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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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TREMONT PUBLIC ADVISORS, LLC *v.* CONNECTICUT RESOURCES RECOVERY AUTHORITY (SC 20119)

Robinson, C. J., and McDonald, Mullins, Kahn and Ecker, Js.

Syllabus

The plaintiff public affairs firm sought to recover damages from the defendant, a quasi-public agency responsible for providing solid waste disposal and recycling services to numerous Connecticut municipalities, alleging that it had engaged in certain anticompetitive practices by conducting a sham public bidding process in connection with its award of a contract for municipal government liaison services in violation of the Connecticut Antitrust Act (§ 35-24 et seq.). The defendant had issued a request for proposals for a multiyear liaison services contract. The plaintiff and B Co., a law firm that had provided the defendant with liaison services since 2006, were the only bidders for the contract, and, even though the plaintiff's bid complied with the request for proposals and B Co.'s did not, the defendant ultimately awarded the contract to B Co. The plaintiff alleged that the defendant had evaluated the bids in a biased manner to ensure that B Co. was awarded the contract, in violation of its own procurement policies and the competitive bidding statute (§ 22a-268) requiring the defendant to engage in open and competitive bidding for contracts with outside vendors. The plaintiff further alleged that the defendant awarded the contract to B Co. because B Co. carried out lobbying services on behalf of the defendant in violation of

the statute (§ 1-101bb) prohibiting quasi-public agencies such as the defendant from retaining lobbyists. In addition, the plaintiff alleged that the defendant's conspiracy with B Co. had reduced the number of competitors for the liaison services contract, had increased the price paid by the defendant for liaison services, resulting in higher costs for those municipalities that dealt with the defendant, and had adversely affected the quality of the defendant's services. The defendant moved to dismiss the plaintiff's operative complaint, claiming, inter alia, that the plaintiff lacked standing to bring the antitrust claim because it did not allege that it had suffered an antitrust injury and that it was an efficient enforcer of the antitrust laws. The defendant also moved to strike the complaint, contending that the plaintiff had failed to allege facts sufficient to demonstrate an antitrust violation. The trial court denied the motion to dismiss, concluding, inter alia, that the plaintiff had standing to bring an antitrust claim against the defendant on the basis of the defendant's alleged violation of a competitive bidding law pursuant to this court's decision in *Cheryl Terry Enterprises, Ltd.* v. *Hartford* (270 Conn. 619). The trial court, however, granted the defendant's motion to strike on the ground that the plaintiff had failed to allege an antitrust injury because its allegations were conclusory and there was no allegation that the defendant's conduct has an adverse effect on competition as a whole in the relevant market of which it is a member. The trial court further found that, to the extent that being an efficient enforcer of the antitrust laws is required to state a cognizable claim under Connecticut law, the plaintiff also failed to adequately plead that element. Thereafter, the trial court rendered judgment for the defendant, from which the plaintiff appealed and the defendant cross appealed. *Held* that the trial court correctly concluded that the plaintiff failed to sufficiently allege an antitrust injury, but, because the failure to allege an antitrust injury implicates the plaintiff's standing and, thus, a court's subject matter jurisdiction, the trial court should have granted the defendant's motion to dismiss rather than its motion to strike: this court relied on federal case law, in accordance with the legislative intent expressed in the Connecticut Antitrust Act (§ 35-44b), in concluding that, to have standing to bring a claim under that act, a plaintiff must adequately allege both that it has suffered an antitrust injury and that it is an efficient enforcer of the antitrust laws, and, because a claim that a plaintiff has failed to allege either of those elements implicates the trial court's subject matter jurisdiction, such a claim should be raised in a motion to dismiss; in the present case, although the plaintiff alleged that the defendant's conduct had the anticompetitive effects of reducing the quality of its services and increasing its prices, it failed to demonstrate that the defendant's conduct itself was anticompetitive, as an agreement to provide illegal lobbying services in exchange for the award of a public contract, which does not restrict a purchaser's freedom of choice or prevent other potential bidders from competing, does not

constitute a restraint of trade for purposes of antitrust law from which an antitrust injury could be inferred; moreover, because the plaintiff lacked standing as a result of its failure to allege an antitrust injury and the trial court therefore lacked subject matter jurisdiction, this court concluded that the form of the trial court's judgment, which was based on the granting of the defendant's motion to strike, was improper, and it vacated the granting of the motion to strike and remanded the case with direction to grant the defendant's motion to dismiss instead.

Cheryl Terry Enterprises, Ltd. v. *Hartford* (270 Conn. 619), to the extent that it suggests a plaintiff need not allege that it has suffered an antitrust injury to establish standing to pursue an antitrust claim, overruled.

Argued January 14—officially released November 12, 2019

Procedural History

Action to recover damages for, inter alia, the defendant's violation of state antitrust law, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Peck, J.*, denied the defendant's motion to dismiss and granted the defendant's motion to strike the second substituted complaint and rendered judgment thereon, from which the plaintiff appealed and the defendant cross appealed. *Improper form of judgment; vacated; judgment directed.*

Michael C. Harrington, with whom, on the brief, were *Melissa A. Federico* and *Sarah Gruber*, for the appellant-cross appellee (plaintiff).

Matthew C. Welnicki, for the appellee-cross appellant (defendant).

Opinion

ROBINSON, C. J. The primary issue that we must resolve in this appeal is whether allegations that a quasi-public agency engaged in a sham competitive bidding procedure and awarded a contract to a preselected entity for corrupt reasons and in violation of a competitive bidding statute are sufficient to support a claim that the agency violated the Connecticut Antitrust Act, General Statutes § 35-24 et seq. (antitrust act). The

plaintiff, Tremont Public Advisors, LLC, is a public affairs firm. The defendant, the Connecticut Resources Recovery Authority, is a quasi-public agency responsible for providing solid waste disposal and recycling services to numerous municipalities in this state pursuant to the Connecticut Solid Waste Management Services Act, General Statutes § 22a-257 et seq.[1] In 2011, the defendant issued a request for proposals for the provision of municipal government liaison services (liaison services). The plaintiff submitted a proposal that complied with the request for proposals, but the defendant awarded the liaison services contract to the law firm of Brown Rudnick, LLP (Brown Rudnick), whose proposal was noncompliant. Thereafter, the plaintiff brought this action alleging that the defendant's request for proposals was a sham and that the defendant had violated General Statutes § 22a-268,[2]

[1] In 2014, the legislature amended the Connecticut Solid Waste Management Services Act. See Public Acts 2014, No. 14-94 (P.A. 14-94). As part of the amendments, the legislature changed the name of the defendant to the Materials Innovation and Recycling Authority. See P.A. 14-94, § 1 (a), codified at General Statutes § 22a-261 (a).

[2] General Statutes § 22a-268 provides in relevant part: "The authority shall utilize private industry, by contract, to carry out the business, design, operating, management, marketing, planning and research and development functions of the authority, unless the authority determines that it is in the public interest to adopt another course of action. The authority is hereby empowered to enter into long-term contracts with private persons for the performance of any such functions of the authority which, in the opinion of the authority, can desirably and conveniently be carried out by a private person under contract provided any such contract shall contain such terms and conditions as will enable the authority to retain overall supervision and control of the business, design, operating, management, transportation, marketing, planning and research and development functions to be carried out or to be performed by such private persons pursuant to such contract. Such contracts shall be entered into either on a competitive negotiation or competitive bidding basis, and the authority in its discretion may select the type of contract it deems most prudent to utilize, pursuant to the contracting procedures adopted under section 22a-268a and considering the scope of work, the management complexities associated therewith, the extent of current and future technological development requirements and the best interests of the state. Whenever a long-term contract is entered into on other than a competitive bidding basis, the criteria and procedures therefor

which, according to the plaintiff, mandates a competitive bidding procedure for the liaison services contract. The plaintiff further alleged that the defendant's conduct excluded competitors for the liaison services contract in violation of the antitrust act. The defendant filed a motion to dismiss the second substituted complaint, claiming, inter alia, that the plaintiff lacked standing to bring the antitrust claim. The defendant also filed a motion to strike, claiming that, even if the plaintiff had standing, it had not adequately alleged that the defendant's conduct had an adverse effect on competition as a whole in the relevant market, proof of which is required to establish a violation of the antitrust act, but had alleged only that it had an adverse effect on the plaintiff itself. The trial court denied the motion to dismiss but granted the motion to strike and rendered judgment in favor of the defendant. This appeal by the plaintiff and cross appeal by the defendant followed.[3] We conclude that the plaintiff lacked standing to bring this action because it did not adequately allege an antitrust injury, and, therefore, the trial court improperly denied the defendant's motion to dismiss the second substituted complaint. Accordingly, we affirm the judgment in favor of the defendant.

The record reveals the following facts that are undisputed or that the plaintiff has alleged, which we assume

shall conform to applicable provisions of subdivision (16) of subsection (a) and subsections (b) and (c) of section 22a-266, provided however, that any contract for a period of over five years in duration, or any contract for which the annual consideration is greater than fifty thousand dollars shall be approved by a two-thirds vote of the authority's full board of directors. The terms and conditions of such contracts shall be determined by the authority, as shall the fees or other similar compensation to be paid to such persons for such contracts. The contracts entered into by the authority shall not be subject to the approval of any other state department, office or agency. . . ."

[3] The plaintiff appealed and the defendant cross appealed to the Appellate Court, and we transferred the appeal and cross appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

to be true for purposes of reviewing the trial court's denial of the defendant's motion to dismiss. See, e.g., *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007). The plaintiff is a public affairs firm located in Hartford, and the defendant is a quasi-public agency responsible for implementing the statutory solid waste management plan and providing solid waste disposal and recycling services to numerous municipalities in the state. The defendant is empowered to enter into contracts with private entities "to carry out the business, design, operating, management, marketing, planning and research and development functions of the authority . . . ." General Statutes § 22a-268. Section 22a-268 requires the defendant to engage in open and competitive bidding for its contracts with outside vendors. General Statutes § 22a-268 ("[s]uch contracts shall be entered into either on a competitive negotiation or competitive bidding basis"). In addition, the defendant's own procurement policies require it to select the bidder who submits the most responsive qualified bid or proposal and not to award contracts to entities in which a public official has an interest.

For several years prior to 2011, the defendant contracted with Brown Rudnick to provide liaison services with Connecticut municipalities. On May 26, 2006, the defendant awarded a one year liaison services contract to Brown Rudnick without seeking competitive bids for the provision of the services. On May 21, 2007, the defendant's president informed Brown Rudnick by e-mail that renewal of the contract " 'should not be an issue but we will have to go through the motions of [c]ommittee approval and [b]oard [a]pproval.' " Several days later, on May 24, 2007, the defendant's president sent another e-mail to Brown Rudnick stating that the defendant would have to issue a request for proposals for liaison services in order to " 'help [the defendant] defend [its] choice.' " The e-mail also stated that Brown

Rudnick would receive a package that it was to " 'respond to as [it had] in the past' " and that the defendant would extend Brown Rudnick's existing contract on a month-to-month basis until a new one was put into effect. On May 31, 2007, the defendant extended Brown Rudnick's contract to June 30, 2007. The defendant later extended the contract to September 30, 2007, and, still later, to September 30, 2008. After the contract expired, the defendant continued to pay Brown Rudnick pursuant to the contract terms.

On August 18, 2009, an official employed by the defendant informed another of the defendant's officials by e-mail that the defendant intended to award the liaison services contract to Brown Rudnick, but, in order to create the impression of propriety, Brown Rudnick wanted to be interviewed so that the defendant could say that it had " 'check[ed] the box.' " On November 1, 2009, the defendant awarded a one year liaison services contract to Brown Rudnick. On October 25, 2010, the defendant extended the contract to October 31, 2011.

On May 23, 2011, the defendant issued a request for proposals for the provision of liaison services for the period of November 1, 2011, through June 30, 2014. The plaintiff submitted a proposal that complied with all of the requirements of the request for proposals. Brown Rudnick also submitted a proposal, which was noncompliant because it failed to propose an hourly fee. On June 28, 2011, Paul Nonnenmacher, the defendant's director of public affairs, sent an e-mail to Ronald E. Gingerich, the defendant's manager of development, environmental compliance and information technology, reporting that he had completed his evaluation of the responses to the request for proposals. Gingerich responded that he would draft a memorandum to the defendant's board of directors regarding the evaluation. The next day, June 29, 2011, Gingerich sent an e-mail to Matthew Hennessy, the plaintiff's managing direc-

tor, in response to an inquiry from Hennessy about the status of the defendant's interviews with selected proposers. In that e-mail, Gingerich indicated that the defendant had been "delayed in initiating the review of the proposals" and that "[n]o interviews [of the firms that submitted proposals] are scheduled." No interviews were ever conducted.

On September 12, 2011, the defendant informed the plaintiff that the liaison services contract had been awarded to Brown Rudnick. On September 15, 2011, two officials employed by the defendant, one of whom had been appointed by a partner at Brown Rudnick while acting in his capacity as an elected state official, voted to recommend to the defendant's board of directors that Brown Rudnick be awarded the contract. Although the board of directors was prepared to vote on awarding the liaison services contract to Brown Rudnick at its September 29, 2011 meeting, the defendant ultimately bypassed its board of directors and extended the preexisting contract with Brown Rudnick for another year, up to October 31, 2012. In October, 2012, the defendant incorporated the liaison services contract into its general legal services contract with Brown Rudnick.

Thereafter, the plaintiff brought this action against the defendant, alleging that the defendant had evaluated the bids to provide liaison services in a biased manner so as to ensure that Brown Rudnick was selected, that the public bidding process for the liaison services contract was a sham and that the award of the contract to Brown Rudnick without a legitimate public bidding process violated § 22a-268 and the defendant's own procurement policies. The plaintiff further alleged that the defendant awarded the liaison services contract to Brown Rudnick because Brown Rudnick carried out lobbying activities on behalf of the defendant in viola-

tion of General Statutes § 1-101bb.[4] The plaintiff claimed in count one of the complaint that this conduct deprived the plaintiff and others of an opportunity to compete for the liaison services contract in violation of the antitrust act.[5]

The defendant moved to dismiss the complaint on the grounds that (1) under General Statutes § 35-31 (b),[6] the antitrust act did not apply to its conduct in entering into the liaison services contract with Brown Rudnick because it was acting pursuant to its statutory obligations as set forth in § 22a-268, and (2) the plaintiff lacked standing because it had not alleged that it had suffered an antitrust injury or that it was an efficient enforcer of the antitrust laws.[7] The defendant also filed a motion

[4] General Statutes § 1-101bb provides: "No quasi-public agency, as defined in section 1-120, or state agency may retain a lobbyist, as defined in section 1-91. The provisions of this chapter shall not be construed to prohibit a director, officer or employee of a quasi-public agency or state agency from lobbying, as defined in section 1-91, on behalf of the quasi-public agency or state agency."

[5] In count two of the complaint, the plaintiff asserted a common-law unsuccessful bidder claim alleging that the defendant's award of the liaison services contract to Brown Rudnick was the result of the defendant's fraud, corruption or favoritism, and defeated the integrity of the bidding process. The trial court ultimately granted the defendant's motion to dismiss that claim as moot, and that ruling is not at issue in this appeal. All references in this opinion to the complaint, substituted complaint and second substituted complaint are to the plaintiff's claim that the defendant violated the antitrust act.

[6] General Statutes § 35-31 (b) provides: "Nothing contained in this chapter shall apply to those activities of any person when said activity is specifically directed or required by a statute of this state, or of the United States."

[7] See *In re Aluminum Warehousing Antitrust Litigation*, 833 F.3d 151, 157 (2d Cir. 2016) ("a private antitrust plaintiff must plausibly allege that [1] it suffered an antitrust injury and [2] it is an acceptable plaintiff to pursue the alleged antitrust violations," i.e., that it is "an 'efficient enforcer' "); *Gatt Communications, Inc.* v. *PMC Associates, LLC*, 711 F.3d 68, 78 (2d Cir. 2013) ("[t]o determine whether a putative antitrust plaintiff is an efficient enforcer of the antitrust laws, we examine primarily the following factors: [1] the directness or indirectness of the asserted injury; [2] the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; [3] the speculativeness of the alleged injury; and [4] the difficulty of identifying damages

to strike the complaint, contending that the plaintiff had failed to plead sufficient anticompetitive acts, a relevant market or harm to the relevant market, but had pleaded harm only to an individual competitor.

Relying on *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, 270 Conn. 619, 632, 854 A.2d 1066 (2004), in which this court held that the plaintiff had standing to bring an antitrust action against the defendant arising from the violation of a competitive bidding law, the trial court denied the defendant's motion to dismiss the antitrust claim. The court granted the defendant's motion to strike, however, on the ground that the plaintiff had not sufficiently pleaded injury to competition as a whole in the relevant market. Specifically, the court concluded that the plaintiff's conclusory allegations—namely, that, "[o]ver the years, [the defendant] has not considered any . . . bidder other than Brown Rudnick for its [liaison services] contract, which has resulted in the elimination of any competition," and that, "[n]ot only was [the plaintiff] irreparably damaged, but the general public was damaged by [the defendant's] anticompetitive actions"—failed to sufficiently allege injury to competition as a whole in the relevant market and therefore were insufficient to support its antitrust claim.

Thereafter, the plaintiff filed a substituted complaint in which it again alleged that the defendant had violated the antitrust act.[8] The defendant again filed motions to

and apportioning them among direct and indirect victims so as to avoid duplicative recoveries" [internal quotation marks omitted]).

[8] The trial court noted that the plaintiff had added the following new allegations to its antitrust claim in the substituted complaint: "Member municipalities pay fees to [the defendant] based [on] the amount of trash they dispose of, and [the defendant] uses the revenue generated by the fees to pay various expenses it incurs, including the [liaison services] contract. The initial [liaison services] contract was issued to Brown Rudnick in 2006 without any competitive bidding, and, in the following years, fewer and fewer entities submitted bids. As a result of this anticompetitive activity, Brown Rudnick's price had not been subjected to market competition, and the market for potential bidders was eliminated. As a further result, member towns of [the defendant] incurred greater, unnecessary expense by paying

dismiss and to strike the substituted complaint, in which it incorporated the arguments that it had made in the previous motions to dismiss and to strike. The trial court again denied the motion to dismiss and granted the motion to strike on the grounds that the plaintiff's new allegations also did not "sufficiently allege an increase in prices and/or a reduction in output" as the result of the defendant's conduct and that the plaintiff again had "failed to successfully plead an injury to competition in the relevant market." The court further concluded that the plaintiff had not established that it was an efficient enforcer of the antitrust laws because it had alleged injury to a market of which it was not a member, namely, the market of member municipalities.

The plaintiff then filed a second substituted complaint, alleging, for a third time, that the defendant had violated the antitrust act.[9] Yet again, the defendant filed

higher than market fees for similar work provided by other firms. [The defendant] and its member towns were paying Brown Rudnick $7000 a month at times when there was little or no documentation of work actually performed. At a December 8, 2011 meeting, the quality and costs issues with the Brown Rudnick [liaison services] contract led one [of the defendant's] board member[s] to state that he never observed a representative of Brown Rudnick at any meeting he attended, that he was unaware of any outreach by Brown Rudnick to municipalities in his area, and that the [liaison services] contract seemed to be an unnecessary cost passed on to customers. By granting a monopoly to Brown Rudnick for the [liaison services] contract and allowing it to bill a flat rate without any analysis of its appropriateness, [the defendant] harmed its member towns by passing on these costs through tipping fees and engaged in anticompetitive activity. [The plaintiff] also alleges that [the defendant's] conduct constituted bid rigging, which is a per se anticompetitive activity."

The substituted complaint also included a count alleging, for the first time, that Nonnenmacher had published defamatory statements about Hennessy. The trial court ultimately granted the defendant's motion to strike that count as procedurally improper and denied the plaintiff's motion to amend the substituted complaint to include the defamation count and to cite in Hennessy and Nonnenmacher as parties. Those rulings are not at issue in this appeal.

[9] The plaintiff made the following new allegations in the second substituted complaint: (1) "[a]s part of their conspiracy, in order to cloak the nature

motions to dismiss and to strike the second substituted complaint in which it incorporated the arguments that it had made in its motions to dismiss and to strike the complaint and substituted complaint. Thereafter, the trial court, sua sponte, ordered the parties to file supplemental briefs addressing the following issues: (1) "Whether the court should construe [the defendant] as

of some of the services, [the defendant] and Brown Rudnick agreed that the . . . liaison services would be provided on a flat fee basis . . . and that the services would be generically described on the invoices"; (2) "Brown Rudnick proposed an hourly rate . . . that was higher than the hourly rate proposed by [the plaintiff]"; (3) "[the defendant] and Brown Rudnick were both aware that the number of hours anticipated each month . . . was fabricated and without any basis"; (4) "[t]he market for . . . liaison services includes many providers such as public affairs businesses and government relations professionals"; (5) "[the plaintiff] is a participant in that market"; (6) "[the defendant] engaged in conduct to subvert competition for . . . liaison services by maintaining a private agreement with Brown Rudnick . . . for a flat fee . . . regardless of the amount of services provided"; (7) "[the defendant] agreed to pay that fee in order to secure impermissible lobbying services"; (8) "[i]t was known in the market that [the defendant] would not consider anyone other than Brown Rudnick for the [liaison services] contract"; (9) "[w]ith [the defendant's refusal] to consider any bidders other than Brown Rudnick, the number of firms bidding on the [liaison services] contract steadily declined"; (10) in 2007, the defendant's chief executive officer "stated [that] he would 'revisit' the [request for qualifications] and return to the [defendant's] [b]oard with a 'stable' of choices . . . [but] he did not do so . . . [and] continued to engage in anticompetitive activity to ensure that Brown Rudnick received the contract"; (11) in 2009, "[the defendant] colluded to rig the bidding process to arrange for two existing vendors for nonmunicipal government liaison services to submit bids for the [liaison services] contract in order to give the appearance of open bidding"; (12) the defendant's conduct "led many providers of [liaison] services to refuse to participate in [the defendant's] public bidding process because of the understanding [that] the contract would only be awarded to Brown Rudnick"; (13) "[d]ue to the poor quality of the performance of the [liaison services] contract . . . several municipalities left [the defendant]"; (14) "Brown Rudnick's fee for its . . . liaison services was inflated over the market rate"; (15) "[i]n 2002, before [the defendant] engaged in anticompetitive activity with Brown Rudnick, [the defendant] received substantially similar services for a monthly fee of $4000"; (16) "[b]y engaging in anticompetitive activity . . . the quality of services provided under the [liaison services] contract was compromised, and Brown Rudnick's inflated price [had] not been subjected to market competition"; and (17) "[the plaintiff] notified the attorney general of this action."

the equivalent of the state of Connecticut, and, therefore, entitled to sovereign immunity requiring dismissal of the case for lack of subject matter jurisdiction"; (2) "[w]hether the court should construe [the defendant] as the equivalent of a political subdivision of the state of Connecticut, and therefore a special function governmental unit, under the Local Government Antitrust Act [of 1984], 15 U.S.C. § 34 et seq. [2012], specifically, 15 U.S.C. § 35, which provides that no damages may be recovered from a local government in an antitrust action [and] if so, is the present case nonjusticiable in that it is not capable of resulting in practicable relief to the plaintiff"; and (3) "[i]f the [defendant] is the equivalent of a political subdivision of the state of Connecticut, is its alleged anticompetitive behavior exempt under the foreseeability standard set forth in . . . *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 414–15, [98 S. Ct. 1123, 55 L. Ed. 2d 364] (1978) . . . ."[10] In its supplemental brief in support of its motion to dismiss the second substituted complaint, the defendant contended that (1) it was entitled to sovereign immunity because it was acting on behalf of the state, (2) even if it was not entitled to sovereign immunity, it was entitled to immunity under 15 U.S.C. § 35 because it is a political subdivision of the state, and (3) it was exempt from the antitrust laws under *Lafayette* and § 35-31 (b) because it was carrying out the duties imposed by § 22a-268.

[10] In *Lafayette*, the United States Supreme Court held that, "[w]hile a subordinate governmental unit's claim to [the state action exemption from antitrust actions] is not as readily established as the same claim by a state government sued as such . . . an adequate state mandate for anticompetitive activities of cities and other subordinate governmental units exists when it is found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of." (Internal quotation marks omitted.) *Lafayette* v. *Louisiana Power & Light Co.*, supra, 435 U.S. 415.

The trial court concluded that the defendant was not exempt from the antitrust act under *Lafayette* and § 35-31 because § 22a-268 did not require the defendant to enter into a contract for liaison services. Although the trial court did not expressly address the plaintiff's contentions that it was entitled to sovereign immunity and immunity pursuant to 15 U.S.C. § 35, it implicitly rejected those claims. Accordingly, the court denied the defendant's motion to dismiss.

With respect to the defendant's motion to strike, the trial court noted that the plaintiff had claimed that the defendant's conduct constituted both a per se violation of the antitrust act and a violation under the rule of reason. See, e.g., *Bridgeport Harbour Place I, LLC* v. *Ganim*, 303 Conn. 205, 214–15, 32 A.3d 296 (2011) ("A violation of [antitrust law] generally requires a combination or other form of concerted action between two legally distinct entities resulting in an unreasonable restraint on trade. . . . If a restraint alleged is among that small class of actions that courts have deemed to have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, it will be unreasonable per se . . . . Most antitrust claims, however . . . are analyzed under a rule of reason analysis which seeks to determine if the alleged restraint is unreasonable because its anticompetitive effects outweigh its procompetitive effects." [Internal quotation marks omitted.]). The trial court concluded that the plaintiff had not established a per se violation of the antitrust act because, although an agreement between horizontal competing bidders, such as Brown Rudnick and the plaintiff, constitutes a per se violation; see, e.g., *United States* v. *Koppers Co.*, 652 F.2d 290, 294 (2d Cir.) ("[o]ne of the classic examples of a per se violation of [antitrust laws] is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition"

[internal quotation marks omitted]), cert. denied, 454 U.S. 1083, 102 S. Ct. 639, 70 L. Ed. 2d 617 (1981); an agreement between entities with a vertical relationship, such as Brown Rudnick and the defendant, ordinarily does not. See, e.g., *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 734, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988) ("a horizontal agreement to divide territories is per se illegal . . . while . . . a vertical agreement to do so is not" [citation omitted]). The trial court further concluded that the plaintiff had not adequately alleged an antitrust injury to a relevant market because, as in the first substituted complaint, its allegations were conclusory and there was no allegation that the defendant's conduct " 'had an actual adverse effect on competition as a whole in the relevant market of which [the plaintiff] is a member.' "

The trial court also concluded that the plaintiff had not adequately pleaded that the defendant's conduct violated the antitrust act under the rule of reason. With respect to the plaintiff's allegations that the defendant's conduct had reduced the number of competitors for the liaison services contract, that municipalities had declined to deal with the defendant as the result of the poor quality of Brown Rudnick's services, and that the defendant's conduct had increased the price for liaison services, which in turn had led to higher costs for municipalities that dealt with the defendant, the court concluded that all of these allegations were "conclusory and legally insufficient" to establish a prima facie claim of an injury to competition. Finally, the court concluded that, even if the plaintiff had adequately pleaded an antitrust injury, to the extent that establishing that the plaintiff is an "efficient enforcer" of the antitrust laws is required under state law, the plaintiff had failed to adequately plead that element. Accordingly, the trial court granted the defendant's motion to strike the second substituted complaint and rendered judgment in

favor of the defendant. This appeal and cross appeal followed.

The plaintiff contends on appeal that the trial court incorrectly determined both that the plaintiff had not adequately pleaded that the defendant's conduct constituted a per se violation of the antitrust act and that the defendant's conduct did not violate the antitrust act under the rule of reason. In response, the defendant contends that the plaintiff, in failing to appeal from the trial court's granting of its motion to strike the complaint and its motion to strike the substituted complaint, waived its right to challenge the court's ruling under the rule of reason standard. See *Lund* v. *Milford Hospital, Inc.*, 326 Conn. 846, 850, 168 A.3d 479 (2017). The defendant further claims that, even if the plaintiff did not waive that right, the trial court correctly determined that the plaintiff had failed to adequately plead an antitrust injury under both the rule of reason and the per se standard. In its cross appeal, the defendant contends that the trial court incorrectly determined that (1) the plaintiff has standing to bring an antitrust action against the defendant, (2) the plaintiff's claim is not barred by 15 U.S.C. §§ 34 through 36, and (3) the defendant is not exempt from liability under the antitrust act because it was not acting in furtherance of its statutory obligations when it entered into the liaison services contract with Brown Rudnick. We agree with the defendant that the trial court correctly determined that the plaintiff failed to plead an antitrust injury. We further conclude that, as the result of this failure, the plaintiff lacked standing to bring its antitrust claim. Accordingly, we conclude that the trial court improperly denied the defendant's motion to dismiss the second substituted complaint. Because this conclusion is dispositive, we need not address the other claims raised by the plaintiff on appeal and by the defendant on cross appeal.

"The standard of review for a court's decision on a motion to dismiss is well settled. A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, supra, 282 Conn. 516.

"The issue of standing implicates [the] court's subject matter jurisdiction." (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Orange*, 256 Conn. 557, 567, 775 A.2d 284 (2001). "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining aggrievement encompasses a [well settled] twofold determination: first, the party claiming

aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 411–12, 35 A.3d 188 (2012).

"The fundamental aspect of standing . . . [is that] it focuses on the party seeking to get his complaint before [the] court and not on the issues he wishes to have adjudicated. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded. . . . The concepts of standing and legal interest are to be distinguished. The legal interest test goes to the merits, whereas standing concerns the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (Citations omitted; internal quotation marks omitted.) *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn. 483, 491–92, 400 A.2d 726 (1978).

In the present case, the trial court treated the defendant's claims that the plaintiff had failed to allege an antitrust injury and that the plaintiff was not an efficient enforcer of the antitrust act as challenges to the

legal sufficiency of the complaint. A number of federal courts, however, have treated the requirement that the plaintiff allege both that it suffered an antitrust injury and that it is an efficient enforcer as implicating the plaintiff's standing to bring an antitrust claim. As the United States Court of Appeals for the Second Circuit stated in *In re Aluminum Warehousing Antitrust Litigation*, 833 F.3d 151 (2d Cir. 2016), "[a]n antitrust plaintiff must show both constitutional standing and antitrust standing at the pleading stage. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action. . . . [A]ntitrust standing is a threshold, [pleading stage] inquiry and when a complaint by its terms fails to establish this requirement we must dismiss it as a matter of law. . . . The limitation of antitrust standing to a proper party arose because [a]ntitrust law has long recognized that defendants who may have violated a provision of the antitrust statutes are not liable to every person who can persuade a jury that he suffered a loss in some manner that might conceivably be traced to the conduct of the defendants. . . .

"To satisfy the antitrust standing requirement, a private antitrust plaintiff must plausibly allege that [1] it suffered an antitrust injury and [2] it is an acceptable plaintiff to pursue the alleged antitrust violations. . . . In order to establish antitrust injury, the plaintiff must demonstrate that its injury is of the type the antitrust laws were intended to prevent and that flows from that which makes [the defendant's] acts unlawful. . . . Even a plaintiff that has suffered an antitrust injury must also demonstrate that it is a suitable plaintiff, i.e., an efficient enforcer of the antitrust laws." (Citations omitted; internal quotation marks omitted.) Id., 157–58; see also *Gelboim* v. *Bank of America Corp.*, 823 F.3d

759, 770 (2d Cir. 2016) ("[a]n antitrust plaintiff must show both constitutional standing and antitrust standing"), cert. denied, U.S. , 137 S. Ct. 814, 196 L. Ed. 2d 599 (2017); *Ethypharm S.A. France* v. *Abbott Laboratories*, 707 F.3d 223, 232 (3d Cir. 2013) ("[f]or plaintiffs suing under federal antitrust laws, one of the prudential limitations is the requirement of antitrust standing" [footnote omitted; internal quotation marks omitted]); *Tal* v. *Hogan*, 453 F.3d 1244, 1253 (10th Cir. 2006) ("antitrust standing requires a private plaintiff to show [1] an antitrust injury; and [2] a direct causal connection between that injury and a defendant's violation of the antitrust laws" [internal quotation marks omitted]), cert. denied, 549 U.S. 1209, 127 S. Ct. 1334, 167 L. Ed. 2d 81 (2007).

This court's standing jurisprudence, under which a plaintiff must allege an injury that is within the "zone of interests to be protected or regulated by the statute . . . in question" and be the "proper party" to bring the claim; (internal quotation marks omitted) *Mystic Marinelife Aquarium, Inc.* v. *Gill*, supra, 175 Conn. 492; is consistent with the requirements under federal antitrust law that the plaintiff must have suffered an "antitrust injury" and that the plaintiff must be an "efficient enforcer" of the antitrust laws. Moreover, " '[t]he legislative history of the [antitrust] act clearly establishes that it was intentionally patterned after the antitrust law of the federal government. . . . [O]ur construction of the [antitrust act] is aided by reference to judicial opinions interpreting the federal antitrust statutes. . . . *Accordingly, we follow federal precedent when we interpret the act unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently.*' . . . [*Westport Taxi Service, Inc.* v. *Westport Transit District*, 235 Conn. 1, 15–16, 664 A.2d 719 (1995)]; see also id., 15 n.17 ('[w]e note that in 1992, the legislature explicitly incorporated

into law its intent that the judiciary be guided by interpretations of federal antitrust statutes when it enacted [General Statutes] § 35-44b'). The text of § 35-44b provides: 'It is the intent of the General Assembly that in construing sections 35-24 to 35-46, inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes.' " (Emphasis in original.) *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 806, 873 A.2d 965 (2005). We conclude, therefore, that, to have standing to bring a claim under the antitrust act, a plaintiff must adequately plead both that it has suffered an antitrust injury and that it is an efficient enforcer of the antitrust act. Accordingly, we conclude that a claim that a plaintiff has failed to allege an antitrust injury or that it has failed to allege that it is an efficient enforcer of the antitrust laws implicates the trial court's subject matter jurisdiction and should be raised by way of a motion to dismiss.[11]

[11] We recognize that the court in *Ethypharm S.A. France* v. *Abbott Laboratories*, supra, 707 F.3d 223, noted that the lack of antitrust standing "does not affect the subject matter jurisdiction of the [federal courts], as . . . standing [under article three, § 2, of the United States constitution] does, but prevents a plaintiff from recovering under the antitrust laws." Id., 232. However, "[s]tanding is not a matter of constitutional law in Connecticut, but is rather a rule of judicial administration based upon the principle that the appropriate parties to litigate a dispute are those who are injured or about to be injured. The purpose of this requirement is generally said to ensure the existence of that concrete adverseness between the parties that guarantees that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation would be pursued with the necessary vigor . . . ." (Internal quotation marks omitted.) *Manchester Environmental Coalition* v. *Stockton*, 184 Conn. 51, 65, 441 A.2d 68 (1981), overruled in part on other grounds by *Waterbury* v. *Washington*, 260 Conn. 506, 800 A.2d 1102 (2002). As we have explained, it is well established under Connecticut law that whether a person is a proper party to bring a claim and whether the claim is within the zone of interests that the statute was intended to protect implicate the subject matter jurisdiction of our state courts. See, e.g., *AvalonBay Communities, Inc.* v. *Orange*, supra, 256 Conn. 567.

We recognize that the distinction between subject matter jurisdiction, which implicates the court's authority to entertain and adjudicate a matter, and the authority to act pursuant to a statute, which implicates the court's

Before addressing the merits of the plaintiff's claim that the trial court incorrectly determined that it had not adequately alleged an antitrust injury, however, we address as a threshold issue the plaintiff's contention that the trial court improperly relied on federal law on this issue for guidance pursuant to § 35-44b. The plaintiff points out that this court "follow[s] federal precedent when [it] interpret[s] the [antitrust] act *unless the text of our antitrust statutes, or other pertinent state law, requires us to interpret it differently.*" (Emphasis added; internal quotation marks omitted.) *Miller's Pond Co., LLC* v. *New London*, supra, 273 Conn. 810. The plaintiff further points out that there are several provisions of the antitrust act at issue in the present case, namely, General Statutes §§ 35-26, 35-27 and 35-28 (a) and (d),[12] and that § 35-28 (a) and (d) have no statutory counterparts in the federal antitrust laws. See *Elida, Inc.* v. *Harmor Realty Corp.*, 177 Conn. 218, 227, 413 A.2d 1226 (1979) ("[§] 35-28 [d] has no specific counterpart in the federal antitrust laws, but rather, it is considered to be a codification of what have come to be known

authority to grant relief on the merits, has caused ongoing confusion in our courts. See, e.g., *In re Jose B.*, 303 Conn. 569, 574, 34 A.3d 975 (2012) ("the distinction between challenges to the trial court's subject matter jurisdiction and challenges to the exercise of its statutory authority is not always clear" [internal quotation marks omitted]). We also recognize the "rule that every presumption is to be indulged in favor of jurisdiction . . . [in order] to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court . . . by allowing the litigant, if possible, to amend the complaint to correct the defect . . . ." (Citations omitted; internal quotation marks omitted.) Id., 579. It is arguable that, in light of this ongoing confusion and our policy of favoring entertaining a case on its merits, we should take a hard look at this court's statutory standing jurisprudence and consider whether we should take steps to conform to the federal rule. Because the parties in the present case have not comprehensively briefed this issue, we leave it for another day.

[12] General Statutes § 35-28 provides in relevant part: "Without limiting section 35-26, every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of: (a) Fixing, controlling, or maintaining prices, rates, quotations, or fees in any part of trade or commerce . . . or (d) refusing to deal, or coercing, persuading, or inducing third parties to refuse to deal with another person."

as 'per se' violations of the Sherman Act, [15 U.S.C. § 1 et seq.] notably § 1"); see also G. Brodigan, "The Connecticut Antitrust Act," 47 Conn. B.J. 12, 24 (1973) (§ 5 of the antitrust act, codified at § 35-28, "is a codification of what have come to be known as 'per se' violations" of federal antitrust laws). Because § 35-28 (a) and (d) have no federal counterparts, the plaintiff contends, the courts are not required to look to federal law when applying those provisions. We disagree. Although Connecticut courts might recognize that certain conduct gives rise to an antitrust injury under § 35-28 (a) or (d) even when the federal courts have not spoken on the question, we can perceive no reason why, if § 35-28 was intended to codify federal case law concerning per se violations, relevant federal case law would not provide guidance on the proper interpretation of the statute. Indeed, the court in *Elida, Inc.* v. *Harmor Realty Corp.*, supra, 230, looked to the federal courts' interpretation of federal antitrust law for guidance in determining whether the conduct at issue in that case constituted a per se violation.

We turn, therefore, to the merits of the plaintiff's claim that the trial court incorrectly determined, on the basis of federal case law, that the plaintiff had not adequately pleaded an antitrust injury. An antitrust injury is "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the] defendants' acts unlawful." (Internal quotation marks omitted.) *Tal* v. *Hogan*, supra, 453 F.3d 1253. "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993). "[T]he [United States] Supreme Court, in a now oft quoted phrase, has stated [that] the antitrust laws . . . were enacted for the protection of competition not competitors." (Inter-

nal quotation marks omitted.) *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, 885 F.2d 683, 697 (10th Cir. 1989), cert denied, 498 U.S. 972, 111 S. Ct. 441, 112 L. Ed. 2d 424 (1990). Thus, highly competitive conduct, even if it is unfair or illegal, does not come within the scope of the antitrust laws, as long as the conduct does not unreasonably harm competition. See *Four Corners Nephrology Associates, P.C.* v. *Mercy Medical Center of Durango*, 582 F.3d 1216, 1225 (10th Cir. 2009) ("it is the protection of competition or prevention of [monopoly] which is plainly the concern of the Sherman Act, not the vindication of general notions of fair dealing, which are the subject of many other laws at both the federal and state level" [internal quotation marks omitted]). "Thus, [t]he antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." (Emphasis in original; internal quotation marks omitted.) *Elliott Industries Ltd. Partnership* v. *BP America Production Co.*, 407 F.3d 1091, 1124–25 (10th Cir. 2005).

"A violation of [§] 1 [of the Sherman Act] generally requires a combination or other form of concerted action between two legally distinct entities resulting in an unreasonable restrain on trade. . . . If a restraint alleged is among that small class of actions that courts have deemed to have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, it will be unreasonable per se . . . . Most antitrust claims, however . . . are analyzed under a rule of reason analysis which seeks to determine if the alleged restraint is unreasonable because its anticompetitive effects outweigh its procompetitive effects." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 214–15.

"A determination of the reasonableness of [the] defendants' conduct, whether through detailed analysis under the rule of reason or through classification of the conduct as a per se violation of [the antitrust laws], is . . . significant [however only] if there has been a showing that the defendants' conduct had some negative impact on competition in a relevant market. The rule of reason and the per se [rule] are simply different approaches to the issue of reasonableness once a restraint on trade has been found . . . and both approaches presuppose the presence of an anticompetitive impact. It is not necessary to engage in a balancing of pro and anticompetitive effects under the rule of reason if there is no anticompetitive effect at all." (Citation omitted; internal quotation marks omitted.) *Federal Paper Board Co.* v. *Amata*, 693 F. Supp. 1376, 1381 (D. Conn. 1988). "In sum, [e]very antitrust suit should begin by identifying the ways in which a challenged restraint might possibly impair competition. This step occasionally reveals that competition is not implicated at all and thus that the parties' dispute is not an antitrust case." (Internal quotation marks omitted.) Id., 1382.

"Anticompetitive effects, more commonly referred to as injury to competition or harm to the competitive process, are usually measured by a reduction in output and an increase in prices in the relevant market." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 215–16; see also *Virgin Atlantic Airways Ltd.* v. *British Airways PLC*, 257 F.3d 256, 264 (3d Cir. 2001) ("whether an actual adverse effect has occurred is determined by examining factors like reduced output, increased prices and decreased quality").

In the present case, the trial court concluded that the plaintiff's allegations that the defendant's conspiracy with Brown Rudnick had the effects of reducing the number of competitors for the liaison services contract,

increasing the price that the defendant paid for liaison services, increasing the price that municipalities pay for the defendant's services and decreasing the quality of both the liaison services and the defendant's services were conclusory and legally insufficient. See *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 213 ("With respect to the allegations necessary to state a cognizable antitrust claim, the United States Supreme Court has explained that, in pleading such a claim, a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . ." [Internal quotation marks omitted.]). The trial court also concluded that the plaintiff had not adequately pleaded an antitrust injury because there was *no* allegation in the second substituted complaint "to demonstrate that [the defendant's] activity had an actual adverse effect on competition as a whole in the relevant market of which [the plaintiff] is a member." The plaintiff challenges these conclusions on appeal and contends that highly detailed and specific allegations are not required in an initial pleading and that, considered in the light most favorable to the plaintiff, the allegations in the second substituted complaint are sufficient to establish a prima facie case that the defendant's conduct had the "anticompetitive effects" of reducing the quality of the defendant's services and increasing its prices.

We agree with the plaintiff to the extent that it contends that the trial court should have considered "the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, supra, 282 Conn. 516. Accordingly,

we agree that the trial court should have assumed the truth of the plaintiff's various allegations concerning the economic effects of the defendant's conduct.

Such economic effects do not establish an antitrust injury, however, unless they resulted from *anticompetitive* conduct.[13] See *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 214 ("an act is deemed *anticompetitive* under the Sherman Act only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality" [emphasis in original; internal quotation marks omitted]). We conclude that the trial court correctly determined that that is not the case here. This court's decision in *Ganim* is instructive. The plaintiff in *Ganim* entered into a contract with the defendant, the city of Bridgeport, to develop a certain waterfront property. Id., 208. According to the plaintiff, the city's mayor had conspired with other defendants to seek bribes and kickbacks from businesses with city contracts. Id., 208–209. When the plaintiff refused to participate in the kickback scheme, the defendants conspired to prevent the plaintiff from fulfilling its contractual obligations, causing the plaintiff to spend millions of dollars in its attempt to complete the project. Id. The plaintiff brought an action against the defendants claiming that

[13] In other words, the fact that anticompetitive conduct is *measured* by such effects; see *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 215–16; does not necessarily mean that proof of such effects establishes an antitrust injury. For example, if a business chooses to purchase supplies from a vendor whose products are more expensive than those sold by competitors because the business has family connections with the chosen vendor, it does not follow from the fact that other vendors may choose not to compete to provide the product because they are aware of the family connections, and the fact that the business will have increased expenses that it may well pass on to its customers, that the business has violated the antitrust act. As we discuss more fully subsequently in this opinion, "the antitrust laws protect only the purchaser's freedom to make a choice"; *Doron Precision Systems, Inc.* v. *FAAC, Inc.*, 423 F. Supp. 2d 173, 183 (S.D.N.Y. 2006); not a competitor's right to compete.

they had violated the antitrust act by engaging in conduct that "had an actual adverse effect on competition as a whole in the relevant market of undertaking and completing commercial development in the [c]ity . . . in a timely, cost efficient manner." (Internal quotation marks omitted.) Id., 209.

Relying on federal case law, this court concluded in *Ganim* that "the plaintiff's allegation that the defendants took bribes and kickbacks in exchange for steering public contracts does not state a cognizable antitrust claim" because the defendant's conduct was not anticompetitive.[14] Id., 223. Specifically, we cited the deci-

[14] This court also observed in *Ganim* that, even if the plaintiff had adequately alleged an antitrust injury, federal courts have concluded that government action is exempt from the antitrust laws under the *Noerr-Pennington* doctrine. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670, 85 S. Ct. 1585, 14 L. Ed. 2d 628 (1965); *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136–37, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); see *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 218–19; see also *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 34 (1st Cir.) (distinguishing "the narrow issue of whether . . . conduct is exempt from antitrust regulation" under *Noerr-Pennington* doctrine, which exempts attempts to reduce competition through legislation and regulation from Sherman Act, from "the broader issue of whether [the conduct] has in fact violated the Sherman Act"), cert. denied, 400 U.S. 850, 91 S. Ct. 54, 27 L. Ed. 2d 88 (1970). In support of this conclusion, this court in *Ganim* quoted extensively from the decision of the Tenth Circuit Court of Appeals in *Coll* v. *First American Title Ins. Co.*, 642 F.3d 876 (10th Cir. 2011), which held that a private party's use of bribery or other corrupt means to influence government regulation or legislation does not violate federal antitrust laws "because the purpose of the Sherman Act is to regulate business, not political activity." Id., 896; see *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 218–22. This court assumed in *Ganim* that the *Noerr-Pennington* state-action immunity principle applies not only to a party's use of bribery or other corrupt means to influence legislation or regulation, but also to the use of corrupt means to obtain a government contract. A number of federal courts have concluded, however, that that is not the case. See *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, supra, 33 ("*Noerr* stressed the importance of free access to public officials vested with significant [policy making] discretion. We doubt whether the [c]ourt, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues."); id. ("The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases

sion of the United States District Court for the District of Connecticut in *Federal Paper Board Co.* v. *Amata*, supra, 693 F. Supp. 1383, for the proposition that "[t]he payment of bribes by suppliers to a purchasing agent does not by itself establish an anticompetitive effect. Although the bribes may have been illegal and unfair methods of competition, their illegality and unfairness [do] not support an inference that the bribes restrained competition. On the contrary, bribery could have been consistent with intense competition among the suppliers—some of which resorted to illegal measures to gain an advantage." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn 218. We also cited *Comet Mechanical Contractors, Inc.* v. *E.A. Cowen Construction, Inc.*, 609 F.2d 404, 406–407 (10th Cir. 1980), in which the United States Court of Appeals for the Tenth Circuit held that an allegation that the defendants, certain contractors and the governor of Oklahoma, had conspired to fix bid prices for the construction of two public buildings so that the defendants could force suppliers and subcon-

will be made according to strictly economic criteria. . . . We conclude, therefore, that the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes." [Citation omitted.]); *F. Buddie Contracting, Inc.* v. *Seawright*, 595 F. Supp. 422, 439 (N.D. Ohio 1984) ("*Noerr-Pennington* is concerned with the needs of a representative democracy in the field of public policy making. These needs are not at issue in this case, [in which] the parties are concerned with the award of a competitively bid contract which only incidentally involves a governmental body. The basis for the exemption, therefore, does not apply to this case."); *Czajkowski* v. *Illinois*, 460 F. Supp. 1265, 1279 (N.D. Ill. 1977) ("Courts have recognized that some public activities, such as the purchase of equipment for governmental facilities, involve purely commercial dealings between business and government. . . . In these circumstances, the mantle of state sovereignty is removed and the state activities will be subjected to antitrust scrutiny." [Citation omitted; internal quotation marks omitted.]), aff'd mem., 588 F.2d 839 (1978). Because we conclude that the plaintiff in the present case has not adequately pleaded an antitrust injury in the first instance, we need not consider whether this court correctly assumed in *Ganim* that the *Noerr-Pennington* doctrine exempts from the antitrust act claims arising from the award of a public contract.

tractors to provide kickbacks to the governor did not give rise to an antitrust violation because "[a] buyer and a seller can agree in any particular case to any price they wish," and the defendants' conduct had not prevented the plaintiff from competing with other subcontractors. See *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 222–23. Finally, we cited *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir.), cert. denied, 429 U.S. 940, 97 S. Ct. 355, 50 L. Ed. 2d 309 (1976), in which the court held that a "claim of commercial bribery, standing alone, does not constitute a violation of the Sherman Act." Id., 687; see *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 223. Indeed, although "[t]he parties may break a host of state or federal laws and regulations in making a side deal or in otherwise circumventing the bidding process in reaching a final arrangement . . . they do not breach [§] 1 of the Sherman Act where the alleged vertical agreements involve only one buyer and one seller." *Expert Masonry, Inc.* v. *Boone County*, 440 F.3d 336, 348 (6th Cir. 2006); see also *Parmelee Transportation Co.* v. *Keeshin*, 292 F.2d 794, 804 (7th Cir.) (when plaintiff alleged that defendant had bribed government official to use his influence to ensure that railroads would grant exclusive five year contract to defendant, plaintiff had not adequately pleaded antitrust violation because plaintiff was able to compete for contract, even though "the victory of the successful bidder was made easier by the wrongful conduct of a public official"), cert. denied, 368 U.S. 944, 82 S. Ct. 376, 7 L. Ed. 2d 340 (1961); *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393, 400 (D. Idaho 1964) (when plaintiff alleged that defendant had bribed state official to use best efforts to ensure that state made all fish food purchases from defendant, plaintiff had not adequately pleaded antitrust violation because "the Sherman Act must be interpreted in the light of well understood [common-

law] doctrines relating to monopolies and restraints of trade such as contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like," and "[n]othing of that kind occurred here"), aff'd, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936, 86 S. Ct. 1067, 15 L. Ed. 2d 853 (1966).[15]

We see little to distinguish an agreement to provide illegal services in exchange for the award of a public

[15] We note that there is federal case law supporting the contrary position. See *Stearns Airport Equipment Co.* v. *FMC Corp.*, 170 F.3d 518, 526 (5th Cir. 1999) (stating in dictum that evidence that entity used bribery or threats to obtain public contract can give rise to antitrust violation); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 34 (1st Cir.) ("efforts to influence government officials acting under statutes requiring competitive bidding are within the scope of the antitrust laws"), cert. denied, 400 U.S. 850, 91 S. Ct. 54, 27 L. Ed. 2d 88 (1970); *Doron Precision Systems, Inc.* v. *FAAC, Inc.*, 423 F. Supp. 2d 173, 183 (S.D.N.Y. 2006) (stating in dictum that allegation of bribery, fraud or unethical procedures that corrupted public entity's award of contract might be sufficient to support claim of antitrust violation); *F. Buddie Contracting, Inc.* v. *Seawright*, 595 F. Supp. 422, 437 (N.D. Ohio 1984) ("[w]here a firm succeeds in tampering with the competitive bidding process in such a manner that competitive bidding becomes a farce, the [c]ourt believes that an unreasonable restraint of trade has occurred"). We find these cases to be unpersuasive. In *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, supra, 34, the court engaged in no analysis but simply made a conclusory statement. In *F. Buddie Contracting, Inc.* v. *Seawright*, supra, 437, the court relied on *Richard Hoffman Corp.* v. *Integrated Building Systems, Inc.*, 581 F. Supp. 367 (N.D. Ill. 1984), which involved conduct that had the effect of limiting the public entity's choice of product. See id., 374 ("[i]n the present case, the choice of product is alleged to have been made by . . . the successful bidder, rather than the customer"). In *Stearns Airport Equipment Co.* v. *FMC Corp.*, supra, 526, the court relied on *F. Buddie Contracting, Inc.*, and another case, *Indian Head, Inc.* v. *Allied Tube & Conduit Corp.*, 817 F.2d 938, 947 (2d Cir. 1987), aff'd, 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988), in which the defendant's conduct had restricted purchasers' freedom to choose a product. See id., 947 (efforts by defendant, which manufactured steel electrical conduit, to rig vote on proposal allowing use of polyvinyl chloride conduit at meeting of organization that established product and performance requirements for electrical systems gave rise to antitrust violation). In *Doron Precision Systems, Inc.* v. *FAAC, Inc.*, supra, 183, the court relied on *Interstate Properties* v. *Pyramid Co. of Utica*, 586 F. Supp. 1160, 1163 (S.D.N.Y. 1984), in which the court discussed the sham exception to the *Noerr-Pennington*

contract from an agreement to give a bribe in exchange for a public contract. We conclude, therefore, that an antitrust injury cannot be inferred from the plaintiff's allegation in the present case that the defendant awarded the liaison services contract to Brown Rudnick because that firm was willing to provide statutorily prohibited lobbying services to the defendant.

The plaintiff contends that *Ganim* is distinguishable because the plaintiff in that case did not allege that the defendants' conduct "precluded general contractors from competing for projects open to public bidding . . . ." *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 217. In contrast, the plaintiff in the present case alleged in the operative complaint that the defendant's conduct had, over the years, reduced the number of competitors for the liaison services contract. Accordingly, the plaintiff contends, its allegations are sufficient to establish an antitrust injury.

We disagree. This court in *Ganim* held that the bare allegation that the defendants required bidders to participate in a corrupt practice as a prerequisite for being awarded a contract is not sufficient to support an inference that competition has been restrained because "any general contractor that wanted to do business with the city could do so . . . ." Id. Accordingly, even if we were to assume in the present case that potential bidders *chose* not to submit bids for the liaison services contract because they were aware that the defendant would award the contract only if the bidder would agree to provide illegal lobbying services, and the potential

doctrine. See footnote 14 of this opinion. The fact that *Noerr-Pennington* immunity does not apply to certain corrupt conduct does not necessarily mean that the conduct is anticompetitive in the first instance. See *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, supra, 34 (distinguishing "the narrow issue of whether . . . conduct is exempt from antitrust regulation" under the *Noerr-Pennington* doctrine from "the broader issue of whether [the conduct] has in fact violated the Sherman Act").

bidders did not want or were unable to provide such services, the defendant's conduct did not *prevent* them from competing and, therefore, did not violate the antitrust act.[16] Indeed, we expressly held in *Ganim* that, "even if the plaintiff adequately alleged . . . an anticompetitive impact on the market . . . commercial bribery does not constitute a restraint of trade within the meaning of the Sherman Act." Id., 218; see also *Parmelee Transportation Co.* v. *Keeshin*, supra, 292 F.2d 803–804 (distinguishing "absolute bar to competition," such as horizontal agreement among competitors not to compete, which constitutes violation of Sherman Act, from bribery of government official making "victory of the successful bidder . . . easier," which, although illegal, did not restrain competition).

Moreover, even if we were to assume that potential bidders knew that it would be entirely futile to submit proposals for the liaison services contract because the defendant had made it clear that it was determined to award the contract to Brown Rudnick *regardless of the services that other bidders offered*—which the plaintiff has not alleged—awarding a public contract on a sole source basis in violation of a competitive bidding law

[16] Similarly, we reject the plaintiff's claim that "*Ganim* is distinguishable because . . . *Ganim* involved conduct that occurred *after* the contract was awarded, so there was no allegation that the bidding process was compromised." (Emphasis in original.) The court in *Ganim* did not distinguish corrupt government practices that might discourage parties from competing for a government contract *before* the contract is awarded from corrupt practices that might discourage parties from completing the contract *after* the award so that another party, who is willing to participate in the corrupt practice, can complete it. The intent of the government actor is the same in both cases, namely, to ensure that the parties with which it deals will participate in the corrupt practice. As we have explained, refusing to award a government contract unless the contracting party agrees to participate in a corrupt practice may violate a host of laws, but it does not constitute an antitrust injury. See *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 217–18 (allegation "that any general contractor that wanted to do business with the city could do so but had to pay to play" was not adequate to establish prima facie case of anticompetitive impact).

does not give rise to an antitrust injury because "the antitrust laws protect only the purchaser's freedom to make a choice . . . ." *Doron Precision Systems, Inc.* v. *FAAC, Inc.*, 423 F. Supp. 2d 173, 183 (S.D.N.Y. 2006); see id., 182–83 (finding that plaintiff had not adequately pleaded antitrust violation when it alleged that defendants had violated competitive bidding laws by entering into contract on sole source basis rather than through open bidding process); see also *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co. of America*, supra, 885 F.2d 697 ("antitrust laws . . . were enacted for the protection of competition not competitors" [internal quotation marks omitted]); *Security Fire Door Co.* v. *Los Angeles*, 484 F.2d 1028, 1030 (9th Cir. 1973) ("[t]he proscription against restraint of trade . . . seeks only to assure that the [purchaser's] choice of product has been made freely"); *Bridgeport Harbour Place I, LLC* v. *Ganim*, supra, 303 Conn. 215 ("[i]n order to establish an anticompetitive effect . . . it is not enough to allege an injury to a competitor"). In other words, antitrust laws are designed to protect purchasers and consumers from the restraint of competition, not to protect a competitor's right to compete.

We therefore reject the plaintiff's contention that a violation of the competitive bidding provision of § 22a-268 is, per se, a violation of the antitrust act. As the court recognized in *Doron Precision Systems, Inc.* v. *FAAC, Inc.*, supra 423 F. Supp. 2d 173, "competitive bidding laws and antitrust laws are motivated by very different policies, and therefore a violation of the letter or spirit of a competitive bid statute, unaccompanied by anticompetitive factors bearing [on] the exercise of choice of product, does not create an antitrust problem." (Footnote omitted; internal quotation marks omitted.) Id., 183. Specifically, competitive bidding laws recognize that public officials have an obligation to act in the best interests of taxpayers when entering into

contracts, not in their own interest or in the interest of the competitors with which they deal. See, e.g., *Lawrence Brunoli, Inc.* v. *Branford*, 247 Conn. 407, 412–13, 722 A.2d 271 (1999) ("[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price, *and to benefit the taxpayers, not the bidders*; they should be construed to accomplish these purposes fairly and reasonably *with sole reference to the public interest*" [emphasis in original; internal quotation marks omitted]).

In contrast, the antitrust laws are not intended to embody principles of good government but to protect the freedom of a purchaser to choose the seller with whom it will deal on whatever terms it wants and is able to negotiate, including a price that is greater than the market price or conditions that will make the purchaser less competitive with its competitors. See *Jet-Away Aviation, LLC* v. *Board of County Commissioners*, 754 F.3d 824, 858 (10th Cir. 2014) (Tymkovich, J., concurring) ("from an antitrust perspective, I see no reason to allow a private firm to choose with whom it will deal but not allow a public entity the same freedom"); id. (if public entity violates statute restricting entity's freedom to choose with whom it will deal, proper remedy is to seek relief pursuant to that statute, not through antitrust laws); *Comet Mechanical Contractors, Inc.* v. *E.A. Cowen Construction, Inc.*, supra, 609 F.2d 406 ("[a] buyer and a seller can agree in any particular case to any price they wish" without violating antitrust laws); *Security Fire Door Co.* v. *Los Angeles*, supra, 484 F.2d 1031 ("The competitive bid statute may well serve to limit the freedom of public purchasers to make specific choices on the basis of preference rather than cost. However, a violation of the letter or spirit of a competitive bid statute, unaccompanied by anticom-

petitive factors bearing [on] the exercise of choice of product, does not create an antitrust problem."); *Doron Precision Systems, Inc.* v. *FAAC, Inc.*, supra, 423 F. Supp. 2d 183 ("While competitive bidding statutes may limit the freedom of public purchasers to make specific choices on the basis of preference rather than cost, the antitrust laws protect only the purchaser's freedom to make a choice in the first place. . . . As long as the consumer . . . chose its product, the antitrust laws were not violated." [Citation omitted; internal quotation marks omitted.]).

Elaborating on this point, the District Court in *Doron Precision Systems, Inc.* v. *FAAC, Inc.*, supra, 423 F. Supp. 2d 173, observed that "[c]ompetitive bidding laws prescribe a series of procedural rituals (preliminary analysis, scoping sessions, interim reviews, requests for proposals, scoring of responses, etc.) intended to eliminate corruption in the awarding of public contracts. These procedures are designed to, and in fact do, minimize managerial discretion. The focus of bidding laws is solely on the [lowest cost] responsible bidder; other critical factors, such as quality, timeliness, reliability, productivity and predictability are downplayed or ignored. In this sense, the public bidding process restricts competition. Many have even suggested that the public competitive bidding process adds needless cost and reduces quality. . . . It is significant that when state and local governments want something done well and promptly, competitive bidding is eliminated. . . . Even more significant, the public bidding process is not followed at all in the private sector. Thus, 'competitive' bidding has nothing to do with promoting quality or choice. It is simply an anticorruption device.

"The antitrust laws, on the other hand, promote 'competition' for the best product, by protecting the free choice of the consumer from restrictions imposed by the seller. Thus, the policies and goals of public bidding laws and antitrust laws are completely different, in a

sense even diametrically opposed—while the crux of the antitrust laws is to foster consumer choice, the public bidding laws sacrifice consumer choice to protect the public trust." (Citations omitted.) Id., 183 n.11.

We do not necessarily agree with the court's statements in *Doron* that competitive bidding laws have "*nothing* to do with promoting quality" and that "the public bidding process is not followed *at all* in the private sector." (Emphasis added.) Id. Indeed, one effect of a competitive bidding law may be to force the public entity to choose the most qualified competitor over a competitor that the public entity favors for reasons that are completely unrelated to the competitor's price or qualifications, and private entities frequently obtain multiple bids or estimates in an effort to obtain the lowest price for goods or services, although they are not required to select the lowest qualified bidder. We agree, however, with the court's larger point that "the policies and goals of public bidding laws and antitrust laws are completely different"; id.; because, unlike competitive bidding laws, which are intended to *force* public purchasers to choose the most qualified competitor or to pay the lowest available price for a service or product, the antitrust laws are intended only to ensure that purchasers and consumers have the *freedom* to choose. We conclude, therefore, that an antitrust injury cannot be inferred from the plaintiff's allegation in the present case that the defendant's preselection of Brown Rudnick violated the competitive bidding provision of § 22a-268.

The plaintiff contends, however, that the plain language of § 35-28 (d) provides that colluding to award a public contract to a preselected entity in violation of a competitive bidding law gives rise to an antitrust injury. We disagree. As we have indicated, § 35-28 provides in relevant part that "every contract, combination, or conspiracy is unlawful when the same are for the purpose, or have the effect, of: (a) Fixing, controlling,

or maintaining prices, rates, quotations, or fees in any part of trade or commerce . . . or (d) refusing to deal, or coercing, persuading, or inducing third parties to refuse to deal with another person." Nothing in this language suggests that § 35-28, unlike the Sherman Act, was intended to encompass conduct that does not have the purpose or effect of restricting the freedom of purchasers and consumers to choose. Rather, as we have explained, the statute was intended to be a codification of per se violations of the Sherman Act. See *Elida, Inc.* v. *Harmor Realty Corp.*, supra, 177 Conn. 227 ("[§] 35-28 [d] has no specific counterpart in the federal antitrust laws, but rather, it is considered to be a codification of what have come to be known as 'per se' violations of the Sherman Act, notably § 1"). Moreover, under the plaintiff's interpretation, a *private* commercial entity would violate § 35-28 (d) by refusing to purchase a product from a vendor with the lowest price because the entity, for whatever reason, preferred another vendor. There is no evidence that the legislature contemplated such a bizarre and draconian result.

Finally, we address the plaintiff's contention that this court's decision in *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, supra, 270 Conn. 619, supports the trial court's conclusion that the plaintiff has standing to bring this antitrust action. Although we agree that that is the case, we now conclude that *Cheryl Terry Enterprises, Ltd.*, must be partially overruled. The plaintiff in *Cheryl Terry Enterprises, Ltd.*, was one of three vendors that had submitted bids to the defendant city for a five year contract to provide bus transportation for the city's public schools. Id., 623. Although the plaintiff submitted the lowest bid, the city awarded the contract to another vendor that had submitted the highest bid in violation of a city ordinance requiring the city to award the contract to the lowest responsible bidder. Id. The plaintiff brought an action against the city alleging, among other things, a violation of the antitrust act. Id.

After a jury returned a verdict for the plaintiff on that claim, the city filed a motion to set aside the verdict on the ground that the plaintiff lacked standing to bring the claim, which the trial court granted. Id., 624–25.

On appeal, this court concluded that, "although the legislature has excluded certain organizations and activities from liability under the [antitrust] act, it has not excluded municipalities, or the municipal bidding process, from its provisions." Id., 628. Accordingly, we concluded "that the trial court properly determined that a municipality can be sued for violations of the [antitrust] act." Id., 629. We then rejected the city's claim that, even if a municipality can be sued under the antitrust act, the plaintiff lacked standing to bring an antitrust claim arising from a violation of the competitive bidding laws under this court's decision in *Lawrence Brunoli, Inc.* v. *Branford*, supra, 247 Conn. 411, in which we held that "an unsuccessful bidder [for] a municipal contract has no standing to assert a cause of action for money damages for failure of the municipality to follow its competitive bidding laws, regardless of whether the plaintiff alleges fraud, corruption or favoritism in the bidding process." (Internal quotation marks omitted.) *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, supra, 270 Conn. 631. We concluded that this court could not limit the broad standing conferred by the legislature to bring an antitrust claim against a municipality "in a manner contrary to the plain language of the [antitrust] act." Id., 632. Accordingly, we concluded that the trial court had improperly granted the city's motion to set aside the verdict in favor of the plaintiff on the antitrust claim. Id., 648.

The plaintiff in the present case contends that this court in *Cheryl Terry Enterprises, Ltd.*, "has already decided, as a matter of public policy and pursuant to the text of the [antitrust act], that sham bidding is actionable under [that act]." Although we agree with the plaintiff that that the trial court correctly applied

our decision in *Cheryl Terry Enterprises, Ltd.*, to hold that the plaintiff has standing, we now conclude that our holding in that case must be limited. Specifically, we conclude that, although we correctly held in *Cheryl Terry Enterprises, Ltd.*, that a private entity may bring an action against a municipality under the antitrust act, we now recognize that, to have standing to bring an antitrust action, a plaintiff must adequately allege not only that it is a member of the class of persons that is statutorily authorized to bring such an action, but also that "[1] it suffered an antitrust injury and [2] it is an acceptable plaintiff to pursue the alleged antitrust violations." *In re Aluminum Warehousing Antitrust Litigation*, supra, 833 F.3d 157. This court did not address the specific issue of whether the plaintiff had suffered an antitrust injury in *Cheryl Terry Enterprises, Ltd.* In contrast, we have concluded in the present case that the plaintiff did not have standing to bring an action against the defendant under the antitrust act because, as the trial court correctly held, an allegation that a public entity has awarded a contract to a preselected bidder for corrupt reasons and in violation of a competitive bidding statute does not give rise to an antitrust injury. To the extent that our decision in *Cheryl Terry Enterprises, Ltd.*, is inconsistent with this conclusion, it is overruled.

We conclude, therefore, that the trial court should have treated the defendant's motion to strike on the ground that the plaintiff had not adequately alleged an antitrust injury as a motion to dismiss, because the failure to allege an antitrust injury implicates the plaintiff's standing to bring the antitrust claim.[17] Because we have concluded that the trial court correctly determined that the plaintiff had not adequately alleged an antitrust

[17] We recognize, of course, that the trial court had no authority to overrule our decision in *Cheryl Terry Enterprises, Ltd.*, that private parties have standing to bring an antitrust action against public entities arising from a violation of a competitive bidding statute.

injury, we conclude that the trial court should have dismissed the plaintiff's second substituted complaint. Accordingly, the form of the judgment is improper, and the case must be remanded to the trial court with direction to grant the defendant's motion to dismiss the second substituted complaint. See, e.g., *Pecan* v. *Madigan*, 97 Conn. App. 617, 622, 624, 905 A.2d 710 (2006) (when trial court granted motion to strike certain counts of complaint when it should have dismissed them, Appellate Court remanded case to trial court with direction to dismiss), cert. denied, 281 Conn. 919, 918 A.2d 271 (2007).

The form of the judgment is improper, the trial court's granting of the motion to strike is vacated, and the case is remanded with direction to grant the defendant's motion to dismiss the second substituted complaint.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 333

STATE OF CONNECTICUT *v.* MICHAEL MCCLEAN

The defendant's petition for certification to appeal from the Appellate Court, 167 Conn. App. 781 (AC 37380), is denied.

Heather Clark, assigned counsel, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided October 30, 2019

STATE OF CONNECTICUT *v.* RAYMOND MARTIN

The defendant's petition for certification to appeal from the Appellate Court, 172 Conn. App. 904 (AC 38611), is denied.

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

Melissa Patterson, assistant state's attorney, in opposition.

Decided October 30, 2019

STATE OF CONNECTICUT *v.* MICHAEL MCCLEAN

The defendant's petition for certification to appeal from the Appellate Court, 173 Conn. App. 62 (AC 37380), is denied.

Heather Clark, assigned counsel, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided October 30, 2019

STATE OF CONNECTICUT *v.* EDWARD PARKER

The defendant's petition for certification to appeal from the Appellate Court, 173 Conn. App. 901 (AC 37855), is denied.

W. Theodore Koch III, assigned counsel, in support of the petition.

Melissa Patterson, assistant state's attorney, in opposition.

Decided October 30, 2019

STATE OF CONNECTICUT *v.* RICKY ELLIS

The defendant's petition for certification to appeal from the Appellate Court, 174 Conn. App. 14 (AC 39309), is denied.

Deborah G. Stevenson, assigned counsel, in support of the petition.

Bruce R. Lockwood, supervisory assistant state's attorney, in opposition.

Decided October 30, 2019

GARDEN HOMES MANAGEMENT CORPORATION ET AL. *v.* TOWN PLAN AND ZONING COMMISSION OF THE TOWN OF FAIRFIELD

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 736 (AC 40519), is denied.

Melinda A. Powell and *Cindy M. Cieslak*, in support of the petition.

Daniel J. Krisch, *Mark K. Branse* and *Kenneth R. Slater, Jr.*, in opposition.

Decided October 30, 2019

WILTON CAMPUS 1691, LLC *v.* TOWN OF WILTON

WILTON RIVER PARK 1688, LLC *v.* TOWN OF WILTON

WILTON RIVER PARK NORTH, LLC *v.* TOWN OF WILTON

The defendant's petition for certification to appeal from the Appellate Court, 191 Conn. App. 712 (AC 40697), is granted, limited to the following issue:

"Did the Appellate Court incorrectly conclude that General Statutes § 12-55 (b) precluded the tax assessor of the town of Wilton from imposing late filing penalties pursuant to General Statutes § 12-63c (d) after taking and subscribing to the oath on the town's 2014 grand list?"

Jonathan S. Bowman and *Barbara M. Schellenberg*, in support of the petition.

Matthew T. Wax-Krell, *Marci Silverman* and *Denise P. Lucchio*, in opposition.

Decided October 30, 2019

MICHAEL DEROSE *v.* JASON ROBERT'S, INC., ET AL.

The defendants' petition for certification to appeal from the Appellate Court, 191 Conn. App. 781 (AC 40715), is denied.

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

Proloy K. Das and *Kevin W. Munn*, in support of the petition.

Thomas J. Weihing, in opposition.

Decided October 30, 2019

A BETTER WAY WHOLESALE AUTOS, INC.
v. JAMES SAINT PAUL ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 192 Conn. App. 245 (AC 40014), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that parties to an arbitration agreement did not avoid Connecticut's thirty day statutory deadline for filing an application to vacate an arbitration award set forth in General Statutes § 52-420 (b) by including in their agreement a choice of law provision stating that any arbitration shall be governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (2012), which contains a three month deadline for filing a motion to vacate?"

Kenneth A. Votre, in support of the petition.

Richard F. Wareing, in opposition.

Decided October 30, 2019

AMICA MUTUAL INSURANCE COMPANY
v. MICHELLE LEVINE

The defendant's petition for certification to appeal from the Appellate Court, 192 Conn. App. 620 (AC 40999), is denied.

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

Jennifer B. Levine, in support of the petition.

Philip T. Newbury, Jr., in opposition.

Decided October 30, 2019

ONE ELMCROFT STAMFORD, LLC *v.* ZONING BOARD OF APPEALS OF THE CITY OF STAMFORD ET AL.

The petition by the defendants Pisano Brothers Automotive, Inc., and Pasquale Pisano for certification to appeal from the Appellate Court, 192 Conn. App. 275 (AC 41208), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that General Statutes § 14-55 was not repealed in 2003?"

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

Gerald M. Fox III, in support of the petition.

John W. Knuff and *Jeffrey P. Nichols*, in opposition.

Decided October 30, 2019

ULYSES ALVAREZ *v.* CITY OF MIDDLETOWN

The plaintiff's petition for certification to appeal from the Appellate Court, 192 Conn. App. 606 (AC 41478), is denied.

James V. Sabatini, in support of the petition.

Michael J. Rose and *Cindy M. Cieslak*, in opposition.

Decided October 30, 2019

CITY OF NORWICH *v.* IRINA LOSKOUTOVA ET AL.

The petition by the defendant Anton Loskoutov for certification to appeal from the Appellate Court (AC 42999) is dismissed.

Anton Loskoutov, self-represented, in support of the petition.

Aimee L. Wickless, in opposition.

Decided October 30, 2019

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CONNECTICUT APPELLATE REPORTS

Vol. 194

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* HIRAL M. PATEL
(AC 41821)

Alvord, Bright and Bear, Js.

Syllabus

Convicted of the crimes of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree and tampering with physical evidence in connection with the shooting death of the victim, the defendant appealed, claiming, inter alia, that the trial court improperly admitted into evidence certain statements by his coconspirator, C, that inculpated the defendant, and precluded him from introducing into evidence a statement by S, a cousin of the defendant, that was against S's penal interest. N, a cousin of the defendant who had been charged with narcotics offenses, enlisted the defendant and C in N's plan to rob the victim, with whom N previously had engaged in drug transactions. N drove the defendant and C to an area near the victim's home before

driving away. After the defendant and C entered the victim's home and tied up his mother, C went upstairs, shot the victim and ransacked his bedroom looking for money. The defendant and C then fled into the woods, where the defendant lost his cell phone, and they thereafter met up with N and drove away. N subsequently was convicted of murder in a separate trial, and this court affirmed his conviction on appeal. In the defendant's trial, C, in response to a question by the court and without having been sworn in, informed the court that he would exercise his fifth amendment privilege against self-incrimination and refuse to answer questions if he were called to testify. The court thereafter admitted into evidence a tape recording of a conversation between C and E, a jailhouse informant, that was made after E told correction officials that he would be willing to record his conversations with C without C's knowledge. The court further admitted into evidence testimony from C's girlfriend, B, about statements C had made to her and precluded the defendant's sister, M, from testifying that S had told her that S was with C during the incident. *Held*:

1. The trial court did not abuse its discretion when it admitted C's statements to E and B pursuant to the dual inculpatory statement exception to the hearsay rule under the applicable provision (§ 8-6 [4]) of the Connecticut Code of Evidence:

   a. The defendant could not prevail on his unpreserved claim that the trial court improperly found that C was unavailable to testify because C was not under oath when questioned about his fifth amendment privilege; that court's failure to have C sworn in did not violate the defendant's sixth amendment right to confrontation or constitute plain error, as the defendant made no claim that C's privilege against self-incrimination might not pertain to all of the questions that he would have been asked, and the defendant did not contend that C would have answered some questions or that the court's inquiry of C as to his personal invocation of the privilege was deficient in substance.

   b. The trial court did not violate the defendant's sixth amendment right to confrontation when it admitted C's statements to E, this court having determined in N's appeal that C's statements to E bore none of the characteristics of testimonial hearsay; C's statements, which implicated himself, N and the defendant, were made to his cellmate in an informal setting, there was no indication that C anticipated that his statements would be used in a criminal investigation or prosecution, and although the evidence suggested that the recording of C's statements was initiated by the Department of Correction and that the police had spoken to E prior to the recording, which was not clear from the testimony in N's trial, an objective witness would not reasonably believe that C's statements could be used at a trial, as there was no indication under either scenario that C had knowledge that he was speaking with a jailhouse informant, the determination of whether C's statements were testimonial focused on the reasonable expectations of C, and nothing about the circumstances suggested that a person in C's position would intend his statements to be a substitute for trial testimony.

c. This court found unavailing the defendant's unpreserved claim that C's statements to E were testimonial under the due process and confrontation clauses in article first, § 8, of the state constitution, as the defendant did not identify any compelling economic or sociological concern that supported a change in the interpretation of the confrontation clause in article first, § 8, of the state constitution.

d. The trial court did not abuse its discretion when it admitted C's statements to E and B pursuant to § 8-6 (4), as that court's findings adequately supported its conclusion that C's statements presented sufficient indicia of reliability to justify their admission: C made the statements to E, a fellow inmate who was facing serious charges and appeared to be a fellow gang member, the details of the crime were related only by C, and it was within the trial court's discretion to evaluate the consistencies and inconsistencies in C's statements and to conclude, on balance, in favor of a determination that the statements were reliable; moreover, C had a close relationship with B, and his statements to her were made on the day of the crime and were consistent with other evidence, and even if C downplayed his involvement when he admitted to B that he robbed the victim while failing to offer that he also murdered the victim, C directly and explicitly incriminated himself by admitting his participation in the robbery, and, thus, the statement remained against his penal interest.

2. The trial court did not abuse its discretion when it excluded from evidence M's testimony concerning S's statement to her on the ground that it was not trustworthy and, thus, did not satisfy the requirements of § 8-6 (4): although S's statement that he should have been charged with murder instead of the defendant was against his penal interest, the relationship between M and S did not support a finding of trustworthiness, as M acknowledged that, although they had been close while growing up, she did not see S as much as she did before she entered medical school, that she had seen S only twice in the past year and that it had been years since she had more steady contact with him, and there was no evidence that S had ever repeated his statement to M or made inculpatory statements to others; moreover, contrary to the defendant's assertion that S's statement was supported by corroborating circumstances, statements of the victim's mother, in which she described the intruders, were inconsistent, the lack of proof that S was at a location distant from the crime was not necessarily corroborative of his statement, other statements S had made did not corroborate the key portion of his statement to M but suggested merely that he was involved in the crime to some degree, and circumstances surrounding the murder were far more consistent with a finding that the defendant had entered the victim's home, rather than S.

3. The defendant could not prevail on his claim that the trial court abused its discretion when it denied his motion to preclude the state from offering the testimony of an agent with the Federal Bureau of Investigation about cell phone tower data analysis relative to the movement of cell phones associated with the defendant, N and C on the day of the

murder: contrary to the defendant's assertion that the court improperly failed to conduct a hearing pursuant to *State* v. *Porter* (241 Conn. 57) to determine the reliability of the agent's methods and procedures, the court held the functional equivalent of a *Porter* hearing, as there was ample testimony bearing on the relevant *Porter* factors and sufficient testimony to enable the court to determine whether the agent's methods were reliable, and although the court did not use the words rate of error or peer review in its ruling, it appropriately relied on the experience of other experts who had carried out similar work and noted that the agent's findings were reviewed by other experts in the same field; moreover, the defendant's assertion that the absence of sector analysis in the data rendered the agent's calculations and conclusions less precise and accurate than they would have been with a sector-based analysis was unavailing, as defense counsel did not identify at trial the defendant's alibi that he was out of state at the time of the crime as a factual distinction requiring the court to reconsider its ruling on the issue in N's trial, nor did he explain to this court how sector analysis would be more reliable, when the state, in light of the defendant's alibi, sought only to identify the general area in which his phone was present.

4. The evidence was sufficient to convict the defendant of murder under a theory of liability predicated on *Pinkerton* v. *United States* (328 U.S. 640); it reasonably was foreseeable that the victim might fight back to thwart the robbery of his proceeds from a drug sale and that C, who was armed with a loaded gun, might, in furtherance of the conspiracy, cause the victim's death with the intent to do so, and the defendant's role in the incident was not too attenuated that it would have been unjust to hold him responsible for the criminal conduct of C, as the defendant had communicated with N about the crime days prior thereto, planned to enter the victim's home to rob him of money he had received from a drug sale and restrained the victim's mother after entering the home.

Argued May 14—officially released November 12, 2019

Procedural History

Substitute information charging the defendant with the crimes of felony murder, murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit robbery in the first degree, conspiracy to commit burglary in the first degree and tampering with physical evidence, brought to the Superior Court in the judicial district of Litchfield and tried to the jury before *Danaher*, *J.*; thereafter, the court denied the defendant's motions to preclude certain evidence; verdict of guilty; subsequently, the court denied the defendant's

motion for a new trial and granted the defendant's motion to vacate the verdict as to the charge of felony murder; thereafter, the court vacated the verdict as to the charge of conspiracy to commit robbery in the first degree; judgment of guilty of murder, home invasion, burglary in the first degree as an accessory, robbery in the first degree as an accessory, conspiracy to commit burglary in the first degree and tampering with physical evidence, from which the defendant appealed. *Affirmed.*

Richard Emanuel, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *David S. Shepack*, state's attorney, and *Dawn Gallo*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Hiral M. Patel, appeals from the judgment of conviction of murder in violation of General Statutes § 53a-54a, home invasion in violation of General Statutes § 53a-100aa (a) (1), burglary in the first degree as an accessory in violation of General Statutes §§ 53a-101 (a) (1) and 53a-8 (a), robbery in the first degree as an accessory in violation of General Statutes §§ 53a-134 (a) (2) and 53a-8 (a), conspiracy to commit burglary in the first degree in violation of General Statutes §§ 53a-101 (a) (1) and 53a-48, and tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1).[1] On appeal, the defendant claims that (1) the court erred in admitting into evidence dual inculpatory statements of his coconspirator, Michael Calabrese; (2) the court erred in precluding the defendant from introducing into evidence a statement of Shyam Patel (Shyam), a cousin of the defendant, that was against his penal interest; (3) the court

[1] The defendant also was convicted of felony murder and conspiracy to commit robbery in the first degree. The trial court vacated his conviction of those charges to avoid double jeopardy concerns. See footnote 31 of this opinion.

erred in admitting historical cell site location information without conducting a *Porter*[2] hearing; and (4) there was insufficient evidence adduced at trial to sustain his conviction of murder on a theory of *Pinkerton*[3] liability. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On June 12, 2012, police arrested Niraj Patel (Niraj), the defendant's cousin, after a motor vehicle stop and seized $12,575 from his person and his vehicle. He was charged with criminal attempt to possess more than four ounces of marijuana, interfering with an officer, tampering with evidence, possession of drug paraphernalia, and motor vehicle charges. Following his arrest, Niraj unsuccessfully attempted to borrow money from family members to pay his attorney.

Niraj thereafter formed a plan to rob Luke Vitalis, a marijuana dealer with whom Niraj had conducted drug transactions. Vitalis lived with his mother, Rita G. Vitalis, at 399 Cornwall Bridge Road in Sharon. On August 3, 2012, Niraj sent a text message to the defendant, stating: "I throw you some dough to do this if you have to bring Diva," who was the defendant's family dog. The defendant responded by stating: "You fig a ride out." Niraj responded: "Yes." The defendant replied: "Word." Niraj also offered Calabrese, a friend, money to participate in the robbery.

Niraj knew that Vitalis had sold ten pounds of marijuana from his home on August 5, 2012, and set up a transaction with Vitalis for the following day, with the intention of robbing Vitalis of his proceeds of the previous sale. On August 6, 2012, Niraj drove Calabrese and the defendant to the area of Vitalis' home and dropped them off down the road. Calabrese and the defendant ran through the woods to Vitalis' home. They

[2] See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998).

[3] See *Pinkerton* v. *United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946).

watched the home and saw Vitalis' mother come home. At approximately 6 p.m., Calabrese and the defendant, wearing masks, bandanas, black hats, and gloves, entered the home, encountered Vitalis' mother, and restrained her using zip ties. Calabrese, armed with a Ruger handgun that he received from Niraj, went upstairs and encountered Vitalis in his bedroom. He struck Vitalis with the handgun and shot him three times, killing him. Calabrese searched the bedroom but could find only Vitalis' wallet with $70 and approximately one-half ounce of marijuana, both of which he took. Calabrese and the defendant ran from the property into the woods, where the defendant lost his cell phone. Calabrese and the defendant eventually met up with Niraj, who was driving around looking for them. Calabrese burned his clothing and sneakers on the side of Wolfe Road in Warren.[4]

After freeing herself, Vitalis' mother called 911. State police troopers arrived at the scene at approximately 6:14 p.m. and found Vitalis deceased. Some of the drawers in the furniture in Vitalis' bedroom were pulled out. The police searched the bedroom and found $32,150. They also found marijuana plants growing in the home and outside, 1.7 pounds of marijuana inside Vitalis' bedroom closet, and evidence of marijuana sales.

The defendant's parents, who were traveling out of state on the day of the crime, owned a package store in Madison. While the defendant's parents were away, the defendant was supposed to assist the store's employee, James Smith, and provide him with a ride home at night. On the afternoon of the day of the crime, Smith called the defendant to ask him to pick up single dollar bills for the store, but could not get in touch with

[4] The burnt clothing and sneakers later were discovered, and subsequent forensic testing revealed that footwear imprints from the crime scene probably were made by the right sneaker.

him. The defendant's parents also could not reach him and, eventually, they called a family member, Sachin Patel (Sachin). Sachin left his job at 6:30 p.m. and arrived at the store at about 7 p.m. After Sachin could not reach the defendant on his cell phone, Sachin went to the defendant's house in Branford, let the dog out, and continued to call the defendant from the house phone. Sachin left the defendant's house at about 8:30 p.m. and returned to the store to give Smith a ride home.

On September 11, 2013, the defendant was arrested. Following a trial, the jury, on February 1, 2017, returned a guilty verdict on all counts. The court, thereafter, rendered judgment in accordance with the jury's verdict. See footnote 1 of this opinion. The court imposed a total effective sentence of forty-five years of imprisonment, execution suspended after thirty-five years and one day, twenty-five years of which were the mandatory minimum, with five years of probation. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court erred in admitting into evidence "dual inculpatory statements" made by Calabrese. First, he contends as a threshold matter that the state failed to prove Calabrese's unavailability because Calabrese was not under oath when he invoked his fifth amendment privilege. Next, he claims that Calabrese's statements made to a jailhouse informant, Wayne Early, were testimonial, and that the introduction into evidence of the recording of those statements violated his federal and state confrontation and due process rights. He further contends that the recording and the testimony of Britney Colwell, Calabrese's girlfriend at the time of the crime, regarding statements Calabrese made to her, also were inadmissible pursuant to § 8-6 (4) of the Connecticut Code of Evidence. We consider each of these claims in turn.

A

As a threshold matter, the defendant contends that "the court erred in finding that Calabrese was 'unavailable' because Calabrese was not under oath when questioned about his fifth amendment privilege." The defendant acknowledges that his claim is unpreserved but nevertheless seeks review pursuant to the bypass doctrine set forth by our Supreme Court in *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), or reversal pursuant to the plain error doctrine.[5] The state argues that the defendant's argument is meritless, emphasizing the defendant's "fail[-ure] to cite a single case that holds that a trial court's finding of 'unavailability' must be based on the sworn testimony of the purportedly unavailable witness."[6] We agree with the state that the court did not err in finding Calabrese to be unavailable and, therefore, the defendant has not shown the existence of a constitutional violation or met the stringent standard for relief pursuant to the plain error doctrine.[7]

[5] "The plain error doctrine is based on Practice Book § 60-5, which provides in relevant part: The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . . The plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . A party cannot prevail under [the] plain error [doctrine] unless [he] has demonstrated that the failure to grant relief will result in manifest injustice." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 181 Conn. App. 167, 177 n.3, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018).

[6] The state also responds that the defendant's challenge is "unreviewable because he never asserted in the trial court that Calabrese needed to be sworn in before responding to the trial court's questions." We disagree that the claim is unreviewable. See *State* v. *Nieves*, 89 Conn. App. 410, 414–15, 873 A.2d 1066 (reviewing, pursuant to *Golding*, unpreserved claim that court failed to hold hearing and require witness personally to invoke privilege against self-incrimination), cert. denied, 275 Conn. 906, 882 A.2d 679 (2005).

[7] The defendant makes only passing reference in his appellate briefs to his right to confrontation as the constitutional right violated.

The following additional procedural history is relevant. On the morning of January 4, 2017, the court stated that defense counsel wanted a "record to be made as to whether . . . Calabrese would be willing to testify if he were called by either party in this case or if, alternatively, he would seek to invoke his rights under the fifth amendment." Defense counsel represented his understanding "that the state does not intend to call this gentleman based on their understanding that he's going to invoke his fifth amendment privilege. It is my position that, if that's to be done, it should be done by the witness himself . . . on the record in court; his lawyer can't do it for him." Calabrese was present in court with his counsel, Attorney Gerald Giaimo. Responding to the court's inquiry, Calabrese stated that he had the opportunity to talk with Attorney Giaimo about the proceeding. In response to the court's question concerning whether he would answer questions if he were called as a witness in the defendant's case, he stated that he "would plead the fifth." In response to the court's follow-up questions, Calabrese confirmed that he planned to invoke his rights under the fifth amendment. The court inquired of the parties whether there was "any question in the mind of either party as to whether this is a valid invocation of the fifth amendment privilege," and defense counsel responded that he had "no question about that" but requested "a follow-up question in terms of whether or not he would intend to invoke his fifth amendment rights with respect to every question he might be asked, not just generally." Defense counsel asked to inquire, and the state objected. The court indicated that it did not think it was necessary for defense counsel to inquire. Defense counsel stated that he wanted to know whether Calabrese's invocation of the fifth amendment "applie[d] to every question that is asked of him relevant to this case." The court then asked Calabrese: "[i]f you were to be asked questions about the facts of this case by

either party, what position would you take?" Calabrese stated that he would "take the fifth." The court then asked: "Anything further?" Defense counsel responded: "Nothing from me."

The court found that Calabrese had made a valid invocation of his fifth amendment privilege, stating that it believed that if "Calabrese were to answer any questions relative to the facts of this case, they could have a tendency to incriminate him." The court again asked whether there was "[a]nything further from either party," to which defense counsel responded, "[n]othing further."

"Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Walker*, 332 Conn. 678, 688, 212 A.3d 1244 (2019). We conclude that the defendant's claim is reviewable under the first and second prongs of *Golding*. Accordingly, we turn to the third prong of *Golding*—namely, whether the defendant has established a violation of his sixth amendment confrontation rights.

In support of his claim that his sixth amendment right to confrontation was violated, the defendant cites *State* v. *Cecarelli*, 32 Conn. App. 811, 821, 631 A.2d 862 (1993). In *Cecarelli*, the trial court accepted the representation made by counsel for a witness that the witness would invoke his fifth amendment privilege regardless of the question he was asked. Id., 817. The witness did not

appear in court, and the court denied the defendant's request for a hearing to determine whether a valid privilege properly was claimed as to questions concerning the scope and extent of the witness' actions as a police informant. Id., 817–18. On appeal, this court concluded that the trial court's failure to hold a hearing implicated the defendant's constitutional right to present a defense. Id., 821. Noting that "a question-by-question invocation of the privilege against self-incrimination may not be required under all circumstances," this court concluded that the sustaining of a blanket privilege claim was not appropriate given the circumstances before the trial court, and that a hearing was required. Id., 820.

Cecarelli is distinguishable from the present case in that the defendant in *Cecarelli* challenged the witness' assertion of his constitutional privilege on the ground that it might not pertain to all of the questions the defendant sought to ask regarding his entrapment defense. Specifically, this court reasoned: "We cannot speculate that the defendant's entrapment defense may be inextricably bound up with a scheme of criminality on the part of [the witness] and that all questions asked of [the witness] to corroborate that defense might require answers tending to incriminate him. That determination may be reached only at a hearing for that purpose, which would allow the trial court to explore the basis, if any, of the witness' refusal to testify, if he does, in fact, invoke his privilege." Id., 821. Here, the defendant makes no claim that Calabrese's constitutional privilege might not have pertained to all of the questions that would have been asked of him.

On point with this case is *State* v. *Nieves*, 89 Conn. App. 410, 417, 873 A.2d 1066, cert. denied, 275 Conn. 906, 882 A.2d 679 (2005). In *Nieves*, this court rejected the defendant's claim "that the [trial] court violated his sixth amendment right to present a defense simply by

failing to hold a hearing, requiring [the witness] to take the stand and personally to invoke his fifth amendment privilege." Id. In *Nieves*, the court permitted the witness' counsel to represent that his client would invoke his fifth amendment privilege against self-incrimination as to all questions. Id., 416–17. The defendant did not request a hearing but moved to compel the witness to testify. Id., 416. On appeal, this court noted that "there is no claim that [the witness] might have answered some relevant questions that would go to the defendant's defense"; id., 418–19; and found the defendant's argument premised solely on the fact that the witness personally did not invoke the privilege at a hearing unavailing. Id., 420–21.

The defendant's sole challenge to the court's unavailability finding is that Calabrese had not been administered an oath prior to his testimony, during a hearing before the court, that he would assert his fifth amendment privilege not to testify. The defendant does not contend that Calabrese would have answered some questions or that the court's inquiry of Calabrese as to his personal invocation of the privilege was deficient in substance. We cannot conclude that the court's failure to have Calabrese sworn in violated the defendant's sixth amendment right to confrontation or constituted plain error. Accordingly, the court did not err in finding Calabrese to be unavailable.

B

Having concluded that the court did not err in finding Calabrese to be unavailable, we now consider the defendant's claim that the court improperly admitted into evidence Calabrese's statements to Colwell and Early.

The following additional facts and procedural history are relevant. In statements made to Colwell on the day of Vitalis' killing, Calabrese admitted his participation in the robbery. Subsequently, in September, 2013, Calabrese detailed the events surrounding Vitalis' kill-

ing, implicating himself, Niraj, and the defendant, in a recorded statement to a confidential inmate informant.

Our analysis of this issue requires discussion of filings in Niraj's trial on charges stemming from the same incident.[8] In Niraj's trial, he filed a motion in limine seeking to preclude the state from introducing into evidence out-of-court statements made by Calabrese in lieu of his live testimony, contending that the admission of his statements would violate the fourth, fifth, sixth and fourteenth amendments to the United States constitution, article first, §§ 8, 9 and 10 of the Connecticut constitution, and Practice Book § 42-15. See *State* v. *Patel*, 186 Conn. App. 814, 831, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019). On December 31, 2015, the court issued a ruling denying Niraj's motion without prejudice.

Addressing Calabrese's statements to Early, the court noted the passage of time, thirteen months, as a factor weighing against the trustworthiness of the statements. The court further considered that Calabrese's statements "were made to a fellow inmate who appeared to the defendant to be a fellow gang member, and one who was facing serious charges." The court found that the statements were "replete with specific details of the crime," and stated that inconsistencies identified by the defendant were not as significant as they appear

[8] Niraj also was arrested on September 11, 2013. *State* v. *Patel*, 186 Conn. App. 814, 820, 201 A.3d 459, cert. denied, 331 Conn. 906, 203 A.3d 569 (2019). The trial court, *Danaher*, *J.*, presided over Niraj's jury trial, which was held in January and February, 2016. Niraj was convicted on multiple charges and appealed from the judgment of conviction to this court, which affirmed his conviction. Id., 857.

Judge Danaher also presided over the defendant's trial. At the request of defense counsel, Judge Danaher took judicial notice of the totality of the filings and the transcripts of Niraj's case. During the defendant's trial, the court also referred to certain rulings issued in Niraj's trial.

Accordingly, this opinion references certain decisions, motions, and testimony from Niraj's trial where necessary to our consideration of the issues presented in this appeal.

and "pale[d] in comparison to the myriad details of the crime that could only be known to a participant in the crime." Considering the extent to which the statements were against Calabrese's penal interest, the court noted that Calabrese explicitly stated that he killed Vitalis and "ma[de] clear that any other person involved is less culpable than he is." The court also considered that Calabrese had initiated the discussion about the crime on September 3, 2015, and that Calabrese had made statements to Colwell that were consistent with his statements to Early. Last, the court stated that the state offered cell phone location evidence linking Calabrese to the crime. The court concluded that Calabrese's statements to Early were admissible as statements against penal interest pursuant to § 8-6 (4) of the Connecticut Code of Evidence. The court further concluded that Calabrese's statements to Early were not testimonial.

Regarding Calabrese's statements to Colwell, the court found that the statements constituted declarations against penal interest pursuant to § 8-6 (4), in that the "statements were made to a confidante; they were made just before, on the day of, and the day after, the homicide. Their trustworthiness lies in not only the foregoing facts, but in their consistency with other physical evidence in the case, including the time of the statements relative to the event; the specific admissions of theft that were consistent with other evidence relative to the theft and the statements regarding clothing that were consistent with the declarant's efforts to destroy clothing that might carry evidence of the crime."

In the trial underlying this appeal, on August 3, 2016, the defendant filed a similar motion in limine seeking to preclude the state from offering into evidence Calabrese's out-of-court statements. In his memorandum of law in support of his motion, the defendant recognized

that the issue had been considered and ruled on by the court in connection with Niraj's trial. On November 8, 2016, the court, at the request of defense counsel and without objection from the state, took judicial notice of the totality of the filings and the transcripts in Niraj's trial. Later that day, the court noted that, in Niraj's trial, it had ruled on a motion in limine regarding Calabrese's statements and asked whether "there are any changes in the law since that ruling that require a different result and, alternatively, whether there are any factual developments that you wish to bring to my attention that might bring about a different result." Defense counsel responded, "[n]o, as to both, Your Honor." The court indicated that "it would appear that the law of the case would control,"[9] and the state agreed. The court asked defense counsel whether he had anything further, and defense counsel replied: "No, I just want to make—I think we agree that in the event that this has to—this case has to go beyond as proceeding subsequent to the verdict, that Your Honor is relying—and [the] defendant will have available the record of the Niraj Patel file—trial . . . with respect to the arguments and the submissions." The state had no objection to that request. The court then stated: "Well, the law of the case is not absolute, but under the circumstances expressed by the defense in the motion and the responses to my questions today, I find that the law of the case controls that the ruling of December 31, 2015, will control this motion as well, and the motion is denied for the reasons set forth in that opinion."

On January 6, 2017, the state called Early as a witness. Early, who remained incarcerated at the time of the defendant's trial, testified that while incarcerated at the

[9] The trial court referred to two rulings in Niraj's trial as the "law of the case" when ruling on similar motions in the defendant's trial. See part III of this opinion. Aside from the defendant's accurate notation in a footnote in his principal brief that the law of the case doctrine is not applicable, neither party on appeal raises a claim of error in the court's presumably inartful reference to its rulings in Niraj's trial as the law of the case in the defendant's trial.

New Haven Correctional Center, he was called to the intelligence office, informed that Calabrese was going to be moved into Early's cell, and asked whether he would be willing to wear a recording device to record Calabrese.[10] Early, who previously had made confidential recordings of other inmates, indicated he would be willing to do so, and Calabrese was moved into his cell that evening. Later that evening, the two discussed the crimes for which they were incarcerated. Early stopped the conversation, however, because he knew he was going to wear a recording device and did not want to repeat the same conversation the next day. The next day, Early again was called to the intelligence office and asked whether he " 'could do it,' " and Early responded that he could. The intelligence officer then placed a telephone call to the state police, in which Early was asked what he knew about the case. Early responded that he did not know anything about it, and the state police asked Early to get as many details as possible. The intelligence officer then placed the recording device in Early's shirt pocket.

Early went back to his cellblock recreation area, a lockdown was called, and he went back to his cell with Calabrese. The two engaged in a lengthy conversation, in which Calabrese detailed the events surrounding Vitalis' killing, implicating himself, Niraj, and the defendant. Over the defendant's objection, the recording was played for the jury during trial.[11] The defendant renewed

[10] Early did not know whether Calabrese was moved into his cell for the sole purpose of being recorded. Early testified: "I don't know if he was comin' in just for that reason. I know he got moved out [of] the dorm because of some, some foolishness he did in the dorm. So, when he came to my cellblock, the officer told me, I want you to try to see if you can get him . . . because I done it before."

[11] Defense counsel indicated his objection to the recording's introduction into evidence. The court noted that it had written an opinion on this issue in the trial of Niraj and indicated that it had not written the same opinion for this trial, but that it already had ruled on the issue. Defense counsel agreed that the motion was the same in both trials and indicated his understanding that the "ruling . . . stands," but advised that he planned to formally object in front of the jury to make a record.

his objection to the admission of the recording in his motion for a new trial, which was denied.

On January 18, 2017, the state called Colwell as a witness, who testified that in August, 2012, she lived with her boyfriend at the time, Calabrese, at their condominium in Branford. Colwell stated that one day in the first week of August, 2012, Calabrese was on the telephone with Niraj. He told Colwell that Niraj "wanted him to go up near his parents' house . . . to rob a kid that owed him money" and that Niraj told Calabrese that he "would give him a good amount of money if he did this." Colwell stated that Calabrese was hesitant at first but later decided "he was gonna do it." Within a couple days of the telephone call with Niraj, Calabrese left their condominium, saying that "he was going to pick up [the defendant] to go up near his parents' house to go rob the kid." Colwell begged him not to go. As the evening went on and Colwell did not hear from Calabrese, she began calling him "a hundred times" and calling everyone he knew. When Colwell spoke with Calabrese later that evening, she asked him whether he did what he had to do, and Calabrese responded, "yeah, but we didn't get any money. We just got a little bit of weed." When Calabrese returned to their condominium early the next morning, he was wearing different clothes and was not wearing shoes. He told Colwell he had been playing basketball at Niraj's house and that Niraj had given him a change of clothes.

1

Federal Constitutional Claim

We begin by addressing the defendant's federal constitutional claim that his confrontation rights were violated by the introduction into evidence of the recording of Calabrese's statements to Early. He argues that Calabrese's statements were testimonial. We disagree with

the defendant's claim, which is controlled by our recent decision in *State* v. *Patel*, supra, 186 Conn. App. 814.

"The sixth amendment to the United States constitution, applicable to the states through the fourteenth amendment, provides in relevant part: In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . In *Crawford* v. *Washington*, [541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the [United States] Supreme Court substantially revised its approach to confrontation clause claims. Under *Crawford*, testimonial hearsay is admissible against a criminal defendant at trial only if the defendant had a prior opportunity for cross-examination and the witness is unavailable to testify at trial. . . . In adopting this categorical approach, the court overturned existing precedent that had applied an open-ended balancing [test] . . . conditioning the admissibility of out-of-court statements on a court's determination of whether the proffered statements bore adequate indicia of reliability. . . . Although *Crawford*'s revision of the court's confrontation clause jurisprudence is significant, its rules govern the admissibility only of certain classes of statements, namely, testimonial hearsay. . . . Accordingly, the threshold inquiries in a confrontation clause analysis are whether the statement was hearsay, and if so, whether the statement was testimonial in nature . . . . These are questions of law over which our review is plenary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Walker*, supra, 332 Conn. 689–90.

"As a general matter, a testimonial statement is typically [a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. . . . Although the United States Supreme Court did not provide a comprehensive definition of what constitutes a testimonial statement in *Crawford*, the court did describe three core classes of testimonial statements:

[1] ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially . . . [2] extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions [and] . . . [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . . The present case concerns only this third category form of testimonial statements.

"[I]n *Davis* v. *Washington*, [547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)], the United States Supreme Court elaborated on the third category and applied a primary purpose test to distinguish testimonial from nontestimonial statements given to police officials, holding: Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

"In *State* v. *Slater*, [285 Conn. 162, 172 n.8, 939 A.2d 1105, cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008)], we reconciled *Crawford* and *Davis*, noting: We view the primary purpose gloss articulated in *Davis* as entirely consistent with *Crawford*'s focus on the reasonable expectation of the declarant. . . . [I]n focusing on the primary purpose of the communication, *Davis* provides a practical way to resolve what *Crawford* had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an

objective witness reasonably to believe that the statements would later be used in a prosecution." (Citations omitted; internal quotation marks omitted.) *State* v. *Walker*, supra, 332 Conn. 700–702.

Although arguing that the United States Supreme Court has yet to make an explicit post-*Crawford* ruling on this issue, the defendant recognizes that the court, in dicta, has expressed the view that "statements made unwittingly to a [g]overnment informant" or "statements from one prisoner to another" are "clearly nontestimonial." *Davis* v. *Washington*, supra, 547 U.S. 825 (citing *Bourjaily* v. *United States*, 483 U.S. 171, 181–84, 107 S. Ct. 2775, 97 L. Ed. 2d 144 [1987], and *Dutton* v. *Evans*, 400 U.S. 74, 87–89, 91 S. Ct. 210, 27 L. Ed. 2d 213 [1970] [plurality]). The defendant further concedes that "to date, federal and state courts have refused to accord 'testimonial' status to statements made to fellow inmates or informants."

This court, in resolving Niraj's appeal, noted that our Supreme Court had not "addressed the specific issue of whether a recording initiated by a prisoner, who is acting as a confidential informant, of a fellow prisoner unwittingly making dual inculpatory statements about himself and a coconspirator or codefendant are testimonial in nature." *State* v. *Patel*, supra, 186 Conn. App. 837. Considering this question in the context of Calabrese's statements, this court concluded that his statements were nontestimonial in nature. Id. This court relied on *United States* v. *Saget*, 377 F.3d 223, 229 (2d Cir. 2004), cert. denied, 543 U.S. 1079, 125 S. Ct. 938, 160 L. Ed. 2d 821 (2005), in which the United States Court of Appeals for the Second Circuit concluded "that a declarant's statements to a confidential informant, whose true status is unknown to the declarant, do not constitute testimony within the meaning of *Crawford*" and decisions from other jurisdictions holding that statements to

confidential jailhouse informants were not testimonial. See *State* v. *Patel*, supra, 840–41 (collecting cases).

We conclude that the resolution of the defendant's federal constitution claim is controlled by our decision in *State* v. *Patel*, supra, 186 Conn. App. 814, in which we concluded that Calabrese's statements "[bore] none of the characteristics of testimonial hearsay," in that "Calabrese made these statements to his prison cellmate in an informal setting. He implicated himself, [the defendant] and [Niraj] and there is no indication that he anticipated that his statements would be used in a criminal investigation or prosecution." Id., 841. *State* v. *Patel*, supra, 814, was released on January 8, 2019, after the briefing was completed in this case.[12] At oral argument before this court, the sole bases advanced by the defendant's appellate counsel for distinguishing *Patel* were differences in the evidence presented as to the circumstances preceding Early's agreement to record Calabrese.

The following additional background is relevant. In Niraj's trial, the court denied his motion in limine to

[12] In his brief, the defendant relies on several factors, which he contends support a conclusion that Calabrese's statements were testimonial. First, he argues that there was no ongoing emergency and that the primary purpose of the interrogation, conducted thirteen months after the crime, was "to establish or prove past events potentially relevant to later criminal prosecution." *Davis* v. *Washington*, supra, 547 U.S. 822. Second, as to the "objective analysis of the circumstances of [the] encounter"; *Michigan* v. *Bryant*, 562 U.S. 344, 360, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011); he contends that Calabrese intentionally was moved to a specific cell in order to enable Early to gather evidence for the state to use against Calabrese in a criminal prosecution. Third, emphasizing that Early "was not a neutral listening device," the defendant states that Early interrogated Calabrese by asking "at least 200 questions." Fourth, the defendant places weight on the fact that Early had been asked by correctional staff and the state police to serve as a confidential informant, which, he contends, rendered Early an agent of law enforcement. Last, the defendant argues that "any reasonable person objectively would have known that such statements could be used against him. Indeed, Early confirmed that all prisoners are aware of the possibility of someone 'snitching them out' and becom[ing] a state's witness against them."

preclude introduction into evidence of the Calabrese recording and noted that "the state claims that the conversations between Calabrese and the cellmate were initiated on September 3, 2013, without the involvement of law enforcement . . . ." Early testified, in that case, that "the intelligence officer asked me if I was—if I was willing to wear a device because I was ready—they don't want him because I'm trying to—I'm trying to dis on my plate, so, I say—I say, absolutely, I will. Know what I mean? He was in my cell. And I went to the officer and he started speaking; the next day, I went to the officer and said, he—he's talking about it; know what I mean? So, he put the device in my pocket—in my pocket and sent me back to the cell." On cross-examination, Early further testified that the night Calabrese was moved into his cell, he and Calabrese talked about their charges, and that the following day, Early went to security and said that he knew he could get Calabrese to talk.[13] In the present case, as described previously, Early testified that he first was called to the intelligence office, informed that Calabrese was going to be placed in his cell, and asked whether he would be willing to wear a recording device to record Calabrese. The next day, when Early again was called to the intelligence office, he was put on a telephone call with the state police and was asked to get as many details as possible.

Accordingly, the evidence in the present case suggests that the recording was initiated by the Department of Correction, which fact was not clear from the testimony during Niraj's trial, and that the state police were

[13] Accordingly, this court, in *State* v. *Patel*, supra, 186 Conn. App. 831, recited the circumstances leading to Early's recording as follows: "After Calabrese was arrested, he and his cellmate were talking about the charges that were pending against them. Thereafter, the cellmate approached a security officer and offered to record Calabrese. The cellmate was set up with a recording device, and he recorded his conversation with Calabrese, who was unaware that he was being recorded."

involved and had spoken to Early, facts that were not in evidence during Niraj's trial. We are not convinced that factual discrepancies in Early's testimony as to whether it was Early or law enforcement officials who initiated the cooperation between the two disturbs our conclusion that Calabrese's statements were nontestimonial. The analysis regarding whether Calabrese's statements were testimonial focuses on the reasonable expectation of the declarant, Calabrese. Under either factual scenario, there is no indication that Calabrese had knowledge that he was speaking with a confidential jailhouse informant and, thus, an objective witness making statements under those circumstances would not reasonably believe that his statements later may be used at a trial. Accordingly, as this court previously concluded in *State* v. *Patel*, supra, 186 Conn. App. 841–42, Calabrese's statements to Early were nontestimonial, and the admission into evidence of the recording did not violate the defendant's right to confrontation under the federal constitution.

The defendant raises one additional argument not raised in *State* v. *Patel*, supra, 186 Conn. App. 814. The defendant claims that the court ran afoul of *Michigan* v. *Bryant*, 562 U.S. 344, 369–70, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011), in failing to give consideration to *Early*'s statements and actions during his conversation with Calabrese. He relies on *Bryant*'s direction that, "[i]n determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances," such as "the statements and actions of all participants." Id. The state responds that "[w]hile the circumstances leading to a declarant making his hearsay statements can be relevant to whether they were testimonial, nothing about the circumstances here suggests that a person in Calabrese's 'position would intend his statements to be a substitute for trial testimony,' " quoting *Ohio* v. *Clark*, U.S. , 135 S. Ct.

2173, 2182, 192 L. Ed. 2d 306 (2015). The state directs this court's attention to post-*Bryant* decisions from the United States Court of Appeals for the Fourth and Fifth Circuits that have continued to engage in a declarant focused analysis. See *United States* v. *Dargan*, 738 F.3d 643, 650 (4th Cir. 2013) ("[t]he primary determinant of a statement's testimonial quality is whether a reasonable person in the declarant's position would have expected his statements to be used at trial—that is, whether the declarant would have expected or intended to bear witness against another in a later proceeding" [internal quotation marks omitted]). In *Dargan*, the United States Court of Appeals for the Fourth Circuit held that jailhouse disclosures to a cellmate were plainly nontestimonial, where the statements were made to a casual acquaintance, his cellmate, in an informal setting, and were not made with an eye toward trial, where the declarant "had no plausible expectation of 'bearing witness' against anyone." Id., 651; see also *Brown* v. *Epps*, 686 F.3d 281, 287–88 (5th Cir. 2012) (noting, in post-*Bryant* decision, that "several district courts in this Circuit have held that statements unknowingly made to an undercover officer, confidential informant, or cooperating witness are not testimonial in nature because the statements are not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for later use at trial. Many other Circuits have come to the same conclusion, and none disagree" [footnote omitted; internal quotation marks omitted]). Considering these decisions in factually similar circumstances, we are not persuaded that the court erred in engaging in a declarant focused analysis.[14]

[14] We also do not find persuasive the defendant's citation to a single unreported case from Texas in which the court found testimonial a declarant's statements made to his aunt while she was wearing a wire. *Cazares* v. *State*, Docket No. 15-00266-CR, 2017 WL 3498483, *11 (Tex. App. August 16, 2017), review refused, Texas Court of Criminal Appeals, Docket No. PD-0204-18 (May 23, 2018), U.S. , 139 S. Ct. 422, 202 L. Ed. 2d 324 (2018).

2

State Constitutional Claim

For the first time, on appeal, the defendant argues that "[a]s an independent ground for relief, this court should conclude that Calabrese's statement was 'testimonial' for purposes of the due process and confrontation clauses in article first, § 8, of the Connecticut constitution." The defendant concedes that this issue is unpreserved, but nevertheless seeks review pursuant to the bypass doctrine set forth by our Supreme Court in *State* v. *Golding*, supra, 213 Conn. 239–40. We conclude that the record is adequate for review, and the defendant's claim, on its face, is of constitutional magnitude. The claim fails to satisfy the third prong of *Golding*, however, because the defendant has not established that a constitutional violation exists.

"In determining the contours of the protections provided by our state constitution, we employ a multifactor approach that we first adopted in [*State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992)]. The factors that we consider are (1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of [the] constitutional [framers]; and (6) contemporary understandings of applicable economic and sociological norms [otherwise described as public policies]. . . . We have noted, however, that these factors may be inextricably interwoven, and not every [such] factor is relevant in all cases." (Citations omitted; internal quotation marks omitted.) *State* v. *Skok*, 318 Conn. 699, 708, 122 A.3d 608 (2015).

At the outset, we conclude that five *Geisler* factors—the first through the fifth—do not support the defendant's claim that the admission into evidence of Calabrese's statements violated his rights under article first,

§ 8, and indeed, the defendant, in his principal brief to this court, concedes as much. Moreover, our Supreme Court has stated that "with respect to the right to confrontation within article first, § 8, of our state constitution, its language is nearly identical to the confrontation clause in the sixth amendment to the United States constitution. The provisions have a shared genesis in the common law. . . . Moreover, we have acknowledged that the principles of interpretation for applying these clauses are identical." (Citations omitted.) *State* v. *Lockhart*, 298 Conn. 537, 555, 4 A.3d 1176 (2010).

As to the sixth *Geisler* factor—contemporary economic and sociological considerations, including relevant public policy—the defendant argues that "[t]he Department of Correction should not serve as a Department of Interrogation." He argues: "This is a case in which . . . correctional officers . . . acting at the behest of [the] state police . . . purposely relocated a targeted inmate by moving him to a particular cell so that . . . a 'wired' informant could interrogate the targeted inmate and record the interrogation for later use in a criminal prosecution." He maintains that the law enforcement involved in planning the recording knew or should have known that "under existing law" the recording would likely be admissible at trial if the declarant were unavailable as a witness "and would thereby deprive any codefendant who had been implicated by the declarant of his or her right to confront their accuser." Citing prosecutorial discretion in the determination of the order in which cases are brought to trial, the defendant argues that "prosecutors can effectively manipulate the system to deprive defendants of their confrontation rights."

The state responds, inter alia, that "short of precluding the use of any taped recording of inmate to inmate communication, it is unclear how the defendant's proposed constitutional rule would work in practice. Yet,

recording of inmate confessions should be encouraged, not forbidden, given the distrust with which our courts historically have viewed jailhouse informant testimony." We conclude that the defendant has not identified any compelling economic or sociological concern supporting a change in the interpretation of our confrontation clause and therefore conclude that the sixth *Geisler* factor does not lend support to the defendant's claim.

In light of the foregoing, we conclude that the admission into evidence of Calabrese's statements did not violate the defendant's rights under article first, § 8, of the Connecticut constitution.

3

Evidentiary Claim

The defendant also claims that the court abused its discretion when it concluded that Calabrese's statements to Early and Colwell were admissible as dual inculpatory statements pursuant to § 8-6 (4) of the Connecticut Code of Evidence. We disagree.

"A dual inculpatory statement is admissible as a statement against penal interest under § 8-6 (4) of the Connecticut Code of Evidence, which carves out an exception to the hearsay rule for an out-of-court statement made by an unavailable declarant if the statement at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." (Internal quotation marks omitted.) *State* v. *Pierre*, 277 Conn. 42, 67, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006). "In short, the admissibility of a hearsay statement pursuant to § 8-6 (4) . . . is subject to a binary inquiry: (1) whether [the] statement . . . was against [the declarant's] penal interest and, if so, (2) whether the statement was sufficiently trustworthy." (Internal quotation marks omitted.) *State* v. *Bonds*, 172 Conn. App. 108, 117, 158 A.3d

826, cert. denied, 326 Conn. 907, 163 A.3d 1206 (2017). The defendant concedes that Calabrese's statements to Early and Colwell were against his penal interest and challenges only the court's finding that the statements were trustworthy.

"In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . . Conn. Code Evid. § 8-6 (4). Additionally, when evaluating a statement against penal interest, the trial court must carefully weigh all of the relevant factors in determining whether the statement bears sufficient indicia of reliability to warrant its admission. . . . [W]hen viewing this issue through an evidentiary lens, we examine whether the trial court properly exercised its discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Pierre*, supra, 277 Conn. 68; see also *State* v. *Bonds*, supra, 172 Conn. App. 123 ("[w]e review for an abuse of discretion the court's determination that the statement was trustworthy and, thus, admissible at trial"). "[N]o single factor for determining trustworthiness . . . is necessarily conclusive. . . . Rather, the trial court is tasked with weighing all of the relevant factors set forth in § 8-6 (4) . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Bonds*, supra, 125.

The defendant argues that Calabrese's statements to Early were not trustworthy. With respect to the first factor, the defendant argues that statements to fellow inmates traditionally have been considered untrustworthy, Calabrese and Early did not know each other, and most of Calabrese's statements were prompted and induced by Early's questioning.[15] We disagree that this

[15] The court found that the passage of thirteen months between the crime and Calabrese's statements weighs against the trustworthiness of the statements.

factor weighs against a finding of reliability. The court found relevant that Calabrese made the statements "to a fellow inmate who appeared to . . . be a fellow gang member, and one who was facing serious charges."[16] In *State* v. *Smith*, 289 Conn. 598, 633, 960 A.2d 993 (2008), our Supreme Court concluded that the trial court's findings adequately supported its conclusion that a witness' statements to his cellmate, in which he implicated himself in an unsolved murder, presented sufficient indicia of reliability to justify their admission, noting "the camaraderie that arises" between those who are incarcerated and facing criminal charges. Id. The court in *Smith* also considered that the witness "did not induce [the declarant] to share the details of the crime." Id. It noted the trial court's finding that although "at times [the witness] seemed to lead some of the discussion," the declarant was "a willing and active participant . . . who provided nearly all of the substance of the discussion." (Internal quotation marks omitted.) Id., 616–17. In the present case, although Early continually asked Calabrese questions, Early testified that he did not know anything about the crime before talking to Calabrese. Thus, the details of the crime were related only by Calabrese. Accordingly, the person to whom the statements were made weighs in favor of a finding of trustworthiness.

As to the second factor, the defendant recognizes that Calabrese recited "specific details of the crime" but

[16] The defendant argues that "Early would not have appeared to . . . be a fellow gang member," and points to Early's encouraging Calabrese to become a member of the "blood" gang. (Internal quotation marks omitted.) After Early told Calabrese he could "make shit happen" for him, Calabrese responded: "[I]t's basically the same shit anyway. Fuckin all my boys are fuckin bloods every time there's fucking something goin on I get fucking sucked into fuckin going." Even if Early would not have appeared to be "a fellow gang member," the evidence suggested that he was a member of a gang, with which all of Calabrese's friends were affiliated. Thus, the court did not err in considering this relationship in support of a finding of reliability.

contends that his statements also "contained numerous facts that were contradicted by his other statements or by physical evidence." Specifically, he emphasizes that Calabrese told Early that Vitalis had come at him with a large knife, but there was no evidence of any knife. Rather than setting forth and analyzing the remainder of the alleged inconsistencies, the defendant merely "incorporates . . . the list of contradictory and inconsistent statements listed in the trial memoranda filed by Niraj . . . and the defendant." (Citation omitted.) It was within the trial court's discretion to evaluate the consistencies and inconsistencies to conclude that, on balance, the second factor weighed in favor of a determination that the statements are reliable. Indeed, the trial court noted the inconsistencies identified by the defendant and found that they "pale[d] in comparison to the myriad details of the crime that could only be known to a participant in the crime." Accordingly, our examination of the relevant factors[17] leads us to conclude that the trial court's findings adequately support its conclusion that Calabrese's statements to Early presented sufficient indicia of reliability to justify their admission. See *State* v. *Smith*, supra, 289 Conn. 631.

The defendant also argues that Calabrese's statements to Colwell were not trustworthy because he "was seeking to misinform his girlfriend about his involvement in the incident; he downplayed his participation, admitting to the robbery but denying involvement in the death of . . . Vitalis. He even told Early that he had lied to Colwell." The state responds that Calabrese actually had not denied killing Vitalis in his statement hours after the murder, and that "Calabrese's statement about "rob[bing] the kid," made before the incident,

[17] As to the third factor, the extent to which the statement was against the declarant's penal interest, the defendant does not challenge the court's finding that Calabrese explicitly stated that he killed Vitalis and "ma[de] clear that any other person involved is less culpable than he is."

was not inconsistent with the state's theory, which allowed for the possibility that the gunman's intent to kill may have been formed moments before the actual murder."

With regard to the first factor, Calabrese made his statements to Colwell on the day of the crime, both when he was leaving their condominium to commit the crime and later that night after having committed the crime. "In general, declarations made soon after the crime suggest more reliability than those made after a lapse of time where a declarant has a more ample opportunity for reflection and contrivance." (Internal quotation marks omitted.) *State* v. *Camacho*, 282 Conn. 328, 361, 924 A.2d 99 (statements made within one week of murders trustworthy), cert. denied, 552 U.S. 956, 128 S. Ct. 388, 169 L. Ed. 2d. 273 (2007); see *State* v. *Pierre*, supra, 277 Conn. 71 (statements made within "couple of weeks" trustworthy). The statements also were made to Calabrese's girlfriend, a person with whom Calabrese had a close relationship. See *State* v. *Camacho*, supra, 361–62 (statement made to neighbor, who was also friend, indicative of statement's reliability). As to the second factor, the statements were consistent with other evidence in the case, in that Calabrese told Colwell they "didn't get any money," which was consistent with the police, upon conducting a search, finding $32,150 in Vitalis' bedroom. As to the third factor, even if Calabrese downplayed his involvement by admitting that he robbed Vitalis while failing to offer that he also had murdered Vitalis, the statement remained against his penal interest to a significant extent, in that he "directly and explicitly incriminated himself by admitting his own participation in" the robbery. *State* v. *Bonds*, supra, 172 Conn. App. 123. Thus, the trial court's findings adequately support its conclusion that Calabrese's statements to Colwell presented sufficient indicia of reliability to justify their admission. See *State* v. *Smith*, supra, 289 Conn. 631.

In light of the preceding factors, we conclude that the court did not abuse its discretion when it admitted Calabrese's statements to Early and Colwell pursuant to the dual inculpatory statement exception to the hearsay rule.

II

The defendant's second claim on appeal is that the "court erred in ruling that the defense could not elicit testimony from Salony [Majmudar], the defendant's sister, that Shyam had confessed to her that it was he, not the defendant, who had accompanied Calabrese into the Vitalis home on August 6." He claims that the exclusion of Majmudar's testimony regarding Shyam's statement constituted evidentiary error under § 8-6 (4) of the Connecticut Code of Evidence, and violated his federal and state constitutional rights to present a defense and to due process of law. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. On January 25, 2017, Majmudar, the defendant's sister, testified that Shyam visited her home unannounced one evening during the last two weeks of September, 2013. When defense counsel sought to elicit the substance of the conversation, the state asked for a proffer outside the presence of the jury. The jury was excused, and Majmudar testified that Shyam asked to borrow $50,000 to help make Niraj's bond. Majmudar testified that she told Shyam that she could not help him because she needed to have money ready for the defendant's bond and attorney's fees. Majmudar testified: "I told him that [the defendant] didn't do this, that [the defendant] was innocent, he was in Boston with me. He didn't look surprised. I asked him if he knew who was with [Calabrese] during the robbery. He stayed silent, and he avoided making eye contact with me. I asked him again if he knew who was with [Calabrese] during the robbery, and he still stayed silent and looked away. I

directly asked him if he was with [Calabrese] during the robbery. That's when he started to break down in tears, and he admitted that he and [Calabrese] tried to rob [Vitalis] that night."[18] Majmudar testified that she told only the defendant about Shyam's confession.

The following morning, the court heard argument on the issue of whether Shyam's statements to Majmudar were admissible as statements against penal interest under § 8-6 (4) of the Connecticut Code of Evidence.

[18] Majmudar testified to the remainder of the conversation as follows: "So, I asked him why they robbed [Vitalis]. He said that they needed money to pay for Niraj's attorney fees. He said that [Calabrese] was supposed to rob Luke alone, that Niraj dropped [Calabrese] off near Luke's house first. When Luke's mom got home, [Calabrese] got cold feet and refused to rob [Vitalis] until Shyam showed up last minute.

"I asked him what happened during the robbery. He said the robbery went bad; [Vitalis] got shot. Shyam said he panicked, ran out of the house back to the car. [Calabrese] was still in the house looking for that money. Shyam didn't want to wait around and get caught, so he drove home as fast as he could to change his clothes.

"I asked him what happened to [Calabrese]. He said that he and Niraj drove around with the Pathfinder and eventually picked up [Calabrese] from the woods, and they burned everything they wore in different locations.

"I asked him if [Calabrese] used [the defendant's] phone during the robbery. He said yes. He said that he and [Calabrese] didn't use their own phones, cars or gun during the robbery. He said that Niraj was stupid to use his own phone to contact [Vitalis] that day. I asked him where they left their phones. He said [Calabrese's] phone was with Niraj. Shyam said he left his phone at home.

"I asked him why my parents' two black [sport utility vehicles] were seized. He said they used the black Saab [sport utility vehicle] from New York during the robbery.

"I asked him what happened to the gun. He said that he and Niraj gave the gun to [their cousin] to get rid of.

"I asked him if [the defendant] ever came to Warren earlier that day. He said he never came that day, he came two weeks later.

"I asked him why he was charged with so little, with hindering prosecution and tampering with evidence, why his bond was only fifty thousand when everyone else's was at least one million or more. He said that he threatened [Calabrese], threatened to go after his sister if [Calabrese] ever gave him up.

"I was infuriated. I told Shyam that he needed to come forward and confess. He said that he couldn't do that to his parents, that Niraj may go down for this and his parents couldn't lose him as well.

"I told him that he needed to leave, and I never saw Shyam again."

Analyzing the trustworthiness of the statements, the court considered a number of factors that it determined weighed against admissibility, including that the confession was made thirteen months after the crime; the witness, Majmudar, told no one other than the defendant for more than three and one-half years after the statement was made; the statements were made to only one person, Majmudar; the nature of the relationship between Majmudar and Shyam, in that she had only seen Shyam approximately twice in the preceding year or so; and Majmudar was highly motivated to assist her brother. The court concluded that there was insufficient evidence corroborating the statement to render it trustworthy and, therefore, the statement did not satisfy the requirements of § 8-6 (4).[19]

As set forth in part I B 3 of this opinion, we review for an abuse of discretion the court's determination of the trustworthiness of a statement against penal interest. See *State* v. *Pierre*, supra, 277 Conn. 68. "In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest. . . . Conn. Code Evid. § 8-6 (4)." (Citation omitted; internal quotation marks omitted.) *State* v. *Pierre*, supra, 68.

We begin with the third factor, pursuant to which the defendant argues that "there is no question that Shyam's statement was against penal interest." The court described Shyam's statement as being "to the

[19] The court also indicated that it did not "believe there's been a sufficient showing that Shyam Patel is unavailable" but stated that "the decision I am rendering does not at all turn on that fact." Because we conclude that the court did not abuse its discretion in determining that Shyam's statement was not trustworthy, we need not address the court's finding that the defendant had not established that Shyam was unavailable.

effect that he should be charged with murder instead of the defendant." We agree with the defendant that the statement was against Shyam's penal interest to a significant extent, such that this factor weighs in favor of a finding of trustworthiness.

As to the first factor, the defendant argues on appeal that Shyam's statement was trustworthy in that it was made to "someone with whom he had a close personal relationship, and with whose family he had resided for two years while in high school." We cannot conclude that the court erred in determining that the relationship between Majmudar and Shyam did not support a finding of trustworthiness.[20] Although Majmudar testified that Shyam had shared confidences with her, that she and Shyam were close growing up, and that the two grew even closer when Shyam stayed with her family for his junior and senior years of high school, she acknowledged that she did not see him as much as she did before medical school and residency. She also testified that she had seen Shyam only twice in the past year or so and that it had "been years" since she had more steady contact with Shyam.[21] Moreover, there was no evidence presented that Shyam ever had repeated the statement or had made inculpatory statements to persons other than Majmudar. See *State* v. *Rivera*, 221

[20] Likewise, the court did not err in determining that the thirteen month time period between the crime and Shyam's statement weighed against a finding of trustworthiness, notwithstanding that his statement was made within a few weeks of his arrest. See *State* v. *Lopez*, 254 Conn. 309, 317, 757 A.2d 542 (2000).

[21] The court also noted Majmudar's relationship to the defendant in its consideration of the person to whom Shyam's statement was made. "[A] trial court may not consider the credibility of the testifying witness in determining the trustworthiness of a declaration against penal interest." *State* v. *Rivera*, 268 Conn. 351, 372, 844 A.2d 191 (2004). Our Supreme Court has considered the witness' relationship to the defendant, however, as a factor " 'coloring' " the trustworthiness of the proffered statements. *State* v. *Payne*, 219 Conn. 93, 115, 591 A.2d 1246 (1991) (agreeing with trial court's conclusion that long-standing relationship between defendant and witness would not lead to conclusion of trustworthiness).

Conn. 58, 70, 602 A.2d 571 (1992) (considering that there was no evidence declarant repeated statement to anyone else and testified to the contrary at probable cause hearing); *State* v. *Mayette*, 204 Conn. 571, 578, 529 A.2d 673 (1987) (delay in making statements combined with lack of reiteration of statements weigh against reliability); see also *State* v. *Lopez*, 254 Conn. 309, 321, 757 A.2d 542 (2000) (considering, under second factor, that there was no evidence declarant had repeated statement or made inculpatory statements to any other person).

As to the second factor, the defendant argues that Shyam's statement was supported by a number of corroborating circumstances. First, he points to Vitalis' mother's indication, at one point, that Shyam was one of the intruders. Although Vitalis' mother did not testify at trial, a joint stipulation signed by the prosecutor, Dawn Gallo, and the defendant, by defense counsel, William F. Dow III, was entered into evidence and read aloud to the jury. The joint stipulation provided, in relevant part, that Vitalis' mother gave multiple statements with different descriptions of the intruders, first stating that both men were white and later stating that they could have been Hispanic. In January, 2016, Vitalis' mother told an inspector with the state's attorney's office that she believed one of the two men was an Indian male and that she believed this person to be Shyam Patel. At the time of the incident, she knew Niraj and Shyam, but did not know the defendant. In January, 2017, Vitalis' mother told an inspector that she did not know who either of the two intruders were for certain. Because the statements of Vitalis' mother were inconsistent with each other, they are not sufficiently corroborative of Shyam's statement.

Second, the defendant argues that "[t]here was no irrefutable proof that Shyam was at some distant location at the time of the crime, so he clearly had the

opportunity to participate in it." In support of this argument, he cites *State* v. *Gold*, 180 Conn. 619, 636, 431 A.2d 501, cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980), in which our Supreme Court noted that the declarant had the opportunity to commit the murders, citing, as corroborating circumstances, that two witnesses had testified during the defendant's offer of proof that the declarant was in the state on the day of the murders and was absent from his home at the approximate time of the crimes. No such testimony existed in the present case, and the *lack* of proof that Shyam was at a distant location is not necessarily corroborative of Shyam's statement.

The defendant further argues that Shyam's statement is corroborated by his access to the Pathfinder after the crime, evidence suggesting that it was he who had the car cleaned,[22] and searches he conducted online for information about criminal penalties.[23] Although this evidence may "reinforce the idea of his active criminal involvement," as the defendant argues, these circumstances do not necessarily corroborate the key portion of Shyam's statement that he entered Vitalis' home with Calabrese but, rather, they suggest merely that he was involved in the crime to some degree.

The defendant further suggests that "the court's admissibility ruling was based in part on an improper consideration, i.e., the court's own opinion as to the

[22] There was evidence at trial that Shyam sent the following text messages to Niraj at 8:13 p.m. on August 6, 2012: "U want me to come to the station in pathfinder?"; "?"; "Lemme know . . . I got keys." A white Pathfinder, registered at the home Shyam shared with his parents and, occasionally, Niraj, was seized by police. The vehicle smelled clean and seemingly had new floor mats. A receipt dated August 31, 2012, at 10:40 a.m. from Personal Touch Car Wash in New Milford was found in a bedroom at Shyam's home, and Shyam's cell phone utilized two cell towers in the vicinity of the car wash around the date and time printed on the receipt.

[23] There was evidence at trial that there were Google searches conducted on Shyam's computer for the terms "conspiracy to commit murder in Connecticut" and "conspiracy to kill," along with searches for penalties for those crimes.

credibility of Shyam's statement against penal interest." (Emphasis omitted.) He cites the court's remarks that the evidence pointed "more to Michael Calabrese and this defendant than it does to Shyam Patel having been the person to enter the Vitalis home. The circumstances surrounding the event are far more consistent with this defendant entering the Vitalis' home than Shyam Patel entering that home." (Emphasis omitted.) We are not persuaded that the challenged remarks demonstrate that the court exceeded its gatekeeping function in determining whether Shyam's statements were sufficiently trustworthy to be admitted into evidence. The court referenced defense counsel's point "that it is important to not confuse the issue of credibility with admissibility," and stated that it was "fully cognizant of that" and "kept that in mind . . . in making [its] ruling . . . ."

On the basis of the foregoing, we conclude that the court did not abuse its discretion by excluding from evidence Majmudar's testimony as to Shyam's statement because it was not trustworthy and, therefore, did not satisfy the requirements of § 8-6 (4).[24]

III

The defendant's third claim on appeal is that "[t]he court erred when it denied the defendant's motion to preclude 'cellular telephone tower evidence'—more formally known as 'historical cell[ular] site location information (CSLI)'—and refused to require the state to

[24] The defendant also claims that the court's exclusion of Shyam's statement violated his constitutional rights to present a defense and to due process of law. We disagree. "The defendant's rights to present a defense and to due process do not give him the prerogative to present any testimony or evidence he chooses. In the exercise of his constitutional rights, the accused, as required of the [s]tate, must comply with the established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (Internal quotation marks omitted.) *State* v. *Rosado*, 218 Conn. 239, 249–50, 588 A.2d 1066 (1991).

demonstrate the reliability of such evidence at a hearing held pursuant to *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)." (Footnote omitted.) We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. Again, our analysis of this issue requires discussion of filings and testimony in Niraj's trial. See footnote 9 of this opinion. In Niraj's trial, Niraj filed a motion to preclude the state from introducing "cellular telephone tower evidence or, in the alternative, that the state be required to demonstrate the evidence's reliability at a hearing pursuant to *Porter*." The court held a hearing on the motion on December 23, 2015. Noting the many ways in which cell tower technology has been used, the court stated that "it would seem to me that it would make sense to hear from the witness whom the state would offer at trial. I'm not turning this into deposition, I'm not turning this into a *Porter* hearing, but . . . th[e] first question is whether this is an innovative scientific technique. That's the first question. If what is being offered is something that's been used uncritically for ten years that's one thing, if no one has ever used this type of evidence anywhere then we might need a *Porter* hearing." Defense counsel then stated that the innovative scientific technique he sought to challenge was the theory that the cell phone "must hit the closest tower."

The state then presented the testimony of Special Agent James J. Wines of the Federal Bureau of Investigation (FBI) and a member of its Cellular Analysis Survey Team (CAST), whose responsibilities as a CAST member included "analyz[ing] records obtained by law enforcement agencies related to specific crimes and then using those records [to] conduct an analysis using cell tower information as to the approximate location of a cell phone at a particular time." Wines testified that

CAST members have testified in hundreds of federal and state trials. As to Wines' personal experience, he stated that he has used historical call detail records with cell site information since 2003, spent "thousands of hours reviewing call detail records," and has used that information "to locate subjects in [his] investigations, to locate and apprehend fugitives, to assist in the recovery of evidence, to locate victims of child prostitution, a variety of different . . . scenarios." Wines explained that his reports and presentations are subject to internal peer review, usually by a more senior member of CAST, who reviews his analysis for accuracy and completeness. Wines testified that in his experience, "the individual or the phone has always been in the area where the call detail records indicated the phone would be."

Wines testified that cell phone providers use call detail records for a number of purposes, including "for billing records, so that they can accurately bill their customers for the amount of network resources that their customers use, and they also use it to assist in optimizing the network to provide the best possible coverage for their . . . customers." Wines stated that cell phone carriers "are constantly trying to ensure the reliability and the quality of their networks so that they don't lose customers." Wines testified that he had received training from AT&T, Verizon, Sprint, and T-Mobile, the four major cell phone providers that provide cell phone service in Connecticut, and that he maintains regular contact with their "legal compliance people as well as engineers" regarding "how their call detail records are populated and maintained as well as how their networks are optimized."

In the present case, Wines analyzed the movement of cell phones associated with Niraj, Calabrese, and the defendant on August 6, 2012. He plotted the cell towers each phone utilized, which showed "the movement of

two phones [associated with Niraj] coming up from the area of Queens, New York, to the area of Sharon, Connecticut, and . . . two other phones [associated with Calabrese and the defendant] moving up from the area of Branford, Connecticut, down on the shoreline, again, up to the area of Sharon, Connecticut. And while these phones are moving they're often in contact with one another as they proceed north."

With respect to the towers accessed by the cell phone associated with the defendant on August 6, 2012, Wines explained that prior to 6:04 p.m., the phone accessed tower 1025, which is located on the top of Mohawk Mountain, for a series of phone calls. Wines testified that there were no outgoing calls or messages from the cell phone associated with the defendant after 6:04 p.m. on August 6, 2012, which, he observed, indicated "either that the phone was off or that it was . . . in an area where it could not receive any cell signal," or that "something could have happened to the phone that rendered it unable" to receive a cellular signal.

Wines explained that he had used an AT&T engineering phone[25] and had "detected energy from tower 1025" in the front yard and inside Vitalis' home on a staircase. This meant that were the engineering phone to make a call, "it would have utilized resources from tower 1025." Wines performed this test once. Wines stated that tower 1025 was not the closest tower to the Vitalis residence and explained why a cell phone might use a tower other than the closest tower. Wines stated that a cell phone is "constantly evaluating its network, and it's scanning the area and determining the strength

[25] Wines testified that an engineering phone is "a phone that's set up to show you the—the signals that it's receiving from the tower. It shows you what's happening on your cell phone in the background that you don't see. It presents it on the screen, so that you can kind of spot check and confirm what a particular phone from a particular carrier—what it sees as the strongest, cleanest signal at a particular time."

and clarity of the signals it's receiving from the cell towers in the area. And in doing that analysis it is looking for the strongest, cleanest signal, and that's the tower that it's going to select when it requests resources to make or receive a call or make or receive a text message. The factors that can affect the strength and clarity can be terrain features, can be obstructions, can be the way that the antennas are oriented—the downtilt of particular antennas. In driving in this area in preparing my analysis, what I did note that it is an extremely hilly area, and there are significant terrain features, peaks and valleys that could affect the strength of signal coming from towers, which could cause a phone to select a tower that would not necessarily be the closest tower, but would be the strongest, clearest signal." Wines testified that tower 1025 is between seven and eight miles from the crime scene and that the tower likely had a maximum range of eight miles, which would cover approximately 200 square miles.[26]

Wines further testified that "when a cell phone selects a cell tower, it has to be within the RF [radio frequency] footprint of that particular tower in order to request resources from that tower to complete either a call or an SMS [short message service] message" and, therefore, his analysis also can show where a cell phone was not located. Wines acknowledged that cell towers provide 360 degree coverage and that they are often broken down into sectors. Wines stated that because he "was simply trying to show movement over . . . a large area," he did not "break it down into sectors" and

[26] In situations in which a cell phone connects to a tower that is not the closest tower to the cell phone, Wines stated, he would try to conduct a drive test "if the network was still in the same condition that it was in at the time the crime occurred." In the present case, Wines stated that there had been changes to the AT&T network, so a drive test was not possible. A drive test had been conducted three weeks prior to the homicide, however, and a signal from tower 1025 was present along Route 4, approximately two miles southeast of the crime scene.

that he conducted his analysis "simply using the towers."

Wines testified that the tower a cell phone utilizes is recorded automatically and electronically in the call details records, and that he was not aware of any situation in which a cell tower site noted in a call detail record was incorrect. Although he had never seen a study from outside law enforcement in which the methodology was tested, he stated that "it's tested in a practical, real world sense every day when myself and other members of my unit find fugitives, recover evidence, recover kidnap victims that it's—it works."

Following Wines' testimony, the court heard argument on Niraj's motion in limine. The court then ruled that the evidence offered did not involve an innovative scientific technique and, therefore, a *Porter* hearing was not appropriate. It further stated that "[e]ven if a hearing were warranted and the findings I just made and all the findings I make are based on the evidence presented by this witness, the objection to the technique does not succeed. The evidence offered is scientifically valid; it's rooted in the methods of procedures of science. It is far more than a subjective belief or unsupported speculation; it is therefore sufficiently reliable to be admitted into evidence." The court based its findings "not only on the testimony of the witness in general, but in particular the witness' long experience in this type of analysis, the nature of the evidence that's being offered, the experience of other experts who carry out similar work, the fact that this witness has had significant training and experience in this area, and that his findings are reviewed by other experts in the same field." The court noted Niraj's objection to Wines' methodology but stated that it "did not hear an argument from the defendant as to an alternate methodology that should have been used in this case, nor is there any evidence, offered by the defendant, by any other expert in this field that

some other methodology should have been used." Last, the court found the evidence relevant "in that it purports to show the movement of parties allegedly connected with the homicide . . . on or about the date and time of the homicide . . . ."

In the present case, the defendant filed a motion in limine and memorandum of law in support thereof that virtually was identical to those filed by Niraj. The court heard argument on the motion on November 8, 2016. Defense counsel agreed with the court that his motion paralleled that filed in Niraj's case. Noting that it had ruled on the motion in Niraj's case from the bench on December 23, 2015, and that its ruling was "based upon the testimony provided . . . at a hearing, specifically, testimony by agent Wines," the court inquired of defense counsel whether there were "any changes in the law or factual developments that would cause me to reconsider that ruling." Defense counsel responded: "None that I'm aware of, Your Honor." The court then stated: "[F]or the reasons stated with regard to the Calabrese statement motion, I will deny this motion as well, pursuant to the law of the case.[27] And that's based upon, in part, the representations made by the defense this morning that there are no material factual changes or changes in the law that would warrant a different result. And so the motion in limine to preclude admission of cellular telephone tower evidence is denied." (Footnote added.)

At trial, Wines testified as to the movement of cell phones associated with Niraj, and one cell phone each associated with Shyam, the defendant, and Calabrese over the course of August 6, 2012, and the state introduced into evidence three PowerPoint presentations depicting the movement of those phones to and from the Sharon area, movement in the Sharon area on the

[27] See footnote 9 of this opinion.

afternoon and evening of August 6, 2012, and the activity of cell phones associated with the defendant's family members. Wines testified that from 3:57 p.m. through 6:04 p.m. on August 6, 2012, all activity on the cell phone associated with the defendant utilized tower 1025, which Wines' engineering phone had detected as the "strongest, highest quality signal" at the crime scene and which an AT&T drive test conducted two and one-half weeks prior to the crime "along route 4 approximately two and a quarter to two and a half miles southeast of the crime scene also detect[ed] signal from tower 1025 as being the strongest, highest quality signal in that area."

In his February 6, 2017 motion for a new trial, the defendant claimed that the court, without requiring a sufficient showing of reliability, improperly admitted evidence "purporting to establish instances of mobile telephone communications between the defendant and other accused parties as well as their whereabouts and movements . . . ." The state objected, arguing that the court properly admitted the evidence "after having held a *Porter* hearing in *State* v. [*Patel*, supra, 186 Conn. App. 814], then again hearing argument in [this case], which incorporated by agreement of the parties the evidence and argument presented in *State* v. [*Patel*, supra, 814]." The court denied the motion on April 28, 2017.

In a supplemental written ruling issued on June 20, 2017, the court addressed our Supreme Court's decision, released following the jury's verdict in the present case, in *State* v. *Edwards*, 325 Conn. 97, 133, 156 A.3d 506 (2017), which held that the trial court improperly admitted testimony and documentary evidence of historic cell site analysis, including cell tower coverage maps, through a detective without qualifying him as an expert and conducting a *Porter* hearing in order to ensure that his testimony was based on reliable scientific methodology. The court in *Edwards* relied on the

approach by the United States District Court for the District of Connecticut in *United States* v. *Mack*, Docket No. 3:13-cr-00054 (MPS), 2014 WL 6474329 (D. Conn. November 19, 2014), in which the court conducted a hearing pursuant to *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and concluded that the FBI agent's methodology was sufficiently reliable to meet the requirements of *Daubert* and, therefore, the agent could testify regarding his conclusions.

The court in the present case stated that "the state presented an expert witness with qualifications equal to those of the witness who testified in *Mack*, as opposed to the limited qualifications of the state's witness in *Edwards*." The court explained that Wines demonstrated in detail the methodology that he used in completing his analysis. The court stated: "More significantly, even though this court found that a *Porter* hearing was not required relative to the cell tower data analysis, it effectively carried out a *Porter* hearing out of the presence of the jury in the proceeding against Niraj and concluded that, even if a *Porter* hearing was required, the evidence proffered by the state was scientifically valid in that it was rooted in the methods and procedures of science. Thus, this court made the findings that were lacking in *Edwards* and that the District Court did make in *Mack*."[28]

On appeal, the defendant argues that "[t]his court should not countenance the trial court's attempt, in its June 20, 2017 ruling, to retroactively 'reclassify' the offer of proof at Niraj's trial as 'effectively' constituting a *Porter* hearing." The state responds that the court "conducted the functional equivalent of a *Porter* hearing

[28] The defendant does not dispute that he agreed at trial that the court could rely on the evidence presented at the hearing on the motion in limine in Niraj's trial.

and, most importantly, made the findings required by *Porter*." We agree with the state that the court held the functional equivalent of a *Porter* hearing.

"In *Porter*, we followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, [supra, 509 U.S. 579], and held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show that the expert's methods for reaching his conclusion are reliable. A nonexhaustive list of factors for the court to consider include: general acceptance in the relevant scientific community; whether the methodology underlying the scientific evidence has been tested and subjected to peer review; the known or potential rate of error; the prestige and background of the expert witness supporting the evidence; the extent to which the technique at issue relies [on] subjective judgments made by the expert rather than on objectively verifiable criteria; whether the expert can present and explain the data and methodology underlying the testimony in a manner that assists the jury in drawing conclusions therefrom; and whether the technique or methodology was developed solely for purposes of litigation. . . . Second, the proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 325 Conn. 124.

"[I]t is well established that [t]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence. . . . [Accordingly] [t]he trial court's ruling

on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . Because a trial court's ruling under *Porter* involves the admissibility of evidence, we review that ruling on appeal for an abuse of discretion." (Citation omitted; internal quotation marks omitted.) *State* v. *Montanez*, 185 Conn. App. 589, 619, 197 A.3d 959 (2018), cert. denied, 332 Conn. 907, 209 A.3d 643 (2019).

We first consider whether the hearing conducted in Niraj's case was, in substance, a *Porter* hearing. Our review of the transcript reveals that there was ample testimony before the court bearing on the relevant *Porter* factors and that there was sufficient testimony to enable the court to determine whether Wines' methods were reliable. Specifically, Wines testified, inter alia, that, although he had not seen a study from outside law enforcement that tested his methodology, "it's tested in a practical, real world sense" when CAST members find fugitives and recover kidnap victims and evidence, his work is subject to an internal peer review process where another CAST member reviews his analysis for accuracy and completeness, his personal experience with the accuracy of the technology was such that "the individual or the phone has always been in the area where the call detail records indicated the phone would be," he has had personal experience using historical call detail records with cell site information since 2003 and has received training from the major cell phone providers; and the technology was developed for a number of purposes, including to assist cell phone carriers in optimizing their networks to provide the best possible coverage for their customers.

The defendant contends, however, that the court "did not make adequate *Porter* findings . . . ."[29] Specifically, he argues that the court's ruling failed to address

[29] In a one sentence footnote in his appellate brief, the defendant argues that "[t]he state did not meet its burden of showing that Wines was qualified as an expert . . . and the court never expressly decided that 'preliminary

"the known or potential rate of error" and the "peer review" factor. (Internal quotation marks omitted.) Although the court did not use the words "rate of error" or "peer review," it expressly relied on "the experience of other experts who carry out similar work" and noted that Wines' "findings are reviewed by other experts in the same field," both appropriate considerations under the flexible *Porter* test. See *United States* v. *Mack*, supra, 2014 WL 6474329, *4 (citing testimony that estimation procedures "are commonly relied upon by law enforcement and the cell phone industry when more precise methods of estimation are unavailable" and noting that CAST member had testified that, "in his experience, it is an unusual case in which the actual coverage area of a cell tower differs greatly from the estimation derived from this method"). Last, we note that each of these factors is "only one of several nonexclusive factors . . . . No single *Porter* factor is dispositive." (Internal quotation marks omitted.) *State* v. *Montanez*, supra, 185 Conn. App. 620–21.

Moreover, the court in *Mack* found that the CAST member's inability to provide a precise numerical error rate in the context of estimating the coverage area of cell towers did not negate his qualitative testimony, nor did the lack of scientific peer review render his methods unreliable. *United States* v. *Mack*, supra, 2014 WL 6474329, *4; see also *State* v. *Montanez*, supra, 185 Conn. App. 621 (noting, in context of determining coverage areas of particular towers through drive test analysis, that certain federal courts have declined to find drive test data unreliable on basis of lack of scientific testing and publications).

Last, the defendant contends that "the most fundamental omission is the court's failure to consider the absence of 'sector' analysis and how that absence affected Wines' ability to provide objective rather than

question.' " (Citation omitted.) This argument is inadequately briefed and, accordingly, we decline to review it. See *State* v. *Prosper*, 160 Conn. App. 61, 74–75, 125 A.3d 219 (2015).

subjective data." Specifically, he emphasizes that "[t]he absence of sector analysis means that Wines' calculations and conclusions were less precise and less accurate than they would have been with a sector-based analysis." As the defendant recognizes, defense counsel in Niraj's trial conceded that Niraj, whose alibi was that he was at his parents' house in Warren, was within the radius of coverage of tower 1025. The defendant in the present case states that he "did not make any such concession." Indeed, the defendant's alibi in the present case was that he was at Majmudar's house in Boston, plainly outside of tower 1025's uncontested coverage area of 200 square miles.[30] When the court in the present case asked whether there were any factual developments that would cause it to reconsider the ruling rendered in Niraj's case, defense counsel did not identify his *out-of-state alibi* as a factual distinction requiring reconsideration. Nor does he explain in his appellate brief how the greater precision of a sector analysis would be more reliable, where the state, in light of the defendant's alibi that he was in Boston, sought only to identify the general area in which his phone was present.

Accordingly, the defendant has not demonstrated that the court abused its discretion in denying his motion to preclude CSLI evidence.

[30] Majmudar testified that she and the defendant celebrate Raksha Bandhan, an annual religious festival celebrating the bonds between brothers and sisters, and that the 2012 festival was scheduled for August 2. Majmudar testified that because she was out of town on August 2, she and the defendant arranged to meet at her home on August 6. According to Majmudar, after notifying the defendant that she would arrive home late, Majmudar arrived at about 7 p.m. The defendant was parked with his car door open and was looking for something, which she thought was his cell phone. She stated that they then went inside her home and performed the ceremony, which took no longer than five minutes, and that the defendant left within two hours to return home to Branford to let the dog out. Majmudar testified that she learned about the homicide two days after the defendant was arrested on September 11, 2013. According to Majmudar's testimony, she realized that the defendant came to see her on the day of the homicide and then she told her mother that he could not have been involved.

IV

The defendant's final claim on appeal is that there was insufficient evidence to convict him of murder predicated on *Pinkerton* liability. The defendant acknowledges that he "actively participated in the planned burglary and robbery" but argues that "there is no evidence that he or any [coconspirator] ever contemplated the death of [Vitalis]." He further argues that his "participation in the conspiracy and Calabrese's murder of [Vitalis] was so attenuated or remote . . . that it would be unjust to hold the defendant responsible for the criminal conduct of his coconspirator." (Internal quotation marks omitted.) We disagree.

We first set forth our standard of review. "The standard of review employed in a sufficiency of the evidence claim is well settled. [W]e apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . In conducting our review, we are mindful that the finding of facts, the gauging of witness credibility and the choosing among competing inferences are functions within the exclusive province of the jury, and, therefore, we must afford those determinations great deference." (Internal quotation marks omitted.) *State* v. *Leggett*, 94 Conn. App. 392, 398, 892 A.2d 1000, cert. denied, 278 Conn. 911, 899 A.2d 39 (2006).

We next set forth the scope of *Pinkerton* liability. "Under the *Pinkerton* doctrine . . . a conspirator may be held liable for criminal offenses committed by a

coconspirator that are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy. . . . The rationale for the principle is that, when the conspirator [has] played a necessary part in setting in motion a discrete course of criminal conduct, he should be held responsible, within appropriate limits, for the crimes committed as a natural and probable result of that course of conduct. . . . [W]here . . . the defendant was a full partner in the illicit venture and the coconspirator conduct for which the state has sought to hold him responsible was integral to the achievement of the conspiracy's objectives, the defendant cannot reasonably complain that it is unfair to hold him vicariously liable, under the *Pinkerton* doctrine, for such criminal conduct. . . .

"In analyzing vicarious liability under the *Pinkerton* doctrine, we have stated that the *Pinkerton* doctrine constitutionally may be, and, as a matter of state policy, should be, applied in cases in which the defendant did not have the level of intent required by the substantive offense with which he was charged. The rationale for the doctrine is to deter collective criminal agreement and to protect the public from its inherent dangers by holding conspirators responsible for the natural and probable—not just the intended—results of their conspiracy. . . . This court previously has recognized that [c]ombination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise. . . . In other words, one natural and probable result of a criminal conspiracy is the commission of originally unintended crimes. . . . Indeed, we specifically have contrasted *Pinkerton* liability, which is predicated on an agreement to participate in the conspiracy, and

requires the substantive offense to be a reasonably foreseeable product of that conspiracy . . . with accessorial liability, which requires the defendant to have the specific mental state required for the commission of the substantive crime. . . .

"Thus, the focus in determining whether a defendant is liable under the *Pinkerton* doctrine is whether the coconspirator's commission of the subsequent crime was *reasonably foreseeable*, and not whether the defendant could or did *intend* for that particular crime to be committed. In other words, the only mental states that are relevant with respect to *Pinkerton* liability are that of the defendant in relation to the conspiracy itself, and that of the coconspirator in relation to the offense charged. If the state can prove that the *coconspirator's* conduct and mental state satisfied each of the elements of the subsequent crime at the time that the crime was committed, then the defendant may be held liable for the commission of that crime under the *Pinkerton* doctrine if it was reasonably foreseeable that the coconspirator would commit that crime within the scope of and in furtherance of the conspiracy." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Coward*, 292 Conn. 296, 307–309, 972 A.2d 691 (2009).

Accordingly, "[u]nder the *Pinkerton* doctrine . . . a defendant may not be convicted of murder *unless one of his criminal associates*, acting foreseeably and in furtherance of the conspiracy, caused the victim's death with the intent to do so. . . . [U]nder *Pinkerton*, a coconspirator's intent to kill may be imputed to a defendant who does not share that intent, provided, of course, that the nexus between the defendant's role and his coconspirator's conduct was not so attenuated or remote . . . that it would be unjust to hold the defendant responsible . . . ." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Coltherst*, 263 Conn. 478, 494, 820 A.2d 1024 (2003).

Our Supreme Court has acknowledged, however, that "there may be occasions when it would be unreasonable to hold a defendant criminally liable for offenses committed by his coconspirators even though the state has demonstrated technical compliance with the *Pinkerton* rule. . . . For example, a factual scenario may be envisioned in which the nexus between the defendant's role in the conspiracy and the illegal conduct of a coconspirator is so attenuated or remote, notwithstanding the fact that the latter's actions were a natural consequence of the unlawful agreement, that it would be unjust to hold the defendant responsible for the criminal conduct of his coconspirator. In such a case, a *Pinkerton* charge would not be appropriate." (Internal quotation marks omitted.) Id., 493.

The defendant cursorily maintains that Vitalis' murder was not reasonably foreseeable. We disagree. Giving deference, as we must, to the reasonable inferences of the jury, it reasonably was foreseeable that Vitalis, who was home with his mother at the time of the crime, might resist or fight back to thwart the robbery of his proceeds from a large drug sale, and that the defendant's coconspirator, Calabrese, who was armed with a loaded gun, might, in furtherance of the conspiracy, cause Vitalis' death with the intent to do so. See *State* v. *Coward*, supra, 292 Conn. 312 (quoting *State* v. *Rossi*, 132 Conn. 39, 44, 42 A.2d 354 [1945], for proposition that "crimes against the person like robbery . . . are, in common experience, likely to involve danger to life in the event of resistance by the victim or the attempt of the perpetrator to make good his escape and conceal his identity"); *State* v. *Taylor*, 177 Conn. App. 18, 33, 171 A.3d 1061 (2017) (Sufficient evidence to support the defendant's conviction of murder under the *Pinkerton* doctrine existed where the "court reasonably found, on the basis of the evidence presented and the reasonable inferences drawn therefrom, that the defendant and [his alleged coconspirator] robbed the victim, who fought

back, and that they did so in furtherance of an agreement to commit a robbery while at least one of them was armed with a deadly weapon. Because the murder of the victim was committed in furtherance of that conspiracy, and was a reasonably foreseeable consequence thereof, such proof of conspiracy also supported the defendant's conviction for murder under the *Pinkerton* doctrine."), cert. denied, 327 Conn. 998, 176 A.3d 555 (2018); see also *State* v. *Gonzalez*, 311 Conn. 408, 427, 87 A.3d 1101 (2014) (noting that had the state sought to prove the defendant's liability for manslaughter in the first degree with a firearm under *Pinkerton*, evidence that the defendant possessed a loaded gun when he was together with an individual selling drugs "could well have been probative circumstantial evidence of the existence of a conspiracy between them to sell drugs at [the housing complex], of which the death of an interfering party could be a foreseeable, natural, and probable consequence").

Moreover, we disagree that the defendant's role was too attenuated, such that it would be unfair to apply *Pinkerton*. Viewing the evidence in the light most favorable to sustaining the verdict, the defendant communicated with Niraj via text message regarding the crime days prior to it. The defendant, presumably aware, as was Calabrese, that Vitalis was a drug dealer who recently received a large amount of cash from a drug sale, planned to enter Vitalis' home to rob him of that money. Moreover, before the defendant and Calabrese entered the home, they saw Vitalis' mother arrive home. Once inside, the defendant restrained her using zip ties. Cf. *State* v. *Coward*, supra, 292 Conn. 311 (considering, among other evidence, that the "plan called for [the defendant's coconspirator] and the defendant to invade an occupied home and to 'use force' to commit the robbery"). Under these circumstances, we conclude that the extent of the defendant's participation was not so attenuated and remote that it would be unjust to

hold him responsible for the criminal conduct of his coconspirator, Calabrese.[31]

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* ANTHONY E. BROOKS, JR. (AC 40425)

Lavine, Devlin and Harper, Js.

Syllabus

Convicted of the crimes of criminal possession of a firearm, criminal possession of ammunition, carrying a pistol without a permit, illegal receipt of a firearm, possession of a weapon in a motor vehicle and interfering with an officer, the defendant appealed to this court. *Held* that there was insufficient evidence to support the defendant's conviction of illegal receipt of a firearm; the state did not prove that the defendant was disqualified from receiving a firearm at the time that he received the firearm in question, nor did it establish when the defendant came into possession of the firearm.

Argued September 18—officially released November 12, 2019

Procedural History

Substitute information charging the defendant with the crimes of criminal possession of a firearm, criminal possession of ammunition, carrying a pistol without a permit, stealing a firearm, illegal receipt of a firearm, illegal possession of a weapon in a motor vehicle and

[31] We further note that the jury also found the defendant guilty of felony murder. See footnote 1 of this opinion. Upon motion of the defendant, the court vacated the conviction of felony murder to avoid double jeopardy concerns. Consequently, even if there was insufficient evidence to sustain the defendant's conviction of murder predicated on *Pinkerton* liability, the felony murder conviction could be reinstated on remand. See *State* v. *Miranda*, 317 Conn. 741, 753–54, 120 A.3d 490 (2015) ("[W]e see no substantive obstacle to resurrecting a cumulative conviction that was once vacated on double jeopardy grounds—provided that the reasons for overturning the controlling conviction would not also undermine the vacated conviction. . . . [A] jury necessarily found that all the elements of the cumulative offense were proven beyond a reasonable doubt. Put differently, although the cumulative conviction goes away with vacatur, the jury's verdict does not.").

interfering with an officer, brought to the Superior Court in the judicial district of Waterbury, geographical area number four, and tried to a jury before *K. Murphy, J.*; thereafter, the court granted the defendant's motion for judgment of acquittal as to the count alleging stealing a firearm; verdict and judgment of guilty, from which the defendant appealed to this court. *Reversed in part; judgment directed.*

Judie Marshall, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *David A. Gulick*, senior assistant state's attorney, for the appellee (state).

Opinion

DEVLIN, J. The defendant, Anthony E. Brooks, Jr., appeals from the judgment of conviction, rendered after a jury trial, of illegal receipt of a firearm in violation of General Statutes § 29-33 (b).[1] On appeal, the defendant asserts that there was insufficient evidence to support his conviction of that charge because the state did not prove when or how the defendant received the firearm. We disagree with the defendant's argument but conclude, for another reason, that there was insufficient evidence to support the defendant's conviction of illegal receipt of a firearm. Accordingly, we reverse the judgment of conviction only on this count and remand this case with direction to vacate the conviction of this offense.[2]

[1] The defendant was also convicted of criminal possession of a firearm in violation of General Statutes § 53a-217 (a), criminal possession of ammunition in violation of § 53a-217 (a), carrying a pistol without a permit in violation of General Statutes § 29-35 (a), illegal possession of a weapon in a motor vehicle in violation of General Statutes § 29-38 (a), and interfering with a police officer in violation of General Statutes § 53a-167a (a). These convictions are not affected by this appeal.

[2] As our Supreme Court has elaborated, "[the] principles of judicial economy dictate that, in a case in which the judgment of the reviewing court does not change the total effective sentence, the reviewing court should not order the trial court to resentence a defendant on the remaining convictions

As relevant to this appeal, the jury reasonably could have found the following facts. On September 9, 2015, the police attempted to conduct a motor vehicle stop of the defendant for his failure to obey a stop sign. After crashing his car and fleeing on foot, the defendant was confronted by the police and was seen tossing an object away from him. The police recovered the object, which proved to be a Remington Arms Model 1911 R1 .45 ACP handgun that had been reported stolen on July 27, 2012.

Following a jury trial, the defendant was convicted on November 30, 2016 of, inter alia, illegal receipt of a firearm in violation of § 29-33 (b). The statute provides in relevant part: "[N]o person may purchase or receive any pistol or revolver unless such person holds a valid permit to carry a pistol or revolver . . . a valid permit to sell at retail a pistol or revolver . . . or a valid eligibility certificate . . . or is a federal marshal, parole officer or peace officer." General Statutes § 29-33 (b).[3] On appeal, the defendant argues that there was insufficient evidence to support his conviction on this count. We agree.

Although the parties disagree as to the precise meaning of the word "receive" in § 29-33 (b), both agree that it means more than mere possession. At trial, the state proved that on September 9, 2015, when the defendant

unless there is some evidence or some other basis in the record supporting the conclusion that the judgment of the reviewing court altered the original sentencing intent." *State* v. *Johnson*, 316 Conn. 34, 42–43, 111 A.3d 447 (2015).

Because our decision does not alter the total effective sentence, and because there is no evidence that our decision would alter the trial court's original intent at sentencing, we conclude that the defendant need not be resentenced.

[3] When the state brought charges against the defendant, it charged him with violating General Statutes § 29-33 (b) by illegally receiving a firearm. The state did not charge the defendant with illegally purchasing a firearm. Therefore, we need only address the sufficiency of evidence necessary to establish illegal receipt of a firearm in violation of § 29-33 (b).

was found to be in possession of a firearm, he was disqualified from receiving a firearm because he was a convicted felon. The state, however, concedes that it did not prove that the defendant was disqualified at the time that he received the firearm, nor did it establish when the defendant came into possession of the firearm. The state, therefore, further concedes, and we agree after examining the record, that there was insufficient evidence to establish that the defendant violated § 29-33 (b).[4]

The judgment is reversed only as to the conviction of illegal receipt of a firearm and the case is remanded with direction to vacate the defendant's conviction of that offense; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* OSVALDO DEJESUS (AC 41151)

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

Syllabus

Convicted, after a jury trial, of the crimes of sexual assault in the fourth degree and risk of injury to a child in connection with his sexual abuse of the minor victim, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his unpreserved claim that the trial court improperly admitted into evidence expert testimony from M, an expert in forensic interviewing, regarding how child victims of sexual abuse behave and how they disclose their abuse, which he claimed was irrelevant and unduly prejudicial and constituted impermissible vouching for the victim's credibility:

   a. The trial court did not commit plain error in admitting M's expert testimony; although M testified generally about the nature and purpose of forensic interviews, the general characteristics of sexually abused children, the different types of disclosures and several factors that may trigger those types of disclosures, M did not opine that the victim exhibited any of the characteristics she discussed but, rather, acknowledged

[4] In light of the state's concession that it did not offer sufficient evidence to prove receipt of a firearm, we see no need to address the issue of the meaning of "receive" in § 29-33 (b).

the limitations of her testimony on cross-examination, noting that she did not know anything about the victim or her forensic interview, and stated that she was not offering any opinion about the victim's disclosure process or the truthfulness of any of her disclosures, and, therefore, M's testimony was consistent with testimony that our Supreme Court, in *State* v. *Taylor G.* (315 Conn. 734) and *State* v. *Spigarolo* (210 Conn. 359), previously has determined to be admissible.

b. This court declined to exercise its supervisory authority over the administration of justice to preclude, as a matter of law, the admission of expert testimony on the characteristics of children who report sexual abuse, as our Supreme Court has clearly held that such testimony is admissible, and this court could not use its supervisory authority to overrule binding Supreme Court precedent.

2. The defendant's claim that the trial court abused its discretion during a pretrial hearing by refusing to permit him to ask the victim leading questions on direct examination was unavailing; there was nothing in the record to suggest that the victim's testimony would have been different had defense counsel been permitted to ask her leading questions, and, therefore, as the defendant conceded during oral argument before this court, he could not establish that the trial court's alleged error caused him harm.

Argued September 5—officially released November 12, 2019

Procedural History

Substitute information charging the defendant with two counts each of the crimes of sexual assault in the first degree and sexual assault in the fourth degree, and with four counts of the crime of risk of injury to a child, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *Alander*, *J.*; verdict and judgment of guilty of two counts of sexual assault in the fourth degree and four counts of risk of injury to a child, from which the defendant appealed to this court. *Affirmed*.

Norman A. Pattis, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Maxine Wilensky*, senior assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Osvaldo DeJesus, appeals from the judgment of conviction, rendered after a jury trial, of four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2), and two counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A).[1] On appeal, the defendant claims that the trial court (1) improperly admitted into evidence expert testimony that amounted to impermissible bolstering of the victim's credibility and (2) erred in concluding, during a pretrial hearing, that the victim was not an adverse party, thereby precluding defense counsel from asking the victim leading questions on direct examination. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of this appeal. The defendant and the victim's mother, M,[2] were in a relationship when, in 2003 or 2004, the defendant moved into the apartment M shared with her two daughters, D and the victim. At the time, the victim was two or three years old. Thereafter, the defendant, M, and her daughters moved to a condominium. In 2005, M gave birth to the defendant's son, S, and the five of them shared the condominium.

In 2008, when the victim was eight years old, the defendant began a pattern of sexually assaulting her in the bedroom the victim shared with D. Over the course of the next two years, the defendant sexually abused the victim both in and out of the home. When the victim was ten years old, she began menstruating, prompting

[1] The defendant also was charged with two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). The jury found the defendant not guilty of those charges.

[2] In accordance with our policy of protecting the privacy interests of victims of sexual abuse and the crime of risk of injury to a child, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

the defendant to stop the sexual abuse. In 2013, the defendant and M ended their relationship and, at M's insistence, the defendant moved out of the condominium. Because S continued to live with M, the defendant would stop by the condominium unannounced and would stay there until S went to sleep. The victim withheld disclosure of the abuses she had suffered until she was thirteen years old, at which point she confided in her cousin, C. Unable to articulate verbally what had happened, the victim disclosed the news to C by way of a text message with the expectation that C would keep it a secret. Several days later, the victim's aunt discovered the text message and relayed the information to M. That night, M took the victim to the police station where she gave videotaped and written statements concerning the defendant's sexual abuse. Three days later, the victim went to the child sexual abuse clinic at Yale New Haven Hospital where she had a videotaped forensic interview with Rebecha Sullivan, a licensed clinical social worker.

On the basis of the victim's complaint, the defendant was charged with two counts of sexual assault in the first degree, four counts of risk of injury to a child, and two counts of sexual assault in the fourth degree. Following a jury trial, the defendant was convicted of all four counts of risk of injury to a child and both counts of sexual assault in the fourth degree. He was acquitted of the remaining charges. See footnote 1 of this opinion. The court imposed a total effective sentence of thirty-two years of incarceration, execution suspended after twenty years, with fifteen years of probation and ten years of sex offender registration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant claims for the first time on appeal that the trial court improperly admitted into evidence expert

testimony regarding how child victims of sexual abuse behave and how they disclose their abuse. More specifically, the defendant argues that the court erred by admitting the testimony of Donna Meyer, the state's expert in forensic interviewing, despite the fact that she had never examined the victim. The defendant concedes that he did not preserve this claim at trial, arguing instead that this court should reverse the judgment of conviction under the plain error doctrine. In the alternative, the defendant asks that we exercise our supervisory authority over the administration of justice to preclude the admission of testimony from forensic interviewers on the characteristics of children who disclose sexual abuse and the different manners in which they disclose such abuse. According to the defendant, such evidence is irrelevant to whether a particular complainant is telling the truth, is unduly prejudicial because it suggests that all children who disclose sexual abuse were, in fact, abused, and constitutes improper "vouching" for the complainant's credibility. Because our Supreme Court has made clear that such testimony is admissible, we reject the defendant's arguments.

The following additional facts are relevant to our resolution of the defendant's claim. The state called Meyer as an expert witness in forensic interviewing to discuss generally forensic interviewing and the dynamics of child sexual abuse victims. Meyer testified at length as to what forensic interviews entail,[3] the different types of disclosures,[4] what may cause a delayed

[3] At trial, Meyer testified that a forensic interview "is a fact-finding interview that's used to gather information from the child in a supportive, nonleading, developmentally appropriate way . . . that all the team members need so that . . . as a forensic interviewer I need to not just . . . get one piece of information, but information that all members of the [multidisciplinary investigation team] would be looking for and needing to minimize that secondary need for interviews."

[4] Meyer testified as follows: "[T]here's three different ways; it's accidental, purposeful and prompted. So, the accidental is the one I just mentioned where it comes out by accident and you see those most often with young children who . . . you know, may not be aware of it, say something during bathing, see it with the mom looking at teen's phone, may see it that way, or somebody dropping a note at school. Those are all accident. The purpose-

disclosure,[5] and the effects domestic violence in the home has on child sexual assault victims.[6] She also discussed how a victim's relationship with his or her abuser can impact the delay in disclosure, stating that "the closer the relationship, the longer the delay in general, that's what research has shown." Meyer went on to discuss the effect that sexual abuse has on a victim's sleep, testifying that "[e]very child is unique, so it depends on a lot of different things, but often times children who have been sexually abused will experience nightmares, some children may experience bed wetting, other children may—may experience inability to fall asleep . . . ." On cross-examination, Meyer agreed that she knew nothing about the victim or her forensic interview, and was not opining on the disclosure process in this case. She further confirmed that she was not opining as to whether a particular disclosure was truthful.

A

As previously noted in this opinion, the defendant did not object to Meyer's testimony, and, therefore, he

ful is when that child has made a conscious decision that, for whatever reason, they can no longer [withhold], and they choose to report it to somebody who can help stop it. And then the third, and often we see most, is a prompted, and that is where, you know, the child, for some reason, whether it be that they told a friend and the friend told a teacher, or . . . news came out on TV about a sexual assault and a parent questioned them or something, so it was prompted by another event, but it was not their initial intent to come out and talk about it."

[5] Meyer testified as follows: "There are several reasons why a child may or may not disclose. Some of the reasons that a child may disclose [are] that . . . it becomes safe for them because the perpetrator or the person who has been doing the abuse is no longer in the house; it may be that they . . . are at an age—or their sibling is of an age when they first started getting abused, and they want to protect that child . . . [or] it may be because they just can no longer take it. There are lots of different ways disclosures come out and, based on how they come out, there would be reasons as to why they . . . delayed or disclosed."

[6] Meyer testified that "[d]omestic violence in a home is a strong deterrent because . . . sexual abuse is often about control and in domestic violence there is always somebody who is in control. And, so, the child may really fear that, you know, if they do tell that some of the threats may be carried out; they've seen violence in the home. . . . Battering homes are a huge deterrent for children telling out of fear."

seeks reversal under the plain error doctrine. Our plain error doctrine is well established. "The plain error doctrine is based on Practice Book § 60-5, which provides in relevant part: The court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. The court may in the interests of justice notice plain error not brought to the attention of the trial court. . . . The plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 181 Conn. App. 167, 177 n.3, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018).

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily discernable on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [I]n addition to examining the patent nature of the error, the reviewing court must examine that error for the grievousness of its consequences in order to determine whether reversal under the plain error doctrine is appropriate. . . . [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Sanchez*, 308 Conn. 64, 77, 60 A.3d 271 (2013).

The defendant's contention that Meyer's testimony regarding the characteristics of children who disclose sexual abuse and the manner in which they disclose the abuse was irrelevant and unduly prejudicial, and constituted impermissible vouching for the credibility of the victim is wholly inconsistent with the decisions

of our Supreme Court. In *State* v. *Spigarolo*, 210 Conn. 359, 378, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989), our Supreme Court addressed this exact issue, noting the value of expert testimony because the nuances of child sexual abuse trauma are beyond the average person's understanding. The court stated: "Consequently, expert testimony that minor victims typically fail to provide complete or consistent disclosures of the alleged sexual abuse is of valuable assistance to the trier in assessing the minor victim's credibility. As the Oregon Supreme Court stated: It would be useful to the jury to know that . . . many child victims are ambivalent about the forcefulness with which they want to pursue the complaint, and it is not uncommon for them to deny the act ever happened. Explaining this superficially bizarre behavior by identifying its emotional antecedents could help the jury better assess the [witness'] credibility." (Internal quotation marks omitted.) Id. The court concluded that such expert testimony did not usurp the jury's function of assessing witness credibility. The court held that, "where defense counsel has sought to impeach the credibility of a complaining minor witness in a sexual abuse case, based on inconsistency, incompleteness or recantation of the victim's disclosures pertaining to the alleged incidents, the state may offer expert testimony that seeks to demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents." Id., 380.

In *State* v. *Taylor G.*, 315 Conn. 734, 765, 110 A.3d 338 (2015), our Supreme Court relied on *Spigarolo* to reach the same conclusion, holding that the trial court did not err when it allowed expert witness testimony on the characteristics of child sexual abuse victims. In *Taylor G.*, the state called its expert witness, a forensic interviewer at Yale New Haven Hospital's child sexual abuse clinic, to show the jury the video of her forensic

interview with the complainant after she testified about the general characteristics of sexually abused children. Id., 755–57. The defendant filed a motion in limine challenging the admissibility of the state's expert witness' testimony, which the trial court denied. Id., 755. After the jury returned a guilty verdict, but, prior to sentencing, the defendant filed a motion for a new trial, arguing that the state's witness improperly vouched for the complainant's credibility through testimony that our Supreme Court had deemed inadmissible in *State* v. *Favoccia*, 306 Conn. 770, 51 A.3d 1002 (2012).[7] *State* v. *Taylor G.*, supra, 758. In affirming the judgment of conviction, our Supreme Court reiterated that expert testimony regarding the general characteristics of child sexual assault victims is admissible. Id., 765. The court stated: "The purpose of expert testimony regarding the general characteristics of sexually abused children is to provide information that will assist the jury in evaluating the credibility of the complainant. As we stated in *Spigarolo*, this type 'of expert testimony is admissible because the consequences of the unique trauma experienced by [child] victims of sexual abuse are matters beyond the understanding of the average person. . . . Consequently, expert testimony . . . is of valuable assistance to the trier in assessing the . . . victim's credibility.' . . . *State* v. *Spigarolo*, supra, 210 Conn. 378. It is thus to be expected that a complainant will demonstrate behavior similar or identical to the behavior of other children who have been sexually abused. Indeed, if that were not the case, expert testimony on the subject would have no relevance. More significantly,

[7] In *Favoccia*, the court determined that the expert witness' testimony at issue did amount to impermissible vouching, concluding that, "although expert witnesses may testify about the general behavioral characteristics of sexual abuse victims, they cross the line into impermissible vouching and ultimate issue testimony when they opine that a particular complainant has exhibited those general behavioral characteristics." *State* v. *Favoccia*, supra, 306 Conn. 780.

[the state's expert witness], unlike the expert in *Favoccia*, never drew a comparison between [the victim] and the characteristics she described as typical of child sexual abuse victims generally. Accordingly we conclude that the defendant's claim must fail." *State* v. *Taylor G.*, supra, 765.

Applying these principles to the present case, we conclude that the trial court did not commit plain error in admitting Meyer's expert testimony. *Spigarolo* and *Taylor G.* clearly allow for the use of the type of testimony at issue here. As was true of the expert in *Taylor G.*, in this case, Meyer testified generally about the nature and purpose of forensic interviews, the general characteristics of sexually abused children, the different types of disclosures, and several factors that may trigger those types of disclosures. At no point in Meyer's testimony did she opine that the victim exhibited any of the characteristics she discussed. To the contrary, Meyer acknowledged the limitations of her testimony on cross-examination, noting that she did not know anything about the victim or her forensic interview. She further testified that she was not offering any opinion about the victim's disclosure process or the truthfulness of any of her disclosures. Given that Meyer's testimony was in line with what our Supreme Court determined to be permissible in *Spigarolo* and *Taylor G.*, the court did not err, let alone commit plain error, in allowing her testimony. Accordingly, the defendant's claim fails.

B

In the alternative, the defendant asks this court to exercise its supervisory authority over the administration of justice to preclude, as a matter of law, the admission of expert testimony on the characteristics of children who report sexual abuse. As noted in part I A of this opinion, our Supreme Court clearly has held that such testimony is admissible. It is well established

that, as an intermediate appellate court, we are required to follow the decisions of our Supreme Court. See *Stuart* v. *Stuart*, 297 Conn. 26, 45–46, 996 A.2d 259 (2010) ("it is manifest to our hierarchical judicial system that [the Supreme Court] has the final say on matters of Connecticut law and that the Appellate Court . . . [is] bound by [its] precedent"); *State* v. *Smith*, 107 Conn. App. 666, 684–85, 946 A.2d 319 ("[W]e are not at liberty to overrule or discard the decisions of our Supreme Court but are bound by them. . . . [I]t is not within our province to reevaluate or replace those decisions." [Internal quotation marks omitted.]), cert. denied, 288 Conn. 902, 952 A.2d 811 (2008). Consequently, we are unable to use our supervisory authority effectively to overrule binding Supreme Court precedent. We, thus, decline the defendant's invitation that we do so.

II

The defendant also claims that during a pretrial hearing, the trial court abused its discretion by refusing to permit him to ask the victim leading questions on direct examination.

The following additional facts are relevant to our resolution of the defendant's second claim on appeal. On May 9, 2017, the defendant called the victim to testify at a pretrial hearing regarding his motion to suppress portions of the victim's forensic interview as inadmissible hearsay.[8] During the defendant's direct examination of the victim, he asked her a series of leading questions.

[8] The defendant argued that the victim's testimony during her forensic interview was inadmissible hearsay not recognized by the medical diagnosis and treatment exception under § 8-3 (5) of the Connecticut Code of Evidence. In support of his motion, the defendant sought to establish, through the victim's testimony, that she did not attend the interview for medical diagnosis or treatment. "The admissibility of statements offered under the medical diagnosis and treatment exception to the hearsay rule turns on whether the declarant was seeking medical diagnosis or treatment, and the statements are reasonably pertinent to achieving those ends." (Internal quotation marks omitted.) *State* v. *Estrella J.C.*, 169 Conn. App. 56, 72, 148 A.3d 594 (2016).

The state objected on the basis that the defendant improperly was leading the witness on direct examination, to which the defendant responded that "under [§] 6-8 (b) (1) [of the Connecticut Code of Evidence], I'm asking questions of a party that is aligned as an adverse party . . . ." The court disagreed with the contention that the victim was an adverse party and sustained the state's objection, but noted that if the victim became a hostile witness then it would allow leading questions. The defendant did not claim, thereafter, that the victim was a hostile witness.

We begin with the applicable standard of review. "[I]n order to establish reversible error on an evidentiary impropriety, the defendant must prove both an abuse of discretion and a harm that resulted from such abuse. . . . This requires that the defendant demonstrate that it is more probable than not that the erroneous action of the court affected the result. . . .

"It is well settled that, absent structural error, the mere fact that a trial court rendered an improper ruling does not entitle the party challenging that ruling to obtain a new trial. *An improper ruling must also be harmful to justify such relief*." (Emphasis added; internal quotation marks omitted.) *State* v. *Baker*, 168 Conn. App. 19, 36, 145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016).

We need not address the defendant's novel claim that a complaining witness in a criminal case should be considered an adverse party under § 6-8 of the Connecticut Code of Evidence because the defendant essentially has conceded that he cannot demonstrate harm resulting from the court's alleged abuse of discretion.[9] Having reviewed the record, we agree that there is nothing that

[9] At the close of oral argument before this court, counsel for the defendant stated: "I have to concede . . . [the state's] got me on the prejudice prong. I don't think I can demonstrate that here. I don't want to concede my argument, but I think the record is what it is here."

suggests that the victim's testimony would have been different had defense counsel been permitted to ask her leading questions. Because the defendant cannot establish that the court's alleged error caused him harm, his claim necessarily fails.

The judgment is affirmed.

In this opinion the other judges concurred.

A.C. CONSULTING, LLC *v.* ALEXION PHARMACEUTICALS, INC.
(AC 41814)

Prescott, Elgo and Sheldon, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for, inter alia, breach of contract. In January, 2013, the plaintiff had entered into a service contract with the defendant, in which the plaintiff agreed to provide the defendant with administrative support and coordination of security details for heightened risk employee travel. The contract provided, inter alia, that it was operative through December 31, 2016, but that the defendant could terminate the contract upon five days' written notice. The defendant terminated its contract with the plaintiff in November, 2014. Subsequently, the plaintiff commenced the present action and filed a substitute complaint, which alleged breach of contract, negligent misrepresentation, and breach of the covenant of good faith and fair dealing. The defendant filed a motion to strike the complaint, which the trial court granted. Thereafter, the court granted the defendant's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. On appeal, the plaintiff claimed, inter alia, that, on the basis of the allegations that, prior to executing the contract, the defendant had represented to the plaintiff that the contract would remain in effect for more than three years, the trial court should have concluded that the defendant was estopped from relying on the contract's termination provision, and that, because the defendant should have been estopped from terminating the contract, the court should have viewed the allegation in the complaint that the defendant terminated the contract prior to its expiration as sufficient to allege breach of contract, negligent misrepresentation, and breach of the covenant of good faith and fair dealing. *Held*:

1. The plaintiff could not prevail on its claim that, in considering the legal sufficiency of the substitute complaint, the trial court improperly failed to consider whether the applicable contractual period was ambiguous

and to construe the claimed ambiguity against the defendant as the drafter of the contract, which was based on the plaintiff's claim that an ambiguity existed with respect to whether the defendant's termination of the contract prior to the expiration of the contractual period constituted a breach of the contract because the contract did not expire by its terms until December 31, 2016, and yet the contract also provided in a separate provision that the defendant could terminate the contract at any time with five days' written notice; the contract was not ambiguous in the manner suggested by the plaintiff, as although paragraph 1 of the contract did set forth a contractual period of almost four years, that provision was also expressly qualified with the language "unless terminated earlier" and contained a cross-reference to paragraph 7, which sets forth the conditions upon which the contract may be terminated, and, when read together, the intent of the parties in agreeing to the terms in the two provisions was to resume their contractual relationship for almost four years unless the defendant chose to terminate the relationship earlier by providing the plaintiff with five days' written notice.

2. The plaintiff's claim that the trial court improperly concluded that the plaintiff's allegation that the defendant terminated the contract without giving the plaintiff sufficient notice under the contract was legally insufficient to state a claim for breach of contract was unavailing; the substitute complaint did not provide the necessary factual allegations describing the manner in which the notice the plaintiff received was insufficient, as the complaint did not directly reference the contract's notice provision, which provided that the contract could be terminated by the defendant upon five days' written notice, and did not specify whether the notice the plaintiff received was insufficient because it received less than five days' notice or because the notice was not in writing, and even if the bald allegation of insufficient notice of termination under the contract, without any additional facts, was sufficient to plead a breach of the agreement, the plaintiff failed to allege that it was harmed by the insufficient notice, as the breach of contract count as pleaded focused entirely on the defendant's decision to terminate the parties' contract prior to the expiration of the contractual period, despite oral assurances that the defendant intended to continue with its business arrangement with the plaintiff, and the plaintiff made no factual allegation that it had been damaged by the defendant's failure to give five days' written notice.

3. The plaintiff could not prevail on its claim that the trial court improperly concluded that the allegations that the defendant made assurances regarding the length of the contract were insufficient to plead any of the plaintiff's causes of action, as any reliance by the plaintiff on the alleged representation would have been unreasonable as a matter of law in the face of the fully integrated written contract containing a merger clause; the plaintiff executed a fully integrated contract with a merger clause that provided in express terms that the contract could not be altered except by a written agreement and that the contract terms superseded any prior understanding between the parties, and, thus, any

reassurances that the defendant may have provided to the plaintiff prior to the execution of the contract regarding the length of the parties' anticipated business relationship were superseded by the provisions in the contract stating that the contract could be terminated by the defendant, at will, upon five days' written notice, and any oral assurances, promises, or representations made during the course of the contractual period that contradicted the provisions of the contract would have had no legal effect unless committed to a writing signed by both parties.

Argued September 12—officially released November 12, 2019

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Ecker*, *J.*, granted the defendant's motion to strike the plaintiff's amended complaint; thereafter, the court, *Wahla*, *J.*, granted the defendant's motion to strike the plaintiff's substitute complaint; subsequently, the court, *Wahla*, *J.*, granted the defendant's motion for judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Kevin D. Scully, for the appellant (plaintiff).

Jeffrey R. Babbin, with whom were *Christine Salmon Wachter* and, on the brief, *Lawrence Peikes*, for the appellee (defendant).

Opinion

PRESCOTT, J. The plaintiff, A.C. Consulting, LLC, appeals from the judgment of the trial court rendered in favor of the defendant, Alexion Pharmaceuticals, Inc., following the granting of the defendant's motion to strike the plaintiff's substitute complaint. The substitute complaint contained three counts alleging, respectively, breach of contract, negligent misrepresentation, and breach of the covenant of good faith and fair dealing. On appeal, the plaintiff claims that, in evaluating the legal sufficiency of the allegations in the substitute complaint, the trial court improperly (1) failed both to find

an ambiguity in the parties' contract regarding its operative length and to construe that ambiguity against the defendant as the drafter of the contract, (2) concluded that the plaintiff's allegation that the defendant terminated the contract without giving the plaintiff "sufficient notice under the contract" was legally insufficient to state a claim for breach of contract, and (3) concluded that the allegations that the defendant or the defendant's agent made assurances regarding the length of the contract were insufficient to plead any of the plaintiff's causes of action, including negligent misrepresentation.[1] We affirm the judgment of the trial court.

The following facts, as alleged in the operative complaint, and procedural history are relevant to our resolution of the present appeal. In July, 2011, the plaintiff, through its sole member, James Dolan, entered into a service contract with the defendant, in which the plaintiff agreed to provide the defendant with "administrative support and coordination of security details for heightened risk employee travel." Dolan had acquired expertise and knowledge in the field of security during his lengthy employment with the Connecticut state police. The service contract expired by its terms on December 31, 2012. The operative complaint, however, alleged that the service contract expired on December 31, 2011. The parties subsequently entered into a second service contract with similar terms in March, 2012. That contract expired on December 31, 2012.

In January, 2013, the parties entered into a third service contract (contract), which is the subject matter of the present action. Prior to executing the contract, the plaintiff, through Dolan, had expressed to the defendant its desire for a longer period of contractual commitment

[1] Although the plaintiff briefs its estoppel and negligent misrepresentation claims separately, we address them together because we conclude that they fail for primarily the same reason.

from the defendant. The defendant had assured Dolan that the plaintiff would have the defendant's security business "so long as he wanted it" and that, at the very least, he had an almost four year commitment from the defendant.[2] (Internal quotation marks omitted.) The contract provided that it was operative through December 31, 2016, a term of approximately four years. The contract further provided, however, that the plaintiff would act as an independent contractor and that the defendant could terminate the contract "upon five (5) days written notice." The defendant's right to terminate the contract was otherwise unconditional. The contract contained no reciprocal provision that authorized the plaintiff to terminate the contract prior to its expiration. Finally, the contract contained a clause providing that (1) it could not be altered except by a written agreement signed by both parties, (2) it represented the entire agreement of the parties, and (3) it "supersede[d] all previous written and oral negotiations, commitments, and understandings."

In the summer of 2013, the defendant asked the plaintiff to create a job description for a new position within the defendant's organization titled "Senior Manager of Global Security." The defendant's director of global security, Robert Weronik, told Dolan that he should not apply for the position, reassuring Dolan that the plaintiff would have the defendant's heightened risk employee travel business for as long as the plaintiff wanted it. Weronik, however, knew, or should have known, that the new senior manager would "probably look to terminate the plaintiff."

The defendant terminated its contract with the plaintiff on November 17, 2014. The defendant did not cite to any breach of the contract by the plaintiff and failed to give sufficient notice of the termination. Prior to

[2] The plaintiff alleged in its complaint that, on the basis of these assurances, it had "refrained from developing other clients."

terminating the contract, the defendant had reduced the plaintiff's hours and responsibilities, and had required Dolan to "report to the [defendant] at least two days a week and prepare detailed reports to the defendant," all of which the plaintiff considered to be unilateral changes to the terms and conditions of the parties' contract. The plaintiff theorized that, during the course of its business relationship with the defendant, "the defendant gained vast knowledge from the plaintiff on the means and methods of security" and that "[w]hen the defendant had gained sufficient knowledge," it terminated its agreement with the plaintiff.

On October 13, 2016, the plaintiff commenced the underlying action. The initial complaint consisted of a single count that expressly alleged only a breach of the covenant of good faith and fair dealing. The defendant filed a request to revise, indicating that the complaint contained allegations that could be read as advancing additional theories of recovery, such as breach of contract or wrongful discharge, and asking the plaintiff to set forth each cause of action it intended to pursue in a separate count. The plaintiff objected to the request to revise but ultimately requested leave of the court to file a two count amended complaint. Count one of the amended complaint alleged that the defendant had breached an express term of the contract, and count two alleged that the defendant had breached the covenant of good faith and fair dealing.

The defendant filed a motion to strike the amended complaint, arguing that the first count failed as a matter of law because the plaintiff had failed to allege what contractual term the defendant had breached, and the second count failed because the factual allegations were insufficient to establish that the defendant had breached any contractual obligation owed to the plaintiff or that the defendant had acted in bad faith. The court, *Ecker*, *J.*, granted the motion to strike, stating: "Accepting the plaintiff's factual allegations as true, and applying the legal standard governing a motion to strike,

the court finds as a matter of law that nothing about the actions of the defendant breach any contractual terms or constitute a breach of the covenant of good faith and fair dealing. The plaintiff's arguments regarding procedural and substantive unconscionability do not help save either claim."[3]

On September 1, 2017, the plaintiff elected to replead; see Practice Book § 10-44;[4] and filed a substitute complaint. The substitute complaint contained three counts. Count one again alleged a breach of contract, count two alleged a new cause of action sounding in negligent misrepresentation,[5] and count three alleged a breach of the covenant of good faith and fair dealing. The plain-

[3] The plaintiff argued in its opposition to the first motion to strike that the contract provision permitting the defendant to terminate the contract unilaterally was both procedurally and substantively unconscionable. The plaintiff contended that it was procedurally unconscionable because the defendant, who drafted the agreement, was a large corporation that had superior bargaining power over the plaintiff, which was a small, single member company. The plaintiff also contended that the provision was substantively unconscionable because, by its terms, only the defendant could terminate the agreement at will, whereas the plaintiff was bound for the duration of the contractual period. Ordinarily, unconscionability is raised as a defense to the enforcement of a contract. See *Bender* v. *Bender*, 292 Conn. 696, 731–32, 975 A.2d 636 (2009). In the present case, the plaintiff seems to invoke it to bolster its argument that the court should construe the allegation that the defendant terminated the contract before the contractual period expired as alleging a breach of the contract because, *if* the court deemed the termination provision unconscionable and, thus, unenforceable, the defendant would have had no legal right to terminate the contract as it did. The plaintiff did not attempt to revive this unconscionability argument either in opposition to the second motion to strike or as an issue on appeal. Accordingly, we do not address it further.

[4] Practice Book § 10-44 provides in relevant part: "Within fifteen days after the granting of any motion to strike, the party whose pleading has been stricken may file a new pleading," and if the party fails to do so, "the judicial authority may, upon motion, enter judgment against said party on said stricken complaint, counterclaim or cross complaint, or count thereof. . . ."

[5] We note that the right to file a new pleading under Practice Book § 10-44, "is limited to making those corrections needed to render the claims set forth in the original pleading legally sufficient. It is not an opportunity to file wholly amended pleadings that assert new legal claims . . . permission for which ordinarily could be obtained only in accordance with the provi-

tiff appended copies of the parties' three service contracts to the substitute complaint.[6]

The defendant filed a motion to strike the substitute complaint and a supporting memorandum of law. It argued first that, with respect to counts one and three of the substitute complaint, the plaintiff had added only a few new allegations to those set forth in the stricken amended complaint, none of which helped to overcome the deficiencies in the plaintiff's prior pleading, which the court had determined failed to state a legally cognizable cause of action. In addition to claiming that the prior ruling should be treated as the law of the case with respect to those counts alleging a breach of contract and a breach of the covenant of good faith and fair dealing, it also argued that, like the prior amended complaint, the breach of contract count failed as a matter of law because none of the defendant's alleged actions could be construed as breaching a contractual term. Similarly, the defendant asserted that the third count failed because the plaintiff both failed to allege that the defendant had breached any contractual obligation owed to the plaintiff and that the defendant had done so in bad faith.

sions of Practice Book § 10-60. . . . An example of a proper pleading filed pursuant to Practice Book § 10-44 is one that suppl[ies] the essential allegation lacking in the complaint that was stricken." (Citations omitted; internal quotation marks omitted.) *Perugini* v. *Giuliano*, 148 Conn. App. 861, 878, 89 A.3d 358 (2014). Unlike with the amended complaint, the plaintiff did not request permission from the court to file the substitute complaint pursuant to Practice Book § 10-60. Neither the defendant nor the court, however, raised this as an issue in litigating the second motion to strike, nor has the defendant raised it on appeal as an alternative ground for affirmance with respect to count two.

[6] Practice Book § 10-29 (a) provides in relevant part: "Any plaintiff . . . desiring to make a copy of any document a part of the complaint shall refer to it as Exhibit A, B, C, etc. . . . Except as required by statute, the plaintiff shall not annex the document or documents referred to as exhibits to the complaint, or incorporate them in the complaint, at full length . . . ." The entirety of the contract, therefore, was a part of the allegations of the complaint.

With respect to the new cause of action alleging negligent misrepresentation, the defendant argued that that count also failed to state a cognizable claim for relief because the plaintiff's allegations that it relied on statements made by the defendant's agent were of no legal significance in light of the fully integrated contract, which, by its express terms, precluded the plaintiff from relying on any alleged oral representations that were inconsistent with the contract's terms.

The plaintiff filed an objection to the motion to strike and a memorandum in opposition. It argued that the substitute complaint contained additional allegations not found in the amended complaint, rendering the law of the case doctrine inapplicable. It further argued that the allegations that the defendant had assured Dolan that "his job" was secure despite terminating the contract prior to its expiration were legally sufficient to support a claim of negligent misrepresentation. The defendant filed a reply memorandum, and the plaintiff filed a surreply memorandum.

The court, *Wahla*, *J.*, issued a decision on May 1, 2018, rejecting the plaintiff's arguments and granting the motion to strike all counts. Specifically, after setting forth the appropriate standard of review, the court stated as follows: "In the present case, the added allegations of the [substitute] complaint . . . substantially [repeat] the same core allegations of the amended complaint pertaining to the breach of contract and the breach of the covenant of good and fair dealing. The additional allegations are conclusory and fail to state a legally sufficient claim for breach of contract or breach of the covenant of good faith and fair dealing. In the plaintiff's objection, the cases relied upon by [it are] distinguishable from the case at bar. Therefore, both count[s] one and three are hereby ordered stricken.

"The additional count of negligen[t] misrepresentation of the [substitute] complaint fails as a matter of

law, as no reliance can be made upon oral words in the existence of the written contract. . . . Hence, count two is also ordered stricken." (Citation omitted.)

The plaintiff did not file a new pleading within fifteen days after the granting of the motion to strike. See Practice Book § 10-44. The defendant thereafter filed a motion for judgment in its favor and against the plaintiff on the stricken complaint. The court granted the motion and rendered judgment in favor of the defendant without trial. This appeal followed.

The law governing our review of a trial court's decision on a motion to strike is well settled. "A motion to strike shall be used whenever any party wishes to contest . . . the legal sufficiency of the allegations of any complaint . . . or of any one or more counts thereof, to state a claim upon which relief can be granted . . . ." Practice Book § 10-39 (a). "Appellate review of a trial court's decision to grant a motion to strike is plenary." *U.S. Bank National Assn.* v. *Blowers*, 332 Conn. 656, 667, 212 A.3d 226 (2019). "We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Internal quotation marks omitted.) *Doe* v. *Cochran*, 332 Conn. 325, 333, 210 A.3d 469 (2019). Because a "motion to strike is essentially a procedural motion that focuses solely on the pleadings," a reviewing court cannot "consider material outside of the pleading that is being challenged by the motion." (Internal quotation marks omitted.) *Dlugokecki* v. *Vieira*, 98 Conn. App. 252, 256, 907 A.2d 1269, cert. denied, 280 Conn. 951, 912 A.2d 483 (2006). Nevertheless, "[a] complaint includes all exhibits attached thereto." Id., 258 n.3; see also Practice Book § 10-29.

I

The plaintiff first claims that, in considering the legal sufficiency of the substitute complaint, the court improperly failed to consider whether the applicable contractual period was ambiguous and to construe the claimed ambiguity against the defendant as the drafter of the contract. We are not persuaded.

The plaintiff argues that an ambiguity existed with respect to whether the defendant's termination of the contract prior to the expiration of the contractual period constituted a breach of the contract because the contract did not expire by its terms until December 31, 2016, establishing a contractual period of approximately four years, and yet the contract also provided in a separate provision that the defendant could terminate the contract at any time with five days' written notice. Although the plaintiff's brief is not a model of clarity, we construe the argument as follows: if the court recognized the purported ambiguity in the contract, and resolved it against the defendant as the drafter of the contract, then the allegation in the complaint that the defendant terminated the contract prior to the expiration of the stated contractual period could reasonably be construed as alleging that the defendant breached an express term of the contract, which in turn should have precluded the court from granting the motion to strike as to count one. The plaintiff's claim lacks merit, however, because the contract simply is not ambiguous in the manner suggested by the plaintiff.

"[W]hether a contract is ambiguous is a question of law for the court." *Enviro Express, Inc.* v. *AIU Ins. Co.*, 279 Conn. 194, 200, 901 A.2d 666 (2006). "[A] contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and

every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous. . . . The fact that the parties interpret the terms of a contract differently, however, does not render those terms ambiguous." (Citation omitted; internal quotation marks omitted.) Id., 199–200. "[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. . . . Moreover, in construing contracts, we give effect to all the language included therein, as the law of contract interpretation . . . militates against interpreting a contract in a way that renders a provision superfluous." (Internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, 174 Conn. App. 344, 358, 166 A.3d 800 (2017). With these principles in mind, we turn to the language of the contract.

The plaintiff argues that the parties' contract was ambiguous because paragraphs 1 and 7 of the contract "cannot be reconciled." Paragraph 1 of the contract provides in relevant part: "This Agreement shall be effective from the date first written above until December 31, 2016 *unless terminated earlier in accordance with Paragraph 7*." (Emphasis added.) Paragraph 7 provides in relevant part: "This Agreement . . . may be terminated by the [defendant] upon five (5) days written notice." Contrary to the plaintiff's argument, these paragraphs are not contradictory. Although paragraph 1 does, in fact, set forth a contractual period of nearly four years, that provision is also expressly qualified with the language "unless terminated earlier . . . ." Rather than contradicting paragraph 7, paragraph 1 expressly contains a cross-reference to paragraph 7, which simply provides the conditions upon which the contract may be terminated. Read together,

as they must be, the intent of the parties in agreeing to those terms was to resume their contractual relationship for almost four years unless the defendant chose to terminate the relationship earlier by providing the plaintiff with five days' written notice.

The fact that the term setting forth the length of the contract period is expressly qualified to allow early termination and contains a cross-reference to the provision that authorizes at-will termination by the defendant distinguishes the present case from the one appellate case cited by the plaintiff in support of its claim, *Dainty Rubbish Service, Inc.* v. *Beacon Hill Assn., Inc.*, 32 Conn. App. 530, 630 A.2d 115 (1993). That case involved the construction of inconsistent or conflicting clauses in a contract; id., 532–34; which we simply do not have here. The plaintiff's claim that the contract was ambiguous and that the court should have construed its ambiguity against the defendant in order to conclude that the defendant had no contractual right to terminate the parties' business relationship prior to December 31, 2016, is simply without merit, and it provides no basis for overturning the court's decision to grant the motion to strike the breach of contract count.

II

The plaintiff next claims that the court improperly determined that the substitute complaint failed to state a legally sufficient claim for breach of contract, particularly given the new allegation in the substitute complaint that the defendant terminated the parties' contract without providing the plaintiff with "sufficient notice under the contract." The plaintiff contends that this constituted a legally sufficient allegation that the defendant had violated a specific provision of the contract, namely, the notice provision of the termination clause. We are not persuaded that this allegation, without more, satisfied the plaintiff's pleading obligations with respect to its breach of contract claim.

A complaint "shall contain a concise statement of the facts constituting the cause of action . . . ." Practice Book § 10-20. "The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . It is fundamental in our law that the right of a plaintiff to recover is limited to the allegations in his complaint. . . . A plaintiff may not allege one cause of action and recover on another." (Internal quotation marks omitted.) *Criscuolo* v. *Mauro Motors, Inc.*, 58 Conn. App. 537, 544–45, 754 A.2d 810 (2000). "Conclusions of law, absent sufficient alleged facts to support them, are subject to a motion to strike." *Fortini* v. *New England Log Homes, Inc.*, 4 Conn. App. 132, 134–35, 492 A.2d 545, cert. dismissed, 197 Conn. 801, 495 A.2d 280 (1985). "The elements of a breach of contract action are [1] the formation of an agreement, [2] performance by one party, [3] breach of the agreement by the other party and [4] damages." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 117 Conn. App. 550, 558, 979 A.2d 1055, cert. denied, 294 Conn. 913, 983 A.2d 274 (2009). "To survive a motion to strike, the plaintiff's complaint must allege all of the requisite elements of a cause of action." *Stancuna* v. *Schaffer*, 122 Conn. App. 484, 489, 998 A.2d 1221 (2010).

The court, in granting the first motion to strike in this matter, indicated that none of the defendant's alleged actions, as set forth in the initial complaint, reasonably could be construed as alleging that the defendant had breached any particular contractual term. In other words, the complaint failed to allege facts sufficient to satisfy the third element of an action for breach of contract. In granting the second motion to strike, the court concluded that the plaintiff had not changed the core allegations of its breach of contract claim and that the added allegations did not remedy the initial complaint's failure to state a legally sufficient cause of action. We agree with that assessment.

On appeal, the plaintiff directs our attention to the added allegation in the substitute complaint that the defendant terminated the contract without providing the plaintiff with "sufficient notice under the contract," arguing that this allegation was sufficient to allege a breach of a specific contractual provision. That allegation, however, must be read and evaluated within the context of the allegations in the count as a whole.

Although the plaintiff generally alleged that it did not receive "sufficient notice" prior to the defendant's termination of the contract, it did not provide the necessary factual allegations describing the manner in which the notice it received was insufficient. The contract's termination provision provided in relevant part that the contract could be terminated by the defendant "upon five (5) days written notice." Accordingly, insufficient notice could refer to a defect in either the timing of the notice, the form of the notice, or both. The complaint does not directly reference the contract's notice provision. The plaintiff also does not allege whether the notice it received was insufficient because it received less than five days' notice or because the notice was not in writing. Although the plaintiff argues on appeal that it was only provided with four days' notice, that factual allegation is missing from the complaint. The purpose of fact pleading is to put the defendant and the court on notice of the important and relevant facts claimed and the issues to be tried. See *Harris* v. *Shea*, 79 Conn. App. 840, 842–43, 832 A.2d 97 (2003). Those facts are lacking here.

Furthermore, even broadly construed, the breach of contract count as pleaded focuses entirely on the defendant's decision to terminate the parties' contract prior to the expiration of the contractual period, despite oral assurances that the defendant intended to continue with its business arrangement with the plaintiff. Said another way, it was the termination of the contract itself, not

the precise manner in which the defendant effectuated that termination, that formed the basis for the plaintiff's claims of breach of contract and breach of the covenant of good faith and fair dealing.[7] Even if the plaintiff intended that the failure to give five days' notice would serve as an additional basis for its claim of breach of contract, the plaintiff made no factual allegation that it had been damaged by that particular alleged breach. The sole allegation of damages in the complaint regarding breach of contract was that "[a]s a result of *the defendant's termination of the contract*, the plaintiff has lost the benefit of its bargain and suffered financial loss." (Emphasis added.) Because damages are an element of a cause of action for breach of contract, in order to recover for breach of contract based on a lack of sufficient notice prior to termination, the plaintiff was required to allege how it was damaged by the lack of "sufficient notice . . . ." Such allegations are lacking in the substitute complaint.

Although we must read the pleadings broadly, the plaintiff must still allege sufficient facts that, if proven true, would establish all elements of the cause of action alleged. Even if we were to assume for the sake of argument that a bald allegation of insufficient notice of termination under the contract, without any additional facts, was sufficient to plead a breach of the agreement, the plaintiff failed to allege that it was harmed by the purported one day lack of notice. We agree with the court's assessment that, viewed in a light most favorable to upholding their legal sufficiency, the pleadings still

[7] This construction of the plaintiff's complaint is consistent with the argument made by the plaintiff in opposing the second motion to strike. In its opposition, the plaintiff argued that the additions it made to the substitute complaint "allege that the defendant terminated the agreement without citing a breach and that the agreement set out a three year agreement and the defendant *breached by terminating the agreement prior to the expiration of those three years*." (Emphasis added.)

fail to allege facts sufficient to state a cause of action for breach of contract.

III

Finally, the plaintiff claims that, on the basis of the allegations that the defendant, through its agent, had represented to the plaintiff that the contract would remain in effect for more than three years, the trial court should have concluded that the defendant was estopped from relying on the contract's termination provision. According to the plaintiff, because the defendant should have been estopped from terminating the contract due to the assurances made prior to and following the execution of the contract, the court should have viewed the allegation in the complaint that the defendant terminated the contract prior to its expiration as sufficient to allege both a breach of the contract and a breach of the covenant of good faith and fair dealing.[8] Furthermore, the plaintiff claims that those same alleged representations or assurances supported a cause of action for negligent misrepresentation. Because we conclude that any reliance by the plaintiff on the alleged representation would have been unreasonable as a matter of law in the face of a fully integrated written contract containing a merger clause, the allegations are simply insufficient to support any of the causes of action alleged in the operative complaint.

An integrated contract, meaning "one that the parties have reduced to written form and which represents the full and final statement of the agreement between the

[8] As with the prior claim, the plaintiff fails to explain precisely how this claim of error relates to the court's granting of the motion to strike. To the extent that the plaintiff intends to argue that the allegations of estoppel in the complaint were sufficient to state a cognizable cause of action for promissory estoppel, the plaintiff never asked the trial court to construe the complaint in that fashion, and even if it had, the complaint would fail to state a claim of promissory estoppel for the same reasons that apply to the causes of action that were explicitly alleged.

parties . . . must be interpreted solely according to the terms contained therein. Whether a contract is deemed integrated oftentimes will turn on whether a merger clause exists in the contract. . . . The presence of a merger clause in a written agreement establishes conclusive proof of the parties' intent to create a completely integrated contract and, unless there was unequal bargaining power between the parties, the use of extrinsic evidence in construing the contract is prohibited. . . .

"We long have held that when the parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed, that the whole engagement of the parties, and the extent and manner of their understanding, was reduced to writing. After this, to permit oral testimony, *or prior or contemporaneous conversations*, *or circumstances*, *or usages* [*etc.*], in order to learn what was intended, or *to contradict what is written*, would be dangerous and unjust in the extreme. . . . Although there are exceptions to this rule, we continue to adhere to the general principle that the unambiguous terms of a written contract containing a merger clause may not be varied or contradicted by extrinsic evidence. . . . Courts must always be mindful that parties are entitled to the benefit of their bargain, and the mere fact it turns out to have been a bad bargain for one of the parties does not justify, through artful interpretation, changing the clear meaning of the parties' words." (Citations omitted; emphasis added; internal quotation marks omitted.) *EH Investment Co., LLC* v. *Chappo, LLC*, supra, 174 Conn. App. 359–60.

It is axiomatic that to prevail on a claim of estoppel, "it is not enough that a promise was made; *reasonable reliance* thereon, resulting in some detriment to the

party claiming the estoppel, also is required." (Emphasis added.) *Ferrucci* v. *Middlebury*, 131 Conn. App. 289, 305, 25 A.3d 728, cert. denied, 302 Conn. 944, 31 A.3d 382 (2011). Similarly, in order to recover on a claim of negligent misrepresentation, "the plaintiff is required to prove *reasonable reliance* on the defendant's misrepresentation." (Emphasis added.) *National Groups, LLC* v. *Nardi*, 145 Conn. App. 189, 193, 75 A.3d 68 (2013).

Here, the plaintiff executed a fully integrated contract with a merger clause that provided in express terms that the contract could not be altered except by a written agreement and that the contract terms superseded any prior understanding between the parties. Thus, any reassurances that the defendant may have provided to the plaintiff prior to the execution of the contract regarding the length of the parties' anticipated business relationship were superseded by the provisions in the contract stating that the contract could be terminated by the defendant, at will, upon five days' written notice. Moreover, any oral assurances, promises, or representations made during the course of the contractual period that contradicted the provisions of the contract similarly would have had no legal effect unless committed to a writing signed by both parties. In other words, it would have been unreasonable as a matter of law for the plaintiff to have relied on any alleged representations by the defendant or its agent suggesting that the plaintiff could expect to continue providing the defendant security service for more than three years. Such allegations in the complaint, therefore, were legally insufficient to support any of the causes of action alleged by the plaintiff.

The judgment is affirmed.

In this opinion the other judges concurred.

CHARLOTTE CICCARELLI *v.* PAUL CICCARELLI (AC 41973)

Lavine, Elgo and Moll, Js.

Syllabus

The plaintiff brought this action seeking, inter alia, the partition of certain real property that she owned as a joint tenant with the defendant. In count one of her complaint, the plaintiff sought a partition of the property, and in count two she sought an accounting and damages. After the trial court granted the plaintiff's motion for summary judgment as to the first count of the complaint only, the plaintiff filed a motion for an order of partition by sale and the appointment of a committee. Thereafter, the court entered a notice of judgment of partition by sale and set a sale date, and the defendant appealed to this court, which dismissed the appeal for lack of a final judgment. Subsequently, the defendant filed another appeal to this court from the partial summary judgment rendered by the trial court, claiming that he brought the appeal to overturn summary judgment in order to stop the sale of the property. *Held* that this court lacked subject matter jurisdiction over the defendant's appeal, the defendant having failed to appeal from a final judgment; a judgment that disposes of only part of a complaint is not a final judgment unless the partial judgment disposes of all causes of action against a particular party or parties, and it was undisputed that the partial summary judgment rendered by the trial court did not dispose of all causes of action against the defendant, as the second count of the plaintiff's complaint remained pending and the record did not contain a withdrawal or an unconditional abandonment of that count of the plaintiff's complaint.

Argued September 20—officially released November 12, 2019

Procedural History

Action for, inter alia, the partition or sale of real property, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *S. Richards*, *J.*, granted the plaintiff's motion for summary judgment as to count one of the complaint and rendered partial judgment for the plaintiff, from which the defendant appealed to this court, which dismissed the appeal; thereafter, the defendant appealed to this court. *Appeal dismissed.*

Paul Ciccarelli, self-represented, the appellant (defendant).

Sheila J. Hall, for the appellee (plaintiff).

Opinion

PER CURIAM. The self-represented defendant, Paul Ciccarelli, appeals from the summary judgment rendered by the trial court in favor of the plaintiff, Charlotte Ciccarelli,[1] on count one of a two count complaint. We conclude that the defendant has not appealed from a final judgment and, therefore, dismiss the appeal.

The relevant facts are not in dispute. At all relevant times, the parties owned real property known as 17 Moulthrop Street in North Haven (property) as joint tenants with rights of survivorship. In 2017, the plaintiff commenced the present action against the defendant. Her complaint contained two counts. In the first count, the plaintiff sought a partition of the property pursuant to General Statutes §§ 52-495 and 52-500 (a). In the second count, the plaintiff sought an accounting and damages pursuant to General Statutes § 52-404 (b).[2] The defendant thereafter filed an answer, in which he denied the allegations of the plaintiff's complaint. The defendant also filed a special defense, alleging that the plaintiff had improperly withdrawn funds from a financial account jointly held by the parties.

After the pleadings were closed, the plaintiff filed a motion for summary judgment on the first count of the complaint, claiming that no genuine issue of material fact existed with respect to her right to a partition of the property. That motion was accompanied by the plaintiff's sworn affidavit. Although the defendant filed an opposition to that motion, he did not submit any documentation in support thereof. Following a hearing

[1] The plaintiff is the defendant's mother.

[2] General Statutes § 52-404 (b) provides: "When two or more persons hold property as joint tenants, tenants in common or coparceners, if one of them occupies, receives, uses or takes benefit of the property in greater proportion than the amount of his interest in the property, any other party and his executors or administrators may bring an action for an accounting or for use and occupation against such person and recover such sum or value as is in excess of his proportion."

on April 23, 2018, the court granted summary judgment in favor of the plaintiff on the first count of her complaint. The official case detail contains an entry dated April 23, 2018, which states that the court had entered judgment "as to certain counts of the complaint for the plaintiff—case remains pending."

The plaintiff then filed a motion for an order of partition by sale and the appointment of a committee. On May 14, 2018, the court entered a notice of judgment of partition by sale and set a sale date of October 20, 2018.

On May 29, 2018, the defendant filed an appeal to this court challenging the propriety of the partial summary judgment rendered by the court on April 23, 2019. In response, the plaintiff moved to dismiss the appeal for lack of a final judgment, which this court granted on June 27, 2018.

On August 10, 2018, the defendant filed another appeal from the partial summary judgment rendered by the trial court on April 23, 2018. On his appeal form, the defendant states that he brought this appeal "[t]o overturn the summary judgment in order to stop the sale of the house." In response, the plaintiff maintains that the defendant has not appealed from a final judgment, thereby depriving this court of subject matter jurisdiction. We agree.

"The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law . . . . The jurisdiction of the appellate courts is restricted to appeals from judgments that are final. General Statutes §§ 51-197a and 52-263; Practice Book § [61-1] . . . . The policy concerns underlying the final judgment rule are to discourage piecemeal appeals and to facilitate the speedy and orderly disposition of cases at the trial court level. . . . The appellate courts have a duty to dismiss, even on [their] own initiative, any appeal that [they lack]

jurisdiction to hear." (Internal quotation marks omitted.) *Mazurek* v. *Great American Ins. Co.*, 284 Conn. 16, 33, 930 A.2d 682 (2007); accord *In re Santiago G.*, 325 Conn. 221, 229, 157 A.3d 60 (2017) (lack of final judgment constitutes jurisdictional defect that necessitates dismissal of appeal).

Our precedent further instructs that "[a] judgment that disposes of only a part of a complaint is not a final judgment . . . unless the partial judgment disposes of all causes of action against a particular party or parties; see Practice Book § 61-3; or if the trial court makes a written determination regarding the significance of the issues resolved by the judgment and the chief justice or chief judge of the court having appellate jurisdiction concurs. See Practice Book § 61-4 (a)." (Internal quotation marks omitted.) *Tyler* v. *Tyler*, 151 Conn. App. 98, 103, 93 A.3d 1179 (2014). It is undisputed that the partial summary judgment that the court entered on April 23, 2018, did not dispose of *all* causes of action against the defendant, as the second count seeking an accounting pursuant to § 52-404 (b) remained pending. In addition, the defendant has not requested a written determination from the trial court regarding the significance of the issues resolved by the partial summary judgment entered against him.

As a result, the defendant could appeal from the partial summary judgment "only if the remaining causes of action or claims for relief [were] withdrawn or unconditionally abandoned before the appeal [was] taken." *Meribear Productions, Inc.* v. *Frank*, 328 Conn. 709, 717, 183 A.3d 1164 (2018). The record before us does not contain a withdrawal or an unconditional abandonment of the second count of the complaint by the plaintiff. To paraphrase our Supreme Court, not only does that second count remain unadjudicated, it also presents the possibility that the defendant could be found liable to the plaintiff for additional damages. Id., 726. In such instances, "it cannot be said that further proceedings could have no effect on him." Id.; see also

State v. *Ebenstein*, 219 Conn. 384, 389–90, 593 A.2d 961 (1991) (dismissing appeal from partial summary judgment for lack of final judgment and emphasizing that parties will still be before trial court for final determination of ancillary claim).

We conclude that the defendant has not appealed from a final judgment, as the second count of the plaintiff's complaint remains pending. Accordingly, this court lacks subject matter jurisdiction over the defendant's appeal.

The appeal is dismissed.

THOMAS ROGERS *v.* COMMISSIONER OF CORRECTION
(AC 41974)

Lavine, Prescott and Bear, Js.

Syllabus

The petitioner, who had been convicted of the crimes of murder, conspiracy to commit murder, attempt to commit murder, criminal possession of a firearm and illegal possession of a weapon in a motor vehicle in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his trial counsel and his prior habeas counsel had provided ineffective assistance. Following the shooting, M overheard a conversation between the petitioner and two men regarding certain details of the shooting. Prior to the petitioner's criminal trial, trial counsel advised the petitioner that any testimony from M with respect to that conversation would not be admitted into evidence because it constituted hearsay. Thereafter, the petitioner rejected the state's plea offer of a sentence of thirty-five years of imprisonment and, instead, requested a twenty year sentence. During the criminal trial, the trial court admitted M's testimony pertaining to the postshooting conversation as an adoptive admission. Following the trial, the jury found the petitioner guilty of all the charges against him, and he was sentenced to a total effective term of sixty years of imprisonment. In his amended habeas petition, the petitioner claimed that his trial counsel had provided ineffective assistance by providing him with inaccurate legal advice as to the admissibility of M's testimony concerning the postshooting conversation and that, but for that deficient legal advice, he would have accepted the thirty-five year plea deal rather than proceeding to trial. The petitioner also claimed that his prior habeas counsel had provided ineffective assistance

by failing to raise that claim in his first habeas petition. The habeas court rendered judgment denying the habeas petition, concluding, inter alia, that the petitioner failed to meet his burden of demonstrating that it was reasonably probable that, in the absence of his trial counsel's alleged deficient advice, he would have accepted the thirty-five year plea deal, and, therefore, he failed to establish prejudice. In reaching its decision, the court discredited the petitioner's testimony that he would have accepted the plea offer had he received accurate legal advice from trial counsel, specifically stating that although the petitioner was sincere, his testimony on that issue was unreliable. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held* that the habeas court properly denied the petitioner's amended habeas petition, that court having correctly concluded that the petitioner failed to sustain his burden of proving that he was prejudiced by his trial counsel's alleged deficient performance: contrary to the petitioner's claim that the habeas court's finding that he would have rejected the thirty-five year plea deal even if he had received accurate advice from trial counsel concerning the admissibility of M's testimony was clearly erroneous because it was undermined by the court's statement regarding his sincerity, the court plainly distinguished the petitioner's sincerity from the unreliability of his testimony regarding whether he would have accepted the thirty-five year plea deal, finding that although the petitioner, in hindsight, sincerely believed that he would have accepted the plea deal after having been convicted and sentenced to sixty years of imprisonment, his testimony was unreliable as to whether he would have accepted it at the time it was offered to him; moreover, the habeas court's finding that the petitioner would have rejected the plea deal even if he had received accurate advice from trial counsel was supported by other evidence in the record that tended to demonstrate that the petitioner would not have accepted a plea deal of more than twenty years, and because the habeas court properly concluded that the petitioner failed to meet his burden of demonstrating that it was reasonably probable that he would have accepted the plea but for trial counsel's alleged deficient performance, this court declined to address the petitioner's claim that his prior habeas counsel had rendered ineffective assistance, as that claim failed as a matter of law.

Argued September 5—officially released November 12, 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 to this court. *Affirmed.*

Norman A. Pattis, with whom, on the brief, was *Kevin Smith*, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Patrick Griffin*, state's attorney, and *Rebecca Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

PRESCOTT, J. In this "habeas on a habeas,"[1] the petitioner, Thomas Rogers, appeals from the habeas court's judgment denying his amended petition for a writ of habeas corpus.[2] On appeal, the petitioner claims that the habeas court improperly rejected his claim that his trial counsel, Paul Carty, provided him with ineffective assistance with respect to whether he should have accepted a plea offer. The petitioner asserts that, but for the deficient legal advice he received from his trial counsel, he would have accepted a thirty-five year plea deal. The petitioner also claims that the habeas court improperly rejected his claim that his prior habeas counsel, Frank P. Cannatelli, provided ineffective assistance by failing to raise this claim in his first habeas petition. Having reviewed the record, we conclude that

[1] Our Supreme Court has described a "habeas on a habeas" as "a second petition for a writ of habeas corpus (second habeas) challenging the performance of counsel in litigating an initial petition for a writ of habeas corpus (first habeas), which had claimed ineffective assistance of counsel at the petitioner's underlying criminal trial or on direct appeal." *Kaddah* v. *Commissioner of Correction*, 324 Conn. 548, 550, 153 A.3d 1233 (2017).

Technically, this is the petitioner's third petition for a writ of habeas corpus. The first petition was denied in 2002 after a trial at which Attorney Frank P. Cannatelli represented the petitioner. The habeas court granted certification to appeal its judgment, and this court affirmed the denial of the petition. See *Rogers* v. *Commissioner of Correction*, 82 Conn. App. 901, 846 A.2d 962, cert. denied, 269 Conn. 902, 851 A.2d 304 (2004). In August, 2008, the petitioner filed a second petition but ultimately withdrew it in February, 2012, before trial. Attorney Damon A.R. Kirschbaum represented the petitioner with respect to his second petition.

[2] The habeas court granted the petition for certification to appeal its judgment.

the habeas court properly denied the amended petition for a writ of habeas corpus, and, accordingly, we affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our disposition of the petitioner's claim. The petitioner participated in a shooting that occurred on November 20, 1994, that resulted in the death of one of the victims. *State* v. *Rogers*, 50 Conn. App. 467, 469, 718 A.2d 985, cert. denied, 247 Conn. 942, 723 A.2d 319 (1998). After the shooting, the petitioner, along with Isaac Council and Larry McCowen, returned to the apartment of the petitioner's girlfriend and had a conversation in the living room. Id., 471, 480–81. Council's girlfriend, Safira McLeod, overheard the postshooting conversation between the petitioner, Council, and McCowen. Id., 480–81. From the kitchen, which is where she was during the conversation, McLeod was unable to hear everything they were discussing. Id., 481. She did, however, hear them discuss a shooting, people running, and someone being hit. Id. During the conversation, the petitioner, Council, and McCowen were laughing. Id. McLeod heard the petitioner's voice, but she was unable to attribute anything said during the conversation to any one of its participants. Id. Furthermore, McLeod neither heard the petitioner deny participation in the shooting nor dispute what Council and McCowen were saying. Id. The petitioner subsequently was charged with murder, conspiracy to commit murder, attempt to commit murder, criminal possession of a firearm, and illegal possession of a weapon in a motor vehicle.

The petitioner alleges that his trial counsel assured him that McLeod's testimony pertaining to the postshooting conversation would not be admitted into evidence because it constituted hearsay. He further

alleges that trial counsel did not explain to him that the testimony could be admitted as an adoptive admission.[3]

The petitioner, however, also was aware of other parts of McLeod's potential testimony that were damaging to his defense and that *were not* within the scope of his trial counsel's alleged deficient advice regarding the testimony's admissibility. The habeas court stated that, aside from McLeod's recollection of the post-shooting conversation, McLeod's testimony included "evidence that the petitioner left with Council and McCowen, dressed as the shooters were attired, in a vehicle that matched that of the shooters at the time

[3] The habeas court did not make an explicit finding as to whether trial counsel performed deficiently with respect to providing accurate advice concerning the admissibility of a portion of McLeod's testimony. Rather, it found that even if trial counsel had performed deficiently, the petitioner had "failed to meet his burden of demonstrating that a reasonable likelihood exists that, but for [trial counsel's] misadvice regarding the inadmissibility of a portion of McLeod's testimony, he would have accepted the thirty-five year proposed disposition."

It is well settled that "[a] court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier." *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 704, 23 A.3d 682 (2011). We affirm the court's denial of habeas relief, in which it found that the petitioner failed to meet his burden of demonstrating that it is reasonably probable that, in the absence of his trial counsel's alleged deficient advice, the petitioner would have accepted the thirty-five year plea deal. The petitioner, therefore, failed to establish prejudice. Thus, we do not address whether the petitioner's trial counsel performed deficiently.

Similarly, the habeas court did not make an explicit finding as to whether Cannatelli performed deficiently. Rather, the court focused its analysis on whether the petitioner suffered prejudice from his trial counsel's representation, assuming his trial counsel performed deficiently.

To succeed on a claim that former habeas counsel provided ineffective assistance by failing to raise a claim of ineffective assistance of trial counsel, the petitioner must show that both habeas counsel and trial counsel were ineffective. *Lozada* v. *Warden*, 223 Conn. 834, 842, 613 A.2d 818 (1992). Because the habeas court properly found that the petitioner failed to meet his burden of demonstrating that it was reasonably probable that he would have accepted the plea offer but for his trial counsel's alleged deficient performance, we do not address the petitioner's claim that Cannatelli rendered ineffective assistance, as that claim fails as a matter of law.

of the shooting, returned as a group, concealed the vehicle behind a house and that vehicle contained a spent shell casing . . . .''

Armed with this knowledge and advice from his trial counsel, the petitioner did not accept an offer to plead guilty in exchange for a thirty-five year sentence and, instead, requested a disposition in which he would receive a sentence of twenty years.

Contrary to his trial counsel's prediction, the trial court admitted McLeod's testimony pertaining to the postshooting conversation as an adoptive admission.[4] At the conclusion of the jury trial, the petitioner was convicted of all the crimes with which he was charged. Id., 468. He received a total effective sentence of sixty years of incarceration.

On August 31, 2016, the petitioner filed an amended petition for a writ of habeas corpus. The matter subsequently was tried before the habeas court, which issued a written memorandum of decision on July 23, 2018, denying the petition. In that memorandum of decision, the habeas court stated that the petitioner abandoned all claims for relief in his amended petition except for those enumerated in the ninth and tenth counts.[5] With

[4] In the petitioner's direct appeal from his conviction, this court, in relation to a claim regarding the propriety of jury instructions pertaining to adoptive admissions, stated that the trial court properly admitted McLeod's testimony pertaining to the postshooting conversation as an adoptive admission. See *State* v. *Rogers*, supra, 50 Conn. App. 484–85.

[5] In his appellate brief and at oral argument before this court, the petitioner addressed only count nine, which alleges ineffective assistance of counsel with respect to the advice the petitioner received from his trial counsel regarding the admissibility of McLeod's testimony about the postshooting conversation between the petitioner, Council, and McCowen. The petitioner abandoned his appeal with respect to count ten, in which he alleges that he received ineffective assistance of counsel because his trial counsel failed to adequately explain to him whether he could be convicted as an accessory. On appeal, the petitioner did not brief accessorial liability as a separate claim of ineffective assistance of counsel. Furthermore, at oral argument, the petitioner conceded that the habeas court's ruling with respect to count nine is the only issue he raised on appeal and that his appeal related to count ten is not independent of his appeal related to count nine. Thus, we do not address count ten.

respect to those counts, the habeas court stated: "[T]he petitioner asserts that . . . Cannatelli provided ineffective assistance by failing to raise claims in the earlier habeas case that trial counsel . . . rendered ineffective assistance by inadequately or incorrectly advising the petitioner, when the petitioner was considering a plea offer of thirty-five years, concerning the doctrine of an adoptive admission [and its applicability to McLeod's testimony pertaining to the postshooting conversation] and that the petitioner could be convicted as an accessory to murder if he was not in the vehicle from which the gunfire emanated and caused the death of the victim. [The petitioner] further asserts that, had he received accurate legal advice from [trial counsel] on these points, he would have accepted the plea disposition rather than have proceeded to trial."

Without explicitly resolving the petitioner's allegations of deficient performance, the habeas court concluded that "the petitioner . . . failed to meet his burden of demonstrating that a reasonable likelihood exists that, but for [trial counsel's] misadvice regarding the inadmissibility of a portion of McLeod's testimony, he would have accepted the thirty-five year proposed disposition," and, therefore, it denied the petition for habeas corpus relief. This appeal followed.

On appeal, the petitioner claims that the habeas court incorrectly found that, even if he had received accurate advice from his trial counsel concerning the admissibility of McLeod's testimony about the postshooting conversation, he, nevertheless, would have rejected the plea agreement. We disagree with the petitioner.

We first set forth the well established legal principles governing claims of ineffective assistance of counsel. To succeed on a claim of ineffective assistance of counsel, a petitioner must show that his counsel performed deficiently and that his counsel's deficient performance

prejudiced his defense. *Strickland* v. *Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Lozada* v. *Warden*, 223 Conn. 834, 842–43, 613 A.2d 818 (1992).

In those cases in which a judgment of conviction was rendered following the rejection of a plea offer, "to establish prejudice, a petitioner need establish only that (1) it is reasonably probable that, if not for counsel's deficient performance, the petitioner would have accepted the plea offer, and (2) the trial judge would have conditionally accepted the plea agreement if it had been presented to the court." *Ebron* v. *Commissioner of Correction*, 307 Conn. 342, 357, 53 A.3d 983 (2012), cert. denied sub nom. *Arnone* v. *Ebron*, 569 U.S. 913, 133 S. Ct. 1726, 185 L. Ed. 2d 802 (2013); cf. *Hill* v. *Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (holding that, in cases in which petitioner alleges that he would have rejected plea deal and gone to trial but for counsel's deficient advice, "the [petitioner] 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").[6] "In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities." (Internal quotation marks omitted.) *Sanders* v. *Commissioner of Correction*, 169 Conn. App. 813, 834, 153 A.3d 8 (2016), cert. denied, 325 Conn. 904, 156 A.3d 536 (2017).

"The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed [on appeal] unless they are clearly erroneous. . . . Thus, the [habeas] court's factual findings are

[6] Because we conclude that the habeas court properly found that the petitioner failed to meet his burden of demonstrating that it is reasonably probable that he would have accepted the plea deal but for his trial counsel's alleged deficient performance, we do not address the second prong of the prejudice test.

entitled to great weight. . . . Furthermore, a finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741–42, 937 A.2d 656 (2007). "The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).[7]

To demonstrate prejudice resulting from his trial counsel's alleged deficient performance, the petitioner had the burden of demonstrating by a preponderance of the evidence that it was reasonably probable that, but for the deficient advice he received from his trial counsel, he would have accepted the thirty-five year

[7] The petitioner insists that this court is required to engage in a scrupulous examination of the record to ensure that the habeas court's factual findings are predicated on substantial evidence. See *State* v. *Mullins*, 288 Conn. 345, 362, 952 A.2d 784 (2008) ("[a]s we have noted previously, however, when a question of fact is essential to the outcome of a particular legal determination that implicates a defendant's constitutional rights, *and the credibility of witnesses is not the primary issue*, our customary deference to the trial court's factual findings is tempered by a scrupulous examination of the record to ascertain that the trial court's factual findings are supported by substantial evidence [emphasis added]"). In a lapsed plea case like this case, however, the credibility of the petitioner *is* the primary issue. See *Kellman* v. *Commissioner of Correction*, 178 Conn. App. 63, 72, 174 A.3d 206 (2017) ("[t]he petitioner's claim concerning whether a plea deal was presented or meaningfully explained to him, specifically, whether this prejudiced him, depends entirely on the habeas court's determinations on credibility, to which we defer on appeal"); see also *Barlow* v. *Commissioner of Correction*, 150 Conn. App. 781, 804, 93 A.3d 165 (2014) ("the habeas court is in the best position to determine whether it is reasonably likely that the petitioner would have accepted the offer had he received adequate advice from [his counsel]"). We do not apply the "scrupulous examination-substantial evidence" standard because the petitioner's credibility is the primary consideration in determining whether he was prejudiced by the alleged deficient performance of his trial counsel.

plea deal. See *Sanders* v. *Commissioner of Correction*, supra, 169 Conn. App. 820, 836–38 (affirming denial of petition for certification to appeal habeas court's judgment after habeas court "concluded that the petitioner had not met his burden of proving by a preponderance of the evidence that it [was] reasonably probable that a court would have accepted the state's eight year plea offer" [internal quotation marks omitted]); see also *Lewis* v. *Commissioner of Correction*, 165 Conn. App. 441, 454, 139 A.3d 759 (determining that "[i]t was the petitioner's burden to establish not only that he may have secured a more favorable deal absent [his trial counsel's] deficient performance, but that he would have taken the deal if it had been offered"), cert. denied, 322 Conn. 901, 138 A.3d 931 (2016).

In the present case, the petitioner testified at the habeas trial that, if he had received accurate advice about the admissibility and effect of McLeod's testimony, then he would have "strongly consider[ed] the [plea] offer." Later in his testimony he stated that he would have accepted it. The habeas court, however, discredited the petitioner's testimony, determining that "[a]lthough the court finds the petitioner sincere, his testimony on this point was unreliable." The court stated further that "[i]t is difficult to believe that the inclusion of McLeod's recounting of comments from unspecified members of the trio would have so altered the petitioner's position so as to accept a sentence fifteen years beyond that which he considered acceptable." Given the habeas court's discrediting of the petitioner's testimony, it found that the petitioner had "failed to meet his burden of demonstrating that a reasonable likelihood exists that, but for [trial counsel's] misadvice regarding the inadmissibility of a portion of McLeod's testimony, he would have accepted the thirty-five year proposed disposition."

On appeal, this court "does not retry the case or evaluate the credibility of the witnesses. . . . Rather, we must defer to the [trier of fact's] assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude. . . . The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony." (Internal quotation marks omitted.) *Orcutt* v. *Commissioner of Correction*, supra, 284 Conn. 741.

The petitioner nevertheless argues that the habeas court's finding that he would have rejected the plea deal even if his trial counsel had not performed deficiently is clearly erroneous. The petitioner's chief support for this claim is the habeas court's finding that the petitioner was "sincere . . . [but] unreliable" on whether he would have accepted the plea deal but for his trial counsel's deficient performance. The petitioner asserts that "[t]his finding has no support in the record, and what support was cited by the habeas court was clearly erroneous." In effect, the petitioner interprets the court's finding to mean—paradoxically—that although the court found the petitioner to be "sincere" as to whether he would have accepted the thirty-five year deal, he, nevertheless, would have rejected the plea even if his trial counsel had provided him with accurate advice. We do not agree with the petitioner that the habeas court's statement regarding the sincerity of the petitioner's belief undermines its factual finding that the petitioner would not have accepted the plea offer.

Specifically, the habeas court's memorandum of decision, considered in its totality, plainly distinguishes the petitioner's sincerity from the unreliability of his testimony regarding whether he would have accepted the thirty-five year plea offer. Elaborating on the credibility of the petitioner's testimony, the habeas court found that "[t]he petitioner's present sentiment about what

he would have decided to do in retrospect, and armed with certain knowledge that [he] would be convicted of murder and sentenced to sixty years, amounts to little more than regretful conjecture on his part."[8] In other words, the habeas court found that, in hindsight, the petitioner sincerely now *believes* that he would have accepted the plea after having been convicted and sentenced to sixty years, but, on the matter of whether he would have accepted the plea offer *at the time it was available to him*, the court found his testimony to be unreliable.

Further bolstering its finding that the petitioner would have rejected the plea deal even if he had received accurate advice concerning the admissibility of McLeod's testimony, the habeas court, in its memorandum of decision, cited to the petitioner's testimony in which he expressed that he was willing to accept a plea deal totaling twenty years but not thirty-five years. The habeas court also considered that the petitioner rejected the thirty-five year plea offer despite knowing that McLeod was likely to testify regarding other facts that were inculpatory and on which the adoptive admissions ruling had no bearing. Thus, on the basis of the record before it, the habeas court found that, although the petitioner sincerely believes that, in hindsight, he would have accepted the plea offer, an objective analysis of what he would have done at the time the plea was available to him yields the opposite conclusion.

Ultimately, the habeas court concluded, after choosing not to credit the petitioner's testimony that he would have accepted the plea offer if his trial counsel had

[8] In a case in which the habeas court considered a petitioner's claim that his decision to accept a plea and not to go to trial would have been different but for his counsel's deficient performance, this court, in affirming the habeas court's denial of a petition for a certification to appeal its judgment, determined that such a claim "suffers from obvious credibility problems and must be evaluated in light of the circumstances [he] would have faced at the time of his decision." (Internal quotation marks omitted.) *Colon* v. *Commissioner of Correction*, 179 Conn. App. 30, 36, 177 A.3d 1162 (2017), cert. denied, 328 Conn. 907, 178 A.3d 390 (2018).

performed competently, that the petitioner failed to sustain his burden of persuasion that he was prejudiced by his trial counsel's alleged deficient performance. That conclusion was also supported by other evidence in the record that tended to demonstrate that the petitioner would not have accepted a plea offer of more than twenty years. Given our well established deference to the habeas court's credibility determinations and factual findings, we see no reason to disturb the habeas court's ultimate conclusion that the petitioner was not prejudiced even if his trial counsel did not competently advise him.

The judgment is affirmed.

In this opinion the other judges concurred.

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*Robbery in first degree; threatening in second degree; claim that trial court improperly admitted prejudicial photograph into evidence; claim that state violated defendant's due process right to fair trial by eliciting testimony and making remark during closing arguments about defendant's postarrest and post-*Miranda *silence; whether defendant demonstrated harm resulting from admission of photograph into evidence; whether alleged constitutional violation was harmless beyond reasonable doubt.*

State *v.* Brooks. 301

Illegal receipt of firearm; whether evidence was insufficient to support conviction of illegal receipt of firearm because state did not prove when or how defendant received firearm.

State *v.* Carter 202

Assault in first degree; attempt to commit assault in first degree; risk of injury to child; criminal possession of firearm; mootness; whether trial court erred in

dismissing motion to set aside judgment of conviction; claim that trial court improperly found that it lacked subject matter jurisdiction over motion to set aside judgment of conviction; whether there was any practical relief that could be afforded to defendant in light of unchallenged collateral estoppel basis for trial court's dismissal of defendant's motion to set aside judgment of conviction; whether appeal was moot.

State *v.* DeJesus 304

Sexual assault in fourth degree; risk of injury to child; unpreserved claim that trial court improperly admitted into evidence expert testimony regarding how child victims of sexual abuse behave and how they disclose their abuse; whether trial court committed plain error in admitting testimony of expert witness; request that this court exercise its supervisory authority over administration of justice to preclude, as matter of law, admission of expert testimony on characteristics of children who report sexual abuse; claim that trial court abused its discretion during pretrial hearing by refusing to permit defendant to ask victim leading questions on direct examination; whether defendant failed to establish that trial court's alleged error caused him harm.

State *v.* Patel 245

Murder; home invasion; burglary in first degree as accessory; robbery in first degree as accessory; conspiracy to commit burglary in first degree; tampering with physical evidence; whether trial court abused its discretion when it admitted coconspirator's statements pursuant to dual inculpatory statement exception to hearsay rule in applicable provision (§ 8-6 [4]) of Connecticut Code of Evidence; unpreserved claim that trial court improperly found coconspirator unavailable to testify; claim that defendant's sixth amendment right to confrontation was violated when trial court failed to have coconspirator sworn in prior to making its determination that coconspirator was unavailable to testify; claim that trial court committed plain error when it failed to have coconspirator sworn in before making its determination that coconspirator was unavailable to testify; claim that trial court violated defendant's sixth amendment right to confrontation when it admitted tape recording of coconspirator's statements to jailhouse informant; claim that coconspirator's statements to jailhouse informant constituted inadmissible testimonial hearsay under federal constitution; unpreserved claim that coconspirator's statements to jailhouse informant were testimonial under due process and confrontation clauses in article first, § 8, of state constitution; claim that trial court abused its discretion when it admitted coconspirator's statements to jailhouse informant and coconspirator's girlfriend pursuant to § 8-6 (4); whether trial court properly found that coconspirator's statements to jailhouse informant and coconspirator's girlfriend presented sufficient indicia of reliability; whether trial court abused its discretion when it excluded from evidence under § 8-6 (4) certain testimony as not trustworthy; whether trial court abused its discretion when it denied defendant's motion to preclude state from offering testimony about cell phone tower data analysis; claim that trial court failed to conduct hearing pursuant to State *v.* Porter *(241 Conn. 57) to determine reliability of methods and procedures concerning cell phone tower data analysis; whether evidence was sufficient to convict defendant of murder under theory of liability that was predicated on* Pinkerton *v.* United States *(328 U.S. 640).*

State *v.* Ricks 216

Motion to correct illegal sentence; claim that due process required state to prove that defendant breached initial plea agreement before state could enter into second plea agreement with him; adoption of trial court's memorandum of decision as proper statement of facts and applicable law on issues.

State *v.* Riddick 243

Motion to correct judgment mittimus; subject matter jurisdiction; claim that trial court improperly denied motion to correct judgment mittimus; improper form of judgment.

Tatoian *v.* Tyler 1

Vexatious litigation; trusts; whether trial court properly denied motion to dismiss plaintiff trustee's action for vexatious litigation; claim that trial court lacked subject matter jurisdiction because trustee lacked standing at time he commenced action; claim that trial court improperly failed to consider whether settlor of trust was subjected to undue influence in connection with creation of trust; claim that trial court misinterpreted relevant law in its analysis of whether defendant beneficiaries had probable cause in prior action against trustee to claim that trustee failed to diversify trust's assets in violation of statute (§ 45a-541c); claim

that trial court misinterpreted relevant law in its analysis of whether trustee could prevail merely by demonstrating that beneficiaries lacked probable cause to bring one of several claims beneficiaries brought against trustee in prior action; claim that trial court improperly analyzed whether beneficiaries had probable cause to bring claims against trustee in prior action where court essentially disallowed reliance by trustee on trust's exculpatory clause to demonstrate that beneficiaries lacked probable cause.
U.S. Bank National Assn. *v.* Stephenson (Memorandum Decision) 901

NOTICE

Notice of Inactive Status of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given that on October 2, 2019, in Docket Number HHD-CV 19-6116057, Richard Mark Blank (Juris# 410253) of Milwood, NY was placed on inactive status from the practice of law, effective immediately, commensurate with the order of the Supreme Court of the State of New York Appellate Division: Second Judicial District.

Upon suspension, the Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).

Should respondent seek reinstatement to the Connecticut bar he must do so pursuant to Practice Book Section 2-53 but shall not be eligible to do so until he is eligible for reinstatement in the Supreme Court of the State of New York Appellate Division: Second Judicial Department.

Prior to reinstatement in Connecticut, Respondent will satisfy any Connecticut bar requirements and will be otherwise in good standing.

A trustee will not be appointed as Respondent has not recently practiced law in Connecticut and has no clients nor an IOLTA Account in the State of Connecticut..

David Sheridan
Presiding Judge