CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXX No. 34 February 19, 2019 184 Pages

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CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
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The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

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CONNECTICUT REPORTS

Vol. 330

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

INDEPENDENT PARTY OF CT—STATE CENTRAL ET AL. *v.* DENISE W. MERRILL, SECRETARY OF THE STATE, ET AL.
(SC 20165)

Robinson, C. J., and Palmer, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 9-372 [6]), " '[m]inor party' means a political party or organization which is not a major party and whose candidate for the office in question received at the last-preceding regular election for such office . . . at least one per cent of the whole number of votes cast for all candidates for such office at such election . . . ."

Pursuant further to statute (§ 9-374), "no authority . . . having jurisdiction over the conduct of any election shall permit the name of a candidate of [a minor] party for any office to be printed on the official ballot unless at least one copy of the party rules regulating the manner of nominating a candidate for such office has been filed in the office of the Secretary of the State at least sixty days before the nomination of such candidate," and those "[p]arty rules shall not be effective until sixty days after [their] filing . . . ."

The plaintiffs, a faction of this state's Independent Party based in Danbury and its officers, brought the present action seeking, inter alia, a judgment declaring that the statewide Independent Party is governed by a set of bylaws drafted in 2006 and not, as claimed by the defendants T and R, the officers of another faction of this state's Independent Party based in Waterbury, a separate set of bylaws drafted in 2010. In 2003, T and certain other individuals formed the Waterbury faction for the purpose of endorsing candidates for municipal elections. In 2006, the head of the Danbury faction of this state's Independent Party, F, joined with T in order to petition for statewide offices but failed to obtain a sufficient number of signatures to gain access to the ballot. Later that year, F and L, together with one other person, filed a set of bylaws with the named defendant, the secretary of the state, along with a form designating themselves as officers of the State Central Committee of the Independent Party of Connecticut. In 2008, F and T again joined together, this time with the goal of supporting the candidacy of Ralph Nader for president of the United States. In order to accomplish this, F and T filed a form with the secretary of the state designating themselves as the agents of the Independent Party and agreed to the creation of a new set of statewide bylaws. After Nader received greater than one percent of the votes cast in the 2008 presidential election, the secretary of the state certified the Independent Party as a statewide minor party pursuant to § 9-372

(6). T, along with one other person, subsequently drafted a new set of bylaws, which was later unanimously ratified in a publicly noticed meeting of registered Independent Party members in 2010. F received an advance copy of the proposed bylaws, attended that meeting, and did not object to them. The 2010 bylaws were then filed with the secretary of the state, and no objection was received within the sixty day period required under § 9-374. After a dispute in 2012, the Waterbury faction filed a separate action seeking placement of its candidates on the ballot in the general election but then withdrew its action after the trial court denied its motion for a temporary order of mandamus. Notwithstanding that separate action, the 2010 bylaws were used to govern caucuses, the nomination of candidates, and the election of party officers from 2010 to 2014 without objection by the plaintiffs. In 2016, the Danbury and Waterbury factions held separate events for the purpose of nominating Independent Party candidates, and, when competing nominations were made, the secretary of the state declined to accept either nomination for placement on the ballot. On the eve of trial in the present case, T and R filed a motion for permission to amend their answer and assert a counterclaim seeking a judgment declaring that they were the rightful officers of the Independent Party, along with certain special defenses alleging, inter alia, that the plaintiffs had waived their right to contest the 2010 bylaws. The trial court granted T and R's motion following the close of evidence. Shortly before a memorandum of decision was due pursuant to the statute (§ 51-183b) requiring trial judges to render judgment within 120 days of the date that the trial concluded, the trial court requested a sixty day extension from the parties. The plaintiffs objected to that request, and, shortly thereafter, the trial court ordered supplemental briefing and arguments regarding whether the court had subject matter jurisdiction over the case. The trial court subsequently issued a written memorandum of decision in which it concluded that it had jurisdiction and found the facts in favor of T and R on the both the complaint and the counterclaim. In reaching its conclusion, the trial court rejected the plaintiffs' argument that the 2012 decision denying the request for a temporary order of mandamus was entitled to preclusive effect. The trial court further found that T and R had proven, by a preponderance of the evidence, that the plaintiffs have waived any right they may have had to challenge the validity of the 2010 bylaws. The trial court rendered judgment for the defendants and ordered the secretary of the state to accept only those candidate endorsements made pursuant to the 2010 bylaws. From that judgment, the plaintiffs appealed. *Held*:

1. The trial court issued a timely memorandum of decision under § 51-183b, and, accordingly, that statute did not operate to deprive the trial court of personal jurisdiction over the parties; notwithstanding the plaintiffs' objection to the trial court's request for an extension, the trial court's order requiring supplemental briefing and arguments to address a colorable issue pertaining to subject matter jurisdiction, which was issued

before the 120 day decision period lapsed, had the effect of stopping the decision period and restarting it after supplemental arguments were heard.

2. The trial court properly determined that, under § 9-374, the 2010 bylaws were the effective party rules of the statewide Independent Party; although there was nothing in the language of § 9-374 that would have expressly precluded the filing of party rules before Nader received 1 percent of the vote as a statewide candidate in 2008, other related statutory provisions, including the statutory definition of "minor party" set forth in § 9-372 (6), indicated that the Independent Party did not exist as a minor party for purposes of state election law until 2008, and, therefore, the 2006 bylaws simply had no effect with respect to the obligations of the secretary of the state.

3. The trial court properly declined to give preclusive effect to the decision denying the Waterbury faction's motion for a temporary order of mandamus in the 2012 action; that decision, which was based on a finding that the Independent Party did not follow the amendment procedures provided in the 2006 bylaws in adopting the 2010 bylaws, did not constitute a final judgment under the doctrine of res judicata or collateral estoppel, as it was issued on an expedited basis and specifically emphasized that it was tentative in nature and not a final judgment on the merits.

4. The trial court's factual finding, made in connection with the defendants' special defense of waiver, that the plaintiffs had waived any objection to the use of the 2010 bylaws to govern Independent Party proceedings was not clearly erroneous; there was ample evidence in the record to support the trial court's factual finding, as the trial court properly credited evidence that T and F actively worked together to form a statewide party in 2008, filed joint forms on behalf of the Independent Party, and discussed the proposed 2010 bylaws, which were later unanimously adopted, filed with the secretary of the state, and used without objection by the plaintiffs.

5. The plaintiffs could not prevail on their unpreserved constitutional claim that the trial court's decision improperly interfered with the Independent Party's right to choose its own candidates, as the plaintiffs induced the claimed error by naming the secretary of the state as a defendant and seeking an order mirroring the relief ultimately awarded.

6. The trial court did not abuse its discretion in granting T and R's late request to amend their answer, as that amendment did not prejudice the plaintiffs; the plaintiffs did not claim that they would have litigated the case differently if the court had not permitted the amendment, that they were deprived of the time necessary to respond to the amendment, or that the amended answer confused the issues in the case.

Argued October 19, 2018—officially released February 19, 2019

Procedural History

Action for a judgment declaring, inter alia, that certain bylaws are the validly adopted and currently effective party rules of the statewide Independent Party, and for other relief, brought to the Superior Court in the judicial district of Hartford, where Michael Duff was substituted as a plaintiff and the defendant Michael Telesca et al. filed a counterclaim; thereafter, the case was tried to the court, *Hon. A. Susan Peck*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment for the defendants on the complaint and for the defendant Michael Telesca et al. on the counterclaim, and the plaintiffs appealed. *Affirmed.*

Eliot B. Gersten, with whom was *Johanna S. Katz*, for the appellants (plaintiffs).

Maura Murphy Osborne, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the appellee (named defendant).

William M. Bloss, with whom were *Alinor C. Sterling* and *Emily B. Rock*, for the appellees (defendant Michael Telesca et al.).

Opinion

ROBINSON, C. J. This appeal is the latest battle in the war for control over the state's Independent Party between its Danbury faction, which is led by the plaintiffs, the Independent Party of CT—State Central and its officers, Michael Duff, Donna L. LaFrance, and Roger Palanzo,[1] and its Waterbury faction, which is led by two

[1] Duff is the chairman of the Independent Party of CT—State Central, LaFrance is its treasurer, and Palanzo is its secretary and deputy treasurer. Although the previous chairman, John L. Dietter, was originally a plaintiff in the present action, he died in November, 2016. LaFrance and Palanzo later appointed Duff to the position of chairman, and, shortly thereafter, the trial court granted a motion substituting Duff as a plaintiff. We note that, notwithstanding this substitution, the plaintiffs' appeal form in the present case continues to identify Dietter as chairman. The record reflects that this is nothing more than a scrivener's error. Cf. *State* v. *Zillo*, 124 Conn. App. 690, 691 n.1, 5 A.3d 996 (2010).

of the defendants, Michael Telesca and Rocco Frank, Jr. The plaintiffs appeal[2] from the judgment of the trial court, rendered after a bench trial, for Telesca and Frank on the complaint and the counterclaim in the present action, which both sought declaratory and injunctive relief. Specifically, the trial court ordered the named defendant, Secretary of the State Denise W. Merrill,[3] to accept candidate endorsements made pursuant to the Independent Party's 2010 bylaws (2010 bylaws), which, in effect, gave the Waterbury faction control over the Independent Party's statewide nominations. There are two principal issues among the plaintiffs' plethora of claims in the present appeal. First, we consider whether the trial court's order of supplemental briefing and oral argument concerning its subject matter jurisdiction, issued just prior to the 120 day decision deadline pursuant to General Statutes § 51-183b,[4] and after the plaintiffs' objection to the trial court's request for an extension, preserved its personal jurisdiction over the parties by stopping and later restarting the decision period. The second principal issue is whether the trial court properly determined that General Statutes § 9-374,[5] which requires the filing of party rules

[2] The plaintiffs appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. See also footnote 1 of this opinion. We then ordered, sua sponte, that this appeal "be considered on an expedited basis," and set a briefing and argument schedule accordingly.

[3] For the sake of simplicity, we hereinafter refer to Merrill as the Secretary and to Telesca and Frank, collectively, as the defendants.

[4] General Statutes § 51-183b provides: "Any judge of the Superior Court and any judge trial referee who has the power to render judgment, who has commenced the trial of any civil cause, shall have power to continue such trial and shall render judgment not later than one hundred and twenty days from the completion date of the trial of such civil cause. The parties may waive the provisions of this section."

[5] General Statutes § 9-374 provides in relevant part: "In the case of a minor party, no authority of the state or any subdivision thereof having jurisdiction over the conduct of any election shall permit the name of a candidate of such party for any office to be printed on the official ballot unless at least one copy of the party rules regulating the manner of nominating a candidate

before the name of a candidate endorsed by a minor political party may be printed on an election ballot, rendered the 2010 bylaws controlling, as opposed to bylaws that the Danbury faction had filed with the Secretary in 2006 (2006 bylaws) prior to the Independent Party's receiving the 1 percent of statewide votes necessary to confer minor party status. Because we conclude that the order of supplemental briefing and argument opened the 120 day decision period and later restarted it, thus rendering the trial court's decision timely under § 51-183b, and also conclude that the trial court properly construed § 9-374, we affirm the judgment of the trial court.[6]

The record reveals the following relevant facts, as found by the trial court, and procedural history. The genesis of the current Independent Party dates to 2003, when Telesca and others formed the Waterbury Independent Party (Waterbury party), "to run candidates for local office as an alternative to the major parties."

for such office has been filed in the office of the Secretary of the State at least sixty days before the nomination of such candidate. In the case of a minor party, the selection of town committee members and delegates to conventions shall not be valid unless at least one copy of the party rules regulating the manner of making such selection has been filed in the office of the Secretary of the State at least sixty days before such selection is made. A copy of local party rules shall forthwith be also filed with the town clerk of the municipality to which they relate. Party rules shall not be effective until sixty days after the filing of the same with the Secretary of the State. . . . The term 'party rules' as used in this section includes any amendment to such party rules. When any amendment is to be filed as required by this section, complete party rules incorporating such amendment shall be filed, together with a separate copy of such amendment."

[6] In addition to the principal issues, the plaintiffs also claim that the trial court improperly (1) determined that it was not bound by an earlier decision of the Superior Court in *Independent Party of Connecticut* v. *Dietter*, Superior Court, judicial district of Waterbury, Docket No. CV-12-5016387-S (September 28, 2012), (2) found that they had waived their right to challenge the 2010 bylaws, (3) issued an order that violated the parties' constitutional rights, and (4) allowed the defendants to amend their answer to assert a counterclaim and special defenses. We conclude that these additional claims lack merit. See part III of this opinion.

The Waterbury party "endorsed a full slate of candidates for municipal elections in Waterbury and [saw] eight people [elected] to office, each of whom received more than 1 percent of the vote in [his or her] individual [race]. Because the candidates received at least 1 percent of the vote in each of those races, the Waterbury [party] was eligible for minor party status for those offices. Thereafter, Waterbury electors could register as Independent Party members for local elections. After the 2003 Waterbury municipal elections, the [Secretary] sent a letter to the Waterbury [party] requesting that it submit party rules. In 2004, the Waterbury [party] drafted bylaws on how to conduct caucuses and created a nominating process for future races. Telesca's goal was to build a new statewide third party to help people get ballot access around the state. The Waterbury [party] bylaws were filed with the [Secretary and the] Waterbury town clerk . . . ."

"In 2004, the Waterbury [party] decided to run candidates in races for state representative and state [senator] in the Waterbury area. . . . Around this time, Telesca learned about a separate Independent Party that had been formed in Danbury headed by [Robert] Fand that had reserved the name ['Independent Party for the 30th Senate District' (Danbury party)]. Because the Danbury [party] had already reserved the party designation of Independent Party for the 30th Senate District, the Waterbury [party] was not allowed to nominate a candidate for that election. In 2004, Telesca and Fand reached an agreement that the Waterbury [party] would not operate in Danbury and the Danbury [party] would not operate in Waterbury. . . .

"In 2006, the Waterbury [party] attempted to reserve the name 'Independent Party' statewide but was not able to do so because there were local parties using the name 'Independent' in both Danbury and Waterbury. The [Secretary] would not allow two different parties

with any part of the same name on the ballot at the same time. In 2006, Telesca and [his colleague, John] Mertens learned from the [Secretary] that they needed to get the local independent parties to come together in order to . . . petition for statewide offices. In 2006, Telesca and Fand joined together and signed and filed a form [ED-601[7] with the Secretary] as members of the Independent Party Designation Committee, but they failed to obtain enough signatures to get ballot access for any statewide office. As a result, there was no statewide minor party established in that year. . . .

"In September 2006, Fand, [John L.] Dietter, and LaFrance filed a form ED-48 with the [Secretary] designating themselves as the three members of the party committee for the 'Independent Party of CT—State Central.' . . . At the same time, these individuals filed the 2006 bylaws, which consisted of one page [entitled] 'Party Rules Amended.' . . . The introductory paragraph of those rules states that the committee 'adopts the following rules for the establishment of local committees and nomination of candidates.' . . . The final paragraph of the 2006 bylaws . . . indicates that the rules were passed unanimously at the meeting of the 'State Central Committee of the Independent Party of Connecticut on [September 27, 2006],' and is signed by . . . Dietter [as] Chairman . . . LaFrance [as] Treasurer, and . . . Fand [as] Deputy Treasurer . . . ." (Citations omitted; footnote added.)

"In 2008, Fand and Telesca [again] joined together to create a statewide Independent Party. There were other Independent Party chapters in the state at this time, including ones in Winsted and Milford. Telesca assisted those chapters by providing information

[7] As the trial court noted, a form ED-601 "is required to be filed with the [Secretary] to reserve a party designation in any race where a candidate must petition to get on the ballot. See General Statutes §§ 9-353b and 9-453u. A reservation of party designation may only be filed for a race in which another similarly named party has not already filed such a form."

regarding the election process. The immediate goal in 2008 was to run Ralph Nader as a candidate for president . . . and achieve 1 percent of the vote, which would establish the Independent Party as a statewide minor party. See General Statutes § 9-372 (6).[8] In a joint effort to accomplish this goal, Telesca and Fand both signed and filed [a] form ED-601 . . . as the designated agents of the Independent Party. The form designated the name Independent Party not only for president, vice president, and electors, but also for state senate districts 24, 28, and 11, state assembly districts 110 and 96, United States congressmen for the third and fifth districts, and for several registrar of voters and probate judge races." (Footnote added.)

The trial court credited Telesca's testimony that, "because there were different rules for the various local parties in the state who controlled the Independent Party line for their localities, he and Fand agreed that they would need to create a new set of bylaws to accomplish their joint goal of creating a statewide minor party. Without a statewide party, a local Independent Party could oppose a statewide candidate for any office by reserving the same or a similar party designation for [its town]. Running . . . Nader for president provided a clear path toward garnering 1 percent of the vote and establishing a statewide minor party. Once Nader achieved over 1 percent of the vote in the 2008 presidential election, the [Secretary] certified the Independent Party as a minor party and notified all town registrars of voters of the Independent Party's new status as a statewide minor party. . . . Subsequently, anyone in the state could register to vote as a member of the Independent Party.

[8] General Statutes § 9-372 (6) provides: " 'Minor party' means a political party or organization which is not a major party and whose candidate for the office in question received at the last-preceding regular election for such office, under the designation of that political party or organization, at least one per cent of the whole number of votes cast for all candidates for such office at such election . . . ."

"Following the 2008 election, Telesca and Mertens drafted bylaws for the new statewide party. Telesca sent out [between] 700 [and] 800 postcards about a meeting to be held on March 20, 2010, concerning proposed bylaws to any registered member of the Independent Party who had voted in the last two elections. Mertens created a website and posted the proposed bylaws on it months in advance of the meeting. Telesca put an advertisement in the Hartford Courant announcing the meeting/caucus and gave advance notice to the [Secretary]. Telesca also sent Fand a postcard and gave him a copy of the proposed bylaws before the meeting, which Fand acknowledged. Telesca and [his colleague Mary] Iorio met with Fand about the bylaws for the new statewide party before the meeting was held.

"On March 20, 2010, the Independent Party held a meeting in Waterbury of registered Independent Party members from around the state to ratify the [2010] bylaws for the new statewide party. At the meeting, Fand did not object either to the meeting, the idea of creating bylaws for the new statewide party, or the bylaws themselves, [and also did not] request any changes to the [2010] bylaws as proposed. There was an agenda for the meeting and a sign-up sheet. Only registered Independent Party members were allowed to vote on the [2010] bylaws. The vote to approve the bylaws was unanimous. The [2010] bylaws were filed with the [Secretary] on March 22, 2010 . . . . No objections were filed with the [Secretary] within sixty days of the filing date." (Citation omitted.)

"A caucus was held on August 21, 2010, to nominate Independent Party candidates for placement on the November 2, 2010 ballot. The 2010 bylaws were used to guide the nomination process at the caucus. The Independent Party got ballot access for statewide offices in 2010 by going through the petitioning process for candidates and by filing a form ED-601 . . . . The purpose of the caucus was to endorse candidates for

certain offices and to ratify endorsements for other offices that had been made through the petitioning process. At a meeting held on August 21, 2010, immediately prior to the caucus, Telesca was authorized to preside over the statewide caucus, file all paperwork regarding the upcoming state elections, and to act as the agent and acting chairman of the Independent Party.

"Following the caucus, a document confirming the nominations and endorsements of the statewide Independent Party candidates for the 2010 election was filed with the [Secretary]. The document was signed by Telesca as presiding officer of the caucus, and LaFrance and Fand as agents of the Independent Party. . . . At the time, Fand and LaFrance constituted two-thirds of the [Independent Party of CT—State Central]. The [Secretary] subsequently approved a revised list of nominees on September 8, 2010. . . . All of the candidates were nominated pursuant to the 2010 bylaws. The new statewide Independent Party subsequently published a political advertisement showing its endorsed candidates for the 2010 election. . . .

"[On the basis of] the evidence presented at trial, in the 2010 election cycle, there was no conflict between the Waterbury and Danbury factions of the Independent Party." (Citations omitted.) Indeed, the trial court also found that there "was no evidence of conflict between the Waterbury and Danbury factions in the 2008, 2009, 2010, or 2011 election cycles. The 2006 bylaws were not used by the Independent Party to nominate anyone for president in 2008 or for statewide office in 2008, 2010, 2012, or 2014. The Danbury faction did not object to the caucuses held pursuant to the 2010 bylaws to nominate candidates for statewide office in either 2010 or 2012. On June 10, 2012, the Independent Party held a caucus to elect the officers of the statewide party."

The conflict between the factions that led to litigation first developed in early 2012, when "Fand invited Tel-

esca to a meeting with Danbury mayor Mark Boughton in an effort to gain Telesca's support for Boughton as the endorsed candidate of the Independent Party [for governor]. Boughton hoped to run for governor as the next nominee of the Republican Party. Telesca refused to give Fand his assurance, as chairman of the Independent Party, that he would endorse Boughton for governor and informed Fand that the Independent Party's endorsement of candidates was up to the party membership, not him. After that meeting, Telesca and Fand's relationship soured.

"Because Nader received more than 1 percent of the vote in 2008 presidential election, the Independent Party was able to nominate and endorse a candidate for the 2012 presidential election without having to go through the petitioning process. On August 21, 2012, the Independent Party held a caucus, conducted pursuant to the 2010 bylaws, to nominate and endorse a presidential candidate for 2012. The votes were limited to Independent Party members. At the caucus, Rocky Anderson was selected as the presidential nominee of the Independent Party. Although the 2006 bylaws reserved the right of the Danbury faction to make the Independent Party's nomination for president, the nomination for president was decided at the August 21, 2012 caucus [pursuant to] the 2010 bylaws without objection. Because Anderson failed to garner at least 1 percent of the vote for president, the Independent Party lost its presidential ballot line for the 2016 presidential election.

"In 2014, the Independent Party held a statewide caucus and nominated candidates pursuant to the 2010 bylaws. No one objected to the use of the 2010 [bylaws] for Independent Party nominations in the 2014 statewide elections. In 2015, local Independent Party chapters nominated candidates for municipal elections. In 2016, the Danbury faction and the Waterbury faction nominated different candidates for the Independent

Party's state senate endorsement for one particular race. On August 23, 2016, the Danbury faction held an endorsement event at which nominations for president, vice president, United States Senate, United States House of Representatives, state senate and state [house] were made and thereafter filed with the [Secretary]. Notice of the meeting was given pursuant to General Statutes § 9-452a. . . . Telesca attended that endorsement meeting and voted no without comment when the nominees were presented for a vote. Telesca did not challenge how Duff, the presiding officer, conducted the meeting. Nor did Telesca challenge anyone's right to vote at the meeting. Telesca filed a complaint with the State Elections Enforcement Commission against the current members of the [Danbury faction], Duff, LaFrance, Palanzo and others. The [Waterbury faction] also selected nominees at an event noticed for that purpose which were also filed with the [Secretary]. Where there were competing nominations, the [Secretary] did not accept either nomination for placement on the ballot. A major point of contention between the two factions is that the Waterbury faction believes that the Danbury faction is merely a proxy for the Republican Party and not truly representative of the Independent Party." (Citation omitted; footnote omitted; internal quotation marks omitted.)

The plaintiffs then brought the present action for declaratory and injunctive relief, which is the latest in a line of lawsuits arising from the conflict between the Waterbury and Danbury factions.[9] The case was tried

[9] See *Price* v. *Independent Party of CT—State Central*, 323 Conn. 529, 543, 147 A.3d 1032 (2016) (single justice proceeding before *Palmer*, *J.*, dismissing Waterbury faction's motion for permeant injunction, in connection with Independent Party nomination for United States Senate, for lack of jurisdiction because "officials administering minor party caucuses are not 'election official[s]' for purposes of [General Statutes] § 9-323"); *Independent Party of CT—State Central* v. *Telesca*, Superior Court, judicial district of Danbury, Docket No. CV-14-6015650-S (August 4, 2014) (stipulation between parties regarding conflicting candidate endorsements for 2014 election); *Independent Party of Connecticut* v. *Dietter*, Superior Court, judicial district

to the court, *Hon. A. Susan Peck*, judge trial referee, on October 11, 17, and 18, 2017, with posttrial oral argument on March 23, 2018. Following supplemental briefing and oral argument with respect to whether the political question doctrine deprived the trial court of subject matter jurisdiction over this case, on August 21, 2018, the trial court issued a lengthy memorandum of decision in which it concluded that it had subject matter jurisdiction over this case[10] and rendered judgment for the defendants on the complaint.

With respect to its specific findings of fact and conclusions of law, the trial court first concluded as a matter of statutory interpretation that the 2010 bylaws were controlling under the statutory scheme governing minor parties, in particular §§ 9-374 and 9-372 (6), the "plain language of [which] indicates that a minor party does not exist in Connecticut until it designates a candidate

of Waterbury, Docket No. CV-12-5016387-S (September 28, 2012) (withdrawn by Waterbury faction after denial of motion for temporary order of mandamus).

[10] We note that none of the parties challenges the court's subject matter jurisdiction over this case under the political question doctrine, and, having considered the issue sua sponte; see, e.g., *Soracco* v. *Williams Scotsman, Inc.*, 292 Conn. 86, 91, 971 A.2d 1 (2009); we agree with the trial court's conclusion that, although this case is an intraparty dispute, its resolution "required [the court] to interpret § 9-374 and related provisions to determine which bylaws govern the Independent Party's nomination procedures for candidates for public office, which is the central dispute between the parties. . . . [S]uch issues of statutory interpretation are regularly entertained by the [court] and are well within its jurisdiction." See *Nielsen* v. *Kezer*, 232 Conn. 65, 76, 652 A.2d 1013 (1995) (The court concluded that the political question doctrine did not preclude judicial resolution of an intraparty dispute because "the plaintiffs' claims present no special obstacles to judicial ascertainment and application of appropriate standards for resolving them, and adjudication of the claims does not require judicial policy-making properly left to another branch of government. On the contrary, the controversy raises issues of constitutional and statutory interpretation of the kind regularly entertained by courts."); see also id., 77 n.19 ("We recognize, of course, that the issues raised by the plaintiffs' action relate to activities that are at the heart of our political process. Nonetheless, the mere fact that the suit seeks protection of a political right does not mean it presents a political question. . . . The doctrine of which we treat is one of political questions, not one of political cases." [Citation omitted; internal quotation marks omitted.]).

for office who achieves 1 percent of the vote." The trial court further observed that, in contrast to the 2010 bylaws, which were created in a statewide process after Nader's nomination in 2008, the 2006 bylaws were filed with the Secretary at a time when "the party so-named had not achieved minor party status for any statewide office." Thus, the trial court determined that the "2006 bylaws are valid only to the extent they are recognized as such within the local committee. Although the plaintiffs filed the 2006 bylaws with the [Secretary], the filing of these rules merely allowed the [Danbury faction] to nominate local candidates and get them on an official ballot once they had attained 1 percent of the vote for a particular office. The 2006 bylaws did not automatically allow the [Danbury faction] to gain control of the statewide Independent Party after the 2008 presidential election."[11] (Footnote omitted.) Accordingly, the trial court concluded that "the only statewide Independent Party was created post-2008, and the 2010 bylaws are the only valid governing rules of that party."[12]

The trial court also rejected the plaintiffs' additional arguments about why the 2006 bylaws should be consid-

[11] The court also observed that "there is no evidence that any other local party adhered to the 2006 bylaws or that the [Danbury faction] actually sought to impose the will of its three member state central committee beyond [Danbury]. Although the [Danbury faction] may have won the race to the [Secretary's] office and referred to themselves by a name which included the designation 'State Central,' that is not enough to anoint them as the governing body of the Independent Party post-2008." The court observed that the "designation 'State Central' has no real significance in the organization or operation of a minor party. It is simply a name chosen by the [Danbury faction] and carries with it no special status. For reasons previously stated in the findings of fact, there is no indication that [the Danbury faction] has statewide reach although they continue to claim that they are the true governing entity of the statewide Independent Party."

[12] The trial court also rejected the plaintiffs' argument that the 2010 bylaws afford the Independent Party statewide status only for particular offices, emphasizing that "nothing in § 9-374 or any other statute concerning minor parties states that bylaws must be repeatedly filed every time a minor party candidate achieves 1 percent of the vote for any office, unless those bylaws are amended."

ered controlling. With respect to those relevant to this appeal, the trial court first considered the plaintiffs' conduct subsequent to the adoption of the 2010 bylaws and concluded that "the defendants have established by a preponderance of the evidence submitted in this case [their special defense alleging] that the plaintiffs have waived any right they may have had to challenge the validity of the 2010 bylaws." The trial court also rejected the plaintiffs' contention that a 2012 decision issued by Judge Mark H. Taylor in *Independent Party of Connecticut* v. *Dietter*, Superior Court, judicial district of Waterbury, Docket No. CV-12-5016387-S (September 28, 2012) (2012 Waterbury action), which had concluded "that the 2006 bylaws were the validly adopted Independent Party rules," was entitled to preclusive effect in the present case. The trial court reasoned that the 2012 Waterbury action was distinguishable because it did not concern statewide office, addressed only "a motion for a temporary order of mandamus, and . . . was [subsequently] withdrawn."

Accordingly, the trial court concluded that the plaintiffs "failed to establish by a preponderance of the evidence that they are entitled to the declaratory and injunctive relief requested in their second amended complaint," which would have given them control over the Independent Party. Instead, the trial court concluded that "the defendants . . . have established by a preponderance of the evidence that the 2010 bylaws are the validly adopted and operative bylaws of the Independent Party/Independent Party of Connecticut, filed pursuant to the requirements of § 9-374, and that [Telesca and Frank] are the duly elected officers of the Independent Party/Independent Party of Connecticut, and the individual plaintiffs are not. In addition, the court hereby declares that the 2006 bylaws apply only to the Danbury faction's local committee of the Independent Party. Finally, the court hereby declares and orders that the [Secretary] must accept only the nominations

and endorsements of the Independent Party/Independent Party of Connecticut, made pursuant to the 2010 bylaws filed with the [Secretary] on March 22, [2010], or as may be amended, pursuant to . . . § 9-374." According to the plaintiffs, this order effectively "gives the Waterbury faction, under the leadership of Telesca and Frank, control of the statewide ballot line." This expedited appeal followed.[13] See footnote 2 of this opinion.

On appeal, the plaintiffs claim that the trial court (1) lost personal jurisdiction over this case when it failed to render judgment within 120 days as required by § 51-183b, (2) improperly construed § 9-374 in concluding that the 2010 bylaws are controlling, (3) improperly declined to give preclusive effect to Judge Taylor's decision in the 2012 Waterbury action, (4) committed clear error in finding that they had waived their objections to the 2010 bylaws, (5) crafted an order that violated their constitutional rights, and (6) abused its discretion in permitting the defendants to amend their answer to assert special defenses and counterclaims. Additional relevant facts and procedural history will be set forth in the context of each of these claims as necessary.

I

WHETHER § 51-183B DEPRIVED THE TRIAL COURT OF PERSONAL JURISDICTION

Relying primarily on *Foote* v. *Commissioner of Correction*, 125 Conn. App. 296, 8 A.3d 524 (2010), and

[13] We note that significant motions practice continued before the trial court subsequent to the commencement of appellate proceedings, as numerous candidates for the state House of Representatives sought to intervene in the present case and otherwise protect their rights with respect to the judgment of the trial court as it affected the Independent Party's endorsements for the 2018 election, ultimately leading them to file a writ of error under Docket Number SC 20160. A detailed discussion of those additional facts and procedural history is set forth in a separate opinion of this court pertaining to that writ of error, which is also released today. See *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 729, A.3d (2019).

Waterman v. *United Caribbean, Inc.*, 215 Conn. 688, 577 A.2d 1047 (1990), the plaintiffs first claim that the trial court lost personal jurisdiction over this case because it failed to issue its decision within 120 days after oral argument and posttrial briefing as required by § 51-183b. The plaintiffs argue that their refusal to consent to the extension of time requested by the trial court deprived it of authority to issue the decision after 120 days had passed, and that countenancing the trial court's attempt to extend the deadline by raising subject matter jurisdictional questions at the last minute would remove the "teeth" from § 51-183b. The plaintiffs further argue that it was improper for the trial court to raise subject matter jurisdictional questions so late in the process because the parties had mentioned these issues repeatedly earlier in the proceedings. In response, the defendants contend that the trial court's decision was timely under § 51-183b because its order of supplemental briefing and argument concerning its subject matter jurisdiction, which was filed prior to the expiration of the original 120 day decision period, had the effect of stopping and then restarting the 120 day decision period after the court heard supplemental arguments on August 3, 2018. We agree with the defendants and conclude that the trial court's order requiring supplemental briefing to address a colorable jurisdictional issue had the effect of stopping the 120 day decision period, which then started anew after supplemental arguments, thus rendering its decision timely under § 51-183b.

The record reveals the following additional relevant facts and procedural history. On July 17, 2018, four days before the trial court's decision was due pursuant to § 51-183b, the trial court left voice mail messages for the parties, requesting a sixty day extension to issue the decision and asking them to file certain additional proposed orders. On July 18, 2018, the defendants filed proposed orders and did not comment as to timeliness.

That same day, the plaintiffs filed a response declining to submit additional filings and refusing to waive the 120 day decision deadline, stating that a decision was needed to facilitate plans for the 2018 elections in light of the upcoming September 5, 2018 nomination filing deadline pursuant to General Statutes § 9-452. On July 19, 2018, the trial court issued an order directing the parties to brief the question of whether the court had subject matter jurisdiction over the case under, inter alia, the political question doctrine, and to appear for oral argument on that issue on August 3, 2018. Following oral argument, on August 21, 2018, the trial court issued a comprehensive memorandum of decision addressing both the jurisdictional issue and the merits of the various claims made by the parties.

At the outset, we note that the plaintiffs' claim concerns the application of the case law interpreting § 51-183b to the undisputed facts, which raises a question of law over which our review is plenary. See, e.g., *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 546, 46 A.3d 112 (2012); see also *Gilmore* v. *Pawn King, Inc.*, 313 Conn. 535, 542, 98 A.3d 808 (2014) ("we do not write on a clean slate when this court previously has interpreted a statute" [internal quotation marks omitted]).

"[I]n past cases interpreting § 51-183b and its predecessors, we have held that the defect in a late judgment is that it implicates the trial court's power to continue to exercise jurisdiction over the parties before it. . . . We have characterized a late judgment as voidable rather than as void . . . and have permitted the lateness of a judgment to be waived by the conduct or the consent of the parties. . . . [A]n unwarranted delay in the issuance of a judgment does not automatically deprive a court of personal jurisdiction. Even after the expiration of the time period within which a judge has the power to render a valid, binding judgment, a court continues to have jurisdiction over the parties until

and unless they object. It is for this reason that a late judgment is merely voidable, and not void." (Citation omitted; internal quotation marks omitted.) *Foote* v. *Commissioner of Correction*, supra, 125 Conn. App. 300–301, quoting *Waterman* v. *United Caribbean, Inc.*, supra, 215 Conn. 692; see also *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, 302 Conn. 263, 269–70, 25 A.3d 632 (2011) (noting that § 51-183b concerns personal rather than subject matter jurisdiction).

The "completion date" of trial, for purposes of starting the 120 day period, includes the filing of briefs and completion of oral argument because "briefing of the legal issues [is] a component of the judicial gathering of the materials necessary to a well reasoned decision. In related contexts, 'completion' has been held to encompass the availability of all the elements directly or indirectly to be considered in the rendering of a decision." *Frank* v. *Streeter*, 192 Conn. 601, 604, 472 A.2d 1281 (1984); see also *Fibre Optic Plus, Inc.* v. *XL Specialty Ins. Co.*, 125 Conn. App. 399, 406, 8 A.3d 539 (2010) ("completion date" includes any oral argument heard subsequent to filing of briefs), cert. granted, 300 Conn. 907, 12 A.3d 1003 (2011) (appeal withdrawn February 14, 2012), and cert. granted, 300 Conn. 907, 12 A.3d 1003 (2011) (appeal withdrawn February 28, 2012).

Our decision in *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, supra, 302 Conn. 263, controls the plaintiffs' claim in the present appeal. In that case, we followed the Appellate Court's decision in *Statewide Grievance Committee* v. *Ankerman*, 74 Conn. App. 464, 470, 812 A.2d 169, cert. denied, 263 Conn. 911, 821 A.2d 767 (2003), and concluded that, "when a trial court properly reopens a case *during* the pendency of the 120 day statutory time period, the completion of proceedings scheduled on the date the proceedings were reopened constitutes the relevant completion date for purposes of commencing the 120

day limitation period for rendering judgment." (Emphasis added.) *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, supra, 271; see also *Statewide Grievance Committee* v. *Ankerman*, supra, 470 (trial court's order that attorney appear at hearing on disposition of grievance proceedings opened 120 day period). Thus, under *Forvil*, the trial court's order requiring supplemental briefing and argument within 120 days had the effect of stopping the decision period and then restarting it after supplemental arguments were heard.

The plaintiffs' reply brief relies, however, on *Waterman* v. *United Caribbean, Inc.*, supra, 215 Conn. 688, for the proposition that their July 18, 2018 refusal to consent to a late decision deprived the trial court of authority to render a late judgment. See id., 694 (concluding that parties could not withdraw their prejudgment refusal to consent upon subsequently learning of favorable judgment). We understand the plaintiffs to argue that, under *Waterman*, their refusal to extend the deadline acted, as a matter of law, to block the court from subsequently reopening the decision period in any way, even to address a jurisdictional issue. We disagree with this reading of *Waterman*. First, that case is factually distinguishable from the present case because the trial court in *Waterman* took no steps to open the 120 day period *prior* to its expiration and had not asked for consent until *after* the lapse of the 120 day period. See id., 690 ("[b]y a letter dated October 5, 1988, which acknowledged that a judgment had *not* been rendered within the 120 day period . . . the trial court asked the parties to consent to an extension of time until December 15, 1988" [emphasis added]). In contrast to *Waterman*, the trial court in the present case acted to reopen the jurisdictional period by requesting supplemental briefing and argument while it still had personal jurisdiction because the 120 day period had not yet elapsed.

Second, beyond the trial court's inherent discretion to seek supplemental briefing and argument on factual or legal issues in the case, the plaintiffs' *Waterman* argument, insofar as it concerns the trial court's decision to raise a colorable question of subject matter jurisdiction, squarely conflicts with the axiom that questions about subject matter jurisdiction issues may be raised at *any* time, including by the court, sua sponte, and on appeal. See, e.g., *Angersola* v. *Radiologic Associates of Middletown, P.C.*, 330 Conn. 251, 265, 193 A.3d 520 (2018). Indeed, in *Machado* v. *Taylor*, 326 Conn. 396, 404, 163 A.3d 558 (2017), we recently concluded that it "would contravene well settled law" to allow "delay or laches [to preclude] a jurisdictional challenge." In so concluding, we emphasized that "[t]he objection of want of jurisdiction may be made at any time," including by the court sua sponte, and that "[t]he requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Emphasis omitted; internal quotation marks omitted.) Id.; see also id. (concluding that trial court improperly denied motion to dismiss "and render[ed] judgment in favor of the plaintiff without first resolving whether the defendant's motion raised a colorable jurisdictional issue, and, if so, whether it had jurisdiction over the cause of action").

In the present case, we conclude that the trial court's order requiring supplemental briefing stopped the 120 day decision period, which then restarted after supplemental arguments were heard, thus rendering the trial court's decision in this case timely under § 51-183b, notwithstanding the plaintiffs' earlier refusal to consent to the requested extension.[14] Accordingly, § 51-183b did

[14] We recognize that the legislature "clear[ly]" intended § 51-183b "to place the onus on judges to decide cases in a timely fashion. . . . [A]s a practical matter, there is nothing that counsel can do to require the trial judge to comply with [§ 51-183b]. . . . Thus, the statute . . . attempts to balance judicial expediency with fairness to the parties and to reduce delays over which counsel have little, if any, control. . . . The salutary effect of [§ 51-

not operate to deprive the trial court of the personal jurisdiction over the parties required to decide this case.

II

WHETHER § 9-374 RENDERS THE 2010 BYLAWS CONTROLLING

We next address the second principal issue in this appeal, namely, whether the trial court improperly construed § 9-374 in concluding that the 2010 bylaws, filed after Nader's tally of 1 percent of the vote in the 2008 election afforded the Independent Party statewide status for the first time, were controlling over the 2006 bylaws previously filed by the Danbury faction. The plaintiffs argue that the trial court's construction of § 9-374 has the effect of improperly supplying nonexistent statutory language because, as enacted by the legislature, the statute "contains no requirement" that a party refile its bylaws with the Secretary "upon achieving minor party status." The plaintiffs rely on "[p]ublic policy and common sense," arguing that the trial court's construction of the statute "would create a burdensome and tedious exercise for minor parties that the statutory

183b] is to compel diligence and a prompt decision on the part of the judge who tried the case, and to avoid manifest disadvantages attendant on long delay in rendering judgment." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Foote* v. *Commissioner of Correction*, supra, 125 Conn. App. 304–305; see also *Connecticut Light & Power Co.* v. *Costle*, 179 Conn. 415, 420, 426 A.2d 1324 (1980); *Gordon* v. *Feldman*, 164 Conn. 554, 556–57, 325 A.2d 247 (1973).

We also acknowledge that compliance with the 120 day mandate of § 51-183b while rendering a comprehensive decision is sometimes difficult, especially in relatively complex cases, given the scheduling demands placed on our trial judges, who are often left to their own devices without the aid of legal research assistance. Given the lack of a clearly articulated claim in the present appeal that the trial court abused its discretion by ordering supplemental briefing and argument on the jurisdictional question subsequent to the plaintiffs' refusal to extend the deadline, we leave to another day the question of whether a trial court could ever abuse its discretion by requesting supplemental briefs or argument on any relevant question shortly before the expiration of the 120 day period.

scheme does not anticipate [or] facilitate," insofar as it would require that "new bylaws . . . be filed every time the Independent Party wins new minor party status for a given office . . . ." In response, the defendants contend that, under General Statutes § 1-2z, the court's construction of § 9-374 must consider the definition of minor party in a related statute, § 9-372 (6), and that, because the Independent Party did not receive 1 percent of the vote until 2008, "[n]o matter how the plaintiffs styled it, the 2006 filing was not the filing of a statewide minor party." We agree with the defendants and conclude that, under § 9-374, the 2010 bylaws govern the statewide Independent Party.

Whether § 9-374 renders the 2010 bylaws controlling "presents a question of statutory construction over which we exercise plenary review. . . . When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning . . . § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . . The test to determine ambiguity is whether the statute, when read in context, is suscepti-

ble to more than one reasonable interpretation." (Internal quotation marks omitted.) *Marchesi* v. *Board of Selectmen*, 328 Conn. 615, 627–28, 181 A.3d 531 (2018).

Beginning with the statutory text, § 9-374 provides in relevant part: "In the case of a minor party, no authority of the state or any subdivision thereof having jurisdiction over the conduct of any election shall permit the name of a candidate of such party for any office to be printed on the official ballot unless *at least one copy of the party rules* regulating the manner of nominating a candidate for such office has been filed in the office of the Secretary of the State *at least sixty days before* the nomination of such candidate. In the case of a minor party, the selection of town committee members and delegates to conventions shall not be valid unless at least one copy of the party rules regulating the manner of making such selection has been filed in the office of the Secretary of the State at least sixty days before such selection is made. A copy of local party rules shall forthwith be also filed with the town clerk of the municipality to which they relate. Party rules shall not be effective until sixty days *after* the filing of the same with the Secretary of the State. . . . The term 'party rules' as used in this section includes any amendment to such party rules. When any amendment is to be filed as required by this section, complete party rules incorporating such amendment shall be filed, together with a separate copy of such amendment." (Emphasis added.)

Section 9-374 sets forth two operative time periods with respect to the filing of the party rules. First, the statute requires minor parties to file their party rules with the Secretary "at least sixty days" before nominating a candidate or selecting town committee members and delegates to conventions, and precludes state or municipal officials from putting such candidates on the ballot unless such a filing has been made. Second,

§ 9-374 provides that such party rules "shall not be effective until sixty days *after* the filing of the same with the Secretary of the State." Given this time frame, we agree that the plaintiffs' reading of § 9-374 is plausible, insofar as there is no statutory language *precluding* a minor party from filing its party rules before a given point in time, or rendering those rules ineffective if filed early, and reading § 9-374—standing by itself—in such a manner might conceivably run afoul of the maxim that, in construing statutes, "[w]e are not permitted to supply statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *State* v. *Josephs*, 328 Conn. 21, 27, 176 A.3d 542 (2018).

We do not, however, read § 9-374 by itself. Section 1-2z counsels us to construe statutes in light of related provisions, as we are "guided by the principle that the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *State* v. *Fernando A.*, 294 Conn. 1, 21, 981 A.2d 427 (2009); see also, e.g., *Gilmore* v. *Pawn King, Inc.*, supra, 313 Conn. 555–56 ("in interpreting a statute, [r]elated statutory provisions, or statutes in pari materia, often provide guidance in determining the meaning of a particular word" [internal quotation marks omitted]). Thus, we read § 9-374 in conjunction with § 9-372 (6), which defines " '[m]inor party' " as "a political party or organization which is *not* a major party and whose candidate for the office in question received *at the last-preceding regular election for such office*, under the designation of that political party or organization, at least one per cent of the whole number of votes

cast for all candidates for such office at such election . . . .'' (Emphasis added.) This definitional statute suggests that a minor party simply does not exist—for purposes of the ballot—unless and until its candidate receives 1 percent of the vote for a particular office at the last preceding regular election. Put differently, this definition suggests that there is nothing—at least under the contemplation of the statutory scheme—for those bylaws to govern until a putative party's candidate receives 1 percent of the vote for an office.

Another related statute, namely, General Statutes § 9-453u,[15] which governs applications to reserve party des-

[15] General Statutes § 9-453u provides: ''(a) An application to reserve a party designation with the Secretary of the State and to form a party designation committee may be made at any time after November 3, 1981, by filing in the office of the secretary a written statement signed by at least twenty-five electors who desire to be members of such committee.

''(b) The statement shall include the offices for which candidates may petition for nomination under the party designation to be reserved but shall not include an office if no elector who has signed the application is entitled to vote at an election for such office.

''(c) The statement shall include the party designation to be reserved which (1) shall consist of not more than three words and not more than twenty-five letters; (2) shall not incorporate the name of any major party; (3) shall not incorporate the name of any minor party which is entitled to nominate candidates for any office which will appear on the same ballot with any office included in the statement; (4) shall not be the same as any party designation for which a reservation with the secretary is currently in effect for any office included in the statement; and (5) shall not be the word 'none', or incorporate the words 'unaffiliated' or 'unenrolled' or any similarly antonymous form of the words 'affiliated' or 'enrolled'.

''(d) The statement shall include the names of two persons who are authorized by the party designation committee to execute and file with the secretary statements of endorsement required by section 9-453o and certificates of nomination as required by section 9-460.

''(e) The secretary shall examine the statement, and if it complies with the requirements of this section, the secretary shall reserve the party designation for the offices included in the statement and record such reservation in the office of the secretary. The reservation shall continue in effect from the date it is recorded until the day following any regular election at which no candidate appears on the appropriate ballot for that office under that party designation.''

ignations for candidates on the ballot by petition, further supports this reading. The designation of a candidate under § 9-453u is a precursor to minor party status, and that provision makes clear that a minor party is conceptually distinct under the statutory scheme from an organization seeking a party designation. See General Statutes § 9-453u (c) (3) and (4) (precluding designation of party name that "incorporate[s] the name of any minor party which is entitled to nominate candidates for any office which will appear on the same ballot with any office included in the statement" or is "the same as any party designation for which a reservation with the secretary is currently in effect for any office included in the statement"). These provisions indicate that a minor party simply does not exist for purposes of our election laws until its candidate receives 1 percent of the vote, thus triggering an obligation to file party rules and creating a party line on the ballot for the next election. Because a minor party does not exist prior to that point, ipso facto, party rules filed prior thereto simply have no effect with respect to the obligations of the Secretary.

Although there is no legislative history to illuminate the meaning of the statutes further, we observe that limiting the effective party rules to those filed after the putative minor party's candidate receives 1 percent of the vote, along with the sixty day period before those rules take effect, has the salutary effect of allowing the party to take shape and potentially eliminate the confusion sown by factional disputes, such as that in this case. The statutory framework also reflects the organic nature of the development of statewide parties like the Independent Party that have their genesis in a conglomeration of smaller or local groups, each with their own history and political interests. Accordingly, we conclude that the trial court properly determined that the 2010 bylaws are the effective party rules of the

Independent Party, because they were filed after Nader received 1 percent of the vote as a statewide candidate.[16]

III

ADDITIONAL CLAIMS

Beyond the principal issues in this appeal, the plaintiffs also raise numerous other claims. Specifically, the plaintiffs contend that the trial court improperly (1) failed to afford preclusive effect to Judge Taylor's decision in the 2012 Waterbury action, (2) determined that they had waived their rights to challenge the adoption of the 2010 bylaws, (3) adopted a construction of § 9-374 that violated the parties' constitutional rights, and (4) permitted the defendants to amend their answer to add special defenses and counterclaims after the close of evidence. See footnote 6 of this opinion. Because we conclude that all of these claims lack merit, we briefly address each in turn.

A

Preclusive Effect of 2012 Waterbury Action

The plaintiffs contend that the trial court's decision improperly conflicts with Judge Taylor's decision in

[16] The plaintiffs argue that this reading of the statutory scheme is unworkable because it means that a minor party must refile its rules with the Secretary each time that party's candidate receives 1 percent of the vote for a particular office, thereby affording it party status for that office for the next election. The defendants appear to disagree, insofar as they argue that the 1 percent of the vote received by Nader in 2008 rendered the Independent Party a statewide party, meaning that the 2010 bylaws filed with the Secretary are effective for other statewide offices, such as governor and United States senator. Although the trial court determined that such refiling was not necessary, we agree with the plaintiffs that their reading requiring refiling better accords with the plain language of the statute, insofar as it links minor party status to specific "office[s]." General Statutes § 9-374. We disagree, however, with the plaintiffs' conclusory claim in their reply brief that this reading would create "bedlam" in the Secretary's office. We have every confidence that the Secretary will be able to implement this reading on an administrative level, such as by the promulgation of new forms indicating the continued acceptance and utilization of previously filed party rules, each time a political party receives minor party status for a particular office.

the 2012 Waterbury action; see *Independent Party of Connecticut* v. *Dietter*, supra, Superior Court, Docket No. CV-12-5016387-S; an action brought and withdrawn by the Waterbury faction after Judge Taylor denied its motion for a temporary order of mandamus based on his finding that the "Independent Party did not follow the amendment procedures provided in the 2006 [bylaws] for the adoption of amendments to those rules in 2010." The plaintiffs argue that Judge Taylor's decision was well reasoned and considered "essentially the same issues between essentially the same parties," and that the trial court in this case should have accorded it preclusive effect given the defendants' "gamesmanship" in withdrawing that action upon receipt of an adverse ruling. In response, the defendants contend that Judge Taylor's decision in the 2012 Waterbury action lacks preclusive effect in the present case because it was specifically intended to be a preliminary decision rendered on an expedited basis and not a final judgment on the merits. We agree with the defendants and conclude that Judge Taylor's decision in the 2012 Waterbury action has no preclusive effect with respect to the present case.

The record reveals the following additional relevant facts and procedural history. In one chapter of this dispute between the parties; see footnote 9 of this opinion; the officers of the Waterbury faction and its nominees for the 16th senate district and the 106th assembly district brought the 2012 Waterbury action against the Secretary, the officers of the Danbury faction, and their corresponding house and senate candidates, seeking a declaration and an order directing the Secretary to place the Waterbury faction's candidates on the ballot for the 2012 election. *Independent Party of Connecticut* v. *Dietter*, supra, Superior Court, Docket No. CV-12-5016387-S. In that case, Judge Taylor observed that the "essential dispute between the parties revolve[d] around the validity and proper adoption of political

party rules following the Independent Party of Connecticut's qualification as a minor political party for presidential elections, inter alia, which occurred after the 2008 election." Id. Along with their complaint, the Waterbury faction filed a motion seeking a temporary order of mandamus. Id. After conducting an evidentiary hearing and receiving memoranda of law on an expedited basis, the court issued a decision denying that motion. Id.

Although Judge Taylor agreed with the Waterbury faction's claim that "the 2006 [bylaws] concerning the party nomination process are extremely general and do not so much as state the vote required for a local committee or caucus endorsement," he nevertheless rejected its argument that the 2006 bylaws did not comply with § 9-374, concluding that "there are no specific requirements listed in the statute to guide a political party in adopting party rules 'regulating the manner of nominating a candidate . . . .' " Id. Judge Taylor then observed that the "question presented is whether the [Waterbury faction] properly convened a caucus of the Independent Party of Connecticut in 2010 to amend the 2006 [bylaws] and [to] elect new officers pursuant to the newly adopted 2010 [bylaws]. The court finds that the [Waterbury faction] did not follow the amendment procedures provided in the 2006 [bylaws] for the adoption of amendments to those rules in 2010. The court further finds that the 2010 amendments made to the 2006 [bylaws] occurred at a caucus of the [Waterbury faction] pursuant to a statute that is inapplicable to the amendment of state party rules. These findings lead to the court's conclusion that the [Waterbury faction] has failed to establish a clear legal right to the performance of a duty by the [Secretary] necessary for the issuance of an order of mandamus in this case."[17] Id.

[17] Judge Taylor further stated that, in "reviewing the language of . . . § 9-374 regarding the nomination of candidates by minor parties, the court sees no inconsistency between the plain meaning of the statute and the 2006 [bylaws], currently followed by the [Danbury faction]. Further, the [Water-

Judge Taylor emphasized, however, that, "[t]hus far in this case . . . the court has held only an expedited hearing on a preliminary [m]otion for a [t]emporary [order of] [m]andamus. The court notes that *there has not yet been a full opportunity for an exploration into the questions raised at the preliminary hearing as to whether the 2006* [*bylaws*] *are fatally inconsistent with state elections statutes*, other than § 9-374 standing alone. The 2006 [bylaws] appear to be vintage party rules, allowing for strong party leadership through a self-perpetuating central committee, holding a veto over party endorsements that appear inconsistent with more modern and open party rules and procedures. These issues would be more thoroughly considered in a motion to dismiss, which the [Danbury faction] has not yet filed. Accordingly, in light of the inextricable link between the issue of standing and the merits of the [Waterbury faction's] underlying claims, the court will postpone a determination of the jurisdictional issue." (Emphasis added.) Id. After Judge Taylor's ruling on the motion for a temporary order of mandamus, the Waterbury faction subsequently withdrew the 2012 Waterbury action.

Whether the preclusion doctrine of collateral estoppel or res judicata applies is a question of law subject to plenary review. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 738–39, 183 A.3d 611 (2018). "Although res judicata and collateral estoppel often appear to merge into one another in practice, analytically they are regarded as distinct." *Weiss* v. *Weiss*, 297 Conn. 446, 458–59, 998 A.2d 766 (2010). "The doctrine

bury faction] neither followed the amendment procedure of the 2006 [bylaws] nor an applicable statute in the adoption of the 2010 [bylaws]. Therefore, the [Waterbury faction] has not shown that it has a clear legal right to the placement by the [Secretary] of its nominees on the ballot line reserved for the Independent Party of Connecticut, in the face of different nominees from the [Danbury faction]." *Independent Party of Connecticut* v. *Dietter*, supra, Superior Court, Docket No. CV-12-5016387-S.

of res judicata provides that [a] valid, final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties . . . upon the same claim or demand. . . . Res judicata prevents a litigant from reasserting a claim that has already been decided on the merits. . . . Under claim preclusion analysis, a claim—that is, a cause of action—includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. . . . Moreover, claim preclusion prevents the pursuit of any claims relating to the cause of action which were actually made or might have been made. . . . [T]he essential concept of the modern rule of claim preclusion is that a judgment against [the] plaintiff is preclusive not simply when it is on the merits but when the procedure in the first action afforded [the] plaintiff a fair opportunity to get to the merits. . . . Stated another way, res judicata is based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . [W]here a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding." (Citations omitted; emphasis altered; internal quotation marks omitted.) Id., 459–60.

"[I]t is significant that the doctrine of res judicata provides that [a] judgment is final not only as to every matter which was offered to sustain the claim, but also as to any other admissible matter which might have been offered for that purpose. . . . The rule of claim preclusion prevents reassertion of the same claim regardless of what additional or different evidence or legal theories might be advanced in support of it." (Internal quotation marks omitted.) Id., 463.

Similarly, the "fundamental principles underlying the doctrine of collateral estoppel are well established. The

common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel, or issue preclusion, is that aspect of res judicata which prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been *fully and fairly litigated* in the first action. It also must have been actually decided and the decision must have been necessary to the judgment. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. . . . An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered. . . . If an issue has been determined, but the judgment is not dependent [on] the determination of the issue, the parties may relitigate the issue in a subsequent action. . . . Before collateral estoppel applies [however] there must be an identity of issues between the prior and subsequent proceedings. To invoke collateral estoppel the issues sought to be litigated in the new proceeding must be identical to those considered in the prior proceeding. . . . In other words, collateral estoppel has no application in the absence of an identical issue. . . . Further, an overlap in issues does not necessitate a finding of identity of issues for the purposes of collateral estoppel." (Citations omitted; emphasis altered; internal quotation marks omitted.) *MacDermid, Inc.* v. *Leonetti*, supra, 328 Conn. 739–40.

Finality of judgment is critical because "the preclusive effects of res judicata and collateral estoppel depend upon the existence of a valid, final judgment

on the merits by a court of competent jurisdiction."[18] *Slattery* v. *Maykut*, 176 Conn. 147, 157, 405 A.2d 76 (1978); see also id. ("a judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata in the absence of fraud or collusion even if obtained by default, and is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as when rendered after answer and complete trial"); *Corey* v. *Avco-Lycoming Division*, 163 Conn. 309, 317–18, 307 A.2d 155 (1972) (decisions of administrative board acting in judicial capacity are entitled to res judicata effect), cert. denied, 409 U.S. 1116, 93 S. Ct. 903, 34 L. Ed. 2d 699 (1973). This need for finality reflects the fact that the application of preclusion doctrines can have "dramatic consequences for the party against whom the doctrine is applied." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 59, 808 A.2d 1107 (2002).

Accordingly, courts have held that preliminary decisions, such as on preliminary injunctions or other temporary orders, are not entitled to preclusive effect, particularly when the court makes clear that it is a "tentative ruling . . . not intended as a final decision on the merits. Ordinarily, findings of fact and conclu-

[18] This emphasis on finality is consistent with the public policies underlying the preclusion doctrines, which are "the interests of the defendant and of the courts in bringing litigation to a close . . . and the competing interest of the plaintiff in the vindication of a just claim. . . . These [underlying] purposes are generally identified as being (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation. . . . The judicial doctrines of res judicata and collateral estoppel are based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest." (Internal quotation marks omitted.) *Cumberland Farms, Inc.* v. *Groton*, 262 Conn. 45, 59, 808 A.2d 1107 (2002).

sions of law made in a preliminary injunction proceeding do not preclude reexamination of the merits at a subsequent trial." *Irish Lesbian & Gay Organization* v. *Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998); see also id., 644–46 (treating District Court's earlier decision as on merits and subject to res judicata effect, rather than about whether to grant preliminary injunction, because it dismissed plaintiff's claims after hearing and "gave no indication that this ruling was tentative or done without prejudice, and [the plaintiff] did not dispute the dismissal at the time"); *Gawker Media, LLC* v. *Bollea*, 129 So. 3d 1196, 1204 (Fla. App. 2014) ("we are not convinced that a ruling at such a provisional stage in the proceedings should have preclusive effect," and preliminary injunction rulings may be given preclusive effect only if "the prior decision is based on a decisive determination and not on the mere likelihood of success"); *Malahoff* v. *Saito*, 111 Haw. 168, 182 n.16, 140 P.3d 401 (2006) (grant of preliminary injunction is "not a final judgment sufficient for collateral estoppel purposes" unless intended as final resolution [internal quotation marks omitted]). Declining to accord the effect of finality to preliminary decisions, such as on preliminary injunctions or other temporary orders, is consistent with the observation of the United States Supreme Court that such orders are often issued with "haste" and are "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *University of Texas* v. *Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 68 L. Ed. 2d 175 (1981).

Having reviewed Judge Taylor's decision in the 2012 Waterbury action, it is clear that he rendered it on an expedited basis as, in essence, a preliminary injunction ruling, without benefit of full exploration of the questions raised. Judge Taylor specifically emphasized that his denial of the Waterbury faction's motion for a tempo-

rary order of mandamus was tentative and *not* a final judgment on the merits. Accordingly, we conclude that the trial court properly declined to give preclusive effect to Judge Taylor's decision in the 2012 Waterbury action.[19]

B

Special Defense of Waiver

The plaintiffs next claim that the trial court "improperly intervened in the party's internal affairs" because the 2010 bylaws are "invalid" given that the defendants did not follow the amendment procedure contained in

[19] Given the lengthy history of the litigation between the parties, the plaintiffs also rely by analogy upon the law of the case doctrine, and contend that these proceedings should be treated, in essence, as a unitary litigation such that Judge Taylor's decision was the law of the case with respect to the force and validity of the 2010 and 2006 bylaws. "The law of the case doctrine expresses the practice of judges generally to refuse to reopen what [already] has been decided . . . . New pleadings intended to raise again a question of law which has been already presented on the record and determined adversely to the pleader are not to be favored. . . . [When] a matter has previously been ruled [on] interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case, if it is of the opinion that the issue was correctly decided, in the absence of some new or overriding circumstance. . . . A judge should hesitate to change his own rulings in a case and should be even more reluctant to overrule those of another judge. . . . Nevertheless, if . . . [a judge] becomes convinced that the view of the law previously applied by his coordinate predecessor was clearly erroneous and would work a manifest injustice if followed, he may apply his own judgment." (Citations omitted; internal quotation marks omitted.) *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 322, 63 A.3d 896 (2013). Here again, the preliminary nature of the proceedings before Judge Taylor in 2012 defeats the plaintiffs' reliance on the law of the case doctrine. We agree with the United States Supreme Court that preliminary injunctions, which are akin to the temporary order of mandamus at issue here, are often issued with "haste" and are "customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a [preliminary injunction] hearing . . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits . . . ." (Citations omitted.) *University of Texas* v. *Camenisch*, supra, 451 U.S. 395. Accordingly, we decline to treat the preliminary decision by Judge Taylor—which was expressly preliminary and expedited—as the law of this case.

the 2006 bylaws. In this vein, the plaintiffs also contend that the trial court improperly held for the defendants with respect to the special defense of waiver; the plaintiffs contend specifically that the trial court improperly found that they had waived any right to challenge the validity of the 2010 bylaws, because, since 2012, they have operated in accordance with Judge Taylor's decision in the 2012 Waterbury action, which held that the 2010 bylaws were not a properly executed amendment of the 2006 bylaws. In addition to renewing their statutory argument that the 2006 bylaws were not binding on the statewide Independent Party, which was a new entity that did not exist until after the 2008 election, the defendants also contend that the trial court properly found that the plaintiffs waived objection to the 2010 bylaws by "their acquiescence in the process of their adoption and in the use of those bylaws, with their express consent, to govern subsequent nominations and endorsements." We agree with the defendants and conclude that the trial court's finding that the plaintiffs had waived any objection to the use of the 2010 bylaws to govern Independent Party proceedings was not clearly erroneous.

"Waiver is a question of fact. . . . [W]here the factual basis of the court's decision is challenged we must determine whether the facts set out in the memorandum of decision are supported by the evidence or whether, in light of the evidence and the pleadings in the whole record, those facts are clearly erroneous. . . . Therefore, the trial court's conclusions must stand unless they are legally or logically inconsistent with the facts found or unless they involve the application of some erroneous rule of law material to the case. . . .

"Waiver is the intentional relinquishment or abandonment of a known right or privilege. . . . Waiver is based upon a species of the principle of estoppel and where applicable it will be enforced as the estoppel

would be enforced. . . . Estoppel has its roots in equity and stems from the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed . . . .

"Waiver does not have to be express, but may consist of acts or conduct from which waiver may be implied. . . . In other words, waiver may be inferred from the circumstances if it is reasonable to do so." (Citations omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 704* v. *Dept. of Public Health*, 272 Conn. 617, 622–23, 866 A.2d 582 (2005); accord *RBC Nice Bearings, Inc.* v. *SKF USA, Inc.*, 318 Conn. 737, 747, 123 A.3d 417 (2015); see also *DeLeo* v. *Equale & Cirone, LLP*, 180 Conn. App. 744, 758–60, 184 A.3d 1264 (2018) (finding that defendant did not waive noncompete clause in partnership agreement was not clearly erroneous, despite defendant's statement encouraging plaintiff to take clients and that he did not want to hurt plaintiff, because defendant never denied existence or enforceability of noncompete clause and reiterated accounting firm's intention to adhere to partnership agreement, which required compensation when departing partner took clients); *Santos* v. *Zoning Board of Appeals*, 144 Conn. App. 62, 66–67, 71 A.3d 1263 (concluding that trial court's finding that plaintiff had waived 120 day decision deadline under § 51-183b "by executing multiple agreements to extend the period for the court to render judgment" was clearly erroneous because plaintiff "seasonably objected" to late decision and agreements "set forth a specific date beyond which their consent to a late judgment would not extend"), cert. denied, 310 Conn. 914, 76 A.3d 630 (2013); *Grey* v. *Connecticut Indemnity Services, Inc.*, 112 Conn. App. 811, 815–16, 964 A.2d 591 (2009) (trial court's finding that defendant waived right to arbitration was not clearly erroneous because she "acted inconsistently

with her contractual right to arbitration" by litigating case in court for three years before moving to compel arbitration on eve of trial).

We conclude that the trial court's factual finding of waiver with respect to the 2010 bylaws was not clearly erroneous and was, moreover, consistent with the court's legal conclusion under § 9-374 and its underlying findings—namely, that the Independent Party, as constituted in contemplation of the 2008 election, was a newly formed political party that had roots in various local independent parties around the state, including those from Danbury and Waterbury. Thus, the record amply supports the trial court's findings of "numerous indicators that the plaintiffs have waived their right to contest the validity of the 2010 bylaws." For example, the trial court properly credited testimony by Telesca and Mertens in finding that that Telesca and Fand "actively worked together starting in 2008 to create a statewide Independent Party in 2008 by petitioning to get Nader ballot access for the office of [the] president of the United States. Both Fand and Telesca filed a joint ED-601 party designation form on behalf of the Independent Party on May 5, 2008."[20] (Footnote omitted.) After Nader received the requisite 1 percent of the vote, "Telesca and Mertens then began drafting bylaws for the new statewide party in an effort to comply with § 9-374. They sent the bylaws they drafted to local Independent Party town committee chairs, [21] and arranged for a statewide party meeting/caucus to vote on the proposed

[20] Telesca testified that cooperation between him and Fand actually began in 2006, when they jointly signed a form ED-601 seeking a party designation for every single statewide race but did not receive enough votes to afford them minor party status for those offices in subsequent years.

[21] Telesca testified that his goal was "to unify the party, not just Danbury, but Waterbury, Watertown, Winsted, Milford, all the other regional parties that were around. And [he] tried to get everybody to come together to create a statewide party." Similarly, Mertens testified that they modeled their collaborative approach after that taken by the Green Party to combine local organizations into a statewide party under a single set of bylaws.

bylaws." (Footnote added.) As the trial court found, Telesca and Iorio "met personally with Fand to discuss the proposed bylaws; Fand did not object to the planned meeting, nor did he object to the idea of creating new bylaws for the statewide party or to the bylaws themselves. After the bylaws were unanimously adopted at the March 20, 2010 party meeting and later filed with the [Secretary], neither Fand nor any other member of the Danbury faction objected to them,"[22] either at the meeting or after they were filed with the Secretary.

"Moreover, when the Independent Party held a caucus on August 21, 2010, to endorse candidates for various offices pursuant to the 2010 bylaws, Fand and other members of the Danbury faction attended the meeting and did not question or object to their use. In addition, both Fand and LaFrance, two-thirds of the [Danbury faction], signed the endorsement form filed with the Waterbury town clerk and the [Secretary] along with Telesca, which specified the candidates that the Independent Party had endorsed for the 2010 elections at the August 21 meeting." The 2010 bylaws also governed the 2011 municipal election cycle, with no objection by Fand or the Danbury faction. "Fand and others in the Danbury faction also used the 2010 bylaws to govern [statewide] nominations/endorsements for the 2010, 2012 and 2014 election cycles without any objection," including the presidential election in 2012.

[22] Telesca testified that, with respect to the 2008 election, he believed that "[d]ifferent rules" governed "different areas of the state," and emphasized his belief that the 2006 bylaws "didn't apply to us" because they "were not my bylaws," and that he did not look to them as a "guide" for drafting the 2010 bylaws. Telesca also testified that he had voiced his objection to the 2006 bylaws, particularly the portion allowing nonmembers to vote in party proceedings, to Fand, Dietter, and LaFrance, and that he told "Fand in 2008 that we would never live under those bylaws. And if we got a party together, we had to create a new set of bylaws, and he agreed." On redirect examination, Telesca emphasized his belief that "there [weren't] any rules in 2010 until we created them" and that they were not in any way bound by the 2006 bylaws, even though they had previously been filed with the Secretary.

As the trial court found, Fand and the Danbury faction "did not call the legitimacy of the 2010 bylaws into question until sometime in 2012 when [Fand and Telesca] first disagreed about the nomination of Mark Boughton, the Republican mayor of Danbury, who was hoping for the endorsement of the Independent Party in connection with his gubernatorial ambitions in 2012." Accordingly, the trial court found that "there is nothing in the law that prevented Telesca from filing the 2010 bylaws with the [Secretary], and that the plaintiffs' knowledge about the drafting and adoption of such bylaws and their failure to object demonstrate their de facto acceptance of them." We conclude that the trial court did not commit clear error in finding, with respect to the special defense of waiver, that "the defendants have established by a preponderance of the evidence submitted in this case that the plaintiffs have waived any right they may have had to challenge the validity of the 2010 bylaws."

C

Constitutional Claims

The plaintiffs next argue that the trial court's decision violated the parties' rights under the first amendment to the United States constitution and article first, § 14, of the Connecticut constitution by directing the Secretary to accept only those Independent Party nominations "made pursuant to the 2010 bylaws . . . ." They contend that this order is an improper interference with the Independent Party's right to choose its candidates in accordance with its own desires and hurts the party by depriving the Danbury faction of the right to make an endorsement even when the Waterbury faction has not made a competing endorsement, thus adversely affecting the entire party's chance to maintain the ballot line for future elections. In response, the defendants contend, inter alia, that this claim is unreviewable

because the plaintiffs did not raise it before the trial court. The defendants also argue that the trial court's "disposition of the parties' dispute [with an order to the Secretary] was a necessary and appropriate judicial action" to which the plaintiffs had agreed at trial, because they named her as a defendant and explained to the trial court the necessity of an order directed to the Secretary given her office's long established policy of not accepting a minor party's nomination for an office when there is a conflicting nomination under the same party designation. We agree with the defendants and conclude that the plaintiffs waived their constitutional claim by inducing any claimed error.

The plaintiffs' failure to raise their constitutional claim before the trial court ordinarily would not be fatal to appellate review, insofar as we could consider it under the bypass doctrine of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[23] See, e.g., *Gleason* v. *Smolinski*, 319 Conn. 394, 402 n.10, 125 A.3d 920 (2015) (*Golding* doctrine applies in civil cases); see also *State* v. *Elson*, 311 Conn. 726, 750–51, 91 A.3d 862 (2014) (*Golding* review is available when record is adequate and claim fully briefed, even without specific invocation of doctrine or acknowledgment of unpreserved nature of claim).

It is well settled, however, that *Golding* review is not available when the claimed constitutional error has

[23] We review unpreserved constitutional claims pursuant to *Golding*, under which "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 590 n.8, 175 A.3d 514 (2018); see also *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying *Golding*'s third prong).

been induced by the party claiming it. See, e.g., *State* v. *Coward*, 292 Conn. 296, 305, 972 A.2d 691 (2009); *State* v. *Cruz*, 269 Conn. 97, 106–107, 848 A.2d 445 (2004). "[A] party cannot take a path at trial and change tactics on appeal." (Internal quotation marks omitted.) *State* v. *Martone*, 160 Conn. App. 315, 327, 125 A.3d 590, cert. denied, 320 Conn. 904, 127 A.3d 187 (2015). "[T]he term induced error, or invited error, has been defined as [a]n error that a party cannot complain of on appeal because the party, through conduct, encouraged or prompted the trial court to make the [allegedly] erroneous ruling. . . . It is well established that a party who induces an error cannot be heard to later complain about that error. . . . This principle bars appellate review of induced nonconstitutional error and induced constitutional error. . . . The invited error doctrine rests [on principles] of fairness, both to the trial court and to the opposing party. . . . [W]hether we call it induced error, encouraged error, waiver, or abandonment, the result—that the . . . claim is unreviewable—is the same." (Citations omitted; internal quotation marks omitted.) Id., 328.

Our review of the record leads us to conclude that the plaintiffs induced the claimed constitutional error in this case by naming the Secretary as a defendant and seeking an order directed to her. In their posttrial memorandum of law, the plaintiffs explained that the Secretary "remains as the first named [d]efendant for two reasons. First, the [Secretary] practices a long-standing policy of not accepting a candidate's nomination to office by a minor party when the [Secretary's] office receives a conflicting nomination with the same minor party designation for a given office. Therefore, the [trial court's] granting [of the plaintiffs'] third prayer for relief will compel the [Secretary] to recognize nominations from the plaintiffs as the valid nominations from the Independent Party, invalidating conflicting ones by

[the defendants] or otherwise. Second, without the third prayer for relief, the [Secretary]—by enforcing its long-standing policy—stands positioned to cause the plaintiffs irreparable harm. This harm has been caused in at least the last three . . . state election cycles." (Footnote omitted.) The relief granted to the defendants, namely, a declaration that they, rather than the plaintiffs, are the "rightful" officers of the Independent Party, with the 2010 bylaws controlling, and an order that the Secretary "recognize the above and to treat nominations and endorsements made pursuant to [the] 2010 bylaws as nominations and endorsements of the Independent Party of Connecticut," is simply a mirror image of that requested by the plaintiffs. Accordingly, because we consider the alleged constitutional errors to have be induced by the plaintiffs' own litigation tactics, we decline to review those claims.

D

Amendment of Pleadings

The plaintiffs' final claim is that the trial court abused its discretion by granting the defendants' request to amend their answer to add special defenses and counterclaims after the close of evidence. In response, the defendants contend that the plaintiffs were not prejudiced by the amendment, insofar as they have not identified anything that they would have done differently had the amendment either not been permitted or made earlier, and observe that the plaintiffs did not seek a continuance to address any new factual issues. The defendants rely on *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 833 A.2d 908 (2003), and emphasize that the amended pleading did not change any of the factual issues in the case, and that any changes were purely questions of law that the plaintiffs could address in posttrial briefing. We agree with the defendants and conclude that the trial court did not abuse its discretion by allowing them to amend their answer.

The record reveals the following additional relevant facts and procedural history. On October 10, 2017, on the eve of trial, the defendants sought permission to file an amended answer, including four special defenses and a counterclaim. The original answer did not include any special defenses or counterclaims. The proposed amended answer asserted the following special defenses: (1) the plaintiffs "lack standing to file and prosecute this action"; (2) the plaintiffs "have ratified the actions of the defendants in filing bylaws for the Independent Party of Connecticut in 2010 or have waived any right they might have had to challenge it"; (3) the "purported bylaws [of 1987 and 2006] violate rights of free of association [under] the first amendment [and] the Connecticut Constitution"; and (4) the 2006 bylaws were adopted without authority and therefore invalid. The defendants also filed a counterclaim seeking a declaratory judgment "that they are [the] rightful officers of the Independent Party of Connecticut [and] that the individual plaintiffs . . . are not . . . ." The plaintiffs objected to the request, and the trial court considered argument on the proposed amendment on October 11, 2017, which was the first day of trial.[24] The trial court held the defendants' motion in abeyance and, after the close of evidence, indicated that it would overrule the plaintiffs' objection and permit the amendment.

"While our courts have been liberal in permitting amendments . . . this liberality has limitations.

[24] Counsel for the defendants explained to the trial court that he filed the amended answer and counterclaim late because he was not "involved in the case at the time when the complaint was filed," and became involved in the case shortly before trial because the defendants' previous attorney had been suspended from the practice of law. He argued that the proposed amended answer and counterclaim would not affect the development of the record at trial and emphasized that he did not intend for the "allegations of the complaint and the allegations of the answer to be materially different" or change the issues in the case, and that the new pleading was intended "to clean things up . . . ."

Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. This court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [appellant's] burden to demonstrate that the trial court clearly abused its discretion. . . . If an amendment is allowed at trial and the opponent wants to raise an abuse of discretion issue on appeal, he should immediately move for a continuance in the trial in order to defend against the new issue. . . . Under certain circumstances, the trial court may allow an amendment to plead an additional special defense even after judgment has entered." (Citations omitted; internal quotation marks omitted.) *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, supra, 266 Conn. 583–84.

In considering whether a trial court has abused its discretion "in granting or denying a request to amend a [pleading] during or after trial," we recognize that "the trial court has its unique vantage point in part because it is interpreting the . . . allegations not in a vacuum, but in the context of the development of the proceedings and the parties' understanding of the meaning of those allegations. Similarly, prior to trial, in light of discovery, pretrial motions or conferences, a trial court may have a different context for the allegations than what is evident to an appellate court." *Dimmock* v. *Lawrence & Memorial Hospital, Inc.*, 286 Conn. 789, 799 n.4, 945 A.2d 955 (2008).

We conclude that the trial court did not abuse its discretion in allowing the late amendment to the defen-

dants' answer because it did not prejudice the plaintiffs. In their reply brief, the plaintiffs posit only that they were injured by the late amendment because the trial court "ultimately found in favor of the defendants on one special defense [of waiver] and on their counterclaim. The injury is that the trial court could not have found waiver or found in favor of the defendants on their counterclaim if the court had not permitted the amendment." Beyond the obviously adverse result of losing, however, the plaintiffs do not indicate that the trial court's decision to permit the amendment adversely affected the process. Specifically, they do not argue that they would have litigated the case differently had the trial court not permitted the amendment, or that they were deprived of any additional time necessary to respond to the amendment. Indeed, the trial court specifically afforded the plaintiffs fourteen days to file any necessary responsive pleading, in addition to posttrial briefing. See *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, supra, 266 Conn. 584 (The court noted that no prejudice resulted from allowing the inclusion of a special defense claiming a violation of state regulations because the plaintiff did not seek a continuance, and "the new affirmative defense did not inject any new factual issues into the case, but instead raised a purely legal issue. The plaintiff had the opportunity to address that issue fully in its posttrial brief to the court, which was filed nearly one month after trial. Finally . . . the trial court would have been obligated to consider the effect of the regulation on the enforceability of the cobrokerage agreement even if it had not been raised as a special defense."); *Burton* v. *Stamford*, 115 Conn. App. 47, 61–62, 971 A.2d 739 (declining to find that trial court abused its discretion by permitting late amendment of complaint when key factual issues remained same despite new theory of liability that would have required changes to jury instructions), cert. denied, 293 Conn. 912, 978 A.2d 1108 (2009).

Nor do the plaintiffs indicate that the late "amendment . . . confuse[d] the issues in the case . . . ." *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 759, 95 A.3d 1031 (2014); cf. *LaFrance* v. *Lodmell*, 322 Conn. 828, 847–48, 144 A.3d 373 (2016) (it was not abuse of discretion to deny defendant permission to amend cross complaint and related defenses at "late stage" when amendment "would have raised many complex issues, which would have required motions and discovery" that "would have significantly delayed the trial and prejudiced the plaintiff"). This suggests, then, that the late amendment to the answer did not prejudice the plaintiffs. Accordingly, we conclude that the trial court did not abuse its discretion by permitting the late amendment to the defendants' answer.

The judgment is affirmed.

In this opinion the other justices concurred.

INDEPENDENT PARTY OF CT—STATE CENTRAL ET AL. *v.* DENISE W. MERRILL, SECRETARY OF THE STATE, ET AL.
(SC 20160)

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

Syllabus

The plaintiffs in error, thirteen candidates for the state House of Representatives endorsed for the 2018 general election by a local faction of the state's Independent Party based in Danbury, brought a writ of error, seeking, inter alia, to preserve their rights in connection with a judgment rendered in the underlying action brought by that faction and its officers. In the underlying action, the Danbury faction and its officers sought, inter alia, a judgment declaring that the state's Independent Party is governed by a set of bylaws drafted in 2006 and not, as claimed by T and R, the leaders of another faction of the state's Independent Party based in Waterbury, a separate set of bylaws drafted in 2010. After the Danbury faction endorsed the thirteen plaintiffs in error, the trial court

rendered judgment in favor of T and R, and ordered the secretary of the state to accept only those endorsements made pursuant to the 2010 bylaws. Subsequently, the secretary of the state sent a letter to one of the plaintiffs in error, M, and one of the Waterbury faction's nominees, H, who were both running in the 106th assembly district, and informed them that neither would be placed on the ballot as the Independent Party nominee for that office unless one of them withdrew. Two weeks later, the secretary of the state published a list of candidates that named twelve of the plaintiffs in error as candidates of the Independent Party, as the Danbury and Waterbury factions had not made conflicting nominations with respect to those candidates, but declining to name an Independent Party candidate in the 106th assembly district. Ballots were printed consistent with that list, and, shortly thereafter, this court granted H's motion to be designated as a defendant in error. The plaintiffs in error ultimately claimed that their writ of error was rendered moot by the letter and list of the secretary of the state. In response, H requested that this court issue an order requiring the secretary of the state to place her name on the ballot as the Independent Party's candidate in the 106th assembly district consistent with the trial court's decision in the underlying action and contended that, in light of that request, the writ of error was not moot. *Held* that the writ of error must be dismissed, this court having concluded that the claims made by the plaintiffs in error had been rendered moot and that H's separate request for relief was not properly before the court: in light of the secretary of the state's unchallenged decision to accept the nominations of twelve out of the thirteen plaintiffs in error and to print their names on the ballot for the 2018 general election, there was no practical relief that this court could afford the plaintiffs in error with respect to the trial court's decision in the underlying action, and, accordingly, their claims were moot, and the writ of error was nonjusticiable; moreover, this court declined to reach H's claim for affirmative relief, as that claim raised numerous issues of fact that should have been considered by a trial judge in the first instance.

Argued October 19, 2018—officially released February 19, 2019

Procedural History

Writ of error from the decision of the Superior Court in the judicial district of Hartford, *Hon. A. Susan Peck*, judge trial referee, who, exercising the powers of the Superior Court, ordered the Secretary of the State to accept only certain nominations and endorsements of the state's Independent Party. *Writ of error dismissed.*

Proloy K. Das, with whom was *Sarah Gruber*, for the plaintiffs in error (Timothy D. Walczak et al.).

Maura Murphy Osborne, assistant attorney general, with whom, on the brief, was *George Jepsen*, former attorney general, for the defendant in error (Denise W. Merrill).

William M. Bloss, with whom were *Alinor C. Sterling* and *Emily B. Rock*, for the defendants in error (Michael Telesca et al.).

Prerna Rao, with whom was *Daniel S. Jo*, for the defendant in error (Rebekah Harriman-Stites).

Opinion

ROBINSON, C. J. This writ of error is the companion case to *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, A.3d (2019), in which this court affirmed the judgment of the trial court resolving a long running dispute between the Danbury and Waterbury factions of the state's Independent Party by, inter alia, granting declaratory and injunctive relief directing the named defendant in the underlying action, Secretary of the State Denise W. Merrill (Secretary), to accept only those endorsements made pursuant to the party's 2010 bylaws. The plaintiffs in error, thirteen candidates for the state House of Representatives endorsed by the Danbury faction[1] prior to the issuance of the trial court's decision in the underlying action, brought this writ of

[1] These endorsed candidates are: Timothy D. Walczak for the 16th assembly district, Mary M. Fay for the 18th assembly district, Chris Forster for the 21st assembly district, Mike J. Hurley for the 28th assembly district, Lillian A. Tanski for the 31st assembly district, Linda J. Szynkowicz for the 33rd assembly district, Samuel Belsito, Jr., for the 53rd assembly district, Don E. Crouch for the 85th assembly district, Mitch Bolinsky for the 106th assembly district, Veasna Roeun for the 109th assembly district, Erin M. Domenech for the 110th assembly district, Michael S. Ferguson for the 138th assembly district, and Terrie E. Wood for the 141th assembly district. For the sake of simplicity, we hereinafter refer to these individuals, collectively, as the endorsed candidates.

error[2] to protect their rights with respect to the judgment of the trial court. The endorsed candidates now argue that their writ of error is moot given the unchallenged decision of the Secretary to accept the Danbury faction's endorsements with respect to twelve of them, thus allowing them to be on the Independent Party's ballot line for the 2018 election. Rebekah Harriman-Stites, a candidate endorsed by the Waterbury faction for the 106th assembly district, however, has appeared in the present proceeding as a defendant in error[3] and contends that the writ of error is not moot in light of her request that we order the Secretary to print her name on the ballot in accordance with the trial court's decision. Because the writ of error is moot, and Harriman-Stites' separate request for relief is not properly before us, we dismiss this writ of error.

The record reveals the following relevant facts and procedural history.[4] In the underlying action, the plaintiffs, the Independent Party of CT—State Central and

[2] The plaintiffs brought this writ of error to this court directly pursuant to General Statutes § 51-199 (b) (10).

[3] On October 3, 2018, we granted Harriman-Stites' motion to be designated as a party in this writ of error.

[4] A more detailed overview of the facts and procedural history is set forth in the decision of this court governing the direct appeal. See *Independent Party of CT—State Central* v. *Merrill*, supra, 330 Conn. 681.

We note that portions of our factual recitation are based on factual representations by the parties with respect to events that took place subsequent to the issuance of the trial court's decision, which we may consider in determining whether those events have rendered this writ of error moot. See, e.g., *Private Healthcare Systems, Inc.* v. *Torres*, 278 Conn. 291, 302, 898 A.2d 768 (2006).

We also note that the endorsed candidates ask us to strike or disregard certain portions of the recitation of facts in Harriman-Stites' brief and supporting affidavit as improperly submitted material that is based on hearsay. We emphasize that we consider this material, and other uncontested factual representations about events that took place subsequent to the trial court's decision in the present case, solely as a representation of counsel made for background purposes, particularly given the expedited nature of this proceeding.

its officers, Michael Duff, Donna L. LaFrance, and Roger Palanzo, who lead the Danbury faction of the Independent Party, brought an action seeking declaratory and injunctive relief against two defendants, Michael Telesca and Rocco Frank, Jr., who lead its Waterbury faction.[5] The central dispute in the underlying case concerned which of two sets of bylaws govern the Independent Party under General Statutes §§ 9-372 (6) and 9-374—namely, a set of bylaws that the Danbury faction filed with the Secretary in 2006 (2006 bylaws), or a set filed in 2010 (2010 bylaws), which was drafted after Ralph Nader had received a sufficient number of votes in the 2008 presidential election to afford the Independent Party with statewide minor party status for the first time.

After a three day trial to the court, on August 21, 2018, the trial court, *Hon. A. Susan Peck*, judge trial referee,[6] issued a lengthy memorandum of decision. With respect to its specific findings of fact and conclusions of law, the trial court first concluded that the 2010 bylaws were controlling under the statutory scheme governing minor parties, in particular §§ 9-372 (6) and 9-374, the "plain language of [which indicates] that a minor party does not exist in Connecticut until it designates a candidate for office who achieves 1 percent of the vote." The trial court further observed that, in contrast to the 2010 bylaws, which were created in a statewide process after Nader's nomination in 2008, the 2006 bylaws were filed with the Secretary at a time when the "party so-named had not achieved minor party status for any statewide office." Thus, the trial court determined that the "2006 bylaws are valid only to the extent they are recognized as such within the local

[5] For the sake of simplicity, we hereinafter refer to Telesca and Frank, collectively, as the defendants.

[6] Unless otherwise noted, all references herein to the trial court are to Judge Peck.

committee. Although the plaintiffs filed the 2006 bylaws with the [Secretary], the filing of these rules merely allowed the [Danbury faction] to nominate local candidates and get them on an official ballot once they had attained 1 percent of the vote for a particular office. The 2006 bylaws did not automatically allow the [Danbury faction] to gain control of the statewide Independent Party after the 2008 presidential election." (Footnote omitted.) Accordingly, the trial court concluded that "the only statewide Independent Party was created post-2008, and the 2010 bylaws are the only valid governing rules of that party."[7]

The trial court further concluded that the plaintiffs had "failed to establish by a preponderance of the evidence that they are entitled to the declaratory and injunctive relief requested in their second amended complaint." Instead, the trial court turned to the defendants' counterclaim and special defenses, and concluded that they had "established by a preponderance of the evidence that the 2010 bylaws are the validly adopted and operative bylaws of the Independent Party/Independent Party of Connecticut, filed pursuant to the

[7] The trial court also rejected the plaintiffs' additional arguments about why the 2006 bylaws should be considered controlling. With respect to those relevant to this writ of error, the trial court first considered the plaintiffs' conduct subsequent to the adoption of the 2010 bylaws and concluded that "the defendants have established by a preponderance of the evidence submitted in this case [via their special defense] that the plaintiffs have waived any right they may have had to challenge the validity of the 2010 bylaws." The trial court also rejected the plaintiffs' contention that a 2012 decision issued by Judge Mark H. Taylor in *Independent Party of Connecticut* v. *Dietter*, Superior Court, judicial district of Waterbury, Docket No. CV-12-5016387-S (September 28, 2012) (2012 Waterbury action), which had concluded "that the 2006 bylaws were the validly adopted Independent Party rules," was entitled to preclusive effect in the present case. The trial court reasoned that the 2012 Waterbury action was distinguishable because it did not concern statewide office, was only "a motion for a temporary order of mandamus, and . . . was [subsequently] withdrawn." We address and decide these issues in the companion opinion. See *Independent Party of CT—State Central* v. *Merrill*, supra, 330 Conn. 681.

requirements of § 9-374, and that [Telesca and Frank] are the duly elected officers of the Independent Party/Independent Party of Connecticut, and the individual plaintiffs are not. In addition, the court hereby declares that the 2006 bylaws apply only to the Danbury faction's local committee of the Independent Party. Finally, the court hereby declares and orders that the [Secretary] must accept only the nominations and endorsements of the Independent Party/Independent Party of Connecticut, made pursuant to the 2010 bylaws filed with the [Secretary] on March 22, [2010], or as may be amended, pursuant to . . . § 9-374." According to the plaintiffs, this order effectively "gives the Waterbury faction under the leadership of Telesca and Frank control of the statewide ballot line."

Prior to the issuance of the trial court's underlying decision, the Danbury faction published, in the August 15, 2018 edition of the Hartford Courant, notice of the "Independent Party Endorsement Meeting," scheduled for August 20, 2018. On August 20, 2018, the Danbury faction held that endorsement meeting and endorsed certain candidates for the 2018 general election, including each of the endorsed candidates in the present proceeding. On the morning of August 21, 2018, the Danbury faction filed these endorsements with the Secretary. Later that same day, the trial court issued its memorandum of decision.

Given some uncertainty about the effect of the trial court's decision on those endorsements, on September 7, 2018, the endorsed candidates filed this writ of error to preserve their rights.[8] On September 7, 2018, the endorsed candidates also filed motions to intervene in

[8] Also on September 7, 2018, the plaintiffs appealed from the judgment of the trial court to the Appellate Court, which was later transferred to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1, and then expedited and argued together with this writ of error. See *Independent Party of CT—State Central* v. *Merrill*, supra, 330 Conn. 685 n.2.

the underlying action, and for declaration of an automatic stay pursuant to Practice Book § 72-3A.[9] The trial court did not take any action on these motions.

Subsequently, on September 11, 2018, the Secretary advised the parties and the individual candidates running for the 106th assembly district, Mitch Bolinsky, who was endorsed by the Danbury faction, and Harriman-Stites, who was endorsed by the Waterbury faction, by certified letter that the Secretary had received competing endorsements for the Independent Party ballot line. The Secretary informed Bolinsky and Harriman-Stites that, consistent with her policy and General Statutes § 9-250, she would not print either of their names as the Independent Party nominee for that office, unless one of them were to withdraw.

Telesca, as chairman of the Waterbury faction, received the letter from the Secretary on September 14, 2018, which was a Friday. That same day, Telesca called Ted Bromley, an attorney with the Secretary's office, and left him a voice mail message. Bromley

[9] Practice Book § 72-3A provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order that is challenged in the writ of error shall be automatically stayed for twenty days and if the writ is timely allowed and signed, the stay shall continue until the return date set forth in the writ. If a writ of error is timely filed, such proceedings shall be stayed until the final determination of the writ. . . . The automatic stay only applies to proceedings to enforce or carry out the judgment or order that is being challenged in the writ of error and does not stay any other trial court proceedings. There shall be no automatic stay if a writ of error is filed challenging an order of civil contempt, summary criminal contempt or any decisions under Section 61-11 (b) and (c) in accordance with the rules for appeals.

"Any aggrieved nonparty plaintiff in error or defendant in error or a party may file a motion to terminate or impose a stay in matters covered by this section, either before or after the judgment or order is rendered, based upon the existence of a writ of error. Such a motion shall be filed in accordance with the procedures in Section 61-11 (d) and (e) or Section 61-12. Whether acting on a motion of a party, a nonparty plaintiff in error or defendant in error or sua sponte, the judge shall hold a hearing prior to terminating the automatic stay. . . ."

responded to Telesca with an e-mail stating that he was out of the office and would look into the matter when he returned to the office on Monday. On Thursday, September 20, 2018, not having heard from Bromley, Telesca e-mailed Bromley a letter detailing the trial court's decision in the present case. In that letter, Telesca argued that the only nomination made pursuant to the 2010 bylaws was that of Harriman-Stites, noted that the Waterbury faction had not made any endorsements for certain other House or Probate Judge districts, and concluded that the Secretary must "disregard any nominations that you may have received from the Danbury faction . . . ." Telesca did not hear further from the Secretary's office.

On September 25, 2018, the Secretary published a list of nominees for the November, 2018 election, which included the twelve endorsed candidates other than Bolinsky, in accordance with the September 11, 2018 letter. Absentee ballots had been printed during the week of September 17, 2018, and were made available in town clerks on October 5, 2018, as required by General Statutes § 9-140. Further, military and overseas ballots were mailed to voters on September 22, 2018.

Shortly thereafter, Harriman-Stites filed a motion to intervene in the underlying action, an objection to the endorsed candidates' motion for an automatic stay, and a caseflow request seeking to have her motion and objection heard along with the other posttrial motions filed by the endorsed candidates. Following a motion for continuance filed by the plaintiffs, to which Harriman-Stites' objected, oral arguments on posttrial motions were rescheduled for October 22, 2018. On October 17, 2018, Harriman-Stites filed a motion for contempt in the trial court against the Secretary, arguing that the court's decision has not been stayed and asking it to find the Secretary "in contempt of the orders of the court and [to] direct the Secretary to act consistent with the court's findings immediately."

Although Harriman-Stites asked the trial court to consider this contempt motion at the October 22 hearing, the trial court, *Sheridan*, *J.*, rescheduled arguments on that motion and all other posttrial motions for October 29, 2018, because Judge Peck was unavailable until that date. Subsequently, because the October 29 hearing would have been after the statutory deadline for filing sample ballots; see General Statutes § 9-256; the trial court, *Sheridan*, *J.*, granted Harriman-Stites' request to mark off the October 29 hearing. Accordingly, the trial court has not taken action with respect to any of these posttrial motions filed by the endorsed candidates or Harriman-Stites.

In the meantime, briefing and oral argument on this writ of error and the plaintiffs' appeal continued on an expedited basis. See footnote 8 of this opinion. Beyond challenging the merits of the trial court's decision in the underlying action, the endorsed candidates now suggest that this writ of error has been rendered moot by intervening events, namely, the Secretary's September 11, 2018 decision to accept the Danbury faction's twelve unchallenged endorsements, as reflected in the list of nominees that she dated September 25, 2018.[10] In response, Harriman-Stites contends, inter alia, that (1) the writ of error is not moot, and (2) we should

[10] The defendants agree with the endorsed candidates' mootness arguments in this writ of error because "it appears that the Secretary did not apply the Superior Court's order that she accept only nominations made by the [Waterbury faction] and that [the Secretary] printed ballots as [the endorsed candidates] hoped she would." The defendants posit further that, "[a]ssuming arguendo that the [endorsed candidates] could bring a writ of error, they claim standing as candidates endorsed for 2018—and so they have the relief they seek."

Similarly, the Secretary filed a brief representing her "understanding that the 2010 bylaws govern statewide offices but that the 2006 bylaws can also be applied to the extent they do not conflict with the 2010 bylaws." Acknowledging her neutral position with respect to the parties' factional dispute, the Secretary urged us not to permit this litigation to create a costly disruption to the 2018 general election, in which absentee voting had already commenced; the Secretary did not, however, address specifically whether the writ of error is moot.

direct judgment enforcing the trial court's order and requiring the Secretary to accept the Waterbury faction's endorsement for purposes of the ballots for the 2018 election in the 106th assembly district.[11]

We heard oral argument on the writ of error and the underlying appeal on October 19, 2018. After oral arguments, we issued an order denying Harriman-Stites' request in this writ of error "for relief from [this] court prior to the election"[12] and stating that we would issue written opinions in both proceedings "in due course." This is the opinion relating to the writ of error.

We first consider whether this writ of error is moot, as argued by the endorsed candidates. "It is well established that [m]ootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve. . . . [T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *In re Emma F.*, 315 Conn. 414, 423–24, 107 A.3d 947 (2015); see, e.g., *Statewide Grievance Committee* v. *Burton*, 282 Conn. 1, 13, 917 A.2d 966 (2007) ("the central ques-

[11] Although the defendants "recognize[d] that it is too late to correct ballots at this point, at least on a broad scale basis," they observed in a footnote that "[w]hether relief could be granted to [Harriman-Stites] for the [106th assembly district] endorsement, seems to present a narrower question."

[12] On October 18, 2018, Harriman-Stites moved to supplement her appendix with the affidavit of LeReine Frampton, the Democratic Registrar of Voters in Newtown, to provide guidance to this court on the most current status of the ballots for the 106th assembly district. We denied that motion prior to oral argument on October 19, 2018.

tion in a mootness problem is whether a change in the circumstances that prevailed at the beginning of the litigation has forestalled the prospect for meaningful, practical, or effective relief").

We conclude that the endorsed candidates' writ of error is moot. Given the Secretary's unchallenged decision to accept twelve of the thirteen nominations and print their names on the ballot for the 2018 election, there is no practical relief that we can afford them with respect to the trial court's decision. Accordingly, their claims are moot, and their writ of error is, therefore, nonjusticiable. See, e.g., *Statewide Grievance Committee* v. *Burton*, supra, 282 Conn. 7 ("[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine. . . . Consequently, a court may have subject matter jurisdiction over certain types of controversies in general, but may not have jurisdiction in any given case because the issue is not justiciable." [Citations omitted; internal quotation marks omitted.]).

Harriman-Stites argues, however, that the writ of error is not moot with respect to her claims because of the Secretary's "confounding and inexplicable" decision to leave her off the ballot, despite the Secretary's assurance that she would abide by the trial court's decision in this case. Specifically, Harriman-Stites asked us to render judgment denying the writ of error and to direct the trial court to order the Secretary to comply with the trial court's order by putting her name on the ballot for the 106th assembly district. In responding to that argument, the endorsed candidates relied on, inter alia, *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 595 A.2d 839 (1991), and *East Windsor* v. *East Windsor Housing, Ltd., LLC*, 150 Conn. App. 268, 92 A.3d 955 (2014), contending that we should refuse to reach this claim because "Harriman-Stites' raising of a claim for relief through an *opposition* to a writ of error is malapropos," and that her briefing of

this issue is founded on Telesca's "untested, testimonial affidavit [which is] replete with hearsay."(Emphasis in original.) Given the numerous factual issues attendant to Harriman-Stites' improperly raised claims for relief, we decline to consider them in the first instance in connection with this writ of error.

"A writ of error . . . is generally subject to the same procedural rules as direct appeals." *State* v. *Abushaqra*, 153 Conn. App. 282, 286 n.8, 100 A.3d 1014, cert. denied, 315 Conn. 906, 104 A.3d 757 (2014); see also Practice Book § 72-4 ("[e]xcept as otherwise provided by statute or rule, the prosecution and defense of a writ of error shall be in accordance with the rules for appeals"). Given Harriman-Stites' course of seeking this relief in her brief without filing a separate writ of error to seek affirmative relief with respect to the action or inaction of the trial court, we take guidance from the ample body of case law considering claims raised by appellees in briefs, without having first been raised in a cross appeal, seeking relief vis-à-vis the judgment of the trial court. As a general rule, "[i]f an appellee wishes to change the judgment in any way, the party must file a cross appeal." (Internal quotation marks omitted.) *East Windsor* v. *East Windsor Housing, Ltd., LLC*, supra, 150 Conn. App. 270 n.1; see also *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, supra, 219 Conn. 792 n.5 (declining to reach affirmative claims for relief raised by appellee because appellee failed to file cross appeal); *Board of Police Commissioners* v. *White*, 171 Conn. 553, 557, 370 A.2d 1070 (1976) (declining to reach appellees' claims that "the plaintiffs had waived any claim of illegality as to the collective bargaining agreement and that the court erred in overruling their plea in abatement addressed to the capacity of the plaintiffs to bring [the] action," because "[t]hey did not file an assignment of errors and a cross appeal and we do not consider the merits of these contentions"); *Farmers & Mechanics Savings Bank* v. *First Federal Savings & Loan Assn.*,

167 Conn. 294, 303 n.4, 355 A.2d 260 (1974) (declining to consider briefed issue concerning validity of restrictive covenants because, although appellees "raised this issue at the trial level, the trial court did not find it necessary to rule thereon," and appellee did not "file a cross appeal assigning error in the court's failure to treat this issue"); *East Windsor* v. *East Windsor Housing, Ltd., LLC*, supra, 270 n.1 (refusing appellee's request "to direct the trial court to remove costs of seven title searches and seven filing fees from the fees awarded to the plaintiff" because of failure to file cross appeal). This rule is not, however, absolute, and the court may consider such a claim otherwise improperly raised in the appellee's brief in the absence of prejudice to the appellant. See *Akin* v. *Norwalk*, 163 Conn. 68, 70–71, 301 A.2d 258 (1972); *Rizzo* v. *Price*, 162 Conn. 504, 512–13, 294 A.2d 541 (1972); *DiSesa* v. *Hickey*, 160 Conn. 250, 262–63, 278 A.2d 785 (1971).

We decline to reach this claim for affirmative relief, raised in the first instance in Harriman-Stites' brief. We agree with the endorsed candidates that this claim raises numerous issues of fact, particularly with respect to the feasibility of an order to put Harriman-Stites on the ballot given the timing of the election, that would have been more properly considered by a trial judge in the first instance. See *Rizzo* v. *Price*, supra, 162 Conn. 513 (declining to review appellee's challenge, raised for first time in brief, to trial court's failure to make certain factual conclusions as "clearly prejudicial to the appellant"); see also *Furs* v. *Superior Court*, 298 Conn. 404, 412–13, 3 A.3d 912 (2010) (declining to reach state's claim in writ of error challenging contempt finding, which state did not raise as "an [alternative] ground for affirmance in a filing pursuant to Practice Book § 63-4 [a] [1], and did not designate . . . as such in its brief" because it depended on presumption that "trial court would have accepted the state's claim of an inde-

pendent source of authority to grant use immunity only" or that plaintiff-in-error, "who claims that he refused to testify on the advice of counsel, would have refused to testify if he had been informed that the state had inherent authority to offer use immunity, which would be sufficient under the fifth amendment to compel his testimony and that this would not be violative of the statute" [footnote omitted]); *Gianetti* v. *Norwalk Hospital*, 266 Conn. 544, 560, 833 A.2d 891 (2003) ("[o]rdinarily it is not the function of this court or the Appellate Court to make factual findings, but rather to decide whether the decision of the trial court was clearly erroneous in light of the evidence . . . in the whole record" [internal quotation marks omitted]). Although we are sympathetic to the delays experienced by Harriman-Stites in obtaining a hearing before the trial court, we note that, beyond objecting to the caseflow requests filed by the plaintiffs and the endorsed candidates, she did not file any motions before that court seeking expedited review, including assignment to a different judge given Judge Peck's unavailability, or seek similar relief from this court under Practice Book § 60-2. Accordingly, we conclude that this unmeritorious request for relief does not save the writ of error from dismissal.[13]

The writ of error is dismissed.

In this opinion the other justices concurred.

[13] We note that the endorsed candidates do not contend that we lack subject matter jurisdiction to consider Harriman-Stites' claims as a result of her failure to file her own writ of error seeking relief vis-à-vis the judgment of the trial court. Similarly, our independent research does not reveal any authority to support that proposition, insofar as jurisdiction existed in the first instance over the endorsed candidates' writ of error, to which her claim for relief apparently attaches. See, e.g., *State* v. *Skipwith*, 326 Conn. 512, 526 n.18, 165 A.3d 1211 (2017) (discussing codification of common-law requirements for standing to file writ of error as "codified in Practice Book § 72-1 [a]"). Nevertheless, a rescript ordering dismissal with respect to the writ of error as a whole remains appropriate, as that rescript has been used interchangeably to dispose of writs of error that lack merit or are jurisdictionally defective. See, e.g., id., 516 n.5 (citing cases).

ORDERS

CONNECTICUT REPORTS

VOL. 330

JOHN M. MILLER ET AL. *v.* THOMAS A. LYMAN

The defendant's petition for certification to appeal from the Appellate Court, 186 Conn. App. 904 (AC 39700), is denied.

Logan A. Carducci, in support of the petition.

Jeffrey R. Lindequist, in opposition.

Decided February 6, 2019

JOSEPH MOORE *v.* COMMISSIONER OF CORRECTION

The petitioner Joseph Moore's petition for certification to appeal from the Appellate Court, 186 Conn. App. 254 (AC 40112), is granted, limited to the following issue:

"Did the Appellate Court properly conclude that trial counsel did not render ineffective assistance of counsel in advising the petitioner regarding the pretrial plea offers?"

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

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided February 6, 2019

MICHAEL KONOVER ET AL. *v.* MICHAEL KOLAKOWSKI ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 186 Conn. App. 706 (AC 40173/AC 40434), is denied.

McDONALD and ECKER, Js., did not participate in the consideration of or decision on this petition.

Jeffrey R. Babbin, *Frank J. Silvestri, Jr.*, and *Kristen G. Rossetti*, in support of the petition.

Richard J. Buturla and *Ryan P. Driscoll*, in opposition.

Decided February 6, 2019

U.S. EQUITIES CORP. *v.* PEGGY CERALDI

The plaintiff's petition for certification to appeal from the Appellate Court, 186 Conn. App. 610 (AC 41648), is denied.

P. Jo Anne Burgh, in support of the petition.

Joanne S. Faulkner, in opposition.

Decided February 6, 2019

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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(AC 39816)

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

Syllabus

Convicted of the crimes of breach of the peace in the second degree, criminal mischief in the third degree and threatening in the second degree, the defendant appealed to this court. The defendant's conviction stemmed from a dispute he had with C, a tow truck operator. C had observed the defendant's car at a condominium complex in an area marked as a fire lane and secured the car for towing. When the defendant exited a nearby garage, C informed the defendant that he was towing the defendant's car because it was parked in a fire lane. The defendant became agitated, moved toward C, who was standing near his tow truck, and struck the tow truck with a pipe. After C grabbed a can of pepper spray from his truck and sprayed the defendant in the face, the defendant dropped the pipe and pulled a knife out from his pocket. Immediately upon seeing the knife, C entered his tow truck, drove a safe distance away from the defendant and called the police, who later arrested the defendant. Thereafter, prior to trial, the state filed a motion in limine to preclude evidence of C's prior convictions and any allegations of criminal conduct against C. The defendant filed an objection, to which he attached copies of 2013 police reports relating to C's prior larceny convictions, which contained statements by C admitting that he had

stolen cell phones to exchange them for drugs. The defendant argued that he intended to inquire into those specific acts, as well as C's drug use, in order to impeach C's credibility and to support his defense theory that C, motivated by his desire to fuel a drug habit, was stealing, rather than towing, the defendant's car. The trial court granted in part the state's motion in limine, concluding, inter alia, that evidence of the specific acts underlying the larceny convictions would be inadmissible. Subsequently, the trial court denied the defendant's motion to permit inquiry into the specific acts underlying C's prior breach of the peace conviction, which concerned an incident in which C, following a motor vehicle accident, attempted to use pepper spray on the other motorist in self-defense. The defendant contended that, because C pleaded guilty to the breach of the peace charge, the specific acts underlying the breach of the peace conviction could be used to establish that C was engaging in a pattern of making false self-defense claims and to impeach C's credibility in the present case, where C had sprayed pepper spray into the defendant's face allegedly in self-defense. *Held*:

1. The trial court did not abuse its discretion in prohibiting the defendant from cross-examining C as to the specific acts underlying his larceny convictions and his breach of the peace conviction: the trial court determined reasonably that C's statements from the 2013 police reports relating to C's prior larceny convictions were too remote in time to have probative value as to the incident underlying the present case, which occurred in March, 2015, that even if they were probative, they would have confused the jury, and that C's statements were not probative of C having a motive to steal the defendant's car, namely, to support a drug habit, where there was no indication in the record that C was under the influence of substances at the time of the incident underlying the present case; moreover, the trial court determined reasonably that C's guilty plea to the breach of the peace charge did not impugn his statement in the police report regarding his use of pepper spray in self-defense, such that the specific acts underlying the breach of the peace conviction were not probative of C engaging in a pattern of making false self-defense claims, and that the altercation underlying C's breach of the peace conviction, which occurred more than two years before the incident underlying the present case, was too remote and bore minimal probative value on C's credibility.
2. The defendant could not prevail on his claim that the trial court erroneously denied his motion seeking a disclosure and an in camera review of medical, mental health, and drug and alcohol treatment records of C, thereby violating his constitutional rights to confrontation and to present a defense: the trial court had the discretion to deny the defendant's request to voir dire C with respect to his confidential records on the basis of its determination that C's records from approximately two years prior to the incident underlying the present case were too remote in time and not material, and the defendant's claim that the trial court erroneously concluded that he failed to make a sufficient threshold

showing to require the disclosure and in camera examination of C's confidential records was unavailing, as the police reports relating to C's prior larceny conviction established, at most, that approximately two years before the incident underlying the present case, C had a drug addiction and intended to receive substance abuse counseling and treatment, and the court also determined reasonably that C's alleged drug use and pursuit of treatment and counseling were too remote in time to the incident underlying the present case and not material.

3. The trial court properly declined to instruct the jury that defense of property constituted a justification defense to the charge of criminal mischief in the third degree; although the defendant claimed that, pursuant to statute (§ 53a-16), defense of property applies in any prosecution for an offense, defense of property is applicable only to crimes against persons, and, thus, it does not constitute a justification defense to criminal mischief in the third degree.

4. The defendant could not prevail on his claim that the state failed to meet its burden to disprove his defense of property justification defense beyond a reasonable doubt, which was based on his claim that the evidence adduced at trial demonstrated that he believed reasonably that C was stealing his car and that physical force was necessary to prevent the larceny; there was sufficient evidence produced at trial for the jury to determine reasonably that the defendant's alleged belief that C was stealing his car was unreasonable, as the jury reasonably could have credited C's testimony and found that C, in the course of his employment, was attempting to tow the defendant's car because it was parked illegally in a fire lane, and that the defendant was aware that his car was being towed legally for that reason.

5. The defendant's claim that the state failed to meet its burden to disprove his self-defense justification defense beyond a reasonable doubt was unavailing; although the defendant claimed that the evidence adduced at trial demonstrated that he believed reasonably that C was using or was about to use deadly or nondeadly force on him and that physical force was necessary to defend himself, the evidence was sufficient for the jury to determine reasonably that the defendant's actions caused C to believe reasonably that the defendant was about to use physical force upon him and, thus, that the defendant was the initial aggressor, and, thus, the state presented sufficient evidence to disprove the defendant's self-defense claim beyond a reasonable doubt.

Argued October 18, 2018—officially released February 19, 2019

Procedural History

Information charging the defendant with the crimes of breach of the peace in the second degree, criminal mischief in the third degree, and threatening in the second degree, brought to the Superior Court in the judicial district of Hartford, geographical area number

twelve, where the court, *Lobo*, *J.*, granted in part the state's motion to preclude certain evidence and denied the defendant's motion to disclose certain confidential records; thereafter, the matter was tried to the jury; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

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

James M. Ralls, assistant state's attorney, with whom, on the brief, were *Gail Hardy*, state's attorney, and *Courtney Chaplin*, former assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Elvin G. Rivera, appeals from the judgment of conviction, rendered after a jury trial, of breach of the peace in the second degree in violation of General Statutes § 53a-181 (a) (1), criminal mischief in the third degree in violation of General Statutes § 53a-117 (a) (1), and threatening in the second degree in violation of General Statutes § 53a-62 (a) (1). On appeal, the defendant claims that (1) the trial court erroneously prohibited him from cross-examining the state's key witness, Stephen Chase, as to the specific acts underlying several misdemeanor convictions rendered against Chase, (2) the court erroneously denied his motion seeking a disclosure and an in camera review of Chase's medical, mental health, and drug and alcohol treatment records, (3) the court committed instructional error, and (4) the state failed to meet its burden to disprove his defense of property and self-defense justification defenses beyond a reasonable doubt.[1] We disagree and, accordingly, affirm the judgment of the trial court.

[1] In his principal appellant's brief and his reply brief, the defendant's claims that the state failed to disprove his defense of property and self-defense justification defenses beyond a reasonable doubt were presented in separate sections. For ease of discussion, we will address these claims together.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our disposition of the defendant's claims. In March, 2015, Chase was employed as a tow truck operator. Chase's employer contracted with various property owners to tow vehicles that were parked illegally or otherwise without authorization on their properties. Pursuant to a contract executed by Chase's employer and Coachlight Condominiums, a condominium complex located in East Hartford, Chase was authorized to tow vehicles on the Coachlight Condominiums property that were, inter alia, parked in fire lanes and/or blocking tenants' garages.

On March 24, 2015, while patrolling the Coachlight Condominiums property in the course of his employment, Chase observed a silver car parked in an area marked as a fire lane.[2] To secure the car for towing, Chase attached the rear of the car to the boom of his tow truck and lifted the rear of the car off the ground. Soon thereafter, the defendant exited a nearby garage and angrily asked Chase why the car, which belonged to the defendant, was being towed. Chase replied that the defendant's car was parked in a fire lane. The defendant became agitated, telling Chase that "[y]ou're not f'ing towing my car . . . ." The defendant then approached his car, which was hitched to Chase's tow truck, and opened the driver's side door. Believing that the defendant would attempt to drive the car away, Chase operated his tow truck to lift the rear of the car higher off the ground. Chase then notified the defendant that he could pay $93.59 for the release of his car. The defendant returned to the garage wherefrom he had appeared and obtained a pipe approximately three or four feet in length. The defendant moved toward Chase, who was standing next to the driver's side door of his

[2] More specifically, the car was parked in front of a garage door, above which was a sign indicating that the area in which the car was parked was a fire lane.

tow truck, and struck the tow truck with the pipe. Thereafter, Chase, believing that the defendant intended to strike him with the pipe, stepped backward toward the tow truck, reached into the tow truck through the driver's side door, grabbed a can of pepper spray located in the center console, and sprayed the pepper spray into the defendant's face. The defendant became disoriented, dropped the pipe, and pulled a knife out from his pocket. Immediately upon seeing the knife, Chase entered his tow truck, drove a safe distance away from the defendant, and called the police to report the altercation.

The defendant was arrested on-site and charged with breach of the peace in the second degree in violation of § 53a-181 (a) (1),[3] criminal mischief in the third degree in violation of § 53a-117 (a) (1),[4] and threatening in the second degree in violation of § 53a-62 (a) (1).[5] In September, 2016, the defendant's case was tried to a jury. The state called Chase as its key witness during its case-in-chief. The jury found the defendant guilty on all three counts. The trial court, *Lobo*, *J.*, accepted the jury's verdict and sentenced the defendant to a total effective sentence of two years incarceration, execution suspended after fifteen months of incarceration, followed by two years of probation with special conditions. This appeal followed. Additional facts and procedural history will be set forth as necessary.

[3] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . ."

[4] General Statutes § 53a-117 (a) provides in relevant part: "A person is guilty of criminal mischief in the third degree when, having no reasonable ground to believe that such person has a right to do so, such person: (1) Intentionally or recklessly (A) damages tangible property of another . . . ."

[5] General Statutes § 53a-62 (a) provides in relevant part: "A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury . . . ."

I

We first consider the defendant's claim that the trial court erroneously precluded him from cross-examining Chase as to the specific acts underlying several misdemeanor convictions rendered against Chase, thereby violating his constitutional rights to confrontation and to present a defense under the sixth amendment to the United States constitution.[6] Specifically, the defendant asserts that the court improperly prohibited him from inquiring into the specific acts underlying (1) convictions rendered against Chase on February 20, 2014, on three separate counts of larceny in the sixth degree in violation of General Statutes § 53a-125b[7] (2014 larceny convictions), and (2) a conviction rendered against Chase on January 17, 2013, on one count of breach of the peace in the second degree in violation of § 53a-181 (2013 breach of the peace conviction). We disagree.

We begin by setting forth the relevant standard of review and legal principles that govern our review of the defendant's claim. "The sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . .

[6] The defendant also claims a violation of his state constitutional rights pursuant to article first, § 8, of the Connecticut constitution. We deem the defendant's state constitutional claims abandoned because he has failed to provide an independent analysis under our state constitution. See *State* v. *Maye*, 70 Conn. App. 828, 831 n.1, 799 A.2d 1136 (2002).

[7] General Statutes § 53a-125b provides in pertinent part: "(a) A person is guilty of larceny in the sixth degree when he commits larceny as defined in section 53a-119 and the value of the property or service is five hundred dollars or less. . . ."

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment. . . . Further, the exclusion of defense evidence may deprive the defendant of his constitutional right to present a defense. . . .

"[T]he confrontation clause does not [however] suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . . Rather, [a] defendant is . . . bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the [federal] constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . To the contrary, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. . . .

"In analyzing the defendant's claims, we first review the trial court's evidentiary rulings. Our standard of review for evidentiary claims is well settled. . . . We review the trial court's decision to admit [or exclude] evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . . The trial court has wide discretion to determine the relevancy of evidence and the scope of cross-examination. . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court . . . reasonably [could have] conclude[d] as it did. . . . If, after reviewing the trial court's evidentiary rulings, we conclude that the trial court properly excluded the proffered evidence, then the defendant's constitutional

claims necessarily fail." (Citations omitted; internal quotation marks omitted.) *State* v. *Davis*, 298 Conn. 1, 8–11, 1 A.3d 76 (2010). Additionally, "[i]t bears emphasis that any limitation on the impeachment of a key government witness is subject to the most rigorous appellate review." (Internal quotation marks omitted.) *State* v. *Grant*, 89 Conn. App. 635, 645, 874 A.2d 330, cert. denied, 275 Conn. 903, 882 A.2d 678 (2005).

Pursuant to § 4-5 (a) of the Connecticut Code of Evidence, evidence of other crimes, wrongs, or acts of a person may not be admitted to prove the bad character, propensity, or criminal tendencies of that person, subject to certain exceptions set forth in § 4-5 (b) that are not applicable here. Pursuant to § 4-5 (c), however, evidence of other crimes, wrongs, or acts is admissible for other purposes, "such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." "Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in [Connecticut Code of Evidence §§] 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered and that its probative value outweighs its prejudicial effect." Conn. Code Evid. § 4-5 (c), commentary. "To determine whether evidence of prior misconduct falls within an exception to the general rule prohibiting its admission, we have adopted a two-pronged analysis. . . . First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the probative value of such evidence must outweigh the prejudicial effect of the other crime evidence." (Internal quotation marks omitted.) *State* v. *Boscarino*, 86 Conn. App. 447, 458, 861 A.2d 579 (2004).

Pursuant to Connecticut Code of Evidence § 6-6 (b) (1), "[a] witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness." "The right to cross-examine a witness concerning specific acts of misconduct is limited in three distinct ways. First, cross-examination may only extend to specific acts of misconduct other than a felony conviction if those acts bear a special significance upon the [issue] of veracity . . . . Second, [w]hether to permit cross-examination as to particular acts of misconduct . . . lies largely within the discretion of the trial court. . . . Third, extrinsic evidence of such acts is inadmissible." (Internal quotation marks omitted.) *State* v. *Martinez*, 171 Conn. App. 702, 735, 158 A.3d 373, cert. denied, 325 Conn. 925, 160 A.3d 1067 (2017).

A

The defendant first claims that the trial court erroneously precluded him from cross-examining Chase as to the specific acts underlying the 2014 larceny convictions. We are not persuaded.

The following additional facts and procedural history are relevant to our disposition of the defendant's claim. On September 14, 2016, prior to the start of the second day of jury selection, the defendant orally moved the court for an order requiring the state to disclose any police reports relating to the 2014 larceny convictions and the 2013 breach of the peace conviction. The court denied the defendant's motion as to the 2013 breach of the peace conviction but granted the motion as to the 2014 larceny convictions.

On September 16, 2016, the state filed a motion in limine to preclude evidence of Chase's convictions and any allegations of criminal conduct against Chase. On September 19, 2016, the defendant filed an objection to the motion in limine, to which he attached copies

of, inter alia, three police reports relating to the 2014 larceny convictions, one dated May 29, 2013, and two dated May 30, 2013 (2013 police reports). On September 20, 2016, the court heard argument on the motion in limine. In support of the motion, the state argued, inter alia, that evidence of the specific acts underlying the 2014 larceny convictions was not probative of Chase's veracity and would mislead the jury. The state also requested that, if the court were to deem evidence relating to the 2014 larceny convictions admissible, the court limit the admission of such evidence to the names and dates of the convictions, as well as the identity of the courts in which the convictions were rendered. In opposing the motion, the defendant stated that he sought to inquire into the specific acts underlying the 2014 larceny convictions rather than offer evidence of the convictions themselves. The defendant noted that the 2013 police reports contained statements by Chase admitting that he had stolen cell phones to exchange them for drugs. The defendant argued that he intended to inquire into those specific acts, as well as Chase's drug use, in order to impeach Chase's credibility and to support his defense theory that Chase, motivated by his desire to fuel a drug habit, was stealing, rather than towing, the defendant's car on March 24, 2015.

Following argument, the court granted in part and denied in part the state's motion in limine, ruling that evidence of the 2014 larceny convictions, the dates of the convictions, the identity of the courts in which the convictions were rendered, and the sentences imposed would be admissible, but that evidence of the specific acts underlying those convictions would be inadmissible. In prohibiting evidence of the specific acts underlying the 2014 larceny convictions, the court determined that Chase's statements in the 2013 police reports were too remote, not relevant, would only serve to confuse the jury, and would inject collateral issues into the trial.

The court also rejected the defendant's argument that the 2013 police reports demonstrated that Chase had a drug habit providing him with a motive to steal the defendant's car on March 24, 2015, stating that there were no allegations that Chase was under the influence of any substances at that time.

At trial, Chase testified that he had been convicted of three counts of larceny in the sixth degree in 2014. Chase did not testify as to the specific acts underlying those convictions. In addition, on cross-examination, Chase testified that he had not been under the influence of alcohol or illegal drugs on March 24, 2015, and that he had not been under the influence of illegal drugs during the seven days preceding March 24, 2015.

The defendant asserts that the 2013 police reports included statements by Chase admitting that he previously had stolen cell phones to exchange them for drugs. The defendant contends that, if elicited on cross-examination, that information would have undermined Chase's credibility and supported his defense theory that Chase, motivated by a drug habit, was stealing the defendant's car rather than towing it. In response, the state argues, inter alia, that the specific acts underlying the 2014 larceny convictions were too remote and did not demonstrate that Chase had a motive to steal the defendant's car. We agree with the state.

"It is generally held that larcenous acts tend to show a lack of veracity. . . . [L]arcenous crimes by their very nature indicate dishonesty or tendency to make false statement. . . . Moreover, [i]n common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects on a man's honesty and integrity. . . . It does not follow, however, that if the acts inquired about are indicative of a lack of veracity, the court must permit the cross-examination. Whether to permit it lies largely

within the court's discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Martin*, 201 Conn. 74, 87, 513 A.2d 116 (1986).

Here, the court determined reasonably that Chase's statements in the 2013 police reports were too remote in time to have probative value as to the underlying March 24, 2015 incident and, even if they were probative, they would have confused the jury. See, e.g., *State* v. *Morgan*, 70 Conn. App. 255, 274, 797 A.2d 616 (trial court free to determine that remoteness of specific acts of misconduct tended to outweigh probative value), cert. denied, 261 Conn. 919, 806 A.2d 1056 (2002). The court also determined reasonably that Chase's statements were not probative of Chase having a motive to steal the defendant's car, namely, to support a drug habit, where there was no indication in the record that Chase was under the influence of substances at the time of the underlying incident on March 24, 2015. Accordingly, we conclude that the court did not abuse its discretion in precluding the defendant from cross-examining Chase as to the specific acts underlying the 2014 larceny convictions.

B

The defendant next claims that the trial court erroneously precluded him from cross-examining Chase as to the specific acts underlying the 2013 breach of the peace conviction. We disagree.

The following additional facts and procedural history are relevant to our disposition of the defendant's claim. On September 20, 2016, after the court, in adjudicating the state's motion in limine, had precluded evidence as to the specific acts underlying the 2014 larceny convictions, the defendant requested permission to be heard on an oral motion to permit inquiry into the specific acts underlying the 2013 breach of the peace conviction. The following day, the court heard argument on such

motion. The defendant noted that a police report relating to the 2013 breach of the peace conviction that he had acquired, dated October 14, 2012 (2012 police report),[8] contained a statement by Chase indicating that, following a motor vehicle accident on October 14, 2012, involving Chase and another motorist, Chase attempted to use pepper spray on the motorist in self-defense. As a result of that incident, both Chase and the motorist were charged with breach of the peace in the second degree in violation of § 53a-181. Chase pleaded guilty to the breach of the peace charge, which, according to the defendant, demonstrated that Chase's statement in the 2012 police report, representing that he had used the pepper spray in self-defense, was false. The defendant contended that the specific acts underlying the 2013 breach of the peace conviction could be used to establish that Chase was engaging in a pattern of making false self-defense claims and to impeach Chase's credibility in the present case, where Chase had sprayed pepper spray into the defendant's face allegedly in self-defense. The state objected, arguing, inter alia, that the specific acts underlying the 2013 breach of the peace conviction were too remote, lacked probative value, and did not support the defendant's argument that Chase was engaging in a pattern of making false self-defense claims.

Following argument, the court concluded that it was "maintaining" its ruling that the 2013 breach of the peace conviction and the specific acts underlying that conviction were not probative of Chase's credibility and were not relevant.[9] The court determined that Chase's

[8] On September 14, 2016, the court denied the defendant's oral motion seeking a disclosure of any police reports relating to the 2013 breach of the peace conviction. Nevertheless, sometime thereafter, the defendant obtained a copy of the 2012 police report, which he attached to his objection to the state's motion in limine.

[9] On the basis of the record before us, prior to its September 21, 2016 ruling, it does not appear that the court determined that the 2013 breach of the peace conviction and the specific acts underlying that conviction

guilty plea to the breach of the peace charge did not amount to a concession that Chase's statement in the 2012 police report was false, and it noted that the October 14, 2012 altercation between Chase and the motorist occurred over two years prior to the underlying March 24, 2015 incident. Thus, the court determined that the 2013 breach of the peace conviction and the acts underlying it did not demonstrate that Chase was engaging in a pattern of making false self-defense claims, were too remote, had no probative value, and would inject collateral issues into the trial.

At trial, Chase testified that he had been convicted of one count of breach of the peace sometime around 2013. Chase did not testify as to the specific acts underlying that conviction.

The defendant claims that the 2012 police report reflected that Chase previously had admitted to pepper spraying another individual. He further contends that, if elicited on cross-examination, that information would have undermined Chase's credibility and supported the defendant's theory that Chase had sprayed pepper spray in the defendant's face while attempting to steal his car, rather than in self-defense.

We conclude that the court did not abuse its discretion in prohibiting the defendant from cross-examining Chase as to the specific acts underlying the 2013 breach

were not probative or relevant. On September 14, 2016, in denying the defendant's oral motion seeking a disclosure of any police reports relating to the 2013 breach of the peace conviction, the court rejected an argument raised by the defendant that any police reports relating to the 2013 breach of the peace conviction might contain admissible evidence supporting his defense theory that Chase was the initial aggressor in the underlying altercation, determining that § 4-4 (a) (2) of the Connecticut Code of Evidence allowed such evidence only in homicide or criminal assault cases. The court did not make any findings that the 2013 breach of the peace conviction and the specific acts underlying that conviction were not probative or relevant at that time.

of the peace conviction. The court determined reasonably that Chase's guilty plea to the breach of the peace charge did not impugn his statement in the 2012 police report regarding his use of pepper spray in self-defense, such that the specific acts underlying the 2013 breach of the peace conviction were not probative of Chase engaging in a pattern of making false self-defense claims. The court also determined reasonably that the October 14, 2012 altercation underlying Chase's breach of the peace conviction, which occurred more than two years before the underlying incident on March 24, 2015, was too remote and bore minimal probative value on Chase's credibility. See *State* v. *Morgan*, supra, 70 Conn. App. 274.

In sum, we conclude that the court did not abuse its discretion in prohibiting the defendant from cross-examining Chase as to the specific acts underlying the 2014 larceny convictions and the 2013 breach of the peace conviction. Consequently, the defendant's constitutional claims fail as well.

II

We next address the defendant's claim that the trial court erroneously denied his motion seeking a disclosure and an in camera review of medical, mental health, and drug and alcohol treatment records of Chase (Chase's records), thereby violating his constitutional rights to confrontation and to present a defense under the sixth amendment to the United States constitution.[10] Specifically, the defendant asserts (1) that the court improperly rejected his request to voir dire Chase as to Chase's records, which restricted his ability to make

[10] The defendant also claims a violation of his state constitutional rights pursuant to article first, § 8, of the Connecticut constitution. We deem the defendant's state constitutional claims abandoned because he has failed to provide an independent analysis of them under our state constitution. See *State* v. *Maye*, 70 Conn. App. 828, 831 n.1, 799 A.2d 1136 (2002).

the requisite threshold showing to require the disclosure and in camera inspection of Chase's records, or, in the alternative, (2) that the court improperly concluded that he failed to satisfy the requisite threshold showing. We disagree.

The following additional facts and procedural history are relevant to our disposition of the defendant's claims. On September 19, 2016, before the evidentiary portion of the trial had commenced, the defendant filed a motion requesting that the state disclose, or that the court subpoena, Chase's records, and that the court conduct an in camera inspection of such records, if they existed, to determine whether they were probative of Chase's credibility (motion for disclosure). In support of the motion, the defendant stated that one of the police reports relating to the 2014 larceny convictions, dated May 29, 2013 (May 29, 2013 police report), reflected that Chase had confessed to committing several larcenies in May, 2013, "in an effort to fuel a drug habit." Chase also informed the police that he was "starting a drug addiction program on Monday, June 3, 2013" as a "result" of one of his arrests. The defendant contended that, to the extent that they existed, Chase's records likely contained evidence that the defendant could use to impeach Chase's credibility.

On September 20, 2016, the court heard argument on the motion for disclosure. During argument, defense counsel requested an opportunity to voir dire Chase to determine whether Chase's records existed and whether they were material to Chase's credibility such that obtaining them for an in camera inspection by the court was warranted. Defense counsel argued that he was in a "vacuum," as he did not have access to any of Chase's records, but that the May 29, 2013 police report indicated that Chase apparently had undergone substance abuse treatment. Defense counsel further

argued that substance abuse affects an individual's ability to comprehend, know, and correctly relate the truth, such that Chase's records could contain evidence that was probative of Chase's credibility. The state objected, arguing that it did not possess confidential records of Chase or have knowledge of any substance abuse treatment that Chase had undergone. It further argued that because the defendant had not proffered any evidence suggesting that Chase was impaired at the time of the altercation with the defendant on March 24, 2015, the information sought by the defendant by way of his motion for disclosure was immaterial, prejudicial, and had no probative value. The state also argued that obtaining and reviewing any such confidential records would cause undue delay in the case.

Following argument, the court denied the motion for disclosure. After setting forth the relevant law governing access to confidential records, the court stated: "In listening to argument, [the] court is not persuaded that the defendant has met the initial threshold for the disclosure of the records at this point in time. There is, again—it has been represented, an allegation, that back in 2013, two years prior, that [Chase] had a drug problem, and that [Chase] was seeking treatment. Again, two years prior to the allegations as contained in the case that's presently before the court. Defense counsel also argued that we don't know that—we don't know what's in the records. It's true, none of us know what's in the records. But not knowing what's in the records doesn't allow for a fishing expedition [to] discover what could or potentially be in the records. The initial threshold has to be met. What's being offered as to . . . that initial threshold is the 2013 statement alleged to be made by [Chase]. That there was an issue back then, two years ago. Again, as to how that reflects or is associated with the present matter before the court, there is nothing that this court has heard regarding [Chase's]

ability to perceive or to recollect or narrate relevant events that occurred. There's no indication as to the allegations and, again, as it . . . pertained in the police report as to substance abuse. Based on the remoteness . . . and what the court has already put forth on the record, [the] court does not find that the threshold is met at this point in time, and the request is denied."

With regard to the defendant's request to voir dire Chase as to Chase's records, after initially reserving its decision, the court ruled as follows: "[T]he court had further reflection on [defense] counsel's request as to being able to voir dire [Chase] regarding his substance abuse and mental health records. Again, those are confidential records. Again, [the] court is denying that request to voir dire [Chase] as to the mental health and medical records, again, based on the court's earlier ruling that the initial proffer this court found did not meet the original threshold to bring it to a potential in camera review or consider putting it before witnesses to explore that matter further. Again . . . the statement made by [Chase] was back from in—from 2012 and 2013, two years prior to the matter that's before the court today, and would not be material to this case. And again, just opening up potential collateral issues, which this court is not going to get into."

The following exchange then occurred on the record between defense counsel and the court:

"[Defense Counsel]: Judge, I just want a clarification on the ruling on the motion for an in camera review.

"The Court: Mm-mmm.

"[Defense Counsel]: I believe Your Honor said I could not voir dire preliminarily on the medical records or the mental health, but you didn't mention drug.

"The Court: And substance abuse, as far as the records.

"[Defense Counsel]: Okay.

"The Court: And, again, as far as what attorneys wish to get into, not restricting cross-examination or questions asked of witnesses, but as of this point in time, [the] court hasn't heard anything that would—that would cause this court to order an unsealing of those records.

"[Defense Counsel]: Your Honor, at this point—at this point in that motion for the in camera review of the records—

"The Court: Mm-mmm.

"[Defense Counsel]: —we don't have the records. So the procedure—what I requested was to question [Chase] out of the presence of the jury about where he's treated for drugs and alcohol.

"The Court: Mm-mmm.

"[Defense Counsel]: And then if—and at that point if he states, you know, that he [was] treated at X, Y and Z, and at that point that's when the—Your Honor would determine whether the threshold has been met.

"The Court: And, again, from what's been presented to the court is that there was a statement made back in 2013 that [Chase] was seeking treatment. The court's not finding that relevant as to this case that's before the court today. That that information would not be material. That individual has a right to confidentiality regarding substance abuse and mental health records. That includes potentially if and when and where and whether he's ever treated that. That confidentiality covers all of that. So, at this point in time, the court is not finding, based on the proffer, a reason to have him testify as to anything as to what his treatment is or was at any point in time, if it occurred.

"[Defense Counsel]: And Your Honor has balanced that against [the defendant's] constitutional rights to cross-examine and impeach the witnesses. And we know that—

"The Court: Absolutely.

"[Defense Counsel]: —in the proffer that I made prior is, we know, in 2013 that [Chase] had a cocaine, severe cocaine habit. That he was fueled by a drug addiction to commit larcenies. And that we claim that that's completely material and relevant to the defense in this case.

"The Court: Yes. So noted."

A

The defendant first claims that the trial court erroneously rejected his request to voir dire Chase as to Chase's records, thereby restricting his ability to make the threshold showing warranting the procurement and in camera review of Chase's records. In response, the state argues, inter alia, that the court acted within its discretion to reject the defendant's request to voir dire Chase. We agree with the state.

"[O]ur Supreme Court has established that to compel an in camera review of confidential records, a defendant must make a preliminary showing that there is a reasonable ground to believe that failure to review the records likely would impair the defendant's right to confrontation. . . . To meet this burden, the defendant must do more than assert that the privileged records may contain information that would be useful for the purposes of impeaching a witness' credibility. . . . As explained by our Supreme Court: [T]he defendant's offer of proof should be specific and should set forth the issue in the case to which the [confidential] information sought will relate." (Internal quotation marks omitted.) *State* v. *Campanaro*, 146 Conn. App. 722, 733, 78 A.3d 267 (2013), cert. denied, 311 Conn. 902, 83 A.3d 604 (2014).

Our Supreme Court has "urged trial courts to permit the defendant a certain latitude in his attempt to make [the preliminary showing required to obtain an in camera inspection of confidential records] . . . [however],

in the context of [the defendant's] offer of proof to make that showing, our rules of evidence remain operative." (Citation omitted; internal quotation marks omitted.) *State* v. *Bruno*, 236 Conn. 514, 531, 673 A.2d 1117 (1996). A trial court retains the discretion to curtail inquiry that is not probative. Id., 531, 533. "While we are mindful that the defendant's task to lay a foundation as to the likely relevance of records to which he is not privy is not an easy one, we are also mindful of the witness' legitimate interest in maintaining, to the extent possible, the privacy of [his] confidential records." Id., 531–32.

Generally, a defendant is "afforded an opportunity to voir dire persons with knowledge of the contents of the [confidential] records sought" in creating a factual basis upon which the trial court might conclude that there is a reasonable ground to believe that the records would contain impeachment evidence such that a further inquiry is warranted. Id., 523. The court, however, had the discretion to deny the defendant's request to voir dire Chase with respect to Chase's records on the basis of its determinations that Chase's records were too remote in time to the underlying March 24, 2015 incident and not material. We conclude that the court did not abuse its discretion under these circumstances.

B

In the alternative, the defendant claims that the trial court erroneously concluded that he failed to make a sufficient threshold showing to require the disclosure and in camera examination of Chase's records. Specifically, the defendant contends that, notwithstanding the court's declining his request to voir dire Chase as to Chase's records, the May 29, 2013 police report satisfied the requisite threshold showing. In response, the state argues that the evidence submitted by the defendant was insufficient to meet the necessary threshold showing. We agree with the state.

"This court will review a trial court's denial of a defendant's request to conduct an in camera review of confidential records pursuant to our standard of review for evidentiary rulings. . . . Therefore, [w]e review a court's conclusion that a defendant has failed to make a threshold showing of entitlement to an in camera review of [confidential] records . . . under the abuse of discretion standard. . . . We must make every reasonable presumption in favor of the trial court's action. . . . The trial court's exercise of its discretion will be reversed only where the abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Campanaro*, supra, 146 Conn. App. 732.

In the present case, the May 29, 2013 police report that the defendant submitted in support of his motion for disclosure established, at most, that Chase had a drug addiction in May, 2013, and intended to receive substance abuse counseling and treatment in June, 2013, nearly two years before the underlying March 24, 2015 incident. "However, we have never held that a history of alcohol or drug abuse or treatment automatically makes a witness fair game for disclosure of [confidential] records to a criminal defendant . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Bruno*, supra, 236 Conn. 529. Further, the court determined reasonably that Chase's alleged drug use and pursuit of treatment and counseling were too remote in time to the underlying March 24, 2015 incident and not material. Accordingly, we conclude that the court did not abuse its discretion in denying the defendant's motion for disclosure.[11]

[11] Although the court denied the defendant's motion for disclosure, defense counsel asked Chase on cross-examination whether he was under the influence of alcohol or illegal drugs on March 24, 2015, and whether he was under the influence of illegal drugs in the seven days preceding March 24, 2015. Chase replied "[n]o" to those inquiries. Defense counsel did not ask Chase any other questions concerning his purported substance abuse. "Where the trial court allows significant cross-examination concerning a

III

We now turn to the defendant's claim that the trial court committed instructional error by failing to instruct the jury that defense of property constituted a justification defense to the charge of criminal mischief in the third degree. Specifically, relying on General Statutes § 53a-16, he contends that defense of property applies "in any prosecution for an offense," including criminal mischief in the third degree. (Internal quotation marks omitted.) In response, the state argues, inter alia, that defense of property is applicable only to crimes against persons and, thus, it does not constitute a justification defense to criminal mischief in the third degree. We agree with the state.

We begin by setting forth the relevant standard of review. Whether a justification defense applies to a particular crime is a question of law and, therefore, subject to plenary review. See *State* v. *Amado*, 254 Conn. 184, 197, 756 A.2d 274 (2000).

The following additional facts and procedural history are relevant to the defendant's claim. On September 22, 2016, the defendant filed a written request to charge in which he requested, inter alia, that the court instruct the jury that defense of property applied to all three of the crimes of which he was charged, including criminal mischief in the third degree. Following a charge conference, the court declined to give the charge requested by the defendant regarding defense of property. Instead, the court instructed the jury that defense of property

witness' veracity, it cannot be said that the constitutional right to confrontation is implicated. . . . Although a lack of knowledge about the credibility of a witness implicates the constitutional right of confrontation, [t]hat lack of knowledge can be ameliorated by an extensive and effective [cross-examination]." (Internal quotation marks omitted.) *State* v. *Blake*, 106 Conn. App. 345, 355 n.7, 942 A.2d 496, cert. denied, 287 Conn. 922, 951 A.2d 573 (2008).

applied only to the charges of breach of the peace in the second degree and threatening in the second degree.

"Due process requires that a defendant charged with a crime must be afforded the opportunity to establish a defense. . . . This fundamental constitutional right includes proper jury instructions on the elements of [the defense] so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the [crime charged] was not justified." (Internal quotation marks omitted.) *State* v. *Nathan J.*, 99 Conn. App. 713, 716, 915 A.2d 907 (2007), aff'd, 294 Conn. 243, 982 A.2d 1067 (2009). "A defendant must, however, assert a *recognized legal defense before such a charge will become obligatory*. . . . *State* v. *Rosado*, 178 Conn. 704, 707, 425 A.2d 108 (1979). Our Supreme Court has held that only when the evidence presented indicates the availability of one of the numerous statutory defenses, codified in the General Statutes, is the defendant entitled, as a matter of law, to a theory of defense charge." (Emphasis in original; internal quotation marks omitted.) *State* v. *Fiocchi*, 17 Conn. App. 326, 329, 553 A.2d 181, cert. denied, 210 Conn. 812, 556 A.2d 611 (1989).

Section 53a-16 provides: "In any prosecution for an offense, justification, as defined in sections 53a-17 to 53a-23, inclusive, shall be a defense." General Statutes § 53a-21 provides: "A person is justified in using reasonable physical force *upon another person* when and to the extent that he reasonably believes such to be necessary to prevent an attempt by such other person to commit larceny or criminal mischief involving property, or when and to the extent he reasonably believes such to be necessary to regain property which he reasonably believes to have been acquired by larceny within a reasonable time prior to the use of such force; but he may use deadly physical force under such circumstances

only in defense of person as prescribed in section 53a-19." (Emphasis added.)

This court's decision in *State* v. *Fiocchi*, supra, 17 Conn. App. 326, is instructive to our resolution of the defendant's claim. In *Fiocchi*, following a jury trial, the defendant was convicted of unlawful discharge of a firearm in violation of General Statutes (Rev. to 1985) § 53-203[12] for shooting and killing a neighbor's dog that had entered the defendant's property and had previously attacked his chickens. Id., 327–28. The trial court instructed the jury on the defense codified in General Statutes § 22-358; id., 329; which protects owners of any domestic animal or poultry from criminal and civil liability for killing any dog observed "pursuing or worrying any such domestic animal or poultry." General Statutes (Rev. to 1985) § 22-358 (a). On appeal from the judgment of conviction, the defendant claimed, inter alia, that the court erroneously failed to give the jury a "general justification" instruction. (Internal quotation marks omitted.) *State* v. *Fiocchi*, supra, 329. This court rejected that claim, determining that there was no general, noncodified justification defense recognized under Connecticut law. Id. This court further stated: "With respect to the defense of justification provided in our penal code pursuant to General Statutes §§ 53a-16 and 53a-19, which the defendant referred to in his request to charge, we conclude that those statutes do not apply to the use of force against animals. These statutes represent a codification of the common law; see Commission to Revise the Criminal Statutes, Penal Code Comments, Connecticut General Statutes, p. 219; and specifically refer to the use of force against 'persons.' 'Person' is

[12] General Statutes (Rev. to 1985) § 53-203 provides: "Any person who intentionally, negligently or carelessly discharges any firearm in such a manner as to be likely to cause bodily injury or death to persons or domestic animals, or the wanton destruction of property shall be fined not more than two hundred fifty dollars or imprisoned not more than three months or both."

defined under General Statutes [Rev. to 1985] § 53a-3 (1) as 'a *human being*, and, where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.' . . . Based on a plain language reading of these statutes, it is evident that . . . §§ 53a-16 and 53a-19 apply *only* to the use of force against another *person* and not animals. Therefore, the trial court properly limited its instruction of the defense of justification to the specific statutory defense for killing a dog set forth in . . . § 22-358." (Emphasis in original; footnotes omitted.) *State* v. *Fiocchi*, supra, 329–30.

Although *Fiocchi* discussed the applicability of self-defense to a crime involving the use of force against a domestic animal, the rationale in *Fiocchi* is germane to the issue before us. The plain language of § 53a-21 mandates that a defendant must use "reasonable physical force *upon another person*" to invoke defense of property. (Emphasis added.) Accordingly, defense of property is inapplicable to crimes that involve the use of force against property, such as criminal mischief in the third degree; see General Statutes § 53a-117; and, thus, we conclude that the court correctly declined to instruct the jury that defense of property applied to the charge of criminal mischief in the third degree.[13]

[13] The defendant cites to *State* v. *Morgan*, 86 Conn. App. 196, 860 A.2d 1239 (2004), cert. denied, 273 Conn. 902, 868 A.2d 746 (2005), for the proposition that, pursuant to § 53a-16, a justification defense is a defense to all crimes charged. The defendant's reliance on *Morgan* is misplaced. In *Morgan*, this court held that the trial court improperly charged the jury on self-defense by failing to instruct the jury that it was obligated to find the defendant not guilty of two counts of attempt to commit assault in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-59 (a) (1) and (2) if the jury determined that the defendant was justified in his use of force. Id., 205–206. Contrary to the assertion of the defendant in the present case, *Morgan* does not state that justification defenses apply to *all* crimes. See, e.g., *State* v. *Davis*, 261 Conn. 553, 573, 804 A.2d 781 (2002) (defendant not entitled to self-defense instruction when charged only with interfering with peace officer in violation of General Statutes § 53a-167a and assaulting peace officer in violation of General Statutes [Rev. to 1997] § 53a-167c); *State* v. *Amado*, supra, 254 Conn. 197–202 (defendant not entitled to self-defense

IV

Finally, we address the defendant's claims that the state failed to meet its burden to disprove his defense of property and self-defense justification defenses beyond a reasonable doubt. We disagree.

"On appeal, the standard for reviewing sufficiency claims in conjunction with a justification offered by the defense is the same standard used when examining claims of insufficiency of the evidence. . . . In reviewing a sufficiency of the evidence claim, we apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . Moreover, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty. . . .

"The rules governing the respective burdens borne by the defendant and the state on the justification[s] of self-defense [and defense of property] are grounded in the fact that [u]nder our Penal Code, self-defense, as defined in . . . § 53a-19 (a) [and defense of property as defined in § 53a-21 are] . . . defense[s], rather than . . . affirmative defense[s]. See General Statutes § 53a-16. Whereas an affirmative defense requires the defendant to establish his claim by a preponderance of the

instruction when charged with felony murder in violation of General Statutes § 53a-54c). Further, unlike the present case, the defendant in *Morgan* was not charged with a crime involving the use of force against property. *State* v. *Morgan*, supra, 198.

evidence, a properly raised defense places the burden on the state to disprove the defendant's claim beyond a reasonable doubt. See General Statutes § 53a-12. Consequently, a defendant has no burden of persuasion for a claim of self-defense [or defense of property]; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim . . . to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt. . . .

"Whether the defense of the justified use of force, properly raised at trial, has been disproved by the state is a question of fact for the jury, to be determined from all the evidence in the case and the reasonable inferences drawn from that evidence. . . . As long as the evidence presented at trial was sufficient to allow the jury reasonably to conclude that the state had met its burden of persuasion, the verdict will be sustained." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Nicholson*, 155 Conn. App. 499, 505–506, 109 A.3d 1010, cert. denied, 316 Conn. 913, 111 A.3d 884 (2015).

We also note that "[i]t is the jury's right to accept some, none or all of the evidence presented. . . . Moreover, [e]vidence is not insufficient . . . because it is conflicting or inconsistent. [The jury] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject. . . . We do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record." (Internal quotation marks omitted.) *State* v. *Wortham*, 80 Conn. App. 635, 642, 836 A.2d 1231 (2003), cert. denied, 268 Conn. 901, 845 A.2d 406 (2004).

The following additional facts and procedural history are relevant to our disposition of the defendant's claims. During the state's case-in-chief, Chase testified that, on March 24, 2015, he had been employed by "A & M and Central" and that, pursuant to a contract executed by his employer and Coachlight Condominiums, he was authorized to tow vehicles parked illegally in restricted zones, such as fire lanes, on the Coachlight Condominiums property. Chase further testified that on March 24, 2015, he was attempting to tow the defendant's car from the Coachlight Condominiums property because he had observed it parked in a fire lane, which he identified on the basis of signs on the property designating the area in question as a fire lane. In addition, Chase testified that he informed the defendant that he was towing the defendant's car because it was parked in a fire lane, the defendant approached him and struck his tow truck with a pipe while he was standing nearby, he sprayed the defendant with the pepper spray because he believed that the defendant intended to strike him with the pipe and he "feared for [his] life," and the defendant pulled out a knife from his pocket after being sprayed with the pepper spray.

During his case-in-chief, the defendant elicited testimony from John Freitas, the vice president and director of a company named A & M Towing & Recovery, Inc. (A & M Towing). Freitas testified that A & M Towing did not have a towing services contract with Coachlight Condominiums on March 24, 2015, and that Chase had not been employed by A & M Towing on that date. Freitas also testified that a company named Central Automotive Transport (Central) had started managing A & M Towing's business operations beginning in May, 2014, and that he would not have known the identities of Central's employees who would have been driving A & M Towing's tow trucks. The defendant also elicited testimony from Gloria Stokes, the fire marshal for East

Hartford. Stokes testified that she had the authority to designate fire lanes in apartment complexes in East Hartford and that she had not designated the area on the Coachlight Condominiums property where the defendant's car had been parked on March 24, 2015, as a fire lane. Stokes further testified, however, that there were signs on the Coachlight Condominiums property indicating that the area in question was a fire lane. In addition, the court granted the defendant's request to admit into evidence an undated map indicating that the area where the defendant's car had been parked was not a fire lane.

At trial, the defendant asserted defense of property and self-defense as justification defenses.[14] With respect to his defense of property defense, the defendant's theory was that he believed that Chase was stealing his car and that force was necessary to prevent the larceny. With respect to his self-defense claim, the defendant's theory was that he was entitled to use force to defend himself after Chase had sprayed and incapacitated him with the pepper spray.

A

The defendant first claims that the state failed to meet its burden to disprove his defense of property justification defense beyond a reasonable doubt. Specifically, he asserts that the evidence adduced at trial demonstrates that he believed reasonably that Chase was stealing his car and that physical force was necessary to prevent the larceny. In response, the state argues, inter alia, that there was sufficient evidence produced at trial for the jury to determine reasonably that the defendant's alleged belief that Chase was stealing his car was unreasonable. We agree with the state.

Section 53a-21 provides in pertinent part that "[a] person is justified in using reasonable physical force

[14] The court instructed the jury that both of the justification defenses applied only to the charges of breach of the peace in the second degree and threatening in the second degree.

upon another person when and to the extent that he reasonably believes such to be necessary to prevent an attempt by such other person to commit larceny . . . .''

In the present case, if the jury credited Chase's testimony, which it was free to do, it reasonably could have found that Chase, in the course of his employment, was attempting to tow the defendant's car from the Coachlight Condominiums property because it was parked illegally in a fire lane and, further, that the defendant was aware that his car was being towed legally for that reason.[15] In turn, the jury reasonably could have determined that the defendant's alleged beliefs that Chase was committing a larceny and that physical force was necessary to prevent the larceny were unreasonable. Accordingly, construing the evidence in the light most favorable to sustaining the verdict, we conclude that the state met its burden to disprove the defendant's defense of property justification defense beyond a reasonable doubt.

B

The defendant next claims that the state failed to meet its burden to disprove his self-defense justification

[15] We note that the jury could have harmonized the testimonies of Freitas and Stokes with Chase's testimony. Chase testified that he was employed by "A & M and Central." Freitas testified that Chase was not employed by A & M Towing, but that Central had taken over A & M Towing's business operations in May, 2014, and that its employees, whose identities Freitas would not have known, were driving A & M Towing's tow trucks. The jury could have credited the testimonies of Chase and Freitas to determine reasonably that Chase was employed and authorized by a towing services company to tow illegally parked vehicles from the Coachlight Condominiums property on March 24, 2015. In addition, Chase testified that he observed signs on the Coachlight Condominiums property indicating that the location where the defendant's car had been parked on March 24, 2015, was a fire lane. Stokes' testimony confirmed that there were signs on the property marking the location in question as a fire lane, although she had not designated that area as a fire lane in her capacity as East Hartford's fire marshal. The jury could have credited the testimonies of Chase and Stokes to determine reasonably that the defendant's car was parked illegally in a fire lane on March 24, 2015.

defense beyond a reasonable doubt. Specifically, he asserts that the evidence adduced at trial demonstrates that he believed reasonably that Chase was using or about to use deadly or nondeadly force on him and that physical force was necessary to defend himself. He further contends that the evidence does not establish that he was the initial aggressor in the altercation with Chase. In response, the state argues, inter alia, that there was sufficient evidence produced at trial for the jury to determine reasonably that the defendant was the initial aggressor. We agree with the state.

Section 53a-19 (a) provides in relevant part that "a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm." Section 53a-19 (c) provides in relevant part that "[n]otwithstanding the provisions of subsection (a) of this section, a person is not justified in using physical force when . . . (2) he is the initial aggressor, except that his use of physical force upon another person under such circumstances is justifiable if he withdraws from the encounter and effectively communicates to such other person his intent to do so, but such other person notwithstanding continues or threatens the use of physical force . . . ."

"A defendant who acts as an initial aggressor is not entitled to the protection of the defense of self-defense. . . . The initial aggressor, however, is not necessarily the first person who uses physical force. . . . Section

53a-19 contemplates that a person who reasonably perceives a threat of physical force may respond with physical force without becoming the initial aggressor and forfeiting the defense of self-defense. . . . The initial aggressor is the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person." (Citations omitted.) *State* v. *Skelly*, 124 Conn. App. 161, 167–68, 3 A.3d 1064, cert. denied, 299 Conn. 909, 10 A.3d 526 (2010).

In crediting Chase's testimony, the jury reasonably could have found that Chase had sprayed the defendant with pepper spray, which led the defendant to pull out the knife from his pocket, only after the defendant had approached Chase with a pipe and, with Chase standing nearby, struck Chase's tow truck with the pipe. The evidence was sufficient for the jury to determine reasonably that the defendant's actions caused Chase to believe reasonably that the defendant was about to use physical force upon him and, thus, that the defendant was the initial aggressor. Accordingly, construing the evidence in the light most favorable to sustaining the verdict, we conclude that the state presented sufficient evidence to disprove the defendant's self-defense claim beyond a reasonable doubt.[16]

The judgment is affirmed.

In this opinion the other judges concurred.

[16] In his principal appellant's brief, the defendant also claims that, if the jury determined that the defendant had used deadly physical force, the state failed to prove that any of the statutory exceptions precluding the use of deadly physical force applied. See General Statutes § 53a-19 (b). Regardless of whether the jury found that the defendant used deadly or nondeadly physical force, the jury could have determined reasonably that the defendant was the initial aggressor and, therefore, concluded that the state had disproved the defendant's self-defense claim beyond a reasonable doubt.

STATE OF CONNECTICUT *v.* CALVIN BENNETT (AC 40443)

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

Syllabus

The defendant, who had been convicted by a three judge panel of the crimes of felony murder, home invasion and burglary in the first degree in connection with the shooting death of the victim, appealed to this court from the trial court's denial of his motion to correct an illegal sentence. On appeal, the defendant claimed that his sentence for both burglary in the first degree and home invasion violated his constitutional protection against double jeopardy because the home invasion was part of the same transaction as the burglary and his intent throughout the transaction was to carry out a larceny. *Held* that the defendant's conviction of burglary in the first degree and home invasion did not violate his constitutional protection against double jeopardy; although the defendant claimed that the robbery that gave rise to the home invasion was incidental to the completion of the larceny that gave rise to the burglary charge and, therefore, could be considered as part of an uninterrupted course of conduct in furtherance of the burglary, the acts were susceptible to separation into parts that supported a conviction of both burglary in the first degree and home invasion, as the burglary charge arose from the defendant's distinct and separate act of entering the victim's dwelling at night with the intent to commit a larceny, while the home invasion charge arose from the defendant's separate act of threatening the use of physical force against the victim's girlfriend after the defendant and an associate entered the home and were committing the larceny, and although the defendant's conduct constituted one transaction and the defendant may have had the intent to commit a larceny throughout the transaction, the defendant's intent was not a factor in determining whether the transaction was susceptible to separation into parts that supported a conviction of both crimes.

Argued October 25, 2018—officially released February 19, 2019

Procedural History

Substitute information charging the defendant with the crimes of aiding and abetting murder, felony murder, home invasion and burglary in the first degree, brought to the Superior Court in the judicial district of Waterbury and tried to a three judge court, *Cremins*, *Crawford* and *Schuman*, *Js.*; judgment of guilty, from which the defendant appealed to our Supreme Court,

which reversed the judgment in part and remanded the case for further proceedings; thereafter, the court, *Fasano*, *J.*, denied the defendant's motion to correct an illegal sentence, and the defendant appealed to this court. *Affirmed.*

W. Theodore Koch III, assigned counsel, for the appellant (defendant).

Linda Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *Maureen Platt*, state's attorney, and *John Davenport*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Calvin Bennett, appeals from the judgment of the trial court denying his motion to correct an illegal sentence. On appeal, the defendant argues that the court improperly rejected his claim that his sentence for both burglary in the first degree in violation of General Statutes § 53a-101 (a) (3)[1] and home invasion in violation of General Statutes § 53a-100aa (a) (1)[2] violates his constitutional protection against double jeopardy. We affirm the judgment of the trial court.

Our Supreme Court, in its opinion addressing the defendant's direct appeal, recited the following procedural history and facts relevant to this appeal. "The defendant . . . was charged with aiding and abetting

[1] General Statutes § 53a-101 (a) provides in relevant part: "A person is guilty of burglary in the first degree when . . . (3) such person enters or remains unlawfully in a dwelling at night with intent to commit a crime therein."

[2] General Statutes § 53a-100aa (a) provides in relevant part: "A person is guilty of home invasion when such person enters or remains unlawfully in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein, and, in the course of committing the offense: (1) Acting either alone or with one or more persons, such person or another participant in the crime commits or attempts to commit a felony against the person of another person other than a participant in the crime who is actually present in such dwelling . . . ."

murder in violation of General Statutes §§ 53a-8 and 53a-54a, felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (1), and burglary in the first degree in violation of General Statutes § 53a-101 (a) (3). The defendant elected a trial to a three judge court (panel). See General Statutes § 54-82. The panel, consisting of *Cremins*, *Crawford* and *Schuman*, *Js.*, rendered a unanimous verdict of guilty on all of the charges except aiding and abetting murder, on which a majority of the panel found the defendant guilty, and thereafter rendered judgment in accordance with the verdict and imposed a total effective sentence of sixty years imprisonment. . . .

"[The victim] James Caffrey lived in the second floor apartment of 323 Hill Street in Waterbury with his girlfriend Samantha Bright and one other roommate. James' mother, Emilia Caffrey, lived in the first floor apartment. In the late afternoon of Saturday, October 26, 2008 . . . Caffrey and Bright had five visitors, including Tamarius Maner, in their living room. Maner had a clear view of the bedroom from where he was seated in the living room. Maner purchased a small amount of marijuana from . . . Caffrey and paid him some money, which Caffrey put in the bedroom. Caffrey kept the marijuana in the bedroom. Caffrey remarked that he had saved $500 for a child that he was expecting with Bright.

"At about that time, Maner and the defendant lived next door to each in other in Bridgeport and had done drug business together. Maner contacted the defendant by cell phone during the evening of Saturday, October 26. Shortly after midnight on Sunday, October 27, Maner and the defendant drove from Bridgeport to Waterbury to go to James Caffrey's apartment. They were carrying loaded handguns.

"Just after 1 a.m., the doorbell to the second floor apartment at 323 Hill Street rang and Caffrey answered the door. A conversation of a few seconds with . . . Caffrey ensued. Maner then shot Caffrey in the face from a distance of one to three feet with a .45 caliber handgun. Caffrey fell in the hallway in a pool of blood and died from the gunshot wound to the head.

"Maner and the defendant walked past Caffrey and into the bedroom. Then the defendant put a gun to Bright's head and asked: 'Where is everything?' Bright understood the question to inquire about money and drugs. Bright referred them to the top dresser drawer. Maner opened it and threw its contents on the bedroom floor.

"At about that time, they heard the screams of Emilia Caffrey, who had heard the shot and discovered her son lying in the second floor hallway. The defendant told Bright to keep her head down and face the wall. Maner and the defendant then ran into the kitchen, which Emilia Caffrey had also entered to call 911. Maner, who was standing at the stove, fired one shot at [Emilia] Caffrey and missed. The defendant was standing at the window.

"Maner and the defendant then ran out of the kitchen, pushing [Emilia] Caffrey to the floor as they left. They returned to their car and arrived back in Bridgeport around 2 a.m.

"Police interviews of some of the Waterbury visitors to James Caffrey's apartment on the afternoon of October 26 led to the identity of Maner, who was also known in Bridgeport as T or Trigger. Further police investigation, including analysis of Maner's cell phone calls, brought police to an apartment in Bridgeport where they found the defendant. The defendant voluntarily returned to Waterbury with the police and told them that he had not left Bridgeport on the night in question.

When confronted with the fact that his cell phone records showed him in Waterbury during the time of the crimes, the defendant put his head down for a minute and then indicated that he had nothing more to say. A search, pursuant to a warrant, of his apartment in Bridgeport revealed a suitcase containing the defendant's clothes, a loaded .45 caliber pistol, and a sock containing sixty-one rounds of ammunition." (Internal quotation marks omitted.) *State* v. *Bennett*, 307 Conn. 758, 760–63, 59 A.3d 221 (2013). Our Supreme Court vacated the defendant's conviction of aiding and abetting murder and affirmed the judgment in all other aspects. Id., 777.

On November 16, 2015, the defendant filed a pro se motion to correct an illegal sentence pursuant to Practice Book § 43-22,[3] arguing that his sentence for both burglary in the first degree and home invasion violates his constitutional protection against double jeopardy. The defendant subsequently was appointed counsel, who filed a memorandum of law in support of the defendant's motion. After a hearing, the trial court orally denied the motion. This appeal followed.

We begin by setting forth the standard of review and relevant law. "Ordinarily, a claim that the trial court improperly denied a defendant's motion to correct an illegal sentence is reviewed pursuant to the abuse of discretion standard. . . . A double jeopardy claim, however, presents a question of law, over which our review is plenary." (Citations omitted; internal quotation marks omitted.) *State* v. *Baker*, 168 Conn. App. 19, 24, 145 A.3d 955, cert. denied, 323 Conn. 932, 150 A.3d 232 (2016).

"The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall

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

any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause is applicable to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . .

"Double jeopardy analysis in the context of a single trial is a two-step process. First, the charges must arise out of the same act or transaction. Second, it must be determined whether the charged crimes are the same offense. Multiple punishments are forbidden only if both conditions are met." (Internal quotation marks omitted.) *State* v. *Schovanec*, 326 Conn. 310, 325, 163 A.3d 581 (2017). If we determine that the charges do not arise from the same act or transaction, we do not need to proceed to the second step of the analysis. Id., 328.

"At step one, it is not uncommon that we look to the evidence at trial and to the state's theory of the case . . . in addition to the information against the defendant, as amplified by the bill of particulars. . . . If it is determined that the charges arise out of the same act or transaction, then the court proceeds to step two, where it must be determined whether the charged crimes are the same offense. . . . At this second step, we [t]raditionally . . . have applied the *Blockburger* test to determine whether two statutes criminalize the same offense, thus placing a defendant prosecuted under both statutes in double jeopardy: [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . In applying the *Blockburger* test, we look only to the information and bill of particulars—as opposed to the evidence presented at trial—to determine what constitutes a lesser included offense of the offense charged." (Citations omitted; internal

quotation marks omitted.) *State* v. *Porter*, 328 Conn. 648, 662, 182 A.3d 625 (2018). This test is "a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial." Id., 656.

In the present case, we begin our analysis by determining whether the conviction for burglary in the first degree and home invasion arose from the same act or transaction.[4] "The same transaction . . . may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which constitutes a completed offense. . . . [T]he test is not whether the *criminal intent* is one and the same and inspiring the whole transaction, but whether *separate acts* have been committed with the requisite criminal intent and are such as are made punishable by the [statute]." (Emphasis added; internal quotation marks omitted.) *State* v. *Tweedy*, 219 Conn. 489, 497–98, 594 A.2d 906 (1991). When determining whether two charges arose from the same act or transaction, our Supreme Court has asked whether a jury reasonably could have found separate factual basis for each offense charged. *State* v. *Schovanec*, supra, 326 Conn. 329; see also *State* v. *Snook*, 210 Conn. 244, 265, 555 A.2d 390, cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989). Logically, it follows that we must ask whether the three judge panel reasonably could have found separate factual bases for the burglary and home invasion charges.

The defendant argues that the home invasion was part of the same transaction as the burglary and that his intent throughout the transaction was to carry out a larceny. We agree that the commission of the burglary did not cease until the defendant left the dwelling. See *White* v. *Commissioner of Correction*, 170 Conn. App.

[4] We note that the defendant did not seek a bill of particulars to aid in our analysis.

415, 434, 154 A.3d 1054 (2017) (burglary, once commenced, continues until all participants in burglary have left the premises). Nevertheless, although the defendant's conduct constituted one transaction and the defendant may have had the intent to commit a larceny throughout the transaction, the relevant inquiry does not focus on the defendant's intent. Rather, we must determine whether the transaction is susceptible to separation into parts that support a conviction of both burglary in the first degree and home invasion. We conclude that the acts are susceptible to separation into parts.

The information alleges that the defendant committed burglary in the first degree when he "entered and remained unlawfully in a dwelling at night with the intent to commit a crime therein, namely *a larceny*." (Emphasis added.) The information further alleges that the defendant committed home invasion when he "entered and remained unlawfully in a dwelling, while a person other than the participant in the crime [was] actually present in such dwelling, with the intent to commit a crime therein, here, a larceny, and, in the course of committing the offense, acting with one or more persons, such person or another participant in the crime commit[ted] . . . a felony, here, *a robbery* against the person of Samantha Bright, who was not a participant in the crime who was actually present in such dwelling." (Emphasis added.)

As the charges are presented in the information, the panel could have reasonably found a factual basis to support the burglary charge when the defendant unlawfully entered Caffrey's home at night with the intent of committing a larceny by stealing Caffrey's drugs and money. Additionally, the panel reasonably could have found a factual basis to support the home invasion charge when, subsequent to the unlawful entry, the defendant pointed a gun at Bright's head while asking

"where is everything?" The threatened use of physical force during the commission of the larceny gave rise to the felonious act of robbery and, therefore, completed the offense of home invasion.[5] In other words, the burglary charge arose from the distinct and separate act of *entering* the dwelling at night with the intent to commit a larceny, while the home invasion charge arose from the separate act of *threatening the use of physical force* against Bright after the defendant and Maner entered the home and were committing the larceny. See *State* v. *Meadows*, 185 Conn. App. 287, 295, 197 A.3d 464 (transaction giving rise to conviction of prohibited contact with victim and threatening and harassing victim in violation of standing criminal protective order constituted separate acts because conduct described in long form information was susceptible to separation into parts despite close proximity of acts), cert. granted, 330 Conn. 947, 196 A.3d 327 (2018); *State* v. *James E.*, 154 Conn. App. 795, 833-834, 112 A.3d 791 (2015) (two counts of assault of elderly person considered separate acts or transactions because conduct described in information was susceptible to separation into parts despite victim being shot twice in short period of time), aff'd, 327 Conn. 212, 173 A.3d 380 (2017).

In an attempt to support his argument, the defendant cites to *White* v. *Commissioner of Correction*, supra, 170 Conn. App. 433–34, seemingly for the proposition that when a burglary is in progress, actions taken after entry into a home may be considered as part of an uninterrupted course of conduct in furtherance of the burglary .[6] The relevant portion of our decision in *White*

[5] Robbery is defined in General Statutes § 53a-133, which provides in relevant part: "A person commits robbery when, in the *course of committing a larceny* he uses or threatens the immediate use of physical force upon another person for the purpose of . . . compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." (Emphasis added.)

[6] The defendant argues in his reply brief that one of the state's arguments in the present case is analogous to one of its arguments in *White*, in which

did not address a double jeopardy argument, but rather addressed, following our Supreme Court's decision in *State* v. *Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008), whether a defendant's conduct that gave rise to a kidnapping conviction was incidental to the commission of a burglary.[7] Id., 433. We disagree, therefore, with the defendant's analogy.

Framed differently, the defendant essentially argues that the home invasion, specifically the robbery that gave rise to the home invasion, was incidental to the completion of the larceny that gave rise to the burglary charge. Our court rejected a similar claim in *State* v. *Gemmell*, 151 Conn. App. 590, 603–604, 94 A.3d 1253, cert. denied, 314 Conn. 915, 100 A.3d 405 (2014), in which the defendant argued that, according to *Salamon*, his conviction of home invasion was incidental to the charges of violation of a protective order or unlawful restraint. In rejecting the defendant's claim, the court noted that *Salamon* was applicable only to the state's kidnapping statutes, and not to other crimes. Id. We similarly reject the defendant's claim in the present case.

In conclusion, the burglary in the first degree and home invasion charges arose from a transaction that was susceptible to separation into parts. Accordingly, the defendant's conviction of both offenses did not vio-

it argued that the commission of the burglary was completed upon entry into the home and, therefore, any actions subsequent to the burglary were not incidental to the burglary. Although the state's brief in the present case does state that the burglary was completed upon entry into the dwelling, the state also acknowledged that the burglary continued as long as the defendant and Maner remained in the dwelling. By use of the word "completed," the state appears to mean that liability for burglary attached upon entry into the dwelling.

[7] In *Salamon*, our Supreme Court reexamined this state's kidnapping statutes in holding that a defendant could not be convicted of kidnapping if restraint of a victim was merely incidental in the commission of a separate offense. See *State* v. *Salamon*, supra, 287 Conn. 509.

late his constitutional protection against double jeopardy. Because we conclude that the charges arose from separate acts, we need not move to the second step of our double jeopardy analysis.

The judgment is affirmed.

In this opinion the other judges concurred.

DEVON SMITH *v.* COMMISSIONER OF CORRECTION (AC 40747)

Keller, Prescott and Pellegrino, Js.

Syllabus

The petitioner sought a writ of habeas corpus, claiming, inter alia, that he received ineffective assistance from his criminal trial counsel. After the habeas court granted the motion to dismiss the third count of the amended petition alleging actual innocence filed by the respondent Commissioner of Correction, the petitioner filed a withdrawal of the remaining counts of the habeas petition, which the habeas court accepted with prejudice. Subsequently, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the petitioner could not prevail in his claim that the habeas court erred in accepting the withdrawal of his habeas petition only with prejudice; that court acted within its discretion in accepting the withdrawal with prejudice, as the petitioner had filed and withdrawn numerous prior habeas petitions, all of which he withdrew before trial, the petitioner was provided every opportunity to continue to litigate his prior habeas petitions and had a full opportunity to be heard, trial was continued on five occasions, four continuances of which were granted at the petitioner's request, the habeas court was willing to continue the case and offered the petitioner a second day of trial in the future so that he could attempt to locate a potential witness, the petitioner sought to withdraw his petition on the eve of trial, when exhibits had been marked, counsel were ready to proceed, and witnesses had been subpoenaed and were ready to testify, and the petitioner, who had been extensively canvassed by the habeas court, was fully aware of the potential consequences of withdrawal.

Argued November 13, 2018—officially released February 19, 2019

Procedural History

Amended petition for writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Sferrazza*, *J.*, granted the respondent's motion to dismiss as to the third count of the amended petition and rendered partial judgment thereon; thereafter, the petitioner filed a withdrawal of the remaining counts of the amended petition, which the court, *Prats*, *J.*, accepted with prejudice; subsequently, the court, *Prats*, *J.*, denied the petitioner's motion for reconsideration and granted the petition for certification to appeal, and the petitioner appealed to this court. *Affirmed.*

Justine F. Miller, assigned counsel, for the appellant (petitioner).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Tamara Grosso*, assistant state's attorney, for the appellee (respondent).

Opinion

PELLEGRINO, J. The petitioner, Devon Smith, appeals from the judgment of the habeas court, *Prats*, *J.*, rendered when it granted the petitioner's motion to withdraw his petition for a writ of habeas corpus. The petitioner claims that the habeas court abused its discretion because it conditioned the petitioner's withdrawal of his petition to be with prejudice. We disagree and, accordingly, affirm the judgment of the habeas court.

The record reveals the following relevant facts and procedural history. In 1993, following a jury trial, the petitioner was found guilty of murder in violation of General Statutes § 53a-54a and sentenced to sixty years incarceration. *State* v. *Smith*, 46 Conn. App. 285, 298, 699 A.2d 250, cert. denied, 243 Conn. 930, 701 A.2d 662

(1997). This court affirmed the petitioner's conviction on direct appeal. Id.

In January, 2011, the petitioner, who was self-represented at the time, filed a habeas petition, which is the subject of this appeal. In the petition, the petitioner alleged, inter alia, that his criminal trial counsel, Kevin Randolph, provided ineffective assistance due to his failure to call a "number of witnesses."[1] The petitioner also represented that he had previously not filed a habeas petition.

On November 21, 2011, the habeas court, *Newson, J.*, granted the petitioner's motion for the appointment of counsel and appointed Dante Gallucci to represent the petitioner. Gallucci appeared before the habeas court on November 2, 2012, at which time he stated that it was his understanding that the petitioner had "filed a couple of [prior habeas petitions], but he withdrew them." Gallucci also stated: "[The petitioner] hasn't had any kind of substantive habeas on [the 1993] murder [conviction]. He's been involved in other habeas[es] with other cases." In response to Galluci's statements, the clerk of court identified several habeas petitions that the petitioner previously had filed.

On January 11, 2013, the petitioner appeared before the habeas court, *Solomon, J.*, by videoconference. During that conference, the court asked the petitioner whether he had previously filed habeas petitions and noted that court records indicated that he had filed seven prior habeas petitions. The petitioner then admitted to having filed other petitions involving his 1993 murder conviction but maintained that the issues in the current petition were different from those in the earlier petitions. Ultimately, in a filing dated September 10, 2013, the petitioner acknowledged previously having

[1] The petitioner also alleged a claim of actual innocence that was dismissed by the habeas court.

filed eight habeas actions, seven of which related to the petitioner's 1993 conviction.[2]

On April 3, 2013, the habeas court issued a scheduling order, in which it set the first day of trial for October 7, 2013. On September 13, 2013, less than a month before trial was scheduled to begin, the petitioner filed a motion requesting a continuance. The habeas court, *Newson*, *J.*, granted this motion on September 19, 2013. On September 17, 2013, Gallucci filed a motion to withdraw as the petitioner's counsel, which the habeas court, *Bright*, *J.*, granted on September 23, 2013. In October, 2013, Wade Luckett entered an appearance as the petitioner's counsel.

On June 6, 2014, the habeas court issued a new scheduling order, which postponed the start of trial until June 18, 2015. On January 2, 2015, the petitioner, through counsel, filed an amended habeas petition. On June 4, 2015, two weeks before trial, the petitioner again filed a motion to continue the trial date. In support of this motion, the petitioner identified four potential witnesses that he had yet to interview. The habeas court, *Oliver*, *J.*, granted the petitioner's motion on June 9, 2015, and subsequently rescheduled the trial for May 26, 2016.

On May 3, 2016, approximately three weeks before the trial was scheduled to begin, the petitioner filed a motion to amend his habeas petition because he had become aware that another witness, "Jesus Rodriguez, would have provided favorable, if not outright exculpatory, testimony on [the petitioner's] behalf . . . and was available to testify if he [were] called as a witness." The habeas court granted the petitioner's motion to amend and marked off the trial that had been scheduled to begin on May 26, 2016. The start of trial was then postponed to March 20, 2017. The petitioner filed a third amended habeas petition on March 8, 2017.

[2] The petitioner clarified that one of the petitions he had previously filed related to a different conviction.

On March 15, 2017, five days before trial was scheduled to begin, the petitioner again asked that trial be continued, this time to accommodate two of his witnesses. The habeas court granted this request and rescheduled trial for July 17, 2017. On July 7, 2017, the respondent, the Commissioner of Correction, submitted a witness list for the trial. On July 17, 2017, the petitioner submitted an exhibit, which was marked for identification.

Prior to the commencement of trial on July 17, 2017, Luckett informed the habeas court, *Prats*, *J.*, that he was not ready to proceed because the petitioner wanted to withdraw his petition. The habeas court canvassed the petitioner regarding his desire to withdraw and informed him that if he withdrew his petition, it would be with prejudice, meaning he would be unable to raise the same claims in a subsequent habeas petition. In response, the petitioner stated that he had made the decision to withdraw the pending petition freely and voluntarily.

The petitioner also stated that it was his understanding that he "could withdraw the habeas at any time prior to a hearing" without consequence. The court explained that the petitioner could withdraw his petition, but also stated: "[I]f you try to raise a new habeas in the future, there will be objection from the respondent in this case . . . we're on the eve of trial today. We have witnesses who have been subpoenaed for today. This case goes back six years . . . . [Present] [c]ounsel has been involved . . . since 2013. It's been scheduled for trial. There [have] been continuances.

"All of what has been done between now and then with a full opportunity to be heard. So just withdrawing it with the hope that later on you're going to file another [petition] with the same claims would not be appropriate. Do you understand? And it's going to meet objection, and if the court accepts your withdrawal today,

it would be with prejudice, meaning that it would bar you from raising these claims [in the future]."

Luckett acknowledged that exhibits had been marked and witnesses had been subpoenaed and were present. He argued, however, that the petitioner should be permitted to withdraw his petition without prejudice because evidence had not yet been presented and because the petitioner's claims in the petition at issue had never been fully litigated. Additionally, Luckett asserted that a withdrawal without prejudice was warranted because there were potential witnesses whom the petitioner had been unable to locate, including Rodriguez. Luckett argued that Rodriguez was expected to provide exculpatory testimony and that he had hired several investigators to find Rodriguez, but that they had been unable to do so.

The habeas court told the petitioner that if he started trial that day it would grant the petitioner another day of trial in the future, which would allow the petitioner to continue to search for Rodriguez and the other witnesses whom the petitioner had been unable to locate. The habeas court reiterated that if the petitioner withdrew his petition, it would be with prejudice. Luckett stated that he was ready to begin trial that day but that he would let the petitioner make the ultimate decision regarding withdrawal.

The habeas court again canvassed the petitioner, stating: "[I]f I grant the withdrawal, just for the record, I want to be very clear that the court is going to do it with prejudice, and that later on, if you try to raise the same basis, there's going to be a very strong objection, and you're possibly going to be barred from raising this claim again. You understand that?" The petitioner responded: "I'll take my chances. Rather [not] have a hearing today and lose with certainty." The petitioner subsequently signed a withdrawal form that contained

the notation, "withdrawal w[ith] prejudice accepted . . . after canvass on the record." Thereafter, the petitioner filed a motion to reconsider, which the habeas court denied on July 28, 2017. The petitioner then filed a petition for certification to appeal the decision, which the habeas court granted on July 28, 2017. This appeal followed.

On appeal, the petitioner claims that the habeas court abused its discretion by stating that it would permit him to withdraw his petition only if it was with prejudice to filing a later petition raising the same claims. Specifically, the petitioner claims that the circumstances of the present case are not similar to those in which a court may order that a petition be withdrawn with prejudice. The respondent argues that the habeas court did not abuse its discretion because "the matter had been pending since 2011; counsel had made diligent efforts to locate desired witnesses; trial had been continued at least three times . . . trial was scheduled to begin that day; subpoenaed witnesses were present . . . exhibits had been marked; [the] petitioner's counsel was ready to proceed; the habeas court informed the petitioner that if he proceeded with trial as scheduled, it would schedule a second trial day; and, a withdrawal with prejudice is entirely consistent with our habeas jurisprudence." We agree with the respondent.

"We begin by setting out the standards of review governing this appeal. The decision by a habeas court to condition a withdrawal of a habeas petition on that withdrawal being with prejudice is, when authorized, a decision left to that court's discretion." (Internal quotation marks omitted.) *Kendall* v. *Commissioner of Correction*, 162 Conn. App. 23, 28, 130 A.3d 268 (2015). "Discretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not impede or defeat the ends of substantial justice. . . . Inherent in the concept of judicial

discretion is the idea of choice and a determination between competing considerations. . . . When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court . . . . Under that standard, we must make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Our] review of such rulings is limited to questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *Palumbo* v. *Barbardimos*, 163 Conn. App. 100, 110–11, 134 A.3d 696 (2016).

General Statutes § 52-80 provides in relevant part: "The plaintiff may withdraw any action . . . before the commencement of a hearing on the merits thereof. After the commencement of a hearing on an issue of fact in any such action, the plaintiff may withdraw such action . . . only by leave of court for cause shown." "The term with prejudice means [w]ith loss of all rights; in a way that finally disposes of a party's claim and bars any future action on that claim. . . . The disposition of withdrawal with prejudice exists within Connecticut jurisprudence. . . . Indeed, the disposition of withdrawal with prejudice is a logically compelling disposition in some circumstances. A plaintiff is generally empowered, though not without limitation, to withdraw a complaint before commencement of a hearing on the merits. . . . A plaintiff is not entitled to withdraw a complaint without consequence at such hearing. . . . The decision by a habeas court to condition a withdrawal of a habeas petition on that withdrawal being with prejudice is, when authorized, a decision left to that court's discretion." (Citations omitted; internal quotation marks omitted.) *Marra* v. *Commissioner of*

Correction, 174 Conn. App. 440, 454–55, 166 A.3d 678, cert. denied, 327 Conn. 955, 171 A.3d 456 (2017).

Moreover, "[h]abeas courts are given wide latitude in fashioning remedies." *Mozell* v. *Commissioner of Correction*, 147 Conn. App. 748, 760, 83 A.3d 1174, cert. denied, 311 Conn. 928, 86 A.3d 1057 (2014). "[H]abeas corpus has traditionally been regarded as governed by equitable principles. . . . Among them is the principle that a [petitioner's] conduct in relation to the matter at hand may disentitle him to the relief he seeks." (Internal quotation marks omitted.) *Negron* v. *Warden*, 180 Conn. 153, 166 n.6, 429 A.2d 841 (1980). "A [petitioner] should never be permitted to abuse [his] right to voluntarily withdraw an action. Such abuse may be found if, in executing [his] right of withdrawal, the [petitioner] unduly prejudices the right of an opposing party or the withdrawal interferes with the court's ability to control its docket or enforce its rulings." *Palumbo* v. *Barbadimos*, supra, 163 Conn. App. 115.

"Significantly . . . [this] court . . . [has] recognized that in certain circumstances, a withdrawal of a petition *prior* to the commencement of a hearing on the merits could be deemed to be with prejudice . . . ." (Emphasis in original.) *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 456. This court concluded that such circumstances existed in *Marra* and *Mozell*.

In *Marra* v. *Commissioner of Correction*, supra, 174 Conn. App. 454, this court concluded that, under the circumstances of that case, the habeas court properly determined that the petitioner's habeas action could not be maintained because his withdrawal of a previous habeas action was with prejudice. The petitioner in *Marra* executed a withdrawal of his previous habeas action the day before trial was to begin. Id. The petitioner's case had been pending for two and one-half years,

during which time it was continued three times. Id. The previous habeas court stated that prejudice existed because the court "set aside the time [for the] trial . . . the clerk [of court] gave up her time . . . and even met with the attorneys and marked all the exhibits . . . so that [the court] [would be] ready to go . . . ." (Internal quotation marks omitted.) Id., 449. Moreover, the previous habeas court noted that the court and the respondent were ready for trial. Id., 447. This court also cited the fact that the petitioner "participated personally in the decision to withdraw the previous habeas matter the day before trial was to begin," in affirming that the petitioner's withdrawal of his previous habeas action was with prejudice. (Internal quotation marks omitted.) Id., 458.

Similarly, in *Mozell* v. *Commissioner*, supra, 147 Conn. App. 760, this court concluded that the habeas court acted within its discretion when it only allowed the petitioner to withdraw one of the counts in his habeas petition with prejudice. The petition at issue in *Mozell* was the petitioner's third, and by the time the petitioner sought to withdraw his petition on the day of trial, the action had been pending for approximately two and one-half years. Id., 750–51. The habeas court conditioned withdrawal of one of the petitioner's counts on being with prejudice because "[w]itnesses had been subpoenaed and were in court ready to proceed; [expenses] such as setting up videoconferencing for a witness in Nevada had been incurred; [and] evidence had begun, according to the respondent's counsel, in that some exhibits had already been admitted in full . . . ." (Footnote omitted.) Id., 760.

The petitioner argues that the present case is factually distinguishable from *Marra* and *Mozell*, and, therefore, that a withdrawal with prejudice was not appropriate under the circumstances. We are unpersuaded.

Like the petitioners in *Marra* and *Mozell*, the petitioner in the present case had filed and withdrawn numerous prior habeas petitions. Indeed, the petitioner in the present case had filed more petitions than the petitioners in *Marra* and *Mozell*, who filed two and three petitions, respectively. The petitioner in the present case filed at least seven petitions, all of which he withdrew before trial.

The petitioner attempts to distinguish the present case from *Marra* and *Mozell* by arguing that in those cases a final judgment had been rendered on other petitions filed by the petitioners, whereas, in the present case, none of the petitioner's prior habeas petitions had reached final judgment or even received a hearing on the merits. In the present case, final judgment was not reached on any of the petitioner's many habeas petitions because the petitioner chose to withdraw them. Despite his choice to withdraw the petitions, the petitioner was provided every opportunity to continue to litigate them and, therefore, had a full opportunity to be heard.

In this case, trial was continued on five occasions, more times than in *Marra* and *Mozell* combined. In *Marra*, trial was continued three times, and, in *Mozell*, trial was never continued. Four of the continuances in the present case were granted at the petitioner's request. Moreover, the habeas court was willing to continue the case in response to the petitioner's request to withdraw his petition. The court offered the petitioner a second day of trial in the future so that he could attempt to find Rodriguez.[3] The petitioner was afforded ample time to prepare his case.

As did the petitioners in *Marra* and *Mozell*, the petitioner sought to withdraw his petition on the eve of

[3] The petitioner argues that he had a good reason to withdraw his petition, namely, that he needed more time to locate Rodriguez. By the time the petitioner withdrew his petition, however, he had been attempting to locate Rodriguez with the assistance of counsel for approximately two years. In fact, the habeas court had already granted at least one continuance to allow the petitioner more time to find potential witnesses.

trial when the case was ready to proceed after efforts and resources had been expended in preparation for trial. Similarly, exhibits in the present case had been marked, counsel were ready to proceed, and witnesses had been subpoenaed and were ready to testify. Moreover, as in *Mozell* where expenses had been incurred in setting up videoconferencing for a witness in Nevada, in the present case, witnesses were subpoenaed and were present to testify.

Additionally, like the petitioner in *Marra*, the petitioner in the present case made the ultimate decision to withdraw the habeas matter on the day of trial and was fully aware of the potential consequences of withdrawal, as he had been extensively canvassed by the habeas court.

On the basis of the foregoing, we conclude that, under these circumstances, the court acted within its discretion in granting the petitioner's motion to withdraw with prejudice.

The judgment is affirmed.

In this opinion the other judges concurred.

CONNECTICUT COMMUNITY BANK, N.A. *v.* JAMES T. KIERNAN, JR., ET AL.
(AC 41378)

Lavine, Sheldon and Elgo, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant K. At the time that the plaintiff commenced its foreclosure action, K's property was encumbered by a first mortgage that subsequently was refinanced with another bank, M Co. After a dispute arose between the plaintiff and M Co. as to the priority of their mortgages, the parties agreed to sell the property and to escrow the sale proceeds pending a resolution of the dispute. The plaintiff then converted the foreclosure action to a claim for interpleader as against M Co. and a claim against K for damages pursuant to the language of

the mortgage note. After K was defaulted for failure to plead, the trial court granted the plaintiff's motion for summary judgment as against K. The plaintiff thereafter sought an award of $134,462.82 in attorney's fees as against K, which included attorney's fees it incurred in protecting the priority of its mortgage by prosecuting the interpleader claim. The trial court awarded the plaintiff $11,000 in attorney's fees, and the plaintiff appealed to this court. The plaintiff claimed that the trial court improperly excluded from its award any attorney's fees that it had incurred in protecting the priority of its mortgage as against M Co. *Held* that the trial court properly excluded from its award of attorney's fees against K any fees that the plaintiff incurred in asserting its priority claim as against M Co.; the plaintiff provided no legal or factual basis for extending certain language in its mortgage note, which permitted the recovery of attorney's fees incurred to enforce the plaintiff's rights in foreclosing its mortgage, to a separate claim asserting priority over M Co.'s lien, the mortgage note did not mention attorney's fees incurred in protecting a priority claim, and the plaintiff did not have a priority claim against any other person or entity at the time that it issued its mortgage, as K's property was encumbered by a first mortgage when the plaintiff issued its loan and the plaintiff's lien would have remained subordinate to the first mortgage if that first mortgage had not been refinanced in favor of M Co., and the plaintiff's claim that the trial court improperly applied *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC* (308 Conn. 312) when it required the plaintiff to distinguish the fees it had incurred as against K from those it had incurred as against M Co., was not reviewable, as the plaintiff, at trial, did not in any meaningful way dispute the applicability of *Total Recycling Services of Connecticut, Inc.*, to its claims for fees against K.

Argued November 29, 2018—officially released February 19, 2019

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., brought to the Superior Court in the judicial district of Stamford-Norwalk, where the plaintiff filed an amended complaint and withdrew the action as against the defendant Elizabeth M. Kiernan et al.; thereafter, the named defendant was defaulted for failure to plead; subsequently, the court, *Povodator, J.*, granted the plaintiff's motion for summary judgment and granted in part the plaintiff's motion for attorney's fees, and the plaintiff appealed to this court. *Affirmed.*

Houston Putnam Lowry, with whom, on the brief, was *Dale M. Clayton*, for the appellant (plaintiff).

Opinion

SHELDON, J. The plaintiff, Connecticut Community Bank, N.A., doing business as the Greenwich Bank & Trust Company, appeals from the judgment of the trial court awarding what it claims to be an allegedly insufficient amount of attorney's fees after finding the defendant James T. Kiernan, Jr.,[1] liable pursuant to a mortgage note that he executed in favor of the plaintiff. The plaintiff claims on appeal that the trial court erred by excluding from its award any attorney's fees that it had incurred in protecting the priority of its mortgage as to a subsequent encumbrancer, M&T Bank, formerly known as Hudson City Savings Bank (M&T Bank), which it had brought into this action as a defendant on its claim of interpleader. We affirm the judgment of the trial court.

The following procedural history and undisputed facts are relevant to this appeal. On October 7, 2005, the defendant and his wife, Elizabeth M. Kiernan, executed a home equity line of credit agreement and disclosure statement (HELOC) in favor of the plaintiff in the original maximum principal amount of one million dollars. The HELOC was secured by an open-end mortgage deed encumbering certain real property located at 25 The Ridgeway in Greenwich. At the time the plaintiff issued the HELOC, the subject property, which had been owned by Elizabeth Kiernan since 1992, was encumbered by a mortgage in favor of Washington Mutual Bank, F.A. (Washington Mutual), in the principal amount of $2,500,000. The plaintiff's mortgage was recorded on the Greenwich land records on February 5, 2008.

In April, 2011, the Kiernans refinanced the mortgage on the subject property with M&T Bank. As a result,

[1] Although James T. Kiernan, Jr., is not the only defendant in this action, we refer to him as the defendant because the order at issue in this appeal was rendered against him.

Washington Mutual's mortgage was released and a new mortgage was recorded on the land records in favor of M&T Bank on the principal amount of $2,425,000 on May 3, 2011.

At some point in 2015, the Kiernans defaulted on the HELOC and, consequently, the plaintiff brought this action to foreclose its mortgage on the subject property. During the course of litigation, a dispute arose between the plaintiff and M&T Bank as to the priorities of their respective mortgages. By agreement of all parties, the property was sold and all proceeds from the sale were deposited in an escrow account pending resolution of the priority dispute between the plaintiff and M&T Bank.

On April 6, 2017, the plaintiff amended its complaint, converting its claim against the defendant from a mortgage foreclosure claim to a claim for interpleader and a claim on a note. The amended complaint thus contained two counts; the first stating a claim for interpleader as against M&T Bank and the second presenting a claim for damages on the note as against the defendant. The defendant did not respond to the amended complaint, and thus he was defaulted for failure to plead.

On April 12, 2017, the plaintiff filed a motion for summary judgment as to the defendant on the second count of the amended complaint. The defendant did not oppose the plaintiff's motion. On August 11, 2017, the court granted summary judgment on the note in favor of the plaintiff "in the principal amount of $999,140.89 plus interest in the amount of $68,515.40 ($54,515.40 as calculated through 4/7/17), plus 126 days (through 8/11/17) at $109.49, which comes to $13,795.74 (plus interest continuing to accrue at $109.49 per day)." The court also addressed the plaintiff's claim for attorney's fees as follows: "The plaintiff has indicated an intent to submit a claim for attorney's fees, as allowed

under the note. The court will entertain such a submission, subject to the presumptive obligation of a party claiming the right to attorney's fees to make an attempt to identify fees directly or closely related to the claim for which such fees are allowed, eliminating fees for matters unrelated to the claim, to the extent possible/practical. *Total Recycling Services of Connecticut, Inc.* v. *Connecticut Oil Recycling Services, LLC*, 308 Conn. 312, 63 A.3d 896 (2013) (*Total Recycling*). Thus, subject to the plaintiff's possible argument to the contrary, the plaintiff's fees incurred in connection with its dispute as to priority to the proceeds of the sale of the property, which, in turn, is a consequence of the attempted mortgage foreclosure, at least facially would seem unrelated to the 'pure' note based claim against this defendant. . . . Attorney's fees are to be determined after a claim with supporting documentation is submitted (allowing parties an opportunity to object or otherwise challenge the claim, thereafter)."

On May 5, 2017, the plaintiff filed an affidavit in support of its claim for attorney's fees against the defendant in the amount of $46,152 to recover for time spent by counsel on its claim against the defendant through May, 2017. On August 24, 2017, the plaintiff filed an updated motion for attorney's fees against the defendant in the amount of $134,462.82, seeking $102,084 in fees for its current counsel, $26,672.60 in fees for its prior counsel, and $5706.22 in costs. The plaintiff argued that it was entitled to the full amount of $134,462.82 pursuant to § 18 (c) (ii) of the note signed by the defendant, which provided: "We can enforce our rights in court. This includes, for example, foreclosing on the mortgage described in section 11 above. If we enforce our rights in court, you agree to pay our court costs and attorneys' fees, as allowed by law and as set by the court." Pursuant to the court's previous order to attempt to apportion the fees incurred against the defendant and those

incurred in pursuit of its priority claim, the plaintiff alleged that it had incurred attorney's fees in the amount of $41,484.50 as to the defendant directly. The plaintiff argued, however, that the defendant "is responsible for all attorney's fees pursuant to his contract (the note) with [the] plaintiff, including [the] plaintiff's attorney's fees regarding the priority dispute with [M&T Bank] (because such fees were incurred in connection with his loan). If [the] plaintiff had not made this loan, there would be no priority dispute with [M&T Bank]."[2]

The court heard argument on the plaintiff's motion for attorney's fees on October 10, 2017. At the hearing, counsel for the plaintiff reiterated his contention that his client was entitled to attorney's fees from the defendant not only for all fees it had incurred in obtaining the summary judgment against him on the note, but also for all fees it had incurred in protecting the priority of its mortgage by prosecuting its interpleader claim. The defendant objected to the plaintiff's argument that he was responsible for all fees incurred by the plaintiff in prosecuting its interpleader claim. He further argued that the amount of fees requested was excessive because he did not oppose the plaintiff's claim against him on the note and the claimed 108.5 hours expended in obtaining judgment against him on the note was unreasonable. He requested instead that the court award the plaintiff fees for four hours of work in the total amount of $1600. During rebuttal argument by the plaintiff, the court commented as follows: "[A] hundred hours strike me as somewhat extreme for a motion for summary judgment against a defaulting party." Apparently agreeing, counsel for the plaintiff replied, "It does,

[2] Notably, also on May 5, 2017, the plaintiff filed a motion for attorney's fees against M&T Bank for fees incurred to obtain the judgment of interpleader. Many of the claimed billable hours listed in the affidavit submitted by the plaintiff in support of its motion were identical to those contained in the affidavit that it submitted in support of its claim for fees against the defendant.

Your Honor." Counsel for the plaintiff then agreed with the court that one hundred hours did not seem to be a "defensible" claim, and conceded "that some of these entries, especially early on, relate to the M&T issues. I'm surprise[d] that they weren't stricken from here." The court offered the plaintiff an opportunity to file a revised affidavit, but the plaintiff declined the court's offer, noting: "I'm sure you're more than capable of reviewing what has been submitted and coming up with what you believe is a fair amount of time for the work—summary judgment—and . . . ." The court thereupon took the papers on the plaintiff's motion.

On January 30, 2018, the court issued an order granting the plaintiff attorney's fees in the total amount of $11,000.[3] The court explained that, pursuant to *Total*

[3] Specifically, the court ruled, inter alia: "Having obtained summary judgment as against this defendant, the plaintiff claims that it is entitled to $100,000 as reasonable attorney's fees. The defendant has objected to that claim, and the court heard argument on October 10, 2017. (As a point of reference, in [its ruling on the plaintiff's motion for summary judgment], the court had noted its obligation to apply [*Total Recycling*], supra, 308 Conn. 312, to the claim for attorney's fees, requiring the claimant to make an effort to allocate attorney's fees to claims for which such fees are collectable to the extent reasonably possible. The plaintiff has not challenged [the] applicability of that decision to this situation.) During the course of argument, the defendant accurately pointed out that he had never filed any pleadings, filed no objection to the motion for summary judgment, and while the motion for summary judgment was pending, when the plaintiff filed a motion for default for failure to plead, nothing was done that might prevent that motion from being granted. Somewhat simplistically, the defendant's position is that in connection with these proceedings, he has never actively disputed any claim made by the plaintiff, yet is being asked to pay more than $100,000 as 'reasonable' attorney's fees in connection with his liability under the note. The defendant also argued that an appropriate award would be in the area of $1600. Somewhat conceding that $100,000 might be unreasonable, during argument, the plaintiff suggested something substantially greater would be reasonable, doing a rough calculation suggesting in excess of twenty hours just for the motion for summary judgment. . . . Again, although arguably withdrawn by virtue of the oral argument discussed above, the plaintiff has claimed $102,084 in legal fees attributable to current counsel. The court has attempted to identify each/every billing entry making mention of summary judgment or some activity seemingly related to same (e.g., references to an affidavit of debt), and even if the court were to assume that the full amount of time for each such entry was solely related to the motion for summary judgment, the total would be less than $9500. (Entries

for April 5 [two entries], 11, 12 [two entries], 25, May 5, 10, 12, and 25, with the motion for summary judgment being submitted for adjudication on May 30, 2017.) Most if not all of the entries for those dates contain activities unrelated to summary judgment, and an especially extreme example is the entry for May 12, totaling $1080, where the only apparent connection to summary judgment was reclaiming the motion. (For clarity, the court is not suggesting that the plaintiff is claiming that the full 2.7 hours on May 12 were attributable to summary judgment, but rather is using this as an example of the extent to which the maximal calculation set forth earlier in the paragraph clearly exceeds any realistic allocation of time to the motion.) Additional time undoubtedly was spent with respect to the preparation of the request for admissions and the subsequent notice relating to the failure of the defendant to respond (deny) those requests. Additional time undoubtedly was spent with respect to the deposition, as reflected on submitted documentation. Again, however, to the extent that the primary strategy appears to have been summary judgment, the need for alternate avenues (e.g., the court recalls seeing somewhere, in a pleading, a reference to the admissions potentially being used in support of summary judgment—something that does not appear to have happened) becomes less pressing, such that the reasonableness of substantial fees for such alternate avenues is open to question. (Alternatively, they may be subject to 'discount' for that reason.) Even allowing for some amount of time attributable to 'getting up to speed' when the file was taken over, the claim against this defendant remained an uncontested claim for money owed on a note/loan (amounts advanced on a line of credit). Conversely, the court must recognize that substantial time and effort went into the initial foreclosure aspect of the proceeding—directed to a different defendant—which was transformed into an interpleader proceeding in turn necessitated by the issue currently being litigated quite actively relating to priority of liens. The court must draw a distinction between covering all bases as a matter of due diligence, and reasonableness in pursuing a claim in which there had been no identified or apparent indicia of resistance. Thus, while it may have been appropriate diligence to prepare and file a motion for summary judgment, while at the same time filing/serving requests for admissions directed to him, while at the same time preparing for and eventually taking his deposition, the question for the court is what is reasonable with respect to allowance of attorney's fees, given a contractual entitlement to such an award and the absence of any 'resistance' from this defendant. Under the circumstances, taking into account the need for litigation, the need to address claims against this defendant in the context of a claim against the mortgagor, initial uncertainty as to whether there would be active resistance/opposition to the motion for summary judgment or any other approach that might be taken, the relatively straightforward nature of the claim as advanced and presented via summary judgment, and given the magnitude of the debt (recognizing that the substantial amount in dispute would justify greater attention to detail), the court concludes that an appropriate award of reasonable attorney's fees, as against defendant James Kiernan under his contractual responsibility for reasonable attorney's fees related to collection efforts by current counsel, is $10,000. Added to the $1000 that the court has estimated to be reasonable fees for efforts of prior counsel, the aggregate reasonable attorney's fees attributable to collection efforts directed to defendant James Kiernan total $11,000."

Recycling, which it had previously referenced when granting the plaintiff's motion for summary judgment as against the defendant, it was limiting the plaintiff's award of attorney's fees to those incurred in prosecuting its claim against the defendant on the note, not those incurred in protecting the priority of its mortgage against M&T Bank on its interpleader claim. The court noted that the plaintiff had not objected to the application of *Total Recycling* to this case, and, in fact, that the plaintiff had withdrawn its claim for the full $102,084 when it argued its motion to the court. The court further noted that it had considered all of the plaintiff's claims for fees against the defendant, and noted that the defendant had not opposed any of the plaintiff's claims against him in its pursuit of judgment against him, and thus that summary judgment had been rendered against him on that claim upon his default. The court ultimately concluded that upon weighing the "straightforward nature of the claim as advanced" against the defendant and the "magnitude of the debt" claimed by the plaintiff, the defendant's "contractual responsibility for reasonable attorney's fees related to collection efforts by current counsel is $10,000." Therefore, upon determining that the plaintiff should also receive an additional $1000 in attorney's fees for the limited efforts of prior counsel, it awarded the plaintiff $11,000 in attorney's fees against the defendant under the note. This appeal followed.

The plaintiff claims that the trial court erred in excluding from its award of attorney's fees against the defendant the fees that it had incurred in protecting the priority of its mortgage. In support of that claim, the plaintiff argues that § 18 (c) (ii) of the note "is a very broad contractual attorney's fees provision. [The defendant] agreed to reimburse [the] plaintiff for its court costs and attorney's fees to enforce [the] plaintiff's rights. This not only includes [the] plaintiff's rights under the HELOC, but it also explicitly includes foreclosing the HELOC mortgage. This means the reimbursed attorney's fees will include not only the cost to

enforce the mortgage, but also [the] plaintiff's costs incurred to protect the HELOC mortgage's priority." The plaintiff has provided no legal or factual basis for extending the explicit language relating to foreclosing its mortgage to a separate claim against another party asserting priority over that other party's lien, nor are we aware of any. The HELOC does not mention fees incurred in "protecting" a priority claim; nor does any other provision of the HELOC entitle the plaintiff to such fees. In fact, the plaintiff did not have a priority claim against any other person or entity at the time that it issued the HELOC because the subject property was then encumbered by the first mortgage from Washington Mutual, so it is difficult to understand how the plaintiff reads into that contractual language the defendant's obligation to pay attorney's fees to protect a right that the plaintiff did not have when the parties signed the note. The plaintiff argued in its motion for attorney's fees, consistent with its position before this court, that, "If [the] plaintiff had not made this loan, there would be no priority dispute with [M&T Bank]." This argument overlooks the fact that the property by which its mortgage was secured had been encumbered by a first mortgage when it extended its loan to the defendant. In so arguing, the plaintiff ignores the fact that if the defendant had not refinanced the first mortgage to Washington Mutual in favor of M&T Bank, there also would be no priority dispute, for the plaintiff's lien would have remained subordinate to that of Washington Mutual.[4]

[4] We note that the priority dispute is still pending, and it is not clear from the record whether the priority claim that it seeks to have this defendant fund is valid, a subject upon which we express no opinion. Although it is not disputed that the plaintiff's HELOC mortgage was recorded prior to M&T Bank's mortgage, "[t]here is . . . an exception to the "first in time, first in right rule." The Restatement (Third), Property, Mortgages § 7.6 (1997), on the topic of subrogation, provides a thorough explanation of this complicated doctrine. The Restatement provides in relevant part: "(a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would

The plaintiff also contends that the trial court "erred in applying or misapplying *Total Recycling* . . . to this case. [The] plaintiff made its objection known to the court." We disagree. In its decision granting the plaintiff's motion for summary judgment, the court announced its intention to rely on *Total Recycling*, in which our Supreme Court held that "a party is . . . entitled to a full recovery of reasonable attorney's fees if an apportionment is impracticable because the claims arise from a common factual nucleus and are intertwined." *Total Recycling*, supra, 308 Conn. 333. Pursuant to *Total Recycling*, the court instructed the plaintiff to attempt to distinguish the fees it had incurred against the defendant in enforcing its claim on the note from those incurred against M&T Bank in protecting the priority of its lien. Accordingly, when the plaintiff filed its motion for attorney's fees on August 24, 2017, it did not, in any meaningful way, dispute the applicability of *Total Recycling* to its claims for fees against the defendant; nor did it do so at oral argument on its motion for attorney's fees. We thus decline to review the plaintiff's claim that the court improperly applied *Total Recycling* to this case in ordering it to apportion its fees between those that it had incurred as to the

otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee. . . ." Restatement (Third), supra, § 7.6.

"The holders of intervening interests can hardly complain about this result, for they are no worse off than before the senior obligation was discharged." Id., comment (a), p. 510.

Moreover, the plaintiff's claim of priority does not arise from any interference by the defendant with the plaintiff's enforcement of its rights under the note. As noted, the plaintiff chose to assert its priority over M&T Bank, a right that it did not have when it issued the HELOC to the defendant. That priority dispute is ongoing between the plaintiff and M&T Bank, and, should the plaintiff prevail in its priority claim, it may seek attorney's fees under General Statutes § 52-484, which it has properly requested in its interpleader complaint, and under which it has sought and received an award of attorney's fees for commencing the interpleader proceeding against the defendant.

defendant and those that it had incurred against M&T Bank in its priority claim.[5]

On the basis of the foregoing, we cannot conclude that the court erred by excluding from its award of attorney's fees against the defendant any attorney's fees that the plaintiff incurred in asserting its priority claim against M&T Bank.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DESHAWN TYSON (AC 40468)

Prescott, Bright and Harper, Js.

Syllabus

The defendant, who had been on probation in connection with his conviction of the crime of sexual assault in the first degree, appealed to this court from the judgment of the trial court revoking his probation and imposing a sentence of nine years of incarceration. He claimed that the trial court improperly admitted into evidence details of his prior criminal history and abused its discretion in revoking his probation and imposing the entire nine year period of incarceration remaining on his underlying sentence. *Held* that the trial court did not abuse its discretion in admitting into evidence details of the defendant's prior criminal history: it is well settled that probation proceedings are informal and that strict rules of evidence do not apply to such proceedings, and the factual details of the prior offenses committed by the defendant were plainly relevant to the court's discretionary determination of whether it should revoke the defendant's probation, impose a new sentence, or continue the defendant on probation; moreover, the trial court did not abuse its discretion in revoking the defendant's probation and imposing the remainder of the underlying sentence, that court having found that the defendant, while on probation, committed a sexual assault in the first degree, which was the same criminal behavior for which he was originally sentenced, and given the seriousness of the defendant's conduct and the risk he posed to the public, the court acted well within its discretion in concluding that the defendant was no longer amenable to probation and imposing the remainder of his original sentence.

Argued January 15–officially released February 19, 2019

[5] We note that any claim that it was impractical to so apportion those fees is belied by the fact that the plaintiff did, in fact, present to the trial court an affidavit apportioning them.

Procedural History

Substitute information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Markle*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

Laila M.G. Haswell, senior assistant public defender, for the appellant (defendant).

Rita M. Shair, senior assistant state's attorney, with whom were *Kevin D. Lawlor*, state's attorney, and, on the brief, *Cornelius P. Kelly*, assistant state's attorney, for the appellee (state).

Opinion

PER CURIAM. The defendant, DeShawn Tyson, appeals from the judgment of the trial court revoking his probation and sentencing him to nine years of incarceration. See General Statutes § 53a-32. On appeal, the defendant claims that the trial court (1) improperly admitted into evidence details of his prior criminal history, and (2) abused its discretion in concluding that he was no longer amenable to probation and imposing the entire period of incarceration remaining on his underlying sentence. We disagree and, accordingly, affirm the judgment.

On January 24, 2006, the defendant pleaded guilty to sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). The court subsequently sentenced him to eighteen years of incarceration, execution suspended after nine years, and ten years of probation. On March 1, 2013, the defendant was released from incarceration and began serving his probation.

On March 16, 2016, the defendant was arrested pursuant to a warrant charging him with violating his probation. Specifically, the state alleged that the defendant violated his probation by, among other things, committing a forcible sexual assault on May 6, 2014, on the victim at the Marriott Hotel in New Haven. Following a violation of probation hearing, the trial court found by a fair preponderance of the evidence that the defendant had committed a sexual assault in the first degree as alleged by the state and, thus, had violated one or more conditions of his probation. The court also concluded that the defendant posed a risk to the public and would not benefit from an additional period of probation. Accordingly, the court sentenced the defendant to the remaining nine years of incarceration imposed as part of his original sentence. This appeal followed.

The defendant's claims on appeal do not merit extensive discussion. With respect to his claim that the court improperly admitted evidence regarding the details of prior crimes he had committed, the defendant recognizes that "the Connecticut Code of Evidence does not apply to proceedings involving probation. Section 1-1 (d) (4) of the Connecticut Code of Evidence specifically provides: The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to the following . . . [p]roceedings involving probation. . . . Furthermore, [i]t is well settled that probation proceedings are informal and that strict rules of evidence do not apply to them." (Citation omitted; internal quotation marks omitted.) *State* v. *Tucker*, 179 Conn. App. 270, 276–77, 178 A.3d 1103, cert. denied, 328 Conn. 917, 180 A.3d 963 (2018). "The evidentiary standard for probation violation proceedings is broad. . . . [T]he court may . . . consider the types of information properly considered at an original sentencing

hearing because a revocation hearing is merely a reconvention of the original sentencing hearing." (Internal quotation marks omitted.) *State* v. *Megos*, 176 Conn. App. 133, 147, 170 A.3d 120 (2017). All that is necessary is that the information presented to the court is relevant and "has some minimal indicia of reliability." (Internal quotation marks omitted.) *State* v. *Shakir*, 130 Conn. App. 458, 464, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011). We review a trial court's rulings regarding the admissibility of evidence at a violation of probation hearing for an abuse of discretion. Id.

Here, the factual details regarding other offenses committed by the defendant were plainly relevant to the court's discretionary determination regarding whether it should revoke the defendant's probation, impose a new sentence, or continue the defendant on probation. Moreover, the evidence of the details of his other crimes was probative and had a minimal indicia of reliability because the defendant himself testified to the details during cross-examination by the state. Accordingly, we conclude that the court did not abuse its discretion by admitting this evidence.

The defendant's second claim is equally devoid of merit. After concluding that a defendant has violated his probation, the trial court is vested with broad discretion to determine whether the defendant should be continued on probation, or whether probation should be revoked and all or some of the original sentence be imposed. *State* v. *Faraday*, 268 Conn. 174, 185, 842 A.2d 567 (2004); *State* v. *Corringham*, 155 Conn. App. 830, 837–38, 110 A.3d 535 (2015). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling; reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Tucker*, supra, 179 Conn. App. 284.

In the present case, the court found that the defendant, while on probation, committed a sexual assault in the first degree, the same criminal behavior for which he originally received a significant period of incarceration and a lengthy period of probation. Given the seriousness of the defendant's conduct and the risk he poses to the public, the trial court acted well within its broad discretion to sentence him to the remaining nine years of his original sentence.

The judgment is affirmed.

JEAN COLINET *v.* DAVID BROWN
(AC 40612)

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

Syllabus

The self-represented, incarcerated plaintiff brought this action against the defendant, a retired Department of Correction employee, claiming violations of his federal constitutional rights. After the plaintiff had been removed from his job in the prison's industries program because of security concerns, he was allowed back into the program four years later. Thereafter, he wrote two letters to the defendant seeking back pay for the time that he was removed from the prison industries program. The defendant perceived the letters to contain certain comments that were threatening in nature and, subsequently, requested that the plaintiff be removed from the industries program, and the prison warden agreed. The plaintiff claimed that his removal from his job in the industries program violated his fourteenth amendment rights to due process and to equal protection, and his first and fourteenth amendment right against retaliation. The trial court rejected the due process claim, concluding that the plaintiff had no property or liberty interest in any particular job while in prison. The court found that the plaintiff failed to prove his equal protection claim, and that he failed to prove that his first and fourteenth amendment right against retaliation was violated because the defendant had a legitimate interest in the safety and security of the industries program, which was achieved by removing the plaintiff from the situation. The court thereafter rendered judgment for the defendant. On appeal to this court, the plaintiff claimed that the trial court's conclusions constituted bias and an abuse of discretion. *Held* that after a careful review of the record, the briefs, the parties' arguments and the applicable law, this court found no merit to the plaintiff's claims on appeal.

Argued December 11, 2018—officially released February 19, 2019

Procedural History

Action to recover damages for the alleged deprivation of the plaintiff's federal constitutional rights, and for other relief, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Cobb*, *J.*; judgment for the defendant, from which the plaintiff appealed to this court. *Affirmed.*

Jean Colinet, self-represented, the appellant (plaintiff).

Stephen R. Finucane, assistant attorney general, with whom were *Matthew B. Beizer*, assistant attorney general, and, on the brief, *George Jepsen*, former attorney general, for the appellee (defendant).

Opinion

PER CURIAM. In this action brought pursuant to 42 U.S.C. § 1983, the plaintiff, Jean Colinet, who is an inmate serving a sentence for murder, appeals from the judgment of the trial court rendered in favor of the defendant, David Brown, a retired former director of correctional enterprises for the Department of Correction (department). The plaintiff claims that the court erred in rejecting his claims that his fourteenth amendment rights to due process and equal protection, and his first and fourteenth amendment right against retaliation were violated. We affirm the judgment of the trial court.

The trial court set forth the following relevant facts and procedural history. "In 2011, the plaintiff was removed from his job in the industries program (laundry services) for security reasons. The plaintiff then accepted a post as a janitor, which paid a lower wage. A few years later, the decision to remove the plaintiff from the industries position was revisited, and he was allowed back into that program in 2015. The defendant was not involved in the 2011 decision. [The] plaintiff wrote to the defendant in January, 2015, and expressed

his disagreement with the 2011 decision to remove him from the industries position, and asked that he be paid 'back pay' or the difference in pay between his industries post and his janitorial post from 2011 to 2015. The defendant perceived certain comments in the plaintiff's letter as threatening, and the court agrees. An attorney for the [department] responded to the plaintiff's letter and explained that the plaintiff was not entitled to back pay. The plaintiff sent the defendant a second letter dated February, 2015, which the defendant again believed certain comments in the letter as threatening in nature, and again the court agrees. As a result of the two letters, and in particular because they contained perceived threatening comments, the defendant requested that the plaintiff be removed from the industries program for safety and security reasons. The defendant did not want the plaintiff punished, but only that he be removed from the situation—that is, the industries program. The warden agreed that the letters contained some content that was threatening and, [as] such, that security and safety interests in the prison were implicated. The warden also agreed that the plaintiff [should] be removed from the industries program in March, 2015.

"The plaintiff then brought this action alleging that [the] defendant . . . violated his constitutional rights by having him removed from his industries job after he wrote the two letters disagreeing with his removal from the position and seeking back pay. The plaintiff believes that the letters were not threatening."

The court rejected the plaintiff's due process claim on the ground that he "has no property or liberty interest in any particular job while in prison. *Santiago* v. *Commissioner of Correction*, 39 Conn. App. 674, 667 A.2d 304 (1995)." The court found that the plaintiff failed to prove his equal protection claim because he failed to

prove that he has been treated differently from a similarly situated group. The court also found that the plaintiff failed to prove that his first and fourteenth amendment right against retaliation was violated. The court found that the letters written by the plaintiff had "contained threatening references," and thus that "the defendant had a legitimate interest in the internal safety and security of the industries program within the prison, which was achieved by removing the plaintiff from the situation. The prison's legitimate interests take precedence over the plaintiff's right to complain over being removed from his prison job or not receiving back pay, particularly where he had no right to any particular prison job." This appeal followed.

The plaintiff challenges the judgment of the trial court on the grounds that its conclusions "constituted biasness and an abuse of discretion." We have carefully reviewed the record, the briefs submitted and arguments made by both parties, and the applicable law, and we find no merit to the plaintiff's claims on appeal.

The judgment is affirmed.

MEMORANDUM DECISIONS

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VOL. 187

JOHN K. FINNEY *v.* CAMERON'S AUTO TOWING REPAIR
(AC 41716)

Lavine, Sheldon and Prescott, Js.

Argued January 28—officially released February 19, 2019

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

Per Curiam. The judgment is affirmed.

ROBERT PRITSKER *v.* ANDREW BOWMAN
(AC 41076)

Lavine, Moll and Bear, Js.

Argued January 30—officially released February 19, 2019

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

Per Curiam. The judgment is affirmed.

CHANDRA BOZELKO *v.* ANGELICA PAPASTAVROS
(AC 41068)

Lavine, Sheldon and Moll, Js.

Argued February 1—officially released February 19, 2019

Plaintiff's appeal from the Superior Court in the judicial district of New Haven, *S. Richards*, *J.*

Per Curiam. The judgment is affirmed.

ROBERT GUIJARRO *v.* SUSAN ANTES
(AC 39932)

Alvord, Elgo and Norcott, Js.

Argued January 31—officially released February 19, 2019

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

Per Curiam. The judgment is affirmed.

STATE OF CONNECTICUT *v.* VINCENT J. MARTINEZ
(AC 41609)

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

Argued January 30—officially released February 19, 2019

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Per Curiam. The judgment is affirmed.

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SUPREME COURT PENDING CASES

The following appeals are fully briefed and eligible for assignment by the Supreme Court in the near future.

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SC 20000/20001/20003
Judicial District of Waterbury, Complex Litigation Docket

Insurance; Asbestos; Whether Appellate Court Properly Applied Continuous Trigger Theory of Coverage for Asbestos-Related Disease Claims; Whether Appellate Court Properly Applied Unavailability of Insurance Exception to Time on the Risk Rule; Whether Appellate Court Properly Interpreted Pollution and Occupational Disease Exclusions in Policies. The plaintiff manufactured and sold industrial talc beginning in 1948 and ending in 2008. Over the past several decades, thousands of personal injury lawsuits have been brought against the plaintiff across the country that allege that the plaintiff's talc contained asbestos and that exposure to the plaintiff's product caused diseases such as mesothelioma and asbestosis. The plaintiff brought this action seeking a declaratory judgment as to its rights and obligations, and those of thirty insurance companies, as to the costs of defending and indemnifying the plaintiff in the underlying lawsuits. Among the defendants were secondary insurers Mt. McKinley Insurance Company, St. Paul Fire and Marine Insurance Company, and Travelers Casualty and Surety Company. The trial court bifurcated the trial into four phases, and the first two phases were tried to the court and addressed the plaintiff's declaratory judgment claims and related counterclaims and cross claims. After the trial court ruled as to the first two phases, the plaintiff and some of the defendants sought and received permission to appeal the interlocutory judgment pursuant to Practice Book § 61-4, and those parties filed thirteen appeals. The Appellate Court (171 Conn. App. 61) affirmed the trial court's judgment in part and reversed it in part. The Supreme Court granted the plaintiff, Mt. McKinley, St. Paul, and Travelers certification to appeal the Appellate Court's judgment, and the Supreme Court will be considering the following issues in the certified appeals: (1) Did the Appellate Court properly affirm the trial court's adoption of a "continuous trigger" theory of coverage for asbestos-related disease claims and properly affirm the trial court's preclusion of expert testimony on current medical science regarding the actual timing of bodily injury resulting from asbestos-related disease? (2) Did the Appellate Court properly affirm the trial court's adoption of an "unavailability

of insurance" exception to the "time on the risk" rule of contract law, which allows for pro rata allocation of defense costs and indemnity for asbestos-related disease claims? (3) Did the Appellate Court properly interpret the pollution exclusion clauses in some of the policies as applicable only to claims arising from "traditional" environmental pollution and not to those claims arising from asbestos exposure occurring in indoor working environments? (4) Did the Appellate Court properly interpret the occupational disease exclusion clauses in some of the policies as precluding coverage for claims of occupational disease, regardless of whether the claimant was employed by the policyholder or by a third party user of the allegedly harmful product?

ANTHONY GILCHRIST *v.* COMMISSIONER OF CORRECTION, SC 20141
Judicial District of Tolland

Habeas Corpus; Summary Disposition; Whether Habeas Court Properly Dismissed Petition on its own Motion Pursuant to Practice Book § 23-29 Without Affording Petitioner Notice and an Opportunity to be Heard and Without Ruling on Petitioner's Request for Appointment of Counsel. The petitioner was convicted on a plea of guilty of the crime of robbery in the third degree. While representing himself, the petitioner filed a petition for a writ of habeas corpus, claiming that, because his plea bargain had not been followed, the habeas court should allow him to withdraw his guilty plea and order that the criminal charge be vacated or dismissed. The habeas court, sua sponte and without holding a hearing, dismissed the petition for lack of subject matter jurisdiction pursuant to Practice Book § 23-29 (1), explaining that, at the time the petition was filed, the petitioner was no longer in custody for the conviction that he challenged. Section 23-29 (1) provides that "the judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition . . . if it determines that . . . the court lacks jurisdiction." The petitioner appealed, claiming that the habeas court's sua sponte dismissal denied him his rights to due process, to assigned counsel, and to notice of—and an opportunity to be heard on—the issue of whether the habeas court had jurisdiction over the petition. The Appellate Court (180 Conn. App. 56) affirmed the habeas court's judgment, finding that the habeas court properly dismissed the petition for lack of jurisdiction where the petitioner did not allege sufficient facts to establish that he was in custody on the challenged conviction at the time he filed the petition. The Appellate Court rejected

the petitioner's claim that the habeas court erred by not conducting a hearing before deciding that it lacked subject matter jurisdiction, ruling that, under the circumstances here, Practice Book § 23-29 did not require the habeas court to grant a hearing prior to dismissing the petition. The Supreme Court granted the petitioner certification to appeal, and it will consider whether the Appellate Court properly affirmed the habeas court's judgment of dismissal where the habeas court took no action on the petitioner's request for counsel and where it did not give the petitioner notice and an opportunity to be heard before dismissing the petition on its own motion and pursuant to Practice Book § 23-29.

KIMBERLY GRAHAM et al. *v.* JANIE R. FRIEDLANDER et al., SC 20243
Judicial District of Stamford-Norwalk at Stamford

Education; Exhaustion of Administrative Remedies; Whether Trial Court Properly Dismissed Negligence Action Brought by Autistic Minor Children for Failure to Exhaust Remedies under Individuals with Disabilities Education Act. The plaintiffs, four minor children diagnosed with autism and their parents, brought this negligence action against the city of Norwalk, the Norwalk board of education, and three of the board's employees. The plaintiffs alleged that the defendants were negligent in failing to investigate the credentials of an unqualified individual who was hired to provide services to autistic children in the Norwalk public school system. The plaintiffs further claimed that the defendants' failure to provide the minor plaintiffs with proper services during a critical time in their intellectual development resulted in the minor plaintiffs suffering irreparable developmental and neurological harm. The defendants moved that the action be dismissed for lack of jurisdiction, alleging that the plaintiffs had failed to exhaust their administrative remedies. The trial court granted the motions and dismissed this action, finding that the plaintiffs had failed to exhaust their administrative remedies under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., a federal law that protects the right of a child with disabilities to a free appropriate public education (FAPE) and that outlines the administrative procedures to be followed when there is a claim of failure to provide FAPE under the IDEA. The trial court rejected the plaintiffs' argument that they were not required to exhaust their administrative remedies under *Fry* v. *Napoleon Community Schools*, 137 S. Ct. 743 (2017), which held that the IDEA exhaustion requirement does not apply where the crux, or gravamen, of the complaint is something

other than the denial of FAPE. The trial court determined that the plaintiffs' negligence claims were "inexorably linked" to educational services and that the gravamen of the plaintiffs' complaint was that the defendants had denied the minor plaintiffs appropriate educational services. The plaintiffs appeal from the judgment dismissing their action. The Supreme Court will decide whether the trial court properly dismissed the action for failure to exhaust administrative remedies where the plaintiffs argue that the gravamen of their complaint is not the denial of FAPE, and accordingly that their claims were not capable of redress under the IDEA. The plaintiffs also argue that the trial court failed to consider whether it was improbable that the plaintiffs could obtain adequate relief for their harm by pursuing administrative remedies.

The summaries appearing here are not intended to represent a comprehensive statement of the facts of the case, nor an exhaustive inventory of issues raised on appeal. These summaries are prepared by the Staff Attorneys' Office for the convenience of the bar. They in no way indicate the Supreme Court's view of the factual or legal aspects of the appeal.

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of a Completed Application for a Moratorium in the City of Milford

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (February 4, 2019) for a Moratorium of Applicability for the City of Milford. A copy of this completed application is available for viewing at the Connecticut Department of Housing during normal business hours. For additional information please call or write to Laura Watson, Economic and Community Development Agent, DOH, 505 Hudson Street, Hartford, CT 06106, (860) 270-8169.

NOTICES

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Ansonia/Milford Judicial District
G.A. 22 in Milford

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 14 West River Street, Milford, CT 06460

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 4882

CLOSING DATE: March 1, 2019

In the Division of Criminal Justice, this class is accountable for receiving training and representing the interests of the state in prosecution of assigned criminal and motor vehicle cases and infractions.

Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

Knowledge, Skill and Ability

Knowledge of criminal law and legal process, legal principles and practice; knowledge of and ability to interpret and apply relevant State and federal criminal law; knowledge of the statutory authority, operation and administration of the Division of Criminal Justice; considerable interpersonal skill; considerable negotiating skill, considerable trial and counseling skills; considerable oral and written communication skill; considerable ability to analyze legal problems, present statements of fact, law and argument; ability to write legal briefs and supporting documentation.

Minimum Qualifications – General Experience

Membership in the Connecticut Bar and residency in the State of Connecticut.

Application Procedure

In addition to meeting the above requirements, candidates must submit the following information in order to be considered for this position.

1. Cover letter

2. Division of Criminal Justice Application for Employment - available online at **www.ct.gov/csao**

3. Resume

4. Copy of law school transcript

5. The names and contact information for three (3) professional references to:

By e-mail to: DCJ.HR@ct.gov, cc: DCJ.AnsoniaMilford@ct.gov.

All documents must be combined into a single pdf

(This is the Preferred Method)

Or

Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
Attn: Human Resources

Application packages must be received or postal stamped no later than **March 1, 2019**

Applications received by facsimile will not be accepted

A complete job specification for DCJ Deputy Assistant State's Attorney is available here.

The following notice originally posted February 12, 2019 contained an error in the Location line and has been edited following a request by the Division of Criminal Justice.

STATE OF CONNECTICUT
DIVISION OF CRIMINAL JUSTICE

JOB OPPORTUNITY

DCJ Deputy Assistant State's Attorney
Tolland Judicial District
G.A. 19 in Rockville

PLEASE FOLLOW THE SPECIFIC APPLICATION FILING INSTRUCTIONS ON THE LAST PAGE

LOCATION: 20 Park Street, Rockville, CT 06066

HOURS: 8:00 a.m. – 5:00 p.m.

SALARY RANGE: $67,641.02 - $141,217.18 Yearly

PCN: 4984/5260/5261

CLOSING DATE: March 1, 2019

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Examples of Duties

Reviews all documentation relative to assigned criminal cases and infractions and directs supplemental or further investigation; prepares cases for arraignment, selecting appropriate charges, preparing original statement of facts; reviews outstanding defense motions and prepares responses or objections as appropriate; interviews witnesses and victims; evaluates strengths and weaknesses of case in light of above findings; initiates and completes related legal research; responsible for plea negotiation with defense attorneys; conducts pre-trial conferences; conducts jury selection; tries cases before juries, three-judge panels, single judge or magistrate; may prepare appellate material for submission to Chief State's Attorney's Office after conviction; reviews applications for arrest warrants and - upon approval - signs and presents to presiding judge for final review and signature; may review applications for search and seizure warrants; maintains liaison with and functions as resource to state and local police; advises victims of crimes as to their rights and directs them to the appropriate supportive agencies; defends petitions of habeas corpus including preparation of pleadings, argument of motions, and trial of action; if a member of the Appellate Unit, defends appeals brought by convicted defendants before the Appellate Court and Supreme Court; performs related duties as required.

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