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CONNECTICUT REPORTS

Vol. 334

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* EVAN JARON HOLMES (SC 20048)

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

Syllabus

Convicted, after a jury trial, of the crimes of felony murder, home invasion, conspiracy to commit home invasion and criminal possession of a firearm, the defendant appealed to the Appellate Court, claiming that the trial court had improperly overruled his objection to the prosecutor's use of a peremptory challenge to excuse a prospective, African-American juror, W. During voir dire, the prosecutor questioned W, who previously had disclosed that he was employed as a social worker and performed volunteer work directly with prison inmates, regarding his interactions with the police and his opinions of the criminal justice system. In response, W indicated that he sometimes feared being stopped by the police while driving, he had family members who had been convicted of crimes and incarcerated, and he believed that certain groups of individuals are disproportionately convicted of crimes and receive disproportionate sentences. W further expressed that his concerns were largely informed by his life experiences as an African-American. In objecting to the prosecutor's peremptory challenge, defense counsel argued that it was in violation of the United States Supreme Court's decision in *Batson* v. *Kentucky* (476 U.S. 79), which prohibits a party from challenging potential jurors solely on account of their race. The prosecutor explained that the basis for the peremptory challenge was W's stated distrust of law enforcement and his concern about the fairness of the criminal justice system, as borne out by his life experiences. The prosecutor also noted that the peremptory challenge was not based on W's race but, rather, related only to the particular viewpoints that W had expressed. After the trial court overruled the defendant's *Batson* challenge, it excused W from the venire. The Appellate Court affirmed the trial court's judgment and, relying on *State* v. *King* (249 Conn. 645), concluded that the prosecutor's explanation of W's distrust of the police

and concern regarding the fairness of the criminal justice system constituted a nondiscriminatory, race neutral reason for exercising the peremptory challenge. In so doing, the Appellate Court rejected the defendant's argument that the prosecutor's stated explanation was not race neutral because it had a disproportionate impact on African-Americans. The Appellate Court further concluded that there was no evidence that the prosecutor's explanation was a pretext for intentional discrimination. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court incorrectly concluded that the trial court had properly denied his *Batson* challenge and that this court should overrule *King* and its progeny and hold that distrust of the police and concern regarding the fairness of the criminal justice are not race neutral reasons for exercising a peremptory challenge in light of the disparate impact on prospective jurors of minority races. *Held*:

1. The Appellate Court properly upheld the trial court's rejection of the defendant's *Batson* challenge, and this court declined the defendant's request to overrule *King* and its progeny establishing that distrust of the police and concern regarding the fairness of the criminal justice are race neutral reasons for exercising a peremptory challenge: this court's holdings in *King* and its progeny remain consistent with federal constitutional law, which was the sole basis for the defendant's claim on appeal, and, pursuant to federal constitutional law, the distrust of law enforcement or the criminal justice system is a race neutral reason for exercising a peremptory challenge; in the present case, the prosecutor's proffered explanation for striking W from the jury was facially race neutral as a matter of law, even if it had a disparate impact on minority jurors, who are more likely to have negative interactions with the police or concerns regarding the fairness of the criminal justice system, because it was based not on W's race but, rather, on the viewpoints that he espoused, which may be shared by whites and minorities alike, and, because the defendant did not challenge on appeal the Appellate Court's conclusion that the trial court correctly determined that the prosecutor's proffered explanation for the peremptory strike was not a pretext for purposeful discrimination, the Appellate Court properly affirmed the judgment of conviction.
2. In light of systemic concerns identified by this court regarding the failure of *Batson* to address the effects of implicit bias and the disparate impact that certain race neutral explanations for peremptory challenges have on minority jurors, this court announced that it would convene a Jury Selection Task Force, appointed by the Chief Justice and composed of relevant stakeholders in the criminal justice and civil litigation communities, to study the issue of racial discrimination in the selection of juries, to consider measures intended to promote the selection of diverse jury panels, and to propose necessary changes, to be implemented by court rule or legislation, to the jury selection process in Connecticut.

(*Two justices concurring separately in one opinion*)

Argued January 18—officially released December 24, 2019

Procedural History

Substitute information charging the defendant with the crimes of murder, felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of New London, where the first five counts were tried to the jury before *Jongbloed, J.*; verdict of guilty of the lesser included offense of manslaughter in the first degree with a firearm, felony murder, home invasion, conspiracy to commit home invasion, and burglary in the first degree; thereafter, the charge of criminal possession of a firearm was tried to the court; judgment of guilty; subsequently, the court vacated the verdict as to the lesser included offense of manslaughter in the first degree with a firearm and burglary in the first degree, and rendered judgment of guilty of felony murder, home invasion, conspiracy to commit home invasion, and criminal possession of a firearm, from which the defendant appealed to this court; thereafter, the appeal was transferred to the Appellate Court, *Prescott* and *Beach, Js.*, with *Lavine, J.*, concurring, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Alan Jay Black, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom were *Paul J. Narducci*, senior assistant state's attorney, and, on the brief, *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. From its inception, the United States Supreme Court's landmark decision in *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d

69 (1986), has been roundly criticized as ineffectual in addressing the discriminatory use of peremptory challenges during jury selection, largely because it fails to address the effect of implicit bias or lines of voir dire questioning with a disparate impact on minority jurors.[1] Consistent with these long-standing criticisms of *Batson*, the defendant, Evan Jaron Holmes, asks us in this certified appeal[2] to overrule the line of cases in which this court held that a prospective juror's negative views about the police and the fairness of the criminal justice system constitute a race neutral reason for the use of a peremptory challenge to strike that juror. See, e.g., *State* v. *King*, 249 Conn. 645, 664–67, 735 A.2d 267 (1999). We conclude that the challenged line of cases, on which the Appellate Court relied in upholding the defendant's conviction of felony murder on the basis of its rejection of his *Batson* claim arising from the prosecutor's use of a peremptory challenge during jury selection; see *State* v. *Holmes*, 176 Conn. App. 156, 175–77, 169 A.3d 264 (2017); remains consistent with the federal constitutional case law that provides the sole basis for the *Batson* claim. Accordingly, we affirm

[1] See, e.g., *Batson* v. *Kentucky*, supra, 476 U.S. 106 (Marshall, J., concurring); *State* v. *Veal*, 930 N.W.2d 319, 359–61 (Iowa 2019) (Appel, J., concurring in part and dissenting in part); *State* v. *Saintcalle*, 178 Wn. 2d 34, 46–49, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wn. 2d 721, 398 P.3d 1124 [2017]), cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013); J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1077–78 (2011); N. Marder, "*Foster* v. *Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1182–83 (2017); A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 178–79 and n.102 (2005); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1887–89 (2015).

[2] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court err in determining that the trial court properly denied the defendant's challenge under *Batson* v. *Kentucky*, [supra, 476 U.S. 96–98]?" *State* v. *Holmes*, 327 Conn. 984, 175 A.3d 561 (2017).

the judgment of the Appellate Court in this case but refer the systemic concerns about *Batson*'s failure to address the effects of implicit bias and disparate impact to a Jury Selection Task Force, appointed by the Chief Justice, to consider measures intended to promote the selection of diverse jury panels in our state's courthouses.

The record and the Appellate Court's opinion reveal the following relevant facts and procedural history. In connection with a shooting at an apartment in New London,[3] the state charged the defendant with numerous offenses, including felony murder in violation of General Statutes § 53a-54c, and the defendant elected a jury trial.[4] "On the first day of jury selection, defense counsel noted that the entire venire panel appeared to be 'white Caucasian' and that every prospective juror who had completed a jury questionnaire had indicated that they were either white or Caucasian, or had not indicated a race or ethnicity.[5]

[3] For a detailed recitation of the underlying facts of this case, see *State* v. *Holmes*, supra, 176 Conn. App. 159–62.

[4] Specifically, the state charged the defendant with murder in violation of General Statutes § 53a-54a (a), felony murder in violation of § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (2), conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 (a) and 53a-100aa, burglary in the first degree in violation of General Statutes § 53a-101 (a) (1), and criminal possession of a firearm in violation of General Statutes § 53a-217.

By agreement of the parties, the charge of criminal possession of a firearm was severed from the remaining counts and tried to the court. The parties stipulated that the defendant had a prior felony conviction, and the trial court subsequently found the defendant guilty of that offense.

[5] Defense counsel observed for the record that the defendant "is of mixed race" and that, on the basis of his observation of the questionnaires and the jury panel on the first day, "[there are] no Hispanic surnames, no African-Americans, no Asians, [there are] no Indians or [Middle] Easterners, [there are] no Pacific Islanders. It's 100 percent, from my view, [a] white Caucasian jury panel that was brought in." He indicated that he might put on the record that a prospective juror who had not answered the racial identification question on the questionnaire appeared to be white or Caucasian in the event that person was excused from service.

"On the second day of jury selection, only one prospective juror had indicated on the questionnaire that he or she was African-American. During the voir dire examination of one venireperson, W.T.,[6] he stated to defense counsel that he was African-American. W.T. indicated that he had obtained a master's degree in social work from the University of Connecticut and currently was employed by the state . . . as a supervisory social worker with the Department of Children and Families.

"He also disclosed that he performed volunteer work for the Department of Correction and had worked directly with inmates. When asked by defense counsel whether that work might affect him as a juror, W.T. responded: 'Because I work with, like I say, inmates, and also my work, I do—I mean, you see a lot of different things and you see a lot of sad situations. I'm sure as a professional and because I work with people who've been through a lot of stuff, you know, I'm sure I have an understanding of what they're doing. And also, just—just in the criminal justice system in general, I know how sometimes people are not, you know, given a fair trial or they [maybe] disproportionately have to go to jail and different things of that nature. So, part of my whole experience is as an African-American, as an American and also studying these situations, I know that there's a lot of issues [going] on in various systems. The criminal justice system, the educational system and various systems, but people are not fairly treated, so I know that much. But I don't use that, you know, I can—I could make a professional—and I think keep my composure and do my job just like—as a professional, as I work—even as I do volunteer work, but you have to know the reality in life as well, though.' In

[6] "In accordance with our usual practice, we identify jurors by initial in order to protect their privacy interests." *State* v. *Berrios*, 320 Conn. 265, 268 n.3, 129 A.3d 696 (2016).

response to a subsequent question by defense counsel regarding whether, in light of his life experiences, he could be fair to both sides in the case, W.T. stated that he could.

"During the state's voir dire examination of W.T., the following exchange occurred:

" '[The Prosecutor]: Now, you've obviously had a little more dealing with the court systems than most—most people that we see in through here. Have you formulated any opinions about the criminal justice system based on your experiences? Is it too lenient, too stringent, it works, it doesn't work; any feeling about that?

" '[W.T.]: And like I said, probably already share[d] too much stuff about—that talk about in terms of I have seen people, have had family members [who] went to prison before.

" '[The Prosecutor]: Right.

" '[W.T.]: And I just think—I think that's why I became a social worker, because I wanted to make a difference, and that's why I have been doing mentoring programs—

" '[The Prosecutor]: Yep.

" '[W.T.]: —try[ing] to help young people so they won't get into trouble. So, I meant the system, all various systems, there's a lot of discrimination [that] still goes out. Even today, ladies are still not getting equal pay. So, it's a lot. We've come a long way, but we have a long way to go.

" '[The Prosecutor]: Right.

" '[W.T.]: But I think I can make—I could keep the facts and be able to look at the facts of the case and judge by the facts.

" '[The Prosecutor]: . . . We need to know how you're feeling, so we can make the appropriate assess-

ment and you can make the appropriate assessment. . . . I think that it's not a perfect system, but it's improving every day, and [there are] not as many systems that I can think of that are, any—come anywhere close. One of the concerns that people may have is, jurors who are in the—using their time as a juror to try to fix the system. You indicated, and I think you said, that you would listen to the evidence and decide it on the evidence and you wouldn't let any concerns that you had filter in.

" '[W.T.]: That's correct.

" '[The Prosecutor]: Fair to say?

" '[W.T.]: That's correct.

" '[The Prosecutor]: Okay. And so . . . you would sit and listen to what all the evidence is and make a decision based on the evidence?

" '[W.T.]: That's correct. . . .

" '[The Prosecutor]: Okay. With respect to that, as much as you know about those situations, were you satisfied with the way the police reacted to your family . . . or friend being the victim of a crime?

" '[W.T.]: Sometimes and sometimes not.

" '[The Prosecutor]: Okay.

" '[W.T.]: So-so.

" '[The Prosecutor]: Fair to say that it's an individual situation and that the police have been—have acted in a way that was satisfactory toward your family members or friends, and in other situations they weren't satisfied with what the police did?

" '[W.T.]: That's correct.

" '[The Prosecutor]: Okay. Had you had any interactions with the police in any respect in which you devel-

oped an—either a strong, favorable impression or an unfavorable impression about the police and the way they treated you in any situation, speeding tickets, calling up to complain about [a] noisy neighbor, something with work?

" '[W.T.]: I'm, like—just growing up in this society, I fear, you know, I fear [for] my life. I got a new car, I feared that, you know, I might get stopped, you know, for being black, you know. So, you know, that's concerning and sometimes I get afraid—even me, you know, I—when I see the police in back of me, I wonder, you know, if I'm going to be stopped.

" '[The Prosecutor]: Okay. Now with—with respect to that, there will probably be police officers who will be testifying here, and the judge will tell you that [you] can't give a police officer more credibility merely because [he or she is] a police officer. Conversely, though, they don't get less credibility merely [because] they are police officers. They are to be treated like anybody else. Would you have any difficulty following the judge's instructions concerning that?

" '[W.T.]: No, I wouldn't.

" '[The Prosecutor]: Okay. And I can appreciate what you're saying. Obviously, I haven't been in that—in your shoes. I haven't been in your situation, nor do we ask the jury to put themselves in the shoes of either the police or a particular defendant. We can't ask you to do that. But having now life's experience, is that something that you think you can put aside and decide the evidence based on everything that's presented to you, or is there some concern that you might have that you might not be able to do that?

" '[W.T.]: No, I will be able to because another thing, too, is, I know good police officers who are—who are

good people, nice people, mentors who work in the community. So—so, yes, I'd be able to.

" '[The Prosecutor]: Okay. Okay. And have you had . . . positive experiences with the police as well?

" '[W.T.]: Yes.

" '[The Prosecutor]: Okay. So, I guess like anybody else, there are bad lawyers and there are good lawyers. There are bad social workers, there are good social workers. . . . But what I'm driving at is, we make an individual assessment based on what we hear and what we see and what we listen to. And that is what we're going to ask you to do if you're a juror.

" '[W.T.]: Yes.

" '[The Prosecutor]: We want to make sure you don't carry in any preconceived notions one way or the other.

" '[W.T.]: Yes.

" '[The Prosecutor]: No problems with that?

" '[W.T.]: No problem.

" '[The Prosecutor]: Okay. We can count on your word on that, then?

" '[W.T.]: That's right.

" '[The Prosecutor]: Okay. I asked about being the victim of a crime and your family member. The flip side to that, have you, any member of your family or any close personal friends ever been either accused or ever convicted of crimes?

" '[W.T.]: Yes. I have family members who've been in—who served time in jail.

" '[The Prosecutor]: Okay. This obviously is a crime of violence. Any—any family members who have been convicted of crimes of violence?

" '[W.T.]: No. . . .

" '[The Prosecutor]: You mentioned that your family members have—have served time. With respect to that, were—did you develop any feelings about the way the police had treated your family members in those situations?

" '[W.T.]: Well, I think the—like I told you earlier, my life experiences living in this world—

" '[The Prosecutor]: Right.

" '[W.T.]: —you see that things are not fair. And then you—I mean, you—you experience things, you know, and you see things happen. And some things are not fair, some things not—not all people are the same, all police are not bad or, like, you know, just like you said everybody, but when you see firsthand your own family members, then you experience something a little bit different.

" '[The Prosecutor]: Of course.

" '[W.T.]: Other people who, you know, so—

" '[The Prosecutor]: Of course. And I guess it's kind of tough, because I—you know, I could ask you questions all day long and I'm not going to get to know you as well [as] you know yourself. But there's a difference, I think, between I'm upset that my family member had to go through this versus I'm upset that the police treated my family member in such a way. Do you understand the distinction I'm trying to make, that you're not satisfied that your family member ended up in prison versus I'm not satisfied that they were treated properly by either the court system or by the police. There's a difference, and I'm not sure I'm explaining it very well.

" '[W.T.]: Are you saying more, like, for instance, like, someone may have gone to jail because they did something wrong—

" '[The Prosecutor]: Right.

" '[W.T.]: —and they had to pay the consequences.

" '[The Prosecutor]: Right. And you know, like that, but—

" '[W.T.]: So—exactly. You have to—even if it's your family member or not, you did something wrong, you need to pay the consequences.

" '[The Prosecutor]: Right.

" '[W.T.]: You need to pay the consequences for whatever you've done wrong, you know.

" '[The Prosecutor]: Right.'

"Following the voir dire examination, defense counsel stated that W.T. was acceptable to the defendant. The [prosecutor], however, exercised a peremptory challenge and asked that W.T. be excused." (Footnotes added.) *State* v. *Holmes*, supra, 176 Conn. App. 162–69.

"[Defense counsel] immediately raised a *Batson* objection to the [prosecutor's] use of a peremptory challenge, citing the fact that W.T. was the first African-American venireperson to be examined and that, in essence, W.T. had assured the court and the [prosecutor] that, regardless of his views about the criminal justice system or the police, he could be a fair and impartial juror." (Footnote omitted.) Id., 169. In his argument, defense counsel compared W.T.'s assurances that he could be fair with the voir dire of another member of the venire, a young white man from New London, who had "said that he couldn't be fair because of incidents with . . . police officers," observing that, "if he had been black or white, the kid had to go. You know, [there are] clearly some people [who] can't be jurors. I don't see why [W.T.] shouldn't be seated."

"The [prosecutor] then responded: 'I understand exactly where [defense counsel] is coming from, would agree with him for the most part with the exception of, I do believe that there are race neutral reasons for this.

It was somewhat of a struggle for me, but I looked at some of the answers. And even though he responded favorably after further questioning, the concerns that I did have [were] the—the comments that—about [a] disproportionate amount of people being sent to jail, disproportionate amount of jail time, the fact that he's had family members who have been convicted and have served time, the fact that he works to rehabilitate people. And none of this is per se bad, but I think in the context of this particular case, it's important, it's race neutral. If we had a Caucasian who was in the same situation, the exercising of a peremptory challenge would be the same, I think.

" 'Additionally, the fact that he did mention . . . his concern about and his life's experience about driving and seeing a police officer behind him and his concern about police officers. Yes, he said that there are other police officers who are good and people can be good, but there is that life's experience that I would submit would make it difficult for him to be fair and impartial in this particular—in this particular case.

" 'Again, I understand exactly what [defense counsel] is saying. I believe that they are race neutral reasons, and I was exercising the peremptory based on those race neutral reasons.'

"The court then asked for argument . . . and defense counsel gave the following response: 'With respect to being, as an African-American male, fearful when the police are behind you, I mean, that's just, you know, something that [the prosecutor] and I never have had to deal with . . . but if this gentleman sitting next [to] me is entitled to a jury of his peers, we've picked three white people already. We've accepted them. I mean, isn't he—and that's a common complaint by African-American people, that they feel that they get pulled over too often, and there are probably studies that say it's disproportionate. So, that particular reason does seem to me to be race based . . . . It was [W.T.'s] view

and, I mean, again, that's—he's entitled to a jury of his peers, and we get nobody who feels that way or has those thoughts is not really his peers because that's probably the experience or experiences [that] a lot of African-Americans go through.'

"The prosecutor, when asked if he wanted to argue further, stated: 'Only briefly, and maybe it's a matter of semantics. I think [*Batson*] is, oh, I see an African-American gentleman, I see an Asian-American, I see a Hispanic, I'm going to excuse them. If an African-American comes in with a distrust of the police and will not listen to a police officer and says he will not listen to a police officer, that isn't a challenge based on that person's race or ethnicity; it's a challenge based on that person's personal views.

" 'If a white—a Caucasian person came in and said, I don't like being followed by the cops because I [have seen] a number of cops punch friends of mine in the face, it's not because he is a Caucasian, it's because of life's experiences. And I think that's what I would be arguing, that the comments that were made were not because of his ethnicity or his race, but rather his—his expressed opinions. And I think it's a distinction, I think it's a legitimate distinction, but I defer to Your Honor with respect to this.' " Id., 169–71.

The trial court then denied the defendant's *Batson* challenge, comparing W.T. to the white juror who previously had been excused because of his negative comments about the police, and stating: "I do think that, in both situations, it's an issue with regard to negative contact with the police and that, I believe, has been found to be a legitimate race neutral reason for exercising [a] peremptory challenge. So, under all the circumstances, I am going to find that the [prosecutor] has given a race neutral reason for exercising a peremptory

challenge in this case, and I'm going to overrule the *Batson* challenge."[7]

"Throughout the remainder of the voir dire process, the [prosecutor] asked a uniform set of questions of all jurors. Furthermore, three African-American jurors were selected to serve in this case—two as regular jurors and one as an alternate juror." Id., 171.

After a ten day trial, the jury returned a verdict of guilty of, inter alia, felony murder. The trial court subsequently rendered a judgment of conviction and sentenced the defendant to a total effective sentence of seventy years imprisonment.[8]

The defendant appealed from the judgment of conviction to the Appellate Court, claiming that the trial court improperly overruled his *Batson* objection to the

[7] "Following the filing of this appeal, the defendant filed with [the Appellate Court] a motion for articulation, which was referred to the trial court pursuant to Practice Book § 66-5. The trial court granted the motion and in a memorandum concluded that all of the reasons set forth by the [prosecutor] in exercising [the] peremptory challenge were race neutral." *State* v. *Holmes*, supra, 176 Conn. App. 171. Specifically, the trial court cited, inter alia, this court's decisions in *State* v. *King*, supra, 249 Conn. 664–67, *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999), and *State* v. *Smith*, 222 Conn. 1, 13–15, 608 A.2d 63 (1992), for the proposition that "negative contact with the police" is a "legitimate, race neutral reason for exercising a [peremptory] challenge." The trial court then determined that the defendant had not met his burden of persuading the court by a preponderance of the evidence that the explanations were pretextual or insufficient. The trial court also observed in its articulation that "the other reasons given by the [prosecutor] for exercising the peremptory challenge were also race neutral. Those reasons included the expressed view that the criminal justice system was not fair, the venireperson had family members who had been convicted and served time, and that he worked to rehabilitate people."

[8] Specifically, the defendant was found guilty on all of the counts tried to the jury and the count tried to the court; see footnote 4 of this opinion; except for murder, as the jury instead found the defendant guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a). In rendering its judgment of conviction, the trial court vacated the convictions of manslaughter and burglary in the first degree pursuant to *State* v. *Polanco*, 308 Conn. 242, 255, 61 A.3d 1084 (2013).

prosecutor's use of a peremptory challenge on W.T.[9] The Appellate Court relied on this court's decisions in *State* v. *Edwards*, 314 Conn. 465, 102 A.3d 52 (2014), and *State* v. *King*, supra, 249 Conn. 645, among other cases, and concluded that "[d]istrust of the police or concerns regarding the fairness of the criminal justice system are viewpoints that may be shared by whites and nonwhites alike. In other words, the prosecutor's questions regarding potential jurors' attitudes about the police and the criminal justice system are likely to divide jurors into two potential categories: (1) those who have generally positive views about the police and our criminal justice system, and (2) those who have generally negative views of the police or concerns regarding the criminal justice system." *State* v. *Holmes*, supra, 176 Conn. App. 175–76. The Appellate Court further observed that "the prosecutor . . . also did not refer to race in his explanation except as necessary to respond to the *Batson* challenge" and that Connecticut case law, including this court's decisions in *State* v. *King*, supra, 644–64, *State* v. *Hodge*, 248 Conn. 207, 231, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999), and *State* v. *Hinton*, 227 Conn. 301, 327, 630 A.2d 593 (1993), supported the proposition that "such explanations are facially neutral." *State* v. *Holmes*, supra, 176; see id., 180 (emphasizing that, as intermediate appellate court, it was bound by *King*).

The Appellate Court rejected the defendant's "disproportionate impact" argument, namely, that "resentment

[9] The Appellate Court rejected the defendant's other claims on appeal, namely, that (1) the trial court improperly admitted a tape-recorded statement of a witness pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), and (2) the state violated his right to remain silent under *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), "when it cross-examined him at trial about his failure to disclose to the police at the time of his arrest certain exculpatory information that he later testified to at trial." *State* v. *Holmes*, supra, 176 Conn. App. 185. These claims are not before us in this certified appeal.

of police and distrust of the criminal justice system are not racially neutral justifications for exercising a peremptory challenge because there is a much higher prevalence of such beliefs among African-Americans," as not legally cognizable under the second step of the *Batson* rubric, which requires only a facially valid explanation. Id., 177. The Appellate Court further concluded that there was no evidence that the prosecutor had used W.T.'s distrust of the criminal justice system as a pretext for intentional discrimination under *Batson*'s third step.[10] Id., 179; see id., 182 (emphasizing that prosecutor was not required to accept at "face value" W.T.'s assurances that, "despite his expressed concerns and fears, he believed that he could follow the court's instructions and act as an impartial juror"). Accord-

[10] The Appellate Court observed that the six factors articulated in *State* v. *Edwards*, supra, 314 Conn. 485–86, for determining whether the prosecutor had acted with discriminatory intent in using a peremptory challenge on W.T. all "support the [trial] court's conclusion that the [prosecutor] properly exercised [his] right to use a peremptory challenge with regard to W.T.

"First, the [prosecutor's] reasons for excluding W.T. were his stated distrust of [the] police and the criminal justice system, which clearly related to the trial of this case because it is a criminal proceeding in which police [officers] would provide significant evidence. Second, the [prosecutor] did not exercise [his] peremptory challenge without questioning W.T. but, rather, engaged in a detailed discussion with W.T. about the views he had expressed in response to defense counsel's questions. Third, the defendant concedes, and our review of the record confirms, that the [prosecutor] asked a relatively uniform set of questions of all jurors. Accordingly, W.T. and the other African-American venirepersons were not asked questions that were not asked of other jurors or that sought to elicit a particular response. Fourth, we are unaware of any venireperson of a race different from W.T.'s, who expressed the same or similar views regarding [the] police and the criminal justice system as those of W.T. but nevertheless was permitted to serve on the defendant's jury. Fifth, the [prosecutor] did not advance any explanation that was based on an inapplicable group trait. Finally, and perhaps most significantly, the [prosecutor] did not use a disproportionate number of peremptory challenges to exclude African-Americans from the jury. In fact, as the defendant acknowledges, three African-Americans were selected to serve, two as regular jurors and one as an alternate. Although the racial composition of an empaneled jury certainly is not dispositive of the issue of impermissible motive for use of a peremptory strike as to a particular juror, it is among the various factors that a reviewing court can consider in evaluating whether the explanation for exercising a peremptory challenge is pretextual and, thus, constitutionally infirm." *State* v. *Holmes*, supra, 176 Conn. App. 178–79.

ingly, the Appellate Court "conclude[d] that the court [correctly] determined that the [prosecutor's] use of [a] peremptory challenge to exclude W.T. from the jury was not tainted by purposeful racial discrimination, and, therefore, it properly denied the defendant's *Batson* challenge."[11] Id., 182. The Appellate Court unanimously affirmed the judgment of conviction.[12] Id., 192.

[11] The Appellate Court was by no means insensitive to the concerns raised by the defendant. In a footnote, the Appellate Court cited "studies conducted by reputable research firms" and observed that "permitting the use of peremptory challenges with respect to potential jurors who express negative views toward the police or the justice system may well result in a disproportionate exclusion of minorities from our juries, a deeply troubling result." *State* v. *Holmes*, supra, 176 Conn. App. 180–81 n.5. The Appellate Court also expressed its concern about the effect of implicit bias in decisionmaking, observing that it was making "this point not to suggest that the prosecutor conducting voir dire in this case was motivated by racial bias, but to recognize the need to be particularly vigilant in assessing a prosecutor's use of peremptory challenges, especially if the proffered explanation may have a disproportionate impact on minority participation on juries." Id., 181 n.5. Ultimately, the Appellate Court observed that, as "an intermediate state appellate court, we are, of course, bound by extensive precedent that limits our ability to remedy the weaknesses inherent in the *Batson* standard. Our cases are clear that disparate impact alone is insufficient to demonstrate a *Batson* violation. Accordingly, as [this court] did in *State* v. *Hinton*, supra, 227 Conn. 330, we are confined to reminding trial courts to be particularly diligent in assessing the use of peremptory challenges in circumstances that, if left unscrutinized for pretext, may result in 'an unconstitutionally disparate impact on certain racial groups.' " *State* v. *Holmes*, supra, 181–82 n.5.

[12] Judge Lavine issued a scholarly and insightful concurring opinion, agreeing with the Appellate Court majority's conclusion that, "in the present case, the peremptory challenge was properly exercised under prevailing law and practices" but opining that "this case brings into sharp relief a serious flaw in the way *Batson* has been, and can be, applied. *Batson* is designed to prevent lawyers from peremptorily challenging prospective jurors for manifestly improper reasons based on race, national origin, and the like. It was *not* designed to permit prosecutors—and other lawyers—to challenge members of suspect classes solely because they hold widely shared beliefs within the prospective juror's community that are based on life experiences." (Emphasis in original.) *State* v. *Holmes*, supra, 176 Conn. App. 192. Judge Lavine argued that this "blatant flaw that significantly disadvantages black defendants—and people belonging to other suspect classes—has become part of the *Batson* process itself" and urged reform of Connecticut's "jury selection process to eliminate the perverse way in which *Batson* has come to be used." (Footnote omitted.) Id., 193.

Judge Lavine conducted a thorough review of case law and commentary cataloging *Batson*'s shortcomings, including that it requires the court to find that a prosecutor committed serious ethical violations; id., 196–97 and n.4; and that, "as it has evolved, [*Batson* has come to permit] the elimination

This certified appeal followed. See footnote 2 of this opinion.

I

WHETHER FEAR OR DISTRUST OF LAW ENFORCEMENT IS A RACE NEUTRAL REASON FOR A PEREMPTORY CHALLENGE UNDER *BATSON*

On appeal, the defendant urges us to modify or overrule *State* v. *King*, supra, 249 Conn. 645, and hold that fear or distrust of law enforcement is not a race neutral reason for the use of a peremptory challenge "[b]ecause

of certain categories of prospective jurors whose views are reasonable and widely shared in their communities. The potential for the kind of categorical exclusion that *Batson* permits is simply unacceptable in a system that strives to treat everyone equally. It sends a troubling message to members of minority communities who should be encouraged—not discouraged—to actively engage in, and trust, the criminal justice system.

"[Additionally], permitting a peremptory challenge to be used under these circumstances is an affront to the dignity of the individual prospective juror who is excluded for honestly voicing reasonable and widely held views. It minimizes or negates his or her life experience in an insulting and degrading way. It must be remembered that one of the rationales for *Batson* is that the inappropriate exclusion of prospective jurors deprives the *prospective juror* of his or her constitutional right to serve on a jury—a basic right of citizenship. . . . To prohibit a significant percentage of people belonging to a suspect class from serving on a jury because they express a reasonable, [fact based], and widely held view cannot be countenanced." (Citation omitted; emphasis in original.) Id., 198.

Acknowledging "that peremptory challenges play an important function in our system because they permit lawyers to use their intuition in the very human jury selection process"; id., 199–200; Judge Lavine urged further study of this problem and also proposed an alteration to the *Batson* framework "in Connecticut to ameliorate the negative effects of the present regime." Id., 201. Specifically, Judge Lavine proposed reallocating some of the discretion in the jury selection process from the lawyers to the trial judge and granting "judges . . . the discretion to disallow the use of peremptory challenges in cases in which (1) the prospective juror is part of a suspect class; (2) the prospective juror gives an unequivocal assurance, under oath, that he or she can be fair to both sides; (3) the prospective juror expresses reasonable and [fact based] views, which, in the opinion of the judge, following argument by the lawyers, are widely shared in the prospective juror's particular community; and (4) the judge concludes that the prospective juror can, in fact, be fair." Id.

it is most commonly minority races that possess such a fear . . . .'' The defendant emphasizes that W.T.'s ''general concerns for his safety and equality as an African-American,'' on which the prosecutor relied as a race neutral explanation, are neither ''unique to W.T. as an individual nor . . . a direct reflection of his personal experiences but, rather, a well understood reality to the majority of African-Americans. As a result, if the explanation provided by the [prosecutor] for [his] challenge of W.T. is to be considered by the courts as race neutral, it could be used as a reason for excluding a [large number] of potential African-American venirepersons. It would be difficult to maintain acceptance of this reason as race neutral . . . .'' The defendant relies on the authorities cited in Judge Lavine's concurring opinion in the Appellate Court; see footnote 12 of this opinion; and emphasizes the need for courts to be vigilant in guarding against racial discrimination in jury selection given the effects of implicit bias, disparate impact, and the relative ease by which a prosecutor can proffer a racially neutral explanation in defense of a *Batson* challenge. The defendant further argues that ''[a]ny implicit racial bias housed by the [prosecutor] in this case was certainly inflated by his knowledge of W.T.'s employment, which he could have perceived, when considered alongside knowledge of W.T.'s race, to be a sign of W.T.'s 'negative' opinions of law enforcement.''

In response, the state relies on *Hernandez* v. *New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991), *State* v. *Gould*, 322 Conn. 519, 142 A.3d 253 (2016), and *State* v. *Edwards*, supra, 314 Conn. 465, to contend that the Appellate Court properly upheld the trial court's rejection of the *Batson* challenge because disparate impact and unconscious bias claims are not cognizable under the second step of the *Batson* analysis; instead, ''discriminatory intent or purpose . . . is

discerned under the third step of *Batson* based [on] 'an assessment of all the circumstances' and not simply on the basis of disparate impact alone." Relying on *State* v. *Hodge*, supra, 248 Conn. 231, and *State* v. *Smith*, 222 Conn. 1, 13–15, 608 A.2d 63 (1992), among other cases, the state also argues that fear or distrust of the police is a race neutral explanation as a matter of law because it is a viewpoint that may be shared by whites and minorities alike. The state further argues that this is not an appropriate case in which to overrule or modify *King* because the record demonstrates that the prosecutor's questioning of all members of the venire was uniform, and, of the at least four African-American members of the venire, W.T. was the only one who expressed a negative view of the police and the only one removed.[13] We agree with the state and conclude that the Appellate Court properly upheld the trial court's rejection of the defendant's *Batson* challenge.

The framework under which we consider *Batson* claims is comprehensively set forth in *State* v. *Edwards*, supra, 314 Conn. 465. "Voir dire plays a critical function in assuring the criminal defendant that his [or her] [s]ixth [a]mendment right to an impartial jury will be honored. . . . Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors. . . . Our constitutional and statutory law permit each party, typically through his or her attorney, to question each prospective juror individually, outside the presence of other prospective jurors, to determine [his or her] fitness to serve on the jury. . . . Because the purpose of voir dire is to discover if there is any likelihood that some prejudice is

[13] The state also observes that the prosecutor had proffered other race neutral reasons—unchallenged by the defendant on appeal—for the peremptory challenge of W.T., including his concerns about racial disparities in sentencing, his work to rehabilitate prisoners, and the fact that he had close relatives who had been convicted and incarcerated.

in the [prospective] juror's mind [that] will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted [to ask] questions designed to uncover that prejudice. This is particularly true with reference to the defendant in a criminal case. . . . The purpose of voir dire is to facilitate [the] intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. . . .

"Peremptory challenges are deeply rooted in our nation's jurisprudence and serve as one [state created] means to the constitutional end of an impartial jury and a fair trial. . . . [S]uch challenges generally may be based on subjective as well as objective criteria . . . . Nevertheless, [i]n *Batson* [v. *Kentucky*, supra, 476 U.S. 79] . . . the United States Supreme Court recognized that a claim of purposeful racial discrimination on the part of the prosecution in selecting a jury raises constitutional questions of the utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . The court concluded that [a]lthough a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, as long as that reason is related to his [or her] view concerning the outcome of the case to be tried . . . the [e]qual [p]rotection [c]lause forbids [a party] to challenge potential jurors solely on account of their race . . . ."[14]

"Under Connecticut law, a *Batson* inquiry involves three steps.[15] First, a party must assert a *Batson* claim

[14] In addition to race, it is well established that *Batson* also precludes peremptory challenges that discriminate purposefully on the basis of gender, religious affiliation, and ancestry or national origin. See, e.g., *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (gender); *State* v. *Rigual*, 256 Conn. 1, 10, 771 A.2d 939 (2001) (ancestry/national origin); *State* v. *Hodge*, supra, 248 Conn. 240 (religious affiliation).

[15] "We note that a *Batson* inquiry under Connecticut law is different from most federal and state *Batson* inquiries. Under federal law, a three step procedure is followed when a *Batson* violation is claimed: (1) the party

. . . . [Second] the [opposing party] must advance a neutral explanation for the venireperson's removal. . . . In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the [e]qual [p]rotection [c]lause as a matter of law. . . . At this stage, the court does not evaluate the persuasiveness or plausibility of the proffered explanation but, rather, determines only its facial validity—that is, whether the reason on its face, is based on something other than the race of the juror. . . . Thus, even if the [s]tate produces only a frivolous or utterly nonsensical justification for its strike, the case does not end—it merely proceeds to step three. . . .

"In the third step, the burden shifts to the party asserting the *Batson* objection to demonstrate that the [opposing party's] articulated reasons are insufficient or pretextual. . . . In evaluating pretext, the court must assess the persuasiveness of the proffered explanation and whether the party exercising the challenge was, in fact, motivated by race. . . . Thus, although an improbable explanation might pass muster under the second step, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination at the third stage of the inquiry. . . .

"We have identified several specific factors that may indicate that [a party's removal] of a venireperson

objecting to the exercise of the peremptory challenge must establish a prima facie case of discrimination; (2) the party exercising the challenge then must offer a neutral explanation for its use; and (3) the party opposing the peremptory challenge must prove that the challenge was the product of purposeful discrimination. . . . Pursuant to this court's supervisory authority over the administration of justice, we have eliminated the requirement, contained in the first step of this process, that the party objecting to the exercise of the peremptory challenge establish a prima facie case of discrimination." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 484 n.16; see *State* v. *Holloway*, 209 Conn. 636, 646 and n.4, 553 A.2d 166, cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

through a peremptory challenge was . . . motivated [by race]. These include, but are not limited to: (1) [t]he reasons given for the challenge were not related to the trial of the case . . . (2) the [party exercising the peremptory strike] failed to question the challenged juror or only questioned him or her in a perfunctory manner . . . (3) prospective jurors of one race . . . were asked a question to elicit a particular response that was not asked of other jurors . . . (4) persons with the same or similar characteristics but not the same race . . . as the challenged juror were not struck . . . (5) the [party exercising the peremptory strike] advanced an explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically . . . and (6) the [party exercising the peremptory strike] used a disproportionate number of peremptory challenges to exclude members of one race . . . .

"In deciding the ultimate issue of discriminatory intent, the [court] is entitled to assess each explanation in light of all the other evidence relevant to [a party's] intent. The [court] may think a dubious explanation undermines the bona fides of other explanations or may think that the sound explanations dispel the doubt raised by a questionable one. As with most inquiries into state of mind, the ultimate determination depends on an aggregate assessment of all the circumstances. . . . Ultimately, the party asserting the *Batson* claim carries the . . . burden of persuading the trial court, by a preponderance of the evidence, that the jury selection process in his or her particular case was tainted by purposeful discrimination." (Citations omitted; footnote added; footnote altered; internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 483–86; see also Conn. Const., art. I, § 19, as amended by art. IV of the amendments to the constitution; General Statutes § 54-82f; Practice Book § 42-12.

With respect to appellate review of *Batson* claims, the "second step of the *Batson* inquiry involves a determination of whether the party's proffered explanation is facially race neutral and, thus, is a question of law. . . . Because this inquiry involves a matter of law, we exercise plenary review." (Citations omitted.) *State* v. *Edwards*, supra, 314 Conn. 487.

"The third *Batson* step, however, requires the court to determine if the prosecutor's proffered race neutral explanation is pretextual. . . . Deference [to the trial court's findings of credibility] is necessary because a reviewing court, which analyzes only the transcripts from voir dire, is not as well positioned as the trial court is to make credibility determinations. . . . Whether pretext exists is a factual question, and, therefore, we shall not disturb the trial court's finding unless it is clearly erroneous." (Citations omitted; internal quotation marks omitted.) Id., 489–90.

We understand the defendant's claims in this case, as clarified at oral argument before this court, to be limited to the second step of *Batson*, namely, to contend that fear or distrust of the police is not a race neutral reason for the exclusion of jurors as a matter of federal constitutional law[16] given its disparate effect on minority jurors. The defendant acknowledges that this argument requires us to overrule, or at the very least strictly limit, a line of Connecticut cases. See, e.g., *State* v. *King*, supra, 249 Conn. 666 (concluding that prosecutor's reasons for striking juror were "not motivated by discriminatory considerations" because "it was reason-

[16] Our analysis is limited to the federal constitution because, as the defendant acknowledged at oral argument before this court, he has not briefed an independent state constitutional claim pursuant to *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992). See, e.g., *State* v. *Saturno*, 322 Conn. 80, 113 n.27, 139 A.3d 629 (2016); see also *State* v. *Hinton*, supra, 227 Conn. 329–31 (rejecting *Batson* claim under state constitution on basis of disparate impact on jurors who reside in vicinity of crime scene at issue).

able for the prosecutor to conclude that [the juror's] concerns about the fairness of the criminal justice system might make it difficult for him to view the state's case with complete objectivity" and that rejection of juror's "employment applications [by] two law enforcement agencies . . . gave rise to a legitimate concern that he might harbor some resentment toward the police and the prosecuting authorities"); *State* v. *Hodge*, supra, 248 Conn. 231 ("[The prospective juror] testified that her son, brother and cousin each had a prior arrest record and that her son had been prosecuted by the New Haven office of the state's attorney, the same office involved in prosecuting the present case. In addition, [she] characterized her cousin's treatment at the hands of the prosecutor who handled his case as unfair."); *State* v. *Smith*, supra, 222 Conn. 14 (concluding that exclusion of juror with arrest record was racially neutral because "[p]rosecutors commonly seek to exclude from juries all individuals, whatever their race, who have had negative encounters with the police because they fear that such people will be biased against the government"); *State* v. *Jackson*, 73 Conn. App. 338, 350–51, 808 A.2d 388 (rejecting *Batson* challenge to peremptory strike of African-American juror who "had some relatives that had some general contact with New Haven police officers and had been involved in narcotics, and [whose] relatives have been in court," because defendant's *Batson* argument "rested solely on the disproportionate impact that the race neutral explanations the state provided could have on inner-city black males," and "[p]roof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause" [internal quotation marks omitted]), cert. denied, 262 Conn. 929, 814 A.2d 381 (2002), and cert. denied, 262 Conn. 930, 814 A.2d 381 (2002); *State* v. *Morales*, 71 Conn. App. 790, 807, 804 A.2d 902 (concluding that prospective juror's "negative opinion concern-

ing police performance, especially with respect to drug related crime," was "a valid, nondiscriminatory reason" for excusing him given "the state's considerable dependency on police testimony . . . and the fact that the crime charged was drug related," and prosecutor was not bound to accept his statement that "he would not allow those considerations to affect his impartiality as a juror"), cert. denied, 262 Conn. 902, 810 A.2d 270 (2002); see also *State* v. *Hinton*, supra, 227 Conn. 327–28 (prospective juror's stated "sympathy to African-Americans whom she perceived were treated unfairly by the criminal justice system," as well as her exposure to pretrial media publicity and fact that she lived near crime scene, were legitimate race neutral reasons for her exclusion and not pretextual).

The defendant's disparate impact argument is foreclosed as a matter of federal constitutional law by the United States Supreme Court's decision in *Hernandez* v. *New York*, supra, 500 U.S. 352. In *Hernandez*, the United States Supreme Court concluded that a prosecutor had not violated *Batson* by using peremptory challenges to exclude Latino jurors by reason of their ethnicity when he offered as a race neutral explanation his concern that bilingual jurors might have difficulty accepting the court interpreter's official translation of multiple witnesses' testimony given in Spanish. Id., 357–58. In so concluding, the Supreme Court rejected the argument that the prosecutor's reasons, if assumed to be true, were not race neutral and thus violated the equal protection clause as a matter of law because of their disproportionate impact on Latino jurors. See id., 362–63. The court relied on "the fundamental principle that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the [e]qual [p]rotection [c]lause. . . . Discriminatory purpose

. . . implies more than intent as volition or intent as awareness of consequences. It implies that the [decision maker] . . . selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." (Citations omitted; internal quotation marks omitted.) Id., 359–60, quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979), and *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–65, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). The Supreme Court stated that a "neutral explanation in the context of [its] analysis . . . means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Hernandez* v. *New York*, supra, 360. Noting that the prosecutor also had relied on the prospective jurors' demeanor and his assessment of their willingness to accept the official translation relative to other bilingual jurors, the court observed that "[e]ach category would include both Latinos and non-Latinos. While the prosecutor's criterion might well result in the disproportionate removal of prospective Latino jurors, that disproportionate impact does not turn the prosecutor's actions into a per se violation of the [e]qual [p]rotection [c]lause." Id., 361.

The Supreme Court emphasized, however, that disparate impact is not completely irrelevant under *Batson*. Instead, "disparate impact should be given appropriate weight in determining whether the prosecutor acted with a forbidden intent, but it will not be conclusive in the preliminary [race neutrality] step of the *Batson* inquiry. An argument relating to the impact of a classification does not alone show its purpose. . . . Equal protection analysis turns on the intended consequences

of government classifications. Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality. Nothing in the prosecutor's explanation shows that he chose to exclude jurors who hesitated in answering questions about following the interpreter *because* he wanted to prevent bilingual Latinos from serving on the jury.'' (Citation omitted; emphasis in original.) Id., 362. After analyzing the record under the third step of *Batson*, the Supreme Court concluded that the reason was not a pretext for intentional discrimination, deferring to the state trial judge's factual finding that the prosecutor had not used that reason as a pretext for intentional discrimination. Id., 363–64.

We have relied on *Hernandez* on multiple occasions to reject claims that a prosecutor's explanation was not race neutral as a matter of law under the second step of *Batson* because of its claimed disparate impact on minority groups. Most recently, in *State* v. *Edwards*, supra, 314 Conn. 465, we rejected a defendant's claim that a prospective juror's racial self-identification on the juror questionnaire as "human," which the prosecutor offered as a race neutral explanation in response to the defendant's *Batson* challenge, is "a proxy for race, and, thus, the court should find discriminatory intent inherent in the prosecutor's explanation"; id., 490; because "a racial minority is more likely to identify himself or herself as an 'unusual' race, and, thus, the prosecutor's proffered reason is inherently discriminatory. This argument is, in essence, a disparate impact argument, which is not dispositive of the issue of race neutrality." Id., 492. Turning to the third step of *Batson*, we considered disparate impact as a possible indicator of pretext, but we ultimately determined that there was "insufficient evidence to find any sort of disparate impact from the prosecutor's proffered explanation,'' given that the social science studies proffered by the defendant proved "only that racial minorities are more likely to

self-identify in creative and unusual ways, not that these same individuals would write an unusual answer in an official document. Furthermore, the prosecutor's proffered explanation related to unusual answers in the questionnaire generally, not to the race line specifically." Id., 496–97; see id., 497 (noting that "a policy of excluding all individuals who provide an answer other than the usual answer to the question of race, i.e., 'Caucasian,' 'African-American,' or other [well known] races, 'without regard to the particular circumstances of the trial or the individual responses of the [potential] jurors, may be found by the trial [court] to be a pretext for racial discrimination' "). In *State* v. *Hinton*, supra, 227 Conn. 329–31, this court rejected a state constitutional challenge based on the disparate racial impact of prospective jurors' residency near the crime scene, but we expressed caution about the possible pretextual effect of this explanation should it be left "unscrutinized" by the trial court. Cf. *State* v. *Gould*, supra, 322 Conn. 533–34 (erroneous removal of juror for cause based on judge's misperception of his English language competency did not require automatic reversal under *Batson* because there was no claim of purposeful discrimination, and "the specter of implied or unconscious bias . . . finds no support in *Batson* or its progeny").

Given the breadth of the United States Supreme Court's decision in *Hernandez*, it is not surprising that the defendant has not cited any case law for the proposition that distrust of law enforcement or the criminal justice system is not a race neutral reason under *Batson* for exercising a peremptory challenge on a juror.[17] Indeed, the only post-*Hernandez* cases we have located

[17] Examples abound of courts accepting distrust of the criminal justice system or law enforcement officers as a race neutral explanation for peremptorily challenging a juror. See, e.g., *United States* v. *Alvarez-Ulloa*, 784 F.3d 558, 567 (9th Cir. 2015); *United States* v. *Moore*, 651 F.3d 30, 43 (D.C. Cir. 2011), aff'd sub nom. *Smith* v. *United States*, 568 U.S. 106, 133 S. Ct. 714, 184 L. Ed. 2d 570 (2013); *People* v. *Hardy*, 5 Cal. 5th 56, 81, 418 P.3d 309, 233 Cal. Rptr. 3d 378 (2018), cert. denied, U.S. , 139 S. Ct. 917, 202 L.

on this direct point have expressly rejected this disparate impact argument. For example, the United States Court of Appeals for the Seventh Circuit recently rejected an argument that "the government's proffered justification for the strike—bias against law enforcement—is not [race neutral] because [African-Americans] are disproportionately affected by negative interactions with law enforcement. Even accepting the premise of this argument, it does not support a finding of pretext. *Batson* protects against intentional discrimination, not disparate impact. . . . Moreover, we have acknowledged that bias against law enforcement is a legitimate [race neutral] justification." (Citation omitted.) *United States* v. *Brown*, 809 F.3d 371, 375–76 (7th Cir.), cert. denied, U.S. , 136 S. Ct. 2034, 195 L. Ed. 2d 219 (2016); see *United States* v. *Arnold*, 835 F.3d 833, 842 (8th Cir. 2016) (rejecting argument that prosecutor's reliance on prospective jurors' "[exhibition of] strong agreement with the suggestion that police could be wrong" was "by itself . . . illegitimate and discriminatory because distrust of police officers is prevalent among [African-Americans]"). Similarly, in *State* v. *Rollins*, 321 S.W.3d 353 (Mo. App. 2010), transfer denied, Missouri Supreme Court, Docket No. SC91170 (October 26, 2010), cert. denied, 563 U.S. 946, 131 S. Ct. 2115, 179 L. Ed. 2d 910 (2011), the court rejected an argument under the second step of *Batson*, founded on an African-American prospective juror's negative perception of police officers, that "the court was required to take into account the disparate impact of such a supposedly facially [race neutral] reason when it means that members of a particular race or ethnicity are more likely to be affected than others" because "disparate impact does not conclusively govern in the

Ed. 2d 648 (2019); *State* v. *Mootz*, 808 N.W.2d 207, 219 (Iowa 2012); *Batiste* v. *State*, 121 So. 3d 808, 849 (Miss. 2013), cert. denied, 572 U.S. 1117, 134 S. Ct. 2287, 189 L. Ed. 2d 178 (2014); *State* v. *Nave*, 284 Neb. 477, 487–88, 821 N.W.2d 723 (2012), cert. denied, 568 U.S. 1236, 133 S. Ct. 1595, 185 L. Ed. 2d 591 (2013).

preliminary [race neutrality] step of the *Batson* inquiry." Id., 366; cf. *State* v. *Veal*, 930 N.W.2d 319, 334 (Iowa 2019) (declining to adopt "something like a cause requirement" with respect to use of strike of last African-American juror, despite "aware[ness] of the disproportionate impact when jurors can be removed based on prior interactions with law enforcement," because "this case involved a special set of circumstances—a prosecutor's use of a peremptory strike on a juror because the same prosecutor had sent her father to prison for the rest of his life"). Thus, with no adequate claim that the Appellate Court improperly upheld the trial court's finding that the prosecutor's reasons were not pretextual under the third step of *Batson*,[18] we conclude that the Appellate Court properly affirmed the judgment of conviction.

[18] The state observes that the "Appellate Court majority was unable to ascertain whether the defendant was challenging the trial court's resolution of both the second and third steps of *Batson*, or whether he was challenging only the court's ultimate factual finding that the prosecutor did not act with discriminatory intent in exercising the peremptory challenge against W.T." See *State* v. *Holmes*, supra, 176 Conn. App. 175. We read the defendant's brief to this court to limit his challenge to the second step of *Batson*, insofar as he does not engage in any significant analysis of the record to demonstrate that the trial court's finding of no pretext was clearly erroneous and instead emphasizes that the prosecutor's reasons with respect to " 'negative' " interactions with law enforcement were not racially neutral "per se" because they "have a strong air of implicit racial bias, particularly with the knowledge that potential juror W.T. is of African-American descent," and "minority races are generally afraid of [the] police, a statistical conclusion that is not shocking given the amount of violence against minorities inundating recent headlines." This reading was borne out at oral argument before this court, at which counsel for the defendant candidly acknowledged that the trial prosecutor had *not acted purposefully* to exclude African-Americans or other minorities from the jury but instead had elected to question prospective jurors about a topic that would have the effect of excluding minority jurors, rendering it not race neutral as a matter of law.

The defendant argues, however, that, "based on what is known about the human inability to recognize biases and the tendency to readily provide a race neutral reason for [one's] behavior, it is easy to assume that the [prosecutor] in this case acted in accordance with his implicit racial biases in exercising a peremptory challenge against W.T., and that the trial court did not exercise sufficient prudence in making a determination as to the propri-

II

BATSON REFORM IN CONNECTICUT

Although the relief that we can provide in this case is constrained by the defendant's decision to limit his *Batson* claims to the equal protection clause of the United States constitution; see footnote 16 of this opinion; the broader themes of disparate impact and implicit bias that the defendant advances raise, as the state candidly acknowledges, extremely serious concerns with respect to the public perception and fairness of the criminal justice system.[19] As the United States Supreme

ety of the challenge. Had the court . . . been more aware of the likelihood of implicit racial biases to be hidden by race neutral reasons offered by the party exercising a challenge against a potential juror, [the court] would have found pretext as it related to the [prosecutor's] proffered reasons for challenging potential juror W.T., *particularly in a situation where the* [*court itself*] *found W.T. to be impartial.*" (Emphasis added.) We disagree with this characterization of the record, insofar as the defendant has not identified, and our independent review has not revealed, a specific finding that W.T. was in fact impartial. In any event, this argument—founded on implicit bias—falls short of the purposeful discrimination contemplated by *Batson*. See, e.g., *State* v. *Gould*, supra, 322 Conn. 533–34.

Finally, to the extent that the defendant does argue pretext, he relies on the decision of the United States Court of Appeals for the Second Circuit in *Mullins* v. *Bennett*, 228 Fed. Appx. 55, 56 (2d Cir.), cert. denied sub nom. *Mullins* v. *Bradt*, 552 U.S. 911, 128 S. Ct. 259, 169 L. Ed. 2d 190 (2007), to contend that the prosecutor's challenge to W.T. based on his employment as a social worker was a pretext for racial discrimination because "the central issue being contested in this case does not at all relate to social work or troubled families . . . ." We disagree, insofar as the prosecutor relied on W.T.'s volunteer work with incarcerated persons, not his social work employment as a general matter.

[19] To its great credit, the state acknowledges the importance of "understanding and appreciating the existence and potentially corrupting influence of implicit or unconscious biases" and notes that "Connecticut prosecutors regularly receive training on this subject for the purpose of gaining insight regarding this phenomenon and eliminating its corrupting influences to the full[est] extent possible." See A. Burke, "Prosecutors and Peremptories," 97 Iowa L. Rev. 1467, 1483–85 and n.93 (2012) (urging prosecutors to consider their institutional ethical obligation and to undertake "voluntary reforms designed to bolster the prosecutor's role in protecting [race neutral] jury selection and to neutralize the biases that might lead to racialized peremptory challenges," including implicit bias training and " 'switching' exercises during voir dire to assess for disparate questioning or reasoning").

Court recently observed, "[o]ther than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers* v. *Mississippi*, U.S. , 139 S. Ct. 2228, 2238, 204 L. Ed. 2d 638 (2019). Moreover, there is great "constitutional value in having diverse juries," insofar as "equally fundamental to our democracy is that all citizens have the opportunity to participate in the organs of government, including the jury. If we allow the systematic removal of minority jurors, we create a badge of inferiority, cheapening the value of the jury verdict. And it is also fundamental that the defendant who looks at the jurors sitting in the box have good reason to believe that the jurors will judge as impartially and fairly as possible. Our democratic system cannot tolerate any less." *State* v. *Saintcalle*, 178 Wn. 2d 34, 49–50, 309 P.3d 326 (overruled in part on other grounds by *Seattle* v. *Erickson*, 188 Wn. 2d 721, 398 P.3d 1124 [2017]), cert. denied, 571 U.S. 1113, 134 S. Ct. 831, 187 L. Ed. 2d 691 (2013). "From a practical standpoint, studies suggest that compared to diverse juries, [all white] juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. . . . In contrast, diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused. . . . By every deliberation measure . . . heterogeneous groups outperformed homogeneous groups. . . . These studies confirm what seems obvious from reflection: more diverse juries result in fairer trials." (Citations omitted; internal quotation marks omitted.) Id., 50; see, e.g., J. Rand, "The Demeanor Gap: Race, Lie Detection, and the Jury," 33 Conn. L. Rev. 1, 60–61 (2000) (suggesting that jury diversity is necessary to address "[d]emeanor [g]ap," which undermines accuracy of cross-racial credibility determinations). Insofar as *Batson* has been roundly criticized for its doctrinal

and practical shortcomings in preventing both purposeful and unconscious racial discrimination, this appeal presents us with an occasion to consider whether further action on our part is necessary to promote public confidence in the perception of our state's judicial system with respect to fairness to both litigants and their fellow citizens.

A

Review of *Batson* Problems and Solutions

Reams of paper have been consumed by judicial opinions and law review articles identifying why *Batson* has been a toothless tiger when it comes to combating racially motivated jury selection, and numerous authorities and commentators have proposed various solutions to those specific problems. Much of *Batson*'s perceived ineffectiveness stems from its requirement of purposeful discrimination. To begin with, the pretext and purposeful discrimination aspects of *Batson*'s third step require the trial judge to make the highly unpalatable finding that the striking attorney has acted unethically by misleading the court and intentionally violating a juror's constitutional rights. See, e.g., *State* v. *Veal*, supra, 930 N.W.2d 360 (Appel, J., concurring in part and dissenting in part) ("requiring a district court judge to, in effect, charge the local prosecutor with lying and racial motivation from the bench in the course of voir dire is unrealistic"); *State* v. *Saintcalle*, supra, 178 Wn. 2d 53 ("[i]magine how difficult it must be for a judge to look a member of the bar in the eye and level an accusation of deceit or racism"); J. Bellin & J. Semitsu, "Widening *Batson*'s Net To Ensnare More Than the Unapologetically Bigoted or Painfully Unimaginative Attorney," 96 Cornell L. Rev. 1075, 1113 (2011) ("so long as a personally and professionally damning finding of attorney misconduct remains a prerequisite to awarding relief under *Batson*, trial courts will be understand-

ably reluctant to find *Batson* violations"); M. Bennett, "Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of *Batson*, and Proposed Solutions," 4 Harv. L. & Policy Rev. 149, 162–63 (2010) (noting dual difficulties that "[m]ost trial court judges will . . . find such deceit [only] in extreme situations," while other troubling cases indicated that "some prosecutors are explicitly trained to subvert *Batson*"); R. Charlow, "Tolerating Deception and Discrimination After *Batson*," 50 Stan. L. Rev. 9, 63–64 (1997) ("[S]hould courts apply *Batson* vigorously, it would be even less appropriate to sanction personally those implicated. Moreover, judges may be hesitant to find *Batson* violations, especially in close cases, if doing so means that attorneys they know and see regularly will be punished personally or professionally as a result."); T. Tetlow, "Solving *Batson*," 56 Wm. & Mary L. Rev. 1859, 1897–98 (2015) ("[The *Batson* rule's focus on pretext] requires personally insulting prosecutors and defense lawyers in a way that judges do not take lightly, calling them liars and implying that they are racist. Technically, as some have argued, lying to the court constitutes an ethics violation that the judge should then report to the bar for disciplinary proceedings. Disconnecting the regulation of jury selection from the motives of lawyers will make judges far more likely to enforce the rule." [Footnotes omitted.]).

Second, the purposeful discrimination requirement does nothing to address the adverse effects of implicit or unconscious bias on jury selection. As the Washington Supreme Court has astutely observed: "In part, the problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our insti-

tutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus." (Footnote omitted.) *State* v. *Saintcalle*, supra, 178 Wn. 2d 46; see also T. Tetlow, supra, 56 Wm. & Mary L. Rev. 1946 ("The current *Batson* rule constitutes a placebo that purports to solve the problem of discrimination by juries but really focuses only on purported discrimination against jurors. Not only does it fail to address the real issues, it also actively distracts from them. The *Batson* rule represents the culmination of the [United States] Supreme Court's desire to solve the intractable and unconscionable problem of racism in our criminal justice system by ordering everyone in the courtroom to ignore it.").

In a leading article on implicit bias, Professor Antony Page makes the following observation with respect to a lawyer's own explanations for striking a juror peremptorily: "[W]hat if the lawyer is wrong? What if her awareness of her mental processes is imperfect? What if she does not know, or even cannot know, that, in fact, but for the juror's race or gender, she would not have exercised the challenge?" (Emphasis omitted.) A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U. L. Rev. 155, 156 (2005). "The attorney is both honest and discriminating on the basis of race or gender. Such unconscious discrimination occurs, almost inevitably, because of normal cognitive processes that form stereotypes." (Emphasis omitted.) Id., 180. Professor Page's landmark article "examines the findings from recent psychological research to conclude that the lawyer often will be wrong, will be unaware of her mental processes, and would not have exercised the challenge but for the juror's race or gender. As a result (and not because of lying lawyers), the *Batson* peremptory challenge framework is woefully ill-suited to address the problem of

race and gender discrimination in jury selection." (Emphasis omitted.) Id., 156.

The studies reviewed by Professor Page demonstrate that "few attorneys will always be able to correctly identify the factor that caused them to strike or not strike a particular potential juror. The prosecutor may have actually struck on the basis of race or gender, but she plausibly believes she was actually striking on the basis of a [race neutral] or [gender] neutral factor. Because a judge is unlikely to find pretext, the peremptory challenge will have ultimately denied potential jurors their equal protection rights." (Footnote omitted.) Id., 235. Although Professor Page argues that the social psychology research supports addressing implicit bias by eliminating peremptory challenges entirely; id., 261; in the alternative, he proposes (1) to eliminate the *Batson* procedure's requirement of subjective discriminatory intent, which also relieves judges of "mak[ing] the difficult finding that the lawyers before them are dishonest," (2) to instruct jurors about the concepts of unconscious bias and stereotyping, (3) to require educating attorneys about unconscious bias, with a requirement that they "actively and vocally affirm their commitment to egalitarian [nondiscriminatory] principles," and (4) to increase the use of race blind and gender blind questionnaires. Id., 260–61.

Similarly, Judge Mark W. Bennett, an experienced federal district judge, considers the "standards for ferreting out lawyers' potential explicit and implicit bias during jury selection . . . a shameful sham"; he, too, urges (1) the inclusion of jury instructions and presentations during jury selection on the topic of implicit bias, to adequately explore a juror's impartiality, and (2) the administration of implicit bias testing to prospective jurors. M. Bennett, supra, 4 Harv. L. & Policy Rev. 169–70. But see J. Abel, "*Batson*'s Appellate Appeal and Trial Tribulations," 118 Colum. L. Rev. 713, 762–66 (2018)

(discussing *Batson*'s greater value in direct and collateral postconviction review proceedings, particularly in habeas cases that afford access to evidence beyond trial record to prove discrimination).

The second step of *Batson*, which requires the state to proffer a race neutral explanation for the peremptory challenge, has been criticized as particularly ineffective in addressing issues of disparate impact and implicit bias such as those raised by the defendant in this appeal. Specifically, the United States Supreme Court's decision in *Purkett* v. *Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995), took a very broad approach to the second step, allowing virtually any race neutral explanation, however "implausible or fantastic," to pass muster; the actual merit of the explanation is considered only during the pretext inquiry of the third step. See *State* v. *Edwards*, supra, 314 Conn. 484–85. *Purkett* has been criticized for its effect in "watering down" the *Batson* inquiry. See L. Cavise, "The *Batson* Doctrine: The Supreme Court's Utter Failure To Meet the Challenge of Discrimination in Jury Selection," 1999 Wis. L. Rev. 501, 537. Some courts and commentators have urged reforms to ensure that the reason proffered by the prosecutor relates to the case being tried in an attempt to limit post hoc reasoning for the use of the strike. See *Ex parte Bruner*, 681 So. 2d 173, 173 (Ala. 1996) (rejecting disparate impact conclusion in *Hernandez* v. *New York*, supra, 500 U.S. 352, and *Purkett* as matter of Alabama law); *Spencer* v. *State*, 238 So. 3d 708, 712 (Fla.) (under Florida law, second prong of *Batson* requires prosecutor to identify "clear and reasonably specific" race neutral explanation that is related to trial at hand, which requires trial court to "determine both whether the reason was neutral and reasonable and whether the record supported the absence of pretext" [internal quotation marks omitted]), cert. denied, U.S. , 138 S. Ct. 2637, 201 L.

Ed. 2d 1039 (2018); see also *Tennyson* v. *State*, Docket No. PD-0304-18, 2018 WL 6332331, *7 (Tex. Crim. App. December 5, 2018) (Alcala, J., dissenting from refusal of discretionary review) ("[i]f any implausible or outlandish reason that was never even discussed with a prospective juror can be accepted as a genuine [race neutral] strike by a trial court . . . and if appellate courts simply defer to trial courts . . . then *Batson* is rendered meaningless, and it is time for courts to enact alternatives to the current *Batson* scheme to better effectuate its underlying purpose"). It also has been suggested that the second step of *Batson* be modified to circumscribe the number of permissible race neutral explanations or increase their quality, which would also alleviate the more difficult discrimination finding attendant to the third step. See L. Cavise, supra, 551–52 ("If the Supreme Court is serious when it holds that the venireperson's right to serve is of such importance that it merits equal protection coverage, then surely it is merely a logical extension to prohibit a person from being improperly removed for the [nonreason] of the neutral explanation. Is the exalted right to serve merely a facade to be torn away on the sheerest of explanations? Minorities, women, and persons of cognizable ethnicity should . . . be removed [only] for legitimate reasons—which does not include those that are purely subjective, irrational, or unverifiable, much less racist or sexist."); J. Wrona, Note, "*Hernandez* v. *New York*: Allowing Bias To Continue in the Jury Selection Process," 19 Ohio N.U. L. Rev. 151, 158 (1992) (criticizing *Hernandez* for giving "little value to the disparate impact of the prosecutor's challenges" and "emphasizing the prosecutor's subjective rationale and attaching minor significance to objective evidence," which affords "prosecutors ample means to discriminate in jury selection").

Other commentators have proposed solutions that more directly consider the demographics of the jury in

considering whether to allow the use of peremptory challenges in a particular case, akin to the approach suggested by Judge Lavine in his concurring opinion in the Appellate Court. See *State* v. *Holmes*, supra, 176 Conn. App. 201–202; see also footnote 12 of this opinion. One proposal is to engage in a qualitative analysis similar to that used to assess a challenge for cause, in which the trial judge would balance claims of potential juror bias against the systemic interest in diversity of the jury.[20] See L. Cavise, supra, 1999 Wis. L. Rev. 551 ("The cost of this approach would be that, in gender and race questioning, the peremptory would be transformed into a challenge for 'quasi-cause.' In other words, trial judges would be required to do with peremptories just as they have been doing with challenges for cause . . . but simply lower the standard for the challenge to allow some exercise of the intuitive. Any judge who can say 'I may not agree but I see how you can think that' has mastered this suggestion in peremptory challenges."); A. Cover, "Hybrid Jury Strikes," 52 Harv. C.R.-C.L. L. Rev. 357, 395 (2017) ("[The author suggests the] replacement of traditional peremptory strikes with hybrid jury strikes, which could . . . be exercised [only] if the proponent first articulated reasons coming close to, but not found to satisfy, the standard for cause challenges. This reform would have important salutary effects by mandating ex ante rationality, yet preserving in modified form the most important penumbral function of the peremptory strike."); T. Tetlow, supra, 56 Wm. & Mary L. Rev. 1895 (proposing test that would balance quality of claims of juror bias against impact on diversity of striking juror, rather than their sincerity); see also

[20] The state, while acknowledging that "*Batson* has been widely criticized as being ineffectual," criticizes such diversity conscious solutions as unconstitutional and discriminatory in their own right insofar as they would affirmatively treat white and minority venirepersons differently. Because neither of these solutions is directly before us for adjudication, we express no view regarding the merits of the state's concerns.

T. Tetlow, supra, 1900–1906 (arguing that that *Holland* v. *Illinois*, 493 U.S. 474, 482–83, 110 S. Ct. 803. 107 L. Ed. 2d 905 [1990], holding that sixth amendment requirement of fair cross section on venire does not apply to petit jury, was wrongly decided and arguing in favor of consideration of diversity during jury selection, rather than "equat[ing] race consciousness with racism").

Other commentators have suggested that some of the concerns about *Batson* can be addressed procedurally by delaying the final decision of whether to seat a juror or to accept a strike until the conclusion of voir dire, thus allowing a provisionally stricken juror to be reseated should a pattern emerge of apparently discriminatory challenges. See J. Bellin & J. Semitsu, supra, 96 Cornell L. Rev. 1127 (suggesting that if "a trial court can invalidate a peremptory challenge after finding an unrebutted appearance of discrimination, it could be contended that the proposal is insufficiently tethered to *Batson* and, thus, the constitutional right that *Batson* enforces,'' and making prophylactic ''analogy to *Miranda* warnings and the decades of practice that have shown that a robust enforcement of the *Batson* right must of necessity sweep more broadly than the constitutional right itself" [emphasis omitted]). Our existing *Batson* case law is compatible with this suggestion. See *State* v. *Robinson*, 237 Conn. 238, 252–53 and n.14, 676 A.2d 384 (1996) (holding that "a defendant may object to the state's peremptory challenge on *Batson* equal protection grounds at any time prior to the swearing of the jury" and noting that nothing on face of General Statutes § 51-238a precludes trial judge from recalling juror who was released from duty).

Moving beyond the courtroom itself, other commentators have suggested the reform of recordkeeping practices to allow for the evaluation of jury selection practices on a systemic level. See C. Grosso & B. O'Brien, "A Call to Criminal Courts: Record Rules for

Batson," 105 Ky. L.J. 651, 662 (2017) ("Our limited evidence suggests that the regular availability of statistical evidence might mitigate racial disparities in jury selection. If this is true, criminal courts need to recognize their obligation to preserve and provide access to jury selection data for all criminal trials."); id., 667–68 (suggesting retention of records, including race of potential jurors, whether they served, and "additional venire characteristics," with omission of juror names or other identifying information to protect jurors' privacy and safety); R. Wright et al., "The Jury Sunshine Project: Jury Selection Data as a Political Issue," 2018 U. Ill. L. Rev. 1407, 1442 (advocating for aggregation and collection of jury selection data across court systems to promote public policy advocacy with respect to reduction of discrimination during jury selection process); see also A. Burke, "Prosecutors and Peremptories," 97 Iowa L. Rev. 1467, 1485–86 (2012) (urging prosecutors to "collect and publish both individual and office-wide data regarding the exercise of peremptory challenges").

Finally, we cannot ignore the intersection of peremptory challenges with other areas of the law bearing on the composition of our juries, including the fair cross section requirement that we recently considered in *State* v. *Moore*, 334 Conn. 275, A.3d (2019), to ensure a diverse jury pool. "When we approach a case with civil rights implications, it is important to think systemically. Important issues involving the [composition] of the venire pool, the scope of voir dire of potential jurors, the use of peremptory challenges, and the instructions given to the jury intersect and act together to promote, or resist, our efforts to provide all defendants with a fair trial." *State* v. *Veal*, supra, 930 N.W.2d 344 (Appel, J., concurring in part and dissenting in part); see id., 360 (Appel, J., concurring in part and dissenting in part) ("*Batson*'s relatively free reign on peremptory challenges cuts rough against the grain of the constitu-

tional value of achieving juries with fair cross sections of the community. By opening the valve on peremptory challenges, you close the [fair cross section] pipe and lose the benefits of diversity, which are substantial."); L. Cavise, supra, 1999 Wis. L. Rev. 549 (noting solutions to *Batson*'s shortcomings that "focus on the selection of the venire, such as supplementing the traditional method of voter registration lists with driver's license or other lists to [ensure] proportionality," sending "jury questionnaires . . . to selected areas with a higher percentage of minorities, and [having] the results of the questionnaires or the composition of the venire actually called to service be scanned by the chief judge to [ensure] diversity").

B

Implementation of *Batson* Reforms

Although *Batson* has serious shortcomings with respect to addressing the effects of disparate impact and unconscious bias, we decline to "throw up our hands in despair at what appears to be an intractable problem. Instead, we should recognize the challenge presented by unconscious stereotyping in jury selection and rise to meet it." *State* v. *Saintcalle*, supra, 178 Wn. 2d 49. We hesitate to assume, however, that this court is best situated in the first instance to issue an edict prescribing a solution to what ails *Batson* on a systemic level. But see *State* v. *Holloway*, 209 Conn. 636, 646 and n.4, 553 A.2d 166 (using supervisory authority to provide greater protection than required by *Batson* by eliminating requirement under first prong of establishing prima facie case of purposeful discrimination in any case in which venirepersons of same cognizable racial group as defendant are peremptorily struck from venire), cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989).

Instead, the scale and variety of the potential changes that appear necessary to address the flaws in *Batson*, as shown by the menu of possible solutions such as those discussed in part II A of this opinion, beg for a more deliberative and engaging approach than appellate adjudication, which is limited to the oral and written advocacy of the parties and stakeholders appearing as amici curiae in a single case. See, e.g., *Johnson* v. *California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (recognizing that states "have flexibility in formulating appropriate procedures to comply with *Batson*"); *State* v. *Saintcalle*, supra, 178 Wn. 2d 51 ("[t]he *Batson* framework anticipates that state procedures will vary, explicitly granting states flexibility to fulfill the promise of equal protection"); accord *State* v. *Gould*, supra, 322 Conn. 535–37 (declining to require provision of translator to "prevent the underrepresentation of minorities on juries due to the English proficiency requirement" because that argument "is one that is more appropriately addressed to the legislature rather than this court," but noting that "[o]ur Judicial Branch has been proactive in addressing the issue of limited English proficiency by establishing the Committee on Limited English Proficiency and charging it with 'eliminating barriers to facilities, processes and information that are faced by individuals with limited English proficiency' ").

To this end, we find it most prudent to follow the Washington Supreme Court's approach to this problem in *State* v. *Saintcalle*, supra, 178 Wn. 2d 34, which was to uphold under existing law the trial court's finding that the prosecutor had not acted with purposeful discrimination in exercising a peremptory challenge, but also to take the "opportunity to examine whether our *Batson* procedures are robust enough to effectively combat race discrimination in the selection of juries"; id., 35; by convening a work group of relevant stakeholders to study the problem and resolve it via the state's

rule-making process, which is superintended by that court.[21] Id., 55–56; see *State* v. *Jefferson*, 192 Wn. 2d 225, 243–47, 429 P.3d 467 (2018) (describing work group's process).

The rule-making process[22] that followed *Saintcalle* recently culminated in the Washington Supreme Court's adoption of a comprehensive court rule governing jury selection, Washington General Rule 37,[23] which applies

[21] In referring *Batson* reform to the rule-making process, "[a]s a first step," the Washington court proposed to "abandon and replace *Batson*'s 'purposeful discrimination' requirement with a requirement that necessarily accounts for and alerts trial courts to the problem of unconscious bias, without ambiguity or confusion. For example, it might make sense to require a *Batson* challenge to be sustained if there is a reasonable probability that race was a factor in the exercise of the peremptory challenge or [when] the judge finds it is more likely than not that, but for the defendant's race, the peremptory challenge would not have been exercised. A standard like either of these would take the focus off of the credibility and integrity of the attorneys and ease the accusatory strain of sustaining a *Batson* challenge. This in turn would simplify the task of reducing racial bias in our criminal justice system, both conscious and unconscious." *State* v. *Saintcalle*, supra, 178 Wn. 2d 53–54.

[22] The Final Report of the Jury Selection Workgroup, explaining the proposal adopted by the Washington Supreme Court as General Rule 37, provides a comprehensive "legislative history" of that rule, which resulted from consideration of proposed rules submitted by the American Civil Liberties Union and the Washington Association of Prosecuting Attorneys, with considerable comment by the bench and bar. See Jury Selection Workgroup, Washington Supreme Court, Proposed New GR 37—Jury Selection Workgroup Final Report, p. 1, available at http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/OrderNo25700-A-1221Workgroup.pdf (last visited December 16, 2019).

[23] Rule 37 of the Washington General Rules, adopted on April 24, 2018, provides: "(a) Policy and Purpose. The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

"(b) Scope. This rule applies in all jury trials.

"(c) Objection. A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

"(d) Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons that the peremptory challenge has been exercised.

"(e) Determination. The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

"(f) Nature of Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

"(g) Circumstances Considered. In making its determination, the circumstances the court should consider include, but are not limited to, the following:

"(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

"(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

"(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

"(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

"(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

"(h) Reasons Presumptively Invalid. Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

"(i) having prior contact with law enforcement officers;

"(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

"(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

"(iv) living in a high-crime neighborhood;

"(v) having a child outside of marriage;

"(vi) receiving state benefits; and

"(vii) not being a native English speaker.

"(i) Reliance on Conduct. The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the

in all jury trials and is intended "to eliminate the unfair exclusion of potential jurors based on race or ethnicity." Wn. Gen. R. 37 (a) and (b). With respect to the issues in the present case, one particularly notable feature of General Rule 37 is a declaration—targeted to the second prong of *Batson*—that certain ostensibly race neutral explanations are "presumptively invalid," including distrust of law enforcement officers, not being a native English speaker, and residing in a high crime neighborhood. Wn. Gen. R. 37 (h); see also Wn. Gen. R. 37 (i) (requiring corroboration and verification on record of certain conduct based challenges). General Rule 37 also responds to implicit bias concerns by requiring the trial judge to consider "the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge."[24] Wn. Gen. R. 37 (e); see also *State* v. *Jefferson*, supra, 192 Wn. 2d 229–30 (extending General Rule 37's modification of third prong of *Batson* with objective test to pending cases and reversing defendant's conviction because record indicated that "objective observer could view race or ethnicity as a factor in the use of the peremptory strike").

behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge."

[24] We note that General Rule 37 may well be subject to consideration in at least one other jurisdiction, as a defendant has sought review by the Arizona Supreme Court of an Arizona Court of Appeals decision that relied on its intermediate role in the hierarchal system to decline an invitation to "adopt the approach to peremptory challenges established in Washington, which carves out a list of reasons presumed invalid and expands the third step of the *Batson* analysis to include an 'objective observer' standard." *State* v. *Gentry*, Ariz. , 449 P.3d 707 (App. 2019), petition for review filed (Ariz. August 23, 2019) (CR-19-0273-PR).

Accordingly, we refer the systemic considerations identified in part II A of this opinion to a Jury Selection Task Force that will be appointed by the Chief Justice forthwith. We anticipate that the Jury Selection Task Force will consist of a diverse array of stakeholders from the criminal justice and civil litigation communities and will be better suited to engage in a robust debate to consider the "legislative facts"[25] and propose necessary solutions to the jury selection process in Connecticut, ranging from ensuring a fair cross section of the community on the venire at the outset to addressing aspects of the voir dire process that diminish the diversity of juries in Connecticut's state courts.[26]

[25] "[I]t is well established that an appellate court may take notice of legislative facts, including historical sources and scientific studies, which help determine the content of law and policy, as distinguished from the adjudicative facts, which concern the parties and events of a particular case." (Internal quotation marks omitted.) *State* v. *Santiago*, 318 Conn. 1, 53 n.44, 122 A.3d 1 (2015). "Legislative facts may be judicially noticed without affording the parties an opportunity to be heard, but adjudicative facts, at least if central to the case, may not." (Internal quotation marks omitted.) *State* v. *Edwards*, supra, 314 Conn. 479. Particularly because many of the relevant issues have not yet been presented to us through the crucible of the adversarial process, we deem it advisable to stay our hand in favor of the rule-making process, which is better suited to consider the array of relevant studies and data in this area, along with the interests of the stakeholders, and to promote diversity on juries in Connecticut's state courts. See id., 481–82.

[26] We note that the Jury Selection Task Force may well recommend that the applicability of some *Batson* reforms be limited to criminal cases, given the fundamental difference between a criminal trial—which brings the resources of the government to bear against a private citizen—and one between private litigants. Cf. M. Howard, "Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges," 23 Geo. J. Legal Ethics 369, 373–74 (2010) (Discussing prosecutors' "ethical duty to 'seek justice' " and noting that peremptory challenges are "a prophylactic safeguard of a constitutional right to an impartial jury" that "are subject to cost-benefit scrutiny prompting an assessment of the extent to which the practice risks unconstitutional discrimination, damaging both the actual and perceived fairness of the prosecution process, as well as the extent to which the practice actually increases the likelihood of a just conviction. And in balancing the two, is the benefit of one outweighed by the detriment to the other?" [Footnote omitted.]); see also id., 375 ("I argue for an office policy directing prosecutors to waive peremptory challenges except in narrowly

See *State* v. *Saintcalle*, supra, 178 Wn. 2d 52–53 ("we seek to enlist the best ideas from trial judges, trial lawyers, academics, and others to find the best alternative to the *Batson* analysis"); see also *Seattle* v. *Erickson*, 188 Wn. 2d 721, 739, 398 P.3d 1124 (2017) (Stephens, J., concurring) ("The court has convened a work group to carefully examine the proposed court rule with the goal of developing a meaningful, workable approach to eliminating bias in jury selection. That process will be informed by the diverse experiences of its participants and will be able to consider far broader perspectives than can be heard in a single appeal. Unconstrained by the limitations of the *Batson* framework, the rule-making process will be able to consider important policy concerns as well as constitutional issues.").

Although we observed in *State* v. *Holloway*, supra, 209 Conn. 645, that "the issue of purposeful racial discrimination in the state's use of peremptory jury challenges is a matter of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole," we now have the advantage of more than three decades of research and experience since *Batson* to tell us that implicit bias may be equally as pernicious and destructive to the perception of the justice system. Accordingly, we anticipate that the Jury Selection Task Force will propose meaningful changes to be implemented via court rule or legislation, including, but not limited to (1) proposing any necessary changes to General Statutes § 51-232 (c),[27] which governs the confirmation form

defined circumstances, such as curing a failed challenge for cause by either party or excusing a juror who demonstrates an unwillingness to deliberate in good faith").

[27] General Statutes § 51-232 (c) provides: "The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required

and questionnaire provided to prospective jurors, (2) improving the process by which we summon prospective jurors in order to ensure that venires are drawn from a fair cross section of the community that is representative of its diversity, (3) drafting model jury instructions about implicit bias, and (4) promulgating new substantive standards that would eliminate *Batson*'s requirement of purposeful discrimination. Cf. *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 686 n.7, 142 A.3d 1095 (2016) (expressing preference that Rules Committee of Superior Court consider and adopt prophylactic rules, rather than Supreme Court exercising its supervisory powers, because "the Rules Committee of the Superior Court . . . provides a more appropriate forum in which to fully and fairly consider any potential amendment to the procedural rules"). Accordingly, we "hope . . . that our decision sends the clear message that this court is unanimous in its commitment to eradicate racial bias from our jury system, and that we will work with all partners in the justice system to see this through."[28] *Seattle* v. *Erickson*, supra, 188 Wn. 2d 739 (Stephens, J., concurring).

solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record."

[28] We note that numerous commentators and jurists, including United States Supreme Court Justices Stephen Breyer and Thurgood Marshall, have suggested that nothing short of the complete abolition of peremptory challenges will suffice to address discrimination in jury selection. See, e.g., *Miller-El* v. *Dretke*, 545 U.S. 231, 273, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (Breyer, J., concurring); *Batson* v. *Kentucky*, supra, 476 U.S. 107 (Marshall, J., concurring); *State* v. *Veal*, supra, 930 N.W.2d 340 (Cady, C. J.,

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, McDONALD, KAHN and ECKER, Js., concurred.

MULLINS, J., with whom D'AURIA, J., joins, concurring. I agree with and join the majority's thoughtful and well reasoned opinion. In particular, I wholeheartedly endorse the majority's decision in part II B of its opinion to create a Jury Selection Task Force to identify and implement corrective measures for combatting the dis-

concurring); *People* v. *Brown*, 97 N.Y.2d 500, 509, 769 N.E.2d 1266, 743 N.Y.S.2d 374 (2002) (Kaye, C. J., concurring); *Davis* v. *Fisk Electric Co.*, 268 S.W.3d 508, 529 (Tex. 2008) (Brister, J., concurring); *Seattle* v. *Erickson*, supra, 188 Wn. 2d 739–40 (Yu, J., concurring); *State* v. *Saintcalle*, supra, 178 Wn. 2d 70–71 (Gonzalez, J., concurring); M. Bennett, supra, 4 Harv. L. & Policy Rev. 167; N. Marder, "*Foster* v. *Chatman*: A Missed Opportunity for *Batson* and the Peremptory Challenge," 49 Conn. L. Rev. 1137, 1205 (2017). As the state aptly observes—and as Justice Mullins acknowledges in his concurring opinion, in which he advocates for "substantially reduc[ing] the number of peremptory challenges that the parties have available for their use"—this specific remedy raises serious state constitutional questions. See Conn. Const., art. 1, § 19, as amended by art. IV of the amendments to the constitution ("The right of trial by jury shall remain inviolate . . . . In all civil and criminal actions tried by a jury, *the parties shall have the right to challenge jurors peremptorily*, the number of such challenges to be established by law. The right to question each juror individually by counsel shall be inviolate." [Emphasis added.]); *Rozbicki* v. *Huybrechts*, 218 Conn. 386, 392 n.2, 589 A.2d 363 (1991) ("[t]he provisions concerning peremptory challenges and the individual voir dire appear to be unique to Connecticut's constitution"); see also *Rivera* v. *Illinois*, 556 U.S. 148, 152, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009) ("The right to exercise peremptory challenges in state court is determined by state law. This [c]ourt has long recognized that peremptory challenges are not of federal constitutional dimension. . . . States may withhold peremptory challenges altogether without impairing the constitutional guarantee of an impartial jury and a fair trial." [Citation omitted; internal quotation marks omitted.]). As was emphasized at oral argument before this court, the defendant has not requested that we consider abolishing peremptory challenges as a matter of law, so we do not consider further this more drastic remedy, not yet embraced by any state. See *State* v. *Saintcalle*, supra, 117 (Gonzalez, J., concurring). Accordingly, we leave it to the rule-making process to address the systemic issues identified by the defendant in this appeal.

criminatory use of peremptory challenges beyond the framework set forth in *Batson* v. *Kentucky*, 476 U.S. 79, 96–98, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). I write separately because, in my view, it is time not only to reconsider the framework of the *Batson* challenge in order to eliminate discrimination in jury selection but also to consider substantially restricting the use of peremptory challenges altogether.

Peremptory challenges by their very nature invite corruption of the judicial process by allowing—almost countenancing—discrimination. The credibility and integrity of our system of justice should not tolerate prospective jurors being prevented from serving on juries on the basis of discrimination due to their race, ethnicity, gender or religious affiliation. The straightest line to eliminating such discrimination would be to eliminate the peremptory challenge. In our state, in light of article first, § 19, of the Connecticut constitution, as amended by article IV of the amendments, outright elimination of the peremptory challenge would raise constitutional concerns. However, nothing in our constitution prevents the next best thing, which would be to substantially reduce the number of peremptory challenges that the parties have available for their use.

I

As the majority opinion cogently sets forth, the *Batson* framework has proven to be wholly inadequate to address the discriminatory use of peremptory challenges. There are, however, more fundamental problems with peremptory challenges that should lead us to question whether any reforms short of reducing the parties' access to peremptory challenges will meaningfully reduce the discriminatory effects that they have on the selection of jurors.

The problem of discrimination in peremptory challenges stems from the following systemic issues: (1)

the historical use of peremptory challenges as a means of excluding African-Americans from jury service; (2) peremptory challenges lead inescapably to parties striking prospective jurors on the basis of speculation and stereotypes; (3) peremptory challenges are often based on unconscious biases and justifications that are ostensibly race neutral but that have a disparate impact on minority jurors; and (4) peremptory challenges lead to violations of the constitutional rights not just of the parties but also of the prospective jurors.

A

First, peremptory challenges have a history of being used as a tool of racial discrimination. Until *Batson* was decided in 1986, the United States Supreme Court expressly countenanced the use of peremptory challenges to strike jurors on account of their race. See *Swain* v. *Alabama*, 380 U.S. 202, 220–21, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), overruled by *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Emphasizing the inherent conflict between peremptory challenges and equal protection principles, the United States Supreme Court concluded: "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. . . . To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the [e]qual [p]rotection [c]lause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination . . . . And a great many uses of the challenge would be banned."[1] *Swain* v. *Alabama*, supra, 380 U.S. 221–22.

[1] In *Swain*, the United States Supreme Court recognized that the use of peremptory challenges to exclude African-American jurors violated the equal protection clause only if there was evidence that the state did so in virtually every single case and that no African-Americans were ever selected to serve on juries. *Swain* v. *Alabama*, supra, 380 U.S. 223–24. This requirement later was recognized as "impos[ing] a crippling burden of proof that left

Although *Swain* was eventually overruled by *Batson*, this long held understanding, that it was acceptable to strike prospective jurors on the basis of their race, has left an indelible mark on the use of peremptory challenges.

I acknowledge that the problem extends beyond race and into discrimination on the basis of ethnicity, gender, and religious affiliation, which also are entitled to protection under the *Batson* framework. See *J. E. B.* v. *Alabama*, 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994); *State* v. *Hodge*, 248 Conn. 207, 244–45, 726 A.2d 531 (1999). The *Batson* framework, however, is equally ineffective in addressing discrimination on these bases as well.

B

Second, peremptory challenges lead inescapably to parties striking prospective jurors purely on the basis of speculation and stereotypes. Unlike challenges for cause, where the prospective juror's partiality is articulable, "the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Swain* v. *Alabama*, supra, 380 U.S. 220. "With limited information and time, and a lack of any reliable way to determine the subtle biases of each prospective juror, attorneys tend to rely heavily on stereotypes and generalizations in deciding how to exercise peremptory challenges." *State* v. *Saintcalle*, 178 Wn. 2d 34, 81, 309 P.3d 326 (2013) (Gonzalez, J., concurring).

It is almost inevitable that this expedient resort to stereotypes will invoke improper racial and other discriminatory considerations. I submit that decisions to exclude a prospective juror on the basis of stereotypes,

prosecutors' use of peremptories largely immune from constitutional scrutiny." (Internal quotation marks omitted.) *Miller-El* v. *Dretke*, 545 U.S. 231, 239, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005).

whether based on racial or other discriminatory considerations that have nothing to do with the juror's ability to fairly assess the evidence and follow legal instructions given by the judge, have no place in our system of selecting jurors.

C

Third, as discussed in the majority opinion, there are two especially elusive problems with peremptory challenges: (1) unconscious or implicit bias; and (2) lines of voir dire questioning that are race neutral but that have a disparate impact on minority jurors. Although these forms of discrimination are not purposeful, their consequences are no less pernicious. Both result in minorities being disproportionately excluded from jury service. This brand of exclusion has the effect of reducing diversity in our juries and perpetuating a mistrust of our justice system, particularly among those in the communities disparately impacted by these challenges. See *State* v. *Holmes*, 176 Conn. App. 156, 197–99, 169 A.3d 264 (2017) (*Lavine*, *J.*, concurring); *State* v. *Saintcalle*, supra, 178 Wn. 2d 100 (Gonzalez, J., concurring).

Regarding unconscious or implicit bias, Justice Marshall explained in *Batson* that "[a] prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported." *Batson* v. *Kentucky*, supra, 476 U.S. 106 (Marshall, J., concurring).

A number of judges and commentators have argued that the only way to meaningfully combat the effects of implicit bias on peremptory challenges is to limit or eliminate them. See *Rice* v. *Collins*, 546 U.S. 333, 343,

126 S. Ct. 969, 163 L. Ed. 2d 824 (2006) (Breyer, J., concurring) (In suggesting that peremptory challenges should be abolished, Justice Breyer noted that, "sometimes, no one, not even the lawyer herself, can be certain whether a decision to exercise a peremptory challenge rests upon an impermissible racial, religious, gender-based, or ethnic stereotype. . . . How can trial judges second-guess an instinctive judgment the underlying basis for which may be a form of stereotyping invisible even to the prosecutor?" [Citations omitted.]); A. Page, "*Batson*'s Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge," 85 B.U.L. Rev. 155, 246 (2005) ("The psychological research . . . demonstrates the prevalence of unconscious, automatic stereotype use and the difficulty in eradicating it, even among those who are not of a mind to discriminate. This finding provides one more powerful reason to eliminate the peremptory challenge.").

The problem of lines of voir dire questioning that have a disparate impact on minorities is equally complex. Our case law, as the majority opinion notes, has held that ostensibly race neutral reasons for striking a juror—such as, in this case, the juror's negative views about law enforcement—pass muster under *Batson* even though they disproportionately affect minority jurors. See *State* v. *King*, 249 Conn. 645, 666–67, 735 A.2d 267 (1999); *State* v. *Hodge*, supra, 248 Conn. 230–31; *State* v. *Smith*, 222 Conn. 1, 13–14, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992); see also *Hernandez* v. *New York*, 500 U.S. 352, 359–60, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991).

Throughout history and continuing through the present day, relations between the police and many minorities and minority communities have been strained and highly contentious. Recently, police killings of African-American men and women have been highly publicized. Unfortunately, while the heightened publicity around

these cases is new, these stories are not new. We cannot turn a blind eye to that reality. To permit an honest venireperson who expresses that experience to be prevented from service on a jury is unacceptable.[2] I therefore echo the sentiments of the Appellate Court majority that "permitting the use of peremptory challenges with respect to potential jurors who express negative views toward the police or the justice system may well result in a disproportionate exclusion of minorities from our juries, a deeply troubling result." *State* v. *Holmes*, supra, 176 Conn. App. 181 n.5. Indeed, as Judge Lavine thoughtfully set forth in his concurring opinion in the Appellate Court, the effects of these types of challenges are immensely damaging to our juries and to the perception of our justice system. See id., 197–99 (*Lavine*, *J.*, concurring).

Adequate solutions to this problem are hard to come by, due in no small part to the innumerable permutations of disparate impact questions. In light of the complexity of these problems, I believe that outright elimination of, or at least a substantial reduction in access to, peremptory challenges is the most effective way to lessen the discrimination that arises from peremptory challenges.

D

Finally, it is important to remember that every time a discriminatory, peremptory strike goes unchallenged or such a strike passes muster in our courts, it violates the equal protection rights not only of the affected par-

[2] Judge Lavine, in his concurring opinion in the Appellate Court in this case, provides other examples of experiences that a venireperson of a particular suspect class may honestly reveal that may subject him or her to being stricken from the jury. See *State* v. *Holmes*, supra, 176 Conn. App. 197 (*Lavine*, *J.*, concurring). I agree with his examples and find it unacceptable for an individual to be excluded from service on a jury merely because he or she has experiences common to his or her race, ethnicity or gender that a party considers to be objectionable for service on a jury.

ties but also of the individual jurors who were improperly stricken. See *Powers* v. *Ohio*, 499 U.S. 400, 409, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (The equal protection clause prohibits prosecutors from "exclud[-ing] otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."). "[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." Id., 407. A procedure that permits qualified jurors to be excluded from jury service because of their race, ethnicity, gender or religious affiliation is irreconcilable with promoting the legitimacy and credibility of our justice system.

In my view, the importance of these rights should lead us to question whether they should be left to self-interested parties who, as previously explained, often are acting on the basis of stereotypical judgments. Citizens should not be deprived of the opportunity to serve on a jury in the absence of an acceptable and identifiable reason. Our system takes that into account with the challenge for cause. The peremptory challenge allows too much discrimination to seep into the decision to strike a prospective juror.

II

Having identified the systemic problems associated with peremptory challenges, I now consider the constitutional and policy considerations involved in addressing these problems. I acknowledge at the outset that, although there is no right to peremptory challenges under the federal constitution; see *Georgia* v. *McCollum*, 505 U.S. 42, 57, 112 S. Ct. 2348, 120 L. Ed. 2d 33

(1992); total elimination of peremptory challenges may not be possible in this state. This is because article first, § 19, of the Connecticut constitution was amended in 1972 to include the following provision: "In all civil and criminal actions tried by a jury, the parties shall have the right to challenge jurors peremptorily, the number of such challenges to be established by law. . . ." Conn. Const., amend. IV.

I make two observations here. First, our constitution does not prescribe any minimum number of peremptory challenges that parties are entitled to; see Conn. Const., amend. IV; leaving that to be determined by the legislature. See General Statutes § 51-241 (providing each party with three peremptory challenges in civil cases, subject to limitations); General Statutes § 54-82g (providing state and defendant each with between three and twenty-five peremptory challenges in criminal cases, depending on severity of crime charged). Thus, there does not appear to be any constitutional impediment to reducing the number of peremptory challenges available to parties.

Second, and more fundamental, although the language of the constitution affords the state a right to a peremptory challenge, the historical basis for that right is unclear. Historically, peremptory challenges have been recognized, not as a right belonging to the government, but as a tool for criminal defendants to protect themselves *from* the government. Indeed, this court described peremptory challenges several years before they were constitutionalized as "one of the most important rights secured to *the accused* . . . ." (Emphasis added; internal quotation marks omitted.) *DeCarlo* v. *Frame*, 134 Conn. 530, 533, 58 A.2d 846 (1948). This court has recognized peremptory challenges as a means of securing a criminal defendant's right to trial by a fair and impartial jury. See *State* v. *Hodge*, supra, 248 Conn. 217. The United States

Supreme Court has explained that the right to a trial by a fair and impartial jury "is granted to criminal defendants in order to prevent oppression by the [g]overnment." *Duncan* v. *Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).

Notwithstanding the fact that article first, § 19, of the Connecticut constitution, as amended by article four of the amendments, provides that "the parties" in a criminal action have the right to peremptory challenges, granting that right to the state seems incongruous with the other rights associated with criminal trials. Virtually all of the other trial related rights in a criminal case have as their basis the protection of the individual against the state.[3] Nevertheless, I understand that the language

[3] The right to a jury trial has been deemed fundamental because it safeguards the accused's rights against abuse of state power. See *Duncan* v. *Louisiana*, supra, 391 U.S. 155–56. Likewise, "[t]he right to counsel under the sixth amendment of the federal constitution protects a criminal defendant at critical stages of the proceedings from adversarial government agents . . . ." *State* v. *Piorkowski*, 243 Conn. 205, 215, 700 A.2d 1146 (1997); see also *Gideon* v. *Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to counsel is necessary to protect criminal defendants from government, which spends "vast sums of money to establish machinery to try defendants accused of crime"). The same is true of the sixth amendment right to a speedy trial; see *State* v. *Baker*, 164 Conn. 295, 296, 320 A.2d 801 (1973) ("[o]n its face, [the right to a speedy trial] is activated only when a criminal prosecution has begun and extends only to those persons who have been accused in the course of that prosecution" [internal quotation marks omitted]); and the fifth amendment right against self-incrimination. See *In re Samantha C.*, 268 Conn. 614, 634, 847 A.2d 883 (2004) ("fifth amendment privilege against self-incrimination . . . protects the individual against being involuntarily called as a witness against himself" [internal quotation marks omitted]). Similarly, the fourteenth amendment, which forbids the purposeful discrimination in the exercise of peremptory challenges, was designed to protect citizens from state action. See *State* v. *Holliman*, 214 Conn. 38, 43, 570 A.2d 680 (1990) (fourteenth amendment "prohibits the states from denying federal constitutional rights" and "applies to acts of the states, not to acts of private persons or entities" [internal quotation marks omitted]).

Moreover, article first, §§ 8 and 20, of the Connecticut constitution, which contain our state counterparts to these federal rights, by their express terms extend only to individual citizens or criminal defendants. See Conn. Const., art. I, § 8 (listing rights secured to "the accused" and providing that "[n]o

of the constitutional provision provides the state with peremptory challenges. However, given that the legal basis for the state's constitutional right to peremptory challenges in a criminal case is certainly open to question, I suggest that it is appropriate to consider whether the state should be entitled to an equal number of peremptory challenges as the accused in a criminal case. Instead, it may be appropriate, in a criminal case, to limit the number of peremptory challenges available to the state in greater measure than the number of peremptory challenges available to the defendant.

Apart from the constitutional question of whether limiting the number of peremptory challenges available to the state to a greater degree than the number available to the defendant would be permissible under our state constitution, there remains the question of whether providing criminal defendants with greater access to peremptory challenges than the state is appropriate as a matter of policy. Justice Marshall, for instance, rejected such disparate treatment in his concurring opinion in *Batson*, reasoning that "[o]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' " *Batson* v. *Kentucky*, supra, 476 U.S. 107 (quoting *Hayes* v. *Missouri*, 120 U.S. 68, 70, 7 S. Ct. 350, 30 L. Ed. 578 [1887]).

Others, however, have argued that, because only criminal defendants possess the constitutional right to a fair trial and impartial jury, their use of peremptory challenges should be preserved while prosecutors' use

person shall be compelled to give evidence against himself"); Conn. Const., art. I, § 20 ("[n]o person shall be denied the equal protection of the law"). The foregoing demonstrates that both the language and the origins of these trial related rights establish that their purpose is to protect the accused from the awesome power of the state. Conversely, there is no historical basis for the proposition that the state possesses constitutional trial related rights.

should be eliminated or reduced. See *Georgia* v. *McCollum*, supra, 505 U.S. 68 (O'Connor, J., dissenting) (arguing that *Batson* prohibition on race based peremptory challenges should not apply to criminal defendants because "[t]he concept that the *government alone* must honor constitutional dictates . . . is a fundamental tenet of our legal order . . . [and] [t]his is particularly so in the context of criminal trials, where we have held the prosecution to uniquely high standards of conduct" [emphasis added]).

These difficult constitutional and policy questions are not presently before this court and I make no attempt to answer them here. Instead, I write separately to emphasize that the problem of racial and other forms of discrimination in the use of peremptory challenges is extremely complex and the solution to the problem must take into account that complexity. To be sure, solutions may need to extend beyond the framework of the *Batson* challenge to encompass a substantial reduction in the availability of peremptory challenges.

STATE OF CONNECTICUT *v.* JAMES RAYNOR
(SC 20042)

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

Syllabus

Convicted, after a jury trial, of the crimes of assault in the first degree as an accessory and conspiracy to commit assault in the first degree, the defendant, an African-American, appealed to the Appellate Court, claiming that the prosecutor engaged in racially disparate treatment during jury selection, in violation of *Batson* v. *Kentucky* (476 U.S. 79), by excusing a prospective juror, R, on the basis of his employment history, even though the prosecutor accepted two other venirepersons, I and G, whom the defendant claimed were nonminority venirepersons with work restrictions similar to those of R. The Appellate Court affirmed the judgment of the trial court and concluded that the record was inadequate to review the defendant's unpreserved *Batson* claim because, inter alia, the transcripts of the voir dire did not indicate the racial composition

of the empaneled jury. The Appellate Court also found that, although the trial court had, sua sponte, remarked that R was not the same race as the defendant, there was nothing in the record to indicate the race or ethnicity of either R or I, and, without that information, the court could not engage in a disparate treatment analysis under *Batson*. On the granting of certification, the defendant appealed to this court. *Held* that the defendant could not prevail on his claim that the Appellate Court incorrectly concluded that the failure of the record to indicate the racial composition of the empaneled jury rendered it inadequate to review his *Batson* claim: this court adopted the Appellate Court's well reasoned opinion as a proper statement of the certified issue and the applicable law concerning that issue and, accordingly, affirmed the Appellate Court's judgment; moreover, this court agreed with the state's alternative ground for affirmance that the trial court's finding that the prosecutor did not commit purposeful discrimination in exercising a peremptory challenge to strike R was not clearly erroneous; furthermore, with respect to the defendant's request that this court exercise its supervisory authority over the administration of justice to require that prospective jurors identify their race prior to jury selection, this court anticipated that such a proposal would be addressed by the Jury Selection Task Force that the Chief Justice will appoint, pursuant to this court's decision in the companion case of *State* v. *Holmes* (334 Conn. 202), to suggest changes to court rules, policies, and legislation necessary to ensure that Connecticut juries are representative of the state's diverse population.

Argued January 16—officially released December 24, 2019

Procedural History

Substitute information charging the defendant with the crimes of assault in the first degree as an accessory and conspiracy to commit assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Mullarkey*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Sheldon* and *Flynn*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *David L. Zagaja*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, James Raynor, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court affirming his conviction, rendered after a jury trial, of assault in the first degree as an accessory in violation of General Statutes §§ 53a-59 (a) (5) and 53a-8, and conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (5) and 53a-48. *State* v. *Raynor*, 175 Conn. App. 409, 412–13, 167 A.3d 1076 (2017). On appeal, the defendant claims that the Appellate Court incorrectly concluded that that the record was inadequate to review his challenge under *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the prosecutor's exercise of a peremptory challenge on prospective juror R.E.[2] on the basis of his employment

[1] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the record's failure to indicate the racial composition of the venire or the empaneled jury rendered the record inadequate for review of the defendant's claim under *Batson* v. *Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)?" *State* v. *Raynor*, 327 Conn. 969, 173 A.3d 952 (2017).

We note that the state asks us to rephrase the certified question because it does not accurately reflect the holding of the Appellate Court, the analysis of which focused only on the jurors that had been empaneled and did not discuss the venire as a whole. See *State* v. *Raynor*, 175 Conn. App. 409, 458–59, 167 A.3d 1076 (2017). "After hearing the parties and considering the case more fully, we conclude that the certified question [must be rephrased as it] does not properly frame the issues presented in the appeal because it inaccurately reflects the holding of the Appellate Court." *In re Jacob W.*, 330 Conn. 744, 747 n.1, 200 A.3d 1091 (2019); see *Stamford Hospital* v. *Vega*, 236 Conn. 646, 656, 674 A.2d 821 (1996). Accordingly, we rephrase the certified question to eliminate the reference to the venire.

[2] "In accordance with our usual practice, we identify jurors by initial in order to protect their privacy interests." *State* v. *Berrios*, 320 Conn. 265, 268 n.3, 129 A.3d 696 (2016).

history, even though the record does not indicate the race or ethnicity of both R.E. and one of the two jurors, I.L. and G.H., whom the defendant highlighted as examples of disparate treatment by the prosecutor. In response, the state disagrees and also proffers, as an alternative ground for affirmance, that the trial court did not commit clear error in finding that the prosecutor did not engage in purposeful discrimination when he peremptorily challenged R.E. We affirm the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the following relevant facts and procedural history. "Jury selection occurred over the course of two days, October 30 and 31, 2014. On the first day of jury selection, the parties conducted voir dire of a prospective juror, R.E. Prior to defense counsel's questioning of R.E., the court inquired as to whether R.E. would suffer any financial hardship by participating in jury duty. In response, R.E. initially informed the court that, although he worked part-time, his shift began at 4:30 p.m. and . . . his job was within walking distance of the courthouse. The court then asked R.E. to contact his employer to determine whether he would be compensated for any work he missed or, alternatively, whether he would be able to begin his shift after 5 p.m. After speaking with his employer, R.E. stated that, if he were selected to serve, he would be able to start his shifts after the court had adjourned for the day, and thus he had no financial concerns about being selected as a juror.

"Thereafter, defense counsel questioned R.E. as to whether he could keep an open mind, determine which witnesses were credible, follow the court's instructions on the law, and engage in a free exchange of ideas with his fellow jurors during deliberations. R.E. answered in the affirmative to each of these questions. Thereafter, the following colloquy occurred during the prosecutor's voir dire of R.E.:

" '[The Prosecutor]: . . . You're from Hartford?

" '[R.E.]: Yes.

" '[The Prosecutor]: You haven't heard anything about this incident—

" '[R.E.]: No, sir.

" '[The Prosecutor]: —which was presented to you? None of the names that were listed to you sounded familiar—

" '[R.E.]: No, sir.

" '[The Prosecutor]: —anything like that? So, you're [employed] at Easter Seals. You've been there for how long? You said about four years?

" '[R.E.]: Four years.

* * *

" '[The Prosecutor]: Have you ever had anyone close to you, friends, family members, anyone like that, that has been the victim of a crime?

" '[R.E.]: No, sir.

" '[The Prosecutor]: And if you were to hear information about drugs within this trial, do you think you could still consider that information and make your decisions or would you be turned off by that?

" '[R.E.]: I could still make my decision.

" '[The Prosecutor]: Okay. Still be open-minded and consider all the information—

" '[R.E.]: Yes.

" '[The Prosecutor]: —presented?

" '[R.E.]: Yes, sir.

" '[The Prosecutor]: Is there anything either of us have left out that you think would—would be important to tell us about your ability to sit here as a juror?

" '[R.E.]: No, sir.

" '[The Prosecutor]: Great. Thanks for your time.'

"Thereafter, R.E. exited the courtroom, and the following colloquy occurred:

" '[Defense Counsel]: Accepted.

" '[The Prosecutor]: Excused.

" '[Defense Counsel]: Your Honor, I would ask for a gender or a race neutral explanation or basis.

" '[The Prosecutor]: Should I give one?

" '[The Court]: Yes.

" '[The Prosecutor]: It would be his employment history, Your Honor, and just basically his sense of security. I do have concerns also that he's from Hartford, although he did indicate that he knew nothing about the offense.

" '[Defense Counsel]: Your Honor, if I may. We have two Caucasian women on the panel at this point in time. He answered all the questions, in my view at least, and I think counsel would agree, honestly. He didn't express any reservations about security. Being from Hartford is not a bar to be in this case. He did not express any familiarity with the case. I think he answered all the questions right. I think he's got a right to serve on this panel.

" '[The Prosecutor]: I think I presented a race neutral reason, Your Honor. It's my prerogative. I don't believe—or I've indicated to the court that I am not excusing him based on his race.

" '[The Court]: His work history?

" '[The Prosecutor]: Yes.

" '[The Court]: All right. He's excused.'

"R.E. was then summoned to the courtroom and informed that he had been excused. After R.E. had been dismissed, the court, sua sponte, stated: 'I would note that [R.E.] is not the same race as the defendant, African-American.'

"Later that afternoon, the court asked defense counsel whether he wanted to offer any rebuttal to the [prosecutor's] race neutral explanation for using its peremptory challenge to strike R.E. In response, defense counsel stated: 'Well, I mean the idea that his employment, because he was freelancing, and the idea that he was still working, these are tough times, there was nothing extraordinary about being a freelancer. I meant that the record speaks for itself. I didn't hear anything extraordinary, like, he'd been a victim of a crime or had a brother incarcerated or had been harassed by the police or all the things that you typically hear from . . . individuals who . . . live in the city. His answers were . . . for lack of a better word, you know, correct, either posed by me or by counsel. So, no, I guess . . . I don't really have a rebuttal because I think the record . . . that's . . . kind of the point, the record speaks for itself.' " (Footnote omitted.) *State* v. *Raynor*, supra, 175 Conn. App. 454–58.

On appeal, the Appellate Court rejected the defendant's claim that the prosecutor had violated *Batson* in exercising a peremptory challenge on R.E. because his race neutral explanation was a pretext for discrimination. Id., 458–59. The Appellate Court further disagreed with the defendant's argument that the "[prosecutor's] willingness to accept two other venirepersons, I.L. and G.H.—both of whom the defendant claims were nonminority venirepersons who also held part-time jobs—demonstrates that the [prosecutor's] peremptory challenge as to R.E. was racially moti-

vated." Id., 458. The Appellate Court concluded that this claim of disparate treatment was unpreserved and unreviewable under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), because "the transcripts of the voir dire do not indicate the racial composition of the empaneled jury" or support the "defendant's assertion that there are adequate facts of record to demonstrate that the [prosecutor] engaged in racially disparate treatment by accepting both I.L. and G.H., whom the defendant claims were nonminority venirepersons with work restrictions similar to R.E.'s. First, although the court expressly noted that R.E. was *not* of the same race as *the defendant*, there is nothing in the record demonstrating R.E.'s personal race or ethnicity. . . . Second, the state correctly recognizes a similar lack of facts regarding I.L.'s race. Without such information, [the court] cannot engage in an analysis of disparate treatment between I.L. and R.E." (Citation omitted; emphasis in original.) *State* v. *Raynor*, supra, 175 Conn. App. 458–59; see id., 459 ("[a]bsent such necessary facts of record, we decline to reach the merits of the defendant's claim"). Accordingly, the Appellate Court affirmed the judgment of the trial court. Id., 459. This certified appeal followed. See footnote 1 of this opinion.

On appeal, the defendant claims that the Appellate Court incorrectly concluded that the failure of the record to indicate the racial composition of the empaneled jury rendered it inadequate to review his *Batson* claim, to the extent that it was founded on the prosecutor's disparate treatment of R.E. relative to I.L. and G.H. We disagree. To the contrary, we believe that the Appellate Court's well reasoned opinion fully addresses and properly resolves the certified issue. It would serve no purpose for us to repeat the discussion contained therein. We therefore adopt the Appellate Court's opinion as the proper statement of the issue and the applicable law concerning that issue. See, e.g., *Griswold* v.

Camputaro, 331 Conn. 701, 711, 207 A.3d 512 (2019); *Brenmor Properties, LLC* v. *Planning & Zoning Commission*, 326 Conn. 55, 62, 161 A.3d 545 (2017).

Beyond affirming the judgment of the Appellate Court, we offer three additional observations. First, although we have expressed concerns about the existing *Batson* inquiry, it remains controlling at this time, and we agree with the state's proffered alternative ground for affirmance that the trial court did not commit clear error in finding, under the third step of *Batson*, that the prosecutor did not commit purposeful discrimination in peremptorily challenging R.E. See, e.g., *State* v. *Edwards*, 314 Conn. 465, 493–97, 102 A.3d 52 (2014); see also *State* v. *Holmes*, 334 Conn. 202, 236–41, A.3d (2019) (discussing, inter alia, *Batson*'s failure to address implicit bias and enforceability issues created by purposeful discrimination requirement).

Second, with respect to the trial court's sua sponte observation that the defendant and R.E. are not the same race; see *State* v. *Raynor*, supra, 175 Conn. App. 457; we emphasize that this fact does not affect the defendant's right to seek relief under *Batson* because, in "*Powers* v. *Ohio*, 499 U.S. 400, 415, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the United States Supreme Court extended the *Batson* principle to prohibit the use of racially motivated peremptory challenges irrespective of the race of the defendant."[3] *State* v. *Hodge*, 248

[3] Nevertheless, the overall racial composition of the empaneled jury is one of several nondispositive factors that the court may consider under the third step of *Batson*, namely, determining whether the race neutral explanation proffered by the attorney exercising the peremptory challenge under the second step of *Batson* was a pretext for purposeful discrimination. See, e.g., *State* v. *Hodge*, 248 Conn. 207, 260, 726 A.2d 531 (The court rejected the defendant's claim of pretext because, "at the time of each *Batson* challenge, the state already had accepted minority venirepersons; the final jury of twelve regular and three alternate jurors included four African-Americans and two Hispanics. . . . [T]he trial court, in assessing the validity of the state's proffered reasons, is entitled to take into account the extent to which the state has accepted minority venirepersons."), cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999); *State* v. *Smith*,

Conn. 207, 252–53, 726 A.2d 531, cert. denied, 528 U.S. 969, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999); see, e.g., *State* v. *Rigual*, 256 Conn. 1, 8, 771 A.2d 939 (2001) (Hispanic defendant had standing to raise *Batson* claim to challenge exclusion of Portuguese venireperson).

Finally, the defendant seeks to have this court "exercise its supervisory authority to require that prospective jurors identify their race" prior to the jury selection process. The defendant argues that the optional disclosure of race presently required on the juror questionnaires promulgated pursuant to General Statutes § 51-232 (c)[4] renders it "impossible" to meet an apparent

222 Conn. 1, 13, 608 A.2d 63 (noting that "the panel ultimately chosen contained three black jurors and one black alternate" and stating that, "[a]lthough the racial composition of the jury impaneled is certainly not dispositive of the issue, since the striking of even one juror on the basis of race violates the equal protection clause, even when other jurors of the defendant's race were seated . . . it is a factor that we must consider in assessing the prosecutor's explanation" [citation omitted; internal quotation marks omitted]), cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992); see also *State* v. *Edwards*, supra, 314 Conn. 496 (The court concluded that there was no evidence of discrimination or disparate treatment in the prosecutor's use of peremptory challenges and observed that "[t]here were twenty-three venirepersons, six of whom were selected to serve on the jury and two of whom were selected as alternate jurors. It is unclear how many of the selected jurors were racial minorities, but the record reveals that at least one was African-American. There also is no evidence that other, nonminority jurors answered the juror questionnaire in an unusual way or were treated differently.").

[4] General Statutes § 51-232 (c) provides: "The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court

precondition to review of a *Batson* claim that the record reveal the "racial composition of the venire and empaneled jury . . . ." As counsel suggested in colloquy at oral argument before this court, in the absence of voluntary disclosure by the prospective juror, improving the record of the racial composition of the venire or empaneled jury might well better facilitate the resolution of *Batson* claims, many of which are supported by a comparative analysis that goes beyond the voir dire of the challenged juror. See, e.g., *State* v. *Edwards*, supra, 314 Conn. 496. The extent to which such disclosure should be *required*, however, raises significant administrative and public policy questions in an area in which our legislature has acted by enacting § 51-232 (c), particularly given the potentially difficult intersection of a juror's racial self-identification with the striking attorney's perception of that juror.[5] See E. Margolis, Note,

upon completion of the voir dire. Except for disclosure made during voir dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record."

[5] We note that the Jury Selection and Service Act, 28 U.S.C. § 1861 et seq., which governs jury selection in the federal court system, requires that juror questionnaires elicit information about a prospective juror's race, but—similar to § 51-232 (c)—also provides that such questionnaires must advise the prospective juror that "the furnishing of any information with respect to his religion, national origin, or economic status is not a prerequisite to his qualification for jury service, that such information need not be furnished if the person finds it objectionable to do so, and that information concerning race is required solely to enforce nondiscrimination in jury selection and has no bearing on an individual's qualification for jury service." 28 U.S.C. § 1869 (h) (2012). One federal District Court has suggested maximizing responses to the race inquiry on the questionnaire by moving the advisory about its use in preventing nondiscrimination to a more prominent location. See *United States* v. *Hernandez-Estrada*, Docket No. 10CR0558 BTM, 2011 WL 1119063, *10 (S.D. Cal. March 25, 2011) ("[m]oving the instructions to the front of the form would potentially increase the response rate because people might be more willing to provide information regarding race/ethnicity if it is made clear that such information is required for beneficial purposes, not to invade privacy or collect meaningless data"), aff'd, 704 F.3d 1015 (9th Cir. 2012), aff'd en banc, 749 F.3d 1154 (9th Cir. 2014), cert. denied, U.S. , 135 S. Ct. 709, 190 L. Ed. 2d 445 (2014).

"Color as a *Batson* Class in California," 106 Calif. L. Rev. 2067, 2088 (2018) ("[Arguing that] [r]ecognition of color as a distinct cognizable class may aid in establishing an operational alternative to race" because "[r]acial complexity challenges the basic *Batson* framework" insofar as "[n]o [bright line] rule exists to guide trial courts as to how to categorize mixed-race prospective jurors for *Batson* purposes: if a person's physical appearance and self-identified race or ethnicity do not match attorneys' or the trial judge's assumptions, whose definition controls? If a prospective juror identifies as belonging to multiple racial groups, in which of those groups may they be placed for making *Batson* motions and rulings?"). These exchanges at oral argument are part of the ongoing, robust discussions about the efficacy of *Batson* in addressing discrimination during the jury selection process, particularly when accounting for unconscious or implicit bias. We thank counsel for their thoughtful contributions to these discussions, which we expect will inform the work of the Jury Selection Task Force that the Chief Justice will appoint pursuant to our decision in *State* v. *Holmes*, supra, 334 Conn. 250–51, to suggest those changes to court rules, policies, and legislation necessary to ensure that our state court juries are representative of Connecticut's diverse population.

The judgment of the Appellate Court is affirmed.

STATE OF CONNECTICUT *v.* DARNELL MOORE
(SC 19869)

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

Argued January 18—officially released December 24, 2019

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New London, where the court,

Jongbloed, *J.*, denied the defendant's motions to strike the jury panel and to suppress certain evidence; thereafter, the case was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Beach*, *Keller* and *Norcott*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Appeal dismissed.*

Kenneth Rosenthal, with whom, on the brief, was *Allison M. Near*, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom, on the brief, were *Michael L. Regan*, state's attorney, and *David J. Smith*, supervisory assistant state's attorney, for the appellee (state).

Christine Perra Rapillo, chief public defender, and *Ann M. Parrent*, assistant public defender, filed a brief for the Office of the Chief Public Defender as amicus curiae.

Opinion

PER CURIAM. The defendant, Darnell Moore, appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court affirming his conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a. *State* v. *Moore*,

[1] We granted the defendant's petition for certification to appeal, limited to the following issues: "In concluding that the defendant could not prevail on his motion to strike the voir dire panel on the ground that it failed to constitute a fair cross section of the community:

"1. Did the Appellate Court properly conclude that census data pertaining to the entire African-American population in Connecticut and New London county [did] not [constitute] probative evidence with respect to the claimed underrepresentation of African-American males in the jury pool?

"2. Did the Appellate Court properly decline, in light of the provisions of General Statutes § 51-232 (c), to exercise its supervisory authority over the administration of justice to enforce the collection of demographic data to permit analysis of the diversity of jury panels in Connecticut?" *State* v. *Moore*, 324 Conn. 915, 915–16, 153 A.3d 1289 (2017).

169 Conn. App. 470, 473, 151 A.3d 412 (2016). On appeal, the defendant challenges the Appellate Court's conclusion that the trial court properly denied his motion to strike the voir dire panel on the ground that he failed to provide any statistical analysis or data to prove that the lack of African-American males on that panel rendered it not a fair cross section of the New London judicial district from which it was drawn, in violation of the sixth amendment to the United States constitution. See *Duren* v. *Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979); *State* v. *Gibbs*, 254 Conn. 578, 588, 758 A.2d 327 (2000). The defendant contends specifically that the Appellate Court incorrectly determined that the census data he proffered about the percentage of *all* African-Americans in the population of both Connecticut as a whole and the New London judicial district specifically did not constitute probative evidence with respect to the inquiry at issue, which was limited to the percentage of African-American *males* eligible for jury service, because, "[w]ithout an ability to rely on census data, [he] had no recourse as to how he might demonstrate a fair cross section claim." The defendant also argues that the Appellate Court improperly declined to exercise its supervisory power over the administration of justice to further the purpose of General Statutes § 51-232 (c)[2] by requiring

[2] General Statutes § 51-232 (c) provides: "The Jury Administrator shall send to a prospective juror a juror confirmation form and a confidential juror questionnaire. Such questionnaire shall include questions eliciting the juror's name, age, race and ethnicity, occupation, education and information usually raised in voir dire examination. The questionnaire shall inform the prospective juror that information concerning race and ethnicity is required solely to enforce nondiscrimination in jury selection, that the furnishing of such information is not a prerequisite to being qualified for jury service and that such information need not be furnished if the prospective juror finds it objectionable to do so. Such juror confirmation form and confidential juror questionnaire shall be signed by the prospective juror under penalty of false statement. Copies of the completed questionnaires shall be provided to the judge and counsel for use during voir dire or in preparation therefor. Counsel shall be required to return such copies to the clerk of the court upon completion of the voir dire. Except for disclosure made during voir

the jury administrator to collect and maintain racial and demographic data for all jurors because, "without that information, there is no mechanism by which . . . any defendant can effectively present evidence of the number of distinctive group members in the jury pool for the pertinent judicial district."

After examining the entire record on appeal and considering the briefs and oral arguments of the parties, we have determined that the appeal in this case should be dismissed on the ground that certification was improvidently granted.

Beyond dismissing the appeal, however, we offer an additional observation with respect to the defendant's request, supported by the amicus curiae Office of the Chief Public Defender, to exercise our supervisory authority over the administration of justice to enhance the diversity of our state's juries by requiring the jury administrator to collect racial and demographic information about prospective jurors, including by (1) amending the juror questionnaire to mandate the inclusion of racial and ethnic background, rather than the current practice under § 51-232 (c) of making the provision of such information voluntary, which might skew the data collected, and (2) maintaining statistical information based on that data prior to the destruction of the questionnaires in accordance with Judicial Branch policy intended to protect juror confidentiality. See, e.g., *Barlow* v. *Commissioner of Correction*, 328 Conn. 610, 612–15, 182 A.3d 78 (2018) (providing additional explanation in dismissing appeal as improvidently granted). As we noted in *State* v. *Raynor*, 334 Conn. 264, 274, A.3d (2019), a companion case raising similar issues in the context of claims under *Batson* v.

dire or unless the court orders otherwise, information inserted by jurors shall be held in confidence by the court, the parties, counsel and their authorized agents. Such completed questionnaires shall not constitute a public record."

Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the fact that the legislature has acted in this area by enacting § 51-232 (c)—which specifically makes the provision of racial and ethnic data optional for the juror—renders us reluctant to exercise our supervisory authority in the sweeping manner sought by the defendant and the amicus curiae Office of the Chief Public Defender. Instead, we anticipate these issues will be considered by the Jury Selection Task Force, which the Chief Justice will appoint pursuant to our decision in *State* v. *Holmes*, 334 Conn. 202, 250–51, A.3d (2019), to suggest those changes to court policies, rules, and legislation necessary to ensure that our state court juries are representative of Connecticut's diverse population.

The appeal is dismissed.

ORDERS

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TYRONE D. CAROLINA *v.* COMMISSIONER OF CORRECTION

The petitioner Tyrone D. Carolina's petition for certification to appeal from the Appellate Court, 192 Conn. App. 296 (AC 41500), is denied.

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

Tyrone D. Carolina, self-represented, in support of the petition.

Decided December 12, 2019

STATE OF CONNECTICUT *v.* JEFFREY TODD PALUMBO

The defendant's petition for certification to appeal from the Appellate Court, 193 Conn. App. 457 (AC 41509), is denied.

Richard Emanuel, in support of the petition.

Nancy L. Chupak, senior assistant state's attorney, in opposition.

Decided December 12, 2019

STATE OF CONNECTICUT *v.* OSVALDO DEJESUS

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 304 (AC 41151), is denied.

Norman A. Pattis, in support of the petition.

Laurie N. Feldman, special deputy assistant state's attorney, in opposition.

Decided December 12, 2019

LUIS PEREZ *v.* COMMISSIONER OF CORRECTION

The petitioner Luis Perez' petition for certification to appeal from the Appellate Court, 194 Conn. App. 239 (AC 41160), is denied.

Mark. M. Rembish, assigned counsel, in support of the petition.

Kathryn W. Bare, assistant state's attorney, in opposition.

Decided December 12, 2019

JOHN MAHONEY *v.* COMMISSIONER OF CORRECTION

The petitioner John Mahoney's petition for certification to appeal from the Appellate Court, 194 Conn. App. 902 (AC 42014), is denied.

James E. Mortimer, in support of the petition.

Margaret Gaffney Radionovas, senior assistant state's attorney, in opposition.

Decided December 12, 2019

STATE OF CONNECTICUT *v.* ANTHONY PERNELL

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 394 (AC 42470), is denied.

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

Lisa J. Steele, assigned counsel, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided December 12, 2019

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ABDUL MUKHTAAR
(AC 42490)

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

Syllabus

The defendant, who had been convicted of the crime of murder, appealed to this court from the trial court's dismissal of his motion for a second sentence review hearing. He claimed that the trial court violated his due process rights when it dismissed the motion after finding that it lacked subject matter jurisdiction. *Held* that the trial court properly determined that it lacked subject matter jurisdiction to consider the defendant's motion for a second sentence review; the sentence review committee previously had reviewed the defendant's sentence and issued a final decision, and the defendant had no right to a second sentence review hearing.

Argued September 24—officially released December 24, 2019

Procedural History

Information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield, and tried to the jury before *Gormley*, *J.*; verdict and judgment of guilty, from which the defendant appealed to our Supreme Court, which affirmed the judgment; thereafter, the court, *Devlin*, *J.*, denied the defendant's motion to correct an illegal sentence; subsequently, the court, *Devlin*, *J.*, denied the defendant's motion to allow expert testimony, and

the defendant appealed to this court, which reversed the denial of the motion to correct an illegal sentence and directed the trial court to dismiss the defendant's motion; subsequently, the court, *Devlin*, *J.*, dismissed the defendant's motion to request a sentence review hearing, and the defendant appealed to this court. *Affirmed.*

Abdul Mukhtaar, self-represented, the appellant (defendant).

Jennifer F. Miller, assistant state's attorney, with whom, on the brief, were *John Smriga*, state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The self-represented defendant, Abdul Mukhtaar, appeals from the trial court's dismissal of his motion for a second sentence review hearing. The court dismissed the defendant's motion after finding that it lacked subject matter jurisdiction to consider the motion. We affirm the judgment of the court dismissing the defendant's motion.

The following facts, taken from one of the defendant's prior appeals,[1] and procedural history are relevant to this appeal. "On February 14, 1996, the defendant shot and killed Terri Horeglad . . . . [The defendant] was arrested, charged and, following a jury trial, convicted of murder in violation of General Statutes § 53a-54a. On September 19, 1997, the trial court sentenced the defendant to fifty years imprisonment." *State* v. *Mukhtaar*, 179 Conn. App. 1, 3, 177 A.3d 1185 (2017). Subsequently, the defendant's sentence was reviewed by the

[1] This appeal is the sixth filed by the defendant to an appellate court since being sentenced in 1997 in addition to other challenges to his conviction. See *State* v. *Mukhtaar*, 189 Conn. App. 144, 146 n.3, 207 A.3d 29 (2019) (listing defendant's prior appeals and trial court actions).

sentence review division of the Superior Court, which concluded that the defendant's sentence was "neither inappropriate nor disproportionate" and, thus, affirmed it in 2003.

On or about October 22, 2018, the defendant filed a motion with the Superior Court that was disconnected from any pending action to request a second sentence review hearing. In his motion, the defendant argued that an April, 2015 "psychological evaluation [that] determined that the defendant was not capable to aid and assist in his own defense [at] pretrial, [at] trial, and at sentencing" was "newly discovered evidence" that entitled him to a second sentence review hearing. On November 21, 2018, the court held argument on the defendant's motion. The defendant explained that he first made his request for a second sentence review hearing to the sentence review division, which informed the defendant that it lacked jurisdiction to grant the defendant's request and that he would have to make his request to the trial court. The court issued a memorandum of decision on November 28, 2018, in which it held that it lacked jurisdiction to consider the defendant's motion and, accordingly, dismissed the motion.

In its memorandum of decision, the court succinctly stated: "Under Connecticut law, a trial court is ordinarily without jurisdiction to modify a lawful sentence that a defendant has begun to serve. . . . The legislature, however, may confer jurisdiction to modify executed sentences. . . . The Connecticut legislature has provided two avenues for sentence modification. For total effective sentences of three years or more, review is available through the sentence review division pursuant to General Statutes § 51-195. For definite sentences of three years or less, General Statutes § 53a-39 allows a defendant to seek modification of the sentence from the sentencing court or judge.

"The sentence review division is a creature of statute established in 1957 by Public Act 57-436. The statutory scheme provides a defendant with what is, in effect, a limited opportunity for reconsideration of the sentence imposed. The decision of the review board is final. General Statutes § 51-196 (d).

"The statutory scheme, by its terms does not provide for any reconsideration of sentences that have been reviewed. Moreover, this court is unaware of any authority that this court has to order the sentence review division to conduct such reconsideration.

"Accordingly, this court finds that it lacks jurisdiction to consider the defendant's motion and it is therefore dismissed." (Citations omitted; footnote omitted.) The defendant filed this appeal.

The defendant claims that the trial court violated his due process rights when it dismissed his motion seeking a second sentence review hearing. "It is well settled that [a] determination regarding a trial court's subject matter jurisdiction is a question of law and, therefore, we employ the plenary standard of review and decide whether the court's conclusions are legally and logically correct and supported by the facts in the record." (Internal quotation marks omitted.) *Holliday* v. *Commissioner of Correction*, 184 Conn. App. 228, 233, 194 A.3d 867 (2018).

"[T]he jurisdiction of the sentencing court terminates once a defendant's sentence has begun, and, therefore, that court may no longer take any action affecting a defendant's sentence unless it expressly has been authorized to act." (Internal quotation marks omitted.) *State* v. *Tabone*, 279 Conn. 527, 533, 902 A.2d 1058 (2006). "The purpose and effect of the Sentence Review Act is to afford a convicted person a *limited* appeal for reconsideration of his sentence. . . . It thus gives him an optional de novo hearing as to the punishment to be

imposed." (Citations omitted; emphasis added.) *State* v. *Nardini*, 187 Conn. 109, 121–22, 445 A.2d 304 (1982); General Statutes § 51-194 et seq. To receive sentence review, an individual "file[s] with the clerk of the court for the judicial district in which the judgment was rendered an application . . . ." General Statutes § 51-195. After an application is filed, the clerk shall forward the application to the review division and notify the sentencing judge. General Statutes § 51-195. "On review of the original sentence the division is authorized to let the original sentence stand, to increase or decrease it or may order such different sentence to be imposed as could have been imposed at the time of the original sentence." *State* v. *Nardini*, supra, 119–20; General Statutes § 51-196 (a). If a "different sentence or disposition" is ordered by the review division, "the Superior Court shall resentence the defendant or make any other disposition of the case ordered by the review division." General Statutes § 51-196 (d). Section 51-196 (d), however, "makes the decision of the sentence review division final . . . ." *State* v. *Nardini*, supra, 117. Significantly, the Sentence Review Act expresses no right to a second sentence review hearing. See General Statutes § 51-194 et seq.

Because the sentence review division reviewed the defendant's sentence and, after its review, issued a final decision in 2003, and because the defendant has no right to a second sentence review hearing, the trial court determined correctly that it lacked subject matter jurisdiction over the defendant's motion seeking a second sentence review hearing.

The judgment is affirmed.

MICHAEL D. *v.* COMMISSIONER OF CORRECTION*
(AC 41622)

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

Syllabus

The petitioner, who had been convicted of two counts of risk of injury to a child in connection with his alleged conduct in sexually abusing the minor victim on three separate occasions between 2001 and 2003, sought a writ of habeas corpus, claiming that he received ineffective assistance from the counsel who had represented him with respect to his criminal trial. Specifically, he claimed, inter alia, that his trial counsel had rendered ineffective assistance in failing to challenge the admission into evidence of a pornographic magazine in which young females were depicted in sexually suggestive settings and poses by ensuring that the trial court conduct an in camera review of the magazine. The habeas court rendered judgment denying the habeas petition, from which the petitioner, on the granting of certification, appealed to this court. *Held*:

1. The habeas court properly determined that trial counsel's conduct in attempting to preclude the magazine did not constitute deficient performance; the petitioner's trial counsel testified regarding the numerous steps they took in their attempt to preclude the admission of the magazine, including filing a motion in limine, presenting expert testimony, and making two requests on the record that the magazine be reviewed by the court, which stated that it would review the magazine's contents, and the habeas court found that trial counsel's failure to make an in camera request in writing, or to further press the court on whether it actually had reviewed the magazine, after counsel at least twice had made the specific request on the record that the court do so, did not constitute acts or omissions serious enough to establish that they were not functioning as the counsel guaranteed by the sixth amendment.

2. The petitioner could not prevail on his claim that his trial counsel provided ineffective assistance by failing to request a jury instruction that the jury must unanimously agree on the factual basis for each guilty verdict; although the petitioner claimed that a unanimity instruction should have been provided to the jury given that the three alleged incidents of sexual assault were separate and distinct, and that if counsel had requested a unanimity instruction, there was a reasonable probability that the trial would have resulted in a more favorable verdict, the habeas court properly determined that the petitioner failed to establish prejudice resulting from trial counsel's failure to request a specific unanimity instruction, as the trial court gave a general unanimity charge to the jury prior to

* In accordance with our policy of protecting the privacy interests of the victims of 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.

its deliberations and instructed the jury to consider each count separately and independently from the others, and the habeas court found that there was no evidence that jurors relied on different incidents and facts to support their verdicts without the specific unanimity instruction.

Argued September 18—officially released December 24, 2019

Procedural History

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

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

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

LAVERY, J. The petitioner, Michael D., appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. He claims that the habeas court erred in concluding that he did not prove that his trial counsel provided ineffective assistance of counsel by failing (1) to ensure that a pornographic magazine was not admitted into evidence by ensuring that the trial court conduct an in camera review of the magazine and (2) to request a specific unanimity instruction. We disagree and affirm the judgment of the habeas court.

The following facts—as gleaned from the record, by this court in the petitioner's direct appeal from his conviction and by the habeas court in its memorandum of decision—and procedural history are relevant to our disposition of the appeal. "The [petitioner] and Ann P. were married in December, 1999. At the time of their

marriage, Ann P. had a six year old daughter from a previous relationship, the victim. From 1999 until 2005, the [petitioner] lived with [Ann P.] and the victim in Meriden. The state alleged that the [petitioner] sexually assaulted the victim on three separate occasions between 2001 and 2003. The victim testified that the assaults had taken place at intervals of approximately one year . . . .

* * *

"In October, 2004, Ann P. became suspicious that the [petitioner] was having an affair. Believing that she might find evidence of her husband's suspected infidelity, Ann P. searched the vehicle the [petitioner] regularly drove . . . . Secreted in a small storage space behind the rear row of seats in the vehicle she found a plastic bag. Upon examining the contents of the bag, she discovered that it contained several articles of her daughter's outgrown clothing . . . and two pornographic magazines: an unnamed adult fetish magazine and another magazine entitled 'Barely Legal,' in which young females were depicted in sexually suggestive settings and poses. . . . At some point, she went through the bag and discovered that some of her daughter's clothing felt 'stiff' to the touch, which she attributed to the possible presence of semen. Shortly after discovering the bag and its contents, Ann P. filed for divorce. The divorce was finalized in February, 2005.

"In the years following the divorce, Ann P. occasionally asked her daughter 'in a roundabout way' whether 'anybody [had] ever done anything' inappropriate to her. . . . She disclosed at that time that the [petitioner] had sexually assaulted her." *State* v. *Michael D.*, 153 Conn. App. 296, 299–301, 101 A.3d 298, cert. denied, 314 Conn. 951, 103 A.3d 978 (2014).

On October 27, 2009, the petitioner was arrested and charged with sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), risk of injury

to a child in violation of General Statutes § 53-21 (a) (1), and risk of injury to a child in violation of § 53-21 (a) (2). He was represented by public defenders Joseph Lopez and Tejas Bhatt. Prior to trial, in a memorandum of law in support of a motion in limine filed on January 18, 2012, defense counsel moved to preclude from evidence the "Barely Legal" magazine (magazine) and the shorts found in the petitioner's car on the grounds that such items were "immaterial, irrelevant, unreliable and, even if relevant, their admission would be unfairly prejudicial and outweigh whatever minimal probative value they possess." In support of the motion, trial counsel presented the testimony of Dennis Gibeau, a clinical psychologist specializing in the assessment and treatment of sexual offenders.[1] The trial court denied this motion, and counsel orally renewed the motion. The court stood by its prior ruling and admitted the magazine as a full exhibit at trial.

The petitioner was convicted, after a three day jury trial, of both risk of injury to a child charges but was acquitted of the sexual assault charge. He subsequently filed a direct appeal, and this court affirmed the petitioner's conviction. See *State* v. *Michael D.*, supra, 153 Conn. App. 299.

On June 12, 2017, the petitioner filed the operative amended habeas petition, in which he alleged that his criminal trial counsel, attorneys Lopez and Bhatt, had provided ineffective assistance of counsel. Following a trial on December 11, 2017, the habeas court denied the petition in a written memorandum of decision issued

[1] The habeas court stated that Gibeau testified "regarding the distinctions between the physical and sexual characteristics of prepubescent girls and postpubescent girls, and concluded that it would be speculative to link an interest in a Barely Legal magazine depicting postpubescent girls with a pedophilic attraction to young children." Upon cross-examination, however, he conceded that, when considered together with the victim's clothing and the fact that such items were found in the petitioner's car, it could be clinically inferred that the petitioner had a specific sexual interest in this particular victim.

on April 9, 2018. The petitioner then filed a petition for certification to appeal the habeas court's decision on April 17, 2018, which the court granted on April 19, 2018. This appeal followed.

The petitioner claims that the habeas court erred in concluding that he failed to prove ineffective assistance of counsel by his trial attorneys. He contends that Lopez and Bhatt rendered ineffective assistance by failing (1) to assert a proper challenge to the admission of the magazine into evidence by ensuring that the trial court conducted an in camera review of the magazine and (2) to request a specific unanimity instruction. We are not persuaded.

"In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary." (Internal quotation marks omitted.) *Baillargeon* v. *Commissioner of Correction*, 67 Conn. App. 716, 720, 789 A.2d 1046 (2002).

"A criminal defendant's right to the effective assistance of counsel . . . is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution. . . . To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)." (Citations omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

The petitioner has the burden of establishing that "(1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was

a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance." (Emphasis omitted.) *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 575, 941 A.2d 248 (2008).

Ultimately, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland* v. *Washington*, supra, 466 U.S. 686. "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 . . . ." (Internal quotation marks omitted.) *Brian S.* v. *Commissioner of Correction*, 172 Conn. App. 535, 539, 160 A.3d 1110, cert. denied, 326 Conn. 904, 163 A.3d 1204 (2017).

I

We first address the petitioner's claim that the habeas court erred in concluding that he had failed to prove that trial counsel had rendered ineffective assistance by failing to challenge the admission of the magazine into evidence by ensuring that the trial court conduct an in camera review of the magazine. He contends that the attorneys were aware of the impact the magazine could have on the jury. In particular, the petitioner argues: "They also knew that it needed to be *understood* to appreciate how irrelevant and prejudicial it truly was. They failed to take steps to make [the trial court] understand the magazine . . . ." (Emphasis in original.) Specifically, the habeas court found that the petitioner's amended petition claimed that trial counsel provided ineffective assistance by "failing to (1) file a written request for an in camera review of the 'Barely Legal' magazine found in the petitioner's vehicle, (2) ask the trial court to articulate whether it had made an

in camera review of the magazine, [and] (3) ask the trial court to reconsider its ruling based on an in camera review of the magazine . . . .'' The respondent, the Commissioner of Correction, argues that the habeas court was correct in concluding that the petitioner failed to prove that ''his counsel performed deficiently in their efforts to preclude the magazine, where they filed a motion in limine and presented testimony, evidence, and argument in support of the motion . . . .'' We agree with the respondent.

''To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the [s]ixth [a]mendment.'' (Internal quotation marks omitted.) *Ledbetter* v. *Commissioner of Correction*, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied sub nom. *Ledbetter* v. *Lantz*, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006), quoting *Strickland* v. *Washington*, supra, 466 U.S. 687. ''It is not enough for the petitioner to simply prove the underlying facts that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial.'' *Jones* v. *Commissioner of Correction*, 169 Conn. App. 405, 415–16, 150 A.3d 757 (2016), cert. denied, 324 Conn. 909, 152 A.3d 1246 (2017). When assessing trial counsel's performance, the habeas court is required to ''indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . .'' *Strickland* v. *Washington*, supra, 689.

Both trial attorneys testified at the habeas trial and conceded that neither conclusively knew whether the trial court ever had reviewed the contents of the magazine. They also testified, however, to the numerous

steps they took in their attempt to preclude the magazine from being admitted into evidence. When Attorney Lopez asked the trial court to reconsider its ruling, he specifically asked the court to review the contents, and not just the cover, of the magazine in balancing its potential prejudicial effect against its probative value. The trial court responded that it would review the magazine's contents and rule on the petitioner's request for reconsideration the next morning.[2] Additionally, Attorney Bhatt orally requested that the trial court articulate the relevancy of the magazine as related to the petitioner's sexual interest.[3] Prior to the trial court's ruling,

[2] The following colloquy occurred between the petitioner's trial counsel and the trial court:

"[Lopez]: Your Honor, I would ask that you view that Barely Legal magazine and perhaps reconsider. I think that if that magazine is going in with the jury as a full exhibit that that is, in my opinion, so prejudicial as to denying this man a fair trial.

"The Court: All right, I will—I've already made my ruling. You want me to review the magazine? I'm getting my ruling from the testimony I heard yesterday from the witness you called, what he indicated to this Court.

"[Lopez]: But is that magazine going to go into the jurors?

"The Court: I don't know. I don't know if it's going to go into the jury. If you want me to look at it prior to, I will. I don't have a problem with that.

"[Lopez]: I would request that.

"The Court: All right. Gentlemen, we're picking the jury tomorrow, so we have plenty of time on that. . . .

"[Lopez]: We're asking your Honor to look at the magazine, briefly. I mean it's only 4:30.

"The Court: I'll look at the magazine and at 9:30, I'll let you know."

[3] The following colloquy occurred between the petitioner's trial counsel and the trial court:

"[Bhatt]: Just to clarify for articulation purposes, the court's ruling would be that the magazine, the shorts and the items in the bag are relevant and that their probative value is not outweighed by the prejudicial impact?

"The Court: That's right.

"[Bhatt]: And I guess the other point of clarification, we would ask the court to explain or articulate. The court mentioned or referenced several times the magazine being an indication of the defendant's interest in young girls and we would submit to the court to be considerate of that in light of the testimony that the doctor drew a distinction between young women and young girls and prepubescent and postpubescent is the court's ruling that the magazine is indicative of his interest in prepubescent girls with the age of the complainant or younger women who were teenagers, but older than the complainant. I think it's an important distinction based on the testimony of the doctor and we ask the court to articulate that in its decision.

Attorney Bhatt presented further argument for reconsideration and commented on the court's previous assertion that it would review the contents of the magazine.[4]

The habeas court found that trial counsel's conduct in attempting to preclude the magazine did not constitute

"[The state]: I would object to the court having to articulate that. I think the court has articulated its reasons.

"The Court: I have made my decision."

[4] The following colloquy occurred between the petitioner's trial counsel and the trial court:

"[Bhatt]: I believe at the end of the day the court indicated that prior to this morning it would review the—the magazine in question. We would ask the court to reconsider and I don't know if the court has done that, but I wanted to add a couple of things to that.

"Again, we are asking the court to reconsider its decision. The court relied—reading from the [Connecticut] Code of Evidence on [*State* v. *Rinaldi*, 220 Conn. 345, 599 A.2d 1 (1991)] and [*State* v. *Miller*, 202 Conn. 463, 522 A.2d 249 (1987)] which talks about a tendency to support a fact relevant to the issues if only in a slight degree.

"Again, we would—our position would be that if it's read in context with the rest of the cases it's not—it doesn't mean that any fact that has a relevance to a slight degree read with the other cases which talk about that make the probability—make the existence of a fact more probable than not and the slight degree is only tipping the scales in favor of. It is more probable than not.

"So, again, our position would be that this evidence, if even relevant to a slight degree, does not [rise] to the level of being more probable than not with cases which we cited in our brief and we would ask that the court, again, reconsider its decision. And, finally, even if it is relevant we would ask the court and I'm not sure if I did this yesterday—but we would ask the court to clarify it is finding that its probative value is outweighed by its prejudicial impact.

"Again, the court is aware that the defense's position is that this has been a prejudicial piece of evidence. And, finally, again, I—thinking about this last night and I don't mean to reargue this and I'm not going to, but I just—it seems to me that the purpose of the State introducing this evidence is to convince the jury that this is somebody who has a disposition to having sex—being sexually aroused by minors.

"That is dangerously close to, if not propensity of the evidence and I understand the State has said it's not offering it as an uncharged misconduct, but I would just like the record to be clear with our position that in our opinion it—it essentially is without calling it so that it is dangerously close to propensity of the evidence and should not be permitted.

"The Court: All right. Well, you've made the argument yesterday. You're supplementing it today. I stand by my ruling and I put the reasons on the record."

deficient performance. In its memorandum of decision, the court highlighted the various actions that counsel undertook, including filing a motion in limine, presenting expert witness testimony, and making two requests to the court, on the record, to review the magazine and reconsider its ruling.

The habeas court found that trial counsel's failure to make an in camera request in writing, or to further press the court on whether it actually had reviewed the magazine, after counsel at least twice had made the specific request on the record that the court do so, did not constitute acts or omissions serious enough to establish that they were not "functioning as the counsel guaranteed by the sixth amendment." The petitioner has presented nothing that persuades us that the habeas court erred in its conclusion. Having found no error in the habeas court's deficient performance analysis on the petitioner's claim that counsel provided ineffective assistance on the ground that they failed to ensure that the pornographic magazine was excluded from evidence, we need not consider the petitioner's prejudice argument.

II

We next address the petitioner's claim that trial counsel provided ineffective assistance by failing to request a jury instruction that the jury must unanimously agree on the factual basis for each guilty verdict. The petitioner contends that a unanimity instruction should have been provided to the jury, given that the three incidents were separate and distinct. The petitioner argues that trial counsel "could, and should, have requested a specific unanimity instruction so as to ensure that the jury unanimously found at least one act had been proven beyond a reasonable doubt. There was no strategic reason not to make this request, and every reasonable strategic reason to do so. Worst of all, [trial

counsel] knew they had to take this step and simply forgot to do so."[5] The petitioner also argues that the habeas court erred in finding that he had not established prejudice from counsel's failure to request such an instruction. We disagree.

"A specific unanimity instruction is required . . . where the particular count under consideration by the jury is based on multiple factual allegations which amount to multiple statutory subsections or multiple statutory elements of the offense involved." (Internal quotation marks omitted.) *State* v. *Bailey*, 82 Conn. App. 1, 6, 842 A.2d 590, cert. denied, 269 Conn. 913, 852 A.2d 744 (2004). "[W]e have not required a specific unanimity charge to be given in every case . . . In *State* v. *Famiglietti*, 219 Conn. 605, 619–20, 595 A.2d 306 (1991), we set forth a multipartite test to determine whether a trial court's omission of a specific unanimity charge warrants a new trial. We first review the instruction that was given to determine whether the trial court has sanctioned a nonunanimous verdict. If such an instruction has not been given, that ends the matter. Even if the instructions at trial can be read to have sanctioned such a nonunanimous verdict, however, we

[5] During the habeas trial, the following colloquy took place during Attorney Bhatt's redirect examination:

"[O'Brien]. Okay. Now, just moving on briefly to the unanimity instruction. Did you think of asking for a specific unanimity instruction prior to the case going to verdict?

"[Bhatt]. Yeah. When we were thinking about the long-form and how to deal with it, I think there was a conversation in which it came up, and we said we should file a specific—a unanimity instruction— . . .

"[O'Brien]. Okay. So is it fair to say that isn't just a thought that you had after the verdict was rendered.

"[Bhatt]. No.

"[O'Brien]. It's fair to say you—that's not just something you thought of later, right?

"[Bhatt]. Correct.

"[O'Brien]. Okay.

"[Bhatt]. Because I mean—and I remember—only because I remember thinking to myself I forgot to do that."

will remand for a new trial only if (1) there is a conceptual distinction between the alternative acts with which the defendant has been charged, and (2) the state has presented evidence to support each alternative act with which the defendant has been charged. . . .

"This court is required to conclude, when reviewing a court's instruction to the jury, that [t]he absence of language expressly sanctioning a nonunanimous verdict means that the defendant has not met the first part of the *Famiglietti* test." (Citations omitted; internal quotation marks omitted.) *State* v. *Jessie L. C.*, 148 Conn. App. 216, 232, 84 A.3d 936, cert. denied, 311 Conn. 937, 88 A.3d 551 (2014).

In the present case, the trial court gave a general unanimity charge to the jury prior to its deliberations. It instructed the jury to consider each count separately and independently from the others: "Each count alleges a separate crime. It will be your duty to consider each count separately in deciding the guilt or nonguilt of the defendant. This means that the determination of one count or charge does not automatically make the defendant guilty or not guilty on any other count or charge. Each count must be considered separately by you." As the court went through each of the counts, it instructed the jury that it must unanimously agree that each element of the crimes charged was proven beyond a reasonable doubt.[6]

[6] Regarding count one (violation of §53a-70a [2]), the court instructed the following: "If you unanimously find that the state has proven beyond a reasonable doubt each of the elements of the crime of sexual assault in the first degree then you shall find the defendant guilty. On the other hand, if you unanimously find that the state has failed to prove beyond a reasonable doubt any of the elements you shall then find the defendant not guilty."

Regarding count two (violation of § 53-21 [a] [2]), the court instructed the following: "If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of risk of injury to a minor then you shall find the defendant guilty. On the other hand, if you unanimously find the state has failed to prove beyond a reasonable doubt any of the elements you shall then find the defendant not guilty."

Regarding count three (violation of § 53-21 [a] [1]), the court instructed the following: "If you unanimously find that the state has proven beyond a

The habeas court found that trial counsel "intended to request an additional instruction informing the jurors that they must unanimously agree on the factual basis for their guilty verdicts, but failed to do so." It declined to address whether it was an error on the counsel's part, stating only that it may be "arguable." The habeas court, therefore, did not rule on the deficient performance prong but, instead, analyzed the prejudice prong of the *Strickland* test, and it concluded that the petitioner had failed to prove that he was prejudiced by the "arguable" deficient performance of counsel in failing to request a specific unanimity instruction. We agree with the habeas court's analysis.

The petitioner argues that the habeas court erred in finding that he failed to prove that he was prejudiced by his trial counsel's failure to request a unanimity instruction. According to the petitioner, if such instruction were requested, there was a "reasonable probability" that the trial would have resulted in a more favorable verdict. He argues that such an instruction may have led to a more favorable outcome because he believes the jury did not agree on the factual basis for his conviction based on the mixed verdict. We disagree.

Under the prejudice prong, the petitioner must show "that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." (Internal quotation marks omitted.) *Michael T.* v. *Commissioner of Correction*, 307 Conn. 84, 101, 52 A.3d 655 (2012). "The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 522, 964 A.2d 1186, cert. denied

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

sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

The habeas court found that "there [was] no evidence that jurors relied on different incidents and facts to support their verdicts without the specific unanimity instruction. There is no evidence that had the jury been forced to identify a unanimous factual basis for their verdicts, there is a reasonable probability that the trial would have had a different outcome in the petitioner's favor."

In *State* v. *Bailey*, supra, 82 Conn. App. 7–8, this court held that because a specific unanimity instruction was not required, "it was not reasonably possible that the absence [of such an] instruction misled the jury." We hold the same to be true in the present case that the jury was not misled by the absence of such an instruction. "[G]iven the court's admonitions concerning unanimity, we must presume that the jury, in the absence of a fair indication to the contrary . . . followed the court's instruction as to the law." (Internal quotation marks omitted.) *State* v. *Jessie L. C.*, supra, 148 Conn. App. 233.

Furthermore, on the petitioner's direct appeal, this court specifically addressed and rejected the petitioner's contention that the jury's mixed verdict—finding the petitioner guilty of risk of injury but acquitting him of sexual assault—indicated a likelihood that it was nonunanimous. This court wrote: "The record reflects that the jury deliberated for three days, during which it requested and heard playback testimony of Ann P. and the victim. . . . The [trial] court further cautioned that there is no principle of law for less than a unanimous verdict. It is well settled that [t]he jury is presumed, in the absence of a fair indication to the contrary, to have followed the court's instruction as to the law. . . . The record suggests that the jury considered

the evidence in an assiduous fashion guided by the court's correct instructions on the law. Accordingly, we decline to impute nonunanimity to the jury's verdict because it chose, after careful deliberation, to acquit on the charge of sexual assault.

"[W]e are ever mindful that the defendant is entitled to be protected against the danger that . . . he will be convicted not on the basis of one unanimous verdict on a single set of facts but under juror votes of conviction which, depending on the particular member of the jury, relate to entirely different [occasions] . . . . Here, however, there was no risk that the jury's verdict was not unanimous. The central question for the jury was whether the victim should be believed. The jury considered that question, at length, against the backdrop of the defendant's argument, impugning the victim's credibility, and imploring the jurors to discredit her testimony as to all of the reported incidents, not just some." (Citations omitted; internal quotation marks omitted.) *State* v. *Michael D.*, supra, 153 Conn. App. 326–27. Accordingly, we conclude that the habeas court did not err in finding that the petitioner failed to establish prejudice resulting from trial counsel's failure to request a specific unanimity instruction.

On the basis of our review of the parties' briefs and the record of the criminal and habeas trial, we conclude that the findings of the habeas court are supported by the facts that appear in the record and are not clearly erroneous. Furthermore, we conclude that the habeas court's conclusion that the petitioner was not deprived of his constitutional right to the effective assistance of counsel was correct. The court had before it sufficient evidence to find as it did, and, accordingly, it properly denied the petitioner's habeas petition.

The judgment is affirmed.

In this opinion the other judges concurred.

STARBOARD FAIRFIELD DEVELOPMENT, LLC, ET AL. *v.* WILLIAM C. GREMP ET AL.
(AC 41546)

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

Syllabus

The plaintiffs, S Co. and R Co., sought to recover damages arising out a dispute over real estate investments and the disentanglement of business relationships with the defendants, G and G Co. The plaintiffs brought counts against the defendants sounding in vexatious litigation, breach of a general release benefitting S Co. and its individual members, slander of title, intentional interference with a contract pertaining to certain property, breach of a fiduciary duty, and breach of a promissory note. Following a trial to the court, the trial court rendered judgment in part for the plaintiffs, form which the defendants appealed to this court. *Held*:

1. The defendants' claim that the trial court improperly determined that they breached a general release with S Co. by pursuing a civil action against the plaintiffs was not reviewable; the defendants failed to brief their claim adequately, as their brief was utterly devoid of any citations to or analysis of applicable contract principles or case law that supported their claim, let alone any application of law to the facts of the case.
2. The defendants could not prevail on their claim that the trial court improperly found that they slandered R Co.'s title to certain property by filing a lis pendens and an affidavit of fact pertaining to that property on certain land records; the trial court, as the trier of fact, was free to discredit evidence provided by G at trial that a reasonable and good faith belief existed for his claim of ownership of R Co., which equated to an interest in the property, and having thoroughly reviewed the defendants' arguments on appeal, this court was not persuaded that the trial court's finding of a slander of title was either legally incorrect or factually unsupported.
3. The defendants could not prevail on their claim that the trial court improperly found that they intentionally interfered with R Co.'s contract to sell certain property to a third party: although the defendants baldly stated that the trial court's finding that they acted intentionally and with bad faith to interfere with the property sale was erroneous, they failed to brief that argument beyond mere abstract assertion, and the defendants' claim that there was insufficient evidence for the trial court to find that their interference caused any actual loss lacked merit, as the defendants failed to address the additional attorney's fees and costs incurred, focusing entirely on the escrow funds and arguing only that the escrow could not be a basis for establishing an actual loss, and the loss the court attributed with respect to the escrow funds had nothing to do with the

establishment of the escrow or the original purpose for the funds but, rather, concerned R Co.'s inability to utilize those funds because they remained in the escrow account due to the actions of the defendants; moreover, the defendants' claim that the court improperly awarded R Co. interest on a certain amount that R Co. was forced to hold in escrow due to the defendants' actions also failed.

4. The defendants' claim that the trial court improperly awarded punitive damages without providing them with adequate notice of a hearing in accordance with the rules of practice was unavailing; the defendants failed to demonstrate that their due process rights were violated or that the trial court committed reversible error in calculating the amount of punitive damages, as the record demonstrated that the defendants had ample notice of the hearing on punitive damages, attended the hearing, and were afforded a meaningful opportunity to be heard on the merits, and the trial court record having contained a proper notice of the hearing date, the defendants had notice of the hearing and knew that the purpose of the hearing would be to determine the amount of common-law punitive damages.

Argued October 7—officially released December 24, 2019

Procedural History

Action for, inter alia, the defendants' alleged breach of contract, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the plaintiffs served the defendants with notice of application for a prejudgment remedy; thereafter, the defendants filed counterclaims against the plaintiffs; subsequently, the matter was tried to the court, *Radcliffe, J.*; judgment in part for the plaintiffs, from which the defendants appealed to this court; thereafter, a hearing in damages was held before the court, *Radcliffe, J.*, which awarded damages to the plaintiffs, and the defendants filed an amended appeal. *Affirmed.*

John I. Bolton, for the appellants (defendants).

Colin B. Connor, with whom, on the brief, was *Robert D. Russo, III*, for the appellee (plaintiffs).

Opinion

PRESCOTT, J. In this action arising out of a dispute over real estate investments and the disentanglement

of business relationships, the defendants William C. Gremp and W C Gremp, LLC (WCG)[1] appeal, following a bench trial, from the judgment of the trial court rendered in favor of the plaintiffs, Starboard Fairfield Development, LLC (Starboard), and RR One, LLC (RR One), on counts alleging breach of a general release, slander of title, intentional interference with a contractual relationship, and breach of a promissory note.[2] On appeal, the defendants claim that the court improperly (1) determined that they breached a general release with Starboard by pursuing a civil action against the plaintiffs, (2) found that they slandered RR One's title to certain property by recording a lis pendens and an affidavit of fact pertaining to that property on the Bridgeport land records, (3) found that they intentionally interfered with RR One's contract to sell the property to a third party, (4) awarded RR One interest on $5000 that RR One was forced to hold in escrow due to the defendants' actions, and (5) awarded punitive damages without providing the defendants with adequate notice of a hearing in accordance with Practice Book §§ 7-5, 14-7, and 14-20. After a careful review of the record and the briefs of the parties, we conclude

[1] In addition to Gremp and WCG, Main Street Property Management, LLC (Main Street), also was named as a defendant in the underlying action. In its memorandum of decision, the trial court expressly stated that it was not awarding damages against Main Street and rendered judgment in its favor on all counts of the complaint. Main Street nevertheless was aggrieved by the court's decision because the court denied counterclaims to which Main Street was a party. Although Main Street is listed as an appellant on the appeal form and is included as a party to the appellants' brief, none of the claims of error raised and briefed on appeal pertains to Main Street or the court's disposition of the counterclaims. We conclude, therefore, that Main Street effectively has abandoned its appeal, and, in our discussion of the claims on appeal, we refer to Gremp and WCG collectively as "the defendants."

[2] The trial court rendered judgment for the defendants on the remaining counts of the complaint alleging vexatious litigation and breach of a fiduciary duty. The court also rendered judgment against the defendants on all counterclaims.

that the defendants' claims are either inadequately briefed or wholly unpersuasive on the basis of the record presented, and, accordingly, we affirm the judgment of the trial court.

The following facts, as found by the trial court, and procedural history are relevant to the defendants' claims. In 2010, Gremp organized RR One as a limited liability company with himself as its sole member. As of 2012, RR One was the record owner of two rental properties in Bridgeport. One property is a seven unit, multifamily residence located on a corner lot at 90 Adams Street and 175-77 Newfield Avenue (Newfield property). The other property is composed of three residential units and is located at 188-90 Deacon Street (Deacon property).

In October, 2012, Starboard and WCG, another limited liability company with Gremp as its sole member, executed documents to amend RR One's operating agreement. Pursuant to the amended operating agreement, Starboard, which made a capital contribution of $99,000, owned 99 percent of the newly constituted RR One, and WCG owned the remaining 1 percent on the basis of a capital contribution of $1000. The operating agreement further provided that no member of RR One was entitled to claim any individual interest in any of the property owned by RR One. After the agreement was executed, Gremp served as property manager for the Deacon and Newfield properties.

In 2015, RR One agreed to sell the Deacon property to Gremp for $140,000. RR One signed a sales contract on November 13, 2015, and Gremp signed the contract on November 15, 2015. Gremp planned to obtain a mortgage of $119,000 to help fund the purchase of the Deacon property. In January, 2016, the parties executed an addendum to the sales contract for the Deacon property. The addendum provided in relevant part: "[RR

One] shall provide [Gremp] with title in a form that complies with [Gremp]'s mortgage requirements. Specifically, should lender require title to remain with [RR One], [RR One] agrees to transfer 100 [percent] ownership of [RR One] to [Gremp] provided [RR One] disposes of the Newfield property prior to any such transfer of ownership." The addendum also provided that RR One would pay Gremp for certain outstanding management fees that were in dispute.

Prior to the closing on the Deacon property, Attorney Tyisha Toms, who represented Gremp, and Attorney Bill Gouveia, who represented RR One, discussed the mechanics of the transfer of title. Gouveia drafted a document that, if duly executed, would have assigned Starboard's membership interest in RR One to Gremp in the event that Gremp was unable to obtain financing. Two days before the closing date for the Deacon property, however, Gremp obtained a mortgage.

To obtain his mortgage, Gremp provided the lender with a copy of the 2010 operating agreement that listed Gremp as the sole member of RR One. Gremp, however, failed to inform the lender that the 2010 agreement had been superseded by the 2012 operating agreement. He did not provide the lender with a copy of the sales contract for the Deacon property and failed to disclose to the lender that he intended to purchase and take title to the property individually rather than on behalf of RR One. As the trial court explained, "[t]hrough these machinations, Gremp secured monies based on a mortgage on [the Deacon property] in the name of [RR One], an entity in which his interest was 1 percent under the 2012 agreement. He then used the mortgage proceeds to induce [RR One] to convey title to the [Deacon] property to [himself] individually." In other words, "unbeknownst to [RR One] and [Starboard], which owned 99 percent of [RR One], Gremp financed the purchase of [the Deacon property] with monies

obtained from a mortgage on [the Deacon property] in the name of his grantor, [RR One]." Gremp negotiated the mortgage in RR One's name without any aid from his attorney, Toms, and without her knowledge.

At the closing on January 22, 2016, Gremp took title to the Deacon property in his name individually. Because Gremp had been able to secure financing, the assignment of ownership of RR One that Gouveia had prepared as a contingency plan was not needed and never was delivered to Gremp or his attorney.

In connection with the closing of the Deacon property, Gremp executed a general release on behalf of himself and WCG to the benefit of Starboard and its individual members.[3] Under the terms of that release, Gremp and WCG waived all rights, "past, present or future . . . connected with, related to, or arising from ownership, right to purchase, management or other involvement" in RR One or the Newfield property, which RR One was under contract to sell to a third party, 175 Newfield Avenue, LLC, for $315,000. Gremp further agreed to "cooperate with the sale of [the Newfield property]." The release, which was signed only by Gremp, both individually and in his capacity as manager of WCG, also contained the following language: "The undersigned agree that the transfer of [RR One] takes effect December 31, 2015."[4]

Despite having released any and all claims with respect to the Newfield property, in March, 2016, Gremp and WCG commenced a lawsuit against Starboard and its individual members seeking, inter alia, compensatory damages for an alleged breach of the RR One

[3] Starboard and its individual members executed a separate, reciprocal general release of any and all claims against Gremp.

[4] Although its meaning is not entirely clear from the record, this language presumably pertains to the unexecuted contingency plan to assign ownership of RR One to Gremp in the event a transfer was needed for Gremp to secure a mortgage, which, as the court found, ultimately proved unnecessary.

operating agreement and to temporarily and permanently enjoin the sale of the Newfield property to anyone other than Gremp (March, 2016 action). In conjunction with the March, 2016 action, Gremp and WCG also recorded a lis pendens on the Bridgeport land records. Following an evidentiary hearing on March 30, 2016, the court, *Wenzel, J.*, denied the application for a temporary injunction, finding that Gremp and WCG had failed to demonstrate that they were subject to any irreparable harm or that they had a probability of success on the merits of any of their alleged causes of action. Following the court's refusal to grant a temporary injunction, Gremp and WCG withdrew the March, 2016 action and recorded a release of the lis pendens.

On March 31, 2016, Gremp sent the individual members of Starboard an e-mail indicating that, although he remained interested in purchasing the Newfield property himself and continued to believe that he had a case for monetary damages, he would cooperate in the sale of the Newfield property to a third party. That same day, however, Gremp filed an "Affidavit of Fact" on the Bridgeport land records claiming that he owned 100 percent interest in RR One. Gremp later contacted the attorney for the third party buyer of the Newfield property, to whom he again misrepresented the extent of his ownership of RR One and indicated that he might be able to obtain the Newfield property through litigation.

The sale of the Newfield property from RR One to the third party buyer closed on April 13, 2016. Proceeds in the amount of $5000 were placed in an escrow account pursuant to an indemnity agreement between RR One and the third party that required RR One to remove any encumbrances on the property and to hold the third party harmless for damages arising from any suit or demand related to any encumbrance.

On May 11, 2016, the plaintiffs commenced the action underlying the present appeal. The operative second

revised complaint contained six counts. Counts one and two were brought by Starboard against Gremp and WCG, and alleged, respectively, vexatious litigation and breach of their general release benefitting Starboard and its individual members. Count six was brought by Starboard against Gremp and alleged breach of a promissory note.[5] Counts three and four were brought by RR One against Gremp and WCG and alleged slander of title and intentional interference with a contract pertaining to the Newfield property. Count five was brought by both plaintiffs against WCG and alleged a breach of fiduciary duty. WCG and Gremp asserted numerous special defenses, including fraud, promissory estoppel, waiver, and accord and satisfaction. They also filed counterclaims alleging two counts of breach of contract against Starboard, and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and unjust enrichment against both plaintiffs.

On February 23, 2018, following a trial to the court, the court issued a memorandum of decision. The court found in favor of the defendants on counts one and five of the complaint, but in favor of the plaintiffs on the remaining four counts. The court further ruled in favor of the plaintiffs on the defendants' counterclaims, concluding without elaboration that the defendants had "failed utterly to establish any of the four counts [pleaded] . . . ." The court awarded Starboard $10,082.50 in damages on the basis of Gremp and WCG's breach of their general release and $2819.99 plus interest of 10 percent per year for Gremp's breach of the promissory note. The court awarded RR One the $5000

[5] On January 31, 2014, Gremp had received a personal loan from Starboard and executed a promissory note in the principal amount of $2819.99 with interest at a rate of 10 percent per year. According to the complaint, Gremp never made any payments on the note, despite demands, and the debt remained due and owing.

that remained in the escrow account plus 5 percent interest per year running from the closing date of the Newfield property. The court also found that RR One was entitled to recover common-law punitive damages based on it having prevailed on the slander of title and intentional interference counts.

The defendants filed a motion to reargue and for reconsideration, which the court denied on March 22, 2018. On April 10, 2018, the defendants filed the present appeal from the court's February 23, 2018 judgment.[6] A hearing was held on August 13, 2018, to determine the amount of punitive damages. The court awarded $35,000 in punitive damages, and the defendants amended their appeal to challenge that decision.

Before turning to the defendants' claims on appeal, we briefly set forth the applicable standard of review. "In a case tried [to the] court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . On appeal, we will give the evidence the most favorable reasonable construction in support of the [decision] to which it is entitled. . . . Moreover, we do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported." (Citation omitted; internal quotation marks omitted.) *Aldin Associates Ltd. Partnership* v. *Hess Corp.*, 176 Conn. App. 461, 484–85, 170 A.3d 682 (2017).

As previously indicated, the defendants have raised five claims of error on appeal. None of these claims,

[6] A judgment awarding common-law punitive damages is a final appealable judgment even if the amount of punitive damages have not yet been determined. See *Hylton* v. *Gunter*, 313 Conn. 472, 487, 97 A.3d 970 (2014).

which we address in turn, warrants an extensive discussion because they either are inadequately briefed or fail to demonstrate that the court's decision was legally incorrect or factually unsupported.

I

The defendants first claim that the court improperly determined that they breached the general release that they executed in favor of Starboard. This claim fails primarily due to the defendants' inadequate briefing.

The trial court found that Gremp and WCG breached their general release both by commencing the March, 2016 action seeking to enjoin the sale of the Newfield property and by recording a lis pendens and an affidavit of fact on the Bridgeport land records, thereby clouding the title to the Newfield property. The defendants do not dispute that the release they executed constituted a valid, binding contract in which they agreed to cooperate in the sale of the Newfield property and to waive any claims that they had to the property or against Starboard and its members. The defendants' principal argument on appeal focuses on the language in their release that provided that "[t]he undersigned agree that the transfer of [RR One] takes effect December 31, 2015." The defendants describe this as "clear and unambiguous language contained in the general release obligating [the] [p]laintiffs to transfer or assign [RR One] to Gremp . . . ." The defendants contend that they would not have had to initiate the 2016 action or record the lis pendens or affidavit of fact if the plaintiffs had satisfied their own contractual obligations.

If the defendants are claiming that the court was barred as a matter of law from finding them in breach of the general release because the plaintiffs themselves had breached the agreement, the defendants have failed to adequately brief this claim. The defendants' brief is

utterly devoid of any citations to or analysis of applicable contract principles or case law that would support their claim, let alone any application of law to the facts of this case. "We are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than [mere] abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed." (Internal quotation marks omitted.) *McClancy* v. *Bank of America, N.A.*, 176 Conn. App. 408, 414, 168 A.3d 658, cert. denied, 327 Conn 975, 174 A.3d 195 (2017).

Further, although the court did not discuss the language at issue in this claim in its memorandum of decision, it did deny the defendants' counterclaim alleging a breach of the release by Starboard, expressly finding that the plaintiffs "did not agree to transfer [RR One] to [Gremp] as claimed by the [d]efendants." The defendants do not challenge the court's ruling on their counterclaims in the present appeal nor do they argue that the court's factual finding was clearly erroneous. Because we conclude that the defendants have failed to adequately brief this claim, we decline to review it.[7]

II

Next, the defendants claim that the court improperly determined that they slandered RR One's title to the Newfield property by filing a lis pendens and an affidavit of fact on the land records in which Gremp asserts rights to the property. "Slander of title is a tort whereby

[7] To the extent that the defendants' claim is cognizable, it also appears unavailing on its face. The defendants have failed to explain or to analyze how the language in their general release, which begins, "[t]he undersigned agree," could have been legally binding on Starboard, which never signed the general release. The reciprocal release executed by the plaintiffs in favor of Gremp and WCG did not contain the same or similar language.

the plaintiff's claim of title [to] land or other property is disparaged by a letter, caveat, mortgage, lien or some other written instrument . . . . A cause of action for slander of title consists of any false communication which results in harm to interests of another having pecuniary value . . . ." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 202, 931 A.2d 916 (2007). The defendants suggest that, at trial, Gremp "provided colorable evidence that a reasonable and good faith belief existed for his claim of ownership of [RR One], which equated to an interest in [the Newfield property]." The court, however, as the trier of fact, was free to discredit such evidence. See *Langley* v. *Langley*, 137 Conn. App. 588, 598, 49 A.3d 272 (2012). Having thoroughly reviewed the defendants' arguments on appeal, we are not persuaded that the court's finding of a slander of title was either legally incorrect or factually unsupported. Accordingly, this claim fails.

III

The defendants' third claim is that the court improperly determined that they were liable for intentional interference with RR One's contract to sell the Newfield property to a third-party buyer. We are not persuaded.

"A claim for intentional interference with contractual relations requires the plaintiff to establish: (1) the existence of a contractual or beneficial relationship; (2) the defendant's knowledge of that relationship; (3) the defendant's intent to interfere with the relationship; (4) that the interference was tortious; and (5) [that there was] a loss suffered by the plaintiff that was caused by the defendant's tortious conduct." *Rioux* v. *Barry*, 283 Conn. 338, 351, 927 A.2d 304 (2007).

Although the defendants baldly state that the court's finding that they acted intentionally and with bad faith

to interfere with the Newfield property sale was erroneous, the defendants fail to brief this argument beyond mere abstract assertion. Accordingly, we deem this aspect of the claim abandoned. The remaining aspect of the defendants' claim is that there was insufficient evidence for the court to find that their interference caused any actual loss. That assertion, however, is without merit.

The court found that the "element of actual loss is satisfied, in that [RR One] incurred additional attorney's fees and costs, and lost the use of $5000, which remains in escrow." In challenging this finding, the defendants fail to address the additional attorney's fees and costs incurred, focusing entirely on the escrow funds and arguing only that the escrow could not be a basis for establishing an actual loss because "the $5000 escrow was established for reasons wholly unrelated to any acts of the [d]efendants." The loss the court attributed with respect to the escrow funds, however, had nothing to do with the *establishment* of the escrow or the original purpose for the funds; rather, it had to do with RR One's inability to utilize those funds because they *remained* in the escrow account due to the actions of the defendants and, thus, were unavailable to RR One. There simply is no merit to the defendants' claim.

IV

The defendants' fourth claim is that the trial court improperly awarded RR One interest on the $5000 that it was forced to hold in escrow as a result of the defendants' actions. In support of this claim, the defendants simply refer back to the arguments advanced in support of its third claim, which we have rejected. Accordingly, this claim fails for the reasons previously stated.

V

Finally, the defendants claim that the court improperly awarded punitive damages without providing the

defendants with adequate notice, citing Practice Book §§ 7-5, 14-7, and 14-20.[8] We are not persuaded.

The following additional facts are relevant to this claim. On March 27, 2018, the plaintiffs filed an affidavit of attorney's fees, a bill of costs, and a motion requesting the court to schedule a hearing in damages to determine the amount of punitive damages awarded. Subsequently, the defendants filed an objection arguing that the court should not conduct a hearing in damages "until the appeal period in this matter has expired . . . ." The defendants filed the present appeal on April 10, 2018. On April 20, 2018, the plaintiffs filed a caseflow request asking the court to schedule a status conference during the first week of May, 2018, to discuss how the court wanted to proceed with respect to determining the amount of the punitive damages award. When they failed to receive a response from the court, the plaintiffs filed a second caseflow request on July 26, 2018, seeking a status conference on or about August 10, 2018. The court issued notice the next day setting a hearing date of August 6, 2018. The defendants filed a motion for a continuance informing the court that counsel would be unavailable on that date and indicating that the plaintiffs' counsel consented to a continuance provided a hearing was scheduled prior to August 17, 2018. The court issued notice to the parties on August 2, 2018, that the matter would be heard on August 13, 2018. The

[8] Practice Book § 7-5 provides in relevant part: "The clerk shall give notice, by mail or by electronic delivery, to the attorneys of record and self-represented parties unless otherwise provided by statute or these rules, of all judgments, nonsuits, defaults, decisions, orders and rulings unless made in their presence. . . ."

Practice Book § 14-17 provides: "The judicial authority may, on its own motion or on the motion of a party and upon a showing of extraordinary circumstances, order a case to be assigned for immediate trial."

Practice Book § 14-20 provides: "Parties and counsel shall be present and ready to proceed to trial on the day and time specified by the judicial authority. The day specified shall be during the week certain selected by counsel."

hearing went forward on that date and was attended by counsel for all the parties. Following the hearing, the court awarded $35,000 in punitive damages.

The defendants claim that the court deprived them "of their due process rights to notice and the opportunity to adequately prepare" for the hearing to determine the amount of punitive damages. The defendants assert that notice of the August 13, 2018 hearing in damages was never properly given by the clerk's office, caseflow, or the court. They also assert that they were not provided with adequate notice of the issues the trial court intended to address. That argument is belied by the trial court record, which contains a proper notice of the hearing date. The notice stated in relevant part that the matter had been "set down for *a hearing* . . . ." (Emphasis added.) Further, the hearing was scheduled in response to the plaintiffs' caseflow request, which specifically had asked for a hearing regarding the punitive damages award. Accordingly, the defendants had notice of the hearing and knew that the purpose of the hearing would be to determine the amount of common-law punitive damages, which in Connecticut is limited to reasonable attorney's fees and nontaxable costs. See *Bodner* v. *United Services Automobile Assn.*, 222 Conn. 480, 492, 610 A.2d 1212 (1992). The plaintiffs had filed their affidavit of attorney's fees in March, 2018, so any argument by the defendants that they lacked an opportunity to prepare for the hearing is unfounded and that argument properly was rejected by the trial court when it was raised by the defendants' counsel at the hearing in damages. In short, the record demonstrates that the defendants had ample notice of the hearing on punitive damages, attended the hearing, and were afforded a meaningful opportunity to be heard on the merits. The defendants have failed to demonstrate that their due process rights were violated or that the court committed

reversible error in calculating the amount of punitive damages.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* WILLIAM HYDE BRADLEY
(AC 42061)
(AC 42062)

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

Syllabus

The defendant appealed to this court from the judgments of the trial court rendered in accordance with his conditional pleas of nolo contendere to charges of sale of a controlled substance and violation of probation. The charges stemmed from the discovery by probation officers of approximately thirty ounces of marijuana in the defendant's possession while they were conducting a home visit at his residence. At that time, the defendant was serving a sentence of probation in connection with a prior conviction of possession of marijuana with intent to sell. The defendant filed motions to dismiss the charges, claiming, inter alia, that his prosecution under Connecticut's statutes criminalizing the possession and sale of marijuana violated his rights under the equal protection clause of the United States constitution because such statutes were enacted for the illicit purpose of discriminating against persons of African-American and Mexican descent. Following a hearing on the motions, the trial court, relying on *State* v. *Long* (268 Conn. 508), in which our Supreme Court stated that a genuine likelihood of criminal liability is sufficient to confer standing to challenge a statute, determined that although the defendant is Caucasian, he had standing to raise an equal protection challenge to the statutes under which he was charged, concluding that the defendant did not necessarily need to be a member of the class discriminated against by a challenged statute to be personally aggrieved by the statute. The trial court, however, denied the defendant's motions, ruling that he could not prevail on the merits of his equal protection claim. On the defendant's consolidated appeals to this court, *held* that the defendant could not prevail on his claim that the trial court erred in denying his motions to dismiss: although the trial court misapplied the rule set forth in *Long* and thereby incorrectly concluded that the defendant did not necessarily need to be a member of the class discriminated against to be personally aggrieved by a challenged statute,

it nevertheless properly denied the motions to dismiss, as the defendant, who is not a member of the subject minority groups, lacked standing to raise his equal protection claim in his individual capacity because he did not demonstrate that he had a personal interest that had been or could ever be at risk of being injuriously affected by the alleged discrimination in the enactment of the relevant statute (§ 21a-277 [b]), and his claim did not allege a specific injury to himself beyond that of a general interest of all marijuana sellers facing conviction under that statute; moreover, a balancing of the factors set forth in *Powers* v. *Ohio* (499 U.S. 400) pertaining to third-party standing weighed against the defendant having standing to raise an equal protection claim on behalf of the racial and ethnic minorities who possessed the constitutional rights that were allegedly violated, as the relationship between the defendant and those third parties was not close, and there existed no hindrance to the ability of a criminal defendant who is a member of a racial or ethnic minority group charged under § 21a-277 (b) from asserting his or her own constitutional rights in his or her own criminal prosecution.

Argued September 19—officially released December 24, 2019

Procedural History

Information, in the first case, charging the defendant with the crimes of possession of one-half ounce or more of a cannabis-type substance within 1500 feet of a school and sale of a controlled substance, and information, in the second case, charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Middlesex, where the court *Keegan, J.*, denied the defendant's motions to dismiss; thereafter, the defendant was presented to the court on conditional pleas of nolo contendere to sale of a controlled substance and violation of probation; judgments in accordance with the pleas; subsequently, the state entered a nolle prosequi on the charge of possession of one-half ounce or more of a cannabis-type substance within 1500 feet of a school, and the defendant filed separate appeals to this court, which consolidated the appeals. *Affirmed.*

Naomi T. Fetterman, with whom was *Aaron J. Romano*, for the appellant (defendant).

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Michael Gailor*, state's attorney, and *Russell Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

SHELDON, J. In this consolidated appeal, the defendant, William Hyde Bradley, appeals from judgments that were rendered against him by the trial court following his entry of conditional pleas of nolo contendere to charges of sale of a controlled substance in violation of General Statutes § 21a-277 (b) and violation of probation in violation of General Statutes § 53a-32. On appeal, the defendant claims that the court erred in denying his motions to dismiss those charges, wherein he argued, inter alia, that his prosecution under Connecticut's statutes criminalizing the possession and sale of marijuana violated his rights under the equal protection clause of the United States constitution because such statutes were enacted for the illicit purpose of discriminating against persons of African-American and Mexican descent. We affirm the judgments of the court, concluding that it did not err in denying the defendant's motions to dismiss. We do so, however, on the alternative ground raised by the state that the defendant, as a nonmember of either group of persons against whom he claims that the challenged statutes were enacted to discriminate, lacked standing to bring such an equal protection claim. Accordingly, we do not reach the merits of the defendant's equal protection claim on this appeal.

The following procedural history and facts, as stipulated to by the parties, are relevant to our resolution of this appeal. On January 13, 2017, while the defendant was serving a sentence of probation in connection with a prior conviction of possession of marijuana with intent to sell, probation officers conducting a home visit

at his residence discovered approximately thirty ounces of marijuana in his possession. On the basis of that discovery, the state charged the defendant, in two separate informations, as follows: in docket number M09M-CR17-0210994-S, with one count each of possession of one-half ounce or more of marijuana within 1500 feet of a school in violation of General Statutes § 21a-279 (b) and sale of a controlled substance in violation of § 21a-277 (b); and in docket number MMX-CR14-0204977-T, with violation of probation in violation of § 53a-32.

The defendant moved to dismiss the charges by filing two parallel motions to dismiss, one in each docket number. He argued in those motions, inter alia, that his prosecution under Connecticut's statutes criminalizing the possession and sale of marijuana violated (1) his right to equal protection under the fourteenth amendment to the United States constitution because such statutes were enacted for the illicit purpose of discriminating against persons of African-American and Mexican descent; and (2) his right to equal protection under article first, § 20, of the constitution of Connecticut because the enforcement of such statutes had a disparate impact on persons of African-American descent. The state filed a memorandum of law in opposition to the defendant's motions to dismiss, to which the defendant responded by filing a reply. Following a hearing on the motions, the court ordered the parties to file supplemental memoranda addressing whether the defendant, whom the court had found to be Caucasian, had standing to bring an equal protection challenge to statutes on the ground that they had been enacted for the purpose of discriminating against members of racial or ethnic minority groups of which he was not a member. After the parties filed their supplemental memoranda, the court heard oral argument. Thereafter, in a memorandum of decision dated June 1, 2018, the court

agreed with the defendant that, regardless of his race or ethnicity, he had standing to bring an equal protection challenge to the statutes under which he was charged because there was a genuine likelihood that he, as a person so charged, would be convicted under those statutes. The court went on to rule, however, that the defendant could not prevail on the merits of his equal protection claim because even if he could prove that enforcement of the challenged statutes had a disparate impact on persons of African-American or Mexican descent, he could not prove that the legislature's true purpose in enacting those statutes was to discriminate against the members of either such group. Thereafter, upon conducting an analysis under *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992), the court also rejected the defendant's additional claim that his prosecution under the challenged statutes violated his rights under the equal protection clause of the Connecticut constitution, which he had based on the theory that that provision affords greater protection than its federal counterpart because violation of that provision, unlike the federal equal protection clause, can be established by proof of disparate impact alone.[1] Rejecting that argument, the court denied the defendant's motions to dismiss in their entirety.

On August 28, 2018, the defendant entered pleas of nolo contendere to charges of sale of a controlled substance and violation of probation, which were based on his alleged possession of, with intent to sell, the marijuana that the probation officers had found in his residence. The defendant's pleas, which were entered pursuant to General Statutes § 54-94a, were conditioned on preserving his right to appeal from his resulting convictions based on the trial court's prior denial of

[1] The court also rejected the defendant's claim that Connecticut law on the possession and sale of marijuana has been superseded by federal law. The defendant does not appeal from the court's rejection of this claim.

his motions to dismiss. The court thereafter sentenced the defendant as follows: on his conviction of sale of a controlled substance, he was sentenced to an unconditional discharge; and on his violation of probation, his probation was revoked, and he was sentenced to a term of five and one-half years of incarceration, execution suspended, and two years of probation. These appeals, later consolidated by order of this court, followed.[2]

On appeal, the defendant claims that the court improperly denied his motions to dismiss. He argues here, as he did before the trial court, that Connecticut's statutes criminalizing the possession and sale of marijuana were enacted for the illicit purpose of discriminating against persons of African-American and Mexican descent, and thus that his prosecution under those statutes violated the equal protection clause of the United States constitution. The defendant does not claim, however, that the court erred in denying his alternative equal protection claim under the Connecticut constitution.

In his brief, the defendant initially traces the history of cannabis cultivation from ancient times through the time of its criminalization in Connecticut in the 1930s. He then describes and documents what he claims to have been the pervasive atmosphere in this country in the 1930s of discrimination against racial and ethnic minority groups whose members were known or believed to use marijuana. Against this background, he argues that the federal marijuana prohibition that was enacted in that time frame, for the illicit purpose of discriminating against African-Americans and Mexicans, influenced several states, including Connecticut, to enact their own state laws criminalizing the possession and sale of marijuana for the same discriminatory purpose. The state disputes the defendant's contention

[2] The defendant filed two separate appeals from the trial court's judgments. The defendant filed a motion to consolidate the appeals, which was granted.

that Connecticut's statutes criminalizing the possession and sale of marijuana were enacted for the purpose of discriminating against racial and ethnic minorities. As a threshold matter, however, it argues, as it did before the trial court, that the court lacked subject matter jurisdiction over the defendant's equal protection claim because, as a Caucasian, he lacked standing to vindicate the equal protection rights of members of racial or ethnic minority groups to which he did not belong. The defendant counters by arguing, as he did successfully before the trial court, that regardless of his race or ethnicity, he had standing to raise his constitutional claim because, as a person charged under such allegedly unconstitutional statutes, he personally faced a genuine risk of being convicted thereunder if he were not permitted to prosecute his motions to dismiss.

Because a party's lack of standing to bring a claim implicates the trial court's subject matter jurisdiction over that claim, we must first address this jurisdictional issue. See *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 511, 518, 970 A.2d 583 (2009). We begin by reviewing some well established principles of standing. "Generally, standing is inherently intertwined with a court's subject matter jurisdiction. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time." (Internal quotation marks omitted.) *State* v. *Brito*, 170 Conn. App. 269, 285, 154 A.3d 535, cert. denied, 324 Conn. 925, 155 A.3d 755 (2017).

"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 is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a well-settled twofold determination: [F]irst, 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.) *State* v. *Long*, 268 Conn. 508, 531–32, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004).

To establish his standing to bring an equal protection challenge to the statutes under which he was charged in this case, the defendant does not claim that he was authorized by statute to bring such a challenge or that he had third-party standing to bring the challenge in a representational capacity on behalf of others. Instead, he claims only that he had standing to bring that challenge in his individual capacity, insisting that he is personally aggrieved by the statutes' unconstitutionality because he was charged with violating the statutes, and thus faced a genuine risk of being convicted thereunder. The court's conclusion on the issue of standing, which

the defendant relies on before us, was that "the defendant need not necessarily be a member of the class discriminated against [by a challenged statute] in order to be personally aggrieved by the statute. As our Supreme Court has repeatedly concluded 'a genuine likelihood of criminal liability or civil incarceration is sufficient to confer standing [to challenge a statute]'. . . . *State* v. *Long*, supra, 268 Conn. 532 . . . ." (Emphasis omitted.) The state disagrees, arguing that the defendant and the trial court misunderstood and misapplied the rule set forth in *Long*, which was never intended to empower litigants to raise claims in their individual capacity based on alleged violations of others' constitutional rights. For the following reasons, we agree with the state.

In *Long*, the defendant, who had been charged with assault in the second degree, was found not guilty by reason of mental disease or defect after a trial to the court. Id., 511. The court thereafter committed the defendant, on the basis of that finding, to the jurisdiction of the Commissioner of Mental Health and Addiction Services pursuant to General Statutes § 17a-582 (a) for initial confinement and examination. Id., 511–12. Following a mandatory psychiatric examination, the commissioner issued a report concerning the defendant's mental health. Id., 512. Following a hearing, the trial court ordered the defendant committed to the jurisdiction of the Psychiatric Security Review Board (board) for a period of five years, which was the maximum period for such a commitment because it was the maximum period for which he could have been incarcerated had he been convicted of and sentenced for the charged offense.[3] Id. Prior to the expiration of

[3] "The trial court acted pursuant to General Statutes § 17a-582 (e) (1) . . . which provides in relevant part: 'If the court finds that the acquittee is a person who should be confined or conditionally released, the court shall order the acquittee committed to the jurisdiction of the board and . . . confined in a hospital for psychiatric disabilities . . . for custody, care and treatment pending a hearing before the board pursuant to section 17a-583;

the defendant's initial five year commitment, however, the state's attorney filed a petition, pursuant to General Statutes § 17a-593 (c),[4] to have the defendant's commitment extended beyond its initial five year term. Id., 513. The trial court granted the state's petition, and thereafter recommitted him on three more occasions pursuant to § 17a-593 (c). Id.

After the state filed its fifth petition for recommitment in March, 2001, the board filed a report recommending further recommitment. Id., 513. The defendant moved to strike the board's report and to dismiss the state's petition, claiming, inter alia, that once an acquittee reaches the maximum term of his initial commitment, any order granting a state's petition for recommitment pursuant to § 17a-593 (c) is unconstitutional because, inter alia, it deprives the acquittee of his liberty without affording him the same right to mandatory periodic judicial review of his commitment as is afforded convicted prisoners who are civilly committed to psychiatric treatment facilities while they are incarcerated serving criminal sentences. Id. The trial court at first denied the defendant's motion to dismiss and granted the state's petition for recommitment. Id., 514. Later, however, upon reconsidering its ruling sua sponte, the court

provided (A) the court shall fix a maximum term of commitment, not to exceed the maximum sentence that could have been imposed if the acquittee had been convicted of the offense . . . .' General Statutes (Rev. to 1985) § 53a-35a provides in relevant part: 'For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and the term shall be fixed by the court as follows . . . (6) for a class D felony, a term not less than one year nor more than five years . . . .' " *State* v. *Long*, supra, 268 Conn. 512 n.8.

[4] General Statutes § 17a-593 (c) provides in relevant part: "If reasonable cause exists to believe that the acquittee remains a person with psychiatric disabilities . . . to the extent that his discharge at the expiration of his maximum term of commitment would constitute a danger to himself or others, the state's attorney, at least one hundred thirty-five days prior to such expiration, may petition the court for an order of continued commitment of the acquittee."

vacated its latest order of recommitment and granted the defendant's motion to dismiss the state's petition on the grounds, inter alia, that § 17a-593 (c) violated (1) his right to equal protection under the United States constitution because it treats acquittees, like the defendant, differently from convicted prisoners who are civilly committed at some point after they have been incarcerated, and (2) his right to equal protection under the constitution of Connecticut because it discriminates on the basis of mental disability. Id., 514–15. The court nevertheless found that the state had proven that the defendant "has a mental illness and would be a danger to others were he discharged from confinement," and thus ordered that he be held for sixty days to permit the state, if it chose to, to file a petition for civil commitment. (Internal quotation marks omitted.) Id., 515. The state appealed from the court's judgment of dismissal and challenged all grounds on which the court had found § 17a-593 (c) to be unconstitutional. Id., 516. The appeal was then transferred to our Supreme Court. Id., 516.

On appeal, the state claimed, inter alia, that the defendant lacked standing to bring either a state or a federal equal protection challenge to § 17a-593 (c). Id., 530. The state did not claim that the defendant lacked a specific, personal and legal liberty interest in any recommitment proceedings under § 17a-593 (c) but argued that his liberty interest had not been specially and injuriously affected by his recommitment because, as an acquittee, he had already received more judicial review of his commitment than a civil committee would have been entitled to receive. Id., 532. In concluding that the defendant had standing to raise his due process challenge, our Supreme Court reasoned as follows: "We previously have concluded that a genuine likelihood of criminal liability or civil incarceration is sufficient to confer standing. . . . [I]n the present case, the defendant

challenges the acquittee recommitment statute, § 17a-593 (c), which, if applied to him in the future, could subject him to further recommitment that adversely would affect his liberty interest. Moreover, the trial court specifically found at the most recent recommitment hearing that the defendant still suffered from a mental illness and posed a danger to others were he discharged from confinement. These factual findings demonstrate a genuine likelihood that the defendant is susceptible to the deprivation of his liberty interest in the future via recommitment in accordance with § 17a-593 (c). Consequently, because the defendant risks actual prospective deprivation of his liberty interest under the challenged statute, we conclude that he is classically aggrieved, and has standing to challenge the statute." (Citations omitted; internal quotation marks omitted.) Id., 532–33.

Understood against this background, *Long* cannot be read to empower parties to bring constitutional challenges in their individual capacity based on alleged violations of others' constitutional rights. Instead, it clarifies that, although a party has only individual standing to challenge alleged violations of his own constitutional rights, such challenges are not necessarily limited to ongoing violations of those rights, but may be directed to future violations of such rights that are reasonably likely to occur. Had the defendant in *Long* risked no "actual prospective deprivation of his liberty interest under the challenged statute" in the future, he would not have had standing to challenge the statute in his individual capacity on the basis of any risk, however genuine, enforcement of the statute may have posed to the rights of others.

To provide further context for the rule in *Long*, we also examine *Ramos* v. *Vernon*, 254 Conn. 799, 761 A.2d 705 (2000), which was cited in *Long*. The ordinance at issue in *Ramos* placed a nighttime curfew on minors

under the age of eighteen who were unaccompanied by a parent, a guardian or another adult having custody or control over them, and made it unlawful for any adult having custody of or control over a minor under the age of sixteen to allow the minor to violate the curfew ordinance. Id., 802–805. The fourteen year old minor plaintiff alleged that he had engaged in, and was continuing to engage in, conduct considered unlawful under the ordinance. Id., 810. The court concluded on that basis that if the minor's conduct continued in the future as he had pleaded that it would, then both he and his mother could be prosecuted under the statute in the future and thus could be injured by its alleged constitutional infirmity. Id., 810–11. Accordingly, the court ruled that both the mother and the minor had standing, in their individual capacities, to assert that the ordinance violated their constitutional rights because, in language later repeated by the court in *Long*, "a genuine likelihood of criminal liability or civil incarceration is sufficient to confer standing." (Internal quotation marks omitted.) Id., 809.

Long and *Ramos* are thus inapposite to the present case. First, the defendant in the present case was charged under § 21a-277 (b) at the time of the motions to dismiss, and thus the likelihood of its *future application* against him is not at issue, as it was in *Long* and *Ramos*. Second, the defendant in *Long* was a member of the class of insanity acquittees whose rights he sought to vindicate, just as the minor and his mother in *Ramos* were members of the classes of persons whose own rights were at genuine risk of being violated if they were prosecuted under the challenged statute. In the present case, by contrast, the defendant is not a member of the class whose rights he seeks to vindicate. The defendant in the present case is not now and will never be a member of either minority group against whom he claims the marijuana statutes were enacted

to discriminate, and, thus, he will never personally be discriminated against on the basis of race or ethnicity by virtue of application of § 21a-277 (b) to him. Simply put, the defendant's equal protection claim seeks to redress rights of racial minorities, a class of which he is not a member. Consequently, the defendant has not demonstrated that he has a personal interest that has been or could ever be at risk of being injuriously affected by the alleged discrimination in the enactment of the statute. The defendant's argument that § 21a-277 (b) was enacted with a racially discriminatory purpose does not allege a specific injury to himself beyond that of a general interest of all marijuana sellers facing conviction under the statute.[5]

[5] In support of the argument that he has standing to raise the equal protection claim on his own behalf, the defendant highlights the following quote from Justice Ginsberg's concurrence in *Bond* v. *United States*, 564 U.S. 211, 227, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011): "Our decisions concerning criminal laws infected with discrimination are illustrative. The Court must entertain the objection—and reverse the conviction—even if the right to equal treatment resides in someone other than the defendant." First, concurring opinions do not establish binding precedent. Second, we are not required to apply federal precedent in determining the issue of aggrievement. See *Burton* v. *Freedom of Information Commission*, 161 Conn. App. 654, 660, 129 A.3d 721 (2015), cert. denied, 321 Conn. 901, 136 A.3d 642 (2016).

The defendant also cites to federal cases in which the parties have been conferred with both standing in their own right and with third-party standing. See *Carey* v. *Population Services International*, 431 U.S. 678, 682–84, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (mail order retailer's business of selling contraceptives criminalized); *Craig* v. *Boren*, 429 U.S. 190, 192–97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976) (beer vendor's act of selling 3.2 percent beer to male patrons under age of twenty-one and females under age of eighteen prohibited); *Carhart* v. *Stenberg*, 972 F. Supp. 507, 520–21 (D. Neb. 1997) (doctor's performance of certain abortion procedure criminalized). Federal cases that analyze standing under article three of the federal constitution are not applicable to the issue of whether the defendant was aggrieved in his own right under Connecticut case law. See *Andross* v. *West Hartford*, 285 Conn. 309, 328–32, 939 A.2d 1146 (2008). We note, however, that these cases are readily distinguishable. Assuming without deciding that the parties in those cases would have been aggrieved under Connecticut law, the statutes at issue in *Carey*, *Craig*, and *Carhart* differ from § 21a-277 (b). The statutes in *Carey*, *Craig* and *Carhart* not only prohibited the conduct of the parties seeking standing, but also intertwined that sanctioned conduct

The trial court's conclusion that "the defendant need not necessarily be a member of the class discriminated against [by a challenged statute] in order to be personally aggrieved by the statute" is simply incorrect. First, although controlling case law on rare occasion has permitted litigants to establish standing by proving classical aggrievement *in a representative capacity* based on alleged violations of others' constitutional rights, it has never expanded the scope of classical aggrievement *in an individual capacity* to eliminate the requirement that the litigant himself be personally aggrieved by the alleged violation. See, e.g., *State* v. *Long*, supra 268 Conn. 531–32 (classical aggrievement includes requirement of "a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest" [internal quotation marks omitted]). Second, although the defendant has not claimed, and the trial court did not find, that he was classically aggrieved in a representative capacity by his prosecution under the challenged statutes, he has not in any event met the exacting requirements for the assertion of such a representational claim. The defendant expressly states in his reply brief that he does not claim to have third-party standing, and appropriately so, because third-party standing applies in limited circumstances that manifestly do not exist here.

Under federal law, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. . . . This rule assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation. . . . It represents a healthy concern that if the claim is brought by

with the rights of the third parties to access the goods or services at issue. In the present case, § 21a-277 (b) criminalizes the defendant's conduct in selling marijuana, but does not intertwine the criminalization of the defendant's actions in selling marijuana with the rights of a racial minority seller to be free from discrimination.

someone other than one at whom the constitutional protection is aimed . . . the courts might be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights . . . . We have not treated this rule as absolute, however, recognizing that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." (Citations omitted; internal quotation marks omitted.) *Kowalski* v. *Tesmer*, 543 U.S. 125, 129–30, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004).

In cases involving this principle, such as *Powers* v. *Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the United States Supreme Court explained that it has permitted parties to bring actions on behalf of third parties provided that the party makes two additional showings, beyond that of an article three injury: (1) "close relation to the third party" who possesses the right and (2) "some hindrance to the third party's ability to protect his or her own interests." Id., 410–11; see also *Kowalski* v. *Tesmer*, supra, 543 U.S. 130 (describing two additional factors in *Powers*).

With respect to the first factor, the United States Supreme Court explained that "in certain circumstances the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." (Internal quotation marks omitted.) *Powers* v. *Ohio*, supra 499 U.S. 413. This factor is more likely to weigh in favor of standing if the relationship between the third party and the litigant seeking standing is "one of special consequence." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 623 n.3, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989). For example, a doctor-patient relationship and an attorney-client relationship have

qualified as close relationships for this purpose, mainly due to the professionally intimate advice and decisions arising from such relationships. See, e.g., *United States Dept. of Labor* v. *Triplett*, 494 U.S. 715, 719–21, 110 S. Ct. 1428, 108 L. Ed. 2d 701 (1990) (attorney had standing to raise due process claims to fee restrictions on behalf of clients he represented in black lung benefit cases); *Singleton* v. *Wulff*, 428 U.S. 106, 117–18, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (physician "intimately involved" in women's abortion decision and thus "uniquely qualified" to litigate against statutory interference with that decision); *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (physician and Planned Parenthood official were effective advocates for persons seeking contraceptive advice with whom they had confidential professional relationships).

In the context of market access, sellers who asserted the rights of buyers seeking access to their market have been found to have a sufficiently close relationship with such buyers to give them standing to raise the buyers' claims. The United States Supreme Court in *Craig* v. *Boren*, 429 U.S. 190, 192–97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), held that a licensed vendor of 3.2 percent beer had standing to challenge the constitutionality of a statute that, in a gender discriminatory manner, prohibited the sale of 3.2 percent beer to males under the age of twenty-one and females under the age of eighteen. The court reasoned that the vendor might be deterred by the statutory sanctions thereby causing indirect harm to the rights of third parties and, accordingly, was permitted to act as an advocate for third parties seeking access to the market. Id., 195. Relying primarily on *Craig*, the United States Supreme Court in *Carey* v. *Population Services International*, 431 U.S. 678, 681–84, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977), held that a corporation engaged in the mail order retail sale of nonmedical contraceptive devices had standing on

its own behalf and on behalf of potential customers who sought access to its market to challenge the constitutionality of a statute criminalizing the distribution of contraceptives to anyone under the age of sixteen, prohibiting their distribution to anyone over the age of sixteen by anyone other than a licensed pharmacist, and banning the advertising and display of contraceptives. The court reasoned that the corporation "is among the vendors and those in like positions (who) have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function. . . . As such, [the corporation] is entitled to assert those concomitant rights of third parties that would be diluted or adversely affected should (its) constitutional challenge fail." (Citations omitted; internal quotation marks omitted.) Id., 683–84.

Those who act as advocates for the rights of others have also been held to have third-party standing. Thus, in *Eisenstadt* v. *Baird*, 405 U.S. 438, 440, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), the defendant, who had been convicted of providing a contraceptive device to a woman following a lecture on contraception, was held to have standing to challenge the statute that made it a felony for anyone other than a registered physician or registered pharmacist to distribute contraceptives. The court determined that the defendant's relationship with "those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so. The very point of [the defendant's] giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives." Id., 445.

In *Barrows* v. *Jackson*, 346 U.S. 249, 251–60, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), a Caucasian defendant, who was party to a racially restrictive covenant and

who was being sued for damages by the covenantors because she had conveyed her property to African-Americans, was held to have standing to challenge the enforcement of the covenant on the ground that it violated the equal protection rights of prospective African-American purchasers. The United States Supreme Court, in a later case, explained that "[t]he relationship [in *Barrows*] between the defendant and those whose rights he sought to assert was . . . between one who acted to protect the rights of a minority and the minority itself." *Eisenstadt* v. *Baird*, supra, 405 U.S. 445.

In *Powers*, the United States Supreme Court concluded that the defendant had standing to contest the use of peremptory challenges in a racially discriminatory manner regardless of whether the defendant and the excluded jurors were of the same race. *Powers* v. *Ohio*, supra, 499 U.S. 410–16. The court stated: "For over a century, this Court has been unyielding in its position that a defendant is denied equal protection of the laws when tried before a jury from which members of his or her race have been excluded by the State's purposeful conduct. The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . . [A defendant] does have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." (Citations omitted; internal quotation marks omitted.) Id., 404. After setting forth such principles, the court considered "whether a criminal defendant has standing to raise the equal protection rights of a juror excluded from service in violation of these principles." Id., 410. The court determined that the defendant and the excluded jurors shared a close relationship that began during voir dire and had a "common interest in eliminating racial discrimination from the courtroom." Id., 413. The court reasoned that the juror excluded on the basis of race suffers humiliation

and "may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard. This congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror." Id., 414.

The second factor in assessing third-party standing "involves the likelihood and ability of the third parties . . . to assert their own rights." Id., 414. The excluded jurors in *Powers* faced "daunting" obstacles to bringing an action on their own behalf, which included not only "the economic burdens of litigation" but the fact that "[p]otential jurors are not parties to the jury selection process and have no opportunity to be heard at the time of their exclusion. Nor can excluded jurors easily obtain declaratory or injunctive relief when discrimination occurs through an individual prosecutor's exercise of peremptory challenges." Id., 414. The facts in *Barrows* v. *Jackson*, supra, 346 U.S. 249, presented "a unique situation in which it is the action of the state court which might result in a denial of constitutional rights and in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Id., 257. The United States Supreme Court further reasoned that the covenantor in *Barrows* had the power under the racially discriminatory restrictive covenant to continue or end discrimination and was the only effective adversary of the restrictive covenant. Id., 258.

In *Singleton* v. *Wulff*, supra, 428 U.S. 117, there were "several obstacles" in a woman's path to challenging an abortion statute, such as privacy and imminent mootness. Although the obstacles were not "insurmountable" due to the ability to bring an action under a pseudonym and exceptions to the mootness doctrine, the court noted that there was little loss in terms of effective advocacy by permitting a physician to raise the claim. Id., 118; see also *Carhart* v. *Stenberg*, 972 F.

Supp. 507, 520–21 (D. Neb. 1997) ("the pregnant women who are the doctor's patients have significant obstacles to bringing suit on their own, such as a desire for privacy and the likelihood that their claims would be mooted by the time-sensitive nature of pregnancy and abortion").

We now examine these principles in the context of the present case. We conclude that a balancing of the factors, while bearing in mind the exceptional nature of third-party standing, weighs against the defendant having standing to raise a claim on behalf of classes of racial and ethnic minorities to which he does not belong. With respect to the factor of a close relationship, the defendant obviously does not have a professional or confidential relationship with the possessors of the right, such as the physician had with his patients in *Singleton* or the lawyer had with his clients in *Triplett*. The defendant does not raise a market access claim seeking to assert the rights of racial and ethnic minority marijuana purchasers similar to the claim of the beer vendor in *Craig* or the retail seller of contraceptives in *Carey*. In contrast to the relationship of trust that existed in *Powers* between the defendant and excluded jurors that began during voir dire, the defendant in the present case seeks to advocate for the rights of hypothetical persons with whom he has no relation. The interests of the defendant and those who possess the right are similar to the extent that we fairly may assume that neither wishes to be convicted under the statute. The defendant, however, has not made a showing that, in being charged with sale of a controlled substance, he sought to advocate on behalf of racial or ethnic minority sellers or purchasers. In fact, he expressly disavows such a purpose. Therefore, his actions in selling marijuana do not create a close relationship with the third parties in any way similar to the advocate in *Barrows*, who conveyed her property to

African-Americans in violation of a racially discriminatory covenant, or the advocate in *Eisenstadt*, who gave away a contraceptive device in order to challenge a statute criminalizing such action. Rather, the defendant in the present case expresses only a general interest in avoiding prosecution, independent of any relationship or connection to the possessors of the right he claims to have been violated. Therefore, it cannot be said that the defendant "is fully, or very nearly, as effective a proponent of the right as the [third party]." *Singleton* v. *Wulff*, supra, 428 U.S. 115.

The relationship between the defendant and the third parties is not close, but even if it were close, the importance of the ability of a minority marijuana seller to raise a claim on his or her own behalf is not diminished. In *Singleton* the plurality opinion stated: "Even where the relationship is close, the reasons for requiring persons to assert their own rights will generally still apply. If there is some genuine obstacle to such assertion, however, the third party's absence from court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." Id., 116. The daunting obstacles the excluded jurors faced in *Powers* to challenging the racially discriminatory use of preemptory challenges on their own behalf, such as the expense of litigation and the fact that they are not parties to the jury selection process, and the barriers discussed in *Singleton* to a women's ability to challenge an abortion statute, do not exist in the present case. See *Caplin & Drysdale, Chartered* v. *United States*, supra, 491 U.S. 624 n.3 ("[t]he second . . . factor [of hindrance] counsels against review . . . a criminal defendant suffers none of the obstacles discussed in [*Singleton* v.] *Wulff*, supra, 428 U.S. [116–117], to advancing his own constitutional claim"). In the criminal context, the state's proper presentment of an information initiates the case. *State* v. *Pompei*, 52 Conn.

App. 303, 307, 726 A.2d 644 (1999). It is axiomatic that criminal defendants are parties to their own criminal proceedings, and *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963), made the sixth amendment right to counsel applicable to state prosecutions through the due process clause of the fourteenth amendment. In the present case, the second factor overwhelmingly weighs against third-party standing because there exists no hindrance to the ability of a criminal defendant who is a member of a racial or ethnic minority group charged under § 21a-277 (b) from asserting his or her own constitutional rights in his or her own criminal prosecution.

Our conclusion that the defendant does not have third-party standing coincides with the purposes of the general rule under Connecticut law against third-party standing. Regarding the general principles of standing, this court has explained that "the requirement that a party have standing ensures that courts and parties are not hindered by suits brought to vindicate nonjusticiable interests, and protects the rights of others from being affected by precedential judicial decisions that do not involve the individuals or entities with the most at stake and may not have been contested with the appropriate diligence and vigor." *Third Taxing District* v. *Lyons*, 35 Conn. App. 795, 798, 647 A.2d 32, cert. denied, 231 Conn. 936, 650 A.2d 173 (1994). "Only members of a class whose constitutional rights are endangered by a statute may ask to have it declared unconstitutional. . . . Courts are instituted to give relief to parties whose rights have been invaded, and to give it at the instance of such parties; and a party whose rights have not been invaded cannot be heard to complain if the court refuses to act at his instance in righting the wrongs of another who seeks no redress." (Citations omitted; internal quotation marks omitted.) *Shaskan* v.

Waltham Industries Corp., 168 Conn. 43, 49–50, 357 A.2d 472 (1975).

For the foregoing reasons, we conclude that the defendant does not have standing to raise his equal protection claim. We therefore uphold the court's denial of the defendant's motions to dismiss on this dispositive alternative ground.

The judgments are affirmed.

In this opinion the other judges concurred.

JEAN-MARC JACQUES *v.* MURIEL JACQUES (AC 41789)

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

Syllabus

The plaintiff sought to recover damages from the defendant for breach of contract. Specifically, the plaintiff's complaint alleged that the defendant breached the parties' marital separation agreement by failing to disclose certain assets. Following a trial, the trial court rendered judgment in favor of the defendant, from which the plaintiff appealed to this court. On appeal, he claimed, inter alia, that the trial court erred by concluding that his action was barred by the applicable statute of limitations (§ 52-576 [a]) and determining that it lacked continuing jurisdiction to enforce the parties' separation agreement. *Held* that the plaintiff's appeal was moot; because the plaintiff failed to challenge an independent ground for the court's adverse ruling, namely, the court's determination that the plaintiff's breach of contract claim failed on the merits due to insufficient evidence that the defendant had breached the separation agreement, even if this court agreed with the plaintiff's claim that his action was not barred by the statute of limitations, there would be no practical relief that could be afforded to the plaintiff because of his failure to challenge the trial court's finding on the merits.

Argued October 21—officially released December 24, 2019

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the court,

Hon. Gerard I. Adelman, judge trial referee; judgment for the defendant, from which the plaintiff appealed to this court. *Appeal dismissed.*

Keith Yagaloff, for the appellant (plaintiff).

Brandon B. Fontaine, with whom, on the brief, was *C. Michael Budlong*, for the appellee (defendant).

Opinion

PER CURIAM. The plaintiff, Jean-Marc Jacques, appeals from the judgment of the trial court rendered in favor of the defendant, Muriel Jacques. On appeal, the plaintiff claims that the trial court erred by (1) concluding that his action was barred by the statute of limitations contained in General Statutes § 52-576 (a), (2) determining that it lacked continuing jurisdiction to enforce the parties' separation agreement, and (3) failing to construe the parties' separation agreement as a contract and to effectuate the intent of the parties to the contract. Because, however, the plaintiff has failed to challenge an independent ground for the trial court's ruling, the plaintiff's appeal is moot. Accordingly, we dismiss the plaintiff's appeal.[1]

The following facts and procedural history are relevant to the disposition of the plaintiff's appeal. In May, 2016, the plaintiff brought a breach of contract action against the defendant, alleging that she had breached the parties' marital separation agreement by failing to disclose assets. Paragraph 10 (h) of the separation agreement provided: "[A]ny assets over ten thousand and 00/100 ($10,000.00) dollars in fair market value that the [defendant] owns or has an equitable interest in at the time of the dissolution which are not shown by the [defendant] on her financial affidavit, shall, upon discovery by the other party, become [the plaintiff's]

[1] Because we dismiss the plaintiff's claims as moot, we do not reach the merits of the plaintiff's claims.

property without any defense interposed by the [defendant] whatsoever as to such claims of the other party." In his complaint, the plaintiff alleged that the defendant liquidated two annuities prior to the divorce. The plaintiff argued that the proceeds from these liquidated annuities, totaling $1,153,444.78, were undisclosed assets under paragraph 10 (h) of the separation agreement. The defendant denied the material allegations of the complaint and raised a number of special defenses, including that the plaintiff's claim was barred by the statute of limitations governing breach of contract actions, as provided in § 52-576 (a).[2] After trial, the court first determined that the plaintiff's action was barred by the statute of limitations. The court then found that there was insufficient evidence that the defendant had breached the separation agreement as alleged by the plaintiff and that there had been no failure to disclose assets by either party. Accordingly, the court rendered judgment in favor of the defendant. This appeal followed.

Before this court, the plaintiff argues that the trial court erred in a number of ways relating to the applicability of the statute of limitations. The plaintiff does not, however, challenge the trial court's determination that there was insufficient evidence to support his claim that the defendant had breached the separation agreement.

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on his claim, even if this court were to agree with the appellant on the issues that he does raise, we still would not be able to provide [him] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent

[2] General Statutes § 52-576 (a) provides in relevant part: "No action . . . on any simple or implied contract, or on any contract in writing, shall be brought but within six years after the right of action accrues . . . ."

bases for that ruling, the appeal is moot." (Internal quotation marks omitted.) *Parnoff* v. *Aquarion Water Co. of Connecticut*, 188 Conn. App. 153, 166, 204 A.3d 717 (2019).

In the present case, the trial court rendered judgment in favor of the defendant on two grounds. First, it determined that the separation agreement remained a contract beyond the judgment of the court dissolving the marriage and that the plaintiff's breach of contract claim was barred by the statute of limitations. Second, the court found that there was insufficient evidence that the defendant had breached the separation agreement, and, thus, the plaintiff's claim failed on the merits. On appeal, the plaintiff argues that his action was not barred by the statute of limitations because the separation agreement had been incorporated into the judgment by the court dissolving the marriage.[3] Because the plaintiff did not challenge the trial court's determination that he failed to prove a breach of contract, there is no practical relief that this court can grant to him. Thus, even if we agreed with the plaintiff's argument that his action is not barred by the statute of limitations, we would be unable to provide relief because the plaintiff failed to challenge the trial court's finding on the merits. See *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 210, 192 A.3d 406 (2018) ("[u]ndoubtedly, if there exists an unchallenged, independent ground to support a decision, an appeal from that decision would be moot, as this court could not afford practical relief even if the appellant were to prevail on the issue raised on appeal"). Thus, the plaintiff's appeal is moot and we are without subject matter jurisdiction.

The appeal is dismissed.

[3] The plaintiff relies on § 52-576 (c), which provides in relevant part: "The provisions of this section shall not apply to actions upon judgments of any court of the United States or of any court of any state within the United States . . . ."

JAMES CUNNINGHAM, SR. *v.* COMMISSIONER OF CORRECTION
(AC 42058)

Keller, Moll and Eveleigh, Js.

Syllabus

The petitioner, who had been convicted of the crimes of murder, carrying a pistol without a permit and criminal possession of a firearm in connection with the shooting death of the victim, sought a writ of habeas corpus, claiming that his trial counsel, C, had provided ineffective assistance by failing to conduct an adequate pretrial investigation into the petitioner's theory of self-defense and referring to the petitioner as a bully during closing argument. At the habeas trial, the petitioner testified regarding his version of the shooting, stating, inter alia, that during an altercation with the victim, his previously injured knee buckled when the victim punched him, causing him to fall to the ground, and, being unable to stand, he shot the victim when he reached for the petitioner's pistol. In addition, C testified regarding his extensive pretrial investigation, which included reviewing statements and recordings prior to trial, obtaining information from an investigator who was working on an ancillary matter, personally canvassing the neighborhood where the shooting occurred with an associate, interviewing every witness except for one and visiting the location where the body was found. C also testified that he believed that the petitioner did not have a valid self-defense claim in light of the evidence. The habeas court rendered judgment denying the habeas petition, concluding, inter alia, that the petitioner had not proven that C's pretrial investigation was inadequate or that there was a reasonable probability that, but for C's alleged deficient performance, the result of the trial would have been different. In reaching its conclusion, the court discredited the petitioner's testimony, finding it to be phony, and credited C's testimony. Thereafter, on the granting of certification, the petitioner appealed to this court. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly rejected his claim that C rendered ineffective assistance by failing to conduct an adequate pretrial investigation into his theory of self-defense: the petitioner failed to establish that C's performance was deficient, as the habeas court properly determined that the thorough pretrial investigation conducted by C was not deficient, the petitioner made only a bare allegation in his appellate brief that C failed to investigate the self-defense theory properly and did not specify what benefit additional investigation would have revealed, and, at the habeas trial, the petitioner did not present the testimony of the witness whom C did not interview, nor did he present any medical evidence regarding the

condition of his knee at the time of the shooting; moreover, given the weight of the evidence against the petitioner at his criminal trial, which included his own trial testimony that he shot the victim three times, disposed of the murder weapon and hid the victim's body, the petitioner failed to establish that he was prejudiced as a result of C's alleged deficient performance.

2. The habeas court properly rejected the petitioner's claim that C rendered ineffective assistance by referring to the petitioner as a bully during closing argument: C's use of the term bully during closing argument constituted sound trial strategy, and, therefore, it did not amount to deficient performance or fall below an objective standard of reasonableness, as C, given the evidence before the jury of a litany of oppressive conduct by the petitioner, chose to use that term in an effort to bond with the jury by stating the obvious and using a term that the jury understood; moreover, given the weight of the evidence against the petitioner at his criminal trial, it was not reasonably probable that, but for C's alleged deficient performance, the result of the criminal trial would have been different, and, therefore, the habeas court properly determined that the petitioner had not proven prejudice.

Argued October 16—officially released December 24, 2019

Procedural History

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

James E. Mortimer, assigned counsel, for the appellant (petitioner).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

PER CURIAM. The petitioner, James Cunningham, Sr., appeals from the judgment of the habeas court denying his amended petition for a writ of habeas corpus. The petitioner claims that the court improperly

rejected his claims that his trial counsel rendered ineffective assistance by (1) failing to conduct an adequate pretrial investigation into the petitioner's theory of self-defense, and (2) referring to the petitioner as a "bully" during closing argument.[1] We affirm the judgment of the habeas court.

The following underlying procedural history and facts, which are set forth in more detail on direct appeal, are relevant to our resolution of this appeal. See *State* v. *Cunningham*, 168 Conn. App. 519, 146 A.3d 1029, cert. denied, 323 Conn. 938, 151 A.3d 385 (2016). On the night of August 5, 2012, an altercation arose between the petitioner and the victim, who were friends and who had been living together for several weeks. Id., 522. The petitioner shot the victim three times, with the fatal shot to the chest causing the victim to die within minutes. Id. The petitioner's neighbor helped him wrap the victim's body in a tarp and attach it to a metal rack on the back of the petitioner's Hummer. Id. The petitioner threw the murder weapon in a river and drove the Hummer to his grandmother's house, concealing it in a hedge. Id. At his criminal trial, the petitioner admitted to the events of the shooting and to the subsequent concealing of the body, but testified that he had shot the victim in self-defense. Id., 523. According to the petitioner's version of events, he shot the victim after the victim attacked him and tried to grab his pistol. Id. Two theories of the defense offered at trial were self-defense and that the petitioner had acted at most with the appropriate mens rea for manslaughter, but not murder. Id. Neither the state nor the defense requested an instruction on a lesser included offense. Id. Following a jury trial, the petitioner was found guilty

[1] The petitioner raised additional claims in his appellate brief, but he expressly abandoned those claims at oral argument. Therefore, we do not review these claims. See *Stoner* v. *Stoner*, 163 Conn. 345, 359, 307 A.2d 146 (1972).

of murder in violation of General Statutes § 53a-54a (a) and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). Id., 521. The petitioner subsequently pleaded guilty to a charge of criminal possession of a firearm in violation of General Statutes § 53a-217 (a). Id., 527. The court sentenced the petitioner to a term of sixty years of incarceration. Id. The petitioner's conviction was affirmed on direct appeal. Id., 521, 538.

Thereafter, the petitioner filed an amended petition for a writ of habeas corpus alleging ineffective assistance of his trial counsel, Matthew Couloute. The court denied the petition, reasoning, inter alia, that the petitioner had not proven either deficient performance or prejudice on his claims of inadequate pretrial investigation and improper use of the word "bully" during closing argument. The court granted the petitioner's petition for certification to appeal. This appeal followed.

We first set forth our standard of review. "In *Strickland* v. *Washington*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the underlying] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, [the petitioner] must demonstrate that

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . 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." (Citation omitted; internal quotation marks omitted.) *Stephen J. R.* v. *Commissioner of Correction*, 178 Conn. App. 1, 7–8, 173 A.3d 984 (2017), cert. denied, 327 Conn. 995, 175 A.3d 1246 (2018).

I

The petitioner claims that the court improperly rejected his claim that his trial counsel rendered ineffective assistance by failing to investigate adequately a self-defense theory. We disagree.

The court determined that although the count of the petition alleging inadequate pretrial investigation was "very unspecific," the petitioner had not proven either inadequate pretrial investigation[2] or a reasonable probability that the result of the trial would have been different. At the habeas trial, the petitioner presented only the testimony of himself and Couloute. The court credited Couloute's testimony and found the petitioner's testimony to be "phony."

[2] "Inadequate pretrial investigation can amount to deficient performance, satisfying prong one of *Strickland*, as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation. . . . Although we acknowledge that counsel need not track down each and every lead or personally investigate every evidentiary possibility before choosing a defense and developing it . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. . . . In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." (Citations omitted; internal quotation marks omitted.) *Taft* v. *Commissioner of Correction*, 159 Conn. App. 537, 546–47, 124 A.3d 1, cert. denied, 320 Conn. 910, 128 A.3d 954 (2015).

During the habeas trial, the petitioner explained his version of the relevant events as follows. After the victim punched him, the petitioner's knee, which had been injured previously, buckled, and he fell to the ground. He was unable to stand and believed that he needed to shoot the victim when the victim reached for the petitioner's pistol. After placing the victim on the back of his Hummer with help from a neighbor, the petitioner intended to take the victim to the hospital, but took an "offbeat, weird [route] . . . ." When the victim fell off the Hummer, the petitioner became frightened, returned the victim's body to the Hummer, and drove to his grandmother's house instead of to the hospital because he "was scared that [the victim] passed away."

The court credited Couloute's testimony regarding his extensive pretrial investigation, which included reviewing statements and recordings prior to trial, obtaining information from an investigator who was working on an ancillary matter, personally canvassing the neighborhood with an associate, interviewing every witness except for one, and visiting the location where the body was found. Couloute testified that due to the number of witnesses, he hired an attorney to assist him at trial. The court noted that Couloute testified that he thought there was no valid self-defense claim. He testified that in light of the evidence that the petitioner was able to return the victim's body to the back of the Hummer himself, it seemed "ridiculous" to tell the jury that he could not stand during the altercation with the victim and was forced to shoot the victim in self-defense. The court further concluded that the petitioner failed to prove prejudice because there existed no reasonable probability that the result at trial would have been different.

After an examination of the record, we conclude that the court properly determined that the thorough pretrial investigation conducted by Couloute was not deficient.

In his appellate brief, the petitioner makes only a bare allegation that Couloute failed to investigate the self-defense theory properly and does not specify what benefit additional investigation would have revealed. At the habeas trial, the petitioner did not present the testimony of the one witness whom Couloute did not interview, nor did he present any medical evidence regarding the condition of his knee at the time of the shooting. "The burden to demonstrate what benefit additional investigation would have revealed is on the petitioner." *Holley* v. *Commissioner of Correction*, 62 Conn. App. 170, 175, 774 A.2d 148 (2001). We agree with the habeas court that the petitioner has not proven deficient performance.

Additionally, given the weight of the evidence against the petitioner, which included his own trial testimony that he shot the victim three times, disposed of the murder weapon, and hid the body, we agree with the habeas court that the petitioner failed to establish prejudice under *Strickland*.

II

The petitioner also claims that the court improperly rejected his claim that Couloute's description of the petitioner during closing argument as a "bully" constituted ineffective assistance of counsel. We disagree.

The court concluded that Couloute's use of the term "bully" during closing argument constituted sound trial strategy and, therefore, did not amount to deficient performance. The court detailed a list of behaviors exhibited by the petitioner, which were in evidence at the underlying criminal trial, many of which occurred in the weeks leading up to the underlying incident and most of which the petitioner testified to himself at his criminal trial. The court explained that the word bully was "the least offensive" term Couloute could have used "given the litany of oppressive conduct before the jury." The court concluded that in using the term,

Couloute "was attempting to bond with the jury by admitting the obvious. He then wove in the common belief that the way to confront a bully is to punch him in the head. [Couloute] added to this common belief that when knocked to the ground the petitioner was really scared. . . . Given the overwhelming evidence against [the petitioner] . . . Couloute made a very good summation which did not fall below the standard."

We agree with the court that Couloute's closing argument did not fall below an objective standard of reasonableness. The court made clear that Couloute chose to use the word bully in an effort to bond with the jury by stating the obvious, using a term that the jury understood. In light of the evidence, we agree with the court's reasoning in this regard. "[J]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Mukhtaar* v. *Commissioner of Correction*, 158 Conn. App. 431, 449, 119 A.3d 607 (2015).

The court also concluded that it was not reasonably probable that the result at trial would have been different. The court reasoned: "The petitioner's trial testimony was contradicted by witnesses to the event, his disposal of the gun and the body was strong evidence of consciousness of guilt and his declaration of motive to his cousin shortly after the shooting are what got the petitioner convicted of murder. And if his demeanor and claims appeared as phony as his testimony during the habeas trial, the jurors were fully justified in disregarding it." Given the weight of the evidence against

the petitioner at his criminal trial, we conclude that the court properly determined that the petitioner had not proven the prejudice prong of *Strickland*.

The judgment is affirmed.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 195

MEMORANDUM DECISIONS

STATE OF CONNECTICUT *v.* THOMAS TANNER
(AC 42580)

Alvord, Prescott and Lavery, Js.

Submitted on briefs December 9—officially released December 24, 2019

Defendant's appeal from the Superior Court in the judicial district of Litchfield at Torrington, *Danaher*, *J.*

Per Curiam. The judgments are affirmed.

FELIPE ALONSO *v.* CONSUELO MUNOZ
(AC 42100)

Lavine, Prescott and Bright, Js.

Argued December 4—officially released December 24, 2019

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

Per Curiam. The judgment is affirmed.

DARRIN ANDREW LA MORTE
v. TOWN OF DARIEN ET AL.
(AC 42086)

DiPentima, C. J., and Elgo and Devlin, Js.

Argued November 19—officially released December 24, 2019

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Edward R. Karazin, Jr.*, judge trial referee.

Per Curiam. The judgment is affirmed.

RANDAL LICARI *v.* COMMISSIONER OF CORRECTION
(AC 42197)

Prescott, Bright and Moll, Js.

Argued December 11—officially released December 24, 2019

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Kwak*, *J.*

Per Curiam. The appeal is dismissed.

STATE OF CONNECTICUT *v.* TALIA COLON
(AC 40095)

Lavine, Keller and Devlin, Js.

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

Defendant's appeal from the Superior Court in the judicial district of Waterbury, *Cremins*, *J.*

Per Curiam. The judgment is affirmed.

ASHLEY LYNN ROSSELL *v.* CARLO ENRIQUE ROSSELL
(AC 42290)

Keller, Elgo and Bright, Js.

Argued December 9—officially released December 24, 2019

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Heller*, *J.*

Per Curiam. The judgment is affirmed.

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NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

TANF Caseload Reduction Report

Pursuant to federal regulations at 45 CFR § 261.40 et seq., the Connecticut Department of Social Services is seeking public review and comment on the methodology and the case number estimates used in its Temporary Assistance for Needy Families (TANF) Caseload Reduction Report to calculate the state's TANF Work Participation Rate for Federal Fiscal Year 2020.

The federal TANF block grant includes specific performance expectations and requirements to help federal and state government measure program success. All states are required to meet specific work participation rates. Federal law requires work participation rates, which reflect the percentage of families receiving TANF assistance that must be engaged in federally-defined work activities.

To ensure that states receive credit for families that have become self-sufficient, Congress created the caseload reduction credit. States must complete form ACF -202, the Caseload Reduction Report, and provide the public with an opportunity to comment on its methodology and estimates. The reduction report provides an analysis of monthly caseload, case closure, and application activity, including activity related to changes in eligibility criteria, to arrive at the estimated impact of eligibility changes on the state's average assistance caseloads in FFY 2020 (October 1, 2019 – September 30, 2020).

The caseload reduction credit reduces the required work participation rate that a state must meet for a given fiscal year. It reflects the net percentage point reduction in the state's caseload in the prior fiscal year as compared to the caseload in base year FFY 2005. The Deficit Reduction Act of 2005 recalibrated the base year to be Federal Fiscal Year 2005. Thus, the caseload reduction credit for FFY 2020 reduces the state's work participation rate for that fiscal year based on the caseload decline in the prior year, FFY 2019, compared to FFY 2005.

Statement of Purpose: To solicit public comments on the Caseload Reduction Report in accordance with federal TANF regulations.

Written comments on Connecticut's Caseload Reduction Report must be received by the Department by December 30, 2019, attention: Peter Hadler, Program Administration Manager, Department of Social Services, 55 Farmington Avenue, Hartford, CT 06105 or by email to peter.hadler@ct.gov.

A copy of the draft report is available at no cost upon request to the Department, by email to peter.hadler@ct.gov. The final report will also be available on the web at http://portal.ct.gov/dss.

NOTICE OF INTENT TO APPLY FOR A STATE CERTIFICATE OF AFFORDABLE HOUSING COMPLETION

Notice is hereby given that the Town of Newington has the intent of applying to the State of Connecticut Department of Housing for a ''State Certificate of Affordable Housing Completion'' under Section 8-30g of the Connecticut General Statutes.

The proposed application, including all supporting documentation, is available for public inspection in the Office of the Town Planner at Newington Town Hall, 131 Cedar Street, Newington, CT 06111 from 8:30 am to 4:30 pm weekdays.

Written comments on the application may be submitted to the Town Planner within 20 days of the publication of this Notice. A copy of all written comments received and responses by the municipality to comments received will be included as part of the application.

If, within the 20 day comment period, a petition signed by at least 25 Newington residents is filed with the Town Clerk requesting a public hearing with respect to the proposed application, the Town Council shall hold such a hearing.

Craig Minor, AICP
Town Planner

NOTICES

Notice of Suspension of Attorney and Appointment of Trustee

Pursuant to Practice Book Section 2-54, notice is hereby given that on November 20, 2019, in Docket Number HHD-CV19-6108777 (juris# 425881) of West Hartford, CT was suspended from the practice of law for a period of 35 months, effective immediately.

1. Attorney Anthony D. Collins, Juris No. 403959, of 55 Town Line Road, Wethersfield, CT 06109, is hereby appointed as Trustee to take such steps as are necessary to protect the interests of Respondent's clients, inventory the client files, receive the business mail, and take control of Respondent's clients' funds, IOLTA, and all fiduciary accounts. The Trustee shall not make any disbursements from said accounts without the prior authorization of the Court. The Trustee shall notify all active clients of the Respondent's suspension and the need to arrange for their self-representation or successor counsel.
2. The Respondent shall not deposit to, disburse any funds from, withdraw any funds from, or transfer any funds from, any clients' funds, IOLTA, or fiduciary accounts.
3. The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys).
4. The Respondent shall cooperate with the Trustee in all respects.
5. The Respondent's failure to comply with this order shall be considered misconduct and may subject the Respondent to additional discipline.

David Sheridan
Presiding Judge

Electronic Publication of Orders of Notice in Civil and Family Cases

The Judicial Branch has created a Legal Notices page on the Judicial Branch website for orders of notice by publication issued by the court in civil and family cases. This new web page will be available January 2, 2020.

Historically, such notices have been ordered to be published in a newspaper. The new Legal Notices webpage will allow parties, when ordered by the court, to send their orders of notice to the Judicial Branch for publication on the Judicial Branch's website at no cost. Names published on the Legal Notices webpage will be searchable online. It is expected that this will save a great deal of time and expense, and provide greater accuracy and broader notice than newspaper publication.

FAQs for Legal Notice by Publication will be posted on the Judicial Branch website. Questions may be sent to **LegalNotice@jud.ct.gov**.

Hon. Patrick L. Carroll III
Chief Court Administrator

Revised Law Journal Deadlines for Issues Published January 2020 through December 2020

To submit material to the Connecticut Law Journal please send a Word file to: COLPLJ@JUD.CT.GOV

The deadline for submitting material is Wednesday at noon for publication in the Law Journal on the Tuesday six days later.

If one or more holidays fall within the 6 day time period, the deadline will change as noted in bold type in the following deadline listing:

Law Journal Publication Date (every Tuesday)	Deadline Date (at 12:00 Noon)
January 7, 2020	**Tuesday December 31, 2019**
January 14, 2020	Wednesday January 8, 2020
January 21, 2020	**Tuesday January 14, 2020**
January 28, 2020	Wednesday January 22, 2020
February 4, 2020	Wednesday January 29, 2020
February 11, 2020	Wednesday February 5, 2020
February 18, 2020	**Monday February 10, 2020**
February 25, 2020	Wednesday February 19, 2020
March 3, 2020	Wednesday February 26, 2020
March 10, 2020	Wednesday February 4, 2020
March 17, 2020	Wednesday March 11, 2020
March 24, 2020	Wednesday March 18, 2020
March 31, 2020	Wednesday March 25, 2020
April 7, 2020	Wednesday April 1, 2020
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April 21, 2020	Wednesday April 15, 2020
April 28, 2020	Wednesday April 22, 2020
May 5, 2020	Wednesday April 29, 2020
May 12, 2020	Wednesday May 6, 2020
May 19, 2020	Wednesday May 13, 2020
May 26, 2020	**Tuesday May 19, 2020**
June 2, 2020	Wednesday May 27, 2020
June 9, 2020	Wednesday June 3, 2020
June 16, 2020	Wednesday June 10, 2020
June 23, 2020	Wednesday June 17, 2020
June 30, 2020	Wednesday June 24, 2020

July 7, 2020	**Tuesday June 30, 2020**
July 14, 2020	Wednesday July 8, 2020
July 21, 2020	Wednesday July 15, 2020
July 28, 2020	Wednesday July 22, 2020
August 4, 2020	Wednesday July 29, 2020
August 11, 2020	Wednesday August 5, 2020
August 18, 2020	Wednesday August 12, 2020
August 25, 2020	Wednesday August 19, 2020
September 1, 2020	Wednesday August 26, 2020
September 8, 2020	**Tuesday September 1, 2020**
September 15, 2020	Wednesday September 9, 2020
September 22, 2020	Wednesday September 16, 2020
September 29, 2020	Wednesday September 23, 2020
October 6, 2020	Wednesday September 30, 2020
October 13, 2020	**Tuesday October 6, 2020**
October 20, 2020	Wednesday October 14, 2020
October 27, 2020	Wednesday October 21, 2020
November 3, 2020	Wednesday October 28, 2020
November 10, 2020	Wednesday November 4, 2020
November 17, 2020	**Tuesday November 10, 2020**
November 24, 2020	Wednesday November 18, 2020
December 1, 2020	**Tuesday November 24, 2020**
December 8, 2020	Wednesday December 2, 2020
December 15, 2020	Wednesday December 9, 2020
December 22, 2020	Wednesday December 16, 2020
December 29, 2020	**Tuesday December 22, 2020**