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Table of Contents

CONNECTICUT REPORTS

Bowens *v.* Commissioner of Correction, 333 C 502 2

Habeas corpus; certification to appeal; claim of actual innocence; claim that identification procedures used in connection with petitioner's criminal conviction were so unreliable and unnecessarily suggestive, that they violated petitioner's constitutional right to due process; claim of ineffective assistance of habeas counsel; claim that habeas court incorrectly concluded that petitioner's claim of cruel and unusual punishment with respect to petitioner's sentence was barred by doctrine of res judicata; application of holdings in recent cases, State *v.* McCleese *(333 Conn. 378) and* State *v.* Williams-Bey *(333 Conn. 468), to resolve petitioner's claim of cruel and unusual punishment.*

State *v.* McCleese (replacement pages), 333 CR 403–404 v

State *v.* McCleese (replacement pages), 333 CR 417–28 vii

Volume 333 Cumulative Table of Cases 43

CONNECTICUT APPELLATE REPORTS

Bank of America, National Assn. *v.* Derisme (Memorandum Decision), 193 CA 903 . . . . 163A

Commerce Park Associates, LLC *v.* Robbins, 193 CA 697 . . . . . 91A

Contracts; landlord-tenant; negligence; claim that trial court improperly awarded landlord additional rent for period between November, 2014, through third full week of April, 2015, on basis of its implicit factual finding that premises were fully tenantable during that period and, therefore, that landlord was entitled to receive full amount of rent due under lease, rather than partial payments tendered by tenant; whether there was evidence in record supporting trial court's calculation of back rent owed by tenant; claim that trial court improperly found that tenant was constructively evicted from premises as result of serious and frequent sewer backups; whether record supported trial court's finding that tenant did not vacate premises before landlord had notice and reasonable opportunity to correct problems with building's sewer system; claim that trial court improperly awarded compensatory damages to tenant on theory of gross negligence because Connecticut common law does not recognize degrees of negligence or cause of action sounding in gross negligence; claim that it was improper for trial court to have awarded damages on basis of gross negligence because it was never pleaded by tenant; claim that trial court improperly determined amount of damages awarded to tenant by incorrectly determining that proper measure of tenant's damages was its loss of beneficial use of substantial improvements it had made to premises prior to constructive eviction and that court should have, instead, limited its award of damages to loss of fair market value of lease; whether trial court miscalculated amount of damages awarded to tenant for loss of beneficial use of substantial improvements tenant had made to premises.

Daniel W. E. *v.* Commissioner of Correction (Memorandum Decision), 193 CA 905 . . . . 165A

Fernandez *v.* Commissioner of Correction, 193 CA 746 . . . . . 140A

Habeas corpus; whether habeas court properly dismissed petitioner's third petition for writ of habeas corpus; whether petition failed to state claim upon which habeas relief could be granted; whether petitioner could assert claim for relief under Rules of Professional Conduct; claim that neither rule 1.10 nor rule 3.7 of Rules of Professional Conduct required disqualification of attorneys in all of state's attorney's offices and Office of Chief State's Attorney; whether petitioner provided basis

(continued on next page)

for any conclusion that his statements to prosecutor during plea negotiations while petitioner was self-represented were privileged; whether claim that prosecutor's potential testimony regarding petitioner's statements would have been inadmissible and that prosecutor's testimony effectively prevented petitioner from testifying in his own defense was based on speculation.

Labarge *v.* Commissioner of Correction (Memorandum Decision), 193 CA 904. . . . . 164A

Lampert *v.* Lampert (Memorandum Decision), 193 CA 905 . . . . . 165A

New Haven *v.* Ferrucci (Memorandum Decision), 193 CA 905 . . . . . 165A

Robbins Eye Center, P.C. *v.* Commerce Park Associates, LLC (See Commerce Park Associates, LLC *v.* Robbins), 193 CA 697 . . . . . 91A

State *v.* Lynch, 193 CA 637 . . . . . 31A

Operating motor vehicle while under influence of intoxicating liquor; failure to appear in second degree; criminal trespass in first degree; motion to withdraw guilty pleas; whether trial court abused its discretion in failing to conduct evidentiary hearing with respect to motion to withdraw guilty pleas; whether defendant failed to provide adequate factual basis to support further hearing; whether defense counsel's assertion that plea canvass was deficient for failing to specify that defendant's driver's license could be revoked permanently was reason among grounds enumerated in applicable rule of practice (§ 39-27) for withdrawal of plea; claim that trial court should have granted motion to withdraw guilty pleas, pursuant to § 39-27, on ground that defense counsel was ineffective; whether trial court abused its discretion by failing to conduct evidentiary hearing prior to terminating defendant's participation in alcohol education program.

Thunelius *v.* Posacki, 193 CA 666 . . . . . 60A

Child custody; guardian ad litem; child support; protective order; claim that trial court improperly delegated its decision-making authority to nonjudicial entity when it defined duties and responsibilities of guardian ad litem of parties' minor child; whether trial court abused its discretion in ordering that prevailing party in any postjudgment dispute adjudicated by court between parties after unsuccessful mediation with the guardian ad litem be reimbursed by other party for his or her share of guardian ad litem's fees; whether amount of any future fees and parties' respective financial capacities to pay such fees was purely speculative; whether claim that trial court improperly appointed guardian ad litem without having complied with certain statutory requirements was moot; whether there was practical relief that this court could afford defendant; whether trial court abused its discretion in sua sponte issuing protective order; whether language of order clearly indicated that court intended order to function as protective order issued pursuant to Yontef *v.* Yontef *(185 Conn. 275); whether trial court abused its discretion in ordering parties to enroll child in private school through high school and to divide payments for that schooling; whether there was evidence of cost of private high school or that parties had ever agreed on child attending private high school; claim that trial court improperly relied on child support guidelines worksheet in issuing its child support orders; reviewability of claim that trial court, by failing to order plaintiff to reimburse defendant for certain expenses he allegedly should have paid*

(continued on next page)

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in accordance with prior stipulation between parties, in effect, granted plaintiff retroactive modification of pendente lite orders to pay those expenses.
U.S. Bank Trust, N.A. *v.* Theodore (Memorandum Decision), 193 CA 904 . . . . . 164A
Wager *v.* Moore, 193 CA 608 . . . . . 2A
Negligence; claim that trial court erred in denying motion to set aside verdict and for new trial; claim that there was insufficient evidence to support jury's finding of contributory negligence; claim that trial court erred in instructing jury on contributory negligence when instruction was not supported by evidence; claim that trial court failed to instruct jury on law essential to plaintiff's claim regarding defendant's negligence; claim that once trial court instructed jury on pedestrian's duties pursuant to relevant statutes (§§ 14-300b [a] and 14-300c [b]), its refusal to charge jury on countervailing duties driver owes to pedestrians pursuant to relevant statutes (§§ 14-300d and 14-300i) constituted error; claim that improper hearsay evidence was introduced against plaintiff during videotaped deposition testimony of defendant's toxicology expert.
Volume 193 Cumulative Table of Cases 167A

MISCELLANEOUS

Notice of Reinstatement of Attorney 1B

A.3d (2019). The same situation arises in the present case because the parties cannot locate the presentence investigation report authored for the defendant's original sentencing in 2003. Although it is "not impossible"; *Songster* v. *Beard*, 201 F. Supp. 3d 639, 641 (E.D. Pa. 2016); even in cases in which only a few years have passed, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (Internal quotation marks omitted.) *Graham* v. *Florida*, supra, 560 U.S. 68. Asking sentencing judges to make this determination years after the fact might, in these cases, be asking too much.

The parole board, under P.A. 15-84, § 1, on the other hand, bases its decisions on more recent evidence and more ascertainable outcomes. Although parole and resentencing hearings share many of the same characteristics—e.g., the right to counsel, the offender's right to make a statement and present evidence, each victim's right to make a statement, the availability of expert testimony—the parole board relies more on evidence of actual rehabilitation and focuses more on the offender's ability to succeed outside of prison at the most relevant moment, just before he will, potentially, be released. For example, it considers the probability that he will "remain at liberty without violating the law," the continuing "benefits to [the offender] and society that would result from [the offender's] release," and the offender's "substantial rehabilitation . . . ." P.A. 15-84, § 1, codified at General Statutes (Supp. 2016) § 54-125a (f) (4). It does not overlook the value of the *Miller* factors, though. Alongside these forward-looking factors described previously, the board also considers a juvenile offender's "age and circumstances . . . as of the date of the commission of the crime," "remorse and increased maturity since the date of the commission of the crime," and "efforts to overcome . . . obstacles

that such person may have faced as a child . . . .'' General Statutes (Supp. 2016) § 54-125a (f) (4).[12] It considers not whether a juvenile is capable of change in the distant future but, rather, from the best possible vantage point, whether he has actually changed.

These considerations highlight a truth about the retroactive application of *Miller* that appears to animate the dissent and its frustration with our decisions in this case and in *Delgado*—that no remedy will put the defendant in the same position he would have been in if his youth had been considered when he was sentenced. In the present case, the defendant was effectively sentenced to life imprisonment, and state law did not provide an opportunity for parole for such crimes. See footnote 17 of this opinion. A sentence of life without parole improperly denies the juvenile offender of ''a chance to demonstrate growth and maturity''

[12] See footnote 22 of this opinion (comparing *Miller* factors and parole eligibility factors). The dissent incorrectly states that parole eligibility under P.A. 15-84 does not require the board to give any special weight to the *Miller* factors and the diminished culpability of juvenile offenders but, rather, only permits the board to consider the *Miller* factors in determining rehabilitation. Public Act 15-84, § 1, requires the board to consider whether an inmate has demonstrated substantial rehabilitation, considering factors such as ''the age and circumstances of such person *as of the date of the commission of the crime* . . . .'' (Emphasis added.) The fact that the defendant's age at the time of the crime is a factor in determining whether he has demonstrated substantial rehabilitation shows that this factor is not only '' 'future focused,' '' as the dissent contends, but also considers whether he had diminished capacity because of his age at the time of the crime. Just because his age at the time of the crime may be considered for rehabilitative purposes does not mean it cannot also be considered for culpability purposes. If there is any doubt about this, let us clear it up: the board should, *for culpability purposes*, consider the defendant's age and circumstances as of the date of the commission of the crime. This is in line with the parole board's stated policy of giving ''great weight to the diminished culpabilities of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and maturity that has been displayed when considering an offender for suitability.'' State of Connecticut Board of Pardons and Paroles, Annual Report 2016–2017 (2017), available at https://portal.ct.gov/-/media/BOPP/Legacy-Files/BoPPAnnualReport20162017forDASDigestpdf.pdf (last visited August 23, 2019).

judiciary's power to impose specific types of sentences is therefore defined by the legislature." [Citations omitted; internal quotation marks omitted.]), cert. denied, 235 Conn. 939, 668 A.2d 376 (1995); see also *McLaughlin* v. *Bronson*, 206 Conn. 267, 271, 537 A.2d 1004 (1988) ("Ordinarily, the pardoning power resides in the executive. . . . In Connecticut, the pardoning power is vested in the legislature . . . ." [Citations omitted.]). It is the legislature that defines the parameters of a sentencing scheme, including whether it permits parole eligibility.[17] See *Mead* v. *Commissioner of Correction*, 282 Conn. 317, 324, 920 A.2d 301 (2007) ("eligibility for parole [is] a part of the state's sentencing scheme"). That is what the legislature did in enacting P.A. 15-84, § 1. The legislature did not change the length of the defendant's sentence, but rather provided him with the possibility of parole.

Second, the power to impose or modify a judgment of conviction is not synonymous with the power of sentencing. A judgment of conviction is defined as "[t]he written record of a criminal judgment, consisting of the plea, the verdict or findings, the adjudication, and the sentence." Black's Law Dictionary (10th Ed. 2014) p. 972. "Sentencing," however, is defined as "[t]he

[17] As a matter of fact, the reason that the defendant's original sentence violated *Miller* was because General Statutes § 54-125a (b) (1) denied the defendant the possibility of parole. See General Statutes (Rev. to 2001) § 54-125a (b) (1) ("[n]o person convicted of any of the following offenses, which was committed on or after July 1, 1981, shall be eligible for parole: . . . murder, as provided in section 53a-54a").

Although the trial court had discretion to determine the length of the defendant's sentence, it did not have discretion to grant the defendant the possibility of parole. Thus, by providing the possibility of parole through the enactment of P.A. 15-84, the legislature did not usurp the trial court's exercise of discretion to determine whether the defendant was parole eligible but, rather, modified the sentencing scheme responsible for the defendant's unconstitutional sentence.

judicial determination of the penalty for a crime." Id., p. 1570; see id., p. 1569 (defining "sentence" as "the punishment imposed on a criminal wrongdoer"). Public Act 15-84, § 1, does not alter the defendant's judgment of conviction. He remains convicted of murder, conspiracy to commit murder, and assault in the first degree. In enacting P.A. 15-84, § 1, the legislature retroactively modified the sentencing scheme (although not any particular sentence), which is included in its power to prescribe and limit punishments for crimes.[18]

The defendant counters that, although the legislature has the power to create the scheme of punishment, it cannot do so retroactively without violating the separation of powers doctrine because the change effectively modifies his sentence. But the fact that the legislature, in exercising its power to create and modify the state's sentencing scheme, has affected a particular defendant's sentence does not mean that it has impermissibly encroached upon the judiciary's powers to impose or modify a sentence. It is well established that judicial and legislative powers necessarily overlap in many areas, including sentencing. See, e.g., *State* v. *Campbell*, supra, 224 Conn. 178 ("[a]lthough the judiciary unquestionably has power over criminal sentencing . . . the judiciary does not have exclusive authority in that area").

[18] Our analysis accords with other jurisdictions that have held that the legislature does not intrude on the realm of the judiciary by retroactively changing a sentencing scheme to create more lenient penalty provisions. See *State ex rel. Esteen* v. *State*, 239 So. 3d 233, 237 (La. 2018) ("[T]he legislature exercised its exclusive authority to determine the length of punishment for crimes classified as felonies, and further declared those more lenient penalties shall be applied retroactively to those already sentenced. Nothing in the constitution prohibits the legislature from enacting more lenient penalty provisions and declaring they be applied retroactively in the interest of fairness in sentencing."); see also *State* v. *Vera*, 235 Ariz. 571, 576–77, 334 P.3d 754 (App. 2014) (legislature did not violate separation of powers by providing defendant with possibility of parole after sentencing), review denied, Arizona Supreme Court (March 17, 2015), cert. denied, U.S. , 136 S. Ct. 121, 193 L. Ed. 2d 95 (2015).

The fact that certain governmental powers overlap is not only necessary to ensure the smooth and effective operation of government; see *In re Application of Clark*, supra, 65 Conn. 38 (rigid application of separation of powers doctrine would "result in the paralysis of government"); but also is a product of the historical evolution of Connecticut's governmental system, which established a "tradition of harmony" among the separate branches of government that the separate branches of the federal governmental system did not have. R. Kay, "The Rule-Making Authority and Separation of Powers in Connecticut," 8 Conn. L. Rev. 1, 7 (1975). As it relates to the Judicial Branch, this tradition might be explained in part by the fact that, before the constitution of 1818, Connecticut did not have a separate judicial system. Rather, the executive and legislative branches shared judicial power, with the governor sitting on the five judge panel of the Superior Court and the General Assembly having the power of final review over decisions. W. Horton, The History of the Connecticut Supreme Court (West 2008) pp. 9–12.

Nor was a strict separation of powers enshrined in the state constitution. Although delegates adopted the provision currently contained in article second, they rejected another provision that would have barred one branch of government from exercising the powers of another:[19] "[T]he [1818 state constitutional] convention [did] not seem to have been interested either in a particularly stringent version of separation of powers or in

[19] The rejected provision provides: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances herein after expressly directed or permitted." Journal of the Proceedings of the Convention of Delegates Convened at Hartford, August 26, 1818 (1901) p. 78; see *Norwalk Street Railway Co.'s Appeal*, 69 Conn. 576, 604, 37 A. 1080 (1897) (*Baldwin, J.*, dissenting).

a careful restriction of the powers of the legislature. The convention struck the provision that would have expressly prohibited the officers of each department from exercising powers properly classified as belonging to another. Such explicit provisions were common in constitutions of other states being written at this time. . . . Given [the] tradition of harmony between executive and legislative departments, it may be that the convention did not feel the necessity for a strict expression of separation of powers. . . . The 1818 Constitution thus established a government with a flexible separation of powers and a distinctly dominant legislative branch." R. Kay, supra, 8 Conn. L. Rev. 7.

"The Connecticut history with regard to separation of powers stands in marked contrast, therefore, to that of the federal [c]onstitution." E. Peters, "Getting Away from the Federal Paradigm: Separation of Powers in State Courts," 81 Minn. L. Rev. 1543, 1552 (1997). "Diverse [state] histories[20] demonstrate that even though state constitutional provisions may textually resemble those found in the federal [c]onstitution, they may reflect distinct state identities that will result in differences in how courts apply and construe such texts. Far from being arbitrary departures from a superior federal model, these interpretations have the legitimacy of differences rooted in the past and adaptable for the future." (Footnote added.) Id., 1553.

[20] For example, unlike Connecticut, "Massachusetts had a . . . colonial heritage, colored by numerous perceived injustices at the hands of various royal mandates. Not surprisingly, revolutionary political leaders drafting the Massachusetts Constitution of 1780 provided expressly for the separation of powers. Other states, including Maryland, New Hampshire, North Carolina, and Virginia, did likewise." (Footnotes omitted.) E. Peters, supra, 81 Minn. L. Rev. 1552–53; see also, e.g., Mass. Const., pt. 1, art. XXX ("[i]n the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them").

This is not to say that one branch cannot unconstitutionally intrude upon the authority of another branch, or has not done so. This court is appropriately vigilant in guarding against such intrusions. See, e.g., *State* v. *McCahill*, 261 Conn. 492, 512, 811 A.2d 667 (2002) (legislative intrusion on judiciary); *Savage* v. *Aronson*, 214 Conn. 256, 269, 571 A.2d 696 (1990) (executive intrusion on judiciary); *Stolberg* v. *Caldwell*, 175 Conn. 586, 604, 402 A.2d 763 (1978) (executive intrusion on legislature), appeal dismissed sub nom. *Stolberg* v. *Davidson*, 454 U.S. 958, 102 S. Ct. 496, 70 L. Ed. 2d 374 (1981); see also *Spiotti* v. *Wolcott*, 326 Conn. 190, 201–202, 163 A.3d 46 (2017) ("[w]hen we construe a statute . . . our only responsibility is to determine what the legislature, within constitutional limits, intended to do" [internal quotation marks omitted]).

In the present circumstances, however, the original constitutional intrusion was not upon another branch, but upon the rights of individuals not to have cruel and unusual punishments imposed upon them. Those punishments, although judicially levied, were legislatively authorized or even, in some cases, mandated. It is hardly incongruous—or unconstitutional—then, for the legislature to be a part of the solution to the intrusion on individual liberty it caused. This seems particularly true when the United States Supreme Court has suggested this very remedy; see *Montgomery* v. *Louisiana*, supra, 136 S. Ct. 736; and when we have invited the legislature to take such action. See *State* v. *Riley*, supra, 315 Conn. 662; see also *Casiano* v. *Commissioner of Correction*, supra, 317 Conn. 79.

Accordingly, we conclude that P.A. 15-84, § 1, is not unconstitutional because the legislature did not improp-

erly exceed its authority by providing the defendant with the possibility of parole.[21]

2

The defendant also argues that, in its quest to cure a *Miller* violation via the parole board's future consideration of the *Miller* factors, P.A. 15-84, § 1, violates the separation of powers doctrine by impermissibly delegating sentencing authority to the board. This argument is premised on a misreading of *Delgado* and the act.

To reiterate, in *Delgado*, we held that after passage of P.A. 15-84, § 1, if a sentence includes parole eligibility, it "no longer falls within the purview of *Miller* . . . . *Miller* simply does not apply . . . ." (Citations omitted.) *State* v. *Delgado*, 323 Conn. 811. Thus, as mentioned before, we did not hold in *Delgado* that P.A. 15-

[21] Rather than implicating separation of powers issues, by retroactively modifying the sentencing scheme, P.A. 15-84, § 1, presents the possibility of an ex post facto issue. However, because P.A. 15-84, § 1, does not increase the length of time that the defendant will be incarcerated but, rather, provides for the possibility that he will be released on parole sooner than the expiration of his sentence, P.A. 15-84, § 1, does not present any ex post facto concerns. See *Johnson* v. *Commissioner of Correction*, 258 Conn. 804, 818, 786 A.2d 1091 (2002) ("[T]he primary focus of an ex post facto claim is the probability of increased punishment. . . . [T]he new law [must] [create] a genuine risk that [an individual] will be incarcerated longer under that new law than under the old law."); see also *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 377, 163 A.3d 597 (2017) (amendments to parole eligibility statute did not give rise to ex post facto issue because "the challenged parole hearing provision does not increase the petitioner's overall sentence, alter his initial parole eligibility date, or change the standard used by the [B]oard [of Pardons and Paroles] to determine parole suitability").

We note, however, that should the legislature amend or repeal P.A. 15-84, § 1, possible ex post facto issues might arise. See *Petaway* v. *Commissioner of Correction*, 160 Conn. App. 727, 733, 125 A.3d 1053 (2015) (if there is change in law affecting parole eligibility, such change violates ex post facto clause if change "extend[s] the length of [a defendant's] incarceration or delay[s] the date of his first eligibility for parole consideration beyond the time periods in existence at the time of his criminal conduct"), cert. dismissed, 324 Conn. 912, 153 A.3d 1288 (2017). Under those circumstances, criminal defendants possibly could file a motion to correct an illegal sentence or a petition for a writ of habeas corpus.

84, § 1, cures a *Miller* violation. Rather, more accurately, parole eligibility under P.A. 15-84, § 1, negates a *Miller* violation. As a result, because the defendant is parole eligible under the act, he is not entitled to have the *Miller* factors considered, and, thus, there is no need for resentencing. Therefore, the board's power at the parole stage is distinct from the judiciary's sentencing power.

Instead, the board has the power to determine whether a parole eligible offender is entitled to parole. This is to ensure that defendants have "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham* v. *Florida*, supra, 560 U.S. 75. In furtherance of this goal, the act requires the board to consider certain factors, including the offender's age and circumstances at the time of the offense. But, although these factors echo the *Miller* factors, they are not identical.[22] Even if they were, just because the constitution requires the *Miller* factors to be considered at sentencing going forward does not mean that the legislature may not also require that the board consider those factors at other times.

Therefore, we conclude that P.A. 15-84, § 1, does not violate the separation of powers doctrine by improperly delegating sentencing power to the board.

[22] Compare footnote 1 of this opinion (reciting *Miller* factors), with P.A. 15-84, § 1, codified at General Statutes (Supp. 2016) § 54-125a (f) (4) ("the board may allow such person to go at large on parole . . . if it appears . . . [C] such person has demonstrated substantial rehabilitation since the date such crime or crimes were committed considering such person's character, background and history, as demonstrated by factors, including, but not limited to, such person's correctional record, the age and circumstances of such person as of the date of the commission of the crime or crimes, whether such person has demonstrated remorse and increased maturity since the date of the commission of the crime or crimes, such person's contributions to the welfare of other persons through service, such person's efforts to overcome substance abuse, addiction, trauma, lack of education or obstacles that such person may have faced as a child or youth in the adult correctional system, the opportunities for rehabilitation in the adult correctional system and the overall degree of such person's rehabilitation considering the nature and circumstances of the crime or crimes").

C

In his reply brief, the defendant also claims that we should overrule *Delgado* because it renders P.A. 15-84, § 1, unconstitutional by violating federal due process requirements. Specifically, he argues that, because the legislature has the power to change or repeal P.A. 15-84, § 1, in the future, he is deprived of due process in light of the rule that " '[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them.' *United States* v. *Daugherty*, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926)." He argues that his sentence is not fairly certain if the legislature has the power to continually change it.

The defendant's analysis of this claim consists of one short paragraph in his reply brief. He does not provide any case law or analysis beyond his single citation to *Daugherty*. Nor does he specify whether he is making a procedural or substantive due process claim. There is no reference to the interest balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), as required under a procedural due process claim that implicates a liberty interest; see *State* v. *Anderson*, 319 Conn. 288, 314–15, 127 A.3d 100 (2015); or to the rational basis test applied to a substantive due process claim that does not involve a fundamental right. See *State* v. *Moran*, 264 Conn. 593, 615, 825 A.2d 111 (2003).

Because the defendant has not briefed the analytic complexities of his due process claim, we deem it inadequately briefed. See, e.g., *State* v. *Buhl*, 321 Conn. 688, 726–29, 138 A.3d 868 (2016) (upholding determination that due process claim was inadequately briefed). Nevertheless, we emphasize that our holdings in *Delgado* and the present case are premised on P.A. 15-84, § 1, as enacted. It is on the basis of this legislation that we

hold that any *Miller* violation has been negated and that there are no separation of powers violations. See also footnote 21 of this opinion.

III

Finally, the defendant claims that P.A. 15-84, § 1, violates his right to equal protection under the federal constitution.[23] He argues that, as a juvenile convicted of murder, he is entitled to resentencing because, pursuant to P.A. 15-84, § 6, a juvenile convicted of capital felony, in violation of General Statutes § 53a-54b,[24] is entitled to resentencing. See footnote 25 of this opinion. We are not persuaded.

The defendant's argument proceeds in three parts. First, he contends that, as a juvenile convicted of murder with a discretionary sixty year sentence, he is similarly situated to another type of juvenile offender—one who has been convicted of capital felony with a mandatory life sentence, but without an underlying sentence for murder (which is a lesser included offense of capital felony). See *State* v. *Reynolds*, 264 Conn. 1, 24 n.13, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). Second, he argues that these groups are treated differently under P.A. 15-84. Under § 1 of the act, a juvenile murderer is

[23] The defendant's constitutional claim was not raised before the trial court. To the extent that the record supports it, we nonetheless review it under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). The defendant also cites the Connecticut constitution as a basis for his equal protection claim but provides no separate discussion. Therefore, we limit our analysis to the federal constitution. See, e.g., *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 382 and n.10, 163 A.3d 597 (2017).

[24] Section 53a-54b was amended by No. 12-5, § 1, of the 2012 Public Acts to substitute "murder with special circumstances" for "capital felony." *State* v. *Medina*, 170 Conn. App. 609, 610 n.1, 155 A.3d 285, cert. denied, 325 Conn. 914, 159 A.3d 231 (2017). We refer to § 53a-54 as "capital felony" for convenience and because that is the nomenclature employed by the parties and the trial court.

parole eligible, but under § 6,[25] he contends, a juvenile capital felony offender's conviction may be vacated. Therefore, because the capital felony offender then lacks a conviction (and sentence), his conviction for murder is revived, he receives a new sentencing proceeding for murder, and he becomes parole eligible as a result of § 1. In other words, the murderer receives only a parole hearing, whereas the capital felony offender receives both a second sentencing *and* a parole hearing. Third, he argues that this scheme is irrational because, regardless of the length of the resulting sentence, permitting a second sentencing proceeding and parole eligibility constitutes a less severe punishment than parole eligibility alone. Because capital felony is a crime that is more severe than murder, the defendant contends, no rational basis can support denying a juvenile convicted of murder the second sentencing proceeding that is provided to a juvenile convicted of capital felony. See *State* v. *Moran*, supra, 264 Conn. 614 ("it [is] impossible to conceive of a rational basis to support treating the less serious crime more severely than the more serious crime"). We disagree that the statutory scheme is irrational.

[25] Section 6 of P.A. 15-84 applies only to sentencing—not convictions—and, therefore, does not appear to support the defendant's argument. Public Act No. 15-84, § 6, codified at General Statutes (Supp. 2016) § 53a-46a (a), provides in relevant part: "A person shall be subjected to the penalty of death for a capital felony committed prior to April 25, 2012, under the provisions of section 53a-54b, as amended by this act, in effect prior to April 25, 2012, only if (1) a hearing is held in accordance with the provisions of this section, and (2) such person was eighteen years of age or older at the time the offense was committed."

Rather, the defendant's argument appears to be based on P.A. 15-84, § 7, codified at General Statutes (Supp. 2016) § 53a-54b, which provides in relevant part: "A person is guilty of [capital felony] who is convicted of any of the following *and was eighteen years of age or older at the time of the offense* . . . ." (Emphasis in language added by P.A. 15-84, § 7.) The legislature specified that the amendment was retroactively "applicable to any person convicted prior to, on or after" October 1, 2015, the effective date of P.A. 15-84, § 7. We note that, shortly after the legislature's approval of P.A. 15-84, the court abolished the death penalty in *State* v. *Santiago*, supra, 318 Conn. 140.

Even if we assume that the juvenile offenders the defendant identifies are similarly situated,[26] the legislature had a rational basis for treating them differently. "If the statute does not touch upon either a fundamental right or a suspect class, its classification need only be rationally related to some legitimate government purpose in order to withstand an equal protection challenge." (Internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 383, 163 A.3d 597 (2017). Under rational basis review, "[i]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature. . . . [The law] must be upheld . . . if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (Citation omitted; internal quotation marks omitted.) *Keane* v. *Fischetti*, 300 Conn. 395, 406, 13 A.3d 1089 (2011). "[T]he [statutory scheme] is presumed constitutional . . . and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it . . . ." (Internal quotation marks omitted.) *State* v. *Moran*, supra, 264 Conn. 606.[27]

[26] The defendant argues that the classes of juvenile offenders he identifies are similarly situated because murder is a lesser included offense of capital felony. The state points out, however, that they are distinguishable because one sentence is discretionary and the other is mandatory. Although perhaps a sufficient distinction, we nonetheless assume, without deciding, that the offenders are similarly situated for equal protection purposes.

We note one further issue with regard to the defendant's argument that a capital felony offender will be "resentence[d] . . . ." A capital felony offender is not "resentenced" in the same way that the defendant claims he is entitled to be. Rather, a conviction and sentence for one crime (capital felony) are vacated and a sentence for a separate conviction (murder) is imposed. Conversely, the defendant wants to have a second sentencing for the same conviction (murder).

[27] The defendant argues that intermediate scrutiny applies to his claim because it involves "a significant interference with liberty . . . ." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 161, 957 A.2d 407 (2008). We have rejected similar arguments before and have applied rational basis scrutiny to claims involving interference with liberty as a result of criminal punishment. E.g., *State* v. *Higgins*, 265 Conn. 35, 66, 826 A.2d 1126 (2003); *State* v. *Wright*, 246 Conn. 132, 140–41, 716 A.2d 870 (1998).

The manner in which mandatory sentences for capital felony and discretionary sentences for murder were imposed is distinct and, thus, they conceivably might have warranted distinct remedies. Specifically, a juvenile convicted of murder already had received an opportunity to make his case for leniency to a judge, whereas a juvenile convicted of capital felony had not. In this sense, offering resentencing only to the latter group would result in equal, not harsher, punishment, at least in a numerical sense—each group gets one chance to convince a judge to exercise discretion in its favor. Moreover, practical considerations potentially might have made drawing this distinction between the groups rational. Only 4 juveniles were serving mandatory life sentences for capital felony or arson murder, as compared to approximately 270 juveniles serving sentences of longer than ten years for other crimes.[28] See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., p. 1062, remarks of Sarah Eagan, Office of the Child Advocate (stating number of juveniles sentenced). Because of the judicial resources needed to conduct the proceedings, the legislature reasonably could have determined that resentencing was simply a more feasible task for a smaller group. We also note that the legislature potentially could have distinguished between actual life sentences (for capital felony) and those that are for the functional equivalent of life (for murder). Because the latter still offer the possibility of geriatric release, the legislature could have determined that this possibility was worth granting to even the most culpable offenders, particularly at an advanced age

[28] Although his assertion is not in the record, the defendant claims that forty juvenile offenders were serving sentences of more than fifty years as of November, 2014. Testimony before the Judiciary Committee regarding juvenile sentencing shows that, as of March 4, 2015, "[a]pproximately [fifty] people [were] serving [a] sentence of [fifty] years or more for crimes committed under [the] age [of eighteen], most without the chance of parole." (Emphasis omitted.) Conn. Joint Standing Committee Hearings, Judiciary, Pt. 2, 2015 Sess., p. 1062, remarks of Sarah Eagan, Office of the Child Advocate.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

TYREESE BOWENS *v.* COMMISSIONER OF CORRECTION (SC 20204)

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

Syllabus

The petitioner, who had been convicted of murder, sought a writ of habeas corpus, claiming, inter alia, that he was actually innocent of the crime, the eyewitness identification procedures employed in connection with his criminal case violated his due process rights under the federal constitution, his first habeas counsel provided ineffective assistance of counsel, and his sentence for a crime he committed when he was a juvenile, without any consideration of the mitigating effects of his youth, violated the constitutional prohibition against cruel and unusual punishments. The murder occurred as the victim and another person, P, were sitting in the victim's parked car at a well illuminated intersection at around 11 p.m. P saw the shooter approach the car, lean into the driver's side window, and shoot the victim. The next day at the police station, P identified the petitioner's photograph from a photographic array, and the petitioner was arrested three days later. Two other witnesses, W and D, testified at the petitioner's criminal trial, corroborating P's description of the events, but they were unable to identify the petitioner as the shooter. D identified the petitioner in court as the man she had seen running on an adjacent street shortly after the shooting, entering the driveway of a house that the petitioner admitted staying at frequently at the time of the murder, and as a man she previously had seen in her neighborhood. In support of the alibi defense the petitioner presented at his criminal trial, he offered the testimony of three witnesses who claimed that he was with them at a party at C's home at the time of the shooting. H, an investigator retained by the petitioner's trial counsel, gave trial counsel a report summarizing an interview with C in which C indicated that the petitioner had been at the party. Trial counsel thereafter spoke with C twice during the petitioner's criminal trial but did not call her as a witness. The state nevertheless called C as a rebuttal witness, and she testified that she did not know the petitioner and had never seen him before. The petitioner's conviction was upheld on direct appeal. At the petitioner's first habeas trial, the habeas court denied his petition, in which he alleged that his trial counsel had rendered ineffective assistance of counsel. During the petitioner's second habeas trial, the petitioner presented the expert testimony of K, who testified regarding scientific research on the reliability of eyewitness identifications. K testified that several factors surrounding P's opportunity to observe the shooter could have undermined the reliability of P's identification and that the composition of the photographic array, as well as the procedures

surrounding P's viewing of the array, undermined the reliability of her selection of the petitioner's photograph. At the second habeas trial, the petitioner also presented the testimony of three witnesses who claimed that a third party, N, had made statements to them indicating the petitioner's innocence and implicating himself in the shooting, although they had never relayed this information to the police. Following the petitioner's second habeas trial, the habeas court rendered judgment denying the petition. On the granting of certification, the petitioner appealed. *Held*:

1. The habeas court properly denied the petitioner's claim of actual innocence, as the petitioner failed to sustain his burden of proving by clear and convincing evidence, in view of all of the evidence adduced at his criminal and habeas trials, that he was actually innocent of the victim's murder and that no reasonable fact finder would find him guilty of that crime: K's critique of P's eyewitness identification did not constitute affirmative proof of actual innocence, as P's testimony was not the only evidence linking the petitioner to the murder and was largely corroborated by another neutral, credible witness, W, and by D, whose testimony, if credited, would have severely undermined the petitioner's alibi defense by placing him near the crime scene shortly after the shooting; moreover, there were numerous, significant inconsistencies in the testimony of the petitioner's alibi witnesses, two of those alibi witnesses were not disinterested parties and, therefore, their stories may have been viewed with skepticism by the jury; furthermore, the habeas court's determination not to credit the testimony of the petitioner's third-party culpability witnesses was not clearly erroneous, as those witnesses failed to report N's confessions to law enforcement, N's reputation for veracity was subject to challenge by virtue of the witnesses' descriptions of N as "crazy," "under the influence," "paranoid," and as exhibiting bipolar behavior, and N's confession to one of those witnesses appeared to be inconsistent with P's account of how the victim spent the evening of the murder.

2. The habeas court correctly concluded that the identification procedures employed in connection with the petitioner's criminal case did not violate his due process rights: this court declined to consider the petitioner's contention that the photographic array from which P selected the petitioner's photograph was unnecessarily suggestive, as that claim had been adjudicated in the petitioner's direct appeal from his criminal conviction, and K's testimony that certain variables, such as poor viewing conditions and the stressful effects of suddenly confronting an armed assailant, undermined P's ability to recognize the perpetrator was not compelling, as the jury reasonably could have credited P's testimony that she had an adequate opportunity to observe the perpetrator in view of the fact that the crime scene had been well illuminated and the fact that P had several opportunities to observe the petitioner at close range before she saw that he was carrying a firearm; moreover, a review of the record did not bear out the petitioner's contention that he was

convicted solely on the basis of P's identification of him as the shooter, as the jury, considering the testimony of W and D together, reasonably could have concluded that the petitioner was the perpetrator.

3. The habeas court properly rejected the petitioner's claim that his habeas counsel had provided ineffective assistance at his first habeas trial by failing to challenge trial counsel's decision not to impeach C, as trial counsel's decision did not prejudice the petitioner's defense: the petitioner's failure to call C to testify at his second habeas trial made it impossible to know how she would have explained and reconciled her inconsistent statements to H, and, accordingly, it could not be determined how the jury at the petitioner's criminal trial would have weighed her statements; moreover, in light of other evidence admitted at the petitioner's criminal trial, there was no reason to believe that the jury would have viewed C's inability to recall meeting the petitioner as overly damaging to his alibi defense.

4. Even if the habeas court incorrectly concluded that the doctrine of res judicata barred it from resolving the merits of the petitioner's claim that it was cruel and unusual punishment for the trial court to have sentenced him to a term of imprisonment of fifty years for an offense he committed when he was seventeen years old without considering the mitigating effects of his youth pursuant to *Miller* v. *Alabama* (567 U.S. 460), and its progeny, he could not prevail on that claim, as this court rejected virtually identical claims in *State* v. *McCleese* (333 Conn. 378) and *State* v. *Williams-Bey* (333 Conn. 468), in which it held that parole eligibility under a recent legislative enactment (P.A. 15-84) was an adequate remedy under the state constitution, just as it is under the federal constitution, and that, because parole eligibility negates rather than cures a *Miller* violation, resentencing is not required.

(*One justice concurring in part and dissenting in part*)

Argued February 19—officially released October 22, 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, *Sferrazza*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed. *Affirmed.*

Katharine Goodbody, assistant public defender, with whom was *Alexandra Harrington*, former deputy assistant public defender, for the appellant (petitioner).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's

attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

KAHN, J. The petitioner, Tyreese Bowens, appeals[1] from the judgment of the habeas court denying his second petition for a writ of habeas corpus challenging a 1998 murder conviction. On appeal, the petitioner claims, among other things, that the habeas court incorrectly concluded that (1) he did not establish by clear and convincing evidence that he is actually innocent of the murder, (2) the identification procedures employed in his criminal case did not violate his due process rights, (3) his first habeas counsel did not provide ineffective assistance of counsel, and (4) his cruel and unusual punishment claims were barred by the doctrine of res judicata. We affirm the judgment of the habeas court.

On direct appeal, the Appellate Court briefly summarized the facts of the case as follows: "On August 18, 1996, Kevin Hood, the victim, and [T'lara] Phelmetta were riding around New Haven in [the victim's] car. [Shortly after 11 p.m., they stopped in front of Mike's] convenience store at the well lit intersection of Columbus Avenue, Arch Street and Washington Avenue. [The victim] made some purchases at the convenience store, and, upon his return to the car, Phelmetta noticed a man with a hooded jacket walking toward the car from Washington Avenue. The man came up to the front passenger seat window where she was seated and peered through from about three feet away. She was able to look closely at his facial features before he turned away and walked around the back of the car,

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

appearing to head away from the car. Suddenly, the man changed course and again approached the car. As he walked up to the driver's side, Phelmetta saw him withdraw a gun from underneath his shirt. The man leaned into [the victim's] open window and shot [him] several times. Phelmetta jumped out of the car through her window and fled to safety.

"Thereafter, officers from the New Haven [P]olice [D]epartment patrolling on Columbus Avenue came upon the victim. A few minutes later, Phelmetta returned to the scene and told a police detective that she had witnessed the shooting and gave a description of the shooter. The following day, on August 19, 1996, Phelmetta went to the police station, viewed a photographic array and identified the [petitioner] as the shooter." *State* v. *Bowens*, 62 Conn. App. 148, 149–50, 773 A.2d 977, cert. denied, 256 Conn. 907, 772 A.2d 600 (2001). The petitioner was arrested three days later on August 22, 1996.

In 1998, the case was tried to a jury, which found the petitioner guilty of murder, in violation of General Statutes (Rev. to 1995) § 53a-54a (a). The trial court rendered judgment in accordance with the verdict and sentenced the petitioner to a term of imprisonment of fifty years. The conviction was affirmed on direct appeal. Id., 149.

In 2004, the petitioner filed his first petition for a writ of habeas corpus, in which he alleged that his criminal trial counsel, Attorney Thomas J. Ullmann, had rendered ineffective assistance. Following a trial in 2005 (first habeas), the habeas court denied both the petition and the petitioner's petition for certification to appeal. See *Bowens* v. *Commissioner of Correction*, 104 Conn. App. 738, 936 A.2d 653 (2007) (dismissing appeal), cert. denied, 286 Conn. 905, 944 A.2d 978 (2008).

In 2017, the petitioner filed a second petition for a writ of habeas corpus, which is the subject of the present appeal. Following a habeas trial, the court denied the petition but granted the petitioner's petition for certification to appeal. See footnote 1 of this opinion. Additional facts and procedural history will be set forth as necessary.

I

The petitioner first contends that the habeas court incorrectly denied his claim that he is actually innocent of the victim's murder. He argues that the evidence presented at the two habeas trials, taken together with the evidence admitted at his criminal trial, establishes, clearly and convincingly, that he was actually innocent of the victim's murder. The respondent, the Commissioner of Correction, counters that the habeas court correctly concluded that (1) claims of actual innocence are only cognizable in the habeas context when founded on newly discovered evidence,[2] (2) much of the evidence presented by the petitioner at the habeas trial[3] was not newly discovered, (3) the petitioner's actual innocence claim is barred by the doctrine of res judicata, and (4) the petitioner failed to present sufficient affirmative proof to establish by clear and convincing evidence that he was actually innocent. We agree with the respondent's fourth point: even if we assume that the petitioner's claims were—or were not required to be—predicated on newly discovered evidence and, even if we assume that they were not barred by the doctrine of res judicata, the petitioner failed to sustain his burden of proving that he is actually innocent. For

[2] On the respondent's motion, we permitted the parties to submit supplemental briefs to address the issue of whether newly discovered evidence is required to sustain a claim of actual innocence in the habeas context.

[3] Unless otherwise noted, all references to the habeas trial are to the petitioner's second habeas trial, which is the subject of the present appeal.

that reason, we need not address the other arguments presented by the respondent.

A

Additional Facts

The following additional facts, which the habeas court found or the jury reasonably could have found; see, e.g., *Miller* v. *Commissioner of Correction*, 242 Conn. 745, 748, 700 A.2d 1108 (1997); are relevant to the petitioner's actual innocence claim. Three interrelated factual questions dominated the petitioner's criminal and habeas trials: (1) whether eyewitnesses accurately identified the petitioner as the shooter; (2) whether he presented a believable alibi defense covering the time period when the murder occurred; and (3) whether a different individual, namely, the petitioner's cousin, Tyshan Napoleon, was the actual perpetrator. Each of these questions bears on the petitioner's actual innocence claim.

1

Eyewitness Testimony

At the time of the shooting, the victim's car was parked on the north side of Columbus Avenue, facing west, and just west of the Arch Street intersection, in front of what was known as Mike's convenience store. As we discussed, the state's case against the petitioner centered around the testimony of the victim's date, Phelmetta. She testified at the criminal trial that she observed the shooter as he crossed Columbus Avenue and walked up the street toward the passenger side of the vehicle where she was seated. The shooter drew her attention as he approached because, although "it was pretty warm that day," he was wearing a hooded sweatshirt (hoodie) with the hood up. Phelmetta watched the shooter walk approximately three feet up the sidewalk, peer at her and the victim through the passenger side window, circle back around the rear of

the car, step into the street, quickly approach the car from the driver's side, pull a pistol from under his hoodie, lean into the open driver's window where the victim was seated, and begin firing at close range into the victim's chest. At that point, Phelmetta jumped out of the open car window and fled up Arch Street as she heard additional shots fired. In all, she recalled hearing approximately seven shots fired.

Phelmetta also testified that she was able to observe the shooter's face and features as he initially approached the car from the driver's side, as he looked at her through the passenger side window, and as he approached the victim's side of the car. She described the shooter as a young, dark complexioned black male, approximately five feet nine inches, with squinty eyes, a wide nose, and full lips. The day following the shooting, Phelmetta identified the petitioner as the shooter from a photographic array.[4] She also identified the petitioner in court as the shooter.

The state also called two additional witnesses who, although unable to identify the petitioner as the shooter, provided testimony that largely corroborated that of Phelmetta. The first, Daniel Newell, was a local resident who had just parked on the west side of Arch Street, at, and facing, the intersection with Columbus Avenue, when the shooting occurred. He testified that he saw a young black male wearing a hoodie cross Columbus Avenue from Washington Avenue and approach the victim's parked car from behind. He then heard shots and saw sparks coming out of the car as the young man stood at the driver's window. Newell then heard a young lady scream and saw her exit the passenger side of the car, without opening the door, and run past his car

[4] The trial court denied the petitioner's motion to suppress Phelmetta's identification, ruling that the identification procedure was not unnecessarily suggestive, and the Appellate Court upheld that ruling on direct appeal. *State* v. *Bowens*, supra, 62 Conn. App. 157–61.

along Arch Street. After a couple more shots were fired, Newell saw the young man walk back across the street toward Washington Avenue and Frank Street, where he spoke with a young Hispanic looking male. A short time later, as Newell drove along Frank Street from the other direction, he saw the same young black man in the hoodie running or preparing to run down Frank Street, away from the crime scene. Finally, Newell testified that, although the intersection at Arch Street and Columbus Avenue was well lit, he did not pay close attention to the shooter's facial features.

Next, another local resident, Hilda Diaz, testified that she was in her apartment on Frank Street at the time of the shooting when she heard gunfire. She looked out of her window and saw two young men—one black, one with a lighter complexion—running down the street. The men separated, and she watched the black man run up a driveway that went behind a yellow house across the street from her.

Diaz believed that she recognized the young black male as a man whom she previously had seen frequenting the yellow house. Diaz testified that the black male "had his hair wild, standing up," just like the man whom she previously had seen on her street. She stated: "I said to myself . . . it looks like the guy. I know him." Although Diaz admitted that she did not see the man's face as he ran by, she repeatedly stated that she recognized him from his "wild" hair style. In court, Diaz identified the petitioner as the man whom she saw running on Frank Street after the shooting and whom she previously had seen in her neighborhood, although she noted that his hair was styled differently at the time of trial.[5]

[5] The petitioner's mother, Alice Buie, and his cousin, Tychiah Harrison, both confirmed that, in the summer of 1996, the petitioner lived at or regularly visited and stayed at a house at 24-26 Frank Street that Buie's family owned. The petitioner himself admitted to having stayed at that location two to three times per week in August, 1996.

During the second habeas trial, the petitioner presented the expert testimony of Margaret Kovera, a professor of social psychology. Kovera testified regarding scientific research on the reliability of eyewitness identifications. She explained that studies have found that various factors may undermine the reliability of eyewitness identifications and that those factors may be counterintuitive to the average juror. Consequently, Kovera opined, expert testimony on the factors that impact the reliability of eyewitness identifications can sensitize jurors to those factors and help jurors to make decisions that reflect the types of variations in accuracy that have been observed through research.

Kovera then testified that she had reviewed the circumstances surrounding Phelmetta's opportunity to observe the shooter, as well as the procedures used to obtain her identification of the petitioner from a photographic array and, subsequently, in court. Kovera opined that several "estimator factors" could have undermined the reliability of Phelmetta's identification. These included the presence of a weapon, the stress Phelmetta was under at the time of the shooting, that the shooter was wearing a hoodie that could have disguised his hairline, that the shooting took place at night, and that Phelmetta had a relatively short period of time in which to observe the shooter.

Kovera also noted the presence of various "system variables" that could have undermined the accuracy of the identification. She opined that the composition of the photograph array, as well as the procedures surrounding Phelmetta's viewing of the array, undermined the reliability of her identification. With respect to the array itself, Kovera observed that many of the eight included photographs were "fillers" that did not look like the petitioner or closely match Phelmetta's description of the shooter. For example, the photograph of the petitioner was one of only two photographs that

depicted individuals wearing hooded sweatshirts, one of only two photographs that depicted individuals with "puffy" or "pudgy" eyes, and one of only three photographs that had a yellow or sepia tone that caused them to "pop out from the other pictures." She also noted that not all of the photographs depicted individuals with broad noses and dark complexions.

Kovera also noted that the police officers brought Phelmetta to the police station to make the identification, that they did not utilize a double-blind procedure, and that there was no indication that the administering officer ever advised her that the perpetrator might not be depicted in the array. As a result, Kovera concluded, Phelmetta might have surmised that the police had the shooter in custody, that his picture was included in the array, and that she could identify it simply by the process of eliminating those photographs that were inconsistent with her recollection. Kovera also opined that it was poor police procedure, and potentially biasing, for the police officers to have shown Phelmetta a second photographic array containing the petitioner's picture just prior to her in-court identification of him at trial.

Finally, Kovera testified regarding Diaz' testimony that she recognized the man she saw running on Frank Street after the shooting as the petitioner because of his distinctive hair style. Kovera opined that the fact that Diaz observed the subject at night, from a distance, and while he was running and wearing a hoodie all could have impacted the reliability of her recognition of the petitioner. Kovera also assumed that Diaz' identification was a cross-racial identification, which, Kovera opined, was "problematic in that there's a very significant body of literature showing that people make more mistakes when identifying somebody of another race than they do of their own."

The petitioner characterized Kovera's testimony as newly discovered evidence. In support of that position, Kovera testified that, although the first scientific studies of the reliability of eyewitness identifications were conducted in the late 1970s, it was not until the late 1980s or early 1990s that discussion began regarding whether scholars in her field could provide expert testimony in criminal trials. She stated that the "solidification" of the role of science in identifications occurred with the publication of a white paper by the American Psychology Law Society in 1998 but that eyewitness identification experts were not used in Connecticut's trial courts until 2012. She also highlighted some "really recent" research into the conditions under which the confidence of an eyewitness identification correlates with accuracy. Finally, she opined that her report would have assisted the jury in weighing the eyewitness testimony in the petitioner's criminal case.

In support of his actual innocence claim, the petitioner argued that new science, encapsulated in Kovera's testimony, established that his conviction had been obtained solely on the basis of an unreliable eyewitness identification. In rejecting this claim, the habeas court ruled that (1) affirmative evidence of actual innocence necessary to support a habeas claim must be newly discovered, (2) Kovera's testimony was not newly discovered evidence; rather, it was a change in the rules of evidence that permitted the petitioner to proffer testimony regarding the reliability of eyewitness identification that he could not have introduced at his 1998 trial, and (3) in any event, Kovera's testimony, if credited, did not qualify as affirmative proof of the petitioner's innocence but, rather, merely weakened the state's case by casting doubt on the reliability of their star witness. The petitioner challenges all three conclusions on appeal.

2

Alibi Defense

The relevant facts regarding the petitioner's alibi defense are set forth in full in part III A of this opinion. In brief, the victim was killed at approximately 11:18 p.m. on August 18, 1996. The petitioner testified that he left his mother's house in Hamden at approximately 10 p.m., travelled by taxicab with his friend, Celena Jackson, to her cousin's birthday celebration in the Fair Haven section of New Haven, and then left Fair Haven by taxicab after midnight, returning to Hamden with Jackson around 1 a.m. Jackson's testimony largely mirrored that of the petitioner, and two of the other three adults who were allegedly at the celebration, her cousins Turquoise Cox and Stacy Bethea, also confirmed that the petitioner was with them on the night of the murder. The other attendee, Jackson's cousin, Crystal Bethea, did not recall the petitioner being present or ever having met him previously.

The habeas court did not discuss the petitioner's alibi at length. The court did note, however, that Diaz' testimony, if credited by the jury, placed the petitioner in the vicinity of the murder just moments after it occurred and, therefore, undercut his alibi defense.

3

Third-Party Culpability

In both of his habeas actions, the petitioner contended not only that he was in Fair Haven at the time of the murder but also that he could identify the actual shooter: his cousin, Napoleon. The first habeas action was filed in 2003 and tried in mid-2005, a few months after Napoleon died in a shoot-out with the police. In that petition, the petitioner contended that "Napoleon was and is the person who killed [the victim] . . . ." At trial, however, his habeas counsel, Attorney Frank

Cannatelli, conceded that the petitioner was unable to establish at that time that any specific third party had committed the crime.

In his second habeas petition, the petitioner again contended that he was actually innocent of the victim's murder. At his habeas trial, he produced, for the first time, three witnesses, each of whom testified that, prior to his death, Napoleon had confessed to the crime and lamented that the petitioner had been wrongly convicted. Those witnesses were Joseph Burns, Napoleon's former coworker, roommate, and childhood friend; Tychiah Harrison, Burns' ex-wife and a cousin of both the petitioner and Napoleon; and Amika Collins, a childhood friend of the petitioner and the mother of Napoleon's child.

Burns testified that, at some point in 2000, he offered a ride to Napoleon, who seemed to be angry and upset. When Burns asked what was wrong, Napoleon replied that he was thinking about the petitioner, who was in prison. Napoleon stated that the petitioner "really shouldn't be there" and elaborated that, "I did that shit, man. I did that shit. He shouldn't . . . be there." When Burns asked Napoleon how he could allow the petitioner to "go down for this," Napoleon replied, "I ain't going back to jail."

Burns conceded that he never reported this conversation to the police, explaining that "[w]e don't believe in going to the police." He also stated that he feared Napoleon would retaliate had he gone to the authorities.

Harrison testified that, in 1996, Napoleon was living on Frank Street in New Haven. She recalled that his moods were often "high and low" and he seemed to be angry and "under the influence." She had seen him in possession of a gun on a number of occasions, and she knew that he was selling drugs and had weapons at that time.

Later, on one occasion in 2001 or 2002, Napoleon showed up unannounced at Harrison's North Branford home. He was crying and told Harrison and her husband, Doug, "[T]his shit is killing me. I need someone to talk to. You know Tyreese didn't kill that dude. . . . Tyreese couldn't have done that. That, that wasn't Tyreese. He wasn't about that life." Napoleon then admitted: "[I]t was me."

Harrison also related a second conversation with Napoleon that occurred several weeks after the first. Napoleon had again appeared at Harrison's home and told her that the petitioner had been "across town with his girl," presumably at the time of the murder. She also testified that Napoleon indicated, with respect to some unspecified date, possibly the date of the murder, that "that dude came over here, he came over here," and "I had to run and get my piece, and I ran off the porch after him."

Harrison conceded that she did not report Napoleon's statements to the police, despite knowing that the petitioner was incarcerated, because she did not think the police could do anything. She claimed, however, that she told her grandmother, Irene Johnson, whom she believed would know the appropriate people to notify, as well as her Aunt Thelma.

Harrison's characterizations of Napoleon, however, were inconsistent with eyewitnesses' descriptions of the shooter. Harrison testified that, in 1996, Napoleon "didn't really have too much hair" and that it was "very, very short to his scalp and like he was losing his hair on top. Like it was like fading. It was very, very thin." She also described Napoleon as light skinned, for a person of color. In addition, she characterized his demeanor when making his confession as "paranoid" and "[under] [t]he influence or just crazy . . . [m]aybe both . . . ."

Finally, Collins testified that, in late 2004, Napoleon told her that he "[g]ets away with a lot of things that he's done, that his cousin was locked up for something that he did, just because his name was Ty." Napoleon reiterated, "they got the wrong Ty." Collins admitted that she never told anyone what Napoleon had said, even though she knew that the petitioner was in prison. She claimed that she was afraid of Napoleon and was testifying at the habeas trial only because he was dead.

With respect to the third-party culpability testimony, the habeas court found as follows: "Despite being related to the petitioner by blood or marriage and having occasionally lived in the same house where the petitioner and . . . Napoleon sometimes resided, none of the three witnesses who testified at the present habeas trial that Napoleon implicated himself as the real shooter came forward with this information until after Napoleon's tragic death some years after the petitioner's criminal trial. In order to credit the testimony of [Burns], Harrison, and Collins, a fact finder would have to believe that these three individuals, all of whom were well aware [of] the petitioner's plight, chose to ignore the grievous injustice suffered by their kin for years while he languished in prison.

"As noted above, the revelations of these witnesses about . . . Napoleon were withheld until after Napoleon's unfortunate demise. The surfacing of these accusations only after Napoleon could no longer be called to account taints their testimony with the scent of fabrication to benefit the petitioner. One can argue that these witnesses delayed reporting the conversations with . . . Napoleon, which exonerated the petitioner, for fear of these reports leading to Napoleon's arrest. Napoleon was also a relative of the witnesses. However, clear and convincing proof is more exacting than that sufficient to establish a probability of actual innocence. Clear and convincing evidence is substantial and

unequivocal evidence that demonstrates a very high probability that the fact to be proven is true . . . .

"It is at least equally persuasive that these witnesses took advantage of Napoleon's earthly departure as a convenient occasion to cast false blame on him to rescue the petitioner from his fate as it is to believe that these witnesses allowed the petitioner to sit in prison for years for a crime of which they knew he was innocent. The equivocal motivations for the witnesses' belated revelations fail to convince the court, by clear and convincing evidence, that the petitioner is factually innocent of [the victim's] murder [or] that no reasonable fact finder would convict the petitioner of that crime after consideration of a combination of the evidence adduced at both the criminal trial and the habeas proceedings . . . ." (Citations omitted.)

B

Governing Law

Habeas corpus relief in the form of a new trial on the basis of a claim of actual innocence requires that the petitioner satisfy the two criteria set forth in *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 747. Under *Miller*, "the petitioner [first] must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and the evidence adduced at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did, no reasonable fact finder would find the petitioner guilty of the crime." Id.

As to the first prong, we emphasized in *Miller* that "the clear and convincing standard . . . is a very demanding standard and should be understood as such,

particularly when applied to a habeas claim of actual innocence, where the stakes are so important for both the petitioner and the state. . . . [That standard] should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory. . . . [The standard requires] extraordinarily high and truly persuasive demonstration[s] of actual innocence." (Citations omitted; internal quotation marks omitted.) Id., 795.

Moreover, "actual innocence [must be] demonstrated by *affirmative proof* that the petitioner did not commit the crime." (Emphasis added.) *Gould* v. *Commissioner of Correction*, 301 Conn. 544, 561, 22 A.3d 1196 (2011). "Affirmative proof of actual innocence is that which might tend to establish that the petitioner could not have committed the crime . . . that a third party committed the crime, or that no crime actually occurred." (Emphasis omitted.). Id., 563. "Clear and convincing proof of actual innocence does not, however, require the petitioner to establish that his or her guilt is a factual impossibility." Id., 564. In part for these reasons, we emphasized in *Miller* that "truly persuasive demonstrations of actual innocence after conviction in a fair trial have been, and are likely to remain, extremely rare." (Internal quotation marks omitted.) *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 805–806.

C

Analysis

1

With respect to Kovera's expert testimony, we agree with the conclusion of the habeas court that, as a matter of law, Kovera's critique of Phelmetta's eyewitness identification did not constitute affirmative proof of actual innocence. The court explained that "[a] more vigorous attack on the witnesses' acumen and memory when

identifying the petitioner as the perpetrator only weakens the prosecution case rather than [tending] to establish that the petitioner could not have committed the crime . . . . Simply casting doubt on the reliability of a state's witness, even a star witness, fails to qualify as affirmative proof of innocence . . . ." (Citation omitted; emphasis omitted.) In other words, the fact that an identification is made under less than ideal conditions, even conditions that render it highly suspect, does not mean that the identification is *necessarily* inaccurate or that no reasonable jury could credit it.[6] If that were the case, then many convictions obtained on the basis of eyewitness testimony would have to be nullified.

The habeas court also observed that, as a factual matter, Phelmetta's testimony was not the only evidence tending to link the petitioner to the crime. Rather, her account of events was largely corroborated by that of another neutral, credible witness, namely, Newell. In addition, Diaz testified that an individual, whose hair she recognized as that of the petitioner, ran behind a house that the petitioner tended to frequent, mere moments after the shooting occurred nearby, and at a

[6] See, e.g., *Cook* v. *Ohio*, Docket No. 2:15-cv-02669, 2016 WL 374461, *10 (S.D. Ohio February 1, 2016), report and recommendation adopted and affirmed, 2016 WL 770998 (S.D. Ohio February 29, 2016); *Hale* v. *McDonald*, Docket No. ED CV 09-00570-DMG (VBK), 2010 WL 4630268, *16 (C.D. Cal. July 30, 2010), report and recommendation accepted and adopted, 2010 WL 4628056 (C.D. Cal. November 8, 2010), aff'd sub nom. *Hale* v. *Cate*, 530 Fed. Appx. 636 (9th Cir. 2013); *Coleman* v. *Thompson*, 798 F. Supp. 1209, 1216–17 (W.D. Va.), aff'd, 966 F.2d 1441 (4th Cir.), cert. denied, 504 U.S. 992, 112 S. Ct. 2983, 119 L. Ed. 2d 600 (1992); see also *Carriger* v. *Stewart*, 132 F.3d 463, 477 (9th Cir. 1997) ("[a]lthough the postconviction evidence [that the petitioner] presents casts a vast shadow of doubt over the reliability of his conviction, nearly all of it serves only to undercut the evidence presented at trial, not affirmatively to prove [his] innocence"), cert. denied, 523 U.S. 1133, 118 S. Ct. 1827, 140 L. Ed. 2d 963 (1998); G. Weiss, "Prosecutorial Accountability After *Connick* v. *Thompson*," 60 Drake L. Rev. 199, 242 (2011) ("evidence that challenges the credibility of a witness for the prosecution is of a different category than true *Brady* [v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 194, 10 L. Ed. 2d 215 (1963)] material, which tends to show the actual innocence of the criminal defendant" [footnote omitted]).

time when the petitioner claimed to have been across town in Fair Haven. So, although Diaz could not link the petitioner directly to the shooting, her identification, if credited, would have severely undermined his alibi defense.[7]

Indeed, the fact that the petitioner took the stand and offered an alibi defense at his criminal trial made Diaz' testimony especially damaging. As Michael Sheehan, the petitioner's criminal defense expert, testified at the habeas trial, presenting a weak, implausible, or easily rebutted alibi is an especially risky defense strategy. Although a defendant always enjoys the presumption of innocence, "it is generally acknowledged that an attempt to create a false alibi constitutes evidence of the defendant's consciousness of guilt." (Internal quotation marks omitted.) *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 64, 188 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019).

In the present case, it was not only Diaz' testimony and the fact that Crystal Bethea did not recall the petitioner having attended Cox' birthday celebration that might have led the jury to question the veracity of the petitioner's story. During his closing argument, the prosecutor pointed to the numerous, significant inconsistencies in the testimony of the petitioner's alibi witnesses as evidence that they had fabricated the alibi story. He also emphasized that the petitioner himself admitted to having briefly left Cox' celebration, ostensibly to "walk around the projects"; no one was able to verify where the petitioner went during that period or how

[7] The petitioner contends that Diaz never actually identified him as the individual whom she saw on Frank Street after the shooting but, rather, merely noted a resemblance between the men. The jury, however, reasonably could have interpreted Diaz' testimony that, "I said to myself . . . it looks like the guy. I know him," together with her identification of the petitioner at trial, as a positive identification.

long he was gone.[8] Moreover, Sheehan, the petitioner's own expert, conceded that the petitioner's two principal alibi witnesses, Jackson and Cox, were not disinterested parties, and, therefore, their stories might have been viewed with skepticism by the jury.[9]

For these reasons, we conclude that there is substantial evidence to support the habeas court's determination that the petitioner failed to establish by clear and convincing evidence that he is actually innocent of the charged crime. See *Miller* v. *Commissioner of Correction*, supra, 242 Conn. 803 (defining standard of review). For essentially the same reasons; see *Gould* v. *Commissioner of Correction*, supra, 301 Conn. 559 n.14; we conclude that the petitioner also failed to satisfy the second prong of *Miller*, namely, to demonstrate that no reasonable jury with knowledge of the evidence presented at the habeas trial would have found him guilty beyond a reasonable doubt. See *Miller* v. *Commissioner of Correction*, supra, 747. At the end of the day, the jury, in order to find the petitioner guilty, must have determined that the eyewitness testimony of Phelmetta and Diaz, as linked and corroborated by Newell's testimony, was substantially more credible than that of the petitioner and his alibi witnesses.[10] It is certainly

[8] The prosecutor also highlighted other aspects of the petitioner's testimony that lacked credibility, such as his bizarre statements that, even though he was living alone several days each week at the house on Frank Street and already had a child of his own, he was bound by a self-imposed "curfew" and so rarely went out in the evenings.

[9] Jackson testified that she was a close friend of the petitioner's and that he had dated Cox for a while.

[10] The petitioner takes issue with the habeas court's statement that "[t]he sequence of events surrounding the shooting of the victim described by . . . Phelmetta [was] unassailable." The petitioner contends that this determination is clearly erroneous because (1) Kovera's testimony called into question Phelmetta's ability to accurately perceive and recall the events surrounding the murder, and (2) Newell described the events immediately preceding the shooting as having transpired much more quickly than did Phelmetta, and without the shooter having first peered into her side of the car, which could suggest that Phelmetta had less of an opportunity to observe the shooter than she indicated at trial. The habeas court did not determine,

possible that, had it been given the opportunity to filter the testimony of the state's witnesses through the lens of Kovera's critique, the jury would have weighed the competing stories differently and come to a different conclusion. But we are not prepared to say, on this record, that no reasonable jury, having heard Kovera's testimony, could nevertheless find the petitioner guilty beyond a reasonable doubt. Accordingly, even assuming, for the sake of argument, that Kovera's testimony constituted new evidence, we are not persuaded that, if credited, it would have constituted affirmative proof of the petitioner's actual innocence.

2

We also are not prepared to gainsay the habeas court's determination that the petitioner failed to prove by clear and convincing evidence that Napoleon was the actual perpetrator. Although the court did not expressly state that the petitioner's third-party culpability witnesses—Burns, Harrison, and Collins—lacked credibility, the court's determination that their testimony was tainted "with the scent of fabrication" was tantamount to such a finding. Because the habeas court is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony, we must defer to that finding.[11] See, e.g., *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 604, 103 A.3d 954 (2014).

however, that Phelmetta's *identification* of the petitioner was unassailable. We take the court's point simply to be that the overall sequence of events that the jury reasonably could have found—a man wearing a hoodie approached the car from across Columbus Avenue, walked up to the victim's window, fired point blank into the car, crossed back onto Washington Street, and was seen fleeing on Frank Street a few minutes later—is generally consistent with the testimony of Phelmetta, Newell and Diaz, each of whom was an unbiased observer.

[11] For the same reason, we are not persuaded by the petitioner's argument that the habeas court gave insufficient credence to the testimony of those witnesses that they did not notify law enforcement of Napoleon's confessions for fear that he would retaliate. Of course, the court may have discounted that testimony because none of the witnesses came forward to clear the petitioner's name even after Napoleon died, or for twelve years thereafter.

Moreover, even if we were to construe the habeas court's determination as a legal, rather than factual, conclusion, there is ample authority for the court's conclusion that a witness' failure to report a purported third-party confession to law enforcement calls his or her credibility into question. See, e.g., *State* v. *Bryant*, 202 Conn. 676, 703, 523 A.2d 451 (1987) (friends or acquaintances of defendant may be expected to convey exculpatory information to police); *Moye* v. *Warden*, Docket No. CV-09-4003191, 2012 WL 3006297, *3 (Conn. Super. June 22, 2012) (same), aff'd sub nom. *Moye* v. *Commissioner of Correction*, 147 Conn. App. 325, 81 A.3d 1222 (2013), aff'd, 316 Conn. 779, 114 A.3d 925 (2015); *State* v. *Sands*, 123 N.H. 570, 612, 467 A.2d 202 (1983) (noting cases from other jurisdictions).

Nevertheless, the petitioner contends that the habeas court's findings with respect to the third-party culpability testimony of Burns, Harrison, and Collins are clearly erroneous because those findings rest on an inaccurate understanding of the relationship between the witnesses, Napoleon, and the petitioner. Specifically, the habeas court opined that it was especially implausible that those witnesses would permit the petitioner to languish unjustly in prison when they were "related to the petitioner by blood or marriage and . . . occasionally lived in the same house [on Frank Street] where the petitioner . . . sometimes resided . . . ." The petitioner argues that only Harrison, the petitioner's cousin, was his kin, and that only Burns ever resided with the petitioner on Frank Street.

This, however, ignores the fact that Burns also was essentially family to the petitioner, having lived with him when the two were children and having dated Harrison in high school and married her in 2010.[12] Of the petitioner's cousin Napoleon, Burns testified, "that's my

[12] The two were no longer married at the time of the habeas trial in 2017.

extended family. I'm actually closer to his family, than I am to my own." And of the petitioner himself, Burns volunteered that "we were all close. We was like fingers in the same hand." For her part, Collins was a childhood friend of the petitioner and, while she was never married to Napoleon, did reside with and have a daughter with him.

The record reveals a number of reasons why the habeas court may have declined to credit the petitioner's witnesses. First, Burns and Harrison were married for some unspecified period of time while the petitioner was incarcerated, beginning in 2010. Harrison, however, testified that she related Napoleon's confessions only to her grandmother and her great aunt, whereas Burns stated that he had never shared Napoleon's confession with anyone else. The habeas court reasonably could have found it to be improbable that the couple, both of whom had known the petitioner since childhood and both of whom had been close compatriots of Napoleon over the years, would never once during their married life have compared notes on the topic or remarked that the petitioner was serving time for Napoleon's crime.

Second, even if one takes the confession testimony at face value, Napoleon's reputation for veracity was subject to challenge. The witnesses variously described Napoleon as "crazy," "under the influence," "paranoid," and exhibiting bipolar behavior. And Napoleon's confession to Harrison that he chased the victim off of his porch on Frank Street, presumably just before the murder, appears to be inconsistent with Phelmetta's account of how she and the victim spent the evening in question. For these reasons, we conclude that the habeas court's decision not to credit the testimony of Burns, Harrison, and Collins was not clearly erroneous and that court's determination that the petitioner failed to establish his actual innocence by clear and convincing evidence was not incorrect.

II

The petitioner's second claim also revolves around Kovera's expert testimony as to the questionable reliability of eyewitness identifications. The petitioner contends that he was convicted solely on the basis of Phelmetta's identification of him as the shooter and that that identification was so unreliable as to violate his constitutional right to due process of law.[13] We are not persuaded.

A

A due process challenge to an eyewitness identification presents a mixed question of law and fact that we review de novo. See, e.g., *State* v. *Marquez*, 291 Conn. 122, 137, 967 A.2d 56, cert. denied, 558 U.S. 895, 130 S. Ct. 237, 175 L. Ed. 2d 163 (2009). Although we must defer to any factual findings of the habeas court in this regard, we do so only after conducting a scrupulous examination of the record to ascertain whether those findings are supported by substantial evidence. See id.

The following well established principles guide our resolution of this issue. The due process clause of the fourteenth amendment has been construed to bar, in a criminal prosecution, the admission of evidence deriving from unnecessarily suggestive identification procedures. See *Neil* v. *Biggers*, 409 U.S. 188, 196, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). In applying this protection, "each case must be considered on its own facts, and . . . convictions based on eyewitness identifica-

[13] In his habeas petition, the petitioner alleged violations of his due process rights under both the fourteenth amendment to the United States constitution and article first, §§ 8 and 9, of the constitution of Connecticut. However, because the petitioner has neither briefed the state constitutional question nor presented any argument as to why article first, §§ 8 and 9, affords broader protection than its federal counterpart, we limit our analysis to the petitioner's rights under the fourteenth amendment. See, e.g., *State* v. *Delgado*, 323 Conn. 801, 805 n.4, 151 A.3d 345 (2016); *State* v. *Gonzalez*, 278 Conn. 341, 347 n.9, 898 A.2d 149 (2006).

tion at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." (Internal quotation marks omitted.) Id., 196–97. "But if the indicia of reliability are strong enough to outweigh the corrupting effect of the [police arranged] suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth." *Perry* v. *New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

Moreover, when police misconduct or other state action is not implicated, and the challenge is simply to the reliability of the identification itself, the United States Supreme Court has made clear that the federal constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting [the] introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." Id., 237. As that court further explained in *Perry*, "the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair. . . . The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." (Citations omitted.) Id., 245.

The Supreme Court explained its reasons for rejecting "a broadly applicable due process check on eyewitness identifications . . . . [The] unwillingness to enlarge the domain of due process . . . rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. . . . We also take account of other safeguards built into our

adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant's [s]ixth [a]mendment right to confront the eyewitness . . . the defendant's right to the effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments [and] [e]yewitness-specific jury instructions, which . . . likewise warn the jury to take care in appraising identification evidence. . . . The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence." (Citations omitted; footnote omitted.) Id., 244–47. Accordingly, "[w]hen no improper law enforcement activity is involved . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." Id., 233.

B

With these principles in mind, we turn our attention to Kovera's testimony suggesting that the identification procedures used in the present case were unnecessarily suggestive. Relying on Kovera's testimony, the petitioner appears to allege that both system variables, such as the officers' use of an unnecessarily suggestive photographic array, and estimator variables, such as poor visibility, a short exposure duration, and the fear inspiring presence of a firearm, fatally undermined Phelmetta's ability to identify the perpetrator.

We decline to consider the petitioner's first contention, that system variables rendered the photographic

array from which Phelmetta selected him unnecessarily suggestive, because essentially the same claim was adjudicated in the petitioner's direct appeal. See, e.g., *Carpenter* v. *Commissioner of Correction*, 274 Conn. 834, 845 n.8, 878 A.2d 1088 (2005) ("if an issue was litigated on appeal, the petitioner is not entitled to bring a habeas petition challenging the outcome of the appeal" [emphasis omitted]). Specifically, the Appellate Court considered and rejected the petitioner's argument that the array was unnecessarily suggestive because only two of the eight photographs depicted individuals wearing hoodies and because the array included pictures of light skinned males who did not have the facial features that Phelmetta had described. See *State* v. *Bowens*, supra, 62 Conn. App. 158–61. The fact that Kovera discussed certain other obvious factors, such as that the petitioner's photograph was one of several photographs in the array that had a yellowish hue, does not permit him to relitigate the claim in this habeas action.

With respect to the issue of whether estimator variables, such as poor viewing conditions and the stressful effects of suddenly confronting an armed assailant, rendered Phelmetta's identification so unreliable as to violate the petitioner's fourteenth amendment rights, the United States Supreme Court in *Perry* specifically rejected the theory that factors of this sort that cast doubt on the trustworthiness of an eyewitness identification constitute a due process violation: "[Many] factors bear on the likelihood of misidentification . . . for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he [or she] first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness. . . . To embrace [the

petitioner's] view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence." (Citations omitted; internal quotation marks omitted.) *Perry* v. *New Hampshire*, supra, 565 U.S. 243–44.

We further note that Kovera's testimony that estimator variables undermined Phelmetta's ability to recognize the perpetrator was not especially compelling in light of the evidence presented at trial. Several witnesses testified that the intersection where the crime occurred was well lit. Phelmetta testified that she had several opportunities to observe the perpetrator at close range, before she saw that he was carrying a firearm and before she became aware that he posed any threat. There also is no indication in the record that Phelmetta is of a different race than the petitioner. Although there were certain minor inconsistencies between Phelmetta's trial testimony, the testimony of other witnesses, and Phelmetta's prior statements to the police, the jury reasonably could have credited her trial testimony that she had an adequate opportunity to observe the perpetrator.

Our review of the record also does not bear out the petitioner's contention that Phelmetta's identification was the only evidence tying him to the crime. Newell's testimony largely corroborated that of Phelmetta. He testified that he saw a young black male wearing a hoodie cross Columbus Avenue, approach the victim's car from behind, and fire into the driver's window as a female passenger fled the vehicle from the passenger side. Newell reported seeing the same individual a short time later on Frank Street, just around the time that Diaz saw a man fitting the same description, who appeared to be the petitioner, running down and across Frank Street.

It is true that Newell himself was not able to identify the petitioner as the shooter and, also, that there was

some ambiguity as to whether Diaz actually identified the petitioner or merely observed that the individual whom she saw running down Frank Street immediately after the shooting looked like the petitioner and ran behind a house that was frequented by the petitioner. There is no doubt, however, that the jury, considering Newell's and Diaz' testimony together, reasonably could have concluded that the petitioner was the perpetrator. At the very least, the testimony of Diaz, a neighbor, that a man who looked remarkably like the petitioner ran behind a house frequented by the petitioner moments after the shooting would have given the jury reason to doubt the petitioner's alibi defense that he spent the evening at a party on the other side of town. For all of these reasons, we conclude that the habeas court correctly concluded that the identification procedures employed in this case did not violate the petitioner's due process rights.

III

We next consider the petitioner's claim that his first habeas counsel, Cannatelli, provided ineffective assistance by failing to pursue a claim against his trial counsel, Ullmann, for failing to properly impeach the state's alibi rebuttal witness, Crystal Bethea (Crystal). We are not persuaded.[14]

A

The following additional facts are relevant to this issue. The petitioner presented an alibi defense at trial. He took the stand and testified that, on the evening of the shooting, he had been at his mother's home at 56

[14] Because we resolve the petitioner's actual innocence claim on the merits; see part I of this opinion; we need not address his predicate claim that Cannatelli acted deficiently in failing to withdraw that claim during the first habeas trial. The petitioner states in his brief that he contends that Cannatelli provided ineffective assistance only to overcome the respondent's assertion that that his actual innocence claim is barred by the doctrine of res judicata.

Glemby Street in Hamden, together with his friend, Jackson, and his parents. He and Jackson then decided to leave to attend a birthday celebration for Jackson's cousin, Cox, at Crystal's home in the Fair Haven section of New Haven. They called for a taxicab from Metro Taxi and, at approximately 10 p.m., more than one hour before the shooting occurred, traveled by taxicab from Hamden to the celebration.

The petitioner further testified that he and Jackson remained at Cox' residence for "a couple of hours." Around midnight, the petitioner called for another taxicab and requested a driver named Nina, with whom he was acquainted. When Nina arrived, the petitioner and Jackson traveled in her taxicab to a diner, where they ordered take-out food. They then smoked marijuana in the taxicab as Nina drove them back to 56 Glemby Street in Hamden, where they arrived at approximately 1 a.m.

The petitioner further testified that, on the day of the murder, he was never present at the intersection where the shooting occurred and also that he was never on Frank Street that day. He also specifically denied that he shot the victim.

The defense presented four additional witnesses in support of the alibi. First, Jackson testified that she and the petitioner traveled by taxicab from Hamden to the celebration in Fair Haven at 9:30 p.m. and remained there until approximately 1 a.m. She also recalled that she called for a taxicab to take herself and the petitioner home but denied that she and the petitioner previously knew Nina or requested her as the driver. She did testify, however, that they took the taxicab to a diner, purchased food, and smoked marijuana with Nina, the driver, before returning to Hamden. Jackson recalled that she arrived at her home in Hamden at approximately 2 a.m.

Second, Stacy Bethea (Stacy) testified that she was already at 4 Bailey Street in Fair Haven with her cousins, Cox and Crystal, and their respective children, when Jackson arrived with the petitioner. Stacy recalled that Jackson and the petitioner later departed in a taxicab, but she could not remember at what times they arrived or left the residence. She also testified that she had not known the petitioner prior to that night, never saw him again, could not recall what he looked like, and could not identify him in court.

Cox was the petitioner's third alibi witness. She confirmed that her birthday is August 18, the same date as the charged murder. She testified that, on the night of the shooting, she was celebrating at Crystal's Fair Haven apartment. She recalled that the petitioner and Jackson arrived there by taxicab sometime between 9:30 and 10 p.m. and stayed at the party for approximately three hours. Cox also remembered seeing Jackson call for a taxicab before Jackson and the petitioner departed around 12:30 or 1 a.m.

Cox, like Jackson, testified that she had learned of the petitioner's arrest on August 19, the day following the murder, notwithstanding testimony by police officers, and the petitioner's own acknowledgement, that he was not arrested until three days later, on August 22. Both Cox and Jackson admitted that they did not go to the police to inform them that the petitioner had been with them in Fair Haven at the time of the shooting.

The petitioner's final alibi witness was Francis Anderson, a manager from Metro Taxi. Anderson authenticated documents from his company's computerized database that memorialized two telephone calls that the company had received on August 18 and 19, 1996. On the basis of those records, he testified that the company dispatched a taxicab to 56 Glemby Street in Hamden at 10:03 p.m., with a stated destination of 4 Bailey Street

in Fair Haven, and that the company dispatched another taxicab at 12:51 a.m. to 4 Bailey Street, with a stated destination of "56 Geny Street" in New Haven.[15]

Anderson testified that the driver of the taxicab that responded to the second call was female but that he could not recall her name. He also conceded that the records did not specify whether a taxicab actually went to Glemby Street in Hamden at 10:03 p.m., who, if anyone, it picked up at that location, or whether it ever went to Bailey Street in New Haven. Likewise, he could not confirm whether a taxicab actually went to 4 Bailey Street in New Haven at 12:51 a.m., whether it picked up anyone at that location, or whether it transported anyone anywhere after that.[16] Finally, on cross-examination, Anderson estimated that it would take only ten minutes to travel from Bailey Street to Frank Street in New Haven.

The petitioner did not call Crystal to testify, even though she also allegedly had been present at her home for Cox' celebration at the time the murder transpired. The state called Crystal as a rebuttal witness. She testified that she did not know the petitioner and that she had never seen him before.

On cross-examination, Crystal indicated that she recalled that Cox, Jackson, and Stacy were present at her apartment on the evening of August 18, 1996, but that she did not recall the petitioner being there. Ull-

[15] Anderson stated that, to the best of his knowledge, there is no Geny Street in either New Haven or Hamden, suggesting that the entry was likely a scrivener's error.

[16] The call records indicate that both calls were for a single passenger. That is to say, on each document, the field titled "# Psgrs" has an entry of "1." Anderson's testimony did not indicate whether, if the call had in fact been made for two passengers, Metro Taxi's ordinary business practice would have been to indicate that by entering a "2" on the "# Psgrs" field of the form. It is impossible to know, then, whether the jury may have interpreted those documents as evidence that only Jackson attended Cox' celebration.

mann was able to establish that she had been drinking alcohol that night.

At the second habeas trial, Ullmann testified that he began representing the petitioner in September, 1996. He learned at their first meeting that the petitioner had a potential alibi defense, and he filed a notice of alibi shortly thereafter. He testified that his investigator, Donna Harris, was able to identify, locate, and interview three of the potential alibi witnesses: Cox, Jackson, and Crystal. In his case file, Ullmann retained a handwritten investigative report in which Harris memorialized a September, 1996 phone interview she had conducted with Crystal. In the report, Harris recounted: "Ms. Bethea relates the following. On August 18, 1996, she arrived home (4 Bailey St.—New Haven) between 9:30-10 p.m. [The petitioner, Jackson and Cox] were already there. Everyone stayed until 12:30-1 a.m. when [the petitioner, Jackson and Cox] left by cab. Cab was called from her apartment."

Ullmann subsequently interviewed Crystal on two occasions during the petitioner's criminal trial. The second interview took place at the courthouse on June 5, 1998. This was the same day that the state rested its case and the defendant presented his alibi witnesses, and just four days before the state called her to testify as a rebuttal witness.

At the second habeas trial, Ullmann was questioned as to why, when Crystal testified at trial that she had never met the petitioner, he did not confront her with her prior conflicting statement to Harris that the petitioner had attended Cox' celebration. Ullmann testified that he could not recall his reasoning. The petitioner did not call Crystal to testify at the habeas trial, and, although Harris testified, she was unable to recall the details of her conversation with Crystal.

The petitioner then called Sheehan, a highly experienced criminal defense attorney, as a legal expert. Sheehan remarked that Crystal's unimpeached testimony was "important," "dramatic" and "powerful," and he opined that a reasonable defense attorney would have either confronted her with her prior statement or called Harris to testify. As to Cannatelli, Sheehan observed that he had alleged ineffective assistance by Ullmann on several bases, but, Sheehan opined, those claims were weaker than a claim premised on Ullmann's failure to impeach Crystal with her statement to Harris. Consequently, Sheehan opined that, *assuming that Ullmann had no strategic reason for failing to impeach Crystal's testimony*, Cannatelli's failure to claim that Ullmann was ineffective for failing to impeach Crystal also was unreasonable.

The habeas court found that the petitioner had failed to prove his claim related to Ullmann's decision not to impeach Crystal because the petitioner had not established either necessary element of an ineffective assistance claim, namely, deficient performance or prejudice. See part III B of this opinion. As to deficient performance, the habeas court stated that, in light of the presumption that counsel acted competently, Ullmann's excellent reputation, and the fact that Ullmann spoke twice with Crystal in the week before her testimony and made a strategic decision not to call her as a witness, the court was "hesitant to draw the inference that such omission was the result of oversight rather than discretion." The court speculated that "[w]hatever information he gleaned from her, motivated . . . Ullmann to decline to call Crystal as a witness and may have caused him to be cautious when cross-examining her as a rebuttal witness."

With respect to prejudice, the habeas court noted, among other things, that (1) the petitioner did not call Crystal to testify at the habeas proceeding, and so failed

to establish how she would have responded if confronted with her statement, (2) the state's brief direct examination of Crystal was limited to asking whether she previously had seen the petitioner, (3) Ullmann was able to establish on cross-examination that Crystal had been drinking on the night in question, and (4) Crystal's testimony did not figure prominently in either attorney's closing arguments, which focused primarily on the testimony of Phelmetta and Diaz. Accordingly, the habeas court found that the petitioner's claim that Ullmann provided ineffective assistance of counsel lacked merit, and, as such, the petitioner could not prove that Cannatelli was ineffective in failing to challenge Ullmann's failure to impeach Crystal during the first habeas trial.

B

The following well established principles govern our analysis of this claim. "[T]he habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . .

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

been different. . . . Although a petitioner can succeed only if he [or she] satisfies both prongs, a reviewing court can find against a petitioner on either ground. . . . (Citation omitted; internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 330 Conn. 520, 537–38, 198 A.3d 52 (2019).

C

With these principles in mind, we now consider whether the habeas court correctly concluded that Ullmann's decision not to impeach Crystal with her alleged statement to Harris did not constitute deficient performance or prejudice the petitioner's defense. Because we agree with the habeas court that Ullman's failure to question Crystal regarding that statement did not prejudice the petitioner's defense, we need not determine whether that court also correctly determined that Ullman's performance was not deficient. See id.

As we discussed, the petitioner did not call Crystal to testify at the habeas trial. Without knowing how Crystal would have explained and reconciled her allegedly inconsistent statements to Harris, it is impossible to know how the jury would have weighed them at the petitioner's criminal trial. Cf. *Gallimore* v. *Commissioner of Correction*, 112 Conn. App. 478, 483, 963 A.2d 653 (2009); *Adorno* v. *Commissioner of Correction*, 66 Conn. App. 179, 186, 783 A.2d 1202, cert. denied, 258 Conn. 943, 786 A.2d 428 (2001). That fact alone precludes a finding of prejudice.

It is also noteworthy in this regard that Stacy's activities and movements on the night of the murder tracked those of Crystal. Although Stacy testified that she did recall the petitioner attending the celebration, she also could not recall what he looked like or identify him in court. Further, the petitioner's own testimony was not necessarily inconsistent with Crystal's rebuttal testimony. Specifically, in testifying as to his whereabouts and activities on the night of the murder, the petitioner

stated that he spent only a few minutes in the presence of Crystal during Cox' celebration. Further, he conceded that, during that period, he sat on a couch off to the side and largely remained quiet, while the four women sat in the kitchen talking among themselves. Accordingly, there is no reason to think that the jury would have viewed Crystal's inability to recall meeting the petitioner as overly damaging to his alibi defense. We thus conclude that, even if Ullmann's representation of the petitioner was deficient, the petitioner has failed to establish that he was prejudiced thereby.

IV

Lastly, we consider the petitioner's argument that the habeas court incorrectly concluded that his cruel and unusual punishment claims were barred by the doctrine of res judicata. Because we resolved the identical underlying constitutional questions in two other recent cases; see *State* v. *McCleese*, 333 Conn. 378, A.3d (2019); *State* v. *Williams-Bey*, 333 Conn. 468, A.3d (2019); we need not decide whether the habeas court misapplied the doctrine of res judicata.

The following additional procedural history is relevant to this issue. In March, 2016, the petitioner filed in the Superior Court a motion to correct an illegal sentence pursuant to Practice Book § 43-22. Relying on *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012),[17] and its progeny, he argued that it was cruel and unusual punishment for the trial court to have sentenced him to a term of imprisonment of fifty years for an offense that he committed at the age of seventeen, without first considering the mitigating

[17] In *Miller*, the United States Supreme Court held that mandatory life imprisonment without the possibility of parole for those who were under the age of eighteen at the time of their crimes violates the eighth amendment's prohibition against cruel and unusual punishment. See *Miller* v. *Alabama*, supra, 567 U.S. 489.

impacts of his youth. The petitioner acknowledged that, in *State* v. *Delgado*, 323 Conn. 801, 151 A.3d 345 (2016), and *State* v. *Boyd*, 323 Conn. 816, 151 A.3d 355 (2016), we concluded that the legislature's enactment of No. 15-84 of the 2015 Public Acts (P.A. 15-84)[18] "offers a constitutionally adequate remedy under the eighth amendment to those who qualify for parole under its provisions." (Internal quotation marks omitted.) *State* v. *Delgado*, supra, 808. He argued, however, that those cases did not resolve the issues of whether (1) the availability of parole adequately vindicates his rights under the constitution of Connecticut, and (2) P.A. 15-84 established a constitutionally adequate parole procedure.

The court rejected the petitioner's argument, concluding that resentencing was not required under the state constitution. Following what it believed to be the mandate of *Delgado* and *Boyd*, the court dismissed the petitioner's motion in March, 2017, rather than denying it. In May, 2017, the petitioner appealed from the dismissal of his motion. See *State* v. *Bowens*, Connecticut Appellate Court, Docket No. AC 40727 (appeal filed May 18, 2017). In August of that year, the Appellate Court, sua sponte, stayed that appeal pending this court's disposition in *Williams-Bey*.

At the same time, the petitioner also raised his cruel and unusual punishment claims in the present habeas

[18] Public Act 15-84, codified at General Statutes § 54-125a (f) (1) (A), provides in relevant part: "[A] person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided . . . if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty [percent] of the sentence or twelve years, whichever is greater . . . ."

action, including in the operative second amended petition, which he filed in April, 2017. Although the respondent had raised a defense of res judicata only with respect to issues that the petitioner had raised on direct appeal or in the first habeas action, the habeas court, sua sponte, ruled that "[t]he respondent's res judicata defense bars this claim from being relitigated in this habeas case" because the precise claim had been litigated in the motion to correct an illegal sentence.

On appeal to this court, the petitioner contends that his cruel and unusual punishment claims should not have been denied on the basis of res judicata because (1) his motion to correct an illegal sentence was dismissed rather than denied on its merits, and (2) it would be perverse to require that, "*before* seeking to correct an illegal sentence in the habeas court, a defendant either must raise the issue on direct appeal or file a motion pursuant to [Practice Book] § 43-22 with the trial court" (emphasis added); *Cobham* v. *Commissioner of Correction*, 258 Conn. 30, 38, 779 A.2d 80 (2001); but then to conclude that filing such a motion pursuant to § 43-22 precludes a defendant from bringing a subsequent habeas action.

Even if we were to assume, for the sake of argument, that the petitioner is correct that the habeas court should have resolved his constitutional claims on the merits, he cannot prevail on those claims. After the present case was argued, we released our decisions in *State* v. *McCleese*, supra, 333 Conn. 378, and *State* v. *Williams-Bey*, supra, 333 Conn. 468, in which we rejected virtually identical claims. Specifically, we held in those cases that (1) parole eligibility under P.A. 15-84 is an adequate remedy under our state constitution just as it is under the federal constitution, and (2) because the opportunity for parole negates, rather than cures, a *Miller* violation, resentencing is not required, and P.A. 15-84 is constitutionally sound. Accordingly,

we need not determine whether the habeas court improperly applied the doctrine of res judicata.

The judgment is affirmed.

In this opinion, ROBINSON, C. J., and McDONALD, D'AURIA and MULLINS, Js., concurred.

ECKER, J., concurring in part and dissenting in part. I agree with and join parts I, II, and III of the majority opinion. I respectfully dissent, however, from part IV of the majority opinion, in which the majority concludes that, even if the cruel and unusual punishment claims raised by the petitioner, Tyreese Bowens, are not barred by the doctrine of res judicata, he cannot prevail on those claims in light of this court's recent decisions in *State* v. *McCleese*, 333 Conn. 378, A.3d (2019), and *State* v. *Williams-Bey*, 333 Conn. 468, A.3d (2019). For the reasons articulated in my dissenting opinions in those cases, I believe that juvenile offenders cannot constitutionally be sentenced as adults without an individualized sentencing proceeding in which the sentencing judge *must* consider the mitigating effects of youth and its associated features, and also that the availability of parole eligibility under § 1 of No. 15-84 of the 2015 Public Acts, codified at General Statutes § 54-125a, is not a substitute for such an individualized sentencing hearing. See *State* v. *McCleese*, supra, 429 (*Ecker*, *J.*, dissenting); *State* v. *Williams-Bey*, supra, 477 (*Ecker*, *J.*, dissenting); see also *State* v. *Taylor G.*, 315 Conn. 734, 796–97, 110 A.3d 338 (2015) (*Eveleigh*, *J.*, dissenting).

Cumulative Table of Cases
Connecticut Reports
Volume 333

(Replaces Prior Cumulative Table)

Adams *v.* Commissioner of Correction (Order) . . . 910
Bank of America, N.A. *v.* Cuseo (Order) . . . 922
Barry A. *v.* Commissioner of Correction (Order) . . . 905
Bolat *v.* Bolat (Order) . . . 918
Bowens *v.* Commissioner of Correction . . . 502
Habeas corpus; certification to appeal; claim of actual innocence; claim that identification procedures used in connection with petitioner's criminal conviction were so unreliable and unnecessarily suggestive, that they violated petitioner's constitutional right to due process; claim of ineffective assistance of habeas counsel; claim that habeas court incorrectly concluded that petitioner's claim of cruel and unusual punishment with respect to petitioner's sentence was barred by doctrine of res judicata; application of holdings in recent cases, State *v.* McCleese *(333 Conn. 378) and* State *v.* Williams-Bey *(333 Conn. 468), to resolve petitioner's claim of cruel and unusual punishment.*
Bozelko *v.* Statewide Construction, Inc. (Order) . . . 901
Casablanca *v.* Casablanca (Order) . . . 913
Clasby *v.* Zimmerman (Order) . . . 919
Cohen *v.* Statewide Grievance Committee (Order) . . . 901
Commissioner of Transportation *v.* Lagosz (Order) . . . 912
Connecticut Interlocal Risk Management Agency *v.* Jackson . . . 206
Negligence; summary judgment; proof of causation; application of alternative liability doctrine when conduct of multiple defendants is tortious and plaintiff's injuries have been caused by conduct of only one defendant but it is unclear which one; claim that trial court improperly failed to apply alternative liability doctrine in granting defendants' motions for summary judgment; application of alternative liability rule pursuant to which plaintiff's burden of proving causation shifts to each defendant to show that he or she did not cause plaintiff's injuries; elements required for application of alternative liability doctrine, discussed; whether application of doctrine to defendants in present case was unfair or compromised any legitimate reliance interest that they may have had.
DeChellis *v.* DeChellis (Order) . . . 913
DeMaria *v.* Bridgeport (Order) . . . 916
Deutsche Bank National Trust Co. *v.* Siladi (Order) . . . 902
Farmington-Girard, LLC *v.* Planning & Zoning Commission (Order) . . . 917
Federal National Mortgage Assn. *v.* Farina (Order) . . . 920
Francis *v.* Board of Pardon & Paroles (Order) . . . 907
Goodwin Estate Assn., Inc. *v.* Starke (Order) . . . 912
Griffin *v.* Commissioner of Correction . . . 480
Habeas corpus; motion for summary judgment; certification from habeas court; claim that contemporary standards of decency regarding acceptable punishment for children who engage in criminal conduct have evolved such that transfer of case of fourteen year old defendant to regular criminal docket from docket for juvenile matters and subsequent sentence of forty years violated prohibition against cruel and unusual punishment in due process provisions (article first, §§ 8 and 9) of state constitution; whether recent statutory (P.A. 15-183 and P.A. 15-84) modifications to state's juvenile justice system reflect changes in contemporary standards of decency; whether petitioner was entitled to be resentenced.
Halladay *v.* Commissioner of Correction (Order) . . . 921
Harris *v.* Commissioner of Correction (Order) . . . 919
In re Taijha H.-B. . . . 297
Termination of parental rights; appeal from trial court's granting of appointed appellate counsel's motion to withdraw based on counsel's determination that any appeal from termination decision was frivolous; dismissal of appeal by Appellate Court on grounds that procedure set forth in Anders *v.* California *(386*

U.S. 738) is not applicable to withdrawal of appellate attorney in child protection proceedings and that appeal was not properly filed due to failure to comply with rules of practice (§ 79a-3 [c]); certification from Appellate Court; whether Appellate Court improperly dismissed indigent respondent's appeal for failure to comply with Practice Book § 79a-3 (c) insofar as counsel filed respondent's appeal before fully reviewing merits of appeal; claim that § 79a-3 violates equal protection clause of fourteenth amendment to United States constitution on ground that rule imposes higher legal burden on appeals brought by indigent litigants who have been assigned counsel than on litigants who have financial means to hire private counsel; differences between standards in determining whether appeal is frivolous or meritless set forth in Rules of Professional Conduct (3.1) and rules of practice (§§ 35a-21 [b] and 79a-3), discussed; whether respondent had right under due process clause of fourteenth amendment to assistance of counsel in connection with her appeal from termination of parental rights; factors to be considered in determining whether indigent parents have federal constitutional right to counsel in termination proceedings and appeals, discussed; whether due process required utilization of some Anders*-type procedure before court could allow appointed counsel to withdraw; whether Appellate Court improperly dismissed respondent's appeal on ground that procedure set forth in* Anders *was not applicable to withdrawal of appellate attorney in child protection proceedings; minimal procedural safeguards that court must follow before allowing appointed counsel to withdraw in connection with appeal from termination decision, discussed; whether trial court failed to observe adequate procedural safeguards before permitting respondent's counsel to withdraw.*

Jackson *v.* Commissioner of Correction (Order) 904
Jordan *v.* Commissioner of Correction (Order) 905
Kaminski *v.* Poirot (Order) 916
King *v.* Volvo Excavators AB 3

Product liability; whether trial court properly granted defendants' motions for summary judgment on ground that plaintiff's claims were barred by applicable statute of repose (§ 52-577a [a]); claim that amendment to § 52-577a (P.A. 17-97) applied retroactively to plaintiff's claims.

Lewis *v.* Newtown (Order) 919
Lowry *v.* Mayers (Order) 922
McGinty *v.* Stamford Police Dept. (Order) 920
Metcalf *v.* Fitzgerald. 1

Vexatious litigation; Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); whether trial court properly dismissed state law claims alleging vexatious litigation and violation of CUTPA for lack of subject matter jurisdiction; whether trial court properly dismissed plaintiff's state law claims; whether plaintiff's state law claims were expressly preempted by federal Bankruptcy Code; whether plaintiff's state law claims were implicitly preempted by federal Bankruptcy Code; claim that Congress did not intend to occupy field of sanctions and remedies for abuse of bankruptcy process; claim that plaintiff's state law claims were not preempted because remedies under Connecticut law and federal law are different.

Nonhuman Rights Project, Inc. *v.* R.W. Commerford & Sons, Inc. (Order) 920
Outing *v.* Commissioner of Correction (Order) 903
Pamela Corp. *v.* Planning & Zoning Commission (Order) (See Farmington-Girard, LLC *v.* Planning & Zoning Commission) 917
Patrowicz *v.* Peloquin (Order) 915
Rauser *v.* Pitney Bowes, Inc. (Order) 903
Riccardo *v.* Couloute (Order) 921
Riley *v.* Travelers Home & Marine Ins. Co. 60

Breach of contract; negligent infliction of emotional distress; motion for directed verdict pursuant to applicable rule of practice (§ 16-37); applicability of waiver rule; whether evidence was sufficient to support jury's verdict with respect to plaintiff's claim of negligent infliction of emotional distress; reviewability of claim that waiver rule is inapplicable in civil cases in which trial court reserved decision on motion for directed verdict; claim that trial court was limited to considering evidence adduced in plaintiff's case-in-chief when it ruled on defendant's motion for judgment notwithstanding verdict.

R.T. Vanderbilt Co. *v.* Hartford Accident & Indemnity Co.. 343

Insurance; declaratory judgment action to determine, inter alia, rights and obligations under insurance policies issued to plaintiff by defendant insurers in connection with actions against plaintiff alleging personal injuries resulting from

exposure to asbestos; certification from Appellate Court; whether Appellate Court properly adopted, as matter of law, continuous trigger theory of coverage for asbestos related disease claims; whether Appellate Court properly upheld trial court's preclusion of expert testimony concerning medical science and timing of bodily injury from asbestos related disease; whether Appellate Court properly adopted unavailability of insurance exception to pro rata, time on risk allocation rule; whether Appellate Court properly interpreted pollution exclusion clauses contained in certain of defendants' secondary insurance policies to bar coverage for claims against plaintiff; claim that occupational disease exclusion clauses in certain of defendants' secondary insurance policies did not preclude coverage of claims by nonemployees of plaintiff who developed occupational disease while using plaintiff's products in course of working for other employers.

Roger R. *v.* Commissioner of Correction (Order) 904
St. Denis-Lima *v.* St. Denis (Order) 910
Santa Energy Corp. *v.* Santa (Order) 910
Sena *v.* American Medical Response of Connecticut, Inc. 30

Negligence; whether trial court's denial of defendant city's motion for summary judgment claiming immunity pursuant to statute (§ 28-13) governing liability of political subdivisions for actions taken in response to civil preparedness emergencies constituted final judgment for purpose of appeal; nature of immunity provided to political subdivisions under § 28-13, discussed; whether trial court improperly denied city's motion for summary judgment; whether trial court incorrectly concluded that genuine issue of material fact existed as to whether emergency continued to exist at time of alleged negligence.

State *v.* Abdus-Sabur (Order) 911
State *v.* Ayala 225

Murder; conspiracy to commit murder; claim that trial court improperly admitted evidence of statement made by gang leader under coconspirator hearsay exception; whether defendant demonstrated that trial court's admission of testimony regarding gang leader's statement substantially affected verdict; whether trial court improperly admitted testimony regarding victim's statement about his fear of gang as state of mind evidence.

State *v.* Daniels (Orders) 918
State *v.* Dawson (Order) 906
State *v.* Dojnia (Order) 914
State *v.* Elmer G. 176

Sexual assault second degree; risk of injury to child; criminal violation of restraining order; certification from Appellate Court; whether evidence was sufficient to support conviction of criminal violation of restraining order; claim that trial court's explanation of temporary restraining order was unclear such that jury could not reasonably determine that defendant knew he was prohibited from contacting his children outside of weekly, supervised visits; claim that defendant was not adequately informed in his primary language that he was prohibited from contacting children by text or letter; claim that defendant did not violate restraining order when he sent letter to victim because evidence was insufficient to establish that he sent letter while restraining order was in effect; claim that defendant was deprived of fair trial as result of certain alleged improprieties committed by prosecutor; claim that prosecutor improperly bolstered credibility of certain witnesses; claim that prosecutor made golden rule argument when he asked jurors to consider their own perspectives; claim that prosecutor improperly referred to victim's credibility in light of psychological, social and physical barriers she faced in accusing defendant of sexual assault; claim that prosecutor improperly asked jurors whether other individuals in similar circumstances would fabricate sexual assault accusations.

State *v.* Fernandes (Order) 908
State *v.* Francis (Order) 912
State *v.* Irizarry (Order) 913
State *v.* Leniart 88

Capital felony; murder; certification from Appellate Court; whether unpreserved sufficiency claim under state common-law corpus delicti rule was reviewable on appeal; whether there was sufficient, corroborating evidence, independent of defendant's confessions, to sustain defendant's conviction; purpose, history, and scope of corpus delicti rule, discussed; whether Appellate Court correctly concluded that trial court's improper exclusion of video recording depicting polygraph pretest interview constituted harmful error; definition of categorically inadmissi-

ble polygraph evidence under State *v.* Porter *(241 Conn. 57), discussed; claim that Appellate Court incorrectly concluded that trial court had abused its discretion in excluding expert testimony regarding credibility of incarcerated informants.*
State *v.* McCleese 378
Murder; conspiracy to commit murder; assault first degree; whether trial court properly dismissed motion to correct illegal sentence for lack of jurisdiction on ground of mootness; claim that, under Connecticut constitution, parole eligibility afforded by recent legislation (P.A. 15-84, § 1) to certain juvenile offenders did not remedy violation of requirement in Miller *v.* Alabama *(567 U.S. 460) and* State *v.* Riley *(315 Conn. 637) that juvenile offender's age and hallmarks of adolescence be considered as mitigating factors before juvenile may be sentenced to life imprisonment, or its functional equivalent, without possibility of parole; claim that P.A. 15-84 is unconstitutional under separation of powers doctrine embodied in article two of Connecticut constitution and due process clause of fourteenth amendment to United States constitution; claim that P.A. 15-84 violated separation of powers by impermissibly delegating sentencing power to Board of Pardons and Paroles; claim that P.A. 15-84 violates defendant's right to equal protection under fourteenth amendment to United States constitution on ground that juveniles convicted of capital felony are entitled to resentencing under P.A. 15-84 whereas juveniles, such as defendant, who are convicted of murder, are not.*
State *v.* Pugh (Order) 914
State *v.* Ramon A. G. (Order) 909
State *v.* Robert H. 172
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.* Rodriguez (Order) 908
State *v.* Sanchez (Order) 907
State *v.* Scott (Order) 917
State *v.* Slaughter (Order) 908
State *v.* Thigpen (Order) 909
State *v.* Thompson (Order) 906
State *v.* Turner (Order) 915
State *v.* Williams-Bey 468
Murder as accessory; certification from Appellate Court; whether Appellate Court correctly upheld trial court's dismissal of motion to correct illegal sentence for lack of subject matter jurisdiction; claim that defendant was entitled to resentencing under Connecticut constitution after passage of P.A. 15-84, which requires sentencing court to consider juvenile offender's age and hallmarks of adolescence as mitigating factors in determining sentence when court imposes sentence of life, or its functional equivalent, without possibility of parole; whether resentencing was required, when, following enactment of legislation (P.A. 15-84), defendant became eligible for parole and could no longer claim that he was serving life sentence, or its functional equivalent, without possibility of parole; resolution of defendant's claim controlled by this court's decision in State *v.* McCleese *(333 Conn. 378).*
TPF Development Corp. *v.* R & R Pool & Home, Inc. (Order) 906
Trust *v.* Bliss (Order) 921
U.S. Bank, National Assn. *v.* Fitzpatrick (Order) 916
U.S. Bank Trust, N.A. *v.* Giblen (Order) 903
Vassell *v.* Commissioner of Correction (Order) 911
Viking Construction, Inc. *v.* 777 Residential, LLC (Order) 904
Villafane *v.* Commissioner of Correction (Order) 902
Vitti *v.* Milford (Order) 902
Wachovia Mortgage, FSB *v.* Toczek (Order) 914

CONNECTICUT APPELLATE REPORTS

Vol. 193

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

RACHEL WAGER *v.* ALEXANDRIA MOORE ET AL.
(AC 40329)

Sheldon, Moll and Seeley, Js.

Syllabus

The plaintiff pedestrian sought to recover damages from the defendant for negligence for injuries she sustained when she was struck by a motor vehicle operated by the defendant. After the jury returned a verdict in favor of the defendant, the trial court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with it, from which the plaintiff appealed to this court. *Held:*

1. The plaintiff could not prevail in her claim that the trial court erred when it denied her motion to set aside the verdict and for a new trial, which was based on her claim that there was insufficient evidence to support a finding of contributory negligence, the record having contained ample evidence that the plaintiff was negligent and that such negligence was a substantial factor in causing her injuries: there was evidence that the plaintiff was not in a designated crosswalk at the time of the collision, although there was a crosswalk approximately 750 feet down the roadway that would have been visible to the plaintiff and which she previously had used, that it was dark at the time of the collision and the plaintiff was wearing dark clothing, which the jury reasonably could have concluded would have made it difficult for the defendant to see her, that the plaintiff had "popped out" in front of the defendant's vehicle, that the area of the collision was flat and straight and that the plaintiff was intoxicated at the time of the collision, from which the jury could have inferred that the plaintiff walked or ran into the path of the defendant's vehicle and failed to yield the right-of-way to the defendant, that had the plaintiff been paying attention or keeping a proper lookout, she would have seen the defendant's vehicle in sufficient time to avoid the collision, and that the plaintiff was not exercising reasonable care to avoid harm to herself; moreover, the jury reasonably could have found that the plaintiff's negligence far exceeded the defendant's negligence, as there was evidence that the plaintiff had consumed approximately nine alcoholic drinks shortly before the collision and that she was captured on camera having difficulty standing and walking, whereas there was evidence that the defendant had consumed one alcoholic drink one and one-half hours before the collision and did not appear inebriated, and the defendant testified that she was not speeding and was paying attention to the roadway.
2. The plaintiff's claim that the trial court erred in instructing the jury on contributory negligence when such a charge was not supported by the evidence was unavailing; the record contained sufficient evidence of the plaintiff's contributory negligence to support the court's instruction,

including evidence that the plaintiff was intoxicated, did not cross at a designated crosswalk and was wearing dark clothing when she suddenly appeared in the roadway.

3. The plaintiff could not prevail on her claim that the trial court improperly failed to instruct the jury on the relevant statutes governing the parties' respective duties, which was based on her claim that once the court instructed the jury on a pedestrian's duties pursuant to the applicable statutes (§§ 14-300b [a] and 14-300c [b]), its refusal to charge the jury on the duties that a driver owes to pedestrians pursuant to the applicable statutes (§§ 14-300d and 14-300i) constituted error: the court incorporated the duties of pedestrians identified in §§ 14-300b (a) and 14-200c (b) in its charge on contributory negligence, and the duties of drivers in relation to pedestrians identified in §§ 14-300d and 14-300i in its charge on negligence, the fact that the jury found the defendant 10 percent negligent indicated that the jury understood that the defendant owed a duty of care notwithstanding the plaintiff's negligence, and, therefore, the court adequately instructed the jury regarding the defendant's duty to exercise reasonable care; moreover, although the instructions were not a model of clarity, jury instructions need not be exhaustive, perfect or technically accurate, so long as they are correct in law, adapted to the issues and sufficient for the guidance of the jury, and there was not a reasonable possibility the court's charge misled the jury.

4. The trial court did not abuse its discretion in denying the plaintiff's motions for a mistrial and to set aside the verdict, in which she claimed that she was prejudiced by the admission into evidence of certain improper hearsay evidence during the videotaped deposition testimony of the defendant's expert toxicologist, M, who commented in the video that the plaintiff had stated that she recalled walking across the roadway, even though the parties did not dispute that the plaintiff did not recall the accident and had agreed that M's comment would be excluded from the recording shown to the jury; immediately after the recording containing M's comment was played for the jury, the plaintiff's counsel corrected M, explaining that his statement was based on a police officer's mistaken interpretation of a comment by the plaintiff's mother, M admitted that he was mistaken, and the court gave the jury an instruction, which it was presumed to have followed, to ignore any comments indicating that the plaintiff remembered the collision shortly after the jury viewed the recording.

Argued February 5—officially released October 22, 2019

Procedural History

Action to recover damages for, inter alia, the defendants' negligence, and for other relief, brought to the Superior Court in the judicial district of New London; thereafter, the plaintiff withdrew the action as to the

defendant Mitchell College; subsequently, the matter was tried to the jury before *Cole-Chu*, *J.*; thereafter, the court denied the plaintiff's motion for a mistrial; verdict for the named defendant; subsequently, the court denied the plaintiff's motion to set aside the verdict and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court; thereafter, the court, *Cole-Chu*, *J.*, denied the plaintiff's motion for articulation. *Affirmed.*

Cynthia C. Bott, with whom, on the brief, was *J. Craig Smith*, for the appellant (plaintiff).

Laura Pascale Zaino, with whom, on the brief, was *Lewis S. Lerman*, for the appellee (named defendant).

Opinion

SEELEY, J. The plaintiff, Rachel Wager, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendant Alexandria Moore[1] in an action to recover damages for injuries that she sustained when she was struck by a vehicle operated by the defendant. On appeal, the plaintiff claims that the trial court erred when it (1) denied the plaintiff's motion to set aside the verdict on the basis of insufficient evidence to support the jury's finding of contributory negligence,[2] (2) instructed the jury on contributory negligence when such a charge was not supported by the evidence, (3) failed to instruct the jury on law essential

[1] The plaintiff also brought this action against the defendant Mitchell College but withdrew the action as against it. Our references in this opinion to the defendant are to Alexandria Moore.

[2] "[A]lthough Connecticut has adopted the doctrine of comparative negligence; see General Statutes § 52-572h (b); our statutes retain the term contributory negligence. See, e.g., General Statutes §§ 52-114 and 52-572h (b)." (Internal quotation marks omitted.) *Stafford* v. *Roadway*, 312 Conn. 184, 185 n.3, 93 A.3d 1058 (2014). Therefore, although the briefs filed in this appeal use the term comparative negligence, we use the term contributory negligence throughout this opinion.

to the plaintiff's claim regarding the defendant's negligence, and (4) denied the plaintiff's motion for a mistrial and later motion to set aside the verdict, which were based on the improper introduction of hearsay evidence against her at trial. We disagree and, accordingly, affirm the judgment of the trial court.

The jury was presented with the following evidence on which to base its verdict. At approximately 10:30 p.m. on February 4, 2011, the defendant was driving in the southbound lane on Montauk Avenue in New London, near the campus of Mitchell College, when her vehicle collided with the plaintiff, a student at the college who was crossing Montauk Avenue on foot when the collision occurred.[3] The plaintiff had started on the east side of the road and crossed the entire northbound lane before, walking westward, she entered the southbound lane and proceeded to the point where the collision occurred.

The plaintiff was not in a designated crosswalk at the time of the collision, although there was a marked crosswalk approximately 750 feet from the point of impact. The marked crosswalk was visible from the collision site, and a person crossing Montauk Avenue where the plaintiff attempted to cross it could have been able to use that marked crosswalk by walking northward to it on the sidewalk running on the east side of Montauk Avenue. The plaintiff was aware of the marked crosswalk and previously had used it to walk across Montauk Avenue. There were no cars parked on either side of Montauk Avenue at the time of the collision, but snowbanks then lined both sides of the street. At the time of the collision, the plaintiff was wearing a black jacket, dark jeans, and gold boots. The plaintiff was unable to remember anything about the collision or the period of time immediately before it.

[3] In the area where the collision occurred, Montauk Avenue is two lanes, with northbound traffic in one lane and southbound traffic in the other.

The defendant testified that at the time of the collision she was driving to a friend's house located in New London. She further testified that at the time, she was not speeding and she was not distracted.[4] According to the defendant, she was paying extra attention to the roadway because she was looking for a street sign. The defendant stated that the collision occurred when the plaintiff "popped out in front of [her car]." The defendant knew she had hit something because she heard a thump, so she stopped her vehicle. She did not realize her vehicle had hit a person until after she had exited the vehicle and looked back in the roadway. No one else witnessed the collision.

The plaintiff's accident reconstruction expert, Kristopher Seluga, testified that Montauk Avenue was flat and straight in the area of the collision and that the line of sight in that area was over 700 feet. He further testified that a person standing where he believed the plaintiff had been at the time of the collision would have been able to see the headlights of an oncoming vehicle prior to deciding whether or not to cross the road. Seluga also testified that the plaintiff should have been able to see the headlights of the defendant's vehicle and detect its presence on the roadway before the defendant would have been able to see the plaintiff.

As a result of the collision, the plaintiff was thrown forward and landed approximately 42 feet south of the point of impact. When the initial emergency personnel arrived at the scene, the plaintiff was unconscious. The plaintiff was transported to Lawrence & Memorial Hospital in New London. Later that evening, she was transferred to Yale New Haven Hospital via Life Star helicopter due to the severity of her injuries, which included multiple fractures, lacerations, and a traumatic brain injury.

[4] The defendant's cell phone records showed that she was not using her cell phone when the collision occurred.

A blood test performed at the hospital approximately thirty minutes after the collision revealed that the plaintiff had a blood alcohol level of 170 milligrams per deciliter, or .17 percent, which is equivalent to a .15 percent whole blood alcohol content measurement. Charles McKay, a toxicologist, testified that a .15 percent whole blood alcohol content measurement from a person of the plaintiff's size would represent more than nine standard alcoholic beverages consumed in a short period of time.[5] Earlier on the night of the collision, the plaintiff had shared a bottle of rum with six to eight friends in a dormitory at Mitchell College. The plaintiff appeared inebriated by 8:30 p.m., and she had trouble walking and needed help getting across campus. Footage from a surveillance camera on campus showed the plaintiff struggling to walk and stand on her own.

The plaintiff admitted that everything appears slower and her judgment sometimes is impaired when she is intoxicated. McKay testified that as blood alcohol concentration rises in a person, it can lead to errors in judgment and processing of thoughts, a decrease in motor skills, and an inability to pay attention to multiple stimuli. According to McKay, the plaintiff's blood alcohol concentration of .15 significantly would have impacted her cognitive functioning (i.e., her ability to perceive and respond) and her motor functioning.

Sergeant Lawrence Keating of the New London Police Department testified that while speaking with the defendant at the scene of the collision, he smelled alcohol on her breath. The defendant informed the police that she had consumed one alcoholic drink—a martini—approximately ninety minutes earlier. The police then administered a field sobriety test, which the defendant passed. One of the defendant's coworkers, who was

[5] McKay explained that a standard alcoholic drink is one that contains one and one-half ounces of 80 proof alcohol.

with her shortly before the collision, testified that when she last saw the defendant she was acting normally.

In 2013, the plaintiff brought this action against the defendant. The operative amended complaint, which the plaintiff filed on November 13, 2015, alleged various injuries the plaintiff sustained as a result of the collision and that those injuries were caused by the negligence of the defendant in one or more of the following ways: she operated a motor vehicle while under the influence of an intoxicating liquor in violation of General Statutes § 14-227a (a); she operated a motor vehicle in a reckless manner in violation of General Statutes § 14-222; she operated a motor vehicle at an unreasonably high rate of speed in violation of General Statutes § 14-218a; she failed to keep a proper lookout; she failed to properly control her vehicle; she failed to brake; she failed to yield the right-of-way to a pedestrian already in the roadway; she failed to swerve to avoid striking the plaintiff; she operated her vehicle at an unreasonable speed under the circumstances; and she otherwise failed to drive as a reasonable and prudent driver under the same or similar circumstances.

On March 3, 2016, the defendant filed an answer to the plaintiff's operative complaint. The defendant also asserted, by way of special defense, that any injuries alleged by the plaintiff were proximately caused by her own negligence. Specifically, the defendant alleged that the plaintiff was negligent in one or more of the following ways: she failed to utilize the crosswalk in violation of General Statutes § 14-300b (a); she failed to yield the right-of-way to the defendant in violation of General Statutes § 14-300b (a); she left a place of safety and walked or ran into the path of the defendant's vehicle, causing an immediate hazard to herself, in violation of General Statutes § 14-300c (b); she "walked upon the roadway while under the influence of alcohol or drugs,

rendering herself a hazard in violation of General Statutes [§ 14-300c (b)]"; she was inebriated, intoxicated, or impaired by the consumption of alcohol, and, as a result, walked or ran into the path of the defendant's vehicle; she failed to stop or wait for the defendant's vehicle to pass before entering the roadway, although by a reasonable and proper exercise of her faculties, she could and should have done so; she chose to cross the street while her ability to do so was impaired by the consumption of alcohol; she failed to keep a reasonable and proper lookout for vehicles on the roadway; and she failed to be attentive to her surroundings, including vehicles on the roadway. The plaintiff filed a reply generally denying the allegations in the special defense.

Following a six day trial, the jury returned a verdict for the defendant and found the issues in the defendant's special defense in favor of the defendant. The jury found that the plaintiff "was more than 50 [percent]—specifically 90 [percent]—contributorily negligent in causing the subject accident on February 4, 2011, and her resulting injuries and damages, compared to the 10 [percent] total negligence of the defendant."[6] The trial court denied the plaintiff's subsequent motion to set aside the verdict and for a new trial. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the trial court erred in denying her motion to set aside the verdict and for a

[6] General Statutes § 52-572h (b) provides in relevant part: "In causes of action based on negligence, contributory negligence shall not bar recovery in an action by any person or the person's legal representative to recover damages resulting from personal injury . . . if the negligence was not greater than the combined negligence of the person . . . against whom recovery is sought."

new trial because the evidence was insufficient to support the jury's finding of contributory negligence. Specifically, the plaintiff argues that there was not sufficient evidence to remove the jury's finding that she was more than 50 percent negligent from the realm of speculation. The plaintiff argues that there was insufficient evidence from which the jury reasonably could have found that the plaintiff's alleged negligence was "causally connected to the collision." The plaintiff also contends that the defendant failed to present sufficient evidence from which the jury reasonably could have found that the plaintiff breached a duty of care as specified in the defendant's special defense. We disagree with the plaintiff and conclude that insofar as the jury's verdict was based on its finding of contributory negligence, the verdict was supported by sufficient evidence.

"A party challenging the validity of the jury's verdict on grounds that there was insufficient evidence to support such a result carries a difficult burden. In reviewing the soundness of a jury's verdict, we construe the evidence in the light most favorable to sustaining the verdict. . . . We do not ask whether we would have reached the same result. [R]ather, we must determine . . . whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict . . . . If the jury could reasonably have reached its conclusion, the verdict must stand." (Internal quotation marks omitted.) *Gagliano* v. *Advanced Specialty Care, P.C.*, 329 Conn. 745, 754–55, 189 A.3d 587 (2018).

"The . . . judgment [will be reversed] only if we find that the [fact finder] could not reasonably and legally have reached [its] conclusion. . . . We apply this familiar and deferential scope of review, however, in light of the equally familiar principle that the [defendant] must produce sufficient evidence to remove the [fact finder's] function of examining inferences and finding facts from the realm of speculation." (Internal quotation

marks omitted.) *Reyes* v. *Chetta*, 143 Conn. App. 758, 765, 71 A.3d 1255 (2013). "Moreover, with respect to the trial court's refusal to set aside the verdict, we accord great deference to the vantage of the trial judge, who possesses a unique opportunity to evaluate the credibility of witnesses. . . . The concurrence of the judgments of the [trial] judge and the jury . . . is a powerful argument for upholding the verdict." (Internal quotation marks omitted.) *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 371, 119 A.3d 462 (2015).

"[I]t is [the] function of the jury to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . Because [t]he only kind of an inference recognized by the law is a reasonable one . . . any such inference cannot be based on possibilities, surmise or conjecture. . . . It is axiomatic, therefore, that [a]ny [inference] drawn must be rational and founded upon the evidence. . . . However, [t]he line between permissible inference and impermissible speculation is not always easy to discern. When we infer, we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is reasonable. But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation. When that point is reached is, frankly, a matter of judgment. . . .

"[P]roof of a material fact by inference from circumstantial evidence *need not* be so conclusive as to *exclude every other hypothesis*. It is sufficient if the evidence

produces in the mind of the trier a reasonable belief in the probability of the existence of the material fact. . . . Thus, in determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . In other words, an inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. Equally well established is our holding that a jury may draw factual inferences on the basis of already inferred facts. . . . Finally, it is well established that a [defendant] has the same right to submit a weak [special defense] as he has to submit a strong one." (Emphasis in original; internal quotation marks omitted.) *Procaccini* v. *Lawrence & Memorial Hospital, Inc.*, 175 Conn. App. 692, 716–17, 168 A.3d 538, cert. denied, 327 Conn. 960, 172 A.3d 801 (2017).

To prove contributory negligence, the defendant must prove that the plaintiff's negligence was a proximate cause of or a substantial factor in the resulting harm. See *Opotzner* v. *Bass*, 63 Conn. App. 555, 566, 777 A.2d 718 (court properly instructed jury that it must determine whether plaintiff's negligence was substantial factor in bringing about collision), cert. denied, 257 Conn. 910, 782 A.2d 134 (2001), and cert. denied, 259 Conn. 930, 793 A.2d 1086 (2002). Put another way, "the defendant must . . . prove by a fair preponderance of the evidence that the plaintiff was in fact negligent." *Hackling* v. *Casbro Construction of Rhode Island*, 67 Conn. App. 286, 294 n.4, 786 A.2d 1214 (2001).

In the present case, when the court instructed the jury, it stated in relevant part: "The defendant's special defense is that, if the plaintiff sustained any injuries or damages as alleged in her complaint, then said injuries or damages were proximately caused by her own carelessness and negligence at said time and place, in one or more of the following ways: One, she crossed the

street at a place other than the available crosswalk and failed to yield the right-of-way to the defendant; two, she left a place of safety and walked or ran into the path of the defendant's vehicle, causing a hazard; three, she walked upon the roadway while under the influence of alcohol, rendering herself a hazard; four, she was inebriated, intoxicated, or impaired by the consumption of alcohol and, as a result, walked or ran into the path of the defendant's vehicle; five, she failed to keep a reasonable and proper lookout for vehicles on the roadway; six, she failed to be attentive to her surroundings, including vehicles in the roadway."

First, we address the plaintiff's assertion that there was insufficient evidence from which the jury reasonably could have found that her alleged negligence was "causally connected to the collision." Contrary to the plaintiff's contention,[7] we conclude that the record contains ample evidence that the plaintiff was negligent as alleged in each of the six specifications pleaded in the special defense, on which the trial court charged the jury, and that such negligence was a substantial factor in causing her injuries. Specifically, there was evidence that the plaintiff was not in a designated crosswalk at the time of the collision, although such a crosswalk was located approximately 750 feet down the road. The crosswalk would have been visible to the plaintiff from where she began to cross the roadway, and she was aware of that crosswalk, having used it previously.

Additionally, at the time of the collision, it was dark outside and the plaintiff was wearing dark clothing,

[7] The plaintiff contends that "[t]here was no evidence [the plaintiff] failed to yield the right-of-way (Special Defense no. 1); walked or ran in the path of [the defendant's] car (Special Defense nos. 2, 4); rendered herself a hazard (Special Defense nos. 2, 3); failed to keep a proper lookout or be attentive (Special Defense nos. 5, 6)." (Footnote omitted.) The plaintiff also argues that the defendant "failed to introduce any evidence that the conduct alleged in the special [defense]—e.g., [the plaintiff's] alleged inattentiveness, alcohol consumption—was causally connected to the collision."

which the jury reasonably could have concluded would have made it difficult for the defendant to see her. On the basis of the defendant's testimony that she never saw the plaintiff and that the plaintiff "popped out" in front of her vehicle, the jury reasonably could have inferred that the plaintiff walked or ran into the path of the defendant's vehicle and that she failed to yield the right-of-way to the defendant.

Moreover, the jury heard extensive evidence—in the form of expert and lay testimony—of the plaintiff's intoxication at the time of the collision. The plaintiff's blood alcohol content was .15 percent approximately thirty minutes after the collision. An individual of the plaintiff's size would have had to consume nine standard alcoholic drinks over a short period of time immediately before her blood was drawn to reach this level of intoxication. The plaintiff admitted that when she is intoxicated, things appear slower to her and her judgment can be impaired. Indeed, friends of the plaintiff who observed her prior to the collision stated that she struggled to stand and to navigate campus.[8]

The plaintiff argues that intoxication alone does not constitute negligence and, therefore, the evidence of her intoxication is insufficient to support a finding of contributory negligence. Our Supreme Court has stated: "Even if [the jury] found [that the plaintiff] was intoxicated, that would not constitute contributory negligence as a matter of law. . . . [T]he mere fact that [the plaintiff] was intoxicated . . . would not prevent recovery but its importance in the case would be that if true it would strengthen the probability of the defendants' claim [of contributory negligence]." *Kupchunos* v. *Connecticut Co.*, 129 Conn. 160, 163, 26 A.2d 775

[8] The statements by the plaintiff's friends that the plaintiff struggled to stand and navigate campus were made to a campus safety officer and were referred to during the testimony of toxicologist Charles McKay.

(1942); see also *Craig* v. *Dunleavy*, 154 Conn. 100, 105–106, 221 A.2d 855 (1966) (concluding that trial court properly found that defendant failed to prove plaintiff's decedent was contributorily negligent because defendant presented no evidence other than plaintiff's intoxication in support of his claim). Unlike in *Craig*, where the only evidence of contributory negligence in the record was the intoxication of the plaintiff's decedent, in the present case the defendant did not rely exclusively on evidence of the plaintiff's intoxication in support of her claim of contributory negligence. *Craig* v. *Dunleavy*, supra, 105–106. There also was evidence that the plaintiff "popped out" into the roadway at night dressed in dark clothing. On the basis of this evidence, the jury reasonably could have concluded that the plaintiff, while intoxicated, "popped out" into the roadway at night dressed in dark clothing, thereby rendering herself a hazard. Similarly, the jury reasonably could have inferred that the plaintiff, while intoxicated, walked or ran into the path of the defendant's vehicle.

Moreover, in *Craig*, the defendant failed to offer evidence to indicate how the intoxication of the plaintiff's decedent contributed to the automobile accident at issue. *Craig* v. *Dunleavy*, supra, 154 Conn. 105–106. In the present case, there was circumstantial evidence that the plaintiff's intoxication contributed to the collision through her admission that when she is intoxicated her judgment can become impaired. Further, on the basis of the expert testimony of the toxicologist, a jury reasonably could have determined that the level of her intoxication would have negatively impacted her ability to perceive and respond to a motor vehicle in the road due to a significant decrease in her cognitive functioning and motor skills. The evidence of the plaintiff's intoxication strengthened the probability that she was contributorily negligent rather than serving as per se evidence of her negligence.

Finally, there was evidence that Montauk Avenue was flat and straight in the area of the collision and that a person standing in that area would have been able to see an oncoming vehicle prior to deciding whether or not to cross the road. Thus, the jury reasonably could have concluded that had the plaintiff been paying attention or keeping a proper lookout, she would have seen the defendant's vehicle in sufficient time to avoid the collision.

On the basis of the evidence presented at trial, the jury reasonably could have found that the plaintiff was not exercising reasonable care to avoid harm to herself as alleged in each of the six specifications alleged in the special defense, as charged by the trial court, and as a result, her negligence was a substantial factor in bringing about her injuries.

Second, we address the plaintiff's claim that there was not sufficient evidence to remove from the realm of speculation the jury's finding she was more than 50 percent negligent. We conclude, to the contrary, that the evidence, taken in the light most favorable to sustaining the verdict, establishes that the jury reasonably could have found that the plaintiff's negligence far exceeded the defendant's negligence.

At trial, there was evidence that the plaintiff consumed approximately nine alcoholic drinks shortly before the collision and she was captured on a campus surveillance camera having difficulty standing and walking without assistance. The toxicologist testified that the plaintiff's blood alcohol content was .15 shortly after the collision and that this level of intoxication would have significantly impaired her ability to perceive and respond to her surroundings, negatively impacted her judgment, and resulted in decreased motor skills. By comparison, there was evidence that the defendant consumed one alcoholic drink, one and one half hours

prior to the collision, and did not appear to be inebriated, as demonstrated by her successful completion of a field sobriety test shortly after the collision. The defendant testified that at the time of the collision she was not speeding and she was paying extra attention to the roadway. Additionally, the jury was presented with evidence that the plaintiff would have been able to see headlights from the defendant's vehicle before entering the roadway and before the defendant would have been able to see the plaintiff, who was wearing dark clothing at the time.

Whether we would have reached a contrary conclusion regarding the relative negligence of the parties had we been seated as the jury is not relevant to our determination in this case. See, e.g., *Procaccini* v. *Lawrence & Memorial Hospital, Inc.*, supra, 175 Conn. App. 716 (it is not function of reviewing court to sit as seventh juror when considering claims of evidentiary sufficiency). Our inquiry is limited to whether the jury reasonably could have reached its finding on the basis of the evidence before it, including any inferences reasonably drawn therefrom. We conclude, on the basis of our review of the evidence introduced at trial, that the jury's finding that the plaintiff was more than 50 percent negligent was reasonably supported by the evidence.

II

The plaintiff's second claim is that the court erred in instructing the jury on contributory negligence because the instruction was not supported by the evidence presented at trial. We disagree.

The following additional facts are relevant to the resolution of this claim. On March 24, 2016, during the charge conference, the plaintiff's counsel objected to a proposed charge on contributory negligence, arguing that there was not sufficient evidence to support such

a finding by the jury. The court overruled this objection and instructed the jury on contributory negligence.

"The standard we use in reviewing evidentiary matters, including the sufficiency of the evidence to submit a claim to the jury, is abuse of discretion. . . . Accordingly, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did. . . . Issues that are not supported by the evidence should not be submitted to the jury." (Internal quotation marks omitted.) *Villa* v. *Rios*, 88 Conn. App. 339, 346, 869 A.2d 661 (2005). "The trial court should not submit to the jury any issue that is foreign to the facts in evidence or for which no evidence was offered. . . . In reviewing a claim that there was insufficient evidence to support an instruction, the reviewing court must consider the evidence in the light most favorable to upholding the instruction." (Internal quotation marks omitted.) *State* v. *Morales*, 172 Conn. App. 329, 343, 160 A.3d 383, cert. denied, 327 Conn. 988, 175 A.3d 1244 (2017).

"It has long been recognized that it is the duty of a pedestrian to exercise reasonable care, not only to avoid known dangers, but to discover those to which his conduct might expose him, and to be watchful of his surroundings. . . . Drivers, however, are not held to as high a degree of care to anticipate the presence of pedestrians in the roadway outside of crosswalks. . . . Indeed, [w]hile a pedestrian may ordinarily cross a street at any place, it is the law that in doing . . . so he is bound to exercise care commensurate to the increased danger incident to being in a place where pedestrians do not usually go, and, consequently, where drivers need not take the same precaution in anticipation of their presence that they are required to take at regular crossings." (Citations omitted; internal quotation marks omitted.) *Schupp* v. *Grill*, 27 Conn. App.

513, 518–19, 607 A.2d 1155 (1992). Even "having the right of way would not justify [a pedestrian] in being oblivious to the circumstances and failing to exercise care commensurate with the situation. . . . One who has the right of way is still under a duty to exercise reasonable care." (Citations omitted.) *Drobish* v. *Petronzi*, 142 Conn. 385, 387, 114 A.2d 685 (1955). It is for the trier of fact to determine if the pedestrian exercised "that amount of care as to lookout which a reasonably prudent person would have exercised under the same circumstances." *Labbee* v. *Anderson*, 149 Conn. 58, 61, 175 A.2d 370 (1961).

Similarly, "[t]he question of proximate causation . . . belongs to the trier of fact because causation is essentially a factual issue. . . . It becomes a conclusion of law only when the mind of a fair and reasonable [person] could reach only one conclusion; if there is room for a reasonable disagreement the question is one to be determined by the trier as a matter of fact." (Internal quotation marks omitted.) *Coppedge* v. *Travis*, 187 Conn. App. 528, 534, 202 A.3d 1116 (2019).

As discussed in part I of this opinion, the record contains sufficient evidence of each of the six specifications of the plaintiff's contributory negligence as charged by the trial court, including that the plaintiff did not cross at the designated crosswalk, she was wearing dark clothing when she suddenly appeared in the road, and she was intoxicated. See, e.g., *Schupp* v. *Grill*, supra, 27 Conn. App. 518 (more than sufficient evidence to support contributory negligence charge where decedent running on double yellow line in middle of unlighted road at night toward defendant's vehicle). On the basis of this evidence, construed in the light most favorable to upholding the instruction, we conclude that there was sufficient evidence to support the trial court's instruction to the jury on contributory negligence.

III

The plaintiff next claims that the court erred when it failed to instruct the jury on relevant statutes governing the parties' respective duties. Specifically, the plaintiff argues that once the court instructed the jury on a pedestrian's duties under General Statutes §§ 14-300b (a)[9] and 14-300c (b),[10] its refusal to charge the jury on the countervailing duties that a driver owes to pedestrians on the roadway under General Statutes §§ 14-300d[11] and 14-300i[12] constituted error. We disagree.

The following additional facts are relevant to the resolution of this claim. On March 21, 2016, the plaintiff filed an amended request to charge regarding the defendant's special defense of contributory negligence. The

[9] General Statutes § 14-300b (a) provides in relevant part: "Each pedestrian crossing a roadway at any point other than within a crosswalk marked as provided in subsection (a) of section 14-300 or any unmarked crosswalk or at a location controlled by police officers shall yield the right of way to each vehicle upon such roadway. . . ."

[10] General Statutes § 14-300c (b) provides: "No pedestrian shall suddenly leave a curb, sidewalk, crosswalk or any other place of safety adjacent to or upon a roadway and walk or run into the path of a vehicle which is so close to such pedestrian as to constitute an immediate hazard to such pedestrian. No pedestrian who is under the influence of alcohol or any drug to a degree which renders himself a hazard shall walk or stand upon any part of a roadway."

[11] General Statutes §14-300d sets forth the duties of drivers in relation to pedestrians, providing in relevant part: "Notwithstanding any provision of the general statutes or any regulations issued thereunder, sections . . . 14-300b to 14-300e, inclusive, or any local ordinance to the contrary, each operator of a vehicle shall exercise due care to avoid colliding with any pedestrian . . . and shall give a reasonable warning by sounding a horn or other lawful noise emitting device to avoid a collision . . . ."

[12] General Statutes §14-300i (b), which also relates to the duties of drivers in relation to pedestrians, provides: "Any person operating a motor vehicle on a public way who fails to exercise reasonable care and causes the serious physical injury or death of a vulnerable user on a public way, provided such vulnerable user has shown reasonable care in such user's use of the public way, shall be fined not more than one thousand dollars." Pedestrians are included in the statute's definition of a "vulnerable user." See General Statutes § 14-300i (a).

plaintiff proposed that the court instruct the jury as to the defendant's specific claims of the plaintiff's negligence and then immediately instruct the jury that "[t]here [were] three provisions of the Connecticut General Statutes which address *the duty of a driver to avoid pedestrians* . . . ." (Emphasis added.) The plaintiff requested that the court read the text of §§ 14-300c (pedestrian use of road and sidewalks), 14-300d (operator of vehicle required to exercise due care to avoid pedestrian), and 14-300i (vehicle operator to exercise reasonable care when near vulnerable user on public way).

On March 24, 2016, during a charge conference, the plaintiff objected to the court instructing the jury on §§ 14-300b (a) and 14-300c (b), while excluding instructions on §§ 14-300d and 14-300i from the charge, stating: "I don't see a specific charge with regard to [§§] 14-300d or [14-300i], which . . . says that notwithstanding all of the foregoing sections that are actually being charged, [§§ 14-300b (a) and 14-300c (b),] that it doesn't excuse a driver who fails to use due care, and a driver who fails to use due care is still at fault. So at least . . . minimally, that principle should be charged." The plaintiff emphasized that §§ 14-300b, 14-300c, 14-300d, and 14-300i should be charged "in principle only." The court stated: "The reason I am not including [§ 14-300d or § 14-300i] is that, having removed the specific statutory references on the other items, I believe that . . . the law . . . in [§ 14-300d or § 14-300i is] . . . included in the other instructions. . . . Particularly, in the plaintiff's described claims."

Later on March 24, 2016, the court instructed the jury on negligence and contributory negligence. With regard to contributory negligence, the court instructed: "[T]he plaintiff, like the defendant, also had a duty to exercise the care which a reasonably prudent person would use under the circumstances. A plaintiff can be negligent if

she does something which a reasonably prudent person would not have done under similar circumstances, or fails to do that which a reasonably prudent person would have done under similar circumstances."

The court went on to state six possible ways in which the defendant claimed that the plaintiff was contributorily negligent: "One, she crossed the street at a place other than the available crosswalk and failed to yield the right-of-way to the defendant; two, she left a place of safety and walked or ran into the path of the defendant's vehicle, causing a hazard; three, she walked upon the roadway while under the influence of alcohol, rendering herself a hazard; four, she was inebriated, intoxicated, or impaired by the consumption of alcohol and, as a result, walked or ran into the path of the defendant's vehicle; five, she failed to keep a reasonable and proper lookout for vehicles on the roadway; six, she failed to be attentive to her surroundings, including vehicles in the roadway."

"Our review of the [plaintiff's] claim requires that we examine the [trial] court's entire charge to determine whether it is reasonably possible that the jury could have been misled by the omission of the requested instruction. . . . 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 [trial] court need not tailor its charge to the precise letter of such a request. . . . If a requested charge is in substance given, the [trial] 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." (Internal quotation marks omitted.) *State* v. *Euclides L.*, 189 Conn. App. 151, 160–61, 207 A.3d 93 (2019); see also *State* v. *Campbell*, 328 Conn. 444, 528–29, 180 A.3d 882 (2018)

(individual jury instructions not to be judged in artificial isolation or critically dissected in microscopic search for possible error, but reviewed in context of overall charge).

The plaintiff argues that the court "never instructed the jury in line with § 14-300d that the defendant-motorist would not be relieved of the duty to exercise due care to avoid the collision despite the alleged failure to utilize the crosswalk by the plaintiff-pedestrian." The plaintiff further claims that "[t]he jurors needed to be instructed that even if [the plaintiff] had a duty to cross the street at a particular place which was allegedly breached—despite that circumstance—the defendant . . . still had the duty to exercise reasonable care and would not be absolved of potential liability because of that circumstance."

In the present case, the court incorporated the duties of pedestrians identified in §§ 14-300b (a) and 14-200c (b) in its charge on contributory negligence. See part III of this opinion. Likewise, the court incorporated the duties of drivers in relation to pedestrians identified in §§ 14-300d and 14-300i in its charge on negligence. As requested by the plaintiff during the charge conference, the court did not reference these statutes. The court instructed the jury regarding the relevant common law elements of negligence, stating in part: "[E]ach driver of a motor vehicle has a duty to drive that vehicle in such a way as to avoid reasonably foreseeable harm to other people. Each driver of a motor vehicle has a duty to exercise reasonable care towards others whenever the driver's actions, together with any reasonably foreseeable actions of others, make it likely that harm to another will result if the driver fails to exercise that reasonable care." The court went on to provide the jury with additional instructions on negligence as it related to the defendant's actions.

Moreover, contrary to the plaintiff's argument that the court failed to instruct the jury on a driver's duties in relation to pedestrians under §§ 14-300d and 14-300i, the court instructed the jury on these statutes in essence when it stated: "The law recognizes that a person's conduct can still be negligent if her conduct involves an unreasonable risk of harm when the conduct is combined with the foreseeable conduct of another person, such as the plaintiff stopping her car due to traffic, or someone, a driver, stopping a car due to traffic, or a force of nature." While this instruction did not conform precisely to the language proposed by the plaintiff, it is axiomatic that the court "need not tailor its charge to the precise letter of such a request." (Internal quotation marks omitted.) *State* v. *Euclides L.*, supra, 189 Conn. App. 161.

The plaintiff argues that the court's instructions failed to make clear that, even if the plaintiff was negligent in violating any of the pedestrian statutes, the defendant still had a continuing affirmative duty of care. The fact that the jury found the driver 10 percent negligent, however, indicates that the jury understood that the defendant owed the plaintiff a duty of care notwithstanding the plaintiff's negligence.

Mindful of our obligation to construe the court's charge as a whole, we conclude that the court adequately instructed the jury regarding the defendant's duty to exercise reasonable care. Furthermore, although the instructions at issue were not a model of clarity, we are cognizant of the fact that "[j]ury instructions need not be exhaustive, perfect or technically accurate, so long as they are correct in law, adapted to the issues and sufficient for the guidance of the jury." (Internal quotation marks omitted.) *Matthiessen* v. *Vanech*, 266 Conn. 822, 832, 836 A.2d 394 (2003). On the basis of the foregoing, we are not persuaded that

there is any reasonable possibility that the trial court's charge misled the jury.

IV

The plaintiff's final claim is that the trial court erred in denying her motion for a mistrial and posttrial motion to set aside the verdict, which were based on the introduction of hearsay evidence against her toward the end of the trial during the videotaped testimony of the defendant's toxicology expert. Specifically, the plaintiff argues that "the defendant's introduction of [certain hearsay comments] . . . was highly prejudicial to [her] and deprived her of a fair trial" and that the trial court's instruction relating thereto did not cure the prejudice.[13] We disagree.

The following additional facts and procedural history are relevant to the resolution of this claim. During the trial, the defendant presented testimony of Charles McKay, an expert toxicologist. McKay was deposed prior to trial, and a videotaped recording of his testimony was played for the jury during trial on March 23, 2016.

At one point in the deposition, McKay made comments that indicated that the plaintiff recalled the collision. Prior to trial, the parties agreed that these comments, which were based on hearsay, would be excluded from the recording that was shown to the jury. Throughout the trial, it was undisputed that the plaintiff did not recall the collision. When the recording was shown to the jury, however, it included McKay's

[13] The plaintiff also argues that the trial court erred in concluding that the defendant's introduction of the inadmissible hearsay was invited by the plaintiff because the plaintiff's counsel failed to request that the portion of the recording at issue be edited out before the recording was shown to the jury. Because we conclude that the comments did not deprive the plaintiff of a fair trial and that any prejudice was cured by the court's instruction, we need not address this argument.

comments indicating that the plaintiff recalled the collision as part of the following exchange between the plaintiff's counsel and McKay:

"Q. And you therefore have no idea . . . how long [the plaintiff] was in that street that evening before she was hit by [the defendant]?

"A. She said she was walking across the street, but I don't know how long she was in that process.

"Q. Where did she say she was walking across the street? Where did you get that from?

"A. It was from [the plaintiff's] deposition that she was walking across the street and she saw the light, [but] thought she could make it . . . across the street . . .

"Q. Okay, that was not in her deposition, doctor, with all due respect. You're getting that, again, from the police report based on a statement that her mother said she made in the hospital that was confused by the police. My question is did you ever hear an indication directly from [the plaintiff] as to what she was doing that night?

"A. Oh, in terms of her activities on the street, no, not in her deposition. She described several things she did back and forth with going to different friends' rooms and things like that, but she didn't recall the crash event itself."

Immediately after the recording was shown, the jury was excused. When the jury returned to the courtroom, the court instructed the jury as follows: "[T]here was a statement in the course of Dr. McKay's testimony that was not admissible, and I need to correct the record in that regard, in this way: It is agreed between the parties that [the plaintiff] has no recollection of any of

the events preceding the collision in question. Therefore, you are to disregard any comments or statements attributed to her regarding the collision."

Despite the court's instruction to disregard McKay's comments about the plaintiff's recollection of the collision, the plaintiff's counsel moved for a mistrial, arguing: "[I]n this kind of situation, an instruction . . . simply is not enough. It was suggested by Dr. McKay that [the plaintiff] . . . may or may not have seen [something] immediately prior to getting hit in the roadway in this case . . . when she has clearly stated time and again that she has no recollection of those events. Dr. McKay's testimony seemed to suggest she, in fact, did have recollection of the events, and that she somehow saw the defendant's vehicle in the roadway right . . . before getting hit and saw it speed up and just simply couldn't make it [to the other side of the street]. . . . [T]his type of evidence, which was agreed to be kept out, is clearly inadmissible in the first place, because it's hearsay about three times over. It was a statement contained in a police report that both sides agreed was not admissible and should not be allowed in . . . . [T]hat type of misleading evidence is obviously also prejudicial to the plaintiff, intimates that somehow, [the] plaintiff . . . could have made it across the road or darted out into the road and saw the vehicle and was aware of the vehicle . . . . It's impossible in a situation like [this] . . . to un-ring a bell . . . ."

The defendant's counsel responded: "I think that the remedy . . . agreed upon is sufficient. I don't think this warrants a mistrial. . . . [The jury] just heard an instruction . . . . They heard [the plaintiff]. . . . Everybody denied any knowledge on the part of [the plaintiff], and I think [the jury] believe[s] her, so I don't think that they're not going to listen to this instruction, so I would oppose a mistrial."

The court denied the plaintiff's motion for a mistrial, stating: "I believe that . . . it's premature to grant a motion for mistrial, and I don't regard the agreed three-sentence statement that I . . . read . . . as being the only way to address that. The fact of the matter is that we don't know whether it'll have the slightest effect . . . ."

Thereafter, on March 31, 2016, the plaintiff filed a motion to set aside the verdict and for a new trial pursuant to Practice Book §§ 16-35 and 16-37, in which she argued, inter alia: "The trial court erred in refusing to grant a mistrial due to the admission of the videotaped statement of Dr. McKay regarding causation, as this testimony relied on three levels of hearsay, and as the parties had agreed Dr. McKay would not testify concerning causation . . . ." The court denied this motion on April 5, 2017.

On May 18, 2017, the plaintiff filed a motion for articulation "of the decision of the trial court . . . denying her posttrial motion to set aside the verdict and for a new trial . . . ." The plaintiff argued, inter alia, that "the trial court erred in refusing to grant a mistrial when inadmissible, prejudicial hearsay was introduced during the defendant's presentation of the videotaped trial testimony of . . . Dr. McKay." On August 7, 2017, the court denied the plaintiff's motion for articulation, stating the following with regard to the plaintiff's claim that the court erred in refusing to grant a mistrial on the basis of McKay's statement: "[T]he court perceives no error in refusing to grant a mistrial because unwelcome testimony was included in the video testimony of [McKay] at trial. When the motion for mistrial was first made, the court found the curative instruction to the jury—an instruction to which plaintiff's counsel agreed—adequate for the reasons stated on the record. The court still perceived no error in denying a mistrial when it was again requested as part of the motion for

a new trial because, even in hindsight, the court believes the curative instruction was proper and sufficient."

"The standard for review of an action upon a motion for a mistrial is well established. While the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . On appeal, we hesitate to disturb a decision not to declare a mistrial. The trial judge is the arbiter of the many circumstances which may arise during the trial in which his function is to assure a fair and just outcome. . . . In [our] review of the denial of a motion for mistrial, [we recognize] the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion." (Internal quotation marks omitted.) *Mazier* v. *Signature Pools, Inc.*, 159 Conn. App. 12, 40, 123 A.3d 1, cert. denied, 319 Conn. 933, 125 A.3d 207 (2015).

The denial of a motion to set aside the verdict is also reviewed under the abuse of discretion standard. See *Froom Development Corp.* v. *Developers Realty, Inc.*, 114 Conn. App. 618, 626, 972 A.2d 239, cert. denied, 293 Conn. 922, 980 A.2d 909 (2009). "The trial court possesses inherent power to set aside a jury verdict which, in the court's opinion, is against the law or evidence. . . . [The trial court] should not set aside a verdict where it is apparent that there was some evidence upon which the jury might reasonably reach [its] conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was

made by the jury in the application of legal principles . . . .'' Id., 625.

''If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided.'' (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 630, 175 A.3d 514 (2018). ''[I]n cases tried to a jury . . . curative instructions can overcome the erroneous effect of statements that a jury should not have heard. . . . Because curative instructions often remedy the prejudicial impact of inadmissible evidence . . . [w]e have always given great weight to such instructions in assessing claimed errors. . . . Thus, [a] jury is normally presumed to disregard inadmissible evidence brought to its attention unless there is an overwhelming probability that the jury will not follow the trial court's instructions and a strong likelihood that the inadmissible evidence was devastating to the [plaintiff]. . . . Consequently, the burden is on the [plaintiff] to establish that, in the context of the proceedings as a whole, the stricken testimony was so prejudicial, notwithstanding the court's curative instructions, that the jury reasonably cannot be presumed to have disregarded it.'' (Internal quotation marks omitted.) *State* v. *Boutilier*, 144 Conn. App. 867, 876–77, 73 A.3d 880, cert. denied, 310 Conn. 925, 77 A.3d 139 (2013).

In the present case, the court did not abuse its discretion in denying the plaintiff's motion for a mistrial and motion to set aside the verdict. Immediately after McKay's comment indicating that the plaintiff recalled walking across the street, the plaintiff's counsel corrected him, explaining that his statement was based on a police officer's mistaken interpretation of a comment by the plaintiff's mother. McKay admitted, during the deposition, that he was indeed mistaken, stating: ''[The plaintiff] *didn't* recall the crash event itself.'' (Emphasis added.)

Even after the jury heard McKay correct the misstatement during his deposition, the court instructed the jury to ignore any comments that indicated that the plaintiff remembered the collision. The court's instruction was given shortly after the jury viewed the recording, meaning that the jurors did not have an opportunity to ruminate on the comment. Moreover, this court presumes that a jury will follow curative instructions, unless there is a strong probability that it will not do so. See *State* v. *Boutilier*, supra, 144 Conn. App. 876–77. In the present case, the plaintiff failed to point to any indicia that the jury did not follow the court's instruction to ignore McKay's comments. Accordingly, we conclude that the court did not abuse its discretion when it denied the plaintiff's motion for a mistrial and motion to set aside the verdict.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* KEVIN LYNCH
(AC 41420)

Lavine, Keller and Elgo, Js.

Syllabus

The defendant, who had been convicted on guilty pleas under multiple informations of three counts operating a motor vehicle while under the influence of intoxicating liquor in violation of statute (§ 14-227a), two counts of failure to appear in the second degree and of criminal trespass in the first degree, appealed to this court challenging the trial court's denial of his motion to withdraw his guilty pleas. At sentencing, the defendant made an oral motion to withdraw his guilty pleas on the ground that he was under the influence of psychotropic medication at the time he entered the plea agreement and because the plea canvass was deficient. Defense counsel also claimed that he was ineffective. The trial court denied the motion to withdraw the guilty pleas and sentenced the defendant in accordance with his pleas. *Held:*

1. The trial court did not abuse its discretion in failing to conduct an evidentiary hearing with respect to the defendant's motion to withdraw his

guilty pleas; the defendant never requested an evidentiary hearing on the motion, the trial court afforded him an opportunity to be heard on his various claims, including his motion to withdraw his pleas at the sentencing hearing itself, and the defendant failed to provide an adequate factual basis to support a further hearing, as the defendant told the court during the plea canvass that he was not under the influence of drugs, alcohol or medications, he did not provide the names of any medications or claim that they rendered his guilty pleas involuntary, defense counsel's assertion that the plea canvass was deficient for failing to specify that the defendant's driver's license could be revoked permanently was not a reason among the grounds enumerated in the applicable rule of practice (§ 39-27) for the withdrawal of a plea, and neither defense counsel nor the defendant provided a factual basis for the assertion that defense counsel had been ineffective.

2. The defendant could not prevail on his claim that the trial court should have granted his motion to withdraw his guilty pleas, pursuant to the applicable rule of practice (§ 39-27), on the ground that his counsel was ineffective, as the defendant failed to satisfy his burden of providing that the guilty pleas resulted from the denial of effective assistance of counsel; although the defendant claimed that his counsel rendered ineffective assistance for failing to investigate his case in several ways, defense counsel presented only bare assertions of those claims, and the defendant, thus, presented an inadequate factual and legal basis to support his assertion, and neither the defendant nor his counsel articulated or proved that but for counsel's alleged errors, the defendant would not have pleaded guilty and would have insisted on going to trial.

3. The trial court did not abuse its discretion by failing to conduct an evidentiary hearing prior to terminating the defendant's participation in an alcohol education program, the purpose of which is to allow first time offenders of § 14-227a an opportunity to rehabilitate so as to avoid further involvement with the criminal justice system while protecting the public from persons who operate a motor vehicle while under the influence of intoxicating liquor; the defendant had been admitted to the program following his second operating a motor vehicle while under the influence charge, after which he was arrested for a third such charge and entered into a global plea agreement that included guilty pleas to three counts of operating a motor vehicle while under the influence as a first offender, and it was apparent from the record that the trial court recognized that, by pleading guilty to those three counts, the defendant effectively conceded that, despite participating in the program, he was not entitled to a dismissal of the charge, and in light of the circumstances surrounding the defendant's pleas, the court properly made an independent determination that the termination of the defendant's participation in the program was warranted.

Argued April 22—officially released October 22, 2019

Procedural History

Substitute informations charging the defendant with three counts each of the crimes of operating a motor vehicle while under the influence of intoxicating liquor as a first offender and failure to appear in the second degree, with the crimes of risk of injury to a child, criminal trespass in the first degree, disorderly conduct, failure to appear in the first degree, criminal violation of a protective order, violation of the conditions of release in the second degree and illegal operation of a motor vehicle while his driver's license was suspended, and with the infraction of operating an unregistered motor vehicle, brought to the Superior Court in the judicial district of Hartford, geographical area number fourteen, where the defendant was presented to the court, *Prats*, *J.*, on guilty pleas as to three counts of operating a motor vehicle while under the influence of intoxicating liquor as a first offender, two counts of failure to appear in the second degree, and one count each of risk of injury to a child and criminal trespass in the first degree; thereafter, the court, *Williams*, *J.*, denied the defendant's motion to withdraw and to vacate his guilty pleas, and rendered judgments of guilty and sentenced the defendant in accordance with the pleas; subsequently, the court, *Williams*, *J.*, vacated the conviction of risk of injury of a child in accordance with the pleas; thereafter, the state entered a nolle prosequi as to the remaining charges, and the defendant appealed to this court. *Affirmed.*

Kevin Lynch, self-represented, the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Michael Weber*, senior assistant state's attorney, for the appellee (the state).

Opinion

ELGO, J. The self-represented defendant, Kevin Lynch, appeals from the judgments of conviction rendered by the trial court following the denial of his motion to withdraw his guilty pleas. On appeal, the defendant claims that the court improperly (1) failed to conduct an evidentiary hearing on his motion to withdraw his guilty pleas, (2) denied his motion to withdraw his guilty pleas, and (3) failed to conduct an evidentiary hearing prior to terminating his participation in the pretrial alcohol education program (program). We affirm the judgments of the trial court.

The record reveals the following relevant facts and procedural history. On October 7, 2016, pursuant to a global plea agreement that encompassed all of the defendant's cases and was reached in accordance with *State* v. *Garvin*, 242 Conn. 296, 699 A.2d 921 (1997),[1] the defendant entered guilty pleas to three counts of operating a motor vehicle while under the influence of intoxicating liquor as a first offender in violation of General Statutes § 14-227a, two counts of failure to appear in the second degree in violation of General Statues § 53a-173, and to one count each of risk of injury to a child in violation of General Statutes § 53-21, and criminal trespass in the first degree in violation of General Statutes § 53a-107. In accordance with the *Garvin* agreement, the court, *Prats*, *J.*, agreed to sentence the defendant to a total effective sentence of four years of incarceration, execution suspended, with three years of probation. Pursuant to that agreement, the defendant's conviction of risk of injury to a child would be vacated.

[1] "A *Garvin* agreement is a conditional plea agreement that has two possible binding outcomes, one that results from the defendant's compliance with the conditions of the plea agreement and one that is triggered by his violation of a condition of the agreement." (Internal quotation marks omitted.) *State* v. *Yates*, 169 Conn. App. 383, 387 n.1, 150 A.3d 1154 (2016), cert. denied, 324 Conn. 920, 157 A.3d 85 (2017).

The court, however, also advised the defendant that he remained subject to a possible sentence of up to fourteen and one-half years of incarceration if he violated the terms of the *Garvin* agreement by failing to comply with an inpatient alcohol treatment program, by being arrested with probable cause on any new charges prior to his sentencing, or by failing to appear at the sentencing hearing.

The sentencing hearing was held on February 15, 2018. At that time, the state indicated that the defendant had complied with the conditions of the *Garvin* agreement and, therefore, the state was prepared to enter a nolle prosequi as to the defendant's conviction of risk of injury to a child, once the court vacated that conviction. The court, *Williams*, *J.*, then asked the clerk to verify before they proceeded that the program in one of the defendant's cases was previously terminated.[2] The clerk responded that he had no record of that in the court's file. In response, the state argued that the "agreed disposition and the fact that the plea was entered . . . more than implies the fact that [the program] was supposed to be terminated . . . ."

Defense counsel responded that he believed that a notice of successful completion of the program was filed with the court by the bail commissioner. He also stated that the program had not been terminated and that "there is a valid argument to be made in that file that the [successful completion of the program] should be acknowledged by the court . . . [a]nd that matter should be dismissed . . . ." The court then asked defense counsel if this issue was raised at the time of the *Garvin* plea. Defense counsel answered: "No, it was not [raised], because in all candor to this court, I did not

[2] The record reveals that the court, *Suarez*, *J.*, granted the program on the defendant's behalf at a hearing held on April 2, 2015. The defendant was to complete fifteen sessions and the program termination date was set for April 1, 2016.

comprehend the procedural history of [the defendant's] several cases . . . . At that point in time, my primary focus was to persuade the court . . . to allow for inpatient treatment for [the defendant]."

Defense counsel went on to explain: "But, I also didn't understand at that time . . . that [the defendant] was under [the influence of] about four psychotropic medications administered by the Department of Correction. And what I also didn't take up with the court or with the state is the history of this particular file and the fact that the [program] had been granted by the court. I believe Judge Suarez had granted the [program] with full knowledge with the preexisting matter then still at GA 10 in New London. Also, there was a family violence education program granted in this courthouse at about the same time in a different but companion matter. And there was . . . in that case a successful completion of the family violence education program, as well. And only since long after October 6 have I become aware and better understood the procedural history here. And then, while . . . I have learned only in the past week that there . . . was an absolute defense to the New London failure to appear, to which he [pleaded] guilty on October 7, 2016, which I had no understanding about it at all. And . . . there is a substantial defense to [the failure to appear charge], Your Honor. So . . . the combination of those . . . factored in the new information, is why I would respectfully pray the court to allow me to fulfill my obligations to [the defendant] . . . by allowing me three or four days to file motions and a brief on this issue of [the program]. The last case of the operating under the influence occurred after the one year dismissal date of the [program], as I recall, Your Honor. And the [program] had not been dismissed on the scheduled date only because . . . documentation from [Connecticut Valley Hospital] had not been received by the bail commissioner. So what I'm saying

in good faith, to the court and to the state, is that there is a substantial amount of information that I respectfully suggest calls into question the validity of the pleas, to the failures to appear, as well as the plea to the file that we've just confirmed the [program] had not been terminated in, at the time of the plea."

The court responded by asking defense counsel if he wanted the court to not honor the plea agreement. The court also pointed out that the plea agreement was entered in 2016, that it involved matters dating back to 2014, and that the court had granted multiple continuances in this matter. While defense counsel and the defendant conferred, the court stated that the clerk had discovered that "on [program] progress reports . . . the defendant, apparently, did not complete the fifteen sessions for which he was referred. However, he completed detox and residential treatment."

Subsequently, the following colloquy occurred:

"[Defense Counsel]: I would ask Your Honor for simply four days to file—

"The Court: Well, that's denied. . . . I said back in January that today was the day for sentencing. I made that clear. On January 11, I made that abundantly clear. This is it. This is the sentencing day. And now I'm hearing an oral motion to, I guess, delay sentencing. I'm hearing an oral motion to not honor the plea agreement, after a full canvass based on information that's being brought to the court's attention for the first time. So are you asking the court—first of all, on the [program], your position is that case should be dismissed despite the clear plea agreement with Judge Prats?

"[Defense Counsel]: Yes.

"The Court: That's your motion?

"[Defense Counsel]: Yes, Your Honor.

"The Court: And separately, you're asking the court not to honor the Judge Prats plea agreement of the fully suspended sentence and the vacating of the risk of injury?

"[Defense Counsel]: Well, what I'm asking, Your Honor, is the opportunity to provide the court, and specifically the state, with documentation regarding the failures to appear.

"The Court: That you don't have today on what's the known sentencing date on a case where the pleas were entered [in] October, 2016. That request is denied.

"[Defense Counsel]: Yes, Your Honor.

"The Court: Anything further from defense at this point?

"[Defense Counsel]: May the defendant withdraw his . . . pleas from October?

"The Court: Based on what?

"[Defense Counsel]: Based on the fact that, Your Honor, he was under [the influence of] four psychotropic medications from [the Department of Correction], based upon the fact that the canvass by Judge Prats did not specify the penalties that would attach to three convictions of operating under the influence.

"The Court: Such as what?

"[Defense Counsel]: A lifetime revocation and, ah—

"The Court: Are you saying that's part of—it's something that I normally point out. But, where's your legal support for that argument?

* * *

"[Defense Counsel]: From the Practice Book, Your Honor, for the canvass of a guilty plea."

Subsequently, the court asked the state if it would like to be heard. The state responded by arguing that Judge Prats complied with the requirements in Practice Book § 39-19 for the acceptance of a plea. The state also enumerated the grounds for allowing the withdrawal of a plea pursuant to Practice Book § 39-27, and argued that the defendant had "no basis upon which at this particular point to withdraw the plea." Accordingly, the state argued that the court should go forward with sentencing.

Thereafter, the court asked defense counsel if he wanted to be heard and the following colloquy occurred:

"[Defense Counsel]: Your Honor, I am claiming that I was ineffective for [the defendant].

"The Court: Why should that not be taken up as part of a habeas? The state has pointed out a persuasive argument as to why defense counsel's motion should be denied—his oral motion—should be denied. Why should that not be a habeas as opposed to vacating the plea? Because, then here's what is going to happen? So you're telling me it's a habeas. And then you're going to tell me that you're moving to withdraw, right, for trial, because you're ineffective and shouldn't be representing him going forward, right? That's where . . . this is headed, now.

"[Defense Counsel]: I don't . . . think that it is, Your Honor.

"The Court: Okay. So despite a concession that you think that you're ineffective, you're saying you'd be prepared to go forward with this trial, if it were scheduled immediately?

"[Defense Counsel]: Yes, Your Honor.

"The Court. Okay. Anything further from either party on any of this?

"[The Prosecutor]: Judge, I indicated the Practice Book sections and the fact that I agree, obviously, with the court as I was implying. It's a habeas matter. I can't see why in the world they should be allowed to withdraw at this point.

"The Court: Anything further from defense?

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

Thereafter, the court concluded: "For the reasons cited by the state, the court finds no legal reason to vacate the pleas and finds that it would not be in the interest of justice to further delay these matters that go back four years in some cases. . . . By way of plea agreement, in docket number ending in 1617, the court terminates the [program]. This was the clear intention of both parties when the plea agreement was entered in front of Judge Prats, that this would result in a conviction for driving under the influence, as a triple first offender. The defendant is receiving a substantial benefit by way of a fully suspended sentence and being allowed to vacate his felony plea to the risk of injury to a child. For all of those reasons, [the program] is terminated in [docket number ending in] 1617."

Subsequently, the court sentenced the defendant to a total effective sentence of four years, execution suspended, with three years of probation subject to certain special conditions, including a $500 fine for each conviction of operating a motor vehicle while under the influence, as required by law, and 300 hours of community service. The defendant also was obligated to comply with the ignition airlock device requirements applicable to him by law, and he was ordered not to drive without a valid motor vehicle license. Pursuant to the plea agreement, the court vacated the defendant's risk

of injury to a child conviction and the state, thereafter, entered a nolle prosequi as to that count. This appeal followed.

I

The defendant first argues that the court abused its discretion by failing to conduct an evidentiary hearing on his motion to withdraw his guilty pleas. In response, the state contends that the defendant failed to request an evidentiary hearing, rendering the claim unpreserved, and, in any event, under *State* v. *Simpson*, 329 Conn. 820, 189 A.3d 1215 (2018), the defendant was not entitled to an evidentiary hearing. We agree with the state.

We begin with the standard of review and the relevant principles of law that govern our analysis. "It is well established that [t]he burden is always on the defendant to show a plausible reason for the withdrawal of a plea of guilty. . . . To warrant consideration, the defendant must allege and provide facts which justify permitting him to withdraw his plea under [Practice Book § 39-27]. . . . Whether such proof is made is a question for the court in its sound discretion, and a denial of permission to withdraw is reversible only if that discretion has been abused. . . . In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did. . . .

"Motions to withdraw guilty pleas are governed by Practice Book §§ 39-26 and 39-27. Practice Book § 39-26 provides in relevant part: A defendant may withdraw his . . . plea of guilty . . . as a matter of right until the plea has been accepted. After acceptance, the judicial

authority shall allow the defendant to withdraw his . . . plea upon proof of one of the grounds in [Practice Book §] 39-27[3] . . . .

"We further observe that there is no language in Practice Book §§ 39-26 and 39-27 imposing an affirmative duty upon the court to conduct an inquiry into the basis of a defendant's motion to withdraw his guilty plea. . . . [T]he administrative need for judicial expedition and certainty is such that trial courts cannot be expected to inquire into the factual basis of a defendant's motion to withdraw his guilty plea when the defendant has presented no specific facts in support of the motion. To impose such an obligation would do violence to the reasonable administrative needs of a busy trial court, as this would, in all likelihood, provide defendants strong incentive to make vague assertions of an invalid plea in hopes of delaying their sentencing. . . .

"When the trial court does grant a hearing on a defendant's motion to withdraw a guilty plea, the requirements and formalities of the hearing are limited. . . . Indeed, a hearing may be as simple as offering the defendant the opportunity to present his argument on his motion for withdrawal. . . . [A]n *evidentiary* hearing is rare, and, outside of an evidentiary hearing, often a limited interrogation by the [c]ourt will suffice [and] [t]he defendant should be afforded [a] reasonable opportunity to present his contentions. . . .

[3] Practice Book § 39-27 provides in relevant part: "The grounds for allowing the defendant to withdraw his or her plea of guilty after acceptance are as follows:

"(1) The plea was accepted without substantial compliance with [Practice Book §] 39-19;

"(2) The plea was involuntary, or it was entered without knowledge of the nature of the charge or without knowledge that the sentence actually imposed could be imposed. . . .

"(4) The plea resulted from the denial of effective assistance of counsel. . . ."

"Thus, when conducting a plea withdrawal hearing, a trial court may provide the defendant an opportunity to present a factual basis for the motion by asking open-ended questions. . . . Furthermore, in assessing the adequacy of the trial court's consideration of a motion to withdraw a guilty plea, we do not examine the dialogue between defense counsel and the trial court . . . in isolation but, rather, evaluate it in light of other relevant factors, such as the thoroughness of the initial plea canvass. . . .

"This flexibility is an essential corollary of the trial court's authority to manage cases before it as is necessary. . . . The case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases. . . . Therefore, the trial court is not required to formalistically announce that it is conducting a plea withdrawal hearing; nor must it demarcate the hearing from other related court proceedings. It may conduct a plea withdrawal hearing as part of another court proceeding, such as a sentencing hearing. . . . When a trial court inquires into a defendant's plea withdrawal motion on the record, it is conducting a plea withdrawal hearing." (Citations omitted; emphasis altered; footnote added; internal quotation marks omitted.) *State* v. *Simpson*, supra, 329 Conn. 836–39.

In *Simpson*, our Supreme Court held that the trial court "conducted a hearing on the defendant's motion to withdraw his guilty plea, after which no further evidentiary hearing was required, because his allegations did not furnish a proper basis for withdrawal under Practice Book § 39-27." Id., 835. Our Supreme Court further determined that the record in that case reflected that "the trial court gave the defendant a reasonable opportunity to present his contentions" and a "review of the trial court's approach illustrates the adequacy of the hearing." Id., 839. Thus, it considered the trial

court's inquiry into the defendant's motion and how the trial court "allowed the defendant to present a factual basis for the motion . . . ." (Internal quotation marks omitted.) Id., 839–40. Our Supreme Court also explained that it was "irrelevant that the court did not explicitly label its inquiry into the defendant's motion as a hearing. Nor [did] it matter that the trial court addressed the defendant's motion during sentencing. The defendant and his attorney both had ample opportunity to meet their burden of establishing a plausible reason for the withdrawal of a plea of guilty." (Internal quotation marks omitted.) Id., 841.

As the state points out, the defendant never requested an evidentiary hearing. Instead, the trial court afforded the defendant an opportunity to be heard on his various claims, including his motion to withdraw his pleas at the sentencing hearing itself. The transcript of the sentencing hearing reveals that the defendant asked if he could withdraw his guilty pleas[4] and the court asked in response: "Based on what?" Accordingly, like the trial court in *Simpson*, the court in the present case afforded the defendant the opportunity to "present a factual basis for the motion through an open-ended

[4] We note that, the transcript of the sentencing hearing reveals that defense counsel initially sought "three or four days to file motions and a brief on [the] issue of the [program]." The court responded to the defendant's request by seeking clarification as it viewed defense counsel as asking the court not to honor the plea agreement. After giving defense counsel and the defendant time to confer, defense counsel stated: "I'm not asking to abandon . . . the agreement that we reached." The court responded that the defendant was either asking to not honor the agreement, or he was honoring the agreement. Defense counsel then again asked for four days to file papers with the court, which request the court denied on the basis that it had made clear over a month ago that this was the day for sentencing. The court then again sought clarification on what the defendant wanted to do. Defense counsel stated: "[W]hat I'm asking, Your Honor, is the opportunity to provide the court, and specifically the state, with documentation regarding the failures to appear." The court replied: "That you don't have today on what's the known sentencing date on a case where the pleas were entered [in] October 2016. That request is denied."

question." (Internal quotation marks omitted.) Id., 840. When defense counsel responded by stating that the defendant was under the influence of medications and that the canvass "did not specify the penalties that would attach to three convictions of operating under the influence," the court then inquired further with another open-ended question: "Such as what?" Additionally, after the state argued that Judge Prats had complied with the requirements of Practice Book § 39-19 for acceptance of a plea, enumerated the grounds for allowing the withdrawal of a plea pursuant to Practice Book § 39-27, and argued that the defendant had presented no factual basis to support the withdrawal of the pleas, the court provided the defendant with an opportunity to respond.

At that point, defense counsel stated for the first time: "Your Honor, I am claiming that I was ineffective for [the defendant]." After suggesting the circumstances were more appropriate for a habeas proceeding, the court then asked if either party had anything further. Although the state made some final remarks, defense counsel stated that he had nothing further. The court then asked the defendant if he wished to add anything, to which the defendant responded that he had nothing to add. Finally, the court confirmed with the state that it was willing to follow the agreement as to the risk of injury to a child conviction. The court then asked defense counsel and then the defendant, once again, if either had anything further. Both defense counsel and the defendant responded that they had nothing further.[5] Thereafter, the court in the present case, like the trial

[5] We note that, after responding that he had nothing further, the court stated that it found no legal reason to vacate the guilty pleas and then the following colloquy occurred:

"[The Defendant]: Your Honor—

"The Court: You want to say something, go ahead.

"[Defense Counsel]: Don't say anything.

"The Court: Absolutely. Go ahead.

"[The Defendant]: No, Your Honor, I don't."

court in *Simpson*, "terminated the hearing by denying the plea withdrawal motion . . . ." Id., 841.

In considering whether the defendant provided an adequate factual basis for requiring an evidentiary hearing, we turn to the specific grounds asserted in the defendant's motion to withdraw his guilty pleas. The defendant provided three bases on which he sought to withdraw his pleas: (1) the defendant was under the influence of psychotropic medications at the time that he pleaded guilty; (2) the plea canvass was deficient for failing to specify that the defendant's driver's license might be permanently revoked by the Department of Motor Vehicles; and (3) defense counsel had rendered ineffective assistance. As to the claim that the defendant was under the influence of psychotropic medications at the time that he pleaded guilty, the defendant did not elaborate at the sentencing hearing beyond that bald assertion. He did not provide the names of those medications, or evidence of those medications and their effects. See *State* v. *Stith*, 108 Conn. App. 126, 130–31, 946 A.2d 1274 (court did not abuse its discretion in denying defendant's motion to withdraw guilty plea on basis that he was under influence of medication when he entered plea where defendant stated at plea canvass that he was not under the influence of any alcohol, drugs, or medication and defendant provided at hearing on motion to withdraw plea names of medications but did not offer proof of their effects), cert. denied, 289 Conn. 905, 957 A.2d 874 (2008). Additionally, the defendant did not claim that his use of those medications rendered his guilty pleas involuntary.

"[O]ur case law requires that a defendant show a plausible reason for the withdrawal of a guilty plea . . .

The record reveals that the court gave the defendant ample opportunity to discuss his motion and elaborate on his counsel's arguments, but the defendant chose not to do so.

and allege and provide facts that warrant a trial court's consideration of his motion." (Citation omitted; internal quotation marks omitted.) *State* v. *Anthony D.*, 320 Conn. 842, 854, 134 A.3d 219 (2016). Moreover, "we do not view the hearing in isolation but can look to other factors, such as the existence of a thorough plea canvass . . . ." *State* v. *Simpson*, supra, 329 Conn. 841; see also *State* v. *Stith*, supra, 108 Conn. App. 131 ("[i]t is well established that [a] trial court may properly rely on . . . the responses of the [defendant] at the time [he] responded to the trial court's plea canvass" [internal quotation marks omitted]). Our review of the plea canvass reveals that the defendant was asked if he was under the influence of any alcohol, drugs, or medications. The defendant responded: "No, Your Honor." Accordingly, on the basis of our review of the record, we conclude that the court did not abuse its discretion in failing to conduct an evidentiary hearing on the defendant's motion to withdraw his guilty pleas due to his allegedly being under the influence of drugs at the time of his pleas because the defendant failed to demonstrate an adequate factual basis to support a further hearing.

In considering the defendant's claim that the plea canvass was deficient for failing to specify that his operator's license could be revoked permanently, the court asked defense counsel to provide legal support for that proposition. When defense counsel referred to the rules of practice, the court properly concluded that the relevant provisions of Practice Book § 39-19 on the acceptance of a guilty plea do not require advising the defendant of the possible revocation of his driver's license. "The . . . constitutional essentials for the acceptance of a plea of guilty are included in our rules and are reflected in Practice Book §§ [39-19 and 39-20]. . . . The failure to inform a defendant as to all possible indirect and collateral consequences does not render a plea unintelligent or involuntary in a constitutional

sense." (Internal quotation marks omitted.) *State* v. *Reid*, 277 Conn. 764, 780, 894 A.2d 963 (2006). Thus, defense counsel's assertion that the plea canvass was deficient for failing to specify that the defendant's driver's license could be revoked permanently was not a reason "among the grounds enumerated in Practice Book § 39-27 for the withdrawal of a plea, and the court had no reason to inquire further, such as by way of an evidentiary hearing." *State* v. *Simpson*, supra, 329 Conn. 841–42. Accordingly, because it is clear, as a matter of law, that the defendant could not prevail, we conclude that the court did not abuse its discretion in failing to conduct an evidentiary hearing.

As to defense counsel's assertion that he had rendered ineffective assistance, on appeal, the defendant and the state disagree as to what basis defense counsel provided at the sentencing hearing to support his argument. The state argues that defense counsel provided only a "conclusory assertion that he had been ineffective . . . ." In contrast, the defendant argues that defense counsel provided evidence of his ineffectiveness when (1) he told the court that he "did not comprehend the procedural history of [the defendant's] several cases"; (2) he stated that he was not aware at the time of the defendant's guilty plea that the defendant "was [on] about four psychotropic medications administered by the Department of Correction"; (3) he indicated that he "didn't take up with the court or with the state . . . the history of this particular file and the fact that the [program] had been granted by the court"; and (4) he stated that he had "learned only in the last week that there . . . was an absolute defense to the New London failure to appear . . . ." Our review of the record, however, indicates that those arguments were not made in support of an ineffective assistance of counsel claim. Instead, those claims were advanced

initially to justify a continuance of the sentencing hearing, which the court denied,[6] and then subsequently to support a motion to withdraw the guilty pleas.

At the point that defense counsel stated that he was ineffective, neither defense counsel nor the defendant provided any factual basis to support that assertion. Moreover, after questioning counsel about whether these claims more properly were for a subsequent habeas proceeding, the court asked counsel and the defendant several times whether they had anything further to say regarding the claim of ineffectiveness and the withdrawal of the pleas. Neither the defendant nor his counsel added any further support or factual basis for the ineffective assistance of counsel claim. As we have recounted previously, defense counsel did not argue his oral motion to withdraw the guilty pleas until the court denied his initial request for time to file documents with the court. Additionally, once defense counsel specifically began arguing the motion to withdraw the guilty pleas, defense counsel asserted that the guilty pleas should be withdrawn because the defendant was under the influence of psychotropic medications at the time that he pleaded guilty and that the plea canvass was deficient for failing to specify that the defendant's driver's license might be revoked permanently. It was only after the state enumerated the specific grounds for withdrawing a guilty plea provided by Practice Book § 39-27, including ineffective assistance of counsel, and argued that defense counsel had not provided a factual

[6] In denying the defendant's request for a continuance, the court noted that it had already afforded the defendant numerous continuances leading up to the sentencing hearing. The court also noted that it had made clear to the parties on January 11, 2018, that the court would proceed to sentencing on the date finally set for the sentencing hearing, February 15, 2018.

The record reveals that the defendant was afforded fourteen continuances during the sixteen months between the acceptance of his guilty pleas and his sentencing hearing; the defendant did not raise a challenge to the pleas during those sixteen months.

basis substantiating any ground, that defense counsel asserted that he had provided ineffective assistance.[7] "At the time he made an oral motion to withdraw the defendant's guilty plea, it was incumbent upon defense counsel to provide the trial court with specific reasons to support the motion, but he failed to do so." *State* v. *Anthony D.*, supra, 320 Conn. 854.

We observe from the record that the proceeding evolved from a motion for a continuance, to a motion to withdraw the guilty pleas, to what appears from the record to be an impromptu claim of ineffective assistance of counsel as a basis for withdrawing the guilty pleas. The court clearly addressed each issue appropriately as they were presented. Under the circumstances of this case, we cannot conclude that the court abused its discretion in failing to afford the defendant an evidentiary hearing.

II

The defendant next claims that the court abused its discretion when it denied his motion to withdraw his guilty pleas. Specifically, the defendant argues that the court should have granted his motion to withdraw his guilty pleas pursuant to Practice Book § 39-27 (4) because his counsel rendered ineffective assistance.[8] We disagree.

[7] We note that the transcript of the sentencing hearing indicates that the court questioned the timing of defense counsel's numerous, unsupported assertions, which were brought up for the first time at the date he had known for some time was set for sentencing.

[8] In his appellate brief, the defendant also vaguely alleges that the court should have granted his motion to withdraw his guilty pleas, pursuant to Practice Book § 39-27 (2), and that his plea canvass was "improper" because it "did not address [his] participation in the diversionary [program]." The defendant, however, does not cite to authority or provide any analysis to support those propositions. See *Nowacki* v. *Nowacki*, 129 Conn. App. 157, 163, 20 A.3d 702 (2011) ("It is well settled that [w]e are not required to review claims that are inadequately briefed. . . . We consistently have held that [a]nalysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." [Internal quotation marks omitted.]) Moreover, the defendant did not raise those

We begin with the standard of review and relevant principles of law that govern our analysis. As previously noted, Practice Book § 39-26 provides in relevant part: "A defendant may withdraw his or her plea of guilty . . . as a matter of right until the plea has been accepted. After acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon proof of one of the grounds in [Practice Book §] 39-27. A defendant may not withdraw his or her plea after the conclusion of the proceeding at which the sentence was imposed."

"[O]ur standard of review is abuse of discretion for decisions on motions to withdraw guilty pleas brought under Practice Book § 39-27. . . . Practice Book § [39-27] specifies circumstances under which a defendant may withdraw a guilty plea after it has been entered.[9] [O]nce entered, a guilty plea cannot be withdrawn except by leave of the court, within its sound discretion, and a denial thereof is reversible only if it appears that there has been an abuse of discretion. . . . The burden is always on the defendant to show a plausible reason for withdrawal of a plea of guilty. . . .

"In determining whether the trial court [has] abused its discretion, this court must make every reasonable presumption in favor of [the correctness of] its action. . . . Our review of a trial court's exercise of the legal

claims before the court at the sentencing hearing. See *Remillard* v. *Remillard*, 297 Conn. 345, 351, 999 A.2d 713 (2010) ("It is well established that an appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked." [Citations omitted; emphasis in original; internal quotation marks omitted.]). For these reasons, we will not address the defendant's claims that his motion to withdraw his pleas should have been granted because the pleas were involuntary, pursuant to Practice Book § 39-27 (2), or that the plea canvass was improper for not addressing his participation in the program.

[9] See footnote 3 of this opinion.

discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; footnote added; internal quotation marks omitted.) *State* v. *Lameirao*, 135 Conn. App. 302, 319–20, 42 A.3d 414, cert. denied, 305 Conn. 915, 46 A.3d 171 (2012).

"Almost without exception, we have required that a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim. . . . *Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible.* The evidentiary hearing provides the trial court with the evidence which is often necessary to evaluate the competency of the defense and the harmfulness of any incompetency. . . .

"Practice Book § 39-27 (4) provides an explicit exception to this general rule, however, and allows a defendant to withdraw a guilty plea after its acceptance if the plea resulted from the denial of effective assistance of counsel . . . . We recognize, therefore, that the defendant's claim of ineffective assistance of counsel is procedurally correct. Nevertheless, we are mindful that on the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal . . . we have limited our review to situations in which the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development. We point out, finally, that irrespective of whether a defendant proceeds by way of habeas corpus or direct appeal, our review is the same, and the burden remains on the defendant to produce an adequate record so that an appellate court may ascertain whether counsel's performance was ineffective."

(Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *State* v. *Turner*, 267 Conn. 414, 426–27, 838 A.2d 947, cert. denied, 543 U.S. 809, 125 S. Ct. 36, 160 L. Ed. 2d 12 (2004).

"A defendant must satisfy two requirements . . . to prevail on a claim that his guilty plea resulted from ineffective assistance of counsel. . . . First, he must prove that the assistance was not within the range of competence displayed by lawyers with ordinary training and skill in criminal law . . . . Second, there must exist such an interrelationship between the ineffective assistance of counsel and the guilty plea that it can be said that the plea was not voluntary and intelligent because of the ineffective assistance. . . . In addressing this second prong, the United States Supreme Court held in *Hill* v. *Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), that to satisfy the prejudice requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. . . . The resolution of this inquiry will largely depend on the likely success of any new defenses or trial tactics that would have been available but for counsel's ineffective assistance." (Citation omitted; internal quotation marks omitted.) *State* v. *Scales*, 82 Conn. App. 126, 129–30, 842 A.2d 1158, cert. denied, 269 Conn. 902, 851 A.2d 305 (2004). "In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a [claim of ineffective assistance of counsel]." (Internal quotation marks omitted.) *State* v. *Lameirao*, supra, 135 Conn. App. 327.

In his appellate brief, the defendant argues that his defense counsel rendered ineffective assistance for failing to investigate his case in various ways, including failing to investigate his participation in the program, the court's failure to hold a hearing prior to terminating

his participation in the program, the circumstances of one of his arrests, the timing and admissibility of his blood test, compliance with General States § 14-227b, "the retaliatory nature" of the risk of injury and reckless endangerment charges, the charge of failure to appear for which defense counsel "would have uncovered exculpatory evidence of the clerk sending the notice to the wrong address," and "if the defendant was under the influence of psychotropic medications." In response, the state argues that "[n]one of the defendant's claims of ineffective assistance of counsel are reviewable because they were not raised below, and, to the extent that they were [raised below], he presented no evidence to support any of them." We agree with the state.

To the extent that the defendant raised these grounds before the trial court to support his claim that he should be allowed to withdraw his guilty pleas based on the ineffective assistance of counsel, all the court had before it was the bare assertions that defense counsel made at the beginning of the sentencing hearing, well before he actually asserted that he had rendered ineffective assistance. As we already have discussed, the defendant presented an inadequate factual and legal basis to support those assertions. See Practice Book § 39-26 ("[a]fter acceptance, the judicial authority shall allow the defendant to withdraw his or her plea upon *proof* of one of the grounds in [Practice Book §] 39-27" [emphasis added]). Additionally, with regard to the prejudice prong, neither defense counsel nor the defendant articulated before the trial court, much less proved, that but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. In light of the foregoing, we conclude that the defendant has failed to satisfy his burden of proving that the guilty pleas resulted from the denial of effective assistance of counsel. The court, therefore, did not

abuse its discretion in denying the defendant's motion to withdraw the guilty pleas based on the ineffective assistance of counsel claim.

III

The defendant next claims that the court abused its discretion by failing to conduct an evidentiary hearing prior to terminating his participation in the program. We disagree.

The following additional facts are relevant to this claim on appeal. The defendant was arrested on May 5, 2014, and charged with operating a motor vehicle while under the influence of intoxicating liquor in violation of § 14-227a.[10] The defendant subsequently was arrested on June 20, 2014, and charged for the second time with operating a motor vehicle while under the influence in violation of § 14-227a.

The defendant applied to participate in the program pursuant to his second operating while under the influence charge. His application was accepted on February 20, 2015, and the program was granted on the defendant's behalf at a hearing held on April 2, 2015.[11] The transcript of that hearing reveals that the defendant was to complete fifteen sessions and the program termination date was set for April 1, 2016. No hearing was held on the program termination date, however, because the court had not timely received the program completion report.[12]

[10] The record reveals that the matter was eventually transferred from the judicial district of New London to the judicial district of Hartford.

[11] The record reflects that the court accepted the program with full knowledge of the defendant's prior operating while under the influence charge.

[12] The program's final progress report, dated August 9, 2017, indicates that the defendant had satisfactorily completed the assigned program. The report states in the comments section, however, that the defendant did not successfully complete the fifteen sessions and, instead, completed an inpatient residential treatment from which he was discharged on March 18, 2016. Proof of the defendant's successful completion of the inpatient residential treatment was not provided until July 20, 2017, well after the one year program termination date set by the court. The report also notes in the

On May 11, 2016, a little over a month after the scheduled date of termination, the defendant was arrested and charged for the third time with operating a motor vehicle while under the influence in violation of § 14-227a. The defendant, therefore, was facing three counts of operating a motor vehicle while under the influence in violation of § 14-227a, two counts of failure to appear in the second degree in violation of § 53a-173, one count of risk of injury to a child in violation of § 53-21, and one count of criminal trespass in the first degree in violation of § 53a-107. In an effort to secure another opportunity to engage in treatment to avoid mandatory incarceration for his third violation of § 14-227a, the defendant reached a global *Garvin* agreement with the state on his pending charges. That agreement included guilty pleas to three counts of operating a motor vehicle while under the influence as a first offender in violation of § 14-227a, as well as guilty pleas to all other counts under the *Garvin* agreement, with the state agreeing to nolle the felony risk of injury to a child charge and certain other changes brought against the defendant.

Subsequently, at the defendant's February 2, 2018 sentencing hearing, the court discovered that the defendant's participation in the program had not been formally terminated. Defense counsel requested a continuance to "file motions and a brief on the issue of the [program]," which was denied by the court. The court then terminated the program, concluding that, "[b]y way of plea agreement," it "was the clear intention of both parties when the plea agreement was entered in front of Judge Prats that this would result in a conviction for driving under the influence, as a triple first offender. The defendant is receiving a substantial benefit by way of a fully suspended sentence and being

comments section that the defendant was arrested on May 11, 2016, for his third operating a motor vehicle while under the influence charge in violation of § 14-227a.

allowed to vacate his [conviction of] risk of injury to a child." The court, thereafter, sentenced the defendant according to the plea agreement.

"We begin our analysis with a brief discussion of the relevant statutory framework. Section 54-56g established the program for individuals charged with violating § 14-227a. . . . The trial court has discretion to grant or deny an application to participate in the program." (Citation omitted.) *State* v. *Fetscher*, 162 Conn. App. 145, 150, 130 A.3d 892 (2015), cert. denied, 321 Conn. 904, 138 A.3d 280 (2016). "A person admitted to the . . . program remains under the jurisdiction of the court for control purposes until he has successfully completed the program and his charges are dismissed. If a defendant satisfactorily completes the program to which he has been assigned, the defendant may apply for dismissal of the charges against him and the court, on reviewing the record of his participation in such program . . . and on finding such satisfactory completion, shall dismiss the charges. . . . The statute clearly requires the trial court to make an independent determination of the defendant's satisfactory completion of the prescribed program of alcohol education and treatment. The trial court is not . . . relegated to the ministerial role of rubber stamping the certification of the program provider that the defendant has successfully completed the assigned program. While the court may rely heavily on the recommendation of the office of adult probation or the program provider, such recommendations are not conclusive. The court must determine for itself, and enter a finding, that the defendant's completion of the program has been satisfactory. Otherwise, there would be no purpose to the statutory requirement that the defendant, upon completion of the program, return to court and apply for dismissal of the charges against him." (Citation omitted; internal quotation marks omitted.) *State* v. *Descoteaux*, 200 Conn. 102, 106–107, 509 A.2d 1035 (1986).

The defendant relies on the language of our Supreme Court in *State* v. *Hancich*, 200 Conn. 615, 513 A.2d 638 (1986), to support his contention that his removal "from the [program] without a hearing violates [§] 54-56g and [his] due process rights." In *Hancich*, the defendant was charged with operating a motor vehicle while under the influence in violation of § 14-227a and was, thereafter, admitted to the program. Id., 616-17. Before completing the program, however, the defendant again was charged with operating a motor vehicle while under the influence in violation of § 14-227a. Id, 617. On appeal to our Supreme Court, the defendant claimed that the trial court improperly refused to dismiss her initial operating while under the influence charge. Id., 626. Our Supreme Court explained that "[o]nce [the defendant] had been admitted to the . . . program, the defendant could not be removed unless the trial court made an independent determination that she had lost her eligibility to continue or that she had not completed it successfully. . . . We note that in this case the trial court need not have deferred its decision on the defendant's motion to dismiss to await the outcome of the upcoming trial on the [second operating under the influence] arrest. The defendant was entitled to no more than a hearing . . . and to an independent determination by the trial court that she had committed the act underlying [her second arrest], and that based on that act, she could not successfully have completed the . . . program. Minimum standards of due process would further require that the trial court state the reasons for this decision on the record." (Citations omitted; internal quotation marks omitted.) Id., 627.

The defendant's reliance on *Hancich* to support his contention that he should have received an evidentiary hearing is misplaced. In the present case, the defendant pleaded guilty to the charge of operating a motor vehicle while under the influence, for which he participated in

the program. The court terminated the program "[b]y way of plea agreement," concluding that it "was the clear intention of both parties when the plea agreement was entered in front of Judge Prats that this would result in a conviction for driving under the influence, as a triple first offender." The court considered the context of the entire plea, and it recognized that, with the plea agreement, "[t]he defendant is receiving a substantial benefit by way of a fully suspended sentence and being allowed to vacate his felony plea to the risk of injury to a child."

The purpose of the diversionary program is to allow first time offenders of § 14-227a an opportunity to rehabilitate so as to avoid further involvement with the criminal justice system while protecting the public from those who operate a motor vehicle while under the influence of intoxicating liquor. See, e.g., *State* v. *Descoteaux*, supra, 200 Conn. 107. A dismissal of the charge is incentive for achieving these public policy goals. It is apparent from our review of the record that the court recognized that, by pleading guilty to three counts of operating a motor vehicle while under the influence of intoxicating liquor, the defendant effectively conceded that, despite participating in the program, he was not entitled to a dismissal of that charge. In considering all of the circumstances surrounding the defendant's pleas, the court properly made an independent determination that termination of the defendant's participation in the program was warranted. Accordingly, the court did not err in failing to afford the defendant an evidentiary hearing prior to terminating his participation in the program.

The judgments are affirmed.

In this opinion the other judges concurred.

GERALD THUNELIUS *v.* JULIA POSACKI
(AC 40635)

Lavine, Keller and Bishop, Js.

Syllabus

The defendant mother appealed to this court from the judgment of the trial court awarding the plaintiff father sole legal and primary physical custody of the parties' minor child and issuing certain orders. The plaintiff had filed an application seeking sole custody of the child, who had been living with the defendant since his birth. The plaintiff also filed motions for pendente lite orders to establish a parenting plan, to appoint a guardian ad litem for the child and for child support. Thereafter, the trial court issued a pendente lite order appointing H as guardian ad litem for the child and accepted the parties' stipulation regarding pendente lite financial orders. Subsequently, the defendant filed a motion seeking to hold the plaintiff in contempt for violating the pendente lite financial orders, and the plaintiff filed a motion to modify his support obligations under the financial orders, claiming a substantial change in circumstances. Following a hearing on the plaintiff's application for custody, the trial court found that the plaintiff had rebutted the presumption of joint legal custody and ordered that the plaintiff have sole legal and primary physical custody of the child, with parenting time for the defendant, and that the defendant pay the plaintiff $241 in weekly child support in accordance with the Connecticut child support guidelines. The court also issued a protective order pending any potential appeal to secure the custody award in order to provide a smooth as possible transition for the child. In addition, the court issued orders related to, inter alia, the child's education and associated costs, and ordered that H continue to serve as the child's guardian ad litem and issued various orders related thereto. The court also granted the plaintiff's motion to modify and ordered that the plaintiff's child support obligation would terminate on the date when the defendant's child support obligation began. The court, however, did not rule on the defendant's motion for contempt. On the defendant's appeal to this court, *held*:

1. The defendant could not prevail on her claim that the trial court improperly delegated its decision-making authority to a nonjudicial entity when it defined the duties and responsibilities of the guardian ad litem: none of the challenged duties amounted to an improper delegation of the court's authority, as the breadth of tasks assigned to the guardian ad litem reflected the court's confidence in the commitment and talent of the guardian ad litem, and the court's desire to minimize the effect of the parties' toxic parenting relationship on the child and to discourage them from heedless and incessant litigation over matters that should not require judicial intervention; moreover, contrary to the defendant's

claim, requiring that the guardian ad litem hold the child's passport, monitor the parties' communications, review the child's telephone bill, investigate facts, make recommendations, mediate disputes and testify in court in no way empowered the guardian ad litem to issue orders that affect the parties or the child, and although the court did authorize the guardian ad litem to select a coparenting counselor/coordinator in the absence of an agreement between the parties, any dispute regarding the selection of a coparenting counselor/coordinator reflected little more than a difference of opinion or preference between the parties and did not so implicate the best interests of the child as to require judicial resolution of the matter.

2. The trial court abused its discretion in ordering that the prevailing party in any postjudgment dispute between the parties adjudicated by the court after unsuccessful mediation with the guardian ad litem be reimbursed by the other party for his or her share of the guardian ad litem's fees; the amount of any future fees and the parties' respective financial capacities to pay such fees were purely speculative, and there was nothing in the record to guarantee that if any such guardian ad litem fees became due, the respective financial situations of the parties would have remained unchanged.

3. The defendant's claim that the trial court improperly appointed the guardian ad litem without having complied with certain statutory requirements was moot, that court's relevant order having been superseded by subsequent orders of the court that addressed the same issues, and, therefore, there was no practical relief that this court could afford the defendant.

4. The trial court did not abuse its discretion in, sua sponte, issuing its protective order: the language of the order clearly indicated that that court intended it to function as a protective order issued pursuant to *Yontef* v. *Yontef* (185 Conn. 275) that was meant to ensure an orderly transition that protected the primary interests of the child in a continuous, stable custodial placement, and the court had the inherent authority to issue such an order sua sponte to preserve the parties' rights during the immediate postjudgment period pending an appeal; moreover, the need for such an order was amply supported by the record, as the court found that there was an extraordinarily high level of conflict and mistrust between the parties, that the parties had been wholly incapable of resolving such conflict, that the parties demonstrated a willingness to disregard court orders and to engage in self-help, and that their behavior had the potential to do irreparable harm to the child.

5. The trial court abused its discretion in ordering the parties to enroll the child in private school through high school and to divide the payments for that schooling: although that court did not abuse its discretion in determining that it was appropriate for the child to continue to attend the private school that he had been enrolled in through eighth grade, there was no evidence of the cost of a private high school or that the parties had ever agreed on the child attending a private high school, as

the parties' financial affidavits listed only the cost of the child's current attendance at the private school, and the court's determination that it lacked sufficient evidence to issue an educational support order for higher education or private occupational school, pursuant to statute (§ 46b-56c [c]), supported the notion that the court also lacked sufficient evidence to issue an order for private high school.

6. The trial court did not abuse its discretion in relying on the child support guidelines worksheet in issuing its child support orders; contrary to the defendant's claim, the net income figures contained in the child support guidelines worksheet and relied on by the court were supported in the record.

7. This court declined to review the defendant's claim that the trial court, by failing to order the plaintiff to reimburse her for certain expenses he allegedly should have paid in accordance with a prior stipulation between the parties, in effect, granted the plaintiff a retroactive modification of pendente lite orders to pay those expenses; because the trial court did not rule on the defendant's motion for contempt, and it made no findings or orders in regard to what the defendant alleged the plaintiff owed, there was no retroactive modification from which to appeal, and, therefore, in the absence of a decision on the defendant's motion from the trial court or an explanation for its failure to rule on the motion, this court had no basis for reviewing the trial court's silence.

Argued May 16—officially released October 22, 2019

Procedural History

Application for custody of the parties' minor child, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Tindill*, *J.*; judgment awarding sole legal and primary physical custody to the plaintiff, and issuing certain orders; thereafter, the court, *Heller*, *J.*, issued certain orders, and the defendant appealed to this court. *Appeal dismissed in part*; *judgment reversed in part*; *judgment directed in part.*

Samuel V. Schoonmaker IV, with whom, on the brief, was *Wendy Dunne DiChristina*, for the appellant (defendant).

Alexander J. Cuda, for the appellee (plaintiff).

Opinion

BISHOP, J. In this protracted, high conflict custody and support matter, the defendant mother, Julia Posacki, appeals from the judgment rendered by the trial court following a sixteen day trial on the custody action filed by the plaintiff father, Gerald Thunelius. On appeal, the defendant claims that the court improperly (1) delegated its decision-making authority to the guardian ad litem appointed for the parties' minor child, (2) ordered that the prevailing party in any postjudgment dispute adjudicated by the court after unsuccessful mediation with the guardian ad litem be reimbursed by the other party for his or her share of the guardian ad litem's fees, (3) appointed the guardian ad litem without having complied with the requirements of General Statutes §§ 46b-54 and 46b-12, (4) issued a protective order sua sponte, (5) ordered the parties to enroll the child in private school through high school and to share the payments for that schooling, (6) relied on unsupported net income figures on the child support guidelines worksheet prepared by the Judicial Branch, and (7) retroactively modified a pendente lite child support order by effectively forgiving the plaintiff's support arrearage. We agree with the defendant's second and fifth claims and further conclude that the defendant's third claim is moot. Accordingly, we affirm in part and reverse in part the court's judgment, and we dismiss in part the defendant's appeal.

The following facts and procedural history are taken from the court's memorandum of decision or are part of the record.[1] The parties, who never married one

[1] Although much of the postjudgment procedural history is not reflected in the record provided by the parties, it is well established that "[this court], like the trial court, may take judicial notice of files of the Superior Court in the same or other cases." (Internal quotation marks omitted.) *Wasson* v. *Wasson*, 91 Conn. App. 149, 151 n.1, 881 A.2d 356, cert. denied, 276 Conn. 932, 890 A.2d 574 (2005).

another, are the parents of a minor child who was born on November 2, 2010. On April 18, 2012, the plaintiff filed an application seeking sole custody of the child, who had been living with the defendant since his birth. The plaintiff also filed motions for pendente lite orders to establish a parenting plan, to appoint a guardian ad litem for the child, and for child support.

At a status conference held on June 20, 2012, the plaintiff's counsel recommended several attorneys for possible appointment as a guardian ad litem for the child, including Attorney Jocelyn B. Hurwitz. The defendant opposed appointing a guardian ad litem, but her attorney agreed that Hurwitz would be an acceptable choice should the court choose to appoint one. At the conclusion of the status conference, the court, *Novack*, *J.*, issued an oral pendente lite order appointing Hurwitz as guardian ad litem for the child. The court did not specify Hurwitz' duties or the length of her appointment.

On October 15, 2012, the court, *Schofield*, *J.*, approved the parties' pendente lite parenting agreement, pursuant to which the parties were to have joint legal custody of the child, with the defendant having primary physical custody and the plaintiff having parenting time every other weekend and some holidays and vacations. Subsequently, on October 2, 2013, the court, *Emons*, *J.*, accepted the parties' stipulation regarding pendente lite financial orders. Pursuant to the pendente lite financial orders, the plaintiff was required to pay the defendant $389 in weekly child support and was required to provide medical and dental insurance for the child if available through his employer. As to the child's unreimbursed medical expenses, qualified child care expenses, and tuition and costs for the Whitby School through June, 2014, the

plaintiff was responsible for 52 percent, and the defendant was responsible for 48 percent.[2]

On February 24, 2014, the defendant filed a motion seeking to hold the plaintiff in contempt for violating the pendente lite financial orders. She alleged that the plaintiff had failed and refused to reimburse her for his share of child care costs in the amount of $4309. She further alleged that the plaintiff unilaterally had reenrolled the child at the Whitby School for the 2014–2015 school year without the defendant's consent in violation of the pendente lite parenting plan and that he had informed her that he intended to deduct from his child support payments the defendant's share of the tuition. The defendant, therefore, requested that the court order the plaintiff to reimburse her for the child care costs, to refrain from making deductions to his child support obligation, and to pay 100 percent of the child's tuition for the Whitby School for the 2014–2015 school year. Subsequently, on May 15, 2014, the plaintiff filed a motion to modify his support obligations under the 2013 pendente lite financial orders, citing a substantial change in circumstances.

A trial to the court, *Tindill*, *J.*, on the plaintiff's custody application was conducted over the course of sixteen days between February, 2015 and October, 2016. In her proposed claims for relief filed on September 7, 2016, the defendant sought reimbursement from the plaintiff of $31,586 for child care expenses, $7117 for the child's health insurance premiums, $13,361 for tuition at the Whitby School for the 2014–2015 school year, and the plaintiff's share of all of the child's medical expenses incurred since October 2, 2013.

On June 29, 2017, the court issued a memorandum of decision finding that the plaintiff had rebutted, by a preponderance of the evidence, the presumption of

[2] The Whitby School is a private, independent school located in Greenwich providing education for children from preschool through the eighth grade.

joint legal custody under General Statues § 46b-56a.[3] The court, therefore, ordered that the plaintiff have sole legal custody and primary physical custody of the child, with parenting time for the defendant, and that the defendant pay the plaintiff $241 in weekly child support in accordance with the Connecticut child support guidelines. The court further ordered that, "[g]iven the likelihood of appeal, the court, sua sponte, hereby enters a protective order pending any potential appeal to secure the award of sole custody to the plaintiff and parenting time for the defendant. The court, in consideration of the child's best interests, intends this protective order to offer as smooth as possible a transition for the child, under the circumstances, in the immediate postjudgment period."

As to the child's education, the court ordered that the child "shall attend the Whitby School until he completes the [eighth] grade or the parties' written stipulation to change schools is approved and made an order of the court, whichever occurs first" and that "[t]he parties shall split the cost, beginning the 2017–2018 academic year, of Whitby School or other private school education 56 [percent] (plaintiff) [and] 44 [percent] (defendant) through [twelfth] grade." The court noted, however, that there was insufficient evidence presented for it to issue an educational support order for the child's education beyond high school pursuant to General Statutes § 46b-56c.

The court further ordered that Hurwitz "shall continue to serve as guardian ad litem . . . for the minor child until further order of the court." The court also ordered in relevant part that "[t]he parties shall work to resolve any dispute or conflict regarding the minor child by mediation first with the [guardian ad litem] prior to filing a motion with the court. The cost and

[3] More specifically, the court found that joint legal custody was "not in the minor child's best interests as the parties have consistently demonstrated a refusal to effectively coparent."

fees associated with mediation of postjudgment disputes with the [guardian ad litem] shall be split equally (50/50) by the parents. In the event that a motion is filed and litigated after unsuccessful resolution with the [guardian ad litem] of the dispute or issue regarding the minor child, the party who prevails in court shall be reimbursed his/her 50 [percent] for the [guardian ad litem] fees by the other party within one week of the court order resolving the dispute or issue." In reappointing Hurwitz as guardian ad litem, the court did not make an express finding that the appointment was in the child's best interests as required by § 46b-54 (a); nor did it give the parties an opportunity to agree on a different person to serve in the role as required by § 46b-12 (a). The court also did not issue a subsequent order that included all of the information required by § 46b-12 (c).

Additionally, the court ordered the parties "to work with Dr. David Bernstein, who shall serve as a coparenting counselor/coordinator, until further order of the court. . . . In the event Dr. Bernstein is not available to work with the parties as a coparenting counselor/coordinator, the [guardian ad litem] shall offer the parties no less than three options for a coparenting counselor/coordinator in writing no later than July 31, 2017. The options presented for the coparenting counselor/coordinator shall be based on the [guardian ad litem's] own independent research and work on behalf of her ward . . . . The parties shall notify the [guardian ad litem], in writing, no later than one week from receipt of the options of their choice . . . from the coparenting counselor/coordinator options. In the event the parties do not agree on one of the coparenting counselor/coordinator options, or do not agree in writing within one week (without good cause as determined by [guardian ad litem]), the [guardian ad litem] shall select and notify the coparenting counselor/coordinator of her choice."

The court also ruled on several of the parties' unresolved motions, including the plaintiff's May 15, 2014 motion to modify his pendente lite support obligations. The court granted this motion and ordered that the plaintiff's child support obligation would terminate as of July 1, 2017, when the defendant's support obligation began. The court did not, however, rule on the defendant's February 24, 2014 motion for contempt. Nor did the court make any findings or issue any orders regarding any claimed arrearages. This appeal followed.

I

The defendant first claims that the court improperly delegated its authority to the guardian ad litem when it "defined the duties and responsibilities of the [guardian ad litem] . . . ." We are not persuaded.

"[W]hether the court improperly delegated its judicial authority presents a legal question over which we exercise plenary review." *Zilkha* v. *Zilkha*, 180 Conn. App. 143, 170, 183 A.3d 64, cert. denied, 328 Conn. 937, 183 A.3d 1175 (2018). "It is well settled . . . that [n]o court in this state can delegate its judicial authority to any person serving the court in a nonjudicial function. The court may seek the advice and heed the recommendation contained in the reports of persons engaged by the court to assist it, but in no event may such a nonjudicial entity bind the judicial authority to enter any order or judgment so advised or recommended. . . . A court improperly delegates its judicial authority to [a nonjudicial entity] when that person is given authority to issue orders that affect the parties or the children. Such orders are part of a judicial function that can be done only by one clothed with judicial authority." (Internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, 182 Conn. App. 353, 371–72, 190 A.3d 68 (2018).

The defendant argues that "[t]he court has made the [guardian ad litem] a permanent governmental presence

in the life of the child and the parents and has granted [the guardian ad litem] decision-making authority in some of the fundamentals of their parenting." Specifically, the defendant notes that, pursuant to the court's orders, the guardian ad litem is (1) to hold the child's passport, (2) to have access to all family communications through OurFamilyWizard,[4] (3) to receive copies of the child's telephone bill, (4) to investigate facts, (5) to make recommendations as to what is in the child's best interests, (6) to mediate the parties' disputes, (7) to act as final arbiter in the selection of a coparenting counselor/coordinator for the parties, and (8) to testify in court if the parties are unable to resolve a dispute in mediation.[5] Contrary to the defendant's suggestion,

[4] In its June 29, 2017 memorandum of decision, the court ordered that "[t]he parties shall, except in cases of an emergency, only communicate about their son through OurFamilyWizard . . . the guardian ad litem, or the coparenting counselor/coordinator, until further order of the court." OurFamilyWizard is a commercial application designed to facilitate communications between parents who do not live together. See OurFamilyWizard, available at https://www.ourfamilywizard.com/.

[5] The defendant also argues that "[t]he court's orders conflate the distinct roles of mediator and [guardian ad litem] in problematic and impermissible ways." Specifically, she notes that "[t]he same individual who mediates a parenting dispute between the parties is tasked with investigating the dispute, making a recommendation and testifying in support of that recommendation if a matter goes before the court for resolution." Although we believe that the court's use of the term "mediator" is inapplicable for the task assigned to the guardian ad litem to "mediate the parties dispute" because the classic role of a mediator to facilitate a couple's negotiations requires confidentiality and does not permit a mediator to either adjudicate a party's disputes or to make recommendations to others beyond the parties, we do not understand the court's assignment to be that of a true mediator. Instead, the court assigned a dual role to the guardian ad litem: to work with the parties to assist them to reach agreements on disputed areas of parenting and, if unsuccessful, to report and make recommendations to the court. Because that dual role would, indeed, violate the tenets of mediation, the court's use of the term is misplaced. The assigned function, however, shorn of its title, is entirely appropriate for a guardian ad litem. In a different context, where a mediator has been retained by the parties to help them negotiate the terms of their parenting dispute, we might find this argument persuasive. In such a situation, the mediator does not have a reporting function, and, indeed, to undertake a reporting function in that context may

none of these duties amounts to an improper delegation of the court's authority. In sum, the breadth of tasks assigned to the guardian ad litem reflects the court's confidence in the commitment and talent of the guardian ad litem, and the court's desire to minimize the effect of the parties' toxic parenting relationship on their child and to discourage them from heedless and incessant litigation over matters that should not require judicial intervention.

Moreover, requiring that the guardian ad litem hold the child's passport, monitor the parties' communications, review the child's telephone bill, investigate facts, make recommendations, mediate disputes, and testify in court in no way empowers the guardian ad litem "*to issue orders* that affect the parties or the [child]." (Emphasis added; internal quotation marks omitted.) *Kyle S.* v. *Jayne K.*, supra, 182 Conn. App. 371. Indeed, as recognized by the Judicial Branch in a publication developed pursuant to General Statutes § 46b-12a,[6] a

well violate the terms of a mediation agreement or the mediator's own professional responsibilities. See Academy of Professional Family Mediators, "Standards of Practice for Professional Family Mediators," (2014), available at https://apfmnet.org/standards-practice-professional-family-mediators/ (last visited October 17, 2019); see also "Model Standards of Practice for Family and Divorce Mediation," available at https://www.americanbar.org/content/dam/aba/migrated/family/reports/mediation.authcheckdam.pdf (last vistited October 17, 2019). However, where a guardian ad litem has been appointed by the court and, in that capacity, has a duty to give evidence to the court, the guardian ad litem does not serve as a mediator but has a hybrid function to assist the parties in dispute to resolve issues and, when required, to provide information regarding a child's best interests to the court. In that context, and with the full understanding of the parties of the contours of the guardian ad litem's function, we see no inconsistency between the reporting function of the guardian ad litem and her role in attempting to assist the parties to resolve issues relating to the child.

[6] General Statutes § 46b-12a provides in relevant part: "The Judicial Branch shall develop a publication that informs parties to a family relations matter about the roles and responsibilities of counsel for a minor child and the guardian ad litem for a minor child when such persons are appointed by the court to serve in a family relations matter. . . . Such publication shall be available to the public in hard copy and be accessible electronically on the Internet web site of the Judicial Branch."

guardian ad litem may be asked by the court to "[i]nvestigate facts," "[r]eview files and records," "[p]articipate in court hearings," "[m]ake recommendations to the court," and "[e]ncourage settlement of disputes." Judicial Branch, State of Connecticut, "Guardian Ad Litem or Attorney for Minor Child in Family Matters" (June, 2014), available at https://www.jud.ct.gov/Publications/FM224.pdf (last visited October 17, 2019).[7]

We conclude, as well, that although the court's order does empower the guardian ad litem to select a coparenting counselor/coordinator should the parties disagree on whom to select, this does not constitute an improper delegation of judicial authority because the coparenting counselor/coordinator, in turn, has no delegated decisional authority from the court. As our Supreme Court has recognized, "conflicts frequently develop over relatively minor decisions relating to the day-to-day upbringing and support of minor children, conflicts which in reality reflect little more than a difference of opinion or preference between sometimes hostile parties. . . . Frequent litigation of these minor disagreements leads to frustrating court delays . . . and, because of the adversarial nature of traditional court proceedings, can work to heighten tensions and engender further conflict. . . . Where the issues involved do

[7] We recognize that there may be tension between the duty to encourage settlement of disputes and the proscription in the "Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem" (code of conduct) that a guardian ad litem may only communicate directly to litigants represented by counsel with the permission of counsel. See Judicial Branch, State of Connecticut, "Code of Conduct for Counsel for the Minor Child and Guardian Ad Litem," available at https://www.jud.ct.gov//family/GAL_code.pdf (last visited October 17, 2019). On appeal, however, we need not reach that issue because neither party has asserted that the court's orders in this regard conflict with the code of conduct adopted by the Judicial Branch. In the future, we believe that it would be appropriate for the court, in issuing its directives to guardians ad litem to couch them in terms that comport with the code of conduct.

not themselves impact directly on the child's best interests, judicial resolution of each disagreement has been characterized as burdensome and counterproductive." (Citations omitted.) *Masters* v. *Masters*, 201 Conn. 50, 66, 513 A.2d 104 (1986). Thus, where the parties' dispute represents a mere "difference of opinion about fundamentally acceptable choices"; id., 69; such dispute does not "so implicate the best interests of the children as to require a judicial decision . . . ." Id. In the present case, any dispute regarding the selection of a coparenting counselor/coordinator reflects little more than a difference of opinion or preference between the parties and does not so implicate the best interests of the child as to require judicial resolution of the matter. Consequently, the court's order authorizing the guardian ad litem to select a coparenting counselor/coordinator in the absence of an agreement between the parties did not amount to an improper delegation of judicial authority.

In sum, we conclude that the trial court did not improperly delegate its authority to a nonjudicial entity in defining the duties and responsibilities of the guardian ad litem.

II

The defendant also claims that the court improperly ordered that the prevailing party in any postjudgment dispute adjudicated by the court after unsuccessful mediation with the guardian ad litem be reimbursed by the other party for his or her share of the guardian ad litem's fees. The defendant argues that this order constitutes an improper delegation of the court's authority to decide whether to sanction the parties. The defendant also appears to argue that the order is improper because it provides for automatic sanctions without taking into account the parties' current financial circumstances or making a finding that the losing party's position was totally without color and taken in

bad faith. We disagree that this order amounted to an improper delegation of judicial authority[8] but agree that it was nevertheless improper because the court's authority to award fees in a custody matter is circumscribed by statute and decisional law.

We first briefly set forth the applicable standard of review. "[J]udicial review of a trial court's exercise of its broad discretion in domestic relations cases is limited to the questions of whether the [trial] court correctly applied the law and could reasonably have concluded as it did. . . . In making those determinations, [this court] allow[s] every reasonable presumption . . . in

[8] The defendant argues more specifically that, "[e]ssentially, the [guardian ad litem] is deemed by prior court order to be the correct arbiter and one of the parties will automatically be sanctioned for failing to accede to the [guardian ad litem's] recommendations, without court approval and regardless of whether the [guardian ad litem's] position was even correct. . . . The [guardian ad litem's] inability to successfully mediate with the parties determines whether sanctions occur and the court neither reviews nor approves such sanctions." (Emphasis omitted.) According to the defendant, this amounts to an improper delegation of the court's authority to sanction the parties.

Contrary to the defendant's suggestion, the court's order does not empower the guardian ad litem to resolve any disputes between the parties. The guardian ad litem's role is limited to working with the parties to help them reach agreements. In this sense, the role has some parallels to that of a mediator, except that it also includes a reporting role which, as we have noted, is inconsistent with the role of one strictly engaged as a mediator. Mediation is "[a] method of *nonbinding* dispute resolution involving a neutral third party who tries to help the disputing parties reach a *mutually agreeable solution* . . . ." (Emphasis added.) Black's Law Dictionary (11th Ed. 2019). In other words, the role of a mediator is not to impose his or her recommended resolution on the parties but to assist the parties in resolving the dispute themselves. Thus, to the extent that the court's order in the present case properly may be construed as providing for automatic sanctions, it is the parties' failure to agree with *each other* that triggers the sanction and not their failure to follow the guardian ad litem's recommendations. We, therefore, disagree with the defendant's underlying assumption that the practical effect of the court's order is to penalize the parties for failing to agree with the guardian ad litem. It is a sanction simply for failure to reach an accord. As subsequently noted in this opinion, however, we find the sanction problematic for reasons relating to the court's authority to award fees generally.

favor of the correctness of [the trial court's] action." (Internal quotation marks omitted.) *Pena* v. *Gladstone*, 168 Conn. App. 141, 149, 144 A.3d 1085 (2016).

In our assessment of this claim, we start with the oft-stated proposition that "[i]t is well entrenched in our jurisprudence that Connecticut adheres to the American rule. . . . Under the American rule, a party cannot recover [attorney's] fees in the absence of statutory authority or a contractual provision." (Citation omitted.) *Doe* v. *State*, 216 Conn. 85, 106, 579 A.2d 37 (1990). Additionally, the scope of the American Rule extends beyond the payment of counsel fees and encompasses ordinary expenses and the burdens of litigation as well. *ACMAT Corp.* v. *Greater New York Mutual Ins. Co.*, 282 Conn. 576, 582, 923 A.2d 697 (2007). On the basis of our decisional law, we believe that the theory and thrust of the American Rule pertains to the assignment of fees and costs in the family law context as well. In that context and as it applies to the question at hand, "[t]he court may order either party to pay the fees for [a] guardian ad litem . . . pursuant to General Statutes § 46b-62, and how such expenses will be paid is within the court's discretion." (Internal quotation marks omitted.) *Greenan* v. *Greenan*, 150 Conn. App. 289, 305, 91 A.3d 909, cert. denied, 314 Conn. 902, 99 A.3d 1167 (2014). We look, then, to the parameters of § 46b-62 to determine if the statute authorizes an award of fees to one party from the other on the basis that a party seeks judicial intervention after having failed to reach an agreement. In this inquiry, because the provisions of § 46b-62 are an exception to the common-law American rule, our teaching is that the statutory provisions must be narrowly construed. See *Fennelly* v. *Norton*, 294 Conn 484, 504, 985 A.2d 1026 (2010) ("[w]hen a statute is in derogation of common law . . . it should receive a strict construction and is not to be extended, modified, repealed or enlarged in its scope" [internal quotation marks omitted]). On the basis of our review of

§ 46b-62 and the decisional law that flows from it, we find no authority for the court's award of guardian ad litem fees in the case at hand.

"The statutory authority for the award of fees for a court-appointed guardian ad litem is found in § 46b-62. . . . Section 46b-62 provides in relevant part: If, in any proceeding under this chapter . . . the court appoints an attorney for a minor child, the court may order the father, mother or an intervening party, individually or in any combination, to pay the reasonable fees of the attorney. . . . The order for payment of [guardian ad litem] fees under . . . § 46b-62 requires consideration of the financial resources of both parties and the criteria set forth in General Statutes § 46b-82. . . . Section 46b-82 instructs the court to consider, inter alia, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties . . . ." (Internal quotation marks omitted.) *Greenan* v. *Greenan*, supra, 150 Conn. App. 305.[9] Moreover, "[t]o provide a meaningful basis on which to assign responsibility for the payment of guardian ad litem fees, consideration of the financial situation of the parties and the statutory criteria should be made at the time that fees are sought." *Lamacchia* v. *Chilinsky*, 79 Conn. App. 372, 377, 830 A.2d 329 (2003), cert. denied, 271 Conn. 942, 861 A.2d 514 (2004). Thus, this court has held that a trial court's anticipatory allocation of future guardian ad litem fees constitutes

[9] "The appointment of a guardian ad litem, specifically authorized by General Statutes § 45a-132 (a), is governed by the same standards as those pertaining to an attorney for minor children, and the standards regarding payment of fees are the same for both categories." *Greenan* v. *Greenan*, supra, 150 Conn. App. 306 n.12; see also *Lamacchia* v. *Chilinsky*, 79 Conn. App. 372, 375 n.3, 830 A.2d 329 (2003) ("[w]e note that although . . . § 46b-62 addresses only the issue of attorney's fees, we previously have recognized that the same criteria properly informs the court's exercise of discretion regarding fees for a guardian ad litem appointed for a minor child in a dissolution of marriage action or in an action seeking a modification of custody and visitation" [emphasis omitted]), cert. denied, 271 Conn. 942, 861 A.2d 514 (2004).

an abuse of discretion where "the amount, if any, of future . . . fees and the respective financial capacities of the parties to pay such fees are purely speculative." Id., 377; see id., 377–78 (reversing order for allocation of future guardian ad litem fees to be paid 80 percent by plaintiff and 20 percent by defendant).

The order at issue in the present case provides in relevant part: "In the event that a motion is filed and litigated after unsuccessful resolution with the [guardian ad litem] of the dispute or issue regarding the minor child, the party who prevails in court shall be reimbursed his/her 50 [percent] for the [guardian ad litem] fees by the other party within one week of the court order resolving the dispute or issue."[10] In other words, the court ordered that 100 percent of any future guardian ad litem fees be paid by whichever party loses in court following an unsuccessful mediation. As in *Lamacchia* v. *Chilinsky*, supra, 79 Conn. App. 377–78, the amount of any future fees and the parties' respective financial capacities to pay such fees are purely speculative, and there is nothing in the record to guarantee that if any such guardian ad litem fees become due, the respective financial situations of the parties will have remained unchanged. We conclude, therefore, that the court abused its discretion in issuing this order.[11]

III

The defendant next claims that the trial court improperly appointed the guardian ad litem without having complied with certain statutory requirements. More

[10] The defendant does not challenge the propriety of the court's baseline fifty-fifty allocation of payment of guardian ad litem fees.

[11] We note that, pursuant to General Statutes § 46b-87, the trial court is empowered to award attorney's fees to the prevailing party in a contempt proceeding without balancing the parties' respective financial abilities. See *Larson* v. *Larson*, 138 Conn. App. 272, 277–78, 51 A.3d 411, cert. denied, 307 Conn. 930, 55 A.3d 769 (2012). Similarly, the court has the inherent authority to assess attorney's fees against a losing party where the party's claim was entirely without color and the party acted in bad faith. See *Berzins* v. *Berzins*, 306 Conn. 651, 661–63, 51 A.3d 941 (2012). Even if we were to

specifically, the defendant contends that the court violated (1) § 46b-54 (a)[12] by failing to make a specific finding that appointing a guardian ad litem was in the child's best interests, (2) § 46b-12 (a)[13] by appointing Hurwitz as guardian ad litem without giving the parties an opportunity to choose someone else, and (3) § 46b-12 (c)[14] by failing to issue a subsequent order setting

assume that these same rules apply to guardian ad litem fees, the order at issue in the present case does not limit its application to circumstances in which the losing party is found in contempt, acted in bad faith, or asserted a claim that was entirely without color.

[12] General Statutes § 46b-54 (a) provides in relevant part: "The court may appoint . . . a guardian ad litem for any minor child or children of either or both parties at any time after the return day of a complaint under section 46b-45, if the court deems it to be in the best interests of the child or children. . . ."

[13] General Statutes § 46b-12 (a) provides in relevant part: "[P]rior to appointing . . . a guardian ad litem for any minor child in a family relations matter, the court shall provide the parties to the matter with written notification of fifteen persons who the court has determined eligible to serve as . . . a guardian ad litem for any minor child in such matter. . . . Not later than two weeks after the date on which the court provides such written notification, the parties shall provide written notification to the court of the name of the person who the parties have selected to serve as . . . a guardian ad litem. In the event that the parties (A) fail to timely provide the court with the name of the person to serve as . . . guardian ad litem, or (B) cannot agree on the name of the person to serve as . . . guardian ad litem, the court shall appoint . . . a guardian ad litem for the minor child by selecting one person from the fifteen names provided to the parties."

[14] General Statutes § 46b-12 (c) provides in relevant part: "Not later than twenty-one days following the date on which the court enters an initial order appointing . . . a guardian ad litem for any minor child pursuant to this section, the court shall enter a subsequent order that includes the following information: (1) The specific nature of the work that is to be undertaken by such . . . guardian ad litem; (2) the date on which the appointment of such . . . guardian ad litem is to end, provided such end date may be extended for good cause shown pursuant to an order of the court; (3) the deadline for such . . . guardian ad litem to report back to the court concerning the work undertaken; (4) the fee schedule of such . . . guardian ad litem that shall minimally set forth (A) the amount of the retainer, (B) the hourly rate to be charged, (C) the apportionment of the retainer and hourly fees between the parties, and (D) if applicable, all provisions related to the calculation of fees on a sliding-scale basis; and (5) a proposed schedule of periodic court review of the work undertaken by such . . . guardian ad litem and the fees charged by such . . . guardian ad litem. . . . Not later than thirty days after the entry of a final judgment in a family relations matter involving . . . a guardian ad litem for a minor child, such . . . guardian ad litem shall file with the court an affidavit that

forth certain statutorily required information regarding the appointment. In response, the plaintiff argues, inter alia, that the defendant's claim is moot as a result of subsequent, superseding orders issued by the court. We agree with the plaintiff that this claim is moot.

The following additional procedural history is relevant to this issue. Following the rendering of the June 29, 2017 judgment from which the defendant appeals, the trial court treated the portion of the judgment relating to the guardian ad litem as automatically stayed by operation of Practice Book § 61-11 (c).[15] Consequently, on April 16, 2018, the plaintiff filed a postjudgment motion again requesting that the court appoint Hurwitz as the child's guardian ad litem. The court, *Heller*, *J.*, heard the plaintiff's motion at short calendar on June 4, 2018.

Following the hearing, on June 11, 2018, the court, pursuant to § 46b-12 (a), provided the parties with written notification of fifteen persons, including Hurwitz, who the court deemed eligible to serve as guardian ad litem, and directed the parties to select one person from this list by June 22, 2018.[16] The notification further

sets forth (A) the case name, (B) the case docket number, and (C) the hourly fee charged, total number of hours billed, expenses billed and the total amount charged by such . . . guardian ad litem. . . ."

[15] Practice Book § 61-11 (c) provides in relevant part: "Unless otherwise ordered, no automatic stay shall apply to orders of relief from physical abuse pursuant to General Statutes § 46b-15, to orders for exclusive possession of a residence pursuant to General Statutes §§ 46b-81 or 46b-83 or to orders of periodic alimony, support, custody or visitation in family matters brought pursuant to chapter 25, or to any decision of the Superior Court in an appeal of a final determination of a support order by a family support magistrate brought pursuant to chapter 25a, or to any later modification of such orders. . . ."

Ostensibly, the trial court determined that an order appointing a guardian ad litem does not constitute an order for support, custody, or visitation. We need not address the correctness of this determination. The important point is that the court treated the order appointing the guardian ad litem as stayed.

[16] The court provided this notification using a form published by the Judicial Branch, JD-FM-229, titled "Notice to Parties of Persons Eligible to Serve as Counsel or Guardian Ad Litem for Minor Child or Children and Notice to Court of Person Selected."

advised that "[i]f the parties cannot agree on a person by the date specified, the court will select a person from this list." On June 22, 2018, the parties notified the court that they had failed to agree on a person to serve as guardian ad litem. Accordingly, on June 29, 2018, the court issued an initial order appointing Hurwitz as guardian ad litem for the child.

On July 27, 2018, the defendant filed a motion requesting that the court issue a subsequent order that included the information required by § 46b-12 (c). The court thereafter held a hearing over the course of three days in October and November, 2018, to take additional evidence with respect to its June 29, 2018 order appointing Hurwitz as guardian ad litem. Following the hearing, on December 17, 2018, the court issued an order finding that it was in the child's best interest for Hurwitz to remain his guardian ad litem and reaffirming its June 29, 2018 order. Also on December 17, 2018, the court issued an order setting forth the information required by § 46b-12 (c). The defendant has not appealed from any of these postjudgment orders.

"Mootness implicates [the] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . It is a well-settled general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which

our review is plenary." (Internal quotation marks omitted.) *Brown* v. *Brown*, 132 Conn. App. 30, 34, 31 A.3d 55 (2011).

In the present case, Judge Heller's 2018 orders addressed the appointment of a guardian ad litem for the parties' child for a period of time postjudgment, the same issue decided by Judge Tindill in her June 29, 2017 order. Consequently, Judge Tindill's order has been superseded and is no longer in effect.[17] Thus, we conclude that there is no practical relief that this court can afford the defendant, and, therefore, this portion of the defendant's appeal is moot. See *Santos* v. *Morrissey*, 127 Conn. App. 602, 605–606, 14 A.3d 1064 (2011) (appeal from custody and visitation order was moot because it was superseded by subsequent order addressing same issues); *Kennedy* v. *Kennedy*, 109 Conn. App. 591, 599–600, 952 A.2d 115 (2008) (plaintiff's appeal from visitation order rendered moot by subsequent order expanding amount of time and circumstances under which plaintiff could visit his children).

IV

The defendant next claims that the trial court abused its discretion when it issued a protective order without finding that there had been any domestic violence by either party or that the minor child had been abused or neglected, and without making it clear when the protective order would expire or what conduct would constitute a violation of the order. In short, the defendant equates the court's protective order with protective orders in cases of family violence.[18] See General

[17] In reaching this conclusion, we do not conclude that Judge Tindill's order that the guardian ad litem "mediate" the parties' disputes was rendered moot by any subsequent order because the record does not reflect either that the order was nullified by Judge Heller or that it was in any other way vitiated.

[18] The defendant, however, cites to statutes providing for *criminal* protective orders. See General Statutes §§ 46b-38c (providing for criminal protective orders in cases of family violence), 53a-40e (authorizing court to issue standing criminal protective orders for specified duration against persons

Statutes § 46b-15 (providing for relief from physical abuse, stalking, or pattern of threatening by family or household member). The plaintiff argues in response that the court properly issued a protective order pursuant to our Supreme Court's decision in *Yontef* v. *Yontef*, 185 Conn. 275, 440 A.2d 899 (1981). We agree with the plaintiff.

"An order of the court will be affirmed if it is legally correct and finds support in its factual findings. It will be overturned only on a showing of abuse of the court's discretion." *Lane* v. *Lane*, 84 Conn. App. 651, 654, 854 A.2d 815 (2004). "[I]t is axiomatic that a judge has the ability to issue interim orders. . . . Our Supreme Court has expressly affirmed the necessity of interim orders in the best interests of children in dissolution proceedings. *Yontef* v. *Yontef*, [supra, 185 Conn. 293–94]." (Citation omitted.) *Lane* v. *Lane*, supra, 654.

In *Yontef*, our Supreme Court noted that pendente lite custody orders do not survive the rendition of a judgment and that the judgment itself, being automatically stayed by operation of Practice Book (1981) § 3065[19] (now § 61-11), is not binding for twenty days.

convicted of family violence crimes), and 54-1k (providing for criminal protective orders in cases of stalking, harassment, sexual assault, and risk of injury to or impairing morals of child). Her reliance on these statutes is misplaced, as criminal protective orders are not within the ambit of the family division of the Superior Court. See General Statutes § 46b-1 (enumerating matters within jurisdiction of Superior Court deemed to be family relations matters).

[19] Practice Book (1981) § 3065 provided: "In all actions, except criminal actions and actions concerning child neglect brought pursuant to chapter 37, proceedings to enforce or carry out the judgment shall be stayed for twenty days; if the time in which to take an appeal is extended under [§] 3097 such proceedings shall be stayed until the time to take an appeal has expired; if an appeal is filed, such proceedings shall be stayed until the final determination of the cause; and, if the case goes to judgment in the supreme court, until ten days after the decision is announced; but if the judge who tried the case is of the opinion that the extension is sought or the appeal is taken only for delay or that the due administration of justice requires him to do so, he may at any time, upon motion and hearing, order that the stay be terminated. This section shall not apply to orders of a court rendered

Yontef v. *Yontef*, supra, 185 Conn. 291. The court further noted that, "[i]n this twenty-day gap period, the parties arguably may revert to their common law rights, under which both are entitled, without preference, to take custody." Id. The court found that such a resolution was both "unseemly" and "inconsistent with the concern, repeatedly enunciated in the statutes and the cases, for the best interests of the children." Id. The court therefore advised that "[a] trial court rendering a judgment in a disputed custody case should . . . consider entering protective orders sua sponte to ensure an orderly transition that protects the primary interests of the children in a continuous, stable custodial placement." Id., 291–92.

More specifically, the court stated: "In the interest of minimizing the emotional trauma so often imposed upon the children of divorce, a trial court should, at or before the time of its judgment, inquire whether its custody order is apt to be acceptable to the parties or is apt to be further litigated upon appeal. If an appeal appears likely, the court should enter whatever interim postjudgment order it deems most appropriate, in the exercise of its broad discretion, taking into consideration the needs of the minor children for continuity, stability and well-being as well as the need of the parent who appeals for a fair opportunity fully to present his or her case. These legitimate needs are not, in all probability, apt to be protected if dissatisfied parties are able to intervene unilaterally, without judicial supervision, to effect changes in custody pending appeal. A court exercising its equitable jurisdiction with regard to custody has the duty to assure itself that its judgment will

on an application for a prejudgment remedy nor shall it apply to dispositions in delinquency matters. In appeals from such matters there shall be no stay unless the judge making the disposition grants one."

be implemented equitably to serve the best interests of the children for the near as well as for the more distant future." Id., 293–94.

The order at issue in the present case, which was issued as part of the court's June 29, 2017 memorandum of decision, provides: "The [p]laintiff . . . shall have sole legal custody of the minor child. Given the likelihood of appeal, the [c]ourt, sua sponte, hereby enters a protective order pending any potential appeal to secure the award of sole custody to the [p]laintiff and parenting time for the [d]efendant. The [c]ourt, in consideration of the child's best interests, intends this protective order to offer as smooth as possible a transition for the child, under the circumstances, in the immediate postjudgment period."

The language of this order makes clear that the trial court intended it to function as a *Yontef*-type protective order meant "to ensure an orderly transition that protects the primary interests of the children in a continuous, stable custodial placement." *Yontef* v. *Yontef*, supra, 185 Conn. 291–92. As recognized in *Yontef*, the court had the inherent authority to issue such an order sua sponte to preserve the parties' rights during the immediate postjudgment period pending an appeal. See id., 292 ("[a]lthough there is no express statutory authority for a trial court to enter postjudgment orders, this court has recognized the inherent authority of a court to preserve rights pending an appeal"). Moreover, the need for such an order is amply supported by the record. In its memorandum of decision, the court found that there is an "extraordinarily high level of conflict and mistrust between the [parties]," that "the parties have been *wholly incapable* of [resolving such conflict]," that the parties "demonstrate a willingness to disregard court orders and engage in self-help," and that the parties' behavior "has the potential to do irreparable harm to the minor child." (Emphasis in original.) In

these circumstances, we conclude that the court did not abuse its discretion in issuing a *Yontef* protective order.[20]

V

The defendant next claims that the court improperly ordered the parties to enroll the child in private school through high school and to divide the payments for that schooling. Specifically, the defendant argues that the order stating that the child continue in the Whitby School through eighth grade and that the parties divide the cost of a private school through twelfth grade is unsupported by any evidence that private school is in

[20] In her reply brief, the defendant appears to argue that the order in the present case is improper because *Yontef* protective orders are no longer necessary in light of the 1986 amendments to Practice Book § 61-11, which resolved the problem that the type of protective order approved of in *Yontef* was meant to address. Although we agree that *Yontef*-type protective orders may be unnecessary in some circumstances, we disagree that this renders such orders improper.

As our Supreme Court has clarified, its "concern in *Yontef* was to ensure an orderly transition [from prejudgment status to postjudgment status] that protects the primary interests of the children in a continuous, stable custodial placement *during the period in which the enforcement of the judgment is stayed*." (Emphasis added; internal quotation marks omitted.) *Garrison* v. *Garrison*, 190 Conn. 173, 182, 460 A.2d 945 (1983). In 1986, however, Practice Book § 61-11 was amended to exclude custody and visitation orders from operation of the automatic stay of execution provision. See W. Horton & K. Bartschi, Connecticut Practice Series: Connecticut Rules of Appellate Procedure (2018–2019 Ed.) § 61-11, pp. 110–11. Such orders, once issued, are now immediately enforceable, and, thus, there is no longer a "gap period" between pendente lite custody orders and the final orders. See *Yontef* v. *Yontef*, supra, 185 Conn. 291. Thus, we agree with the defendant that *Yontef*-type protective orders may be superfluous in most cases involving issues of custody and visitation. Cf. *O'Neill* v. *O'Neill*, 13 Conn. App. 300, 304, 536 A.2d 978 (issuing *Yontef* protective order requiring that physical custody of child remain with defendant until trial court, on remand, has had opportunity to address issue of custody at new hearing), cert. denied, 207 Conn. 806, 540 A.2d 374 (1988). Nevertheless, the standard for reversing a trial court's order is abuse of discretion, and not that the order was unnecessary. Moreover, the trial court has inherent equitable authority to protect the integrity of its judgment. *Carpenter* v. *Montanaro*, 52 Conn. App. 55, 58, 725 A.2d 390 (1999).

the child's best interests or any evidence of the costs of the Whitby School through the eighth grade or the cost of a private high school. In response, the plaintiff argues that, because their financial affidavits revealed what they were paying for the Whitby School, the court did, in fact, have evidence of the cost of the school. We agree with the defendant in part.

In its memorandum of decision, the trial court issued the following order in regard to the child's education: "The minor child shall attend the Whitby School until he completes the [eighth] grade or the parties' written stipulation to change schools is approved and made an order of the [c]ourt, whichever occurs first. . . . The parties shall split the cost, beginning the 2017–2018 academic year, of Whitby School or other private school education 56 [percent] (plaintiff) [and] 44 [percent] (defendant) through [twelfth] grade."

"[C]ourts have the power to direct one or both parents to pay for private schooling, if the circumstances warrant. It is a matter to be determined in the sound discretion of the court on consideration of the totality of the circumstances including the financial ability of the parties, the availability of public schools, the schools attended by the children prior to the divorce and the special needs and general welfare of the children." (Internal quotation marks omitted.) *Carroll* v. *Carroll*, 55 Conn. App. 18, 24, 737 A.2d 963 (1999). In addition, "[t]he right of the custodial parent to make educational choices is . . . an insufficient basis, absent a showing of special need or some other compelling justification, for increasing the support obligation of the noncustodial parent who genuinely doubts the value of the program that he [or she] is being asked to underwrite." (Internal quotation marks omitted.) Id., 25.

We first address the defendant's argument that there was no evidence that continuing to send the child to

the Whitby School was appropriate. Both parties in their proposed claims for relief supported the notion that the child could continue to attend the Whitby School or some other private school, but simply disagreed on who should pay for such education. In addition, the court had evidence of the cost of the Whitby School through the parties' financial affidavits. Moreover, the court, in its findings, made the following determination: "The child has adjusted well to his home, school, and community environments. There is credible evidence before the [c]ourt that the school in which the child is currently enrolled has been a stabilizing factor amidst the parents' prolonged legal battle. Other than his parents' conflict, his school environment has been a steadfast, reliable element in his short life." Thus, the record reflects that the court considered the totality of the circumstances in making its determination of whether it was appropriate for the child to continue to attend the Whitby School, including the cost for both parties as well as the benefit that the school has had on the child. Accordingly, we conclude that the court did not abuse its discretion in this regard.

Turning to the defendant's argument in regard to the cost of high school, we agree with the defendant that there was no evidence of the cost of a private high school or that the parties had ever agreed on the child attending a private high school. As previously discussed, the parties' financial affidavits list only the cost of the child's current attendance at the Whitby School. In addition, although the plaintiff's amended proposed claims for relief states that the parties shall equally pay the cost of private school through high school, the defendant's proposed claims for relief only references payment of the cost of the Whitby School or another private school if the defendant chooses to enroll the child in a private school other than the Whitby School. Moreover, the court's determination in its findings that

it lacked sufficient evidence to make an educational support order for higher education or private occupational school, pursuant to § 46b-56c (c),[21] supports the notion that the court also lacked sufficient evidence to make an order for private high school. Accordingly, we conclude that the court abused its discretion in ordering the parties to divide the cost of private school education beyond eighth grade.

VI

The defendant next claims that the trial court improperly relied on unsupported net income figures contained in the child support guidelines worksheet prepared by the Judicial Branch in issuing its child support orders. In particular, the defendant claims that the net income figures relied on by the court in the child support guidelines worksheet were different from the figures shown in the parties' financial affidavits and trial testimony, and, therefore, were unsupported by the evidence. In response, the plaintiff argues that the court may refuse to consider this issue because the defendant failed to raise it in her preliminary statement of issues. The plaintiff alleges that this failure prejudiced him because he is now foreclosed from timely filing a motion for articulation to help address his defense of the child support

[21] General Statutes § 46b-56c (c) provides: "The court may not enter an educational support order pursuant to this section unless the court finds as a matter of fact that it is more likely than not that the parents would have provided support to the child for higher education or private occupational school if the family were intact. After making such finding, the court, in determining whether to enter an educational support order, shall consider all relevant circumstances, including: (1) The parents' income, assets and other obligations, including obligations to other dependents; (2) the child's need for support to attend an institution of higher education or private occupational school considering the child's assets and the child's ability to earn income; (3) the availability of financial aid from other sources, including grants and loans; (4) the reasonableness of the higher education to be funded considering the child's academic record and the financial resources available; (5) the child's preparation for, aptitude for and commitment to higher education; and (6) evidence, if any, of the institution of higher education or private occupational school the child would attend."

orders.[22] The plaintiff also argues that the court had sufficient evidence on which to base its child support orders and that, on the basis of that evidence, the orders were not clearly erroneous. We agree with the plaintiff that the court had sufficient evidence on which to base its child support orders.

We review the trial court's application of the child support guidelines under an abuse of discretion standard. See *Tuckman* v. *Tuckman*, 308 Conn. 194, 208, 61 A.3d 449 (2013) (court concluded that trial court had abused its discretion in awarding child support "without determining the net income of the parties, mentioning or applying the guidelines, or making a specific finding on the record as to why it was deviating from the guidelines"). General Statutes § 46b-215b (a) provides in relevant part: "The child support and arrearage guidelines . . . shall be considered in all determinations of child support award amounts . . . . In all such determinations, *there shall be a rebuttable presumption that the*

[22] We disagree and conclude that we may consider this issue. See *Bouchard* v. *Deep River*, 155 Conn. App. 490, 496, 110 A.3d 484 (2015) ("although the trial court did not reach a dispositive issue and the defendant did not raise that issue in a preliminary statement of issues as an alternative ground for affirmance pursuant to Practice Book § 63-4 [a] [1], a court can still affirm the judgment of a trial court so long as the plaintiff is not prejudiced or unfairly surprised by the consideration of the issue" [footnote omitted]); *Pelletier Mechanical Services, LLC* v. *G. & W. Management, Inc.*, 162 Conn. App. 294, 302, 131 A.3d 1189 (court considered issue not raised by trial court or included in plaintiff's preliminary statement of issues because it presented question of law, record was adequate for review, and defendant not prejudiced because it had time to file reply brief), cert. denied, 320 Conn. 932, 134 A.3d 622 (2016).

Although whether the trial court's application of the child support guidelines is supported by the record is a question of fact, the record is adequate for review, the issue was briefed by both parties, and consideration of the issue would not prejudice the plaintiff. Moreover, the language of Practice Book § 63-4 (a) (1), which provides in relevant part that "[w]henever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court *may* refuse to consider such issue," is clearly permissive. (Emphasis added.)

amount of such awards which resulted from the application of such guidelines is the amount to be ordered. A specific finding on the record that the application of the guidelines would be inequitable or inappropriate in a particular case . . . *shall be required in order to rebut the presumption in such case*." (Emphasis added.)

The defendant does not identify any finding that indicates that the court's application was inequitable or inappropriate but, rather, alleges that the resulting child support orders were inconsistent with the evidence in the record. Contrary to the defendant's argument, however, the evidence supports the figures enumerated in the court's child support guidelines worksheet. The defendant testified that she has a gross weekly income of $2885 and a net weekly income of $1712, which match the figures listed in her financial affidavit. The defendant also testified that, in addition to her salary, she could receive a discretionary bonus as well as a retention performance based on her production and subject to her employment agreement, and that she was due to receive a forgivable loan from her new employer, which would compensate her for the deferred equity compensation she gave up when she left her prior employer. Moreover, the defendant testified that she deducts $132 per week from her gross weekly income for deferred compensation or 401 (k), which is also shown on her financial affidavit. The addition of $132 per week to her gross weekly income of $2885 equals $3017, which matches the amount set forth in the court's child support guidelines worksheet. As such, the net income figures contained in the child support guidelines worksheet and relied on by the court are supported in the record.

Accordingly, we conclude that the trial court did not abuse its discretion in relying on the child support guidelines worksheet in issuing its child support orders.

VII

Finally, the defendant claims that by not ordering the plaintiff to reimburse her for certain expenses she alleges he should have paid in accordance with an earlier stipulation between them, the trial court, in effect, granted the plaintiff a retroactive modification of pendente lite orders to pay those expenses. We decline to review the defendant's claim.

Unlike the present custody and support action, in a marital dissolution case, pendente lite orders merge with the judgment and, therefore, have no vitality postjudgment. *Parrotta* v. *Parrotta*, 119 Conn. App. 472, 479, 988 A.2d 383 (2010). The present case, however, is not one for a marital dissolution; rather, it is a series of orders made by the court in response to multiple filings regarding a range of issues in an ongoing dispute between these parents.[23] Because the court did not rule on the defendant's motion for contempt, and it made no findings or orders in regard to what the defendant alleged the plaintiff owed, there is no retroactive modification from which to appeal. In short, absent a decision on the motion from the court or an explanation for its failure to rule on the defendant's motion, we have no basis for reviewing the court's silence.[24] In addition, although we are mindful of the court's responsibility to timely respond to the parties' filings in pending matters, the avalanche of filings in this matter renders it nearly impossible for the court to keep pace without a singular dedication to this matter. Therefore, we decline to review this claim. See *Bento* v. *Bento*, 125 Conn. App. 229, 234–35, 8 A.3d 531 (2010) (court could not review claim that trial court abused its discretion in awarding

[23] Indeed, the docket sheet for this matter in the Superior Court reflects that, since the present appeal was commenced, the parties have filed in excess of forty-five filings as of May, 2019.

[24] The defendant did not file a motion for reargument or reconsideration regarding her motion for contempt.

defendant attorney's fees where not clear from trial court's order as to factual and legal basis on which it awarded such fees).

The appeal is dismissed with respect to the defendant's third claim, the judgment is reversed with respect to the court's orders that (1) the prevailing party in any postjudgment dispute adjudicated by the court after unsuccessful mediation with the guardian ad litem be reimbursed by the other party for his or her share of the guardian ad litem's fees and (2) the parties enroll the child in private school through high school and share the payments for that schooling, and the case is remanded with direction to vacate those orders; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

COMMERCE PARK ASSOCIATES, LLC *v.* KIM ROBBINS (AC 41398)

ROBBINS EYE CENTER, P.C. *v.* COMMERCE PARK ASSOCIATES, LLC, ET AL. (AC 41543)

Lavine, Prescott and Eveleigh, Js.

Syllabus

The plaintiff landlord, C Co., brought an action for breach of a commercial lease seeking to recover rent that it allegedly was owed by the defendant former tenant, R, and R's ophthalmological and surgical practice, R Co., brought a tort action against C Co. and its property manager, M Co., seeking, inter alia, monetary damages for economic injuries that R Co. suffered as a result of C Co.'s negligence and failure to make necessary repairs to the leased premises. Prior to the commencement of those actions, in August, 2007, R had executed a commercial lease to rent the entire lower level of a building owned by C Co. for a fifteen year term, with an option to extend the lease for two additional five year terms. In December, 2009, the leased premises, which were occupied by R Co., were remodeled and transformed into an eye care center, complete with, inter alia, a surgical center with operating rooms for optical surgery

and an optical shop. In September, 2013, as a result of the flooding to parts of the lower level, R Co. was forced to suspend business completely for six weeks. Afterward, by relocating its examination rooms and a downsized version of its optical shop into portions of the premises designated for administrative offices, R Co. was able partially to resume operations, albeit utilizing only approximately one half of the premises. By the end of October, 2014, R Co. had repaired the flood damage and reoccupied the remainder of the premises. Beginning in the third full week of April, 2015, and continuing into May and June, 2015, the building's sewage system backed up, causing sewer water and waste to flood into the premises. On the basis of the various problems with the premises, beginning in September, 2013, and continuing until the time R and R Co. vacated the premises in June, 2015, R, through R Co., paid only approximately one half of her monthly rental obligation under the lease. C Co.'s rent action and R Co.'s tort action were consolidated and tried to the court, which rendered judgment in part for C Co. in the rent action, from which R appealed and C Co. cross appealed to this court, and rendered judgment in part for R Co. in the tort action. Specifically, regarding the rent action, the court determined, inter alia, that R Co. had been constructively evicted from the premises and that C Co. was not owed any rent under the lease from April 23, 2015, to the end of the lease period, but that C Co. was owed additional rent for the time period between November, 2014, and April 22, 2015, when there were no grounds to abate the rent. The court concluded, regarding the tort action, that although liability for any ordinary negligence by C Co. was waived by R Co. under the terms of the lease's waiver provision, R Co. was entitled to damages on its negligence claim as a result of C Co.'s gross negligence. Subsequently, the trial court granted R Co.'s motion to reargue and for reconsideration and awarded R Co. additional damages, and denied the motion to reargue and for reconsideration filed by C Co., and C Co. appealed to this court from the judgment in the tort action. *Held*:

1. R could not prevail on her claim that the trial court improperly awarded C Co. additional rent for the period between November, 2014, through the third full week of April, 2015, on the basis of its implicit factual finding that the premises were fully tenantable during that period and, therefore, that C Co. was entitled to receive the full amount of rent due under the lease, rather than the partial payments tendered by R Co.; although R claimed that the court overlooked evidence that, during the time period at issue, R Co. was unable to use certain administrative office space for its intended purpose as office space and, thus, that R was entitled to continue partial abatement of rent during that period, the trial court's finding that there were no grounds to support abatement under the lease after October, 2014, was supported by the factual record and was not clearly erroneous, as R testified that repairs to all the water damaged areas were completed in October, 2014, the administrative

office space at issue, which, prior to November, 2014, was used by R and R Co. as patient examination space and as a temporary optical shop, did not become untenantable after it was no longer needed for those alternative purposes, and the mere fact that the administrative office space would have needed additional modifications to return it to its original use as office space did not render the space untenantable for purposes of determining whether R was entitled to an abatement of rent under the lease.

2. There was no evidence in the record supporting the trial court's calculation that R owed back rent totaling $89,484.37 between November, 2014, and the end of April, 2015, which the court determined by multiplying the number of months at issue by $15,562.50, the minimum monthly base rent set forth in the lease: the trial court failed to credit partial rent payments that R Co. had made to C Co. during that time period, the court's use of the minimum monthly base rent at the time the lease was executed in 2007 failed to take into account that, pursuant to the express provisions in the lease, the basic rent was to be adjusted annually using the consumer price index and a proportional share of property taxes was to be included as an additional component of the total monthly rental obligation under the lease, and the court's use of the $15,562.50 figure was inconsistent with and unsupported by other evidence before the court, including the stipulated facts in the parties' joint management trial report and certain information in a tenant's ledger, regarding the actual amount of R's unpaid rental obligation to C Co.; accordingly, a new hearing in damages was appropriate.

3. C Co. could not prevail on its claim on cross appeal that the trial court improperly found that R was constructively evicted from the premises as a result of the serious and frequent sewer backups following the third full week of April, 2015, and that this erroneous finding thwarted C Co.'s efforts to recover the remainder of rent due under the lease, which was based on C Co.'s claim that R had been intending to vacate the premises even before the sewage backups occurred and, thus, did not vacate the premises in June, 2015, because of the sewage problems: that court was entitled to credit R's testimony at trial as satisfying the requirement that she vacated the premises because of the sewage backups that began at the end of April, 2015, and the record supported the trial court's finding that R did not vacate the premises before C Co. had notice and a reasonable opportunity to correct the problems with the building's sewer system, as C Co. and M Co. had actual notice of the sewer system defects from at least June, 2014, when a former M Co. employee informed M Co. of the sewer contractor's findings that there were sags in the sewer lines and that the floors would need to be ripped up to make needed repairs, and although C Co. did engage professionals to respond to the sewage backups at the time they occurred to address the immediate situation, there was nothing in the record to indicate that C Co. made any real effort to remedy the root cause of

those backups, the origins of which were known before the first serious sewage backup ever occurred; accordingly, the trial court's finding that C Co. was afforded adequate time to remedy the defect that caused the constructive eviction was not clearly erroneous.

4. C Co. could not prevail on its claim that the trial court improperly awarded compensatory damages to R Co. on a theory of gross negligence because Connecticut common law does not recognize degrees of negligence or a cause of action sounding in gross negligence: even though Connecticut courts have not recognized a cause of action sounding in gross negligence, it does not necessarily follow that a court, in the course of adjudicating a negligence cause of action, is barred from recognizing a distinction between negligent and grossly negligent conduct, and because, in the present case, it was necessary to make such a distinction in order to determine the applicability of a contractual provision that waived a landlord's liability for ordinary negligence but not for gross negligence, the court was permitted to award damages on the basis of acts or omissions that it determined fell within a full range of negligent behavior, including, but not limited to, acts of gross negligence; moreover, C Co.'s claim that it was improper for the trial court to have awarded damages on the basis of gross negligence because it was never pleaded by R Co. was unavailing, as R Co. recovered under a negligence theory that was pleaded, the court considered whether C Co. was grossly negligent only in order to determine whether R Co. was precluded from recovering under a negligence theory because of the indemnification clause in the lease, and this court was not persuaded that the complaint was silent with respect to allegations of gross negligence, as even though R Co., in its negligence count against C Co., never used the words "gross negligence," it nevertheless incorporated detailed factual allegations describing the conduct of C Co. and M Co. in response to the sewer backups.

5. C Co. could not prevail on its claim that the trial court improperly determined the amount of damages awarded to R Co. by incorrectly determining that the proper measure of R Co.'s damages was its loss of the beneficial use of the substantial improvements it had made to the premises prior to the constructive eviction and that the court should have, instead, limited its award of damages to the loss of the fair market value of the lease; R Co. was entitled to recover damages from C Co. based on, inter alia, the fair market value of the lease on the date that R Co. terminated the lease and the loss sustained by R Co. due to reasonable expenditures made by it before C Co.'s default, as may be appropriate, so long as no double recovery was involved, and, thus, the trial court, which had discretion to choose the appropriate measure of damages in crafting a compensatory damages award, properly considered R Co.'s loss of use of improvements as a component of the damages awarded to R Co.

6. The trial court miscalculated the amount of damages awarded to R Co. for the loss of the beneficial use of the substantial improvements R Co. had made to the premises; that court improperly included two unexercised five year option periods in calculating the expected length of the tenancy because doing so was legally inconsistent with the express terms of the lease, as the right to exercise the options was expressly conditioned on R's compliance with each and every obligation of the lease and not being in default of any provision of the lease, and the court's finding that R breached the lease by failing to pay the full rental for five and three-quarter months would have precluded her from exercising her option to extend the lease as a matter of law.

Argued March 12—officially released October 22, 2019

Procedural History

Action, in the first case, to recover damages for breach of a commercial lease agreement, and for other relief, brought to the Superior Court in the judicial district of Fairfield, Housing Session at Bridgeport, and action, in the second case, to recover damages for, inter alia, the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the actions were consolidated and tried to the court, *Krumeich, J.*; judgment in part for the plaintiff in the first case and judgment in part for the plaintiff in the second case, from which the defendant in the first case appealed and the plaintiff in the first case cross appealed to this court; thereafter, the court, *Krumeich, J.*, granted the motion to reargue and for reconsideration filed by the plaintiff in the second case and denied the motion to reargue and for reconsideration filed by the defendants in the second case, and the defendants in the second case appealed to this court. *In AC 41398, reversed in part; further proceedings. In AC 41543, reversed in part; judgment directed.*

James M. Moriarty, with whom, on the brief, was *Aaron A. Romney*, for the appellant-cross appellee in AC 41398 (defendant in the first case).

Colin B. Connor, with whom were *Joseph DaSilva, Jr.*, and *Robert D. Russo III*, for the appellee-cross appellant in AC 41398 (plaintiff in the first case).

Joseph DaSilva, Jr., with whom were *Colin B. Connor* and, on the brief, *Robert D. Russo III* and *Marc J. Grenier*, for the appellants in AC 41543 (defendants in the second case).

James M. Moriarty, with whom, on the brief, was *Aaron A. Romney*, for the appellee in AC 41543 (plaintiff in the second case).

Opinion

PRESCOTT, J. The present appeals and cross appeal arise from two actions involving a commercial lease that share a nucleus of operative facts and were consolidated for trial. They raise, among other issues, whether the landlord's failure to take actions to remedy recurrent sewage backups into the leased premises occupied by an eye surgery center resulted in a constructive eviction that excused the tenant from the obligation to pay rent in accordance with the terms of the lease, and whether, as a result of the alleged inaction of the landlord and its property management company, the eye surgery center was entitled to recover compensatory damages for the loss of its use of improvements it previously had made to the premises.

In the action underlying AC 41398 (rent action), Commerce Park Associates, LLC (Commerce Park),[1] sought to recover rent it alleges it was owed by a former tenant, Kim Robbins—an ophthalmologist and the owner of Robbins Eye Center, P.C. (REC). REC had occupied the lower level of a commercial property owned by Commerce Park in Bridgeport pursuant to a commercial

[1] To avoid confusion, we will refer to the parties throughout this opinion by their names rather than their party designations, which differed in the underlying actions.

lease but vacated the premises prior to the lease's expiration following a series of sewage backups that flooded the premises. Robbins now appeals, and Commerce Park cross appeals, from the judgment of the trial court rendered in part in favor of Commerce Park. Robbins claims that the court improperly (1) awarded Commerce Park rent for a period of time from November, 2014, through the third full week of April, 2015, and (2) miscalculated the amount of the rent that she owed for that period. Commerce Park claims by way of cross appeal that the court improperly determined that Robbins was constructively evicted from the premises after the third full week of April, 2015, by the sewage backups, and, consequently, Commerce Park was not entitled to recover any rent from Robbins after that date. We affirm the judgment of the court with the exception of its calculation of the amount of the rent awarded to Commerce Park and, accordingly, remand for a new hearing in damages in the rent action.

In the action underlying AC 41543 (tort action), REC sued Commerce Park and its property manager, RDR Management, LLC (RDR), seeking monetary damages for economic injuries that REC suffered as a result of their failure to make necessary repairs to the premises. Commerce Park now appeals[2] from the judgment of the trial court rendered in part in favor of REC and awarding REC damages of $958,041.92 against Commerce Park.[3] Commerce Park claims that the trial court improperly (1) awarded damages on the basis of gross negligence because (a) Connecticut common law does not recognize distinctions or degrees of negligence and (b) REC never pleaded or otherwise asserted allegations of gross negligence prior to trial; and (2) miscalculated the amount of damages awarded because the court

[2] Although Commerce Park and RDR jointly filed their appeal in the tort action, the claims on appeal are raised solely by Commerce Park.

[3] The court ruled in favor of RDR on all counts, and REC has not challenged that aspect of the judgment in the tort action on appeal.

(a) utilized an incorrect measure of damages in determining REC's losses and (b) misconstrued the length of Robbins' expected tenancy under the lease, which was an integral component of the court's calculation of damages. We agree that the court improperly included two unexercised lease extension options in determining the length of Robbins' tenancy and, accordingly, reverse the amount of damages awarded; we otherwise affirm the judgment of the court in the tort action.

The following facts, which either were stipulated by the parties[4] or found by the trial court, and procedural history are relevant to our discussion of the parties' claims. Beginning in 1995, Robbins leased from Commerce Park increasing amounts of space in the lower level of a commercial building it owned at 4695 Main Street in Bridgeport (building). The building, which was constructed in 1964, primarily houses medical offices and is part of a complex of office buildings owned by Commerce Park. By 2014, the building's roof, foundation, and sanitary sewer system were in poor condition and in need of repair.

Although Robbins executed the original and all subsequent leases, the leased space was occupied by REC, Robbins' ophthalmological and surgical practice. REC is a domestic professional corporation with Robbins as its sole shareholder. REC paid all rents and other charges due under the operative lease and carried all required insurance policies, which, as described by the court, made REC "the de facto tenant of the leased space with whom the landlord dealt."

On August 1, 2007, Robbins executed the lease at issue in the present appeals and cross appeal. Pursuant to the lease, Robbins agreed to rent the entire lower

[4] The parties filed a joint trial management report in which they set forth a detailed list of facts that they stipulated were not in dispute.

level of the building (premises), which consisted of 20,750 square feet of space. The lease was for a fifteen year term, with the tenant, Robbins, having the option of extending the lease for two additional five year terms. The lease required Robbins to pay rent at an adjustable rate, starting at $186,750 per year and payable in monthly installments of $15,562.50.[5] Robbins also was responsible for paying a pro rata share of the building's property taxes as additional rent.

Paragraph 23 (c) of the lease provided in relevant part: "In the event the Demised Premises shall be damaged by fire or other casualty and shall be rendered wholly or partially untenantable, then . . . Landlord shall, at Landlord's own cost and expense, proceed with all reasonable dispatch to cause the damage to be repaired and in the case of partial damage, the monthly rental for any period of such repair which is not otherwise covered by Tenant's business interruption insurance shall be abated in proportion to the portion of the Demised Premises rendered untenantable . . . ."

Paragraph 16 (b) of the lease provided in relevant part: "[*U*]*nless caused by the gross negligence or willfulness of Landlord, or of Landlord's agents*, Landlord shall not be responsible or liable to Tenant, or any person, firm or corporation claiming by, through, or under Tenant for, or by reason of, any defect in the Demised Premises . . . or from any injury or loss or damage to person or property of Tenant, for loss of or damage to property contained in or upon the Demised Premises . . . caused by or arising or resulting from pipes . . . or by or from any defect in or leakage, running or overflow of water or sewerage in any part of the Demised Premises . . . ." (Emphasis added.)

[5] The lease provided for yearly increases in the base rental rate tied to the consumer price index. The monthly basic rental payments during the time period for which Commerce Park sought unpaid rents ranged from $18,613.23 to $18,929.83.

After signing the new lease, Robbins hired a contractor to transform the premises into what the trial court found was a "state-of-the-art eye care center, complete with a surgical center with two operating rooms certified by the state for optical surgery . . . a LASIK facility, and an optical shop." The remodeling was completed in December, 2009, at a cost of $1,186,267.[6]

In September, 2013, during a period of heavy rain, a downspout detached from a roof drain, which allowed water to flood into the building and inundate parts of the lower level.[7] The flooding from above was exacerbated by groundwater that seeped in through the building's porous foundation. The water caused substantial damage to REC's equipment, materials, and work spaces. As a result of the flooding, REC was forced to suspend business completely for six weeks. Afterward, by relocating its examination rooms and a downsized version of its optical shop into portions of the premises designated for administrative offices, REC was able partially to resume operations, albeit utilizing only approximately one half of the leased premises.

For months, mold would appear at various times and locations within the premises. By the end of October, 2014, however, REC had repaired the flood damage, remediated the mold infestations, and reoccupied the

[6] The parties stipulated in their joint trial management report that the contractor hired by REC to remodel the premises was paid $1,035,479, which the court found "probably does not include the full cost of fitting out the operating rooms, which Robbins estimated cost in excess of $1,000,000." In calculating damages for loss of use of the improvements, however, the court opted to use the improvement cost listed on REC's tax return of $1,186,267, "rather than the unsubstantiated and unsupported $2,000,000 improvement cost estimated by Robbins or the lower contractor cost stipulated by the parties."

[7] The court found that, although the roof was in poor condition and likely leaked, the September, 2013 incident was not the result of poor maintenance or a failure to repair the roof or failing components.

remainder of the premises, including the surgical center.[8]

At other times, both before and after the major flooding incident in 2013, REC's normal operations were interrupted due to contaminated water that leaked into the premises from blocked toilets in the offices or common areas of the upper floors of the building. Patients and staff often smelled urine or other foul odors at various locations throughout the lower floor. The court found that these various smaller leaks, although certainly disruptive, never rendered the premises untenantable. Nevertheless, as the court noted, "Robbins and REC became disenchanted with RDR's and [Commerce Park's] attitude and efforts to maintain and repair the building. The periodic plumbing problems, unpleasant odors and mold blooms proved to be quite disruptive [to] the practice and eroded any goodwill remaining between Robbins and REC, on one side, and RDR and [Commerce Park], on the other." On the basis of the various problems with the premises, beginning in September, 2013, and continuing until the time REC vacated the premises on June 30, 2015, Robbins, through REC, paid only approximately one half of her monthly rental obligation under the lease.

Beginning in April, 2015, and continuing into May and June, 2015, the building's sewage system backed up,

[8] In its recitation of the facts, the court states that, after October, 2014, when REC reoccupied the previously untenantable portions of the premises, the optical shop and LASIK center remained closed. That statement arguably conflicts with the court's determination that there was no basis for REC to have continued with its reduction in rent for the period beginning in November, 2014, until the sewer incursions commenced at the end of April, 2015. Robbins, however, does not raise this potential misstatement in support of her claim that the court improperly awarded Commerce Park full rent for that period. We limit our review to the arguments as raised and framed by the parties, which are that the former administrative office space remained unusable as office space during the more than five month period prior to the first sewage backup, and that the inability to use the office space justified Robbins' continued withholding of rent.

causing sewer water and waste to flood the premises. Specifically, sewage flooded the premises on April 23, 27, and 28, 2015. In addition, on April 29, 2015, a plumber hired by RDR accidently cut a waste pipe, causing additional sewer water and fecal matter to contaminate REC's offices. Continued incidents of sewage backups in the following months culminated in a major event on June 29, 2015. At that time, REC complained to municipal authorities, including Lawrence Palaia, the sanitarian of the city of Bridgeport. Palaia, who described the premises as having "sewer water all over the place," issued a notice of violation to Commerce Park and RDR, and ordered REC to close operations until the problem was remedied. As set forth in the court's memorandum of decision, "[t]he notice demanded that [Commerce Park] engage a contractor acceptable to the city [of Bridgeport], take out any necessary permits, and commence repairs within three business days. The [premises were] supposed to be vacant until the city signed off on [their] condition after repairs and cleanup." REC and Robbins vacated the premises on June 30, 2015.

The serious and persistent problems with the building's sanitary sewer system were known by Commerce Park and RDR and were well-documented. The court made the following findings regarding the problems that existed and the response by Commerce Park and RDR: "[T]here were several serious backups of the sewer system . . . into the [premises] as a result of known defects in the sewer system that RDR and [Commerce Park] failed to address effectively. No one has a map of the sewer system, which has a main sewer line under the slab and branch lines connected to an uncounted number of plumbing fixtures throughout the [b]uilding. The main sewer line is a gravity fed system that uses four inch cast-iron pipes to pass sewer water, paper and effluent into a cistern, where it is collected

and, when it reaches a certain level, is ejected out of the [b]uilding by two ejector pumps. One problem with the system is that there is insufficient pitch in the main line to efficiently pass water and material to the cistern. . . . [T]here was insufficient space for the existing main line to be building code compliant in pitch of the pipes into the cistern. The other related problem is that the system lacked uniformity of pitch. The cast-iron pipe used in the system has multiple sags, some of which were major and acted as pockets that trapped water and material flushed down the toilets that, together with insufficient pitch, ultimately led to clogs, which backed up the system and sent sewer water, effluent and raw sewage into the lower level occupied by REC on a number of occasions." (Internal quotation marks omitted.)

As further explained by the court, on at least five occasions between 1997 and 2015, sewer contractors hired by RDR made videotapes of the sewer system in conjunction with clearing out blockages in the system. "These videos demonstrated a deteriorating sewer piping system as penetration of the pipe and sags worsened over time. The first video in 1997 showed a penetration of a rock into the main line, and subsequent videos in 2014 and 2015 showed multiple sags worsening over time. . . . [T]here were sags throughout the main line and laterals, some of which were major and severe enough to cause backups. . . . [T]here were clogs all over the system, not just in one place . . . . [F]loods to the lower floor would be caused by a clog in the main line, not the laterals. . . . [T]he recurrence of problems more frequently indicated [that] there was a problem with the performance of the system, and [RDR's sewer contractor] had discussed the defects and possible remedies with RDR, such as cutting up the floor to replace the pipes, as well as controlling what went into the system. A former employee of RDR . . .

was present when a video was taken on June 12, 2014, and informed RDR of the sewer contractor's concern about sags that needed to be fixed, and also about the need to rip up the floors to make repairs to the pipes. He was also present when the video was taken on June 28, 2015, when multiple sags were seen, and he told RDR . . . that the sewer contractor expressed concern about sags, in particular, a major sag in the main line, approximately twenty feet from the ejector pit, that needed to be dug up and fixed. . . . [T]he major sags, along with lack of pitch, had become worse over time and interfered with the performance of the system and caused the sewage backups into the [premises]." (Footnotes omitted; internal quotation marks omitted.)

Moreover, as expressly found by the court, both RDR's sewer contractor and RDR's own personnel had advised RDR about the presence of the sags in the system, that those sags were the cause of the many sewer backups in the building, and that the sags could be remedied properly only by tearing up the floor and replacing the affected sections of the pipe. RDR also was informed by its contractor that, if it chose not to repair the sags, "it would be necessary to carry on a preventative maintenance program to periodically snake the sewer system to break up potential clogs before they were formed. RDR and [Commerce Park] pursued neither course but merely decided to address system backups as they occurred."[9]

[9] The court additionally found that "[a]fter REC abandoned the [premises], there is no evidence of any repairs or remediation efforts by RDR or [Commerce Park] other than to snake the line to remove the specific clog that caused the backup. There was no evidence of any repairs to the sewer system in response to the June 29, 2015 notice of violation, although there is evidence the [premises were] cleaned and the specific clog was removed. If there were repairs, they were not done by the outside sewer contractor. What work was done was likely [performed] by RDR's maintenance personnel. There is no evidence the [premises were] fit to be occupied after the June 29, 2015 incident, and apparently, the entire lower floor was left vacant. In October, November and December, 2016, while the lower space was vacant and its fixtures unused, there were other major problems with the

Commerce Park commenced the action against Robbins for back rent on June 24, 2014, which was after the flooding event of September, 2013, but prior to the major sewage backups in 2015. The one count complaint alleged that Robbins had breached her obligations under the lease because, after August, 2013, she had failed to make the full required monthly rental payments.

Robbins filed an answer, special defenses, and counterclaims on August 14, 2014. By way of special defense, Robbins asserted that Commerce Park breached the lease by failing to maintain the premises in a tenantable condition, thus excusing her own nonperformance. Robbins further claimed that she was entitled to a setoff from any rent owed for the damages she sustained as a consequence of Commerce Park's "gross negligence and wilfulness in maintaining the leased premises," and that she was entitled to an abatement of the rent under the provisions of the lease due to damage from the water and sewer infiltrations that rendered the premises untenantable. Robbins also alleged counterclaims sounding in breach of contract, tort, constructive eviction, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.

Robbins later determined that the damages she sought by way of relief in her counterclaims in the rent action actually were incurred by REC. Consequently, on September 9, 2016, REC commenced the underlying tort action against Commerce Park and RDR. Count one of the operative complaint in the tort action alleged negligence against Commerce Park for breach of its duty to properly maintain the premises. Count two alleged negligence against RDR for breaching its property management responsibilities by utilizing unli-

sewer system, as sewage once again backed up into the [premises]." (Footnote omitted.)

censed plumbers to conduct repairs, knowing that failure to repair and replace the sewage line properly could cause substantial damage to REC. Count three alleged common-law recklessness by Commerce Park. Counts four and five alleged violations of CUTPA against Commerce Park and RDR, respectively.

On October 7, 2016, Robbins filed a motion seeking to consolidate the two matters, which the court granted. Robbins thereafter withdrew her counterclaims in the rent action. The matters were consolidated and tried to the court, *Krumeich*, *J.*, over seven days in July, 2017. The parties each submitted multiple posttrial briefs.

The court issued a memorandum of decision resolving the two actions on February 6, 2018. The court first addressed Commerce Park's allegations in the rent action that Robbins had breached the lease and that it was owed additional rent for the period of time that REC occupied the premises but had failed to pay its full monthly rental obligations, as well as for the time period after REC vacated the premises through the termination date of the lease. The court agreed with Robbins that REC had been constructively evicted from the premises as a result of the numerous sewer backups beginning in the last week of April, 2015, and continuing until REC vacated the premises at the end of June, 2015. Accordingly, the court determined that Commerce Park was not owed any rent under the lease from April 23, 2015, through the end of the lease period.[10]

The court determined, however, that Commerce Park was owed additional rent for a portion of the period beginning in September, 2013, and continuing through the first three weeks of April, 2015, during which time

[10] The court noted that there was no evidence that Commerce Park ever remedied the problems with the building's sewer system even after REC vacated the premises and that Commerce Park had engaged in only "a sporadic and desultory effort to market the [premises]."

REC had paid only one half of the total rent due under the lease. According to the court, "[w]ith respect to the period [of] September, 2013, to October, 2014, there should be a partial rent abatement that, based roughly on the area affected, justifies the reduced rent paid by REC. There were five and three-quarter months, however, [between November, 2014, and April 22, 2015], when there [were] no grounds to abate the rent. Failure to pay the full rental for those months was a breach of the lease, and [Commerce Park] was damaged to the extent [that] rents for those months were reduced unilaterally by the tenant in the amount of $89,484.37 ($15,562.50 per month for [six] months minus $3,890.63 for the last week of April, 2015)."[11]

The court next turned to REC's claim for damages in the tort action against Commerce Park and RDR premised on allegations of negligence, recklessness, and violation of CUTPA. The court explained that Commerce Park "relies on the negligence waiver in [paragraph 16 (b) of] the lease as a defense, which it argues also extends to its agent, RDR."

The court first determined that, although the indemnification clause of the lease prevented Robbins and REC from recovering on the basis of any ordinary acts of negligence on the part of Commerce Park relating to the sewage backups or seepage of water caused by the porous foundation, such exculpation, by the plain terms of the clause, did not extend to RDR as Commerce Park's agent. Nevertheless, the court found that RDR could not have repaired the sewer problems without authorization from Commerce Park because the problems went beyond simple maintenance issues and would have required major capital expenditures by

[11] The court indicated that although the leaks caused by toilets overflowing on upper floors were disruptive, they did not provided a valid basis for the abatement of rent because they were not severe enough to support a finding that the premises were rendered untenantable, either in whole or in part.

Commerce Park. For that reason and others, the court concluded that any failure by RDR to repair the sewer system was, under the circumstances, neither negligent, reckless or a violation of CUTPA.

With respect to Commerce Park, the court first determined that its liability for any ordinary negligence clearly was waived by REC under the terms of the lease's waiver provision. The court noted, however, that the waiver clause expressly excluded any waiver of liability for conduct that amounted to "gross negligence" or, by logical extension, recklessness. See *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 382, 119 A.3d 462 (2015) (recklessness involves conduct that "is more than negligence, more than gross negligence" [internal quotation marks omitted]). The court relied on our Supreme Court's definition of gross negligence as "very great or excessive negligence, or as the want of, or failure to exercise, even slight or scant care or slight diligence . . . ." (Internal quotation marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, 294 Conn. 611, 631 n.11, 987 A.2d 1009 (2010).

With respect to whether Commerce Park's actions or inaction in the present case amounted to gross negligence, the court reasoned as follows: "The failure to repair the sewer system or to carry out a preventative maintenance program breached [Commerce Park's] duties under the lease and was more than 'mere neglect' but, [rather], a conscious choice to risk future floods and expose REC to repeated disruption of its business. . . . It was foreseeable that [Commerce Park's] decision not to make the repairs to the sewer system recommended by the sewer contractor in violation of its repair obligations under the lease (paragraphs 16, 18, 23) and common-law duty, or its failure to carry out a preventative maintenance program outlined by the contractor as an alternative, would result in future sewage overflows in the basement space occupied by REC. It was

also foreseeable that periodic sewage floods into the [premises] would seriously disrupt Robbins' and REC's ability to conduct a medical practice in the offices and to use the operating rooms, rendering the [premises] untenantable. [Commerce Park's] conduct was grossly negligent." (Citation omitted.)

Although the court concluded that REC was entitled to damages as a result of Commerce Park's gross negligence, it ruled in favor of Commerce Park with respect to the additional counts alleging recklessness and a violation of CUTPA. The court, citing to our Supreme Court's definition of recklessness in *Matthiessen* v. *Vanech*, 266 Conn. 822, 832–33, 836 A.2d 394 (2003), found that, although Commerce Park's decision not to heed expert advice regarding the defects in the sewer system was grossly negligent, its actions "did not sink to the level of highly unreasonable conduct, involving an extreme departure from ordinary care" and, thus, "did not constitute reckless conduct."[12] (Internal quotation marks omitted.) The court also rejected the CUTPA count against Commerce Park, finding that the evidence presented failed to demonstrate unfair or deceptive conduct that would violate the "cigarette rule."[13] (Internal quotation marks omitted.)

[12] The court reasoned: "[Commerce Park] probably anticipated there would be a sewer backup from time to time that either its maintenance crew or its sewer contractor could handle. [Commerce Park] probably did not anticipate the devastating series of sewage floods in the spring and summer of 2015 that culminated in the [premises] being shut down by the health department in late June, [2015]. [Commerce Park's] failure to remedy the defects in the sewer pipes within a reasonable period after the April, 2015 video inspection revealed multiple sags in the main sewer line and its failure to thoroughly clean the [premises] after the floods leading to mold infestation would be reckless conduct, but by that time, REC had already vacated the [premises] and, so, has no claim."

[13] Whether Connecticut should abandon the "cigarette rule" as the appropriate standard for determining unfairness under CUTPA in light of the federal courts' abandonment of that rule in favor of the "substantial unjustified injury test" remains an open question. *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 622 n.13, 119 A.3d 1139 (2015). That issue, however, is not before us in the present appeals and cross appeal.

The court recognized that quantifying the amount of damages to award REC for Commerce Park's gross negligence was a challenge. The court first acknowledged that there was insufficient evidence presented to award REC damages on the basis of lost profits resulting from the interruption of its business. The court, however, concluded that if a tenant has made improvements to a leased premises and is subsequently forced by the landlord's misconduct to abandon the premises, the tenant is entitled to recover damages on the basis of its loss of the beneficial use of the improvements the tenant would have enjoyed during the remaining term of the lease. Such damages, according to the court, are measured by determining the period of time the tenant had use of the improvements compared against the period of time the tenant would have had the right to use them under the terms of the lease. The court found that REC had used the improvements it made to the premises for "five years and four months out of a twenty-two year term (ten years after the completion of the improvements plus two five year options). Therefore, REC's damages are 75.8 percent of the improvement cost, which totals $899,190 ($1,186,267 x 75.8 percent)."

REC filed a motion for an award of postjudgment interest, and both REC and Commerce Park filed motions seeking reconsideration and reargument of the damages awarded to REC. Commerce Park argued that any damages attributable to lost use of improvements should have been calculated from the lease's commencement date, not from the date that the improvements were completed. It also argued that the court failed to credit against the damages awarded $300,000 that Commerce Park allegedly contributed toward the cost of the improvements. According to REC, it was entitled to additional damages for expenses that it incurred as a result of having to abandon the premises,

including moving expenses and costs related to fitting out a new, temporary work space.

The court heard arguments on the postjudgment motions on March 5, 2018. On March 22, 2018, the court filed supplemental memoranda of decision, rejecting Commerce Park's arguments but awarding REC additional damages of $58,557.55, for a total award of $958,041.92, along with postjudgment interest at a rate of 8 percent per annum.[14] These appeals and cross appeal followed.

I
AC 41398

We begin our discussion with the claims arising out of Commerce Park's action to recover unpaid rent that it asserted Robbins owed under the lease. Robbins claims on appeal that (1) the court improperly awarded Commerce Park additional rent for the period between November, 2014, through the third full week of April, 2015, and (2) even if she owed additional rent, the court miscalculated the amount of rent due. Commerce Park claims by way of cross appeal that the court improperly determined that Robbins owed no rent following the third full week of April, 2015, because she was constructively evicted by the repeated sewage backups.

A

Robbins first claims that the court improperly awarded Commerce Park back rent for the time period between November, 2014, and the final week of April, 2015. Specifically, Robbins challenges the court's implicit factual finding that the premises were fully

[14] Subsequent to judgment, REC also sought and was granted a prejudgment remedy of attachment against Commerce Park. The prejudgment remedy later was modified and is the subject matter of a separate appeal by Commerce Park (AC 42375).

tenantable during that period and, therefore, that Commerce Park was entitled to receive the full amount of rent due under the lease rather than the one-half payments tendered by REC. Robbins argues that the court overlooked evidence that would have supported a contrary finding, namely, that during the time period at issue, REC was unable to use certain administrative office space for its intended purpose as office space and, thus, Robbins was entitled to continue partial abatement of rent during that period.

Commerce Park counters that, prior to November, 2014, Robbins and REC had been using the administrative office space at issue as patient examination space and as a temporary optical shop and that Robbins' argument that this same space became untenantable after it was no longer needed for these alternative purposes advances an "unreasonable and myopic view of what 'use for its intended purpose' means in the context of a commercial lease." Commerce Park argues that the mere fact that the administrative office space would have needed additional modifications to return it to its original use as office space did not render the space untenantable for purposes of determining whether Robbins was entitled to an abatement of rent under the lease.

Although Robbins' position cannot be described as wholly lacking merit, we find Commerce Park's arguments more persuasive under the terms of the lease. We conclude that Robbins has failed to demonstrate that the court's finding that there was no justification for abatement of rent during the period at issue was clearly erroneous and, therefore, that finding must stand.

As previously set forth, paragraph 23 (c) of the operative lease provided in relevant part that if the premises

became "wholly or partially untenantable," rental payments "shall be abated in proportion to the portion of the [premises] rendered untenantable . . . ." The lease does not define the term "untenantable"; however, our courts previously have indicated that the question of whether premises are untenantable is one of fact for the trier, to be decided on a case-by-case basis "after a careful consideration of the situation of the parties to the lease, the character of the premises, the use to which the tenant intends to put them, and the nature and extent by which the tenant's use of the premises is interfered with by the injury claimed." (Internal quotation marks omitted.) *Welsch* v. *Groat*, 95 Conn. App. 658, 662, 897 A.2d 710 (2006).

It is well settled that a factual finding is not clearly erroneous unless "it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . Simply put, we give great deference to the findings of the trial court because of its function to weigh and interpret the evidence before it and to pass upon the credibility of witnesses." (Internal quotation marks omitted.) *Benedetto* v. *Wanat*, 79 Conn. App. 139, 147, 829 A.2d 901 (2003).

In its memorandum of decision, the court found that "[t]he entire [premises were] untenantable for [their] intended purpose for six weeks as a result of the September, 2013 flood" and "the area that formerly housed the clinic, optical shop and operating rooms was not tenantable until October, 2014." During that time, REC paid only one half of the rent due under the lease, and the court found, on the basis of the portion of the premises affected, that this reduction of rent was justified.

The court, nevertheless, also found that REC eventually was able to utilize the previously untenantable

areas of the premises and, for the period after October, 2014, until the sewage backups began in April, 2015, "there were no grounds to abate the rent" and "[f]ailure to pay the full rental for those months was a breach of the lease . . . ." Implicit in this finding is a determination by the court that the entire premises were tenantable during that period, otherwise the court logically would have found that some continued abatement of rent was justified under the lease.

The court made no additional subordinate factual findings and provided no analysis regarding the tenantability of the premises after all areas were repaired of the damage from the September, 2013 flooding.[15] Its finding that no ground existed to support Robbins' and REC's continued abatement of rent is, nevertheless, supported by some evidence in the record. Robbins testified that repairs to all the water damaged areas were completed in October, 2014. She also testified that once the administrative office space was no longer needed as examination space, it would have needed to be remodeled to return it to its original use as office space. Robbins never testified or presented any other evidence, however, that would have mandated a finding by the court that the former administrative space was ever "untenantable," meaning unusable for a purpose related to REC's operations.[16] Robbins testified that, at the time, she had been considering converting some of the office space into additional operating rooms, which demonstrates that the space had a variety of potential uses for REC and Robbins aside from its use as administrative offices.

Even assuming that REC would have had to expend additional resources to return the office space to its

[15] We note that Robbins and REC never filed a motion for articulation nor did they challenge the court's determination regarding back rent in REC's postjudgment motion for reargument and reconsideration.

[16] The court found that the intended use of the premises was as "a medical office and operating rooms."

original use, that fact alone does not directly conflict with the court's finding, which was not that the space was available for use as administrative offices, but that there was no basis for abating rental payments. Under the express terms of the lease, rent abatement was permitted for periods in which all or part of the premises were rendered untenantable due to damage caused by fire or other casualty, and then only during the period of repair. Here, even if the converted administrative office space could not be used for its originally intended purpose, the record indicates that this portion of the premises was not significantly damaged and rendered untenantable as a result of the September, 2013 flood or any other casualty during the period at issue and was not undergoing repair. Accordingly, the court's finding that there were no grounds to support abatement under the lease after October, 2014, is supported by the factual record before the court.

Moreover, although Robbins suggests that the evidence before the court could have supported a different conclusion, it is not the function of this court to retry the facts or pass on the credibility of fact witnesses. See *Johnson* v. *Fuller*, 190 Conn. 552, 556, 461 A.2d 988 (1983) (affirming court's finding that premises were tenantable despite uncontroverted expert testimony to contrary). Because there is evidence in the record to support the court's factual findings, and we are not left with a firm and definite conviction that a mistake was made, we do not agree that the court's finding that rent abatement was unjustified for the period in question was clearly erroneous.

B

Robbins next claims that, even if she owed Commerce Park some additional rent for the five and three-quarter months between November, 2014, and the end

of April, 2015, there is no evidence in the record supporting the court's calculation that she owed back rent totaling $89,484.37. In particular, Robbins argues that the court failed to credit partial rent payments that REC made to Commerce Park during that time period. Commerce Park responds that the language used by the court suggests that it took into account any partial payments made, but principally argues that the court's damages award is unreviewable because the court did not set forth the precise basis for its calculations in its memorandum of decision and Robbins failed to seek an articulation from the court. We agree with Robbins that the court's unpaid rent calculation is unsupported by the record.

The following facts are relevant to this claim. The court concluded that Robbins breached the lease by not making full rental payments for the five and three-quarter months at issue. The court determined that the proper measure of damages to award Commerce Park was the amount of any unpaid rent, which the court determined was $89,484.37. In arriving at that number, the court, in essence, multiplied the number of months at issue, or 5.75,[17] by $15,562.50, which was the minimum monthly base rent set forth in the lease. For the following reasons, however, we are left with a firm and definite conviction that the court's calculation is mistaken and, thus, must be reversed.

First, the court fully recognized that REC had not paid Commerce Park "the *full* rental" but had "*reduced* unilaterally" the amount it paid each month. (Emphasis added.) It is reasonable to infer from this language that

[17] November, 2014, through April, 2015, represents a period of six calendar months. Although the court indicates in its memorandum that it multiplied the monthly rent by five and then subtracted one-quarter month's rent in order to properly account for the last week of April, 2015, the numbers used by the court demonstrate that it correctly used a period of six months, less one week, in calculating the amount of unpaid rent at issue.

the court was aware that, although REC had not paid its rental obligation *in full* each month, it did pay some *reduced* amount of rent during the period at issue. That inference is consistent with the court's finding earlier in the decision that REC had made reduced rent payments of approximately one half of the amount due under the lease. The court, nevertheless, appears to have based its calculation of the rent owed for the period at issue by using a figure that represented the full amount of the minimum monthly base rent due at the time the lease was executed in 2007. The court never stated that its calculation took into account any credit for the rent that REC actually had paid. REC was entitled to that credit.

Second, although $15,562.50 represented the amount of the monthly basic rent due at the time the lease was executed in 2007, the lease also expressly provided that the basic rent was to be adjusted annually using the consumer price index, as set forth in detail in exhibit B of the lease. Given that the rental period in question spanned from late 2014 into 2015, we have no confidence that $15,562.50 accurately represents the actual amount of the monthly rent owed by Robbins during the period in question or the balance due, taking into consideration partial payments. The court's use of that figure also appears to ignore that a proportional share of property taxes was to be included as an additional component of the total monthly rental obligation under the lease.

Third, the court's use of the $15,562.50 figure is inconsistent with and unsupported by other evidence before the court regarding the actual amount of Robbins' unpaid rental obligation to Commerce Park. In their joint trial management report, the parties stipulated regarding the amount of rent that Robbins paid, through REC, to Commerce Park during the period of time at

issue. As stipulated, not including a payment to reimburse Commerce Park for snaking a clogged drain, Robbins paid $73,424.10. As previously discussed, those payments are not reflected in the mathematical formula used by the court, and there appears to be no reasonable basis in the record for the court to have disregarded the stipulated facts. Robbins also submitted into evidence a tenant's ledger that, in addition to showing the same payments as stipulated to by the parties, lists the actual base rent for the months in question as $18,929.83 and the estimated monthly taxes as an additional $5544.87. The ledger shows that REC made monthly payments that represented one half of the total of the base rent plus taxes, or $12,237.35. Using the figures in the ledger, which were never disputed by Commerce Park, the court appears to have overstated the amount of rent owed to Commerce Park by more than $20,000.[18]

Commerce Park argues that Robbins never asked the court to articulate the factual basis for its calculation of damages and suggests that this is fatal to her claim on appeal. See *Smith* v. *Snyder*, 267 Conn. 456, 467, 839 A.2d 589 (2004) (concluding that appellants' failure to file motion for articulation to illuminate further basis for compensatory damages award left reviewing court to speculate regarding how and why court arrived at sum awarded). The record before us, however, is adequate for review. Although it is true that courts have broad discretion in calculating the amount of damages; see *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 68, 717 A.2d 724 (1998); if, as is the case here, the record clearly reflects that the figures utilized by the court were incorrect and

[18] Nothing in our discussion of the evidence should be construed as binding on the trial court that makes the final determination of the correct amount of damages to award on remand. We discuss the evidence only to illustrate why we firmly and definitely believe that the court made a mistake in its calculation of damages.

untethered from the evidence before it, a new hearing in damages is appropriate.

C

Turning to Commerce Park's cross appeal, it claims that the court improperly found that Robbins was constructively evicted from the premises as a result of the serious and frequent sewer backups following the third full week of April, 2015, and that this erroneous finding thwarted Commerce Park's efforts to recover the remainder of rent due under the lease. It maintains that, in making this finding, the court misinterpreted and misapplied governing case law because Robbins failed to establish that (1) REC vacated the premises as a result of the sewer backups or (2) she gave Commerce Park a reasonable amount of time to correct the problem. We are not persuaded by either argument.

"[A] constructive eviction arises [if] a landlord, [although] not actually depriving the tenant of possession of any part of the premises leased, has done or suffered some act by which the premises are rendered untenantable, and has thereby caused a failure of consideration for the tenant's promise to pay rent. . . . In addition to proving that the premises are untenantable, a party pleading constructive eviction must prove that (1) the problem was caused by the landlord, (2) the tenant vacated the premises because of the problem, and (3) the tenant did not vacate until after giving the landlord reasonable time to correct the problem. . . . Moreover, [w]hether the premises are untenantable is a question of fact for the trier, to be decided in each case after a careful consideration of the situation of the parties to the lease, the character of the premises, the use to which the tenant intends to put them, and the nature and extent by which the tenant's use of the premises is interfered with by the injury claimed. . . . That factual determination will not be disturbed by [a

reviewing] court unless the conclusion is such that it could not reasonably be reached by the trier." (Citations omitted; internal quotation marks omitted.) *Welsch* v. *Groat*, supra, 95 Conn. App. 662.

In challenging the court's finding that Robbins and REC were constructively evicted from the premises as a result of the backup of the sewage into the premises beginning at the end of April, 2015, Commerce Park does not argue on appeal that the court applied an incorrect legal standard or failed to make all requisite findings. It does not contend that the sewage backup did not render the premises untenantable, nor does it argue that the backups were not "caused by the landlord." Rather, Commerce Park first argues that Robbins had been intending to vacate the premises even before the sewage backups occurred and, thus, did not vacate the premises "because of" the sewage problems. Second, it argues that she vacated the premises without giving Commerce Park a reasonable amount of time to remedy the situation.

Whether Robbins and REC vacated the premises as a result of the sewage backups and whether Commerce Park had a reasonable amount of time to remedy the sewage problems before the premises were vacated are factual determinations for the trier of fact and, thus, are subject to our clearly erroneous standard of review. See *Baretta* v. *T & T Structural, Inc.*, 42 Conn. App. 522, 527, 681 A.2d 359 (1996). It is apparent from the court's decision that it found both requirements were satisfied in this case and those findings, whether express or implied, are supported by evidence in the record.

The court expressly found that it was "the sewage backups and floods in the spring of 2015" that constructively evicted Robbins from the premises, and that Commerce Park was responsible for those backups

because of its failure adequately to address and repair known defects in the buildings sewage system. Further, there can be little doubt on this record that Robbins vacated the premises "because of" the sewage backups that began at the end of April, 2015. Robbins testified at trial to the following: she made her decision to move her business to a new location after the first sewage backup; at that time, she received an estimate of $10,000 to clean and sanitize the fouled operating rooms; she quickly came to the realization that Commerce Park was not going to fix the underlying problems with the sewer pipes and that the sewage backups likely would continue, which in fact occurred; and the continued negative impact on her business and associated costs of cleanup became intolerable. The court was entitled to credit Robbins' testimony as satisfying the requirement that "the tenant vacated the premises because of the problem [caused by the landlord] . . . ." (Internal quotation marks omitted.) *Welsch* v. *Groat*, supra, 95 Conn. App. 662.[19]

Similarly, the record supports the court's finding that Robbins did not vacate the premises before Commerce Park had notice and a reasonable opportunity to correct the problems with the building's sewer system. In making this finding, the court relied on the fact that Commerce Park and RDR had actual notice of the sewer system defects from at least June, 2014. This finding is supported by the testimony of a former RDR employee that, in June, 2014, he informed RDR of the sewer contractor's findings that there were sags in the sewer lines and that the floors would need to be ripped up to make

[19] Although Commerce Park points to other testimony that it believes indicates that Robbins had decided to leave prior to the first sewage backup, the trial court, as the trier of fact, was "free to weigh conflicting evidence and to accept some, all or none of the testimony that [was] before it." *Stein* v. *Tong*, 117 Conn. App. 19, 30, 979 A.2d 494 (2009). Thus, the mere presence of conflicting evidence will not suffice to render a court's factual findings clearly erroneous; rather, there must be an absence of supporting evidence.

needed repairs. Moreover, as the court found, after the first sewage backup in April, 2015, Robbins learned from the sewer contractor that Commerce Park "had been advised to repair known defects in the sewer system and failed to do so . . . ." Although Commerce Park did engage professionals to respond to the sewage backups at the time they occurred to address the immediate situation, there is nothing in the record to indicate that Commerce Park made any real effort to remedy the root cause of those backups, the origins of which were known before the first serious sewage backup ever occurred. We conclude on the basis of our review of the record that the court's finding that Commerce Park was afforded adequate time to remedy the defect that caused the constructive eviction is not clearly erroneous.

In sum, our review of the record before the court shows that there was evidence to support the court's ultimate finding that there was a constructive eviction, and, thus, the finding was not clearly erroneous. Having resolved all claims raised with respect to the rent action, we turn to the appeal of Commerce Park and RDR from the decision of the court awarding REC $958,041.92 in damages in REC's tort action.

II
AC 41543

In AC 41543, the tort action, Commerce Park claims that (1) the court improperly awarded compensatory damages against it in favor of REC on a theory of gross negligence and (2) even if REC was entitled to damages, the court improperly determined the amount of damages. We address each of these claims in turn.

A

Commerce Park first claims that the trial court improperly awarded damages to REC on a theory of

gross negligence. According to Commerce Park, the court's decision was flawed for primarily two reasons. First, it argues that Connecticut common law does not recognize degrees of negligence or a cause of action sounding in gross negligence. Second, it argues that REC never pleaded allegations of gross negligence in its complaint and, thus, could not properly recover on that basis, even if it was a legally cognizable theory on which to impose liability. We conclude that both arguments founder on a fundamental misinterpretation of the pleadings and the legal basis for the court's decision. Accordingly, we reject this claim.

1

We first address the argument that it was improper for the court to have awarded damages to REC on the basis of gross negligence because Connecticut does not recognize gross negligence as separate and distinct from ordinary negligence. Although we certainly agree that Connecticut courts have not recognized a *cause of action* sounding in gross negligence, it does not necessarily follow that a court, in the course of adjudicating a negligence cause of action, is barred from recognizing a distinction between negligent and grossly negligent conduct. This is particularly so if, as in the present case, it is necessary to make such a distinction in order to determine the applicability of a contractual provision that waives a landlord's liability for ordinary negligence but not for gross negligence.

As our Supreme Court has stated: "Connecticut does not recognize degrees of negligence and, consequently, does not recognize *the tort* of gross negligence as a separate basis of liability." (Emphasis added.) *Hanks* v. *Powder Ridge Restaurant Corp.*, 276 Conn. 314, 337, 885 A.2d 734 (2005). Our Supreme Court "ha[s] never recognized degrees of negligence as slight, ordinary, and gross in the law of torts." (Internal quotation marks

omitted.) *Matthiessen* v. *Vanech*, supra, 266 Conn. 833 n.10. Accordingly, if REC had asserted a cause of action sounding in gross negligence, and the court had permitted REC to recover on such a count, Commerce Park might have a viable appellate issue. That, however, is not how the present case was pleaded or adjudicated.

In the underlying tort action, REC pleaded counts sounding in negligence, common-law recklessness and a CUTPA violation. Consistent with our Supreme Court's statement in *Matthiessen*, under count one, the negligence count against Commerce Park, the court was permitted to award damages on the basis of acts or omissions that it determined fell within a full range of negligent behavior, including, but not limited to, acts of gross negligence. In other words, a cause of action for negligence can encompass liability for any and all degrees of negligence, including gross negligence. Accordingly, it was not improper as a matter of law for the court in the present case to have awarded damages on the basis of a finding of gross negligence. Gross negligence, after all, is negligence.

More importantly, the concept of gross negligence was injected into the case by Commerce Park through its assertion at trial and in posttrial briefs that it could not be liable to REC because of the indemnification provision in the lease.[20] In the lease with Commerce Park, Robbins had agreed, on her own behalf and on behalf of REC, to indemnify Commerce Park for, inter alia, damages caused by the overflow of water or sewage into any part of the premises unless such damages were caused "by the gross negligence or willfulness" of Commerce Park or its agents. In order to rebut that assertion, it was incumbent upon Robbins to convince

[20] Commerce Park never raised the indemnification provision as a special defense to the negligence count. See part II A 2 of this opinion. Rather, the issue was first asserted before the court during the direct examination of Commerce Park's principal, Robert Russo.

the court that Commerce Park's failure to take action to repair the known sewer problems rose beyond simple negligence to gross negligence. See *Atelier Constantin Popescu, LLC* v. *JC Corp.*, 134 Conn. App. 731, 738–40, 49 A.3d 1003 (2012) (upholding finding of gross negligence that was necessary for plaintiff to overcome negligence waiver in lease). Moreover, Commerce Park's argument, if valid, would render meaningless and unenforceable the very distinction to which the parties had agreed in the lease. See *Tinaco Plaza, LLC* v. *Freebob's, Inc.*, 74 Conn. App. 760, 767, 814 A.2d 403 (lease is contract and court must construe it in manner that gives effect to every provision), cert. granted, 263 Conn. 904, 819 A.2d 840 (2003) (motion to dismiss granted February 4, 2004). We simply are unpersuaded by Commerce Park's argument that it was improper for the court to have rendered judgment in favor of REC on its negligence count against Commerce Park on the basis of the court's determination that Commerce Park was grossly negligent.

2

Commerce Park also argues that it was improper for the court to have awarded damages on the basis of gross negligence because it was never pleaded by REC. We are not persuaded.

It is indisputable that the pleadings establish the framework of any legal action. "Generally, it is clear that [t]he court is not permitted to decide issues outside of those raised in the pleadings." (Internal quotation marks omitted.) *Lynn* v. *Bosco*, 182 Conn. App. 200, 213, 189 A.3d 601 (2018). "[I]t is imperative that the court and opposing counsel be able to rely on the statement of issues as set forth in the pleadings. . . . [A]ny judgment should conform to the pleadings, the issues and the prayers for relief. . . . [A] plaintiff may not allege one cause of action and recover upon another.

. . . The requirement that claims be raised timely and distinctly . . . recognizes that counsel should not have the opportunity to surprise an opponent by interjecting a claim when opposing counsel is no longer in a position to present evidence against such a claim." (Citations omitted; internal quotation marks omitted.) Id., 214–15. "That does not necessarily mean, however, that the absence of a particular claim from the pleadings automatically precludes a trial court from addressing the claim, because a court may, despite pleading deficiencies, decide a case on the basis on which it was actually litigated and may, in such an instance, permit the amendment of a complaint, even after the trial, to conform to that actuality. . . . Indeed, [our Supreme Court has] recognized that, even in the absence of such an amendment, where the trial court had in fact addressed a technically unpleaded claim that was actually litigated by the parties, it was improper for the Appellate Court to reverse the trial court's judgment for lack of such an amendment." (Citation omitted.) *Stafford Higgins Industries, Inc.* v. *Norwalk*, 245 Conn. 551, 575, 715 A.2d 46 (1998).

Any argument that the court acted outside the scope of the pleadings implicates its authority to act, which presents a question of law over which our review is plenary. *Lynn* v. *Bosco*, supra, 182 Conn. App. 213. Furthermore, "[t]he interpretation of pleadings is always a question of law for the court . . . ." (Internal quotation marks omitted.) *McLeod* v. *A Better Way Wholesale Autos, Inc.*, 177 Conn. App. 423, 444, 172 A.3d 802 (2017).

In support of the present argument, Commerce Park directs our attention to the operative complaint, noting that although REC alleged in count one that it was damaged by Commerce Park's negligence, REC failed to set forth any specific references to gross negligence in either count one or in its prayer for relief. According

to Commerce Park, "[e]ven if this court concluded that the trial court had the power to find [that] the negligence waiver was operative and barred [Commerce Park's] negligence but not its gross negligence, the trial court erred in that [REC] never pleaded, raised or even argued that [Commerce Park] was grossly negligent."

Commerce Park's suggestion that the court went beyond the pleadings in awarding damages on the basis of gross negligence is simply unfounded on this record. First, REC recovered under a negligence theory that *was pleaded*. In considering whether Commerce Park was grossly negligent, the court simply adjudicated an issue, inserted into the case by Commerce Park, namely, whether REC was precluded from recovering under a negligence theory because of the indemnification clause in the lease. The court rejected Commerce Park's assertion in that regard. Thus, Commerce Park's argument that REC prevailed on a theory it did not plead borders on the frivolous. If any pleading irregularity occurred, it arose out of Commerce Park's failure to allege the indemnification clause as a special defense to REC's negligence count. If Commerce Park had pleaded the indemnification clause as a special defense, REC would have had an opportunity to file a responsive pleading indicating that the conduct it alleged in the complaint rose to the level of gross negligence and, thus, the exculpatory provision did not apply. Furthermore, by raising the negligence waiver as a defense at trial, Commerce Park demonstrated that it fully understood that the issue of whether the facts alleged in the complaint rose to the level of gross negligence was an issue to be litigated and decided by the court. It addressed that issue fully in its posttrial brief, never raising any claim of pleading irregularity to the trial court. See *Tedesco* v. *Stamford*, 215 Conn. 450, 459, 576 A.2d 1273 (1990) ("a pleading defect cannot be a basis for setting aside

a judgment unless it has materially prejudiced the defendant"); *Landry* v. *Spitz*, 102 Conn. App. 34, 43–44, 925 A.2d 334 (2007) ("in the context of a postjudgment appeal, if a review of the record demonstrates that an unpleaded cause of action actually was litigated at trial without objection such that the opposing party cannot claim surprise or prejudice, the judgment will not be disturbed on the basis of a pleading irregularity").

Second, we are not persuaded that the complaint is silent with respect to allegations of gross negligence. It is factually correct that REC never used the words "gross negligence" in the complaint. Nevertheless, in its negligence count against Commerce Park, REC incorporated detailed factual allegations describing the conduct of Commerce Park and RDR in response to the sewer backups. It is axiomatic that we must "construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery." (Internal quotation marks omitted.) *McLeod* v. *A Better Way Wholesale Autos, Inc.*, supra, 177 Conn. App. 444–45. Given that REC sought to recover on a theory of negligence, it was sufficient for REC to describe the acts or omissions it believed would support a determination of liability under that count. As we explained in part II A 1 of this opinion, general allegations of negligence are legally sufficient to encompass liability for any and all degrees of negligence, including gross negligence. In short, the record simply does not

support Commerce Park's argument that there was a defect in the pleadings sufficient to warrant a reversal and, accordingly, we reject that argument.

B

Commerce Park's final claim challenges the court's calculation of the damages awarded to REC. Commerce Park's claim is, again, twofold. First, it argues that the court incorrectly determined that the proper measure of REC's damages was its loss of the beneficial use of the substantial improvements it had made to the premises prior to the constructive eviction. Second, it argues that, even if this was a proper measure of damages, the court miscalculated the amount of those damages because, in calculating the remainder of Robbins' tenancy under the lease, the court included unexercised options to extend the lease for two additional five year periods. We agree with the second argument only.

Our standard of review applicable to challenges to damages awards is well settled. As we have already stated, "[t]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . [If], however, a damages award is challenged on the basis of a question of law, our review [of that question] is plenary." (Citation omitted; internal quotation marks omitted.) *Landry* v. *Spitz*, supra, 102 Conn. App. 49–50. "[T]he burden of proving damages is on the party claiming them. . . . Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . [T]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative . . . but which allows for some objective ascertainment of the amount. . . . This certainly does

not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate." (Citations omitted; internal quotation marks omitted.) *Weiss* v. *Smulders*, 313 Conn. 227, 253–54, 96 A.3d 1175 (2014).

1

Commerce Park first argues that the court utilized the wrong measure of damages. It contends that rather than awarding damages on the basis of REC's loss of the use of improvements it had made to the premises, the court should have limited its award of damages to the loss of the fair market value of the lease. We conclude that the court utilized a proper measure of damages.[21]

Citing our Supreme Court's decision in *Gans* v. *Olchin & Co.*, 109 Conn. 164, 145 A. 751 (1929), Commerce Park urges us to hold that the proper measure of damages for a tenant constructively evicted from leased premises is limited to "the difference between the rental value of the leased premises at the time of the eviction and the reserved rent for the unexpired period of the lease." Id., 168. Nothing in that opinion, however, states that this is the only appropriate measure of damages in every case of constructive eviction.

It is axiomatic that the purpose of compensatory damages is "to restore an injured party to the position he or she would have been in if the wrong had not been committed." (Internal quotation marks omitted.) *Rizzuto* v. *Davidson Ladders, Inc.*, 280 Conn. 225, 248, 905 A.2d 1165 (2006). In deciding whether the court

[21] REC argues that Commerce Park waived its right to raise this claim because it was not raised at trial or in the motion for reargument and reconsideration filed by Commerce Park and RDR. We do not agree.

utilized a proper measure for determining compensatory damages in the present case, we find the rule set forth in the Restatement (Second) of Property both instructive and persuasive. Section 10.2 of the Restatement (Second) of Property sets forth the following rule for determining damages: "If the tenant is entitled to recover damages from the landlord for his failure to fulfill his obligations under the lease, absent a valid agreement as to the measure of damages, damages *may include one or more of the following items as may be appropriate so long as no double recovery is involved*:

"(1) if the tenant is entitled to terminate the lease and does so, the fair market value of the lease on the date he terminates the lease;

"(2) *the loss sustained by the tenant due to reasonable expenditures made by the tenant before the landlord's default* which the landlord at the time the lease was made could reasonably have foreseen would be made by the tenant;

"(3) if the tenant is entitled to terminate the lease and does so, reasonable relocation costs;

"(4) if the lease is not terminated, reasonable additional costs of substituted premises incurred by the tenant as a result of the landlord's default while the default continues;

"(5) if the use of the leased property contemplated by the parties is for business purposes, loss of anticipated business profits proven to a reasonable degree of certainty, which resulted from the landlord's default, and which the landlord at the time the lease was made could reasonably have foreseen would be caused by the default;

"(6) if the tenant eliminates the default, the reasonable costs incurred by the tenant in eliminating the default; and

"(7) interest on the amount recovered at the legal rate for the period appropriate under the circumstances." (Emphasis added.) 1 Restatement (Second), Property, Landlord and Tenant § 10.2, pp. 338–39 (1977).

Subsection (1) of § 10.2 of the Restatement (Second) of Property is, in essence, equivalent to the measure of damages discussed in *Gans* v. *Olchin & Co.*, supra, 109 Conn. 168. The Restatement rule, however, leaves it to the court's discretion to choose from any one or more of the enumerated items in crafting a compensatory damages award, providing only that the court must ensure that it does not permit double recovery.

In its posttrial brief, REC claimed entitlement to damages totaling more than four million dollars on the basis of lost business profits and its loss of use of substantial improvements it had made to the premises. Those components correspond, respectively, with subsections (5) and (2) of the rule set forth in § 10.2 of the Restatement (Second) of Property. The court found that REC had failed to prove its lost profits claim with reasonable certainty but was able to make a fair estimate of the value of REC's loss of its improvements. Consistent with § 10.2 of the Restatement (Second) of Property, we conclude that the court properly considered REC's loss of use of improvements as a component of the damages awarded to REC.[22]

2

Commerce Park further argues, however, that even if the court properly included REC's loss of the beneficial use of its improvements as a component of the

[22] We note that appellate courts in other jurisdictions have relied on subsection (2) of § 10.2 of the Restatement (Second) of Property and its accompanying commentary in affirming an award of damages to a commercial tenant on the basis of loss of use of leasehold improvements following a constructive eviction. See, e.g., *Reisterstown Plaza Associates* v. *General Nutrition Center, Inc.*, 89 Md. App. 232, 240, 597 A.2d 1049 (1991).

overall damages award, the court, in calculating the amount of damages for loss of use, improperly determined the length of Robbins' expected tenancy under the lease, which increased the amount of the damages awarded for the loss of use. More specifically, according to Commerce Park, the court improperly included in its calculations the two unexercised options to extend the lease for a term of five years each, and this error resulted in excessive damages awarded to REC. We agree that the court improperly included the two option periods in calculating damages.

As previously set forth, the determination of damages generally involves a question of fact that we will not overturn absent a showing that the resulting award is clearly erroneous, meaning it is unsupported by evidence in the record or, if supported, we are left with a definite and firm conviction that a mistake has been made. See *Benedetto* v. *Wanat*, supra, 79 Conn. App. 147. In the present case, however, our review of the damages awarded turns largely on our construction of the option clause in the parties' lease. "[A] lease is a contract," and, thus, our rules governing the construction of contracts apply. *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007). "[W]e accord the language employed in the contract a rational construction based on its common, natural and ordinary meaning and usage as applied to the subject matter of the contract. . . . [If] the language is unambiguous, we must give the contract effect according to its terms." (Internal quotation marks omitted.) *Kaplan* v. *Scheer*, 182 Conn. App. 488, 496, 190 A.3d 31, cert. denied, 330 Conn. 913, 193 A.3d 49 (2018). Accordingly, "[if] a party's intent is expressed clearly and unambiguously in writing . . . the determination of what the parties intended . . . is a question of law [over which our review is plenary]." (Internal quotation

marks omitted.) *19 Perry Street, LLC* v. *Unionville Water Co.*, supra, 294 Conn. 622–23.

The following facts are relevant to our discussion. The lease commenced on August 1, 2007. In order to transform the premises into "a state-of-the-art eye care center," Robbins made significant improvements to the premises that were substantially completed by the end of 2009. The lease had a definite, initial term of fifteen years, meaning it was set to expire on July 31, 2022. The lease, however, also contained a provision that provided Robbins with the option of extending the lease for two additional five year periods upon timely written notice to Commerce Park. Specifically, paragraph 3 of the lease, titled "Option Terms," states in relevant part: "*Provided that Tenant shall have complied with each and every obligation hereunder, and shall not be in default of any provision of this Lease*, then Tenant shall have two (2) successive options to extend this Lease (individually, an 'Option'), each for a term of five (5) years (individually, an 'Option Term'), upon the same terms and conditions herein set forth . . . . These Options shall be exercised by delivery of written notice from Tenant to Landlord, which notice must be received by Landlord not less than six (6) months prior to the expiration of the Term or Option Term (as applicable) then existing." (Emphasis added.)

Accordingly, Commerce Park had no right to refuse the options to extend the lease "[p]rovided that" Robbins met the stated conditions, including that she complied with all of her obligations under the lease. Robbins testified at trial that, at the time she signed the lease in 2007, she had no intention of moving her practice. Robbins and REC vacated the premises at the end of June, 2015, before the expiration of the lease's initial term and without having exercised any option to extend the lease beyond 2022.

To calculate the dollar value to assign to REC's loss of the use of the improvements it made to the premises, the trial court utilized the following formula: the percentage of time that REC had lost the use of its improvements, calculated by comparing the length of time of actual use against the time that REC would have enjoyed under the lease had Robbins not been constructively evicted, multiplied by the cost of the improvements. In applying that formula, the court stated: "Here, as of April, 2015, REC had used the improvements to the [premises] for five years and four months out of a twenty-two year term (ten years after the completion of the improvements *plus two five year options*). Therefore, REC's damages are 75.8 percent of the improvement cost, which totals $899,190 ($1,186,267 x 75.8 percent)."[23] (Emphasis added.) Commerce Park does not challenge the formula used by the court but argues only that it was improper for the court to have included the two unexercised option periods in its calculations.

The record supports a finding that Robbins would have sought to exercise the options. Robbins testified at trial that there were "many reasons that made [the

[23] As previously indicated, the court found that the improvements were completed by the end of December, 2009. Therefore, when Robbins was constructively evicted at the end of April, 2015, REC had used the improvements it made to the premises for a period of approximately five years and four months, as indicated by the court. The court further indicated that this period of use was "out of a twenty-two year term," which, as set forth in the parenthetical that follows, included the two five year option periods. In order for the math to work, the court necessarily must have computed that twelve years remained of the original fifteen year lease term after the improvements were completed, not ten years as the court stated in the parenthetical. Further, it is manifest from the percentage used by the court in its mathematical calculation that it used a twelve year period rather than a ten year period in determining the total potential period for which REC would have had use of the improvements. Nevertheless, on the basis of the dates found by the court, we calculate that twelve years and seven months remained under the original fifteen year lease term after the improvements were completed. Accordingly, we use twelve years and seven months in our recalculation of the damages owed to REC for loss of use.

premises] very attractive" to Robbins and her practice. She also indicated that "each time you move a practice you lose a percentage of patients . . . ." Further, soon after she decided to renew her lease with Commerce Park in 2007, Robbins expended a considerable sum of money to hire contractors to fit out the premises for use as a state-of-the-art surgical facility. When asked if she had any intention of moving her business at the time she executed the 2007 lease, Robbins responded that she "had no intention of moving the operating rooms or the practice." She also answered in the negative when asked if she ever intended to practice medicine at any location other than the premises, stating, "I was planning on staying there for my entire career." Thus, it was reasonable for the court to have inferred from Robbins' testimony that, absent the type of problems that later arose, she would have remained there for the full extent of the lease and that, in deciding to invest in significant improvements to the premises, Robbins would have considered the cost in light of the full potential time span that she and REC expected to utilize the improvements, which would have included the option periods. It was a pure factual determination for the court whether Robbins reasonably would have exercised one or both options if Commerce Park had not constructively evicted her and REC.

A finding that Robbins likely would have sought to exercise the options had she and REC remained in the premises, however, does not completely answer the question of whether those option periods were properly considered by the court in assessing damages. The right to exercise the option was expressly conditioned on Robbins having "complied with each and every obligation" of the lease and not being "in default of any provision" of the lease. By using clear and unambiguous language that the option could be exercised "[p]rovided

that" the stated conditions were met, the parties signaled their intent to create a condition precedent. See *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 360–62, 166 A.3d 800 (2017) (discussing legal parameters of contractual conditions). If a condition precedent to an option clause in a lease is not met, then the right to exercise the option is extinguished. See *Brauer* v. *Freccia*, 159 Conn. 289, 293–94, 268 A.2d 645 (1970) (lessees' failure to pay rent for eight months defeated their right to exercise option in lease to purchase leased premises conditioned on lessees duly and punctually fulfilling all conditions of lease).

In adjudicating the rent action, the court expressly found that Robbins' "[f]ailure to pay the full rental for [five and three-quarter months] was a breach of the lease . . . ." Accordingly, under any reasonable metric, Robbins had not complied with each and every obligation under the lease.[24] If a condition precedent to an option does not occur, the option does not exist. See *Brauer* v. *Freccia*, supra, 159 Conn. 294. Said another way, Robbins' breach of the lease would have precluded her from exercising her option to extend the lease as a matter of law.

The court provided no explanation for including the unexercised option periods in its calculation.[25] We note,

[24] In *Pack 2000, Inc.* v. *Cushman*, 311 Conn. 662, 680, 89 A.3d 869 (2014), the Supreme Court clarified that "when an option is conditioned on a lessee's compliance with a lease, in the absence of explicit contractual language to the contrary, a substantial rather than strict compliance standard applies so that, if the lessee is not in material breach of the lease when he seeks to exercise the option and has not previously been defaulted under the terms of the lease, the option is enforceable against the lessor." Under the circumstances of the present case, there can be no doubt that Robbins' decision to pay only one half of the rent due under the lease for a period of more than five months was a material breach of the lease.

[25] We note that this issue was directly raised to the court by Commerce Park in the motion for reconsideration and reargument filed by Commerce Park and RDR. Commerce Park argued that "the [c]ourt's finding that the tenant owed full rent for a period of five and three-quarter months constitutes a finding that the tenant was in default, which alone would preclude the

however, that the Superior Court decision on which the court relied as a template for both awarding damages for loss of use and determining the method for calculating those damages also included an option period in its calculation of the length of the expected tenancy in that case. See *31 Tobey Road, Ltd.* v. *Wright*, Superior Court, judicial district of Hartford, Docket No. CV-13-5001318-S (August 16, 2016). In that case, however, unlike the present case, although the tenant had stopped paying rent, the court did not find the tenant in breach of the lease. Further, the court in *31 Tobey Road, Ltd.*, did not set forth the terms of the option agreement in that case, and, therefore, there is no way of determining whether the option to extend was subject to a similar condition precedent.

REC argues on appeal that the court properly included the option periods in calculating damages despite Robbins' nonpayment of rent. First, REC argues that Robbins began to withhold a portion of the rent only after the September, 2013 flood caused by the downspout that detached from the roof drain, and that the court found this withholding was justified due to the impact on REC's business. This argument ignores, however, the court's ruling in part in favor of Commerce Park in the rent action. In so doing, the court expressly found that the withholding of rent was *not* justifiable once REC had repaired the damage caused by the flooding and that Robbins breached the lease by continuing to make reduced rent payments for the five and three-quarter months prior to the constructive eviction.

Second, REC argues that, despite the withholding of rent, Commerce Park never terminated the lease or

exercise of the option. In the absence of proof that the conditions precedent for exercise of the options were met, the options can never be operative." The court denied the motion without acknowledging or addressing Commerce Park's argument.

sought to evict Robbins and REC. That fact alone, however, does not change the legal significance of Robbins' breach of the lease as it related to extinguishing her right to exercise the lease option. There is no language in the option provision or elsewhere in the lease that required Commerce Park to seek to terminate the lease in response to a breach by Robbins in order to avoid waiving the agreed upon condition precedent of the option provision.

On the basis of the record before us, we conclude that the court improperly included the two unexercised option periods in calculating the expected length of the tenancy because doing so was legally inconsistent with the express terms of the lease and its finding that Robbins breached the lease. Because the record contains all of the facts necessary to determine the proper amount of damages, it is unnecessary to remand the matter for a new hearing in damages to calculate the amount of damages due to REC on the basis of its loss of use of its improvements. On the basis of the trial court's findings, after the improvements were completed, REC had use of those improvements for five years and four months out of the twelve years and seven months remaining of the fifteen year original lease term. Under the formula utilized by the court, REC, therefore, is entitled to 57.6 percent of the cost of improvements, or $683,289.79. Added to the additional damages awarded, the total damages award in the tort action is $741,847.34.

In AC 41398, the judgment is reversed only with respect to the court's calculation of damages, and the matter is remanded for a new hearing limited to a determination of the amount of rent owed by Robbins to Commerce Park; the judgment is affirmed in all other respects. In AC 41543, the judgment is reversed only with respect to the amount of damages awarded and the case is remanded with direction to render judgment

in favor of REC in the amount of $741,847.34; the judgment is otherwise affirmed.

In this opinion the other judges concurred.

RAFAEL FERNANDEZ *v.* COMMISSIONER OF CORRECTION (AC 37692)

Alvord, Bright and Bear, Js.

Syllabus

The petitioner, who previously had been convicted of arson in the first degree and murder, filed a third petition for a writ of habeas corpus, claiming, inter alia, that his right to a fair trial under the state and federal constitutions had been violated. Specifically, he claimed that because A, an attorney with the Office of the State's Attorney, initially had prosecuted his criminal case before the trial court declared a mistrial on the ground that A had become a potential witness in the case, the Office of the Chief State's Attorney, which prosecuted the petitioner's criminal case in the second trial, should have disqualified itself from the case under the Rules of Professional Conduct. The habeas court granted the motion to dismiss filed by the respondent Commissioner of Correction and rendered judgment thereon, from which the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly dismissed the petitioner's third habeas petition, as the petition failed to state a claim upon which habeas relief could be granted; the petitioner could not assert, on the facts alleged, a claim for relief under the applicable rules (1.10 and 3.7) of the Rules of Professional Conduct, as neither rule 1.10 nor 3.7 required disqualification of the attorneys in all of the state's attorney's offices and the Office of the Chief State's Attorney, the petitioner provided no basis for any conclusion that certain statements he had made to A during plea discussions while the petitioner was self-represented were privileged, as an attorney-client relationship did not exist between the petitioner and A, and although the petitioner claimed that A's potential testimony regarding the petitioner's statements to A would have been inadmissible and that the threat of A's testimony effectively prevented him from testifying in his own defense, that claim was entirely speculative, especially given that the petitioner did not file a motion in limine to obtain a ruling regarding the admissibility of A's potential testimony.

Argued May 20—officially released October 22, 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 dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Dante R. Gallucci, for the appellant (petitioner).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Jo Anne Sulik*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Rafael Fernandez, appeals from the judgment of the habeas court dismissing his second amended petition for a writ of habeas corpus, which alleged that communications between the then self-represented petitioner and the assistant state's attorney during plea negotiations, and the resulting implication of the assistant state's attorney as a potential witness at the petitioner's trial, required the disqualification of all of the state's attorney's offices and the Office of the Chief State's Attorney, and that the failure of the Office of the Chief State's Attorney to disqualify itself violated his right to a fair trial. On appeal, the petitioner claims that the habeas court improperly granted the motion to dismiss the petition filed by the respondent, the Commissioner of Correction, on the ground that the petition failed to state a claim upon which habeas corpus relief can be granted. We disagree and, accordingly, affirm the judgment of the habeas court.

The following relevant facts and procedural history are set forth in part in our Supreme Court's decision on the petitioner's direct appeal from his conviction. See *State* v. *Fernandez*, 254 Conn. 637, 758 A.2d 842

(2000), cert. denied, 532 U.S. 913, 121 S. Ct. 1247, 149 L. Ed. 2d 153 (2001). "The [petitioner] was arrested on September 14, 1995, and charged with felony murder in violation of General Statutes § 53a-54c, murder in violation of [General Statutes] § 53a-54a (a), first degree burglary in violation of General Statutes § 53a-101 (a), and first degree arson in violation of [General Statutes] § 53a-111 (a) (1). In addition, the [petitioner] was charged with tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1). The [petitioner] received the assistance of the office of the public defender from the time that he first appeared before the court on September 15, 1995, until a privately retained counsel, Attorney William T. Gerace, filed an appearance on the [petitioner]'s behalf on December 19, 1995." (Footnotes omitted.) Id., 640. On May 15, 1996, Gerace made an oral motion to withdraw from the case, which was granted by the court, *Espinosa*, *J.* Id., 640–41. "Gerace indicated that the [petitioner] could retain new counsel within two weeks . . . ." Id., 641.

"Evidently, the [petitioner] did not retain new counsel during the period between May 15 and May 29, 1996. Although the record is unclear at this point, it appears that the [petitioner] had asked the court if he could proceed pro se because, on May 30, 1996, Judge Espinosa indicated that she had 'not decided whether . . . [the petitioner was going to] be allowed to represent [himself] . . . .' Judge Espinosa then appointed a public defender who would serve as standby counsel in the event that the [petitioner] was allowed to proceed pro se or who would serve as lead counsel in the event that the [petitioner] was not permitted to proceed pro se. Judge Espinosa then stated that, in the meantime, the public defender could talk to the [petitioner] about the [petitioner's] decision to proceed pro se. Judge Espinosa also tried to impress upon the [petitioner] the seriousness of his situation and the foolhardiness of proceeding pro se: 'You are not a lawyer and you are

going to be going against an experienced lawyer on the other side that wants to convict you and send you to jail for sixty years.'

"On June 24, 1996, the matter of the [petitioner's] representation still was not finalized. Michael Isko, a public defender, filed an appearance as standby counsel for the [petitioner], and Judge Espinosa granted another continuance in light of the [petitioner's] request for more time to retain private counsel.

"On July 10, 1996, however, the [petitioner] appeared in court with Isko and stated that he wanted to represent himself. At that time, the [petitioner] knowingly and intelligently waived his right to counsel before the trial court, *Norko*, *J*. Isko remained as standby counsel.

"Throughout the following months, the [petitioner] filed various pro se motions, including a motion for access to a law library on September 18, 1996, which Judge Barry granted on October 2, 1996, 'subject to availability of accommodations within the dep[artment] of [c]orrection.'

"On October 30, 1996, the office of the attorney general appeared on behalf of the commissioner of correction and moved to vacate Judge Barry's October 2 order granting the [petitioner] access to a law library. Arguments on that motion were heard on October 30." (Footnotes omitted.) Id., 641–43.

"Before indicating how he would decide the motion to vacate, Judge Barry again stressed to the [petitioner] the seriousness of his decision to represent himself:

"The Court: You're unable to retain your own attorney, I presume, a private attorney? Is that right?

"[The Petitioner]: I do not want to retain. I can afford it, but I do not want to retain him.

"The Court: And you don't want the services of a public defender . . . on a full-time basis?

"The [petitioner] indicated that he did not want a public defender, and that he did not wish to receive advice from standby counsel. Judge Barry then inquired of the [petitioner]: It may be that your only chance is by retaining an attorney or by having access to the courts through the public defender's office . . . . Do you understand? The [petitioner] replied: Yes.

"On November 25 and December 5, 1996, the [petitioner] was brought to court to review the state's file. At this point, the record is unclear again. Evidently, the [petitioner's] pro se status had changed because Isko was appointed as the [petitioner's] public defender on January 8, 1997 and filed an appearance in lieu of the [petitioner] on January 15, 1997.

"On February 4, 1997, the [petitioner] filed another motion to return to pro se status, which was granted by Judge Espinosa on February 5, and Isko again was appointed standby counsel. Jury selection began on February 10, before Judge Norko. After several of his pro se motions had been denied, the [petitioner], on February 14, before Judge Norko, requested to change his pro se status, and Isko agreed to file an appearance as full counsel. On February 27, Judge Barry granted the commissioner's motion to vacate the previous order granting the [petitioner] access to a law library.

"On March 7, 1997, Isko asked for a continuance, claiming that he lacked sufficient time to prepare for trial in light of his relatively recent change in status to full counsel and the somewhat technical nature of the evidence. To accommodate Isko, Judge Norko ordered the office of the public defender to provide Isko with cocounsel and continued the case until March 14, 1997. On March 14, however, Judge Norko declared a mistrial, relying on the fact that the state's attorney could be called as a witness because of various communications

with the [petitioner] while the [petitioner] was proceeding pro se."[1] (Footnote omitted; internal quotation marks omitted.) Id., 644–45.

[1] During the March 14, 1997 court appearance, the following colloquy occurred between the court and Isko:

"The Court: Now, in your preparation for this particular position to go to trial today as you've indicated, you're prepared to begin trial, has the theory of the defense changed in any way?

"[Defense Counsel]: Most accurately, Your Honor. Based on our preparation and, again, what we needed to do was to give advice to the client, it became clear that there were a number of theories of a defense. Clearly what was presented to Mr. Fernandez; I have advised him on his right to testify and that is clearly a much—clearly much more of a possibility now than it was when he was conducting the case, yes.

"In that sense a theory of defense that is a serious defense, and the court has noted that can be full of theories of defenses based on the careful evaluation of the evidence and that the evidentiary rules have changed, and what can be presented now can be considerably different.

"The Court: All right. And you're aware of course, Mr. Isko, that Mr. Fernandez in his capacity was representing himself, has had individual conversations within the presence of the state's attorney concerning . . . his theory of defense of that particular period of time and other discussions of the case with Attorney Alexander.

"[Defense Counsel]: I was, at the time that these discussions were in pretrial process, as standby counsel. Again, I was not always requested to be present. And there were conversations that I was aware of but not present and, again, because I was not requested to be there by Mr. Fernandez.

"I want to be frank with the court so, yes, I am aware that there were discussions going on. And just this morning it was brought to my attention and I think I at one point I may have—I was aware [that] Mr. Fernandez was filing motions and there was additional correspondence and statements sent him. It has been brought to my attention, yes.

"The Court: And the fact that the state has had individual correspondence, at this particular time from your particular client specifically addressed to the state's attorney, does that bring any—does that concern you as to the defense at this particular period of time?

"[Defense Counsel]: Especially in light of conversations we've had this past week. Let me just make it clear, it doesn't concern me as to the actions of the state's attorney or the state's attorney's office. I don't think they're—again, that the time that Mr. Fernandez sent the letters my understanding it was before I was full counsel. He was doing that on his own as pro se.

"The Court: The court's not implying or inferring in any way there's anything wrong with what the state's attorney did what was—what she was supposed to do under the circumstances.

"[Defense Counsel]: Certainly the knowledge of those letters and what the complex sense have been related to do cause me concern as we go forward.

"The Court: Yes. In that concern and with the present knowledge that you have in your previous preparation, there in your opinion a possibility that the state's attorney—the present state's attorney may have information

In a footnote, our Supreme Court provided: "Judge Norko stated: '[B]ased upon [Isko's] reading of the file and research, the [petitioner] is changing [his] defense, which implicates the present state's attorney as a possible witness for the state . . . . With that in mind, the court will declare a mistrial in this particular case. The court will also note that no witnesses were called for the record—that we haven't finished impaneling an entire jury.'

"Furthermore, Judge Norko indicated that he found 'no fault' with the state, the office of the state's attorney or the office of the public defender, and 'that the court [was] somewhat at fault for not viewing it as a possible conflict in the future.' Judge Norko continued: 'However, I don't think that anyone could have predicted that we'd end up in this and, if the defense had remained the same, we wouldn't be in this particular position.' " Id., 645 n.13.

"On April 23, 1998, the [petitioner] expressed his desire to proceed pro se again, as well as his desire to be tried by a three judge panel rather than a jury. The [petitioner] then was canvassed by the trial court, *Clifford, J.*, regarding his decision to proceed pro se, the appointment of standby counsel, and his election to be tried by a three judge panel. At this time, the [petitioner] voluntarily waived his right to counsel and his right to a jury trial. Isko again was assigned to be standby counsel. On May 18, 1998, the [petitioner's] case was tried before a three judge panel, *Devlin*, *Fasano* and *Maloney, Js.* Isko served as standby counsel during that trial.

"On May 29, 1998, the panel found the [petitioner] guilty of arson in the first degree and murder. . . . The panel found the [petitioner] not guilty of felony murder,

to the contrary, or may have information given by your client that the state may wish to bring out in its case in chief?

"[Defense Counsel]: Yes."

burglary in the first degree and tampering with physical evidence. The [petitioner] was sentenced to a total effective term of fifty-five years imprisonment." (Citation omitted.) Id., 646. On direct appeal from his conviction, the petitioner claimed that "the trial court, *Espinosa*, *J.*, denied him his constitutional right to counsel in granting defense counsel's motion to withdraw," and also challenged "the order of the trial court, *Barry*, *J.*, vacating its previous order, which had granted the [petitioner's] pro se motion to be transferred to another correctional facility in order to gain access to a law library." Id., 639. The petitioner claimed that "this action resulted in the failure of the state to fulfill its constitutional obligation to provide pro se criminal defendants with access to the courts." Id. Our Supreme Court rejected both claims. Id.

Approximately eighteen months after our Supreme Court affirmed the petitioner's conviction, the petitioner filed his first habeas petition. See *Fernandez* v. *Commissioner of Correction*, 86 Conn. App. 42, 43–44, 859 A.2d 948 (2004). The habeas court dismissed that petition on the ground that the two claims raised therein "were identical to those discussed and ruled on by our Supreme Court in the petitioner's direct appeal . . . ." Id., 44. This court affirmed the judgment of the habeas court. Id., 51.

On April 1, 2005, the petitioner instituted a second habeas action, in which he claimed that "Gerace rendered ineffective assistance by virtue of the manner in which he withdrew as the petitioner's trial counsel," and "his attorney during the first habeas trial, Timothy Aspinwall, rendered ineffective assistance by failing to raise a claim of ineffective assistance of counsel in the first habeas petition." *Fernandez* v. *Commissioner of Correction*, 291 Conn. 830, 833, 970 A.2d 721 (2009). After a hearing, the habeas court denied the petition and granted the petition for certification to appeal filed

by the petitioner. Id., 831 n.1. Our Supreme Court affirmed the judgment of the habeas court. Id., 837.

On March 28, 2012, the petitioner filed a third habeas action, which underlies the present appeal. In his second amended petition for a writ of habeas corpus, the petitioner claimed that his right to a fair trial, under the state and federal constitutions, was violated. He alleged that an attorney from the Office of the State's Attorney for the judicial district of Hartford, Assistant State's Attorney Joan Alexander, initially prosecuted his criminal case before the court declared a mistrial on the basis that Alexander became a potential witness in the case. The petitioner alleged that the Office of the Chief State's Attorney, which prosecuted his case in the second trial, "should have disqualified itself from the case under the Rules of Professional Conduct, Rules 3.7, and 1.10, in essence, and the State's Attorney's Office for the judicial district of Hartford, and the Chief State's Attorney's Office, is a 'firm' for purposes of those rules, and that as a member of that firm was a potential witness in the case, that firm was disqualified from participation in the trial."[2]

[2] On May 30, 2014, the respondent filed a return, raising the affirmative defense of procedural default. In his reply, the petitioner asserted, as good cause for his failure to raise his claim at trial or on direct appeal, that "he, as a [self-represented] defendant, was unaware of the rules regarding attorney as witness conflicts, and disqualification, and that this claim, and the underlying claim of conflict, was not discovered by him until after his trial and direct appeal."

In its motion to dismiss, the respondent again raised procedural default as a ground for dismissal of this third action for a writ of habeas corpus. In its memorandum of decision dismissing the petition, the habeas court did not address the respondent's procedural default defense. The respondent argues on appeal that this court may affirm the judgment of dismissal on the alternative legal ground that the petitioner's claim is unreviewable because he failed to establish good cause for his failure to raise it earlier. We decline to reach the procedural default issue because the habeas court addressed the petitioner's claim on the merits and did not address expressly the issue of procedural default. See, e.g., *Crawford* v. *Commissioner of Correction*, 285 Conn. 585, 600 n.8, 940 A.2d 789 (2008) (declining to consider respondent's affirmative defense of procedural default in part because parties did not raise issue at habeas hearing and habeas court did not make any findings of fact or ruling on issue); *Giuca* v. *Commissioner of Correction*,

On May 30, 2014, the respondent filed a motion to dismiss the second amended habeas petition on the ground that the petition failed to state a claim upon which habeas relief could be granted. Specifically, the respondent argued that even if the original prosecutor was considered a necessary witness and disqualified under rule 3.7 of the Rules of Professional Conduct, the other attorneys in her office were not disqualified from litigating the case. The respondent further argued that rules 1.7, 1.9, and 1.10 of the Rules of Professional Conduct "govern conflicts of interest with current and former clients" and thus, "did not prohibit other prosecutors from [prosecuting] the petitioner's case." The petitioner filed an objection to the motion to dismiss, arguing that his claim was "more than a claim of an ethical violation, it is a prosecutorial misconduct claim, based upon an actual conflict of interest, which deprived the petitioner of a fair trial . . . ." He argued that the presence of the Office of the Chief State's Attorney in the case "had the chilling effect of preventing the [petitioner] from testifying, for concern that this 'firm' would call as a witness one of its own members to rebut the defense presented, by utilizing privileged information obtained before being disqualified for possessing this very same information."

In support of his claim, the petitioner submitted an affidavit from Assistant State's Attorney Alexander.

171 Conn. App. 619, 620 n.1, 157 A.3d 1189 (addressing merits of appeal when habeas court did not address expressly issue of procedural default as raised in return), cert. denied, 326 Conn. 903, 162 A.3d 726 (2017); *Gibson* v. *Commissioner of Correction*, 135 Conn. App. 139, 153 n.2, 41 A.3d 700 (determining that it need not reach procedural default issue in part because court did not rule on affirmative defense), cert. denied, 305 Conn. 922, 47 A.3d 881 (2012); *Brown* v. *Commissioner of Correction*, 92 Conn. App. 382, 383–84 n.1, 885 A.2d 761 (2005) (declining to address respondent's claim that judgment should be affirmed on alternative ground of procedural default in light of decision on merits of petitioner's appeal), cert. denied, 277 Conn. 908, 894 A.2d 989 (2006), appeal dismissed, 281 Conn. 466, 915 A.2d 870 (2007).

Alexander submitted answers under oath to questions propounded to her by the petitioner. In those answers, she stated that she served as an assistant state's attorney for the judicial district of Hartford and was the trial prosecutor in the case of *State* v. *Fernandez*, Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. CR-95-0478387-S. She stated that "the court declared a mistrial just before the evidence was about to commence," upon finding "that the [petitioner] would be denied effective assistance of counsel." She responded that she "did not prosecute the subsequent trial and [did] not recall any specific personal involvement." Alexander could not recall whether she was assigned to the Office of the Chief State's Attorney or the Office of the State's Attorney for the judicial district of Hartford during the time of the petitioner's second trial in May, 1998. Alexander also could not recall whether she testified in the petitioner's trial at that time. Alexander answered that she did discuss the case with Domenick Galluzzo, Deputy Chief State's Attorney. The petitioner's final question asked: "[D]id any of those discussions include discussion of any matters discussed with Rafael Fernandez, himself, while he was acting as his own counsel in the first trial?" Alexander responded: "Not to my recollection."

The court held argument on the respondent's motion to dismiss the petition on August 13, 2014. In its memorandum of decision issued on December 3, 2014, the court granted the respondent's motion. The court noted at the outset that the petitioner based "the entirety of his claim on the . . . Rules of Professional Conduct governing attorney-client relations." Noting that "there is no claim that there was ever any attorney-client relationship between the trial prosecutors and the petitioner," the court stated that "[t]he petitioner seeks the creation of a new rule based on an unreasonable

interpretation of two of the Rules of Professional Conduct and a failure to harmonize those two rules with the Rules of Professional Conduct as a whole." As to the claim that the disqualification of Alexander required disqualification of all of the state's attorney's offices and the Office of the Chief State's Attorney, the court, citing *Anderson* v. *Commissioner of Correction*, 127 Conn. App. 538, 546, 15 A.3d 658 (2011), aff'd, 308 Conn. 456, 64 A.3d 325 (2013), noted well settled case law that "the Rules of Professional Conduct do not impute conflicts between associated government attorneys."

The court concluded by stating: "In truth, the petitioner is attempting to assert a claim of ineffective assistance of counsel against himself and disguise it as prosecutorial misconduct based on a conflict of interest. No habeas relief is available to him on these facts and bases." The court dismissed the petition on the ground that it failed to state a cause of action upon which relief can be granted. On December 18, 2014, the court granted the petitioner's petition for certification to appeal. This appeal followed.

On appeal, the petitioner claims that the habeas court erred in granting the respondent's motion to dismiss. First, he argues that "the disqualification of the trial prosecutor's office, the judicial district of Hartford, should have resulted in the disqualification of the [Office of the Chief State's Attorney], as those offices are part of the same law firm, for the purposes of conflict of interest rules . . . ." He argues that the failure of the Office of the Chief State's Attorney to disqualify itself constituted prosecutorial misconduct. Second, he argues that "the trial prosecutor's obtaining of privileged information during pretrial negotiations and discussions with the petitioner while he was acting pro se, threatened testimony regarding inconsistent statements and defenses at the subsequent trial, and disclosure of that information to the successor counsel from the

[Office of the Chief State's Attorney], further violated the conflict of interest rules . . . ." Specifically, he argues that he was prevented from testifying regarding his defense of self-defense because he feared Alexander would testify regarding prior inconsistent statements he made to her, including that he was not present at the time the crime occurred.[3] We conclude that the petition failed to state a claim upon which habeas relief can be granted. Specifically, the petitioner cannot assert, on the facts alleged, a claim for relief under the Rules of Professional Conduct and, thus, the habeas court properly dismissed his habeas petition.

We first set forth our standard of review. "The standard of review of a motion to dismiss is . . . well established. In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The conclusions reached by the [habeas] court in its decision to dismiss the habeas petition are matters of law, subject to plenary review. . . . Thus, [w]here the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *Abdullah* v. *Commissioner of Correction*, 123

[3] In his appellate brief, the petitioner represents that, in pretrial discussions with Alexander, he had "stat[ed] a defense denying his presence at the crime scene." This description of his statement to Alexander is consistent with the representations made by counsel for the petitioner during the hearing before the habeas court on the motion to dismiss. The respondent's counsel stated during the hearing that "I don't think anyone in this room can testify as to what was actually said . . . in that pretrial negotiation . . . . I mean, at this point I think we're all just hypothesizing what could've possibly been said." We note that there were no factual findings made regarding the content of the statements the petitioner made to Alexander. Because we conclude that the petitioner cannot assert a claim for relief under the Rules of Professional Conduct, for purposes of our review, we assume that the petitioner's statement, in substance, was as represented.

Conn. App. 197, 201, 1 A.3d 1102, cert. denied, 298 Conn. 930, 5 A.3d 488 (2010).

The petitioner's claim on appeal challenges the habeas court's interpretation and application of the Rules of Professional Conduct, which requires plenary review. "Given that the Rules of Professional Conduct appear in our Practice Book, and given that [t]he interpretive construction of the rules of practice is to be governed by the same principles as those regulating statutory interpretation . . . we employ our well established tools of statutory construction to determine the term's meaning.

"The interpretation and application of a statute, and thus a Practice Book provision, involves a question of law over which our review is plenary. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case . . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [we] consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . We recognize that terms in a statute are to be assigned their ordinary meaning, unless

context dictates otherwise . . . .'' (Citation omitted; internal quotation marks omitted.) *Helmedach* v. *Commissioner of Correction*, 168 Conn. App. 439, 459–60, 148 A.3d 1105 (2016), aff'd, 329 Conn. 726, 189 A.3d 1173 (2018).

The petitioner's first argument is that Alexander's alleged disqualification should have resulted in the disqualification of the Office of the Chief State's Attorney because all state's attorney's offices are part of the same law firm for purposes of the conflict of interest rules. We disagree that the principle of imputed disqualification applies in this matter.

We first set forth the relevant language of the Rules of Professional Conduct in effect at the time of the petitioner's trial.[4] Rule 1.7 (a) of the Rules of Professional Conduct provided: ''A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and (2) Each client consents after consultation.'' Rule 1.7 (b) of the Rules of Professional Conduct provided: ''A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) The client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.'' Rule 1.10 (a) of the Rules of Professional Conduct, on which the petitioner relied in his second

[4] All references in this opinion to the Rules of Professional Conduct are to the rules in effect at the time of the petitioner's trial in May, 1998, unless otherwise noted.

amended petition, stated: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 (c), 1.9 or 2.2."[5] Rules 1.10 and 1.11 of the Rules of Professional Conduct were amended, effective January 1, 2007, and the revisions "adopted the express distinction that conflicts are not imputed between current government employees."[6] *Anderson* v. *Commissioner of Correction*, supra, 127 Conn. App. 546, 548–49 ("[R]ules of Professional Conduct do not require the imputation of conflicts of interest among public defenders working in the same office on the basis of reasoning that they are members of the same firm").

Rule 3.7 (a) of the Rules of Professional Conduct, on which the petitioner also relied in his habeas petition, provides: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the lawyer would work substantial hardship on the client." Rule 3.7 (b) provided that "[a]

[5] The commentary to rule 1.10 of the Rules of Professional Conduct defined "firm" to include "lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization."

[6] The current version of "[r]ule 1.10 (d) of the Rules of Professional Conduct provides: 'The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.' Rule 1.11 (d), in turn, subjects current government lawyers to rules 1.7 and 1.9, regarding personal conflicts of interest, but does not provide for the imputation of conflicts. Rather, the commentary to rule 1.11 emphasizes that 'Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule' and explains that '[b]ecause of the special problems raised by imputation within a government agency, *subsection (d)* [*of rule 1.11*] *does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees*, although ordinarily it will be prudent to screen such lawyers. . . .' (Emphasis added.) Rules of Professional Conduct 1.11, commentary." (Emphasis in original.) *Anderson* v. *Commissioner of Correction*, supra, 127 Conn. App. 545.

lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."

Rule 1.7 of the Rules of Professional Conduct governs a lawyer's representation of a client where representation of that client "will be directly adverse to another client" or may "be materially limited by the lawyer's responsibilities to another client . . . ." In the present case, the habeas court noted that the petitioner had not alleged an attorney-client relationship between himself and any of the prosecutors involved in his criminal case. The habeas court found that "only an adversarial relationship existed between the parties." The petitioner does not challenge this finding on appeal. Thus, rule 1.7, which addresses conflicts of interest arising out of the representation of clients, is inapplicable.

Rule 1.10 (a) of the Rules of Professional Conduct, which addresses imputation of conflicts, provided that the other lawyers in a firm cannot represent a client when any one of them would be prohibited from doing so by rule 1.7, which governs general conflicts; rule 1.8 (c), which prohibits the preparation of an instrument giving the lawyer any substantial gift from a client; rule 1.9, which governs former clients; or rule 2.2, which governs a lawyer's action as an intermediary between clients. Because none of the enumerated rules applied to prohibit Alexander's participation in the petitioner's case, rule 1.10 (a) would not prohibit the other lawyers in her firm from participating in the case. In other words, there was no conflict to be imputed to all of the state's attorney's offices and the Office of the Chief State's Attorney.[7]

[7] Because there was no conflict to be imputed, we need not address whether the amendments to rules 1.10 and 1.11 of the Rules of Professional Conduct subsequent to the petitioner's criminal trial, which adopted the distinction that conflicts are not imputed between current government employees, necessitate the conclusion that the version of rule 1.10 in effect at the time of the petitioner's trial would have required that any conflict be

Additionally, even if the Office of the Chief State's Attorney and the Office of the State's Attorney for the judicial district of Hartford were considered one "firm," absent the specific conflict situations addressed in rules 1.7 or 1.9, rule 3.7 did not prohibit a lawyer in the Office of the Chief State's Attorney from trying a case in which another lawyer in the "firm" was likely to be called as a witness. Because rules 1.7 and 1.9 did not preclude Alexander's participation in the petitioner's case, there was no disqualification to be imputed pursuant to rule 3.7.[8] Accordingly, neither rule 1.10 nor rule 3.7 of the Rules of Professional Conduct required disqualification of the attorneys in all of the state's attorney's offices and the Office of the Chief State's Attorney.

The petitioner's second argument is that the prosecutors violated rule 3.8 of the Rules of Professional Conduct, which sets forth the special responsibilities of prosecutors.[9] Specifically, he emphasizes that "the trial

imputed and whether that imputation would extend beyond the attorneys in all of the state's attorney's offices to the Office of the Chief State's Attorney.

[8] In his appellate brief, the petitioner recognizes that "[c]learly, [rule] 1.7 [of the Rules of Professional Conduct], speaking of current clients, and [rule] 1.9 [of the Rules of Professional Conduct] speaking of former clients, are also inapplicable to this case." Instead, he argues that "[the] issue in this case is more analogous to the Code of Judicial Conduct, Rule 2.11 (a) . . . ." Citing the current version of the Code of Judicial Conduct provision governing the circumstances under which a judge shall disqualify himself, the petitioner provides no authority for the application of that provision to the attorneys of all of the state's attorney's offices and the Office of the Chief State's Attorney. Further, the application section of the current Code of Judicial Conduct states that the code's provisions "apply to all judges of the Superior Court, senior judges, judge trial referees, state referees, family support magistrates . . . and family support magistrate referees."

[9] Rule 3.8 of the Rules of Professional Conduct provided, in relevant part, that "[t]he prosecutor in a criminal case shall (2) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; [and] (3) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing . . . ." The commentary to that rule stated that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice . . . ." Rules of Professional Conduct 3.8, commentary.

prosecutor's obtaining of privileged information during pretrial negotiations and discussions with the petitioner while he was acting pro se, threatened testimony regarding inconsistent statements and defenses at the subsequent trial, and disclosure of that information to the successor counsel from the [Office of the Chief State's Attorney] further violated the conflict of interest rules . . . ." He argues that "the trial prosecutor did not honor her responsibility to treat the petitioner fairly, in obtaining the information absent a valid waiver of his constitutional rights, if she viewed the petitioner solely as a party, or, in threatening to testify using that information, if she viewed the petitioner as counsel, knowing such communications are privileged." We disagree.

Because the petitioner's argument is predicated on Alexander's receipt of privileged information from the petitioner, the lack of an attorney-client relationship between the petitioner and Alexander is dispositive. The petitioner provides no basis for any conclusion that the petitioner's statements to Alexander during plea discussions were privileged. Although the petitioner characterizes his communications with Alexander as privileged, he has not alleged any relationship beyond an adversarial one and, consequently, has identified no privilege existing under statutory or common law that may have attached to his statements. Cf. *Hardison* v. *Commissioner of Correction*, 152 Conn. App. 410, 418, 98 A.3d 873 (2014) ("[Our Supreme Court has] recognized that the attorney-client privilege was created to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observation of law and the administration of justice" [internal quotation marks omitted]).[10]

[10] Moreover, we note that although Alexander answered that she had discussed the petitioner's case with Galluzzo, as to whether any of her discussions with Galluzzo "include[d] discussion of any matters discussed with [the petitioner] himself, while he was acting as his own counsel in the

Furthermore, the petitioner's argument that Alexander's potential testimony regarding the then self-represented petitioner's statements made during plea discussions would have been inadmissible and that the threat of Alexander's testimony "effectively prevent[ed] the [petitioner] from testifying in his own defense" is entirely speculative. The petitioner's counsel recognized during oral argument before this court that the petitioner could have filed a motion in limine to obtain a ruling regarding the admissibility of Alexander's potential testimony. In light of his failure to seek such a ruling, we will not speculate whether Alexander could have provided admissible evidence in the petitioner's criminal trial or whether the petitioner's decision to refrain from testifying in his defense was due to Alexander's potential testimony.[11] See *Ramos* v. *Commissioner of Correction*, 172 Conn. App. 282, 320, 159 A.3d 1174 ("[b]ecause this court is constrained to evaluating demonstrable realities, we will not engage in mere speculation" [internal quotation marks omitted]), cert. denied, 327 Conn. 904, 170 A.3d 1 (2017); *Grant* v. *Commissioner of Correction*, 121 Conn. App. 295, 303–304, 995 A.2d 641 ("[i]n a habeas corpus proceeding, the petitioner's burden of proving that a fundamental

first trial," she answered, "[n]ot to my recollection." Thus, there was no evidence before the habeas court that Alexander had shared the allegedly privileged information with Galluzzo.

The petitioner argues, however, that the mere discussion of the case between Alexander and Galluzzo constituted an impermissible breach of a "Chinese Wall" required pursuant to *State* v. *Jones*, 180 Conn. 443, 457, 429 A.2d 936 (1980), overruled in part on other grounds by *State* v. *Powell*, 186 Conn. 547, 442 A.2d 939, cert. denied sub nom. *Moeller* v. *Connecticut*, 459 U.S. 838, 103 S. Ct. 85, 74 L. Ed. 2d 80 (1982). *Jones* is wholly distinguishable from and inapplicable to the present case, however, in that unlike the defendant in *Jones*, the petitioner has not alleged any attorney-client relationship between himself and any prosecutor affiliated with any of the state's attorney's offices or the Office of the Chief State's Attorney.

[11] The respondent does not concede that Alexander's potential testimony would have been inadmissible and instead argues that the state "would not necessarily have been precluded from calling Alexander for impeachment purposes had [the] petitioner testified."

unfairness had been done is not met by speculation . . . but by demonstrable realities" [internal quotation marks omitted]), cert. denied, 297 Conn. 920, 996 A.2d 1192 (2010).

We conclude that the petitioner's habeas petition fails to state a claim upon which habeas corpus relief can be granted and, thus, the habeas court properly dismissed the habeas petition.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 193

BANK OF AMERICA, NATIONAL ASSOCIATION
v. FABIOLA DERISME ET AL.
(AC 41476)

Alvord, Moll and Norcott, Js.

Argued September 19—officially released October 22, 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.

U.S. BANK TRUST, N.A., TRUSTEE
v. TARA THEODORE ET AL.
(AC 41952)

Lavine, Devlin and Harper, Js.

Submitted on briefs September 18—officially released October 22, 2019

Appeal by the defendant Danielle Caciopoli from the Superior Court in the judicial district of Fairfield, *Hon. Alfred J. Jennings, Jr.*, judge trial referee.

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

MICHAEL LABARGE *v.* COMMISSIONER OF CORRECTION
(AC 41972)

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

Argued October 7—officially released October 22, 2019

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

Per Curiam. The appeal is dismissed. See *Cancel* v. *Commissioner of Correction*, 189 Conn. App. 667, 681, 208 A.3d 1256 ("it is well established that where the evidence in one case is cross admissible at the trial of another case, the defendant will not be substantially prejudiced by joinder"), cert. denied, 332 Conn. 908, 209 A.3d 644 (2019).

CITY OF NEW HAVEN *v.* RALPH FERRUCCI ET AL.
(AC 39562)

Keller, Bright and Flynn, Js.

Argued October 9—officially released October 22, 2019

Named defendant's appeal from the Superior Court in the judicial district of New Haven, *Avallone*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

DANIEL W. E. *v.* COMMISSIONER OF CORRECTION
(AC 41715)

Alvord, Prescott and Sullivan, Js.

Argued October 10—officially released October 22, 2019

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

Per Curiam. The judgment is affirmed.

SPENCER LAMPERT *v.* SHARI LAMPERT
(AC 41604)

Keller, Elgo and Bright, Js.

Argued October 11—officially released October 22, 2019

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Michael E. Shay*, judge trial referee.

Per Curiam. The judgment is affirmed.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 193

(Replaces Prior Cumulative Table)

Alpha Beta Capital Partners, L.P. *v.* Pursuit Investment Management, LLC 381
Contracts; breach of implied covenant of good faith and fair dealing; conversion; statutory theft (§ 52-564); Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.); claim that trial court improperly interpreted agreements between parties when it concluded that plaintiff prevailed on its breach of contract claim; claim that trial court improperly rejected defendants' breach of contract counterclaim; claim that trial court erroneously found that defendants' prior partial delayed payment of certain claim to plaintiff relieved plaintiff from its obligations under confidentiality provision; claim that trial court improperly concluded that plaintiff prevailed on its breach of implied covenant of good faith and fair dealing claim because neither limited partnership agreement nor settlement agreement mandate that defendants remit entirety of plaintiff's proportionate share of certain litigation proceeds; claim that trial court improperly concluded that plaintiff could not prevail on its conversion claim; claim that trial court improperly granted motion to strike Connecticut statutory causes of action for statutory theft and violation of CUTPA on ground that those claims were barred by choice of law provision in settlement agreement; claim that all of defendants should be held liable to plaintiff for claims of breach of contract and implied covenant of good faith and fair dealing pursuant to piercing corporate veil or alter ego theory, and that trial court improperly declined to consider these theories despite fact that they had been pleaded and briefed; whether trial court improperly interpreted settlement agreement to conclude that all defendants who were signatories to settlement agreement were liable for nonpayment of certain litigation proceeds to plaintiff; claim that trial court erroneously determined amount of damages awarded to plaintiff; claim that trial court improperly granted motion to increase amount of prejudgment remedy because filing of appeal, without more, did not constitute sufficient basis for court to modify, pursuant to statute (§ 52-278k), existing prejudgment remedy; unpreserved claim that trial court improperly granted motion for postjudgment discovery in connection with court's upward modification of prejudgment remedy amount.
Autumn View, LLC *v.* Planning & Zoning Commission 18
Zoning; affordable housing statute (§ 8-30g); whether Superior Court erred in concluding that plaintiffs' application for affordable housing development filed following remand was not new application; claim that plaintiffs' remand application was beyond scope of remand order; claim that record supported denial of revised and resubmitted application on ground that application failed to comply with town zoning regulations and was necessary to protect health and safety.
Ayres *v.* Ayres 224
Dissolution of marriage; motion for contempt; alimony; whether trial court improperly interpreted provision in parties' separation agreement governing alimony to conclude that payment of long-term incentives, including restricted stock units and performance stock units, received from employer were to be included within alimony calculation; claim that trial court erred in ordering defendant to include all past and future restricted stock unit payments in calculation of gross income under alimony provision; claim that alimony exclusion for stock excluded only nonperformance based awards of stock; claim that court erred in finding that performance based units are not stock; whether court erred in finding that severance payment to defendant was includable within alimony calculation as base pay or performance based bonus.
Bank of America, National Assn. *v.* Derisme (Memorandum Decision) 903
Barber *v.* Barber 190
Dissolution of marriage; motion to modify child support; motion for contempt; motion for attorney's fees and costs; claim that trial court improperly rewrote parties' separation agreement by issuing order directing manner in which parties

were to proceed to resolve their dispute regarding basic child support, including how to calculate amount of basic child support defendant owed plaintiff; whether trial court's inclusion of term adjusted gross income in its order rewrote agreement; whether plaintiff demonstrated that she was harmed by subject order; reviewability of claim that trial court erred by failing to award plaintiff attorney's fees and costs to defend against defendant's alleged attempt to invalidate agreement with respect to law applicable to motion to modify child support; claim that trial court erred by failing to award plaintiff attorney's fees pursuant to default provision of parties' agreement; whether plaintiff's motion for contempt regarding children's add-on expenses was successful; whether claim on cross appeal that because defendant had registered New York dissolution judgment in Connecticut pursuant to applicable statute (§ 46b-71), trial court improperly concluded that New York law, rather than Connecticut law, applied to defendant's motion to modify was moot; whether there was no practical relief that could be afforded to parties.

Boccanfuso *v.* Daghoghi 137

Summary process; claim that trial court applied incorrect legal standard in determining that defendants failed to prove their special defense of equitable nonforfeiture; whether court abused its discretion in applying doctrine of equitable nonforfeiture; whether trial court erred in finding that plaintiffs were unaware of contamination at property until after July 1, 2014; harmless error; reviewability of claim that trial court abused its discretion in finding that defendants failed to prove their special defenses of unjust enrichment and violation of implied covenant of good faith and fair dealing; whether trial court abused its discretion by not granting defendants' request for continuance so witness could testify.

Colon-Collazo *v.* Cox 251

Property execution; exemption; action to obtain satisfaction of civil dissolution judgment; whether trial court erred in determining that certain property was exempt from execution where no exemption claim form was filed as required by statute (§ 52-361b [d]); whether there was sufficient evidence to determine certain property should be exempt from execution.

Commerce Park Associates, LLC *v.* Robbins. 697

Contracts; landlord-tenant; negligence; claim that trial court improperly awarded landlord additional rent for period between November, 2014, through third full week of April, 2015, on basis of its implicit factual finding that premises were fully tenantable during that period and, therefore, that landlord was entitled to receive full amount of rent due under lease, rather than partial payments tendered by tenant; whether there was evidence in record supporting trial court's calculation of back rent owed by tenant; claim that trial court improperly found that tenant was constructively evicted from premises as result of serious and frequent sewer backups; whether record supported trial court's finding that tenant did not vacate premises before landlord had notice and reasonable opportunity to correct problems with building's sewer system; claim that trial court improperly awarded compensatory damages to tenant on theory of gross negligence because Connecticut common law does not recognize degrees of negligence or cause of action sounding in gross negligence; claim that it was improper for trial court to have awarded damages on basis of gross negligence because it was never pleaded by tenant; claim that trial court improperly determined amount of damages awarded to tenant by incorrectly determining that proper measure of tenant's damages was its loss of beneficial use of substantial improvements it had made to premises prior to constructive eviction and that court should have, instead, limited its award of damages to loss of fair market value of lease; whether trial court miscalculated amount of damages awarded to tenant for loss of beneficial use of substantial improvements tenant had made to premises.

Cordero *v.* Commissioner of Correction (Memorandum Decision) 902

Daley *v.* Kashmanian 171

Negligence; claim that conduct of police detective while operating unmarked vehicle violated ministerial duty imposed on him by certain motor vehicle statutes; whether trial court improperly granted motion for directed verdict on count alleging recklessness; whether evidence, viewed in light most favorably to plaintiff, was sufficient for jury reasonably to conclude that detective acted recklessly; whether jury reasonably could have concluded that detective consciously disregarded state laws relating to speed limits, reckless driving, following too closely and traveling in correct lane of traffic, and that he was aware of risks and dangers his conduct imposed on others, yet showed little regard for consequences

of his actions; whether trial court properly set aside verdict in favor of plaintiff on negligence claim; whether circumstances surrounding conduct of detective demonstrated that he was engaged in discretionary activity for which he was entitled to governmental immunity.

Daniel W. E. *v.* Commissioner of Correction (Memorandum Decision) 905

Doan *v.* Commissioner of Correction 263

Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal; claim that petitioner's trial counsel rendered deficient performance by failing to investigate petitioner's mental health and to retain forensic psychologist to aid in mitigating sentence.

Doe *v.* Sulzicki (Memorandum Decision) 903

Echeverria *v.* Commissioner of Correction. 1

Habeas Corpus; claim that habeas court improperly denied petition for writ of habeas corpus; whether petitioner met burden to demonstrate prejudice resulting from trial counsel's allegedly deficient performance in failing to advise petitioner properly regarding immigration consequences of guilty plea.

Fernandez *v.* Commissioner of Correction 746

Habeas corpus; whether habeas court properly dismissed petitioner's third petition for writ of habeas corpus; whether petition failed to state claim upon which habeas relief could be granted; whether petitioner could assert claim for relief under Rules of Professional Conduct; claim that neither rule 1.10 nor rule 3.7 of Rules of Professional Conduct required disqualification of attorneys in all of state's attorney's offices and Office of Chief State's Attorney; whether petitioner provided basis for any conclusion that his statements to prosecutor during plea negotiations while petitioner was self-represented were privileged; whether claim that prosecutor's potential testimony regarding petitioner's statements would have been inadmissible and that prosecutor's testimony effectively prevented petitioner from testifying in his own defense was based on speculation.

Francini *v.* Riggione 321

Contracts; attorney's fees; claim that trial court abused its discretion in calculating award of attorney's fees; whether trial court abused its discretion by not discounting award of attorney's fees on account of small sum awarded to plaintiffs for breach of contract claims; claim that proper analysis of factors listed in rule 1.5 (a) of Rules of Professional Conduct would compel a significant downward departure from plaintiffs' initial lodestar calculation because damages awarded were insignificant in relation to court's award of attorney's fees; whether plaintiffs had legitimate claim for attorney's fees pursuant to contract; whether trial court abused its discretion in awarding attorney's fees with respect to private nuisance claim on which plaintiffs did not prevail; whether party may recover attorney's fees for unsuccessful claims that are inextricably intertwined and involve common basis in fact or legal theory with successful claims; whether private nuisance and breach of contract claims were factually and legally distinct and were inextricably intertwined or based on common legal theory.

Goldstein *v.* Hu (Memorandum Decision) 903

Jezouit *v.* Malloy. 576

Sovereign immunity; action concerning alleged illegal recording of telephonic communications by state officials; whether trial court properly granted motion to dismiss complaint on ground of sovereign immunity; claim that only possible interpretation of statute (§ 52-570d) pertaining to recording of telephonic communications was that it impliedly waived sovereign immunity because it authorized an aggrieved person to bring action in Superior Court; claim that because § 52-570d (b) exempted from liability certain state officials, by necessary implication, it waived sovereign immunity from suit for state officials not so designated, such as defendants; claim that dismissal of complaint was improper because trial court failed to apply exception to sovereign immunity for claims of declaratory and injunctive relief.

Kelly *v.* Kurtz. 507

Contracts; whether trial court abused its discretion in denying motion to set aside jury's verdict on counts alleging breach of supplementary agreement and breach of implied covenant of good faith and fair dealing; claim that evidence was insufficient to prove that plaintiff was terminated or prevented from working scheduling of his own choosing; claim that verdict was inconsistent; whether trial court abused its discretion in setting aside jury's verdict on claims that defendants invaded plaintiff's privacy by misappropriating his name after he was terminated, of tortious interference with business expectancies, of alleged

violations of Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.), and of unjust enrichment; whether plaintiff failed to prove that he suffered any damages as result of defendants' use of his name; whether plaintiff failed to prove that he suffered actual loss as result of defendants' alleged interference with his business expectancies or that he suffered any ascertainable loss as result of alleged CUTPA violations; whether plaintiff could recover under theory of unjust enrichment where he recovered under theory of breach of contract; whether plaintiff lacked standing to bring claims relating to breach of operating agreement.

King *v.* Commissioner of Correction 61

Habeas corpus; claim that habeas court improperly concluded that petitioner failed to establish that he had received ineffective assistance from his trial counsel; whether trial counsel provided ineffective assistance by not objecting to trial court's jury instructions or requesting additional jury instruction regarding difference between intent elements of assault charges against petitioner; whether trial counsel provided ineffective assistance by declining to object to admission of police detective's written summary of petitioner's oral account of incident; whether trial counsel's strategic decision to allow written summary into evidence was reasonable; whether there was not reasonable probability that outcome of trial would have been different if written summary had been excluded; whether habeas court reasonably concluded that petitioner failed to prove that he was prejudiced by trial counsel's failure to request trial court to place its rejection of his plea agreement on record; whether there was reasonable probability that outcome of criminal proceedings would have been different if trial counsel had requested trial court to place its rejection of plea on record; claim that habeas court improperly dismissed claim that trial court violated petitioner's right to due process by not stating on record its reasons for rejecting plea agreement; whether petitioner was harmed by absence of record of rejection of plea agreement.

Kirby *v.* Commissioner of Correction 902

Klein *v.* Quinnipiac University 469

Negligence; premise liability action; claim that trial court erred by declining to instruct jury on definition of, and duty owed to, licensee; whether evidence sufficient to support conclusion that plaintiff was licensee; whether defendant private university explicitly or implicitly expressed desire that plaintiff enter its campus or willingness that he do so; claim that defendant impliedly gave plaintiff consent to ride his bicycle on campus because there was lack of no trespassing signs and no gate at each entrance to campus; whether lack of no trespassing signs or gate, without some additional evidence demonstrating implied consent, was insufficient to send question of whether plaintiff was licensee to jury; whether evidence supported finding that defendant breached duty to plaintiff as licensee; whether defendant was required to warn plaintiff of obvious dangers of his actions; whether general verdict rule precluded review of plaintiff's remaining evidentiary claim, which related only to special defense of contributory negligence.

Labarge *v.* Commissioner of Correction (Memorandum Decision) 904

Lampert *v.* Lampert (Memorandum Decision) 905

Meribear Productions, Inc. *v.* Frank 598

Foreign judgment; breach of contract; quantum meruit; final judgment; motion to dismiss appeal as untimely; motion for permission to file late appeal; whether twenty day time limit for filing appeal pursuant to applicable rule of practice (§ 63-1) is subject matter jurisdictional; whether good cause existed to allow defendants' appeal to proceed.

New Haven *v.* Ferrucci (Memorandum Decision) 905

Peek *v.* Manchester Memorial Hospital 337

Negligence; motion for summary judgment; claim that trial court improperly granted motion for summary judgment and determined that action was barred by applicable statute of limitations (§ 52-584); whether statute of limitations was tolled by continuous course of treatment doctrine; whether evidence before trial court demonstrated genuine issue of material fact as to when plaintiff discovered injury as contemplated by § 52-584.

Putnam Park Apartments, Inc. *v.* Planning & Zoning Commission 42

Zoning; whether trial court improperly determined that zoning regulations permitted building to be located less than 100 feet from property line; whether trial court improperly determined that building proposal was consistent with zoning regulations; whether certain zoning regulation applied to special permit application.

R & P Realty Co. *v.* Peerless Indemnity Ins. Co. 374
Contracts; reviewability of claim that trial court erroneously concluded that defendant did not breach insurance policy by declining to cover increased demolition costs resulting from presence of asbestos and lead in building; reviewability of claim that trial court improperly found that increased demolition costs constituted replacement costs, rather than being component of actual cash value of plaintiffs' loss, and that plaintiffs failed to provide reasonable notice to defendant of claim seeking recovery for increased demolition costs; failure of plaintiffs to provide adequate record for review.
Robbins Eye Center, P.C. *v.* Commerce Park Associates, LLC (See Commerce Park Associates, LLC *v.* Robbins) 697
Simms *v.* Commissioner of Correction 901
Soto *v.* Christians Alliance, Inc. 901
State *v.* Bryan 285
Murder; conspiracy to commit murder; whether trial court abused its discretion by admitting into evidence as dual inculpatory statements under applicable rule of evidence (§ 8-6 [4]), statements that defendant's accomplice made to friend of accomplice about victim's murder; claim that accomplice's statements to friend of accomplice were inadmissible as dual inculpatory statements because they sought to shift blame for victim's murder to defendant; claim that accomplice's statements to friend of accomplice were not against accomplice's penal interest; whether trial court correctly concluded that accomplice's statements to friend of accomplice were trustworthy; unpreserved claim that state failed to disclose to defendant, in violation of Brady *v.* Maryland *(373 U.S. 83), certain police internal affairs records that concerned allegations of prior misconduct by detective who investigated murder; whether police internal affairs records were material to outcome of defendant's trial.*
State *v.* Cane 95
Criminal possession of firearm; criminal possession of ammunition; possession of controlled substance with intent to sell; whether trial court erroneously denied motion to suppress evidence police seized from defendant's home and car; claim that trial court improperly found that warrantless search of defendant's home by police after he was arrested and in police custody constituted justifiable, protective sweep of defendant's home; reviewability of unpreserved claims that defendant was constructively seized by police and that they lacked probable cause to search his car; whether information in affidavit of police officer in support of warrant application provided basis for determination that probable cause existed to search defendant's vehicle; unpreserved claim that trial court committed plain error when it granted state's motion for joinder, where defendant, personally and through counsel, expressly stated that he had no objection to joinder; unpreserved claim of judicial bias; whether reversal of judgment was warranted under plain error doctrine where defendant claimed that trial court, in pretrial memorandum of decision on motion to suppress, had found him guilty of kidnapping and assault charges as to certain individuals it referred to as victims and then considered those charges in sentencing him.
State *v.* Crewe 564
Possession of narcotic substance; claim that there was insufficient evidence to support conviction; whether jury reasonably could have inferred from evidence that defendant knew of presence of narcotics in van, exercised dominion and control over at least some of narcotics and, thus, constructively possessed narcotics.
State *v.* Gomes 79
Assault in second degree; whether trial court deprived defendant of right to present defense of investigative inadequacy when it omitted from its jury instructions certain language in defendant's written request to charge that pertained to alleged inadequacy of police investigation as it might relate to weaknesses in state's case.
State *v.* Lynch 637
Operating motor vehicle while under influence of intoxicating liquor; failure to appear in second degree; criminal trespass in first degree; motion to withdraw guilty pleas; whether trial court abused its discretion in failing to conduct evidentiary hearing with respect to motion to withdraw guilty pleas; whether defendant failed to provide adequate factual basis to support further hearing; whether defense counsel's assertion that plea canvass was deficient for failing to specify that defendant's driver's license could be revoked permanently was reason among grounds enumerated in applicable rule of practice (§ 39-27) for withdrawal of plea; claim that trial court should have granted motion to withdraw guilty pleas,

pursuant to § 39-27, on ground that defense counsel was ineffective; whether trial court abused its discretion by failing to conduct evidentiary hearing prior to terminating defendant's participation in alcohol education program.

State *v.* Palumbo 457

Sexual assault in first degree; sexual assault in fourth degree; risk of injury to child; claim that questions referring to trial as being first time that defendant mentioned that other people were in same area during hike where he alleged sexually abused minor victim violated his constitutional right to remain silent pursuant to Doyle *v.* Ohio *(426 U.S. 610), by introducing evidence of his post-*Miranda *silence; claim that questions that sought to elicit evidence of defendant's post-*Miranda *silence amounted to prosecutorial impropriety that violated his due process right to fair trial; whether defendant's unpreserved* Doyle *claim failed under third prong of* State *v.* Golding *(213 Conn. 233).*

State *v.* Shin 348

Interfering with officer; disorderly conduct; reviewability of claim that defendant's arrest and seizure by police was illegal, where claim was raised for first time in reply brief, defendant never moved to suppress evidence, and trial court did not make any factual findings or legal conclusions regarding whether any evidence was illegally seized; claim that evidence was insufficient to support conviction because police officers' testimony was fabricated; reviewability of claim that trial court improperly admitted testimony from police officers about statements defendant made in Internet video he had posted; whether defendant failed to secure finalized, specific ruling as to testimony of officers; whether trial court abused its discretion when it denied defendant's request to excuse prospective juror for cause during voir dire; unpreserved claim that trial court violated defendant's state constitutional right to compulsory process when it denied request to issue subpoena to rabbi from out of state; reviewability of claim that trial court improperly found defendant incompetent to stand trial before it later determined that he was competent to stand trial; whether claim that trial court violated defendant's constitutional right to travel when it imposed as term of conditional discharge special condition that he stay out of Connecticut for two years was moot; whether claim that trial court violated defendant's constitutional right to travel was not moot because it fell within collateral consequences exception to mootness doctrine.

Stiggle *v.* Commissioner of Correction (Memorandum Decision) 902

Thunelius *v.* Posacki 666

Child custody; guardian ad litem; child support; protective order; claim that trial court improperly delegated its decision-making authority to nonjudicial entity when it defined duties and responsibilities of guardian ad litem of parties' minor child; whether trial court abused its discretion in ordering that prevailing party in any postjudgment dispute adjudicated by court between parties after unsuccessful mediation with the guardian ad litem be reimbursed by other party for his or her share of guardian ad litem's fees; whether amount of any future fees and parties' respective financial capacities to pay such fees was purely speculative; whether claim that trial court improperly appointed guardian ad litem without having complied with certain statutory requirements was moot; whether there was practical relief that this court could afford defendant; whether trial court abused its discretion in sua sponte issuing protective order; whether language of order clearly indicated that court intended order to function as protective order issued pursuant to Yontef *v.* Yontef *(185 Conn. 275); whether trial court abused its discretion in ordering parties to enroll child in private school through high school and to divide payments for that schooling; whether there was evidence of cost of private high school or that parties had ever agreed on child attending private high school; claim that trial court improperly relied on child support guidelines worksheet in issuing its child support orders; reviewability of claim that trial court, by failing to order plaintiff to reimburse defendant for certain expenses he allegedly should have paid in accordance with prior stipulation between parties, in effect, granted plaintiff retroactive modification of pendente lite orders to pay those expenses.*

U.S. Bank Trust, N.A. *v.* Theodore (Memorandum Decision) 904

Wager *v.* Moore 608

Negligence; claim that trial court erred in denying motion to set aside verdict and for new trial; claim that there was insufficient evidence to support jury's finding of contributory negligence; claim that trial court erred in instructing jury on contributory negligence when instruction was not supported by evidence; claim

that trial court failed to instruct jury on law essential to plaintiff's claim regarding defendant's negligence; claim that once trial court instructed jury on pedestrian's duties pursuant to relevant statutes (§§ 14-300b [a] and 14-300c [b]), its refusal to charge jury on countervailing duties driver owes to pedestrians pursuant to relevant statutes (§§ 14-300d and 14-300i) constituted error; claim that improper hearsay evidence was introduced against plaintiff during videotaped deposition testimony of defendant's toxicology expert.

Water Pollution Control Authority *v.* McKinley 901

Weston Street Hartford, LLC *v.* Zebra Realty, LLC 542

Easements; temporary and permanent injunction; counterclaim; whether trial court properly rendered judgment for plaintiff on counts of defendant's counterclaim relating to its request to relocate plaintiff's right-of-way easement over defendant's property; difference between unilateral modification of easement and unilateral relocation of easement, discussed; claim that trial court improperly rendered judgment in defendant's favor on plaintiff's complaint and denied plaintiff's request for injunctive relief; whether trial court applied correct standard of law in determining whether plaintiff was entitled to injunctive relief; whether court abused its discretion in denying plaintiff's request for injunctive relief.

NOTICE

Notice of Reinstatement of Attorney

As Amanda R. Kronin has paid the Client Security Fund Fee, notice is hereby given that on October 3, 2019 she has been reinstated to the bar pursuant to Connecticut Practice Book Section 2-70(b).