so that you, ladies and gentlemen, could see how the scene looked that night. How the lighting looked. They never tried to get any surveillance video. . . . They didn't confirm what happened." Defense counsel also argued that the police "spent ninety minutes on this investigation" and the case "boil[ed] down to one witness and what she saw in a split second, and she may very well believe that [the defendant] did this to her. But the police did nothing to confirm as to what Officer Goncalves said they needed to do."

supra, 299 Conn. 599–600. In its charge to the jury on reasonable doubt, the court in the present case instructed the jury that "[a] reasonable doubt may arise from the evidence itself *or from a lack of evidence*. . . . If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, based on the evidence *or lack of evidence*, you have a reasonable doubt as to the defendant's guilt, you must give him the benefit of that doubt and find him not guilty." (Emphasis added.) The court, moreover, in its charge on investigative inadequacy, repeated to the jury its responsibility to determine whether the state, in light of all of the evidence, had proved beyond a reasonable doubt that the defendant was guilty of the count with which he was charged. Accordingly, we conclude that the jury was not misled by the instructions given, and, therefore, there was no error.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ROBERT A. CANE
(AC 40657)

Alvord, Moll and Flynn, Js.

Syllabus

Convicted of the crimes of criminal possession of a firearm, criminal possession of ammunition and possession of a controlled substance with intent to sell, the defendant appealed to this court, claiming, inter alia, that the trial court improperly denied his motion to suppress certain evidence and improperly granted the state's motion to join two separate cases against him for trial. The defendant had been charged, in one of the cases, with kidnapping and assault in connection with his alleged conduct with two women, D and P, at his home. The jury found him not guilty of all charges in that case. The police had conducted surveillance of the defendant's home and wanted to speak to him outside of the home because it was reported that he had a firearm when the kidnappings and assaults were alleged to have occurred. While one officer was

speaking with the defendant on a phone, the defendant went outside of his home several times and walked near one of his cars that was parked in the driveway before reentering the home. The police saw the car's lights flash and heard its engine run. The defendant told the officer on the phone that he had the keys to the car but had not started it remotely. After several hours of no contact with the police, the defendant came outside of his home again and walked toward a fence that bordered his property where he was arrested. The police then conducted a protective sweep of the home. The next day, pursuant to search warrants, the police seized various items from the defendant's home and car that included weapons, ammunition, marijuana and other drug related materials. *Held*:

1. The defendant could not prevail on his claim that the trial court erroneously denied his motion to suppress the evidence that the police seized from his home and car:

a. The warrantless search of the defendant's home after he was arrested and in police custody constituted a justifiable, protective sweep of the home in light of specific, articulable facts that supported a reasonable belief by the police that a third party who posed a danger to those on the arrest scene was inside the home where firearms were believed to be present; the police reported that they saw movement within the home and that there were multiple cars on the defendant's property, there had been a report of a serious assault of D and P that allegedly occurred in the home within the prior twenty-four to thirty-six hours, D and P had reported that the defendant had guns in the house and had people watch the house, and, in light of the defendant's behavior, the police were entitled to discredit his statements that no one was in the home and that he did not possess weapons or start the car in his driveway.

b. This court found unavailing the defendant's unpreserved claims that he was constructively seized by the police and that they lacked probable cause to search his car: there was no way to know whether a violation of constitutional magnitude in fact had occurred, as the record was insufficient to determine whether the police ordered the defendant to exit his home when they first attempted to make contact with him or how many officers surrounded the home at the time that the constructive entry into the home allegedly occurred; moreover, the information that the police affiants provided in their search warrant application supported a determination that probable cause existed to search the defendant's vehicle, as the affiants' averments that they observed the defendant walk back and forth to the vehicle and heard it being locked or unlocked supported reasonable inferences that he had access to the vehicle when the police observed his movements or prior to their arrival, and that the defendant may have moved evidence from the home to the vehicle, and the defendant's reliance on trial testimony to support his assertion that the police lacked probable cause to search the car because no officer saw him open it or any of its hatches was unavailing, as only

information that was before the issuing judge at the time the warrant was signed could be considered in determining whether the warrant was based on probable cause.

2. The trial court did not commit plain error when it granted the state's motion for joinder, as the defendant, personally and through counsel, expressly stated that he had no objection to joinder; even if the defendant's waiver of his claim concerning joinder did not preclude him from prevailing under the plain error doctrine, he could not demonstrate that the claimed error was so clear and harmful that a failure to reverse the judgment would result in manifest injustice, because even though the defendant claimed that joinder prevented him from testifying concerning the firearms charges but that he had reason not to testify with respect to the assault and kidnapping counts, he did not move to sever the informations or indicate that he wanted to testify concerning some counts of the informations but not others, even when the court canvassed him regarding his decision not to testify.

3. The defendant could not prevail on his unpreserved claim of judicial bias, which was based on his assertion that the trial court, in its pretrial memorandum of decision on his motion to suppress, had found him guilty of the kidnapping and assault charges prior to any evidence when it referred to D and P as victims and then considered those charges in sentencing him, the record not having supported the defendant's contention that the court considered the kidnapping and assault charges when it sentenced him; although the court mentioned the kidnapping and assault charges when it summarized the events that led to the discovery of the firearms, ammunition and marijuana, it had referred to those charges as the "original allegations" and thereafter focused on the events that occurred on the day of the defendant's arrest, its reference to the defendant as violent was done in the context of reviewing his criminal history, not with respect to the kidnapping and assault charges, and, therefore, because the record did not provide a basis for the defendant's claim of judicial bias, there was no manifest injustice that warranted reversal of the judgment pursuant to the plain error doctrine.

Argued April 10—officially released September 24, 2019

Procedural History

Two substitute informations charging the defendant, in the first case, with four counts of the crime of kidnapping in the first degree, two counts each of the crimes of kidnapping in the first degree with a firearm, assault in the first degree and intimidation of a witness, and with one count of the crime of assault in the second degree, and, in the second case, with three counts of the crime of criminal possession of ammunition, two counts of the crime of criminal possession of a firearm,

and with one count each of the crimes of criminal possession of a pistol or revolver, possession of a controlled substance with intent to sell, operation of a drug factory and possession of a controlled substance with intent to sell within 1500 feet of a school, brought to the Superior Court in the judicial district of New Britain, geographical area number fifteen, where the court, *Keegan, J.*, granted the state's motion for joinder; thereafter, the court denied the defendant's motion to suppress certain evidence; subsequently, the matter was tried to the jury; thereafter, the state filed a substitute information in the second case, charging the defendant with three counts of the crime of criminal possession of ammunition, two counts of the crime of criminal possession of a firearm, and one count each of the crimes of possession of a controlled substance with intent to sell and possession of a controlled substance with intent to sell within 1500 feet of a school; verdict of guilty of three counts of criminal possession of ammunition, two counts of criminal possession of a firearm, and one count each of possession of a controlled substance with intent to sell and possession of a controlled substance with intent to sell within 1500 feet of a school; subsequently, the court granted the defendant's motion for a judgment of acquittal as to the charge of possession of a controlled substance with intent to sell within 1500 feet of a school and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

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

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Helen J. McLellan*, senior assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Robert A. Cane, appeals from the judgment of conviction, rendered following a jury trial, of two counts of criminal possession of a

firearm in violation of General Statutes § 53a-217 (a) (1), three counts of criminal possession of ammunition in violation of General Statutes § 53a-217 (a) (1), and one count of possession of a controlled substance with intent to sell in violation of General Statutes § 21a-277 (b).[1] On appeal, the defendant claims that the trial court (1) erroneously denied his motion to suppress evidence that was obtained in violation of his right to be free from unreasonable searches and seizures, (2) improperly granted the state's motion for joinder of the two separate cases against him for trial, and (3) demonstrated judicial bias, thereby violating his right to due process. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On October 7, 2013, the New Britain Police Department received a complaint that the defendant had kidnapped and assaulted two women, D and P, at his home, located at 830 Slater Road in New Britain, during the weekend of October 5 and 6, 2013. D's son reported that D was in the intensive care unit at the Hospital of Central Connecticut in New Britain as a result of her injuries.

At approximately 3:30 p.m. on October 7, 2013, as the police began to investigate these allegations, Michael Steele and Kyle Lamontagne, two plainclothes detectives with the New Britain Police Department, went

[1] The jury also found the defendant guilty of one count of possession of a controlled substance with intent to sell within 1500 feet of a school in violation of General Statutes § 21a-278a (b). Prior to sentencing, however, the trial court granted the defendant's postverdict motion for a judgment of acquittal as to that count. The jury acquitted the defendant of two counts of kidnapping in the first degree with a firearm in violation of General Statutes § 53a-92a (a), two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), two counts of kidnapping in the first degree in violation of § 53a-92 (a) (2) (C), one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), one count of assault in the first degree in violation of § 53a-59 (a) (3), one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (2), and two counts of intimidation of a witness in violation of General Statutes § 53a-151a (a) (2).

to the defendant's home. They conducted surveillance from an unmarked police vehicle parked across the street from the defendant's home in order to determine whether the defendant was at his home and to secure the premises. At approximately 4 p.m., Karl Mordasiewicz, also a detective with the New Britain Police Department, relieved Detective Steele from his position in the unmarked vehicle. Detectives Lamontagne and Mordasiewicz eventually left the vehicle and began to surveil the defendant's home from the rear porch of a neighboring property.[2]

Additional police officers arrived shortly thereafter. The police wanted to speak to the defendant about the kidnapping and assault allegations and, because the defendant was reported to have had a firearm when the kidnappings and assaults were alleged to have occurred, they wanted to speak to the defendant outside of his home. Arthur Powers, Jr., a sergeant with the New Britain Police Department, who had known the defendant since the 1970s, called the defendant's cell phone number to try to encourage him to speak voluntarily with the officers.[3]

While Sergeant Powers was on the phone with the defendant, Detectives Lamontagne and Mordasiewicz watched the defendant exit his home several times,[4]

[2] The neighbors had given the detectives permission to conduct their surveillance from the porch.

[3] The police had been attempting to contact Barbara Micucci, the defendant's former girlfriend. At approximately 5 p.m., when Micucci learned that the police wanted to speak to her, she called the defendant and said something to the effect of "what the 'f' is the New Britain police looking for me for or wanting to talk to me . . . ." The defendant told her that he had no idea and that he had been sleeping all day. Micucci then contacted the New Britain Police Department and provided the defendant's phone number.

[4] At trial, no evidence had been presented with respect to what time Sergeant Powers first spoke with the defendant. On appeal, the parties do not dispute that the defendant's phone conversation with Sergeant Powers occurred after the defendant first exited his home. See part I B 1 of this opinion.

walk in the area near his Cadillac, and reenter his home. At one point, Detectives Lamontagne and Mordasiewicz observed the lights on the Cadillac flash and heard the engine run for approximately fifteen seconds. Sergeant Powers asked the defendant if he had started the Cadillac, and the defendant responded that, although he had the keys, he had not started the car remotely. The defendant eventually walked toward the fence that bordered his property, at which time he was arrested.[5] After arresting the defendant, the police conducted a protective sweep of the defendant's home.

The next day, on October 8, 2013, the police applied for a search and seizure warrant pertaining to the defendant's residence. The search warrant was issued at noon and executed at approximately 12:55 p.m. On the first floor of the defendant's home, the police found a rifle, which was located in a closet, and glassine bags, which were found in the kitchen. In a bedroom on the second floor of the defendant's home, the police found three boxes of Blazer Brass brand ammunition, a gun holster, a gun cleaning kit, a "loader" that assists with loading ammunition into a magazine for a firearm, and a plastic bag containing ten shotgun shells. In addition, the police found a metal box containing various types of ammunition in the closet of that bedroom. In a different bedroom also on the second floor of the defendant's home, the police found a small amount of marijuana, various lighting and power sources, and a scale. In the attic, the police found a large bag, which weighed approximately ten pounds, containing marijuana, sticks and stems of marijuana plants, cardboard material, and soil.

The police did not locate all of the evidence they had been seeking in the defendant's home, including a

[5] The defendant was arrested on charges unrelated to this appeal. Specifically, he was arrested on charges of breach of the peace, threatening, and interfering with the police that were based on his actions toward the police during this encounter. See part I of this opinion. The state entered a nolle prosequi as to each of those charges.

firearm and clothing associated with the kidnapping and assault allegations. Therefore, later that same day, the police applied for a search warrant pertaining to a Cadillac owned by the defendant. Although there had been several additional vehicles on the defendant's property, the police applied for a search warrant only with respect to the Cadillac because the police had observed the defendant walking in the area of that vehicle, and it had been the vehicle that appeared to have been remotely started. The warrant was issued and executed that evening. Inside a bag in the trunk of the Cadillac, the police found a nine millimeter Smith and Wesson handgun, two magazines loaded with ammunition, and a gun holster.

The state initially charged the defendant in two separate informations. In the first information, filed in Docket No. CR-13-0270252-T, the defendant was charged with two counts of kidnapping in the first degree with a firearm in violation of General Statutes § 53a-92a (a), two counts of kidnapping in the first degree in violation of General Statutes § 53a-92 (a) (2) (A), two counts of kidnapping in the first degree in violation of § 53a-92 (a) (2) (C), one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), one count of assault in the first degree in violation of § 53a-59 (a) (3), one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (2), and two counts of intimidation of a witness in violation of General Statutes § 53a-151a (a) (2). In the second information, filed in Docket No. CR-13-0270260-S, the defendant was charged with two counts of criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1), three counts of criminal possession of ammunition in violation of § 53a-217 (a) (1), one count of possession of a controlled substance with intent to sell in violation of § 21a-277 (b), and one count of possession of a controlled substance with intent to sell within 1500 feet of

a school in violation of General Statutes § 21a-278a (b) On September 29, 2016, the state filed a motion for joinder of the two informations.[6] At a hearing on October 24, 2016, the defendant stated that he had no objection to the joinder, and the court granted the state's motion.

A jury trial followed, at the conclusion of which the jury acquitted the defendant of the charges set forth in the first information and convicted him of the charges set forth in the second information. The court accepted the verdict but thereafter granted the defendant's motion for a judgment of acquittal as to the count of possession of a controlled substance with intent to sell within 1500 feet of a school. The court imposed a total effective sentence of thirteen years of imprisonment. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant first claims that the court erroneously denied his motion to suppress evidence that was obtained in violation of his right to be free from unreasonable searches and seizures under the fourth amendment to the United States constitution[7] and article first, § 7, of the Connecticut constitution.[8] Specifically, he argues that the evidence should have been suppressed because (1) the police conducted an unlawful protective sweep of his home, (2) he was constructively seized by

[6] The state filed the motion for joinder on the ground that the evidence in the two cases was cross admissible.

[7] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., amend. IV.

[8] Article first, § 7, of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

the police, and (3) the search warrant for his vehicle was not supported by probable cause.

The following additional facts and procedural history are relevant to our resolution of these claims. On October 8, 2013, Adam Rembisz, a detective with the New Britain Police Department, and Michael Grossi, a sergeant with the New Britain Police Department (affiants), applied for a search and seizure warrant pertaining to the defendant's residence. The affidavit in support of the application for the search warrant detailed the information that the police had received with respect to the kidnapping and assault allegations. In addition, it averred, in relevant part, that "a protective sweep of the house was conducted and in plain view a roll of duct tape, handcuffs, (2) laptop computers, and (1) [iPad] was observed inside the living room. In a second floor bedroom officers observed an ax handle, baseball bat, and a cane.[9] [Detective Kevin] Artruc also observed a green leafed substance, which through his past training, [he] believes to be marijuana."[10] (Footnote added.)

As we previously have stated, the affiants applied for a search warrant pertaining to the defendant's vehicle after they executed the search warrant pertaining to the defendant's home. The affidavit submitted in support of the application for the second search warrant averred, in addition to the information that had been contained in the application for the first warrant, that: "[N]o handgun, yellow shirt, steel toe boots were

[9] These items had been evidence relevant to the kidnapping and assault allegations.

[10] Artruc, a detective with the New Britain Police Department, acknowledged that the affidavit in support of the search warrant application mentioned him observing marijuana during the protective sweep. Detective Artruc testified, at both the suppression hearing and at trial, that he had no recollection of being involved in the protective sweep. At trial, he explained: "It is entirely possible that I was there on the [seventh of October], but I don't have a personal recollection of my involvement on the seventh."

located as described by the victim, however during the incident prior to [the defendant's] being arrested he was observed to walk back and forth to a black Cadillac, bearing registration 137XHF. Responding officers heard the alarm that is commonly sounded when the vehicle is locked or unlocked with a remote as [the defendant] walked to the vehicle. [Department of Motor Vehicle] records show that the said vehicle is registered to the defendant. . . . [The] affiants believe that [the defendant] could have brought evidence to the vehicle from the crime scene within the home prior to surrendering to the police as the handgun, dog collar, yellow shirt, [and] steel toe boots were not located within the residence."

Prior to trial, the defendant filed a motion to suppress "all evidence obtained through warrantless searches of his home and automobile on . . . October 7, 2013," on the grounds that (1) "there were no exigent circumstances or any other reasons" to support the protective sweep, and the evidence would not be admissible under the inevitable discovery doctrine, and (2) "there were no exigent circumstances or any other reasons" to support the "warrantless search" of the defendant's vehicle, and the evidence would not be admissible under the inevitable discovery doctrine.

In his memorandum of law in support of his motion, the defendant argued that with respect to the protective sweep, "there is no evidence . . . that the police had any information whatsoever that there may have been any other people inside [the defendant's] home . . . ." As to the search of the defendant's vehicle, the defendant argued that "[t]here were no 'exigent circumstances' that would have allowed the police to perform the warrantless search of [the defendant's] automobile."

On November 1 and 2, 2016, the court held a hearing on the defendant's motion to suppress. The court

heard testimony from the defendant and several members of the New Britain Police Department. In addition, it admitted into evidence photographs of the defendant's property, a recording of the phone conversation between Sergeant Powers and the defendant, and copies of the search warrants, which included the warrant applications and the affidavits supporting the applications.

At the hearing, the defendant argued that there was no evidence that any other person was inside of the defendant's home to justify the protective sweep. The defendant did not make any additional arguments with respect to the search of the vehicle.

On November 3, 2016, the court issued its memorandum of decision denying the defendant's motion to suppress. The court determined that (1) the protective sweep was lawful and, even if it were not lawful, the evidence would nonetheless be admissible pursuant to the inevitable discovery doctrine, and (2) the search of the defendant's vehicle had been executed pursuant to a search warrant.

The court made the following findings of fact in support of its determination: "On October 7, 2013, at approximately 1:30 p.m., the New Britain police were informed of a serious assault upon two women in a home located at 830 Slater Road. Officer Mark DePinto spoke with [D's son], who relayed that his mother and another woman were tied up, severely beaten and ultimately escaped from 830 Slater Road. [D's son] also relayed that his mother was currently in the hospital, in the intensive care unit. The location of the second female was unknown at this time. [D's son] told DePinto that the home belonged to the defendant . . . and that [the defendant] had indicated he would engage in a shootout with the police if they came to the house.

"The New Britain police patrol division prepared a plan of action: locate [the defendant], any witnesses, the second female injured and present this to the detectives for follow-up investigation. Plainclothes detectives were assigned to surveil 830 Slater Road, and other officers began to gather intelligence about [the defendant]. In reviewing his criminal history, the investigating officers learned [that the defendant] had serious felony convictions and, in light of that information that a weapon was used during the assaults and that [the defendant] possessed weapons in the house, the special response team was also called to the scene. At approximately 2:15 p.m., [Sergeant] Carlos Burgos met with officers in an area near 830 Slater Road to discuss potential scenarios and the safety concerns for the neighbors in the area as well as for the responding officers.

"Photographs of the property confirm the testimony describing the area. There was a brick, two-story dwelling with a steel fence around a portion of the front yard, and enclosed part of the driveway, extending toward a garage in the rear of the property. A gate across the driveway was locked and from the street, a black car could be seen. There was no contact with [the defendant] up to this time. Simultaneous to the surveillance, other officers were gathering information and relaying it to Burgos and others at the Slater Road address. After 5:30 p.m., the police learned that a former girlfriend of [the defendant] had spoken to him, and the police attempted to reach the defendant over the telephone. The police then used sirens and other loud noises to see if anyone in the house would respond. [The defendant] then exited his house. A home phone number for [the defendant] was obtained, and verbal contact was made first by a dispatch officer and then by [Sergeant] Arthur Powers. Powers negotiated with [the defendant]

for over thirty-five minutes to comply with police directives to go to the fence in the front of the house and speak with the police. The recording of the conversation was entered as an exhibit during the hearing. [The defendant] was angry, agitated and uncooperative with both Powers and the police at the house. [The defendant] repeatedly used profane and discriminatory language, often shouting his tirades. He threatened to loosen his dog upon the police officers and taunted the police to shoot him. [The defendant] was distrustful of the police. From the early moments of the recorded conversation, [the defendant] demeaned and blamed the two women victims.

"On-scene officers observed [the defendant] pacing the property, going in and out of the house and, at one point, disrobing, purportedly to show [that] he was unarmed. He was seen holding a knife. One officer saw the rear taillights of the black automobile in the driveway turn on, and when Powers asked him if he turned the car on remotely, [the defendant] denied it. Other officers observed movement inside the house at multiple windows.

"Other officers continued to seek information regarding the incident. DePinto learned from [the defendant's] former girlfriend that she had been to 830 Slater Road over the preceding weekend and had seen the two females, who were still present when she left. She also indicated that [the defendant] was acting irrationally and out of control. A written statement by [D's son] was taken from 5:15 to 5:50 p.m. There, the police learned that [D] had told him that [the defendant] was affiliated with the Outlaw motorcycle gang, he had guns in the house and that he had people watching his house when he wasn't home. They also learned that items of potential evidentiary value could be found within the house.

"At approximately 6:30 p.m., [the defendant] approached the fence to speak with the police, and he was seized by officers and arrested for breach of the peace, threatening and interfering with the police. [Lieutenant John] Rodriguez made the decision to conduct a protective sweep of the house. He wanted to ensure that there were no victims inside the home, he wanted to ensure that there was no one to endanger officers on the scene, and he wanted to ensure that any evidence would be secure. Within two to three minutes, the sweep was concluded. A search warrant for 830 Slater Road was secured on October 8, 2013, at noon; a search warrant for the Cadillac was secured on the same day at 5:17 p.m."[11]

A

The defendant first argues that the court erred in denying his motion to suppress because the protective sweep was unlawful. Specifically, he argues that the police had "no basis to believe a third party was in the home," and, therefore, they lacked an articulable basis on which to justify the protective sweep. We disagree.

The court, in its memorandum of decision denying the defendant's motion to suppress, determined that the protective sweep was lawful. It found: "Based upon all of the articulable facts and rational inferences known to the New Britain police at the time of the defendant's apprehension, a reasonably prudent officer would conclude the following: a serious assault of two women had occurred within the prior twenty-four to thirty-six hours at 830 Slater Road. One victim was being treated for serious injuries at the hospital. That victim told her son that she was tied up, beaten, hit with a pistol and physically degraded. She said that the defendant had guns in the house and he had people [who] watched his house. After several hours of no contact [between

[11] The defendant does not challenge any of these factual findings.

the police and] the defendant while the home was under surveillance, he exited the house. He was uncooperative with the police, and his behavior was erratic, agitated and at times bizarre. The defendant had a history of felony convictions. Movement was seen within the house and a car in the driveway was started, with the defendant denying that he did it. Based upon the defendant's behavior on scene, the police were within their rights to disbelieve the defendant's statements that he possessed no weapons and no [that] one else was inside the house."[12]

"[T]he standard of review for a motion to suppress is well settled. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record . . . . [W]here the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision . . . ." (Internal quotation marks omitted.) *State* v. *Kendrick*, 314 Conn. 212, 222, 100 A.3d 821 (2014). Accordingly, the trial court's legal conclusion regarding the applicability of the protective sweep doctrine is subject to plenary review. See id.; see also *State* v. *Spencer*, 268 Conn. 575, 585, 848 A.2d 1183 (2004).

"It is axiomatic that the police may not enter the home without a warrant or consent, unless one of the established exceptions to the warrant requirement is

[12] The court went on to conclude that even if the protective sweep were not lawful, the evidence was nonetheless admissible pursuant to the inevitable discovery doctrine. It stated: "The credible evidence established that the search warrant for the home had . . . begun at approximately 5:50 p.m. by [Detective Raymond Grzegorzek], once [the complainant's] statement was completed. At that point, the police had a reasonable belief that a crime had been committed and [that] evidence of it could be found within the premises. . . . [T]he information supporting probable cause had been the result of the information gathered in the hours prior to the defendant's arrest on the misdemeanor charges." (Citations omitted.)

met." (Internal quotation marks omitted.) *State* v. *Kendrick*, supra, 314 Conn. 224. "All three exceptions [to the warrant requirement], the exigent circumstances doctrine, the protective sweep doctrine and the emergency doctrine, must be supported by a reasonable belief that immediate action was necessary." Id., 225.

"The protective sweep doctrine . . . is rooted in the investigative and crime control function of the police. . . . As its name suggests, the purpose of the doctrine is to allow police officers to take steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack." (Internal quotation marks omitted.) Id., 229. "Recognizing the often competing interests of the individual's expectation of privacy and the officers' safety, the court [in *Maryland* v. *Buie*, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990)] . . . determined that there were two levels of protective sweeps. Concerning the first tier of protective sweeps, the court concluded that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. . . . Concerning the second tier of protective sweeps, the court concluded: Beyond that . . . we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene."[13] (Citation omitted; internal

[13] In *State* v. *Kendrick*, supra, 314 Conn. 212, our Supreme Court noted that a protective sweep need not be conducted incident to an arrest: "Although originally a protective sweep was defined as one made incident to a lawful arrest . . . the scope has since been broadened so that the current rule is that a law enforcement *officer present in a home under lawful process* . . . may conduct a protective sweep when the officer possesses articulable facts which, taken together with the rational inferences from those facts,

quotation marks omitted). *State* v. *Spencer*, supra, 268 Conn. 588.

"Although the United States Supreme Court never has ruled on the constitutionality of a protective sweep of a home, incident to an arrest occurring just outside that home, the federal courts that have addressed the issue uniformly have held that the reasoning of *Buie* applies to that situation." Id., 589.

In *Spencer*, our Supreme Court recognized "that *Buie* was grounded in the principle that arresting officers have an immediate interest in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. . . . This important safety interest is not diminished simply because the arrest has occurred just outside of the home." (Citation omitted; internal quotation marks omitted.) Id., 590; see also *United States* v. *Colbert*, 76 F.3d 773, 776 (6th Cir. 1996) ("in some circumstances, an arrest taking place just outside a home may pose an equally serious threat to the arresting officers").[14]

would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the . . . scene." (Citation omitted; emphasis altered; internal quotation marks omitted.) Id., 229–30. Because the protective sweep in the present case was conducted incident to an arrest, our analysis continues to be informed by the second tier of protective sweeps as set forth in *Spencer* and *Buie*.

[14] In *State* v. *Spencer*, supra, 268 Conn. 590, our Supreme Court cited to *United States* v. *Henry*, 48 F.3d 1282 (D.C. Cir. 1995), in which the United States Court of Appeals for the District of Columbia Circuit explained: "Although *Buie* concerned an arrest made in the home, the principles enunciated by the [United States] Supreme Court are fully applicable where, as here, the arrest takes place just outside the residence. . . . That the police arrested the defendant outside rather than inside his dwelling is relevant to the question of whether they could reasonably fear an attack by someone within it. The officers' exact location, however, does not change the nature of the appropriate inquiry: Did articulable facts exist that would lead a reasonably prudent officer to believe a sweep was required to protect the safety of those on the arrest scene?" (Citations omitted.) Id., 1284.

Within the first tier of protective sweeps, arresting officers can "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Maryland* v. *Buie*, supra, 494 U.S. 334. In the present case, the defendant was arrested outside of his home, near the fence line bordering his property. Therefore, the defendant's home cannot be characterized as a space " 'immediately adjoining' " the place of the arrest. See *State* v. *Spencer*, supra, 268 Conn. 591. We therefore must determine whether the search in the present case was justifiable as a second tier protective sweep.

The second tier of protective sweeps under *Buie* encompasses searches of areas beyond those spaces immediately adjoining the place of arrest. To satisfy the fourth amendment, a second tier protective sweep must be supported by "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland* v. *Buie*, supra, 494 U.S. 334.[15] In this case, because the

[15] The defendant argues that for a protective sweep of a home incident to an arrest that has occurred just outside of that home, we should apply the test used by the United States Court of Appeals for the Second Circuit in *United States* v. *Oguns*, 921 F.2d 442, 446 (2d Cir. 1990), because that test was more recently applied by a court in the District of Connecticut, in *United States* v. *Butler*, Docket No. 3:16 CR 123 (AWT), 2017 WL 4150466, *4 (D. Conn. September 19, 2017).

Under *Oguns*, a protective sweep inside of a home incident to an arrest outside of that home is permissible "if the arresting officers had (1) a reasonable belief that third persons [were] inside, and (2) a reasonable belief that the third persons [were] aware of the arrest outside the premises so that they might destroy evidence, escape or jeopardize the safety of the officers or the public." (Internal quotation marks omitted.) *United States* v. *Oguns*, supra, 921 F.2d 446. The defendant does not apply this test to the facts of the present case or explain how applying this test would warrant a different result. See id. ("[a]lthough we articulated this standard before *Buie*, we think it may be read consistently with the Supreme Court's recent holding concerning security sweeps").

defendant was in custody, the focus of our inquiry is "whether the arresting officers reasonably believed that *someone else* inside the [home] might pose a danger to them. . . . In other words, we examine whether there were specific and articulable facts showing that another individual, who posed a danger to the officers or others, was inside the apartment at the time of the arrest. . . . Lack of information [concerning the presence of a third party] cannot provide an articulable basis upon which to justify a protective sweep." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Spencer*, supra, 268 Conn. 593–94.

In the present case, the following facts are sufficiently specific and articulable to support a reasonable belief that the defendant's home harbored a third party posing a danger to those on the arrest scene. First, the police reported that they saw movement within the defendant's home.[16] Second, the police reported that there were multiple cars on the defendant's property. Third, it was reported that a car in the driveway was started, and the defendant denied that he was the person who started it. There had been a report of a serious assault of two women that was alleged to have occurred within the prior twenty-four to thirty-six hours at the defendant's home. One of the women was reportedly being treated for serious injuries and alleged that she was hit with a pistol, indicating the presence of a handgun

In *Spencer*, our Supreme Court referenced the decision in *Oguns*. See *State* v. *Spencer*, supra, 268 Conn. 589, 597. It nonetheless applied the test set forth by the United States Supreme Court in *Buie* to a protective sweep of a home incident to an arrest occurring just outside that home. Accordingly, abiding by our Supreme Court's precedent in *Spencer*, we apply the test set forth in *Buie*.

[16] Specifically, at the suppression hearing, Sergeant Burgos testified that the police "were getting information [that] there was movement at the front of the house and at the rear of the house at the same time." Sergeant Burgos explained that it was dark outside at that time and the lights were on inside the defendant's home, and he could therefore see silhouettes and movement through the windows.

inside the home that might be used by another individual within the home, thereby posing a danger to police officers and others. In addition, the woman had reported that the defendant had guns in the house and that he had people who watched his house.[17] The defendant's behavior was erratic, agitated, and at times bizarre. On the basis of the defendant's behavior on the scene, the court concluded that the police were within their right to discredit the defendant's statements that he possessed no weapons and that no one else was inside the house.

These facts are sufficiently specific and articulable to support a reasonable belief that a third party was inside of the home and, on the basis of the information that had been provided to the police regarding the presence of firearms at the home, that the third party posed a danger to those on the arrest scene. Accordingly, we conclude, on the basis of the totality of all the facts and the reasonable inferences drawn therefrom, that the warrantless search of the defendant's home was a justifiable protective sweep under *Buie*.

B

The defendant concedes that his next two claims with respect to his motion to suppress are unpreserved and 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, 781, 120 A.3d 1188 (2015). Generally, this court is not required to consider a claim "unless it was distinctly raised at the trial or arose subsequent to the trial." Practice Book § 60-5. It is well established, however, that an unpreserved claim is reviewable under *Golding* when "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of

[17] The police also had information that the defendant was involved in a motorcycle gang.

a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 239–40. "The appellate tribunal is free to respond to the defendant's claim by focusing on whichever *Golding* prong is most relevant. . . . [T]he inability to meet any one prong requires a determination that the defendant's claim must fail." (Citation omitted; internal quotation marks omitted.) *State* v. *Esquilin*, 179 Conn. App. 461, 475, 179 A.3d 238 (2018).

1

The defendant claims that the police "laid siege to his home, roused and summoned him with coercive force, and constructively seized him" under the fourth amendment to the United States constitution. He also argues that "[t]his court should adopt a rule against constructive entry" under our state constitution "regardless of [our analysis under] the fourth amendment." The state maintains, inter alia, that the record is inadequate for review of the defendant's unpreserved claim and, therefore, the claim fails to satisfy the first prong of *Golding*. We agree with the state.

In *United States* v. *Allen*, 813 F.3d 76 (2d Cir. 2016), the United States Court of Appeals for the Second Circuit explained the constructive entry doctrine: "Under [the constructive entry] doctrine, when officers engage in actions to coerce the occupant outside of the home, they '[accomplish] the same thing' and achieve the same effect as an actual entry, and therefore trigger [the] protections [of *Payton* v. *New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)]."[18] *United States*

[18] In *Payton* v. *New York*, supra, 445 U.S. 576, the United States Supreme Court held that the fourth amendment to the United States constitution "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."

v. *Allen*, supra, 81. The court declined to apply the constructive entry doctrine, but noted that courts applying the doctrine "determine whether a nonexhaustive list of factors, such as the events immediately preceding or accompanying the order, the number and location of officers, the nature and content of the words used to transmit the command, and whether police guns are holstered or brandished, constitute circumstances sufficient to trigger *Payton* . . . ." Id., 88. In reviewing a claim of constructive entry, a court must determine whether "[t]he police show of force and authority was such that a reasonable person would have believed he was not free to leave." (Internal quotation marks omitted.) *United States* v. *Morgan*, 743 F.2d 1158, 1164 (6th Cir. 1984), cert. denied, 471 U.S. 1061, 105 S. Ct. 2126, 85 L. Ed. 2d 490 (1985).[19]

In the present case, the court found that "[a]fter 5:30 p.m. . . . the police attempted to reach the defendant over the telephone. The police then used sirens and other loud noises to see if anyone inside the house would respond. [The defendant] then exited his house." The court further found that the defendant was seized by officers at approximately 6:30 p.m., when he was

[19] The defendant relies on *Morgan* in support of his argument of constructive entry. In *Morgan*, "[n]ine police officers and several patrol cars approached and surrounded the Morgan residence in the dark. The officer in charge strategically positioned his car in the driveway in front of the Morgan home blocking any movement of [the defendant's] car. The police then called for [the defendant] to come out of the house." *United States* v. *Morgan*, supra, 743 F.2d 1164. The court also noted that the police "flooded the house with spotlights and summoned [the defendant] from his mother's home with the blaring call of a bullhorn." Id., 1161. The United States Court of Appeals for the Sixth Circuit determined that "[t]hese circumstances surely amount to a show of official authority such that a reasonable person would have believed he was not free to leave." (Internal quotation marks omitted.) Id., 1164. It therefore concluded that "the record provides ample proof that, as a practical matter, [the defendant] was under arrest . . . as soon as the police surrounded the Morgan home, and therefore, the arrest violated *Payton* because no warrant had been secured." (Citation omitted; internal quotation marks omitted.) Id.

placed under arrest for breach of the peace, threatening, and interfering with the police. As we previously have noted, the defendant did not argue before the trial court that the police constructively entered the defendant's home. The trial court, therefore, did not make any additional factual findings with respect to the conduct of the police when they first attempted to make contact with the defendant and whether the police show of force and authority was such that a reasonable person would have believed he was not free to leave. It is well established, however, that "when reviewing the constitutionality of an alleged seizure, we must parse the entire record, and not only the trial court's express findings." *State* v. *Edmonds*, 323 Conn. 34, 64, 145 A.3d 861 (2016).

"Our Supreme Court has clarified that [a] record is not inadequate for *Golding* purposes because the trial court has not reached a conclusion of law if the record contains the factual predicates for making such a determination. . . . Nevertheless, [i]f the facts revealed by the record are insufficient, unclear or ambiguous as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim." (Citation omitted; internal quotation marks omitted.) *State* v. *Morales*, 164 Conn. App. 143, 167, 136 A.3d 278, cert. denied, 321 Conn. 916, 136 A.3d 1275 (2016).

In the present case, the record is insufficient to determine whether a constitutional violation has occurred. First, the record is unclear as to whether the police ordered the defendant to exit his home when they first attempted to make contact with him.[20] At the suppression hearing, the defendant and Sergeant Burgos

[20] The essence of the defendant's constructive entry claim is that the coercive conduct of the police forced him to exit his home. As we previously have stated, the defendant exited then reentered his home several times. At oral argument before this court, the defendant clarified that his claim is that the police constructively seized him when he *first* exited his home, after

offered conflicting testimony. The defendant testified that he "heard over the loudspeaker, Robert Cane, come out of your house." Sergeant Burgos, however, testified that, before the defendant first exited the home, one of the officers used audible sirens to make noise seeking to alert anyone within the home. Sergeant Burgos did not testify that a loudspeaker was used.

Second, the record is unclear as to how many police officers surrounded the defendant's home at the time that the constructive entry is alleged to have occurred.[21] Although several officers testified that they had been present at 830 Slater Road, there had been no testimony as to how many total officers were present and whether those officers were in a location such that they would have been visible to the defendant before he exited his home.

In summary, the record is unclear with respect to the factual predicates necessary to establish the defendant's claim on appeal. See *State* v. *Morales*, supra, 164

the police surrounded his home and used their sirens to get his attention. The record shows that the police placed only one phone call, which the defendant did not answer, before he first exited his home. Therefore, the defendant's argument that the multiple phone calls by the police, including his phone conversation with Sergeant Powers, which occurred *after* the defendant first exited his home, are irrelevant to our analysis of his claim. See footnote 4 of this opinion.

The defendant also argues that this was a "quintessential seizure" because the police blocked off the street in front of the defendant's home. We are not persuaded. Although there had been testimony that the police blocked off the defendant's street, there was no evidence presented that it had been blocked off *in front of the defendant's home*. There is no evidence in the record that the defendant saw, or could have seen, that the police blocked off the street. Therefore, we cannot conclude that this police conduct constituted a "show of force and authority . . . such that a reasonable person would have believed he was not free to leave." (Internal quotation marks omitted.) *United States* v. *Morgan*, supra, 743 F.2d 1164; see also *State* v. *Edmonds*, supra, 323 Conn. 52.

[21] The defendant argues that "[t]he record clearly establishes that no fewer than seven armed officers surrounded the defendant's home . . . ." This argument, however, is not supported by the record. In addition, although Sergeant Burgos testified that there were at least three officers directly in front of the defendant's home, and that the officers were displaying their

Conn. App. 167 ("[i]f the facts revealed by the record are . . . unclear . . . as to whether a constitutional violation has occurred, we will not attempt to supplement or reconstruct the record, or to make factual determinations, in order to decide the defendant's claim" [internal quotation marks omitted]). In addition, the state was not put on notice of this claim and, accordingly, was not given an opportunity to put on evidence regarding this claim.[22] See *State* v. *Chemlen*, 165 Conn. App. 791, 814–15, 140 A.3d 347 (holding record inadequate for review under first prong of *Golding* because state not put on notice of claim made on appeal and, thus, not given opportunity to put on evidence regarding claim, and because record did not contain adequate facts and state prejudiced by lack of notice), cert. denied, 322 Conn. 908, 140 A.3d 977 (2016). Because there is an insufficient record in the present case, there is no way to know whether a violation of constitutional magnitude in fact has occurred. See *State* v. *Brunetti*, 279 Conn. 39, 55, 901 A.2d 1 (2006). The defendant's claim thus fails under the first prong of *Golding*.[23]

2

The defendant next claims that the police lacked probable cause to search his vehicle. Specifically, he argues that "no officer saw the defendant open [the vehicle]," and "[t]he idea that the defendant could

firearms, Sergeant Burgos did not explain *when* these three officers were in front of the defendant's home.

[22] For example, as the state points out in its brief, if it had been put on notice of the defendant's claim, it could have adduced evidence from which the court could conclude that the defendant exited his home voluntarily and not as a result of police coercion.

[23] The defendant further requests that we review his claim as plain error under Practice Book § 60-5. We previously have held that "[b]ecause the record is inadequate for review under *Golding*, it is also inadequate for consideration under the plain error doctrine." (Internal quotation marks omitted.) *State* v. *Leon*, 159 Conn. App. 526, 536 n.9, 123 A.3d 136, cert. denied, 319 Conn. 949, 125 A.3d 529 (2015). The defendant's claim also fails, therefore, under the plain error doctrine.

remotely place a pistol in the trunk of the car is not remotely realistic." We conclude that the defendant's claim fails to satisfy the third prong of *Golding*.

"Certain well established legal principles guide our analysis of this issue. Both the fourth amendment to the United States constitution and article first, § 7, of the state constitution require a showing of probable cause prior to the issuance of a search warrant. Probable cause to search exists if . . . (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction . . . and (2) there is probable cause to believe that the items sought to be seized will be found in the place to be searched. . . . Although [p]roof of probable cause requires less than proof by a preponderance of the evidence . . . [f]indings of probable cause do not lend themselves to any uniform formula because probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. . . . Consequently, [i]n determining the existence of probable cause to search, the issuing magistrate assesses all of the information set forth in the warrant affidavit and should make a practical, nontechnical decision whether . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. . . . Probable cause, broadly defined, [comprises] such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe that criminal activity has occurred. . . . In other words, because [t]he probable cause determination is, simply, an analysis of probabilities . . . [p]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. By hypothesis, therefore, innocent behavior frequently will provide the basis for a showing

of probable cause; to require otherwise would be to sub silentio impose a drastically more rigorous definition of probable cause than the security of our citizens' . . . demands. . . . In making a determination of probable cause the relevant inquiry is not whether particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of noncriminal acts. . . .

"Furthermore, because of our constitutional preference for a judicial determination of probable cause, and mindful of the fact that [r]easonable minds may disagree as to whether a particular [set of facts] establishes probable cause . . . we evaluate the information contained in the affidavit in the light most favorable to upholding the issuing judge's probable cause finding. . . . We therefore review the issuance of a warrant with deference to the reasonable inferences that the issuing judge could have and did draw . . . and we will uphold the validity of [the] warrant . . . [if] the affidavit at issue presented a substantial factual basis for the magistrate's conclusion that probable cause existed. . . . Finally, [i]n determining whether the warrant was based [on] probable cause, we may consider only the information that was actually before the issuing judge at the time he or she signed the warrant, and the reasonable inferences to be drawn therefrom." (Citations omitted; internal quotation marks omitted.) *State* v. *Shields*, 308 Conn. 678, 689–91, 69 A.3d 293 (2013), cert. denied, 571 U.S. 1176, 134 S. Ct. 1040, 188 L. Ed. 2d 123 (2014).

We conclude that the information contained in the affidavit supported the issuing judge's determination that probable cause existed to search the defendant's vehicle. The defendant takes issue only with the second prong of the probable cause requirement, namely, "[whether] there is probable cause to believe that the items sought to be seized will be found in the place to be searched." (Internal quotation marks omitted.) Id., 689.

As we previously have noted, in the affidavit submitted in support of the application for the second search warrant, the affiants averred: "[N]o handgun, yellow shirt, steel toe boots were located as described by the victim, however, during the incident prior to [the defendant] being arrested he was observed to walk back and forth to a black Cadillac, bearing registration 137XHF. Responding officers heard the alarm that is commonly sounded when the vehicle is locked or unlocked with a remote as [the defendant] walked to the vehicle. DMV records show that the said vehicle is registered to the defendant. . . . [The] affiants believe that [the defendant] could have brought evidence to the vehicle from the crime scene within the home prior to surrendering to the police as the handgun, dog collar, yellow shirt, [and] steel toe boots were not located within the residence."

On appeal, the defendant, citing to the trial transcript, argues: "Critically, no officer saw the defendant open the Cadillac or any of its hatches." As we previously have stated, however, "[i]n determining whether the warrant was based [on] probable cause, we may consider *only the information that was actually before the issuing judge at the time he or she signed the warrant*, and the reasonable inferences to be drawn therefrom." (Emphasis added; internal quotation marks omitted.) *State* v. *Shields*, supra, 308 Conn. 691; see also *State* v. *Holley*, 324 Conn. 344, 353, 152 A.3d 532 (2016) ("[i]n evaluating whether the warrant was predicated on probable cause, a reviewing court may consider only the information set forth in the four corners of the affidavit that was presented to the issuing judge and the reasonable inferences to be drawn therefrom"). Accordingly, any trial testimony, or lack thereof, with respect to the officers' observations on October 7, 2013, is not to be considered with respect to whether the search of the defendant's vehicle, executed pursuant to a warrant, was supported by probable cause.

In their application for a search warrant, the affiants averred that they observed the defendant walk back and forth to the vehicle in question and that they heard the sound of the vehicle being locked or unlocked as the defendant walked to that vehicle. From this information, the issuing judge reasonably could have inferred that the defendant had access to the vehicle either at the time that they observed his movements or prior to the officers' arrival. The issuing judge, therefore, further reasonably could have inferred that the defendant may have moved the evidence that the police sought from inside his home, where those items were last seen,[24] to the vehicle in question.

We conclude that the information set forth in the affidavit supported the issuing judge's determination that probable cause existed to search the defendant's vehicle and, therefore, the search of the defendant's vehicle that resulted in the seizure of a firearm and ammunition satisfies federal and state constitutional standards. Accordingly, because the defendant has not shown the existence of a constitutional violation that deprived him of a fair trial, his claim fails under the third prong of *Golding*.

II

The defendant next claims that the trial court abused its discretion when it granted the state's motion to join the two informations for trial. Specifically, he argues that joinder prevented him from testifying. The defendant concedes that he affirmatively waived any objection to the joinder and, therefore, requests that we

[24] The affiants averred that a handgun, yellow shirt, and steel toe boots had been items of interest with respect to the kidnapping and assault allegations, and that they had not been located inside the defendant's home. The affidavit contained information that D had been wearing a "construction yellow colored t-shirt" during the alleged assault that occurred inside the defendant's home, during which the defendant had reportedly "pistol-whipped" D and P and kicked D in the stomach with steel toe boots.

review his claim under the plain error doctrine. See Practice Book § 60-5. We conclude that the defendant cannot prevail under the plain error doctrine.

The following additional procedural history is relevant to this claim. At the hearing on the state's motion for joinder, the defendant, personally and through counsel, expressly stated that he had no objection to joinder.[25] The court thereafter granted the state's motion.

At trial, after the close of the state's case, the court canvassed the defendant as to whether he would testify on his own behalf. The defendant elected not to testify. During the canvass, the defendant stated that, although he "personally . . . would like to [testify]," when "all the pros and cons were laid out and what we've witnessed so far in the trial," he agreed with defense counsel that it was not in his best interest to testify.[26] The

[25] At the hearing on the state's motion for joinder, the following colloquy took place between the court and defense counsel:

"The Court: . . . You had no objection to the motion for joinder, is that correct, [defense counsel]?

"[Defense Counsel]: Yes, Your Honor. . . .

"The Court: All right. So, this is something, I take it, you've discussed with your client before today, is that right, [defense counsel]?

"[Defense Counsel]: Yes, Your Honor.

"The Court: Okay. And your client has no objection to the joining of these two informations?

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

The court then addressed the defendant directly, and the following colloquy occurred:

"The Court: All right. Is that correct, sir, Mr. Cane, you have no objection?

"[The Defendant]: Yes, Your Honor."

[26] The court thought that the defendant was "hedging a little bit" and reiterated that it was the defendant's decision whether to testify. The defendant responded that he thought it was his decision "not to testify" on the basis of "the advice of everyone concerned and what we've seen so far presented by the prosecution." When asked whether this decision was based on his own free will, the defendant stated: "Yeah, after consultation with my attorney and family, yes." The defendant thereafter asked the court whether he would "get a chance to say something" after "the prosecution has their closing arguments . . . ." The court explained that he could only do so if he were to testify. The defendant explained that he understood and stated that his attorney's cross-examination had made it "pretty clear" as to why the jury should not believe the testimony presented. The court again asked the defendant whether he understood that he was "giving up [his] opportunity to testify before the jury," and the defendant responded that he did.

defendant did not thereafter move to sever the informations.[27]

We begin by setting forth the legal principles that guide our analysis of this claim. "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." (Internal quotation marks omitted.) *State* v. *McClain*, 324 Conn. 802, 812, 155 A.3d 209 (2017).

"[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." (Citation omitted; internal quotation marks omitted.) Id.

An appellant "cannot prevail . . . 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 in original; internal quotation marks omitted.) Id.; see also *State* v.

[27] Pursuant to Practice Book § 41-18, "[i]f it appears that a defendant is prejudiced by a joinder of offenses, the judicial authority may, upon its own motion or the motion of the defendant, order separate trials of the counts or provide whatever other relief justice may require."

Coward, 292 Conn. 296, 307, 972 A.2d 691 (2009). "It is axiomatic that, [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. . . . Put another way, plain error review is reserved for only the most egregious errors. When an error of such a magnitude exists, it necessitates reversal." (Citation omitted; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 813–14.

The defendant argues that although he affirmatively waived any objection to the joinder, his claim is nevertheless reviewable under the plain error doctrine because of our Supreme Court's holding in *State* v. *McClain*, supra, 324 Conn. 812. In *McClain*, our Supreme Court held that a *Kitchens* waiver[28] does not preclude plain error review. Id.; see also *State* v. *Juan V.*, 191 Conn. App. 553, 571–75, A.3d (2019) (reviewing claim for plain error that defendant had waived pursuant to *Kitchens*).

In response, the state argues that "[t]he defendant's reliance on *McClain* is misplaced because in *McClain*,

[28] In *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), our Supreme Court "established a framework under which we review claims of waiver of instructional error . . . . [T]he court emphasized that waiver involves the idea of assent . . . and explained that implied waiver occurs when a defendant had sufficient notice of, and accepted, the instruction proposed or given by the trial court. . . . More specifically, the court held that when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Ramon A. G.*, 190 Conn. App. 483, 500–501, 211 A.3d 82 (2019).

our Supreme Court concluded that a " '*Kitchens* waiver,' " which refers to an implied waiver based on counsel's having had an opportunity to review proposed jury instructions, does not preclude plain error review . . . . Here, however, counsel and the defendant explicitly stated that they had no objection to joinder. As in [*State* v. *Cancel*, 149 Conn. App. 86, 102, 87 A.3d 618, cert. denied, 311 Conn. 954, 97 A.3d 985 (2014)], these statements constitute an explicit waiver of any claim challenging joinder and plain error review is not appropriate." (Citation omitted.) In *Cancel*, this court rejected a claim that it was plain error for the trial court to grant the state's motion for joinder, reasoning that the defendant had waived any claim regarding the joinder. This court concluded: "Because . . . the defendant waived any claim regarding the joinder of the cases for trial, there is no error to correct. . . . [A] valid waiver . . . thwarts plain error review of a claim." (Citation omitted; internal quotation marks omitted.) Id., 102–103.

Even if we were to read our Supreme Court's holding in *McClain* broadly to extend its application to the circumstances of the present case, and thus assume that the defendant's waiver would not preclude him from prevailing under the plain error doctrine, we conclude that the defendant cannot demonstrate that the claimed error was "so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis omitted; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812.

On appeal, the defendant argues that joinder prevented him from testifying.[29] Specifically, he argues that

[29] The defendant also argues that "joinder burdened [his] ability to plea bargain." The defendant cites to *Lafler* v. *Cooper*, 566 U.S. 156, 170, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012), for the proposition that "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials." In *Lafler*, however, the United States Supreme Court held that a defendant is entitled to effective assistance of counsel during plea negotiations. Id., 162. The issue in that case did not involve a defendant's

he had testimony to provide concerning the firearms charges in the second information but that he had "ample reason not to testify with respect to the assault and kidnapping counts" in the first information and, therefore, joinder "caused substantial prejudice . . . ." We are not persuaded.

The defendant relies on *State* v. *Perez*, 322 Conn. 118, 139 A.3d 654 (2016), in support of his argument. In *Perez*, our Supreme Court addressed the standard that applies "when a criminal defendant contends that severance of the charges is necessary because he or she wishes to testify as to some charges but not as to others."[30] It held that "no need for a severance exists until the defendant makes a convincing showing that he has both important testimony to give concerning one count and [a] strong need to refrain from testifying on the other. In making such a showing, it is essential that the defendant present enough information—regarding the nature of the testimony he wishes to give on one count and his reasons for not wishing to testify on the other—to satisfy the court that the claim of prejudice is genuine and to enable it intelligently to weigh the considerations of economy and expedition in judicial administration

right to plea bargain in the first instance, nor did it involve the effect of joinder on the plea bargaining process. The defendant cites no legal authority to support his proposition that joinder is improper if it impedes a defendant's "ability to plea bargain." We are, therefore, not persuaded by this argument.

[30] Our Supreme Court explained that "joinder of unrelated criminal charges can cause unfair prejudice when it embarrasses or confounds an accused in making his defense. . . . For example, [p]rejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence." (Citation omitted internal quotation marks omitted.) *State* v. *Perez*, supra, 322 Conn. 134. It further explained: "[B]ecause of the unfavorable appearance of testifying on one charge while remaining silent on another, and the consequent pressure to testify as to all or none, the defendant may be confronted with a dilemma: whether, by remaining silent, to lose the benefit of vital testimony on one count, rather than risk the prejudice (as to either or both counts) that would result from testifying on the other." (Internal quotation marks omitted.) Id., 134–35.

against the defendant's interest in having a free choice with respect to testifying." (Internal quotation marks omitted.) Id., 135–36.

In the present case, however, the defendant did not move to sever the informations. He did not, at any point, indicate that he wanted to testify concerning some of the counts against him but not others, even when the court canvassed him regarding his decision not to testify. The claimed error, therefore, was not "so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis omitted; internal quotation marks omitted.) *State* v. *McClain*, supra, 324 Conn. 812.[31] Accordingly, joinder did not constitute plain error.

III

Last, the defendant raises an unpreserved claim of judicial bias. Specifically, he argues: "In this case, the trial court adjudicated the accusers 'victims' in its November 3, 2016 memorandum of decision on suppression—four days before evidence commenced and two weeks before the defendant was acquitted of the allegations in which the trial court named the accusers 'victims.' This combined with the trial court's sentencing comments, in which it excoriated the defendant for

[31] In addition, the defendant cannot demonstrate that joinder resulted in "manifest injustice" necessitating reversal of the judgment pursuant to the plain error doctrine. In the present case, the defendant argues that he "could have testified to everything his counsel argued at closing." Specifically, he argues that he could have testified that "(1) he inherited the home from his father; (2) it was cluttered; (3) the guns were his father's; D and P were stealing from him; (4) D drove his Cadillac on October 4; (5) she found the gun in the house and was shopping it around pawn shops; [and] (6) he had no idea the old [World War II] rifle was in the closet." In response, the state argues, inter alia, that "[i]t is unclear how this evidence would have been more compelling if presented through his testimony [rather] than through the testimony of other witnesses." We agree with the state.

Although the defendant elected not to testify, evidence had been presented at trial concerning each of these points. In addition, as the defendant himself points out, defense counsel's closing argument was based, in part, on this evidence. Accordingly, there is no manifest injustice that warrants reversal of the judgment pursuant to the plain error doctrine.

acts far beyond the scope of his convictions including acquitted conduct, constitute[d] actual and apparent bias at sentencing." (Emphasis omitted.) We are not persuaded.

The following additional procedural history is relevant to this claim. In its memorandum of decision on the defendant's motion to suppress evidence, the court referred to D and P as "victims." Specifically, in its memorandum of decision, the court found that "[f]rom the early moments of the recorded conversation, [the defendant] demeaned and blamed the two women victims." In addition, in its determination with respect to the protective sweep, the court found, in relevant part, that "[b]ased upon all of the articulable facts and rational inferences known to the New Britain police at the time of the defendant's apprehension, a reasonably prudent officer would conclude the following: a serious assault of two women had occurred within the prior twenty-four to thirty-six hours at 830 Slater Road. One victim was being treated for serious injuries at the hospital. That victim told her son that she was tied up, beaten, hit with a pistol and physically degraded."

The defendant did not, at any point in time, move for judicial disqualification or for a mistrial before the trial court. At the conclusion of the trial, the defendant was acquitted of the kidnapping and assault charges in which D and P were alleged to have been victims.

At the defendant's sentencing, the court summarized the events leading up to the discovery of the firearms, ammunition, and marijuana. It noted in relevant part: "The defendant's interactions with the New Britain police on the date in question showed a highly agitated man, unwilling to interact with the police in any way but the way he wanted. The original allegations of kidnapping, assault and weapons were such a serious nature to the police, that's all they had, and they were

trying to investigate it, but at the time that you interacted with them, Mr. Cane, you escalated the situation, and it became extremely volatile and all of this was because of your actions. You were manipulative with the police on that day and you were invasive in your communications. I believe that you were still high, likely on the Oxycodone, given your addiction to those prescription medications."[32] The court also noted that the defendant's mental health evaluations indicated that he "can be extremely manipulative and . . . highly critical of authority . . . ." Last, the court stated that "[t]his entire case stems from [the defendant's] poor choices. His choice to escalate his prescription medication addiction instead of seeking help, his choice to grow marijuana and keep it in his house, his choice to keep a nine millimeter handgun and enough ammunition for who knows what, his choice to go out and invite two unknown women into his home and engage in a drug-fueled week of debauchery. . . . You have no one to blame but yourself for the position that you find yourself in today."

Immediately before imposing the defendant's sentence, the court stated: "The sentence today is simply punishment. You are a grown man who has had numerous contacts with the criminal justice system. Yes, you finished probation, but you clearly learned nothing from your experience and when you get into trouble, you do it big. You are violent, you are dangerous and you cannot make good decisions or learn from your actions. Society needs to be protected from you, and this sentence will hopefully make sure that you do not have a next big crime."

On appeal, the defendant claims that the court's reference to D and P as victims in its memorandum of decision on his motion to suppress, in addition to its

[32] The defendant's substance abuse was noted throughout his presentence investigation report.

statements at the sentencing hearing, demonstrate judicial bias. The defendant concedes that he failed to preserve this claim and now requests review pursuant to the plain error doctrine; Practice Book § 60-5; or under *State* v. *Golding*, supra, 213 Conn. 239–40.[33]

"Accusations of judicial bias or misconduct implicate the basic concepts of a fair trial. . . . It is a well settled general rule [however] that courts will not review a claim of judicial bias on appeal unless that claim was properly presented to the trial court via a motion for disqualification or a motion for mistrial. . . . Nevertheless, our Supreme Court has recognized that a claim of judicial bias strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary. . . . No more elementary statement concerning the judiciary can be made than that the conduct of the trial judge must be characterized by the highest degree of impartiality. If [the judge] departs from this standard, he [or she] casts serious reflection upon the system of which [the judge] is a part. . . .

"In reviewing a claim of judicial bias, this court employs a plain error standard of review. . . . The

[33] Because the record is adequate for review and the defendant's claim is of constitutional magnitude, we agree that the defendant is entitled to review pursuant to *State* v. *Golding*, supra, 213 Conn. 239–40. For the reasons we will discuss in this opinion, however, we conclude that the alleged constitutional violation does not exist and that the record does not establish that the trial court's actions deprived him of a fair trial. See *State* v. *Saturno*, 322 Conn. 80, 102 n.20, 139 A.3d 629 (2016). Accordingly, we conclude that the defendant's claim fails to satisfy the third prong of *Golding*.

To the extent that the defendant's claim is based on the appearance of bias, in addition to actual bias, the claim is not reviewable under *Golding* because it is not constitutional in nature. See *State* v. *James R.*, 138 Conn. App. 181, 203, 50 A.3d 936 ("[I]nsofar as the claim is based on various statements made by the court during the course of the trial, the claim essentially is that the court *appeared to be partial*. We conclude that these aspects of the claim are not reviewable under *Golding* because they are not constitutional in nature." [Emphasis in original.]), cert. denied, 307 Conn. 940, 56 A.3d 949 (2012); see also *State* v. *Herbert*, 99 Conn. App. 63, 68 n.7, 913 A.2d 443 ("[t]he defendant's claim of judicial bias based solely upon the *appearance* of partiality, does not rise to the level of a constitutional violation" [emphasis in original; internal quotation marks omitted]), cert. denied, 281 Conn. 917, 917 A.2d 999 (2007).

standard to be employed is an objective one, not the judge's subjective view as to whether he or she can be fair and impartial in hearing the case. . . . Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for the judge's disqualification." (Citations omitted; internal quotation marks omitted.) *State* v. *Carlos C.*, 165 Conn. App. 195, 206–207, 138 A.3d 1090, cert. denied, 322 Conn. 906, 140 A.3d 977 (2016).

In the present case, the defendant argues that the court displayed judicial bias[34] because it first "found the defendant guilty [of the kidnapping and assault charges] prior to any evidence" by referring to D and P as victims in its memorandum of decision,[35] and subsequently considered the kidnapping and assault charges in sentencing the defendant. (Emphasis omitted.) The defendant

[34] The defendant claims that the court displayed both actual bias and apparent bias, which he argues rises to the level of "presumptive" bias. In support of his claim of presumptive bias, the defendant cites to several cases from the United States Court of Appeals for the Fifth Circuit. These cases provide that "presumptive bias [is] the one type of judicial bias other than actual bias that requires recusal under the Due Process Clause. . . . Presumptive bias occurs when a judge may not actually be biased, but has the appearance of bias such that the probability of actual bias . . . is too high to be constitutionally tolerable. . . . [A] judge's failure to recuse constitutes presumptive bias in three situations: (1) when the judge has a direct personal, substantial, and pecuniary interest in the outcome of the case, (2) when [she] has been the target of personal abuse or criticism from the party before [her], and (3) when [she] has the dual role of investigating and adjudicating disputes and complaints." (Citations omitted; internal quotation marks omitted.) *Richardson* v. *Quarterman*, 537 F.3d 466, 475 (5th Cir. 2008), cert. denied, 555 U.S. 1173, 129 S. Ct. 1355, 173 L. Ed. 2d 589 (2009); see also *Buntion* v. *Quarterman*, 524 F.3d 664, 672 (5th Cir. 2008), cert. denied, 555 U.S. 1176, 129 S. Ct. 1306, 173 L. Ed. 2d 593 (2009); *Bigby* v. *Dretke*, 402 F.3d 551, 558 (5th Cir.), cert. denied, 546 U.S. 900, 126 S. Ct. 239, 163 L. Ed. 2d 221 (2005). Like the defendant's claim of actual bias, his claim of presumptive bias is predicated on the court's use of the kidnapping and assault charges at his sentencing. Accordingly, for the reasons set forth in this opinion, we reject the defendant's claim of presumptive bias.

[35] We first note that the trial court's use of the term "victims" in its memorandum of decision on the defendant's motion to suppress was not indicative of bias. In *State* v. *Cortes*, 276 Conn. 241, 249 n.4, 885 A.2d 153 (2005), the case cited by the defendant in support of his argument, the state conceded that the trial court's seventy-six references to the complainant as the "victim" in its jury charge were improper. Our Supreme Court held that

argues that, because he was acquitted of the kidnapping and assault charges, the court was required to find that the acquitted conduct had been proven by a preponderance of the evidence, pursuant to *United States* v. *Watts*, 519 U.S. 148, 156, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997),[36] in order to be considered at the defendant's

"references to the complainant as the 'victim' [are] inappropriate where the very commission of a crime is at issue" because "the jury could have drawn only one inference from its repeated use, namely, that the defendant had committed a crime against the complainant." Id. In the present case, the court did not refer to D and P as victims in front of the jury. The reasoning of the court in *Cortes*, therefore, is inapposite.

Moreover, we note that the defendant does not cite any legal authority to support his proposition that a court's use of the term "victim," where the defendant is subsequently tried by a jury, and not by the court, constitutes an adjudication of a defendant's guilt.

[36] In *Watts*, the United States Supreme Court considered two cases in which two panels of the United States Court of Appeals for the Ninth Circuit held that sentencing courts could not consider the conduct underlying any charges for which the defendants had been acquitted. *United States* v. *Watts*, supra, 519 U.S. 149.

In the first case, the jury convicted the defendant of possessing cocaine base with intent to distribute, but acquitted him of using a firearm in relation to a drug offense. Id., 149–50. Despite the defendant's acquittal on the firearms count, the sentencing court found by a preponderance of the evidence that the defendant had possessed the guns in connection with the drug offense. Id., 150. In calculating the defendant's sentence, the sentencing court therefore added two points to his base offense level under the federal sentencing guidelines. Id. In the second case, the defendant was charged with two counts of aiding and abetting possession with intent to distribute cocaine on the basis of two separate drug transactions. The jury convicted the defendant on the first count but acquitted her on the second count. Id. The sentencing court found by a preponderance of the evidence that the defendant had indeed been involved in the second transaction. Id., 150–51. The sentencing court determined that the second sale was relevant conduct under the federal sentencing guidelines and therefore calculated the defendant's base offense level under the guidelines by aggregating the amounts of both sales. Id., 151. The United States Court of Appeals for the Ninth Circuit vacated the sentence in each case and held that a sentencing judge may not, under any standard of proof, rely on conduct of which the defendant was acquitted. Id., 150–51.

The United States Supreme Court held that, pursuant to 18 U.S.C. § 3661 and the federal sentencing guidelines, federal judges may consider conduct underlying any charges for which the defendant was acquitted, so long as that conduct has been proven by a preponderance of the evidence. Id., 157. The court explained: "[A]n acquittal is not a finding of any fact. An acquittal can only be an acknowledgment that the government failed to prove an essential element of the offense beyond a reasonable doubt. Without specific jury findings, no one can logically or realistically draw any factual finding inferences . . . . Thus . . . the jury cannot be said to have necessarily

sentencing. Specifically, he contends that "the *Watts* court considered whether a sentencing court could consider acquitted conduct when sentencing for counts of [a] conviction (in a multicount indictment). . . . [T]he court held that a district court could consider the acquitted conduct at sentencing if it found it proven by a preponderance of the evidence." (Citation omitted; emphasis omitted.) The defendant further argues that the court in the present case "was unable to impartially adjudicate this sentencing fact" because it previously had referred to D and P as victims in its memorandum of decision on his motion to suppress.[37]

The record, however, does not support the defendant's contention that the court considered the kidnapping and assault charges when it sentenced the defendant. Although the court had mentioned the kidnapping

rejected any facts when it returns a general verdict of not guilty." (Citations omitted; internal quotation marks omitted.) Id., 155.

[37] The defendant also argues that the court exhibited bias at sentencing by (1) "fault[ing] the defendant for his anger at the police and demeaning the accusers," (2) "explicitly disregard[ing] mitigating evidence with respect to the old Japanese rifle"; see footnote 31 of this opinion; (3) "punish[ing] the defendant for telling the police to leave his property," (4) "claim[ing] the defendant '[chose] to escalate his . . . addiction' in spite of the fact that addiction is a disease," and (5) finding the defendant "to be violent in the absence of violent crime convictions." We are not persuaded.

First, there is nothing in the record to support the defendant's argument that the court punished the defendant for telling the police to leave his property. Next, the defendant's substance abuse, as well as his prior convictions of violent felony offenses, were noted in the defendant's presentence investigation report. The defendant's demeanor, namely, his "anger at the police and demeaning the accusers," as well as his presentence investigation report, are legitimate sentencing considerations. See *State* v. *Elson*, 311 Conn. 726, 782, 91 A.3d 862 (2014) ("[t]he defendant's demeanor, criminal history, [and] presentence investigation report . . . remain legitimate sentencing considerations" [internal quotation marks omitted]).

Last, with respect to the defendant's argument regarding the rifle, there was evidence presented at trial that the defendant's home, where the rifle was found, had once belonged to his father, who died in 2007. There was evidence presented that the rifle was a World War II surplus rifle and that the defendant's father was a veteran of World War II. Nevertheless, the jury found the defendant guilty of criminal possession of a firearm with respect to the rifle. The court was not, therefore, "explicitly disregard[ing] mitigating evidence with respect to the old Japanese rifle," but rather, sentencing the defendant in accordance with the jury's verdict.

and assault charges when it summarized the events leading to the discovery of the firearms, ammunition, and marijuana, it had referred to the kidnapping and assault charges as the "original allegations" and thereafter focused on the events that occurred on October 7, 2013. In addition, although the court referred to the defendant as "violent," it had done so in the context of reviewing the defendant's criminal history. As we previously have stated, the defendant had prior convictions of violent felony offenses, which were noted in the defendant's presentence investigation report. We are not persuaded that the court's comment referred to the kidnapping and assault charges. The record, therefore, does not provide a basis for the defendant's claim of judicial bias. Accordingly, because we conclude that the trial court did not display judicial bias, there is no manifest injustice that warrants reversal of the judgment pursuant to the plain error doctrine.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

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MEMORANDUM DECISIONS

NOEMI SOTO *v.* CHRISTIANS ALLIANCE, INC., ET AL.
(AC 42088)

Keller, Prescott and Moll, Js.

Argued September 9—officially released September 24, 2019

Plaintiff's appeal from the Superior Court in the judicial district of Middlesex, *Domnarski*, *J.*

Per Curiam. The judgment is affirmed.

WATER POLLUTION CONTROL AUTHORITY FOR THE CITY OF BRIDGEPORT *v.* TROY R. MCKINLEY, JR., ET AL.
(AC 40633)

Alvord, Devlin and Beach, Js.

Submitted on briefs September 10—officially released September 24, 2019

Named defendant's appeal from the Superior Court in the judicial district of Fairfield, *Hon. Alfred J. Jennings, Jr.*, judge trial referee.

Per Curiam. The judgment is affirmed.

FLOYD SIMMS *v.* COMMISSIONER OF CORRECTION
(AC 41269)

Elgo, Moll and Devlin, Js.

Argued September 6—officially released September 24, 2019

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

Per Curiam. The appeal is dismissed.

RUSSELL KIRBY *v.* COMMISSIONER
OF CORRECTION
(AC 41454)

Alvord, Devlin and Beach, Js.

Argued September 10—officially released September 24, 2019

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

Per Curiam. The appeal is dismissed.

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SUPREME COURT PENDING CASES

The following appeal is assigned for argument in the Supreme Court on October 15, 2019

STATE *v.* LINDA KOSUDA-BIGAZZI, SC 20341
Judicial District of New Britain

Criminal; Murder; Whether Prosecutor's Examination of Documents Protected by Attorney-Client Privilege Constituted a Per Se Violation of the Defendant's Right to Counsel Such that Dismissal of Charges Warranted. The defendant was charged with murder after her husband was found dead in the basement of the couple's Burlington home. The police had executed a search warrant for the house and seized several items, including two files that were located in a locked file cabinet. The first file was labeled "Criminal Defense Attorney Oct 2017" (defense file), and the second file was labeled "Incident 2017" (incident file). The defense file and the incident file both contained handwritten documents in which the defendant described her husband's killing and claimed that she killed him in self-defense. After reviewing the seized materials, the state notified the defendant that it had obtained documents that were potentially protected by attorney-client privilege. The defendant then moved to dismiss the charges against her pursuant to *State* v. *Lenarz*, 301 Conn. 417 (2011). In *Lenarz*, the Supreme Court held that prejudice may be presumed when the state invades the attorney-client privilege by reading privileged materials that contain specific details regarding trial strategy. The Supreme Court determined in *Lenarz* that, after the prosecutor had reviewed privileged communications that contained a detailed "road map" of the defendant's trial strategy and then continued to prosecute the case, dismissal of the criminal charge of which the defendant had been convicted was the only adequate remedy for the violation. Here, the defendant argued that the state had invaded her attorney-client privilege by seizing and examining the files containing privileged information related to trial strategy and accordingly that dismissal was the only adequate remedy. The state opposed the motion, contending that any prejudice to the defendant could be cured by a remedy short of dismissal. During the hearing on the motion, the parties agreed that that the defense file and its contents were protected by attorney-client privilege, but they disagreed as to whether the other files were privileged. After a multi-day hearing, the trial court denied the motion to dismiss. It concluded that only the criminal defense file and its contents were protected by attorney-client privilege. The court found that the two documents detailing the homicide were not identical

and that, while the version contained in the defense file was protected by attorney-client privilege, the version contained in the incident file was not privileged. The court also found that the actions taken by the state after it had reviewed the potentially privileged materials served to mitigate any prejudice to the defendant. Finally, the court determined that dismissal was not required because any prejudice to the defendant could be remedied by issuing orders designed to result in an investigation and prosecution conducted by individuals with no knowledge of the privileged communications. The defendant appeals upon the granting of certification by the Chief Justice pursuant to General Statutes § 52-265a. She claims that the trial court improperly found that the document detailing the homicide that was in the incident file was not privileged and that it improperly determined that any prejudice could be cured by a remedy short of dismissal.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 19-AA: Dental Fee Schedule Update – CDT Code D2990

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after November 1, 2019, SPA 19-AA will amend Attachment 4.19-B of the Medicaid State Plan to adjust the children and adult dental fee schedules as follows. Specifically, Current Dental Terminology (CDT) Code D2990, ''Resin Infiltration for Incipient Smooth Surface Lesions'' will be added to the dental fee schedules and dental providers will need to bill D2990 in place of D2330 and D2391 in cases where restorations are focused on small areas of one tooth surface. Because D2990 is a lower rate than the existing rates for D2330 or D2331, which are not being changed by this SPA, this SPA results in a lower rate being paid for restorations that are focused on small areas of one tooth surface. This SPA results in more accurate reimbursement when the restorations are focused on small areas of one tooth surface.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then go to the Adult or Children's Dental Fee Schedule, as applicable. The fees for CDT code D2990 are as follows:

CDT Code	Description	Fee Adult	Fee Children
D2990	Resin Infiltration for Incipient Smooth Surface Lesions	$40.00	$40.00

Fiscal Impact

DSS estimates that this SPA will decrease aggregate annual expenditures by approximately $39,000 in State Fiscal Year (SFY) 2020 and $81,000 in SFY 2021.

Compliance with Federal Access Regulations

In accordance with federal regulations at 42 C.F.R. §§ 447.203 and 447.204, DSS is required to ensure that there is sufficient access to Medicaid services, including services where payment rates are proposed to be reduced. Those federal regulations also require DSS to have ongoing mechanisms for Medicaid members, providers, other stakeholders, and the public to provide DSS with feedback about access. In addition to other available procedures, anyone may send DSS comments about the potential impact of this SPA on access to the dental services for which rates are being reduced or payment is being restructured in a manner that could affect access,

as part of the public comment process for this SPA. Contact information and the deadline for submitting public comments are listed below.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-AA: Dental Fee Schedule Update – CDT Code D2990''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than October 24, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 19-AG: Medical Equipment Devices and Supplies (MEDS) Fee Schedule Changes

The State of Connecticut Department of Social Services (DSS) proposes to submit the following amendment to the Medicaid State Plan to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after November 1, 2019, SPA 19-AG will amend Attachment 4.19-B of the Medicaid State Plan in order to update the MEDS Fee Schedule as follows:

1. The pricing methodology for the following two Health Care Common Procedural Coding System (HCPCS) codes E0639 (Patient lift, moveable from room to room with disassembly and reassembly, includes all components/accessories) and E0640 (Patient lift, fixed system, includes all components/accessories) is being updated as detailed below, including increasing specified components from actual acquisition cost (AAC) plus 15% to AAC plus 40% in order to reflect the complexity related to providing overhead patient lifts and the documentation of applicable costs related to provision of those items. The new pricing methodology for these overhead patient lifts is being modified to the following:

Category	**Payment Methodology**
Material cost	AAC plus 40%
Evaluation Time	Actual cost. No mark-up
Labor to install overhead lift	Actual cost. No mark-up.
1 Sling	AAC plus 40%
Freight	Actual cost. No mark-up

2. Procedure Code A4259 (lancets per box of 100) monthly quantities will be reduced from 4 boxes per month to 2 boxes per month. Current fee is $10.25 each. Additional quantities may be approved with prior authorization.

3. The Department will be adding prior authorization (PA) to procedure codes L1960 (Ankle foot orthosis (AFO), posterior solid ankle, plastic, custom fabricated) and L1970 (Ankle foot orthosis, plastic, with ankle joint, custom fabricated). Providers may be able to provide prefabricated AFO's in lieu of custom fabricated AFO's for those members which do not require a custom fabricated item that is individually made for the specific member without prior authorization.

Custom Fabricated AFO Code	Description of Custom Fabricated AFO	Crosswalk to prefabricated AFO code	Description of Prefabricated AFO
L1960	AFO posterior solid ankle plastic custom-fabricated	L1930	AFO plastic or other material prefabricated includes fitting and adjustment
L1970	AFO plastic with ankle joint custom-fabricated	L1971	AFO plastic or other material w/ankle joint prefabricated, includes fitting and adjustment

4. Lastly, this SPA will decrease the reimbursement to the following procedure codes effective November 1, 2019. Code A6198 is being reduced to align with available information regarding applicable cost. The 3 wheelchair codes below (E1028, E2620 and K0040) are being decreased to align the fees at 100% of the Medicare rate.

Procedure Code	Description of Code	Modifier	Current Fee	Proposed Fee
A6198	Alginate or other fiber gelling dressing wound cover sterile pad size more than 48 sq. in., each dressing		$112.50	$19.29
E1028	Wheelchair accessory manual swingaway retractable		$177.39	$128.10
E1028	Wheelchair accessory manual swingaway retractable	RR	$17.74	$12.81
E1028	Wheelchair accessory manual swingaway retractable	KA	$177.39	$128.10

E1028	Wheelchair accessory manual swingaway retractable	RB	$177.39	$128.10
E2620	Positioning wheelchair back cushion planar back . . .		$442.27	$325.60
E2620	Positioning wheelchair back cushion planar back . . .	RR	$44.23	$32.56
E2620	Positioning wheelchair back cushion planar back . . .	KA	$442.27	$325.60
E2620	Positioning wheelchair back cushion planar back . . .	RB	$442.27	$325.60
K0040	Adjustable angle footplate each		$60.30	$45.60
K0040	Adjustable angle footplate each	RR	$6.33	$4.56
K0040	Adjustable angle footplate each	KA	$60.30	$45.60
K0040	Adjustable angle footplate each	RB	$60.30	$45.60

Fee schedules are published at this link: http://www.ctdssmap.com, then select Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

Based on available information, DSS estimates that this SPA will result in a reduction of annual aggregate expenditures of proximately $105,000 in State Fiscal Year (SFY) 2020 and $185,000 in SFY 2021.

Compliance with Federal Access Regulations

In accordance with federal regulations at 42 C.F.R. §§ 447.203 and 447.204, DSS is required to ensure that there is sufficient access to Medicaid services, including services where payment rates are proposed to be reduced. Those federal regulations also require DSS to have ongoing mechanisms for Medicaid members, providers, other stakeholders, and the public to provide DSS with feedback about access. In addition to other available procedures, anyone may send DSS comments about the potential impact of this SPA on access to medical equipment, devices, and supplies for which rates are being reduced or payment is being restructured in a manner that could affect access, as part of the public comment process for this SPA. Contact information and the deadline for submitting public comments are listed below.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-AG: Medical Equipment Devices and Supplies (MEDS) Fee Schedule Changes''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than October 24, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 19-AH: Updates to the Physician Office & Outpatient Fee Schedule and Physician-Surgery Fee Schedule

The State of Connecticut Department of Social Services (DSS) proposes to submit the following amendment to the Medicaid State Plan to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after October 1, 2019, SPA 19-AH will amend Attachment 4.19-B of the Medicaid State Plan to update the physician office and outpatient fee schedule as follows:

This SPA will increase the rates for the Long-Acting Reversible Contraceptive (LARCs) Devices specified below. This change will apply to providers who bill these LARCs off the physician office and outpatient fee schedule. This change is necessary to properly reimburse providers for the increased acquisition cost of this device in order to ensure sufficient access to the device.

Code	Description	Price
J7297	Liletta, 52 mg	$934.82
J7307	Etonogestrel implant	$749.40

This SPA will also update several procedure codes on the physician-surgery fee schedule that are currently manually priced, which will be set as a fixed fee at 57.5% of the 2019 Medicare physician fee schedule. These changes are necessary because Medicare very recently added fixed fees for those codes for the first time. Setting those codes at 57.5% of applicable Medicare rates is consistent with the percentage of applicable Medicare rates used for other codes on the fee schedule. The purpose of this change is to remain aligned with Medicare now that fixed fees have been set for Medicare. The chart below lists the reimbursement rates that will be effective October 1, 2019:

CPT Code	Description	Proposed Rate
33981	Replace vad pump ext	$541.30
33982	Replace vad intra w/o bp	$1272.26
33983	Replace vad intra w/bp	$1493.31
62380	Ndsc dcmprn 1 ntrspc lumbar	$976.25

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

Based on available information, DSS estimates that this SPA will increase annual aggregate expenditures by approximately $188,000 in State Fiscal Year (SFY) 2020 and $290,000 in SFY 2021.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-AH: Updates to the Physician Office & Outpatient Fee Schedule and Physician-Surgery Fee Schedule''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than October 9, 2019.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 19-AI: Rate Increase for Home Health Aide Services

The State of Connecticut Department of Social Services (DSS) proposes to submit the following amendment to the Medicaid State Plan to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after October 1, 2019, SPA 19-AI will amend Attachment 4.19-B of the Medicaid State Plan to update the home health services fee schedule by increasing the rates by one percent (1%) for Health Care Procedural Coding System (HCPCS) codes T1004 (Services of a qualified nursing aide, up to 15 minutes) and T1021 (Home Health aide or certified nurse assistant, per visit) provided by licensed home health agencies. This SPA is intended to reflect the costs of home health agencies paying increased wages in order to comply with the state's October 1, 2019 increase in the state minimum wage.

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $149,000 in State Fiscal Year (SFY) 2020 and $223,000 in SFY 2021.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 19-AI: Rate Increase for Home Health Aide Services''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than October 9, 2019.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 19-AJ: Reimbursement for Individuals in a Disaster Struck Nursing Facility

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after November 1, 2019, SPA 19-AJ will amend Attachment 4.19-D of the Medicaid State Plan to update the payment rates for nursing facility residents to provide for reimbursement when a resident of a Disaster Struck Nursing Facility must be temporarily evacuated to another facility due to a disaster for a period of up to thirty (30) days, as detailed in the SPA. The nursing facility accepting the temporary resident will be reimbursed at the same rate as the Disaster Struck Nursing Facility. The Disaster Struck Nursing Facility must enter into a contract with the facility accepting the temporary resident.

Fiscal Impact

DSS estimates that this SPA will have a nominal impact on annual aggregate expenditures in State Fiscal Year (SFY) 2020 and SFY 2021.

Obtaining SPA Language and Submitting Comments

This SPA is posted on the DSS web site at the following link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Medical Policy Unit, Department of Social Services, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''Reimbursement for Individuals in a Disaster Struck Nursing Facility''.

Anyone may send DSS written comments about the SPA. Written comments must be received by DSS at the above contact information no later than October 24, 2019.

NOTICES

NOTICE OF SUSPENSION OF ATTORNEY

Pursuant to Practice Book § 2-54, notice is hereby given that on August 14, 2019, Attorney Don A. Carlos, Jr., Juris # 406780, was ordered suspended from practice of law by the Hon. Taggart Adams for a period of two and one-half (2 1/2) years, retroactive to October 2, 2018, and subject to any further orders of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York.

The full order of the court can be found in FST-CV-19-6041568-S OFFICE OF CHIEF DISCIPLINARY COUNSEL V. DON A. CARLOS, JR.

Appointment of Trustee

Pursuant to Practice Book § 2-64, on September 13, 2019 in docket number HHD-CV-19-6116322-S, Attorney Keith K. Fuller (juris# 416953) of Enfield, CT is appointed as trustee to inventory the late Walter E. Bass, Jr. (juris# 002450) files, to secure his clients' fund account(s), take and review the office mail, and take such action as seems indicated to protect the interests of Attorney Bass's clients and to provide an accounting to the Court.

David Sheridan
Presiding Judge

Notice of Reprimand of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on September 12, 2019, in Docket Number HHD-CV-18-6087712-S, Attorney Nitor Egbarin was reprimanded.

David Sheridan
Presiding Judge