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Vol. 334

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* JOHN WHITE
(SC 20168)

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

Syllabus

Convicted of the crime of assault in the first degree in connection with an incident in which he attacked the victim with a box cutter, the defendant appealed. Immediately after the attack, the victim described the assailant to the police as a white male wearing a red hooded sweatshirt, and the police recovered a red hooded sweatshirt and a box cutter near the crime scene. The police subsequently were notified that the defendant's DNA profile was a potential match to DNA taken from the recovered evidence. A detective, P, compiled a photographic array, and another detective administered the array to the victim at the police station outside of P's presence. The victim identified the defendant from the array and wrote on his photograph that she was "pretty certain" that he was the man who had attacked her. Ten to fifteen minutes later, the victim met with P and, unprompted by either detective, stated that, although she had written "pretty certain" on the photograph, she was "absolutely certain" that the defendant was her assailant. The victim then provided a written statement to P, in which she reiterated that she meant that she was absolutely certain about her identification of the defendant as her assailant, even though she previously had indicated that she was pretty certain. The defendant was arrested, and he retained private counsel to represent him, using funds provided by his wife to pay for attorney's fees and to retain an expert, C, on eyewitness identification. After jury selection began, the state gave notice of its intent to introduce DNA evidence and requested that the court order the defendant to submit to a DNA sample. The court granted the state's request but continued the trial to allow the defendant an opportunity to reframe his defense and to locate a DNA expert. The defendant then filed a motion requesting that the court order public funding so he could retain a DNA expert, claiming that he was indigent and that he was constitutionally entitled to such funding. In denying the defendant's motion for public funding, the trial court declined to find him to be indigent, noting, inter alia, that, pursuant to this court's decision in *State* v. *Wang* (312 Conn. 222), requests for public funding for ancillary defense costs must be made to the Public Defender Services Commission via the local public defender's office, that the defendant had not applied to the public defender's office for such funding, and that there was no authority for the trial court to order payment of a portion of the defense costs. In light of the defendant's concerns about having to choose between keeping his privately retained defense counsel or applying for

public defender services, the court indicated that the defendant could apply to the public defender's office for funding without necessarily changing counsel. The defendant, however, elected not to apply for public defender services and retained his private counsel throughout the trial. The trial court also denied the defendant's pretrial motion in limine, which sought to preclude the admission of the victim's postidentification statement to P that she was absolutely certain that the defendant was her assailant and any subsequent in-court statements regarding her confidence at the time of trial in her identification of the defendant. At trial, the victim and P testified about the victim's confidence statement after viewing the array, the victim testified that she was absolutely certain at the time of trial that the photograph she had selected was of her attacker, and C, the expert witness whom the defendant ultimately retained, testified concerning the reliability of eyewitness identifications. On appeal from the judgment of conviction, the defendant claimed that the trial court improperly denied his request for public funding for a DNA expert and his motion in limine to preclude the victim's postidentification confidence statements. *Held*:

1. The defendant failed to establish his indigence because of his decision not to apply to the Public Defender Services Commission via the local public defender's office for his requested public funding, and, accordingly, the record lacked an essential factual predicate necessary for this court to review his claim that the trial court violated his constitutional rights by denying his motion for public funding to pay for a DNA expert to assist in his defense solely on the ground that he had retained private counsel: a defendant's right to publicly funded expert or investigative services under the due process clause of the fourteenth amendment, to the extent that such services are reasonably necessary to formulate and present an adequate defense to pending criminal charges, belongs only to indigent criminal defendants, and the trial court properly declined to find the defendant indigent and instead referred him for further action to the Public Defender Services Commission via the local public defender's office, as courts are not statutorily authorized to fund ancillary defense costs for indigent defendants, and, consistent with the statute (§ 51-297) governing the determination of indigency in connection with the appointment of or request for a public defender, this court's decision in *Wang* makes clear that a defendant claiming to be indigent and seeking public funding for ancillary defense costs should be referred to the commission via the local public defender's office for a determination of indigency in the first instance, subject to judicial review via appeal to the trial court; moreover, the defendant's choice of counsel concerns, which were premised on the policy of the Office of the Chief Public Defender to deny all public funding unless the defendant is represented by a public defender or assigned counsel, were unfounded on the record of this case.

2. The trial court did not abuse its discretion in denying the defendant's motion in limine to preclude the victim's postidentification confidence statement to P and any in-court statements regarding her confidence at the time of trial in her identification of the defendant: in light of applicable case law holding that a witness' confidence in an identification, both at the time it was made and at trial, is a relevant factor to be considered in the determination of whether an identification is reliable, the trial court did not abuse its discretion in concluding that the victim's professed level of confidence in her identification shortly after she made it and at trial was relevant to the jury's determination of whether the defendant was the victim's assailant; moreover, the trial court reasonably concluded that the victim's postidentification confidence statements were not more prejudicial than probative, as those statements would not unduly arouse the jurors' emotions or be so persuasive as to overwhelm the jury's capacity to fairly evaluate the evidence, and also reasonably concluded that those statements did not invade the province of the jury, as a witness' testimony regarding the witness' confidence in an identification of which the witness has personal knowledge is simply a tool that the jury uses to evaluate the accuracy or credibility of the identification; furthermore, in the absence of any evidence indicating a recent shift in the relevant social science, this court declined to adopt a categorical rule precluding the admission of evidence of a witness' confidence in his or her identification, unless the evidence stems from the earliest identification procedure that complies with the statute (§ 54-1p) containing the guidelines that the police must follow in conducting eyewitness identification procedures, because a defendant may challenge such confidence statements by presenting expert testimony on the reliability of eyewitness testimony, as the defendant did in the present case.

(*Four justices concurring separately in one opinion*)

Argued December 12, 2018—officially released March 3, 2020

Procedural History

Substitute information charging the defendant with the crime of assault in the first degree, brought to the Superior Court in the judicial district of Waterbury, where the court, *Murphy, J.*, denied the defendant's motion to preclude certain evidence; thereafter, the court, *Murphy, J.*, denied the defendant's motion for costs to pay for expenses associated with procuring an expert for the purpose of presenting a criminal defense; subsequently, the case was tried to the jury; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

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

Matthew A. Weiner, assistant state's attorney, with whom were *Marc G. Ramia*, senior assistant state's attorney, and, on the brief, *Maureen Platt*, state's attorney, for the appellee (state).

Charles D. Ray and *Brittany A. Killian* filed a brief for The Innocence Project as amicus curiae.

Lauren Weisfeld, chief of legal services, and *Deborah Del Prete Sullivan*, director of legal counsel, filed a brief for the Office of the Chief Public Defender as amicus curiae.

J. Christopher Llinas and *Ioannis A. Kaloidis* filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

Opinion

ROBINSON, C. J. The defendant, John White,[1] appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1). On appeal,[2] the defendant claims that the trial court improperly denied his motions (1) seeking public funds to pay for a DNA expert to assist in his defense, and (2) to exclude certain evidence of the victim's confidence in her identification of the defendant when presented with a photographic array by the police. We disagree with the defendant's claims and, accordingly, affirm the judgment of the trial court.

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On May 17, 2009, the victim, April Blanding, spent the afternoon and evening drinking alcohol and smoking

[1] The defendant also appears to be known as "John Kryzak."

[2] The defendant appealed from the judgment of conviction to the Appellate Court, and we subsequently granted his motion to transfer the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-2.

marijuana and crack cocaine at the home of her friend, Tara Coleman. Coleman lived on Rose Street in Waterbury, which runs parallel to Wood Street, and the backyards of the homes on the two streets adjoin. At approximately 11 p.m., the victim left Coleman's home to walk to a nearby store to purchase a beverage.

As she approached the end of Rose Street, the victim encountered a man, later identified as the defendant, sitting on the porch of an abandoned house approximately twelve to twenty feet away from her. The defendant had cuts on his face and was wearing a red hooded sweatshirt. The defendant asked the victim if she was "tricking tonight," and the victim replied "no" and continued on her way to the store. While walking back to Coleman's house after making her purchases, the victim saw the defendant still sitting on the same porch. Shortly after the victim passed the defendant, she felt someone walking behind her. As she stepped onto Coleman's driveway, the defendant tapped her on the shoulder and said: "Lady, guess what? You're dead, you're dead, you're dead. As of right now, you are a dead woman." The defendant tripped the victim, who landed on her back, jumped on top of her and repeatedly stabbed her with what later was discovered to be a box cutter in her neck, face, head, chest, finger, and arm.

A resident on the third floor of Coleman's building overheard the victim shouting, looked out his window and saw the victim and a white male wearing a red hooded sweatshirt, and then yelled down to ask if they were alright. At that point, after some ten to fifteen minutes of struggling with the defendant, the victim managed to "thr[ow] him off of [her]." The defendant then stopped the attack and ran down the driveway toward a wooded area behind Coleman's home.

The victim ran to Coleman's front door screaming for help. When she saw the victim, Coleman called 911. The victim told responding police officers that she had

been attacked in the driveway by a white male wearing a red hooded sweatshirt. The victim was transported by ambulance to Saint Mary's Hospital where she underwent surgery for her injuries.

After the police had secured the scene, officers recovered a red hooded sweatshirt from the side of an abandoned house on Wood Street, "[toward] the end of the driveway, right in between where the wood[ed] area was" behind Rose Street. The police also found a blood-stained box cutter in the backyard of another home on Wood Street adjacent to Coleman's home.

Although the initial investigation did not initially produce a suspect, approximately four years later, in 2013, Waterbury police obtained information regarding a potential DNA match on a piece of evidence recovered near the crime scene. The victim went to the police department on October 14, 2013, where she identified the defendant in a double-blind, sequential photographic array procedure. The victim wrote on the defendant's photograph: "I . . . am pretty certain that this is the young man who stabbed [me] 6 times on May of 2009 at 11 p.m. . . . on Rose Street in Waterbury . . . ." Afterward, the victim was interviewed by Detective John Pesce, and she told him that she was in fact "absolutely certain" with respect to her prior identification. Subsequent forensic testing revealed the presence of both the defendant's and victim's DNA on the red hooded sweatshirt and the victim's DNA on the box cutter.

The defendant was arrested in 2016 and charged with assault in the first degree in violation of § 53a-59 (a) (1). Jury selection began on December 7, 2016. The following day, the state filed a notice of its intent to introduce DNA evidence pursuant to General Statutes § 54-86k, as well as a motion for nontestimonial evidence pursuant to Practice Book §§ 40-32 and 40-34 (6), requesting to sample the defendant's DNA by buccal

swab. Over the defendant's objection, the trial court granted the state's motion but gave the defendant a continuance to allow him to locate an expert and to reframe his defense. The defendant subsequently filed a motion seeking public funds to pay for a DNA expert, which the trial court denied following a hearing. The two jurors who already had been selected were excused, and jury selection began again on December 19, 2016. The trial court then denied the defendant's motion to suppress the victim's pretrial identification of him from the photographic array, as well as his motion in limine, which sought to preclude both the victim's postidentification statements and any in-court statements regarding her confidence in the accuracy of her identification. The jury subsequently returned a verdict of guilty, and the trial court rendered judgment in accordance with the verdict. The trial court sentenced the defendant to a total effective sentence of twenty years of incarceration, with a mandatory minimum of five years of incarceration, consecutive to a fifteen year sentence that the defendant is serving in Missouri. This appeal followed.

On appeal, the defendant raises two claims. First, he claims that the trial court abused its discretion and violated his federal and state constitutional rights when it denied his motion for funds for a DNA expert to assist in his defense. Second, he claims that the trial court abused its discretion when it denied his motion in limine seeking to preclude certain evidence of the victim's confidence in her identification of the defendant when presented with a photographic array by the police. We address each claim in turn, setting forth additional relevant facts and procedural history when necessary.

I

The defendant first claims that the trial court abused its discretion and violated his federal and state constitutional rights when it denied his motion for public

funds to obtain a DNA expert to assist in his defense in challenging the state's DNA mixture results. The record reveals the following additional relevant facts and procedural history. At all times relevant to this appeal, the defendant was represented by private counsel, Attorney Ioannis A. Kaloidis. The defendant's wife had paid for Kaloidis' attorney's fees and the expenses associated with his retention of an eyewitness identification and memory expert.

The day after jury selection began, the state gave notice of its intent to introduce evidence of DNA analysis and moved for permission to obtain a DNA sample from the defendant via a buccal swab in order to compare the defendant's DNA against samples taken from the red hooded sweatshirt and the box cutter recovered from Wood Street. Defense counsel objected, claiming that the state's notice was untimely under § 54-86k (c), which requires that such notice be given at least twenty-one days prior to the commencement of trial, and that allowing the state to sample the defendant's DNA constituted an unfair surprise and was prejudicial. On December 12, 2016, the trial court overruled the objection and granted the state's motion, finding that, although it was "extremely bothered that [the parties were] having this conversation three days . . . from the beginning of evidence," the state nonetheless had established good cause to test and introduce DNA evidence on the eve of trial.[3] The trial court then granted the defendant a continuance for as much time as he needed to prepare for trial in light of the state's late disclosure and, with the parties' agreement, dismissed the two jurors who already had been selected.

The next day, December 13, 2016, the defendant filed a motion seeking public funds to pay for a DNA expert to assist in his defense, as well as an accompanying

[3] On appeal, the defendant does not challenge this ruling.

memorandum of law and a financial affidavit in which he asserted that he was indigent. In his memorandum of law, the defendant argued that, since this court issued its decision in *State* v. *Wang*, 312 Conn. 222, 92 A.3d 220 (2014), "it has been the practice in this state that requests for funding go through the Public Defender [Services] Commission [(commission)]. Such requests have routinely been denied except in cases [in which] counsel has been appointed as assigned counsel by the public defender's office. In the present case, the undersigned [counsel] is privately retained counsel." The court held a hearing on the motion on December 14, 2016, at which the defendant argued that an expert who would evaluate the results of the state forensic science laboratory was necessary to his defense given the anticipated importance of DNA evidence at trial. The defendant argued that the trial court could grant his motion, even though he was not represented by a public defender or assigned counsel, because his choice of counsel was a constitutionally protected right.

After hearing argument, the trial court denied the defendant's motion in an oral decision. The trial court declined to find the defendant indigent because, inter alia, he had been represented by private counsel to this point and his defense experts had been, or were being, paid, and he had not applied to the public defender's office, leaving the trial court without access to the results of an indigency investigation to aid its indigency determination.[4] The trial court, citing *Wang*, then

[4] In its decision, the trial court noted that "the defendant has been represented by private counsel since the beginning of this case, that he has been receiving, whether it's from his pocket or someone else's pocket, his attorney is being paid. His experts have been paid or are in the process of being paid. . . . I cannot make a finding [that] the defendant is indigent and has no means to pay for the services that he can—I cannot make a finding that he doesn't have any source of funds. I certainly [can] make a finding that he has no income and no assets based on his testimony, but I also cannot make a finding that he has no other sources of assets." Significantly, the trial court observed that, because the defendant had not yet applied to the public defender's office, the trial court did not, at the time of its decision, have access to the results of an indigency investigation.

explained that a request for public funding for defense expenses must be made to the commission via the local public defender's office and that there was no authority for the trial court to order payment of a portion of the defense costs. The trial court also was not convinced that the defendant had established that a private DNA expert was necessary to his defense, noting that "[t]he state lab is a public institute and is going to analyze the [DNA] results . . . [a]nd, so, it's not clear . . . what an expert adds to the equation on the part of the defense." Further, the trial court explained that the defendant could apply for funds from the public defender's office without necessarily changing defense attorneys.[5] The trial court then took a recess to allow the defendant and Kaloidis to confer as to whether the defendant wished to apply for public defender services. Kaloidis subsequently informed the court that the defendant had elected to retain his existing private counsel and would not submit an application to the public defender's office.

On appeal, the defendant claims that the trial court improperly denied his motion for public funds to obtain

[5] The trial court also suggested that the defendant could waive counsel and have standby counsel appointed, attempt to have the public defender's office make an arrangement with Kaloidis, ask the public defender's office to file an appearance in addition to Kaloidis' appearance, or seek representation by the public defender's office.

The trial court then clarified its ruling, which was made in the presence of both the defendant and Kaloidis: "I know you've indicated [that the defendant] does not want to apply for the public defender, but you can talk to him a little bit more about what that will mean. If he wishes to apply for the public defender, you know, for the purpose of an investigation on indigency, or for the purpose of him actually being represented by the public defender's office, and, as I said, whether that means you represent him as a special public defender or someone comes in as a cocounsel, or whatever scenario works out. I'll allow you to investigate that and him to apply.

"So, what I will do is this. I'm going to take a recess; you can talk to him. If you feel it's appropriate, then he should make an application for the public defender services. And, if that occurs, then I will hear that motion in front of me. Someone obviously from the public defender's office needs to appear in front of me to disclose the result of [its] investigation, and then I will rule if there is an application. If there is no application for [the] public defender, then we will discuss scheduling."

a DNA expert. The defendant acknowledges that, although he was indigent and had been incarcerated for years in Missouri, his family had sufficient funds to hire a private attorney for him, as well as an eyewitness identification expert. The defendant claims, however, that, when the state decided at the last minute to perform additional DNA testing that resulted in evidence of DNA from both the defendant and the victim being present on the red hooded sweatshirt, his family could not afford the additional funds necessary for a DNA expert. The defendant argues that the trial court had discretion to order funds either independently or through the commission pursuant to *Wang* and that his motion for funds was denied solely because he had private counsel in violation of his constitutional rights under *Ake* v. *Oklahoma*, 470 U.S. 68, 76–85, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985). In response, the state argues that the trial court did not deny the defendant's motion for funds solely because he had retained private counsel; rather, the trial court denied the defendant's motion because the defendant had refused to file the application necessary for the commission to investigate his claim of indigence. Indeed, the state argues that, under our interpretation of General Statutes §§ 51-289 (*l*) and 51-292, as expressed in *State* v. *Wang*, supra, 312 Conn. 249–56, the commission is the *only* entity authorized to grant requests for public funds to be used for ancillary defense costs such as expert witnesses. Accordingly, the state argues that the trial court properly denied the defendant's motion because it lacked discretion altogether to consider a request to fund ancillary defense costs. We agree with the state's argument that the defendant failed to establish his indigence because of his decision not to apply to the commission, and, therefore, the record lacks an essential factual predicate necessary for us to review his constitutional claims under *Ake*.

We begin with a review of our decision in *Wang*, which addressed several issues that arose from a request by

the indigent, self-represented defendant, Lishan Wang, for public funding to retain experts and investigators to aid in his defense at his murder trial, including whether a right to such funding exists and which governmental entity, the commission or the Judicial Branch, would be obligated to provide those funds. *State* v. *Wang*, supra, 312 Conn. 224–26. Wang was found to be indigent and was appointed public defender representation, but he subsequently filed a motion to represent himself, which was granted by the trial court. Id., 227. After the hearing on his motion, at which he waived his right to counsel after being formally canvassed by the court, Wang represented himself with the assistance of the Office of the Chief Public Defender (OCPD) as standby counsel. Id. Wang subsequently requested that the trial court order public funding to enable him to retain experts and an investigator, claiming that he was constitutionally entitled to such experts and investigator in order to formulate and present his defense. Id. The OCPD declined the request to provide that funding. Id., 227–28.

Relying on the United States Supreme Court's decision in *Ake* v. *Oklahoma*, supra, 470 U.S. 68, we concluded that "an indigent self-represented criminal defendant has a fourteenth amendment due process right to publically funded expert or investigative services, to the extent that such services are reasonably necessary to formulate and to present an adequate defense to pending criminal charges."[6] *State* v. *Wang*, supra, 312 Conn. 231. We further concluded that an indigent, self-represented defendant need not accept representation from a public defender in order to obtain public funding for reasonably necessary ancillary defense costs, noting that, "[w]hereas the right of self-representation directly

[6] In *Wang*, we observed as a preliminary matter "that the right articulated in *Ake* is not contingent upon the penalty sought or the field of assistance demanded, so long as that assistance is reasonably necessary for the indigent defendant to have a fair opportunity to present his defense." (Internal quotation marks omitted.) *State* v. *Wang*, supra, 312 Conn. 236–37.

conflicts with the right to counsel pursuant to the sixth amendment, no such conflict exists between the right of self-representation and the right to access the basic tools of an adequate defense pursuant to the fourteenth amendment. Indeed, an indigent defendant . . . is entitled *both* to the constitutional right to counsel *and* the constitutional right to be provided with the basic tools of an adequate defense." (Emphasis in original; internal quotation marks omitted.) Id., 239.

Considering next which governmental entity is obligated to provide the public funds sought by Wang, we concluded that, although the commission is statutorily authorized to fund the reasonably necessary ancillary defense costs for indigent, self-represented defendants,[7] the Judicial Branch is not so authorized. We reasoned that, because "the statutes governing public defender services, § 51-289 et seq., vest authority in the commission as an autonomous body for fiscal purposes, and require the commission to approve reasonably necessary defense costs prior to expenditure from the commission's budget," a trial court does *not* "[retain] discretion to authorize public funding for ancillary defense costs for self-represented defendants based upon its threshold determination that such costs are reasonably necessary to an adequate defense." Id., 257. In concluding that the commission was obligated to pay the ancillary defense costs of Wang, an indigent, self-represented defendant, we emphasized that he had standby counsel appointed by the trial court; see id., 262–63 and n.37; and that § 51-292 authorized the commission "to fund reasonably necessary ancillary defense costs incurred by standby counsel who, thusly appointed, is serving pursuant to the provisions of the chapter of the General Statutes governing public defender services," mean-

[7] In *Wang*, we observed that "implicit in the phrase 'upon approval of the commission' in § 51-292 is the recognition that the commission may use its own established procedures for evaluating whether ancillary costs are reasonably necessary." *State* v. *Wang*, supra, 312 Conn. 256.

ing that "an indigent self-represented defendant may access funding for reasonably necessary defense costs through standby counsel." Id., 254–55; see also id., 253 (discussing General Statutes § 51-291 (11) and noting that "[t]he statutes governing public defender services require the chief public defender to maintain a list of attorneys who may be appointed as standby counsel for self-represented defendants, as needed"). We emphasized, however, that our holding in *Wang* was "limited to the provision of publicly funded expert or investigative assistance for an indigent self-represented defendant at a criminal trial. . . . [W]e express[ed] no view as to whether an indigent defendant represented by pro bono counsel is entitled access to public funding for expert or investigative assistance." Id., 239 n.18.

In the present case, the defendant claims that his motion for public funds was denied solely because he had retained private counsel, in violation of his constitutional rights, which effectively asks us to decide the issue we left unaddressed in *Wang*. At the outset, however, we emphasize that the fourteenth amendment due process right to publicly funded expert or investigative services, to the extent that such services are reasonably necessary to formulate and to present an adequate defense to pending criminal charges, belongs only to *indigent* criminal defendants. Id., 231; see *Ake* v. *Oklahoma*, supra, 470 U.S. 76 ("[The United States Supreme Court] has long recognized that when a [s]tate brings its judicial power to bear on an *indigent* defendant in a criminal proceeding, it must take steps to [ensure] that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the [f]ourteenth [a]mendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, *simply as a result of his poverty*, a defendant is denied the opportunity to participate meaningfully in a judicial

proceeding in which his liberty is at stake." (Emphasis added.)). Before we consider any questions left open by *Wang* concerning the connection between an indigent defendant's access to public funding for expert or investigative services and the nature of his legal representation, we must consider the existence of the threshold factual predicate to such an inquiry, namely, *the indigency of the defendant*. In contrast to *Wang*, in which Wang's indigency was undisputed; *State* v. *Wang*, supra, 312 Conn. 226–27; the trial court in the present case expressly declined to find that the defendant was indigent. See footnote 4 of this opinion and accompanying text.

Determining whether the trial court properly declined to find the defendant indigent and instead referred him to the public defender's office requires us to consider the respective roles of the trial court and the public defender in that process. We previously have held that the "trial court's assessment of the defendant's offer of proof pertaining to whether he was indigent and was, therefore, eligible for state funded expert assistance, is a factual determination subject to a clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . .

"It is the duty of the state to provide adequate means to [ensure] that no indigent accused lacks full opportunity for his defense . . . . The right to legal and financial assistance at state expense is, however, not unlimited. Defendants seeking such assistance must satisfy the court as to their indigency . . . . This has largely been accomplished through [public defender services] . . . which has promulgated guidelines that are instructive as to the threshold indigency determination. . . .

"[General Statutes §] 51-297 (a) requires the public defender's office to investigate the financial status of an individual requesting representation on the basis of indigency, whereby the individual must, under oath or affirmation, set forth his liabilities, assets, income and sources thereof. . . . [General Statutes §] 51-296 (a) requires that, [i]n any criminal action . . . the court before which the matter is pending shall, if it determines after investigation by the public defender or his office that a defendant is indigent as defined under this chapter, designate a public defender . . . to represent such indigent defendant . . . . Upon a determination by the public defender that an individual is not eligible for its services, the individual may appeal the decision to the court before which his case is pending." (Internal quotation marks omitted.) *State* v. *Henderson*, 307 Conn. 533, 540–41, 55 A.3d 291 (2012); see also *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 693, 142 A.3d 1095 (2016) (*McDonald*, *J.*, dissenting) ("[u]nder the chapter of our General Statutes governing public defender services, indigent defendant means . . . a person who is formally charged with the commission of a crime punishable by imprisonment and who does not have the financial ability at the time of his request for representation to secure competent legal representation and to provide other necessary expenses of legal representation" (emphasis omitted; internal quotation marks omitted)).

Particularly after *Wang*, we understand our case law to establish that the trial court's role in the indigency determination is secondary to that of the public defender's office, insofar as the commission is the entity statutorily authorized to investigate and determine claims of indigency through local public defender's offices. See *State* v. *Martinez*, 295 Conn. 758, 784–85 n.21, 991 A.2d 1086 (2010); see also *State* v. *Flemming*, 116 Conn. App. 469, 481, 976 A.2d 37 (2009) ("the office of the

public defender is the *only* entity upon which a statutory duty is imposed to investigate a claim of indigency" (emphasis in original; internal quotation marks omitted)). As we observed in *Wang*, "the primary purpose of [No. 74-317, § 7, of the 1974 Public Acts (P.A. 74-317), which was codified at . . . § 51-296, governing the designation of public defenders for indigent defendants] was the creation of [the commission] to administer the public defender system *in lieu of the judges of the Superior Court*, who previously had been responsible for that function. . . . Therefore, by designating the commission as the agency responsible for carrying out the purposes of the chapter governing public defender services, the legislature has charged the commission with protecting the rights of indigent criminal defendants." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Wang*, supra, 312 Conn. 250–51; see *State* v. *Martinez*, supra, 782 ("It is the duty of the state to provide adequate means to [ensure] that no indigent accused lacks full opportunity for his defense . . . . This has largely been accomplished through [the Division of Public Defender Services] . . . which has promulgated guidelines that are instructive as to the threshold indigency determination." (Citations omitted; internal quotation marks omitted.)).

Indeed, the statutes governing indigent defense expressly recognize that the trial court's role in the indigence determination process is secondary to that of the commission. Section 51-297 (g) provides that, "[i]f the Chief Public Defender or anyone serving under the Chief Public Defender determines that an individual is not eligible to receive the services of a public defender under this chapter, the individual may appeal the decision to the court before which the individual's case is pending." This is where the trial court assumes its role in the indigency determination; it has the authority to review the public defender's indigency determination in light of the additional information obtained from the

public defender's office's investigation and that office's rationale for denying the defendant's application. See *Newland* v. *Commissioner of Correction*, supra, 322 Conn. 707–708 (*McDonald*, *J.*, dissenting).

Consistent with § 51-297 (g), *Wang* makes clear the imperative of referring a defendant claiming to be indigent and seeking in the first instance public funding for ancillary defense costs to the commission via the local public defender's office. First, unlike the commission, the Judicial Branch is not statutorily authorized to fund the reasonably necessary ancillary defense costs for indigent, self-represented defendants.[8] See *State* v. *Wang*, supra, 312 Conn. 256, 256–57 n.33. Indeed, we specifically held in *Wang* that, because "the statutes governing public defender services, § 51-289 et seq., vest authority in the commission as an autonomous body for

[8] In *Wang*, "we implicitly conclude[d] that the Judicial Branch is not authorized to pay expert or investigative fees that are reasonably necessary to an indigent self-represented litigant's defense. . . . Although the legislature included reasonably necessary 'costs of defense' within the commission's budget in § 51-292, the legislature did not similarly include such expenses within the budget of the Judicial Branch. Thus, ordering the Judicial Branch to provide funding for reasonably necessary ancillary defense costs in the present case, or in any case, would effectively usurp the power of the legislature to devise a state budget. Out of respect for the will of the legislature, we therefore conclude that the commission must provide funding for reasonably necessary ancillary defense costs of indigent, self-represented defendants.

"Additionally, our conclusion that the commission, and not the Judicial Branch, is authorized to fund reasonably necessary defense costs for indigent self-represented defendants is consistent with the legislature's intent to create separation between the public defender system and the Judicial Branch. See *Gipson* v. *Commissioner of Correction*, [257 Conn. 632, 648, 778 A.2d 121 (2001)] ('the primary purpose of P.A. 74-317 was the creation of a public defender services commission to administer the public defender system in lieu of the judges of the Superior Court, who previously had been responsible for that function').

"While the legislature could ultimately decide to provide for an alternative source of funding for the expenses at issue . . . we conclude that, under the existing legislation, the commission is presently authorized to fund the reasonably necessary ancillary defense costs of indigent self-represented defendants." (Citation omitted.) *State* v. *Wang*, supra, 312 Conn. 256–57 n.33.

fiscal purposes, and require the commission to approve reasonably necessary defense costs prior to expenditure from the commission's budget," a trial court does *not* "[retain] discretion to authorize public funding for ancillary defense costs for self-represented defendants based upon its threshold determination that such costs are reasonably necessary to an adequate defense." Id., 257. With the trial court lacking such discretion, resort to the commission is necessary in the first instance, subject to judicial review via appeal to the trial court.[9] See *State* v. *Garvins*, Superior Court, judicial district of Fairfield, Docket No. FBT-CR-16-293596-T (December 12, 2017) (65 Conn. L. Rptr. 596, 596) (relying on *Wang* and granting indigent defendant's motion for funds for

[9] We acknowledge the potential tension between our analysis in the present case and in this court's decision in *State* v. *Martinez*, supra, 295 Conn. 758, a pre-*Wang* case in which we considered whether the trial court had properly denied the request of the defendant, Luis Norberto Martinez, for a state funded DNA expert on the ground that he had failed to sustain his burden of proving his indigence. A public defender was appointed to represent Martinez when he was arraigned, but, when the case was transferred to part A of the trial court, private counsel appeared in lieu of the public defender. Id., 778. In light of the results of a DNA test, Martinez filed a motion asking the court to appoint a DNA expert. Id., 779–80. The state responded to the motion by arguing that Martinez had not proven his indigence and had not provided the court with an adequately specific request for expert assistance. Id., 780. The trial court denied the motion on the basis of, inter alia, " 'the availability of funds to [Martinez] that were used for other purposes that could have been used for this.' " Id., 780–81. On appeal, we concluded that the trial court's determination that Martinez did not meet his burden of proving indigency and, thus, was not entitled to a state funded expert, was not clearly erroneous. Id., 783–84; see id., 784 (This court noted the lack of evidence in support of Martinez' indigency, including the fact that his financial affidavit "did not include any information concerning his liabilities or assets or those of his mother with whom he was living. Moreover, as the trial court recognized, [Martinez] was represented by private counsel after refusing to permit a public defender to represent him." (Footnote omitted.)). Accordingly, we further concluded that "the record [was] inadequate for us to reach the constitutional issue, as [Martinez had] failed to establish the threshold requirement of his indigency." Id., 784–85. To the extent that *Martinez* may be read to afford the trial court the discretion to make an indigency finding in the first instance, we conclude that it is no longer good law in light of the subsequent statutory analysis in *Wang*.

expert witness, despite public defender's initial refusal to pay because defendant was represented by pro bono counsel and not public defender, and ordering that "the defendant . . . follow the protocol of the OCPD in applying for such funds and that the OCPD shall not unreasonably deny such funds"); id., 597 (concluding that indigent defendant represented by pro bono counsel is constitutionally entitled to public funds for expert witness); see also *State* v. *Thomas*, 177 Conn. App. 369, 402–404, 173 A.3d 430 (trial court did not abuse its discretion by denying defendant's motion for costs for investigative services because, inter alia, trial court did not make threshold indigency finding and, therefore, lacked discretion to grant motion pursuant to *Wang*), cert. denied, 327 Conn. 985, 175 A.3d 43 (2017). Moreover, requiring the defendant to proceed through the commission in the first instance is consistent with the separation of powers, insofar as "[r]equiring the trial court to determine whether certain experts or investigators are reasonably necessary to the defense could potentially call the trial court's role as a neutral arbiter into question." *State* v. *Wang*, supra, 312 Conn. 264; see id., 263–64 ("[t]he legislature created the commission, in part, in order to separate the administration of the public defender system from the Judicial Branch"). Accordingly, we conclude that the trial court properly declined to find the defendant indigent and instead referred him for further action to the commission via the local public defender's office.

The defendant contends, however, that the trial court's approach raises concerns with respect to his right to choice of counsel and futility of remedy because "the public defender routinely denies a request for expert funds when the defendant has private counsel . . . ." The OCPD, appearing as amicus curiae, confirms that, because *Wang* did not determine whether a defendant represented by private counsel could obtain state

funding for ancillary defense costs, the commission has "adopted a policy that only indigent pro se litigants or individuals represented by a public defender or assigned counsel can access funding for experts or other expenses. If a person represented by a private attorney seeks funding, they must also accept representation from the public defender or proceed pro se. The private attorney must withdraw his appearance. The case will be referred to the local public [defender's] office for an eligibility determination, and, if the defendant is indigent, the case will be assigned to an attorney in the office or to assigned counsel if there is a conflict of interest." At oral argument before this court, the defendant suggested that the OCPD's representation of its internal policy means that he was forced to choose between his constitutional rights because his private counsel must *first* have withdrawn *before he could apply* to the public defender's office.[10]

We conclude that the defendant's concerns about futility and loss of counsel are unfounded on the record of this case. First, we do not understand the OCPD's amicus brief to suggest that the relationship with private counsel must be terminated *before* the commission conducts an initial investigation of indigency and reviews the application for assistance with defense costs; rather, we understand that policy to suggest that any defendant seeking public funding for defense costs must ultimately accept representation from the public defender or proceed as a self-represented party prior to receiving such funding once eligibility is determined.[11] Consistent

[10] The defendant's supplemental brief echoes this concern, stating that the OCPD policy that "private counsel must first withdraw before the public defender will even consider eligibility . . . creates a significant risk that the defendant might end up without any counsel . . . ." (Citation omitted; footnote omitted.)

[11] The defendant's reading of the OCPD amicus brief runs counter to our understanding of the timing of the public defender application process. For example, as was discussed in colloquy at oral arugment before this court, it would be extraordinarily unusual for a trial court to allow defense counsel to withdraw prior to trial in the absence of substitute counsel, unless the

with that reading, the trial court expressly stated that Kaloidis would be permitted to continue to represent the defendant during the application process and offered the defendant other options, such as continuing to represent the defendant as a special public defender, standby counsel, or with cocounsel, to be determined later. See footnote 5 of this opinion and accompanying text. Beyond establishing his indigence, the trial court's desire to have the defendant explore these options in the first instance was especially apt, particularly given the link that the court in *Wang* made between the commission's ancillary defense resources and its provision of services, including standby counsel. See *State* v. *Wang*, supra, 312 Conn. 254–55. With the defendant having declined to follow the trial court's instruction to apply for the services of a public defender, the factual predicate for his constitutional claims is simply not present because we lack the requisite finding that he is indeed indigent or subject to the loss of his counsel of choice. See *State* v. *Martinez*, supra, 295 Conn. 784–85 ("the record is inadequate for us to reach the constitutional issue[s], as the defendant has failed to establish the threshold requirement of his indigency"). Accordingly, we decline to consider the defendant's remaining constitutional claims. See, e.g., *St. Paul Travelers Cos.* v. *Kuehl*, 299 Conn. 800, 813, 12 A.3d 852 (2011) (court has "duty to eschew unnecessarily deciding constitutional questions" (internal quotation marks omitted)).

client had properly elected the right of self-representation. Additionally, even if an applicant for public defender services is found to be indigent, that applicant need not accept public defender representation. See, e.g., *Faretta* v. *California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) ("a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so" (emphasis in original)). Ultimately, we are not convinced that, simply by applying to the public defender's office, the defendant would be compelled to forgo his right to counsel in order for the public defender's office to make an indigency determination. We simply do not know what the commission would have done in the present case because the defendant declined to apply to the commission, which has the capacity and statutory authority to make the requisite threshold indigency determination.

II

The defendant also claims that the trial court abused its discretion by denying his motion in limine seeking to preclude certain evidence of the victim's confidence in her identification of the defendant when presented with a photographic array by the police. The record reveals the following additional relevant facts and procedural history. In 2013, the Waterbury police received notice of a hit from the Combined DNA Index System (CODIS) database,[12] which linked the defendant's DNA profile to evidence collected during the police investigation. Detective Pesce called the victim and asked her to come to the police station, but he was "very vague" when he called and did not make her aware of the CODIS hit. On October 14, 2013, the victim went to the police station and viewed a photographic array in a double-blind, sequential procedure. Pesce had created the array, and Detective Daniel Dougherty presented the array to the victim without Pesce present. The victim identified the defendant as her attacker and wrote on the defendant's photograph: "I . . . am pretty certain that this is the young man who stabbed [me] 6 times

[12] "Beginning in 1994, Congress instructed the [Federal Bureau of Investigation] to establish and maintain an index of DNA samples from convicted criminals, crime scenes, and unidentified human remains. . . . In . . . 2000, Congress enacted the first federal statute affirmatively directing convicted felons to submit DNA samples to the national database. Under the DNA Analysis Backlog Elimination Act of 2000 . . . individuals convicted of a qualifying [f]ederal offense must provide a tissue, fluid, or other bodily sample for analysis. . . . After a sample is collected, unique identifying information is obtained for each felon by decoding sequences of junk DNA, which were purposely selected because they are not associated with any known physical or medical characteristics. . . . The DNA profiles are then loaded into CODIS, a national database that also contains profiles generated by state DNA collection programs, as well as DNA samples obtained from the scenes of unsolved crimes. . . . A convicted felon's failure to cooperate constitutes a class A misdemeanor and may be punished by up to one year in prison and a fine of as much as $100,000." (Internal quotation marks omitted.) *State* v. *Webb*, 128 Conn. App. 846, 852–53 n.3, 19 A.3d 678, cert. denied, 303 Conn. 907, 32 A.3d 961 (2011).

on May of 2009 at 11 p.m. . . . on Rose Street in Waterbury . . . .''

After making the identification, the victim met with Pesce and told him, unprompted, that she wished to clarify what she had previously written. The victim told Pesce that, although she had written that she was ''pretty certain,'' she was in fact ''absolutely certain'' that the person she had identified was her attacker. The victim then gave a statement to Pesce in which she stated in relevant part: ''On Friday I was contacted by Detective Pesce and he asked me if I could come into the [d]etective [b]ureau to look at some pictures. I came in today and another [d]etective showed me a set of photos. One of the [p]hotos that the [d]etective showed me, jumped out at me and I realized it was the male that stabbed me. I told the [d]etective that I was *pretty certain* that it was the male, but I meant *absolutely certain*. I realized that it was the same male without a doubt that stabbed me on that night of May 17th 2009. That night is still fresh in my mind and I could still see my attacker's face clearly in my mind. . . .'' (Emphasis added.)

Prior to trial, the defendant filed two motions related to the victim's identification of the defendant. First, the defendant moved to suppress the victim's pretrial identification of him from the photographic array on the ground that it was unnecessarily suggestive and unreliable. Second, he moved to preclude the victim's statement to Pesce that she was ''absolutely certain'' that the defendant was the person who attacked her and any in-court statements pertaining to her confidence in her identification of the defendant at the time of trial. The defendant argued that the challenged testimony would be irrelevant and unduly prejudicial, and that it invaded the province of the jury. The trial court held an evidentiary hearing at which the victim, Pesce and Dougherty testified.

At the conclusion of the hearing, the trial court denied the defendant's two motions.[13] In denying the defendant's motion in limine regarding the victim's confidence statements, the trial court relied on, inter alia, this court's decisions in *State* v. *Dickson*, 322 Conn. 410, 421, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), and *State* v. *Ledbetter*, 275 Conn. 534, 553, 881 A.2d 290 (2005) (overruled in part on other grounds by *State* v. *Harris*, 330 Conn. 91, 191 A.3d 119 (2018)), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006), for the proposition that the level of "certainty of a witness [is] a factor for the court to consider when determining the reliability of [an] identification," and that, "as a result, clearly that information is important for the jury to consider." The trial court also concluded that such confidence testimony does not invade the province of the jury because the victim would be subject to cross-examination regarding her claimed level of certainty and because it was "going to allow the defense to present expert testimony [on] issues of identification in general." The trial court concluded that the victim's certainty in her identification "is something that goes to the weight [of the evidence], as opposed to [its] admissibility."

At trial, the victim, Pesce and Dougherty testified regarding the victim's identification of the defendant. In addition, the victim and Pesce testified regarding the victim's confidence statements. The victim testified that she had signed the array and had written that she was "pretty certain" that the photograph she had selected was of her attacker. The victim explained that, "[w]hen I said I was pretty certain, I meant—I put it in those

[13] For purposes of this issue, the defendant does not challenge the trial court's ruling on his motion to suppress the identification from the photographic array. Additionally, the parties agree that the victim's written statement that she was "pretty certain" the photograph she had written on was of her attacker was admissible.

words, but I meant I was absolutely certain. I just put it down as pretty certain." She testified that, "[j]ust a few minutes after" she wrote on the signed array, she told the detective that she meant "absolutely certain." She said the detective asked her, "if [she] was certain that this was the person, [then] why did [she] write pretty certain and then write absolutely [certain] on the other statement?" The victim explained: "I told him that . . . I wanted to be absolutely sure is the reason why I said that. I wanted to be absolutely sure that that was the person, and I didn't want to accuse someone that was not the person." The victim subsequently testified that, when she made the identification, she was "absolutely certain" that the photograph she selected was of her attacker and that, as she sat there testifying, she was "absolutely certain" that the photograph she selected was of her attacker. Pesce testified that, moments after Dougherty notified him that the victim had made an identification, Pesce took a statement from the victim, and, while taking her statement, he did not ask how certain she was regarding the identification. Before Pesce started taking the statement, however, the victim spontaneously said something to the effect of, "I identified someone and on it I put that I was pretty certain, but I meant to say that I was absolutely certain." Pesce testified that the victim made this statement within ten or fifteen minutes of making the identification.

The defendant then presented testimony from Kevin Colwell, a professor of psychology at Southern Connecticut State University, who testified as an expert on the reliability of eyewitness identifications. Colwell testified that a confidence statement that is made at the time of viewing is the most reliable and that there appears to be no relationship between confidence statements made after an initial identification and reliability. He further testified that this is "[b]ecause the process of having to say several times that this is the person

causes us, in general, as humans, just to become more confident as we've seen the person more and more . . . ."

The trial court subsequently instructed the jury that it could "consider the strength of the identification, including the witness' degree of certainty. Certainty, however, does not mean accuracy." The trial court also instructed the jury that, "[w]hen assessing the credibility of the testimony as it relates to the issue of identification, keep in mind that it is not sufficient that the witness be free from doubt as to the correctness of the identification of the defendant; rather, you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find him guilty on any charge."

On appeal, the defendant, supported by the amicus curiae, The Innocence Project, argues that the trial court improperly denied his motion in limine seeking to preclude evidence of the victim's change in confidence following her photographic array identification of the defendant, her recollection at trial of her confidence in her identification at the time it was made, and her present confidence in her identification. Challenging the link between the victim's postidentification confidence statements and the accuracy of her identification, the defendant claims that the trial court abused its discretion because the victim's postidentification confidence statements were irrelevant, more prejudicial than probative, self-bolstering and invaded the province of the jury. The defendant argues that the victim's postidentification confidence statements were not relevant because, "[i]f there is no scientific support for a relationship between [the victim's] testimony at trial about her present certainty or how she recalled her past certainty, then those statements do not make it more or less probable that her identification is accurate . . . ." The amicus curiae, The Innocence Project, additionally encourages us to adopt evidentiary rules

establishing that testimony on eyewitness certainty is admissible only when it stems from the earliest identification procedure that complies with General Statutes § 54-1p, Connecticut's eyewitness identification statute. In response, the state argues that the challenged evidence was relevant, was not unduly prejudicial, and did not invade the province of the jury. The state also claims that, even if the trial court abused its discretion in denying the defendant's motion, the defendant has failed to establish that such error was harmful. We agree with the state's argument that the trial court did not abuse its discretion when it denied the defendant's motion in limine seeking to preclude evidence of the victim's postidentification confidence statements.

"[T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." (Internal quotation marks omitted.) *State* v. *Kelly*, 256 Conn. 23, 44, 770 A.2d 908 (2001).

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." Conn. Code Evid. § 4-1.

After the completion of briefing in the present case, we issued our decision in *State* v. *Harris*, supra, 330 Conn. 91.[14] In *Harris*, a defendant charged with, inter alia, felony murder and first degree robbery challenged the trial court's denial of his motion to suppress an out-of-court and a subsequent in-court identification of him by an eyewitness, claiming that the out-of-court identification resulted from an unnecessarily suggestive proce-

[14] On October 26 and November 8, 2018, we granted the parties permission to file supplemental briefs, which addressed, inter alia, the effect of *State* v. *Harris*, supra, 330 Conn. 91, on this appeal.

dure and that both identifications were unreliable. Id., 95–96. We concluded that the out-of-court identification procedure was unnecessarily suggestive but that the identification nevertheless was sufficiently reliable to satisfy federal due process requirements. Id., 96. We also concluded that "the due process guarantee of the state constitution . . . provides somewhat broader protection than the federal constitution with respect to the admissibility of eyewitness identification testimony but that . . . the trial court's failure to apply the state constitutional standard that we [adopted in *Harris*] was harmless because the court reasonably could not have reached a different conclusion under that more demanding standard." (Footnote omitted.) Id.

In *Harris*, we concluded, as a matter of state constitutional law, that, when an eyewitness identification allegedly results from an unnecessarily suggestive procedure, "the defendant has the initial burden of offering some evidence that a system variable undermined the reliability of the eyewitness identification. . . . If the defendant meets this burden, the state must then offer evidence demonstrating that the identification was reliable in light of all relevant system and estimator variables. . . . If the state adduces such evidence, the defendant must then prove a very substantial likelihood of misidentification. . . . If the defendant meets that burden of proof, the identification must be suppressed." (Citations omitted.) Id., 131. When there is evidence of a suggestive procedure, "the trial court should consider the eight estimator variables . . . identified in *State* v. *Guilbert*, [306 Conn. 218, 253–54, 49 A.3d 705 (2012)]" in determining whether the identification is reliable.[15]

[15] The eight estimator variables that we identified in *Guilbert* are: "(1) there is at best a weak correlation between a witness' confidence in his or her identification and the identification's accuracy; (2) the reliability of an identification can be diminished by a witness' focus on a weapon; (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events; (4) cross-racial identifications are considerably less accurate than identifications involving

State v. *Harris*, supra, 330 Conn. 133. We explained that "the defendant and the state may adduce expert testimony regarding recent scientific developments that cast light on particular factors" during a suppression hearing and at trial. Id., 134. We further observed that, "even in cases in which an identification was not preceded by an unnecessarily suggestive procedure, a defendant is entitled to present expert testimony on the reliability of eyewitness testimony. . . . [S]uch testimony satisfies the threshold admissibility requirement . . . that [it] . . . be based on scientific knowledge rooted in the methods and procedures of science . . . at least with respect to the [eight estimator variables] . . . ." (Internal quotation marks omitted.) Id., 118.

Significantly, we observed in *Harris* that "we stated in *Guilbert* 'there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy' . . . whereas the court in [*State* v. *Henderson*, 208 N.J. 208, 292, 27 A.3d 872 (2011)] concluded that there is a correlation between high confidence at the time of the identification, before receiving any feedback or other information, and accuracy. . . . In our view, these statements are not inconsistent. Rather, *Guilbert* states the general rule and *Henderson* recognizes an exception to that rule. In any event, to the extent that this issue is the subject of ongoing scientific controversy, the parties may present expert testimony on the issue at the pretrial hearing and at trial in accordance with our [decision] in *Guilbert*." (Citations omitted.) *State* v. *Harris*, supra, 330 Conn. 133–34 n.31.

the same race; (5) memory diminishes most rapidly in the hours immediately following an event and less dramatically in the days and weeks thereafter; (6) an identification may be less reliable in the absence of a double-blind, sequential identification procedure; (7) witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification; and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another." *State* v. *Guilbert*, supra, 306 Conn. 253–54.

Although the defendant correctly observes that *Harris* addressed confidence statements made as part of an identification, whereas the present appeal challenges confidence statements made after an identification procedure, we nevertheless find our conclusions in that case instructive in the present appeal.

Harris was decided as a matter of federal and state constitutional law. Nevertheless, we observed that, "[i]n the absence of evidence of a suggestive procedure or other extraordinary circumstances . . . we continue to believe that evidence relating solely to estimator factors that affect the reliability of the identification goes to the weight, not the admissibility, of the identification. See *Perry* v. *New Hampshire*, [565 U.S. 228, 237, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012)] ('[t]he [c]onstitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy'); see also id. ('juries are assigned the task of determining the reliability of the evidence presented at trial' unless '[the] evidence is so extremely unfair that its admission violates fundamental conceptions of justice' . . .); *State* v. *Guilbert*, supra, 306 Conn. 251 n.31 (this court's 'approach to eyewitness identification testimony [that is not tainted by improper procedure] is exactly the sort of approach that *Perry* encourages'); *State* v. *Ledbetter*, supra, 185 Conn. 612 ('challenges [relating to the reliability of identifications that are not tainted by improper procedure] go to the weight rather than to the admissibility of the evidence'). Accordingly, like the court in *Henderson*, we conclude that a pretrial hearing ordinarily is not required when there is no evidence of a suggestive procedure. See *State* v. *Henderson*, supra, 208 N.J. 293–94. Indeed, even the Supreme Court of Oregon, which concluded that an identification that was not preceded by a suggestive procedure may be inadmissible under that

state's ordinary rules of evidence, has recognized that 'trial courts will continue to admit most eyewitness identifications. That is so because, although possible, it is doubtful that issues concerning one or more of the estimator variables that [the court has] identified will, without more, be enough to support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification. In that regard, [the court] anticipate[s] that when the facts of a case reveal only issues regarding estimator variables, defendants will not seek a pretrial ruling on the admission of the eyewitness identification.' *State* v. *Lawson*, [352 Or. 724, 762, 291 P.3d 673 (2012)]. Thus, that court recognized that evidence relating to estimator variables, standing alone, ordinarily will not render an identification inadmissible." *State* v. *Harris*, supra, 330 Conn. 132–33.

In the present case, the trial court's decision to admit evidence of the victim's postidentification confidence statements and expert testimony from the defendant concerning the connection between confidence statements and reliability and accuracy allowed for the presentation of current scientific evidence on the relationship between confidence and accuracy, while also leaving to the jury the ultimate decision of which evidence to credit. Moreover, there was no evidence of a suggestive procedure in this case, and the defendant does not challenge in this appeal the trial court's denial of his motion to suppress the identification itself. In *Harris*, we noted that, "[i]n the absence of evidence of a suggestive procedure or other extraordinary circumstances . . . evidence relating solely to estimator factors that affect the reliability of the identification *goes to the weight, not the admissibility*, of the identification." (Emphasis added.) Id., 132. Among those estimator factors is the confidence of the eyewitness. Id., 124 n.26. Accordingly, we conclude that the trial court did not abuse its discretion in concluding that the victim's confidence statements were relevant evidence.

Moreover, under the case law governing at the time of the trial court's decision on the motion to suppress, a witness' confidence in an identification, both at the time it was made *and* at trial, is a relevant factor to be considered in determining whether an identification is reliable as both a constitutional and evidentiary matter. See *Manson* v. *Brathwaite*, 432 U.S. 98, 108, 115–16, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977) (level of certainty testified to at trial was factor that supported reliability of identification); *Neil* v. *Biggers*, 409 U.S. 188, 195–96, 200–201, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) (same); *State* v. *Dickson*, supra, 322 Conn. 421 (" 'level of certainty' " is factor to be considered in determining whether identification made during unnecessarily suggestive procedure is reliable);[16] *State* v. *Crosby*, 182 Conn. App. 373, 409, 190 A.3d 1 (fact that eyewitnesses testified at suppression hearing that they were "100 percent certain at the time of the identification that the defendant was the perpetrator" supports reliability of identification), cert. denied, 330 Conn. 911, 190 A.3d 1 (2018). In light of this existing case law, it was not an abuse of discretion for the trial court to conclude that the victim's professed level of confidence in her identification shortly after her identification and at trial was relevant to the jury's determination of whether the defendant was the individual who attacked the victim.

[16] In *State* v. *Dickson*, supra, 322 Conn. 448 n.32, we concluded that cross-examination is a "sufficiently effective tool" to test the reliability of a witness' in-court statement in which the witness expresses a higher degree of confidence than in that same witness' prior out-of-court statement. We observed that a defendant "can present expert testimony that there is a weak correlation between confidence and accuracy, that memory degrades over time, and that witnesses may develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information . . . ." (Internal quotation marks omitted.) Id. If cross-examination is a sufficiently effective tool to test the reliability of an in-court statement in which the witness expresses a higher degree of confidence than in a prior out-of-court statement, then it is also a sufficiently effective tool to test the reliability of an in-court statement that involves the same confidence level as a statement given only minutes after an initial identification, as was the situation in the present case.

We note that the victim's confidence statement made shortly after her identification, in which she said she was "absolutely certain," was relevant to more than just the reliability of her identification; additionally, it clarified the meaning of what she wrote on the photograph when she initially identified the defendant as her attacker. The evidence showed that, within ten or fifteen minutes of her first confidence statement written on the photograph of the defendant, the victim, unprompted, told the police that the words she wrote did not accurately demonstrate her level of confidence at the time she made the initial identification. Because, as the defendant concedes, the confidence statement made by the victim at the time of the identification "may have some relationship to the identification's reliability," it was not arbitrary or unreasonable for the trial court to conclude that evidence of what the victim meant by her initial confidence statement was relevant, particularly when such evidence came without prompting by the police.

The defendant also claims that the victim's postidentification confidence statements regarding her identification were more prejudicial than probative. Pursuant to the Connecticut Code of Evidence, "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Conn. Code Evid. § 4-3. "Situations in which relevant evidence should be excluded because of prejudice include: (1) if the facts offered may unduly arouse the jury's emotions, hostility, or sympathy; (2) if the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues; (3) if the evidence offered and the counterproof will consume an undue amount of time; and (4) if the defendant, having no reasonable ground to anticipate the evidence, is unfairly

surprised." E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 4.5.1, p. 151. We observe that the victim's postidentification confidence statements do not fit neatly into the conventional categories of what constitutes unduly prejudicial evidence. The defendant's argument appears to be that, because eyewitness testimony is likely to be believed by jurors when offered with a high level of confidence, the victim's confidence statements were prejudicial given their "minimal" probative value. We do not agree that such confidence statements would unduly arouse the emotions of the jurors or be so persuasive as to overwhelm the jury's capacity to fairly evaluate the evidence in the case. Further, as noted previously, it was neither arbitrary nor unreasonable for the trial court to conclude that the confidence statements were relevant or more than "minimally" probative. Under these circumstances, it was not arbitrary or unreasonable for the trial court to conclude that the victim's postidentification confidence statements were not more prejudicial than probative.

The defendant further claims that an eyewitness' testimony regarding confidence in a prior identification is self-bolstering and invades the province of the jury. "Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact . . . ." Conn. Code Evid. § 7-3 (a). The defendant relies on case law observing that a witness may not comment on another witness' credibility and that an expert witness is not permitted to give an opinion as to whether another witness is lying or telling the truth. See, e.g., *State* v. *Singh*, 259 Conn. 693, 706–708, 793 A.2d 226 (2002); E. Prescott, supra, § 7.10.4, p. 475. Although questions that require a witness to express an opinion on the credibility of another witness invade the jury's province because the jury is the exclusive judge of credibility; see *State* v. *Singh*, supra, 707; a witness' testimony regarding her own confidence in her

identification does not invade the jury's province because such testimony, regarding something of which the witness has personal knowledge, is simply a tool to be used by the jury to evaluate the accuracy or credibility of the witness' identification. For that reason, it was not arbitrary or unreasonable for the trial court to conclude that the witness' postidentification confidence statements did not invade the province of the jury.

Finally, we address the suggestion of the amicus curiae, The Innocence Project, that we adopt evidentiary rules establishing that testimony concerning eyewitness certainty should be admitted only when it stems from the earliest identification procedure that complies with § 54-1p, Connecticut's eyewitness identification statute.[17] The Innocence Project argues that evidence of eyewitness certainty, in all other circumstances, lacks sufficient reliability, relevance, and probative value. We decline The Innocence Project's invitation to establish a categorical rule concerning the admission of postidentification confidence statements.

The Innocence Project, relying on social science research, emphasizes that confident eyewitnesses are often inaccurate and that eyewitness confidence can be

[17] We address The Innocence Project's well briefed request that we adopt an evidentiary rule on this point, even though the defendant does not formally ask us to do so. See, e.g., *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 550 n.35, 93 A.3d 1142 (2014) ("[a]lthough an amicus brief can be helpful in elaborating issues properly presented by the parties, it is normally not a method for injecting new issues into an appeal, at least in cases [in which] the parties are competently represented by counsel" (internal quotation marks omitted)). We reach The Innocence Project's request because, were we to agree with the defendant's core evidentiary arguments—particularly with respect to relevance, bolstering, and prejudice exceeding probative value—we would, in effect, create the per se bar sought by The Innocence Project. Put differently, The Innocence Project's arguments on this point use social science data to support the arguments raised by the defendant, and we do not read them to seek relief different from that sought by the defendant, which is similarly limited to the admissibility of eyewitness confidence statements taken outside the § 54-1p procedure.

an extremely influential factor in jury determinations of an eyewitness' accuracy. See G. Wells et al., "The Confidence of Eyewitnesses in Their Identifications from Lineups," 11 Current Directions Psychol. Sci. 151, 151, 153 (2002) (in study, "[m]istaken identification by eyewitnesses was the primary evidence used to convict innocent people whose convictions were later overturned by forensic DNA tests," and "three fourths of these convictions of innocent persons involved mistaken eyewitness identifications, and, in every case, the mistaken eyewitnesses were extremely confident, and, therefore, persuasive at trial"); Massachusetts Supreme Judicial Court Study Group on Eyewitness Evidence, Report and Recommendations to the Justices (July 25, 2013) p. 20, available at http://www.mass.gov/courts/docs/sjc/docs/eyewitness-evidence-report-2013.pdf (last visited February 24, 2020) ("eyewitness confidence is the single most influential factor in juror determinations regarding the accuracy of an eyewitness identification" (internal quotation marks omitted)). The Innocence Project argues that eyewitness statements *can* be relevant and probative when they are the result of procedures that minimize the possibility of suggestion and memory contamination,[18] such as the procedures endorsed by the legislature in § 54-1p. However, confidence statements beyond those captured at the initial identification procedure are more prejudicial than pro-

[18] The Innocence Project cites a number of studies to support the proposition that witness confidence is susceptible to, and can be inflated by, suggestion and postconfirmation feedback. We observe that, in the present case, there is nothing in the record to suggest that the victim's confidence statements resulted from, or were inflated by, suggestion or postconfirmation feedback. In fact, the defendant has not challenged the initial identification on the ground that it was unduly suggestive, and the record indicates that the victim's clarifying statement given to Pesce shortly following her initial identification was given unprompted by the police. In the absence of a record suggesting the influence of suggestion or feedback, we decline The Innocence Project's invitation to speculate as to whether the victim's memory was contaminated.

bative because a witness' sincerely held belief cannot be effectively challenged on cross-examination.

We decline to categorically conclude that there is *no* correlation between a witness' postidentification confidence in his or her identification and the accuracy of that identification, especially given our recent reaffirmation in *Harris* of the process that already exists, following *Guilbert*, to address concerns regarding the link between confidence and accuracy. See *State* v. *Harris*, supra, 330 Conn. 132 ("[i]n the absence of evidence of a suggestive procedure or other extraordinary circumstances . . . evidence relating solely to estimator factors that affect the reliability of the identification goes to the weight, not the admissibility, of the identification"). In *Harris*, we concluded that, "as an evidentiary matter, and even in cases in which an identification was not preceded by an unnecessarily suggestive procedure, a defendant is entitled to present expert testimony on the reliability of eyewitness testimony." Id., 118. Such expert testimony may properly challenge the reliability of postidentification confidence statements based on relevant science. That is precisely what happened in the present case. The trial court admitted the witness' confidence statements, permitted the defendant's expert witness to testify about the reliability of eyewitness testimony,[19] and appropriately instructed the jury that it could "consider the strength of the identification, including the witness' degree of certainty. Certainty, however, does not mean accuracy." The trial court also instructed the jury that, "[w]hen assessing the credibility of the testimony as it relates to the issue of identification, keep in mind that it is not

[19] Colwell, the defendant's expert witness, testified, inter alia, that confidence statements made at the time of an initial viewing are more reliable, that there does not appear to be a relationship between confidence statements that are made subsequent to an initial viewing and reliability, and that subsequent confidence statements are not correlated with reliability or accuracy.

sufficient that the witness be free from doubt as to the correctness of the identification of the defendant; rather, you must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may find him guilty on any charge."

The Innocence Project has failed to demonstrate any great shift in the relevant science since our decision in *Harris* that would warrant the imposition of a per se exclusionary rule or a departure from the process enumerated in *Guilbert*, *Dickson*, and *Harris*, which allows for the admission of both postidentification confidence statements and expert testimony to challenge the reliability and accuracy of those statements. Accordingly, we conclude that the trial court did not abuse its discretion by denying the defendant's motion in limine seeking to preclude evidence of the victim's postidentification confidence in her identification of the defendant as her attacker.

The judgment is affirmed.

In this opinion the other justices concurred.

D'AURIA, J., with whom PALMER, McDONALD and ECKER, Js., join, concurring. I agree fully with part II of the majority opinion. I also agree with the majority's conclusion in part I of its opinion that there is an insufficient record in the present case to afford the defendant, John White, review of his constitutional claim, let alone the new trial he requests on this direct appeal. Although I join the majority's opinion, I write separately because over the course of a quarter of a century as a civil servant, I have developed what I humbly believe to be a finely tuned ear to governmental refrains of "not my job" and "we don't have a budget for that." Thus, I feel compelled to comment on how often this bureaucratic jockeying can strike a discordant note that does not focus appropriately on the rights of the accused.

The defendant denies it was he who, in 2009, stabbed the victim with a box cutter and caused her serious injuries while she walked back to a friend's home from the store she had gone to for something to drink. The defendant went to trial without the assistance of a DNA expert to counter the state's expert, or at least to consult for purposes of cross-examination. This was perhaps not advisable. See P. Giannelli, "*Ake v. Oklahoma*: The Right to Expert Assistance in A Post-*Daubert*, Post-DNA World," 89 Cornell L. Rev. 1305, 1315 (2004) ("[f]ew defense attorneys can deal with this type of sophisticated evidence—which raises issues 'at the cutting edge of modern law and science'—without expert assistance" (footnote omitted)). The defendant claims this was not his preference but that, instead, the actions and inactions of several state agencies combined to place him in this predicament.

In 2013, the Waterbury police obtained information about a potential DNA match on a red sweatshirt recovered near the crime scene. Soon thereafter, the victim identified the defendant in a double-blind, sequential photographic array procedure. As the majority indicates, there is some dispute about how certain the victim said she was about her identification. Not until 2016 was the defendant arrested and charged with assault in the first degree in violation of General Statutes § 53a-59 (a) (1).

Two days after jury selection began, the state gave notice of its intent to offer DNA evidence pursuant to General Statutes § 54-86k and moved to sample the defendant's DNA by buccal swab pursuant to Practice Book § 40-34 (6). The state conceded at the time that this notice and motion were clearly untimely under § 54-86k (c). Although the state did not seek to justify (or apologize for) the late disclosure, the trial court—while emphasizing that "this is not an excuse" and not the proper way to try cases—was moved to put on the record that the case had been assigned to another prose-

cutor before being reassigned to the prosecutor who tried the case and provided the late disclosure. For its part, the state focused on the fact that, in its view, there was no real prejudice to the defendant because "the DNA evidence was present from the onset." By this it appears that the state meant that the arrest warrant indicated that a DNA sample taken from the red sweatshirt had generated a "hit" from the CODIS DNA database,[1] linking the defendant to the DNA sample and leading the police to focus on him as a suspect.[2]

Over the defendant's objection, the trial court permitted the state to offer DNA evidence at trial and granted the state's motion for the buccal swab. To mitigate any prejudice to the defendant, however, the trial court suspended jury selection, dismissed the two jurors already selected, and permitted the defendant a continuance for as much time as he needed to attempt to locate an expert, reframe his defense, and prepare for trial in light of the state's late disclosure.[3]

The next day, the defendant filed with the trial court a motion for costs associated with the retention of a DNA expert. He argued that the state's late disclosure caused him a different kind of prejudice that could not be cured simply by a continuance. Particularly, the defendant's counsel, Attorney Ioannis A. Kaloidis, represented to the court that the defendant's wife had paid for his private counsel and for expenses related to retaining an eyewitness identification and memory expert. The defendant claims, however, that when the state notified him after jury selection had begun of its intent to perform additional DNA testing, which later

[1] See, e.g., *State* v. *Webb*, 128 Conn. App. 846, 852–83 n.3, 19 A.3d 678 (generally describing national CODIS database), cert. denied, 303 Conn. 907, 32 A.3d 961 (2011).

[2] This "hit" occurred three years before the defendant's arrest. The state never sought confirmatory evidence from the defendant until jury selection had begun.

[3] On appeal, the defendant does not challenge this ruling.

resulted in evidence of DNA from both the defendant and the victim being present on the red hooded sweatshirt, his family could not afford the additional funds necessary for a DNA expert. The defendant testified on the record that he had no sources of income, owned no property and had no money in any bank account.

The trial court denied the defendant's motion for costs because it determined that the defendant was required to seek funding from the Public Defender Services Commission (commission) and, thus, the court could not make a finding of indigency. The trial court then provided the defendant with the opportunity to file an application with the commission to investigate his claim of indigency but the defendant declined.

As I have mentioned, I ultimately agree that the record is inadequate in this case to address the defendant's constitutional claim or to afford him relief. Specifically, as I will discuss, because the defendant never filed an application with the commission, it is not clear that the commission would have in fact required him to choose between receiving funding and continued representation by his private attorney, thereby potentially burdening his constitutional right to counsel of his choice. Additionally, despite the defendant's unchallenged testimony, it is not perfectly clear on this record that the defendant would have been found indigent by the commission, or could have been found indigent by the court. Nevertheless, I am troubled by several aspects of this case.

First, I am concerned how the actions and inactions of different state actors—focused on their own missions—might in some cases combine to jeopardize a defendant's constitutional rights. I will address these actors in turn.

Like the trial court, I cast no aspersions of bad faith on the prosecution. Most of us, while in the practice of

law or in public service, have missed deadlines or been overwhelmed by other demands. However, it is too easy for the state simply to acknowledge its untimely disclosure, argue that the public interest should not suffer for the prosecutor's mistake, and suggest that with a continuance all will be well. No one is well served when rules are not followed. Putting aside the inconvenience and cost to the court, to opposing counsel and to jurors summoned and discharged, a late disclosure, as in the present case, might prejudice an accused's constitutional rights, or at least create a claim on appeal that could have been obviated. And a continuance of the trial—which, in this case, was in its incipient stage—will not necessarily cure all the harm. In reliance on a firm trial date and the state's actions or inactions, the defendant and his counsel are likely to have taken positions or made choices that will likely be held against the defendant as "strategic" if he is convicted and challenges his conviction in another forum. See, e.g., *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 521, 964 A.2d 1186 ("the decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel"), cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009). For related reasons, it is not difficult to find cases in which parties have been precluded from disclosing experts in analogous situations.[4] See *Hicks* v. *State*, 287 Conn. 421, 445, 948 A.2d 982 (2008) (in negligence case, trial court did not abuse its discretion by pre-

[4] Although the defendant does not challenge the trial court's decision in this case to permit the untimely disclosure, and ultimately the DNA expert's testimony, the apparent unfairness of the state's untimely disclosure and its effect on the defendant should be noted. When the state disclosed this expert, two jurors had already been chosen and had to be discharged. Although the trial court made no finding of bad faith, and I attribute none to the state, surely this taxes the court's indulgence. Reliance on the stakes of the case to the public and the victim to justify such late disclosures promotes neither compliance with the rules, the public's interest nor the constitutional interests of the accused.

cluding untimely disclosed expert because trial already had commenced); *Pool* v. *Bell*, 209 Conn. 536, 541–42, 551 A.2d 1254 (1989) (in medical malpractice case, trial court did not abuse its discretion by precluding untimely disclosed expert because delay was due to improper " 'cat and mouse' " game and plaintiff would have had little time to discover and investigate expert's opinions); see also *Gyerko* v. *Gyerko*, 113 Conn. App. 298, 317, 966 A.2d 306 (2009); *Tornaquindici* v. *Keggi*, 94 Conn. App. 828, 848, 894 A.2d 1019 (2006).

In the present case, the defendant claims that by the time of the late disclosure, on the basis of the state's framing of the case, he already had retained an identification expert with the money his wife was able to muster for his defense. His privately retained counsel represented that the defendant's wife was not in a position to pay for another expert. We do not have a record that would test whether this representation is accurate but it is certainly plausible that if the state had timely disclosed the DNA expert, the defendant would have allocated his resources differently. Yet, after placing the defendant in this dilemma, once its motion for untimely disclosure was granted, the state expressed no interest in the resolution of the funding issue, stating that that was between the defendant and the commission. Most troubling to me about the prosecution's indifferent position is that it's accurate: one arm of the state (the prosecution) having created the problem and another (the court) having countenanced the state's late disclosure, it was not the prosecution's problem to resolve. Instead, the court directed the defendant to a third agency of the state (the commission) for help. But as we will see, for its own reasons, the commission—predictably and somewhat understandably—did not embrace its role as the default fiscal source for such unique situations. Rather, the commission has taken the position that even if the defendant in this case was constitutionally entitled to the funding he sought, the commission was not

required to provide this funding because it is only required to fund defense costs for its own clients, and "[t]here is no funding that is appropriated by the legislature to pay for defense costs of the private bar who represent they have run out of money to pay for experts, investigators and other defense costs." The commission took a similar stance in *State* v. *Wang*, 312 Conn. 222, 92 A.3d 220 (2014), arguing that there was "no statutory authorization or funding appropriated for [it] to pay for experts or investigation from its budget for a pro se litigant who is not its client."

Second, I am concerned that aspects of the majority's reasoning might be read to unduly limit the trial court's and this court's ability to review and resolve legal claims that arise when an indigent defendant's due process right to present a defense, which entitles him to funding for expert costs, is intertwined with his right to counsel. As in *Wang*, the majority in the present case declares that the Judicial Branch is not authorized to fund reasonably necessary defense costs. See *State* v. *Wang*, supra, 312 Conn. 256 and n.33. The court in *Wang* suggested that a court order that funds be made available in these instances might offend notions of separation of powers by "usurp[ing] the power of the legislature to devise a state budget." Id., 256 n.33. Further encroachment would occur, the court reasoned, if a court were itself to make a finding of indigency rather than the commission in the first instance. Id., 263–64. Although ultimately the defendant does not ask us to overrule *Wang*, I think both propositions might be somewhat overstated.

I believe, rather, on the basis of those same separation of powers principles, that it would be reasonable to conclude that the judiciary—an independent branch of government—would not be prevented from paying for such costs itself if a court determined they were constitutionally necessary. True, the Judicial Branch might not have received a specific appropriation for such

costs. If we listen closely to the position of the commission, however—both in *Wang* and in the present case—neither has the commission. See id., 246 n.24. The commission's point is that it has projected its *own* expenditures and been appropriated funds that are based on the needs *of its own clients*, not the needs of someone else's clients, the needs of those defendants who run out of money or the needs of those representing themselves. After this case, the commission might have to ask the legislature to adjust its budgetary projections on the basis of additional responsibilities it had not previously anticipated, as it had to do after *Wang*.[5]

At the very least, nothing prevents a court from declaring what the constitution demands, leaving it to the legislative and executive branches to determine which state agency should pay for it. This court has at times indicated that it does not offend the separation of powers to issue rulings that would have costs beyond what has been budgeted, leaving it to the political branches to determine how to allocate those costs. See *Pellegrino* v. *O'Neill*, 193 Conn. 670, 675–76, 480 A.2d 476 ("[T]he judiciary, as an independent branch of government, has inherent power to direct other governmental agencies to provide such funds as may be necessary

[5] After *Wang*, the commission in 2015 requested deficiency appropriations of approximately $6.3 million, caused, in part, by this court's decision in *Wang*. See Conn. Joint Standing Committee Hearings, Appropriations, Pt. 15, p. 6730, written testimony of Susan O. Storey, Chief Public Defender, Division of Public Defender Services, concerning House Bill 6825, April 21, 2015, available at https://www.cga.ct.gov/2015/appdata/tmy/2015HB-06825-R000421-Agency%20-%20Office%20of%20the%20Chief%20Public%20Defender%20-%20Susan%20O.%20Storey-TMY.PDF. The commission represented that it had not budgeted for the costs associated with *Wang* because "[h]istorically, these expenditures had been court ordered and paid for by the [j]udicial [d]epartment." Id. It was noted, however, that during the 2015 fiscal year, there was only one indigent self-represented defendant who required expert witness funding. See Analysis of Finance Advisory Committee Meeting Items, concerning House Bill No. 6825 (March 5, 2015), available at https://www.cga.ct.gov/ofa/Documents/year/FAC/2015FAC-20150305_March%202015%20OFA%20Analysis%20of%20FAC%20Budgetary%20Transfers.pdf.

for the reasonably efficient operation of the courts. . . . In the absence of a special appropriation the existence of a law requiring an expenditure to be incurred is an appropriation of money for that purpose, and the law imposes on the comptroller the duty of settling and adjusting demands against the state for such expenses." (Citations omitted; internal quotation marks omitted.)), cert. denied, 469 U.S. 875, 105 S. Ct. 236, 83 L. Ed. 2d 176 (1984); see also *Pamela B.* v. *Ment*, 244 Conn. 296, 329, 709 A.2d 1089 (1998) (explaining that court orders pertaining to judicial resources are not improper merely because "there are many competing constraints upon the resources the judicial department has available with which to satisfy other constitutional mandates"). The question of which agency pays for constitutionally necessary costs should not drive our analysis or prevent us from deciding a legal issue properly presented. See *In re Taijha H.-B.*, 333 Conn. 297, 335–36, 216 A.3d 601 (2019); id., 335 ("the benefits of obtaining a second opinion in the form of some limited judicial review of counsel's no merit determination more than offset the potential costs").

Commendably, in my view, Judge Devlin cut to the chase in *State* v. *Garvins*, Superior Court, judicial district of Fairfield, Docket No. CR-16-293596-T (December 12, 2017) (65 Conn. L. Rptr. 596), in which the defendant was represented by pro bono counsel who requested that the trial court approve funding for a psychiatric examination after the commission had denied his request on the ground that the defendant was being represented by privately retained counsel. Judge Devlin convened a hearing on the matter at which counsel for the commission appeared and represented that although the defendant satisfied the indigency requirement, he was not eligible for funding for defense costs by the commission because he had private counsel and, thus, was not the commission's client. Id. The court disagreed. On the basis of a financial affidavit, the court

independently found that the defendant was indigent, determined that the requested examination was "reasonably necessary" to "formulate and possibly present a defense based on mental disease or defect"; id.; and determined that it was unconstitutional to force an indigent defendant to choose between his due process right to present a defense and his right to counsel. Only then did the court pose the question on the lips of all agencies involved: "[W]here should the public funds come from to pay such expense . . . ." Id., 597. Judge Devlin granted the defendant's motion for funds, ordered the defendant to follow the commission's protocol for applying for the funds, and ordered the commission not to unreasonably deny the funds. Id., 596.

I do not believe these determinations of questions squarely presented offended the separation of powers doctrine. Following the reasoning of *Wang*, Judge Devlin answered the legal question at issue between the defendant and the commission—whether the defendant was eligible to receive funding from the commission despite representation by private counsel—and in doing so vindicated the core missions of the Judicial Branch: resolving disputes and protecting the rights of litigants.

If the defendant and the trial court in the present case had followed a similar procedure—if the defendant had applied for funding with the commission, the commission had denied funding due to an unresolved legal issue, and the trial court had determined the defendant's eligibility for funding in light of his representation by private counsel—I do not believe that the court would have acted outside its authority. Even if the trial court believed it could not have made the indigency determination, it certainly could have sent the defendant off to the commission with a ruling that if the defendant was indigent, then in fact the commission must provide him with reasonably necessary funds for expert witnesses, irrespective of whether he had private counsel.

Nevertheless, I cannot conclude that the majority is incorrect that our statutes generally contemplate—and that it is appropriate policy—that a defendant should in the first instance proceed through the commission to determine whether he is indigent, regardless of whether he is represented by a public defender or an attorney assigned to him by the commission or by private counsel. See *State* v. *Wang*, supra, 312 Conn. 250–51; id., 251 (explaining history and purpose of commission, including that commission was "charged . . . with [the broad purpose of] protecting the rights of indigent defendants"). But, to the extent that the majority seems to create an exhaustion-like requirement (i.e., the defendant *must* proceed through the commission for a predicate finding of indigency before turning to the courts), I have some concerns.

It is unclear to me that there was a defined path as to how the defendant was supposed to navigate this situation, which, I again note, was not of his own making but was a result of the prosecution's untimely action. Typically, in cases implicating the exhaustion of administrative remedies, it is clear both that a party must exhaust those remedies and how to go about doing so. *Wang* itself specifically confined its applicability to indigent self-represented defendants. Id., 239 n.18. It did not chart a path forward for how to proceed when the defendant is represented by pro bono counsel and is indigent, or is represented by privately retained counsel but has *become* indigent. That this is true is evidenced by the positions taken by the commission in both *Wang* and this case.

Although in the present case, the majority, like the trial court, suggests that the commission might have permitted the defendant to retain his private counsel and still access funding for defense costs,[6] the commis-

[6] As the majority explains, "the trial court expressly stated that Kaloidis would be permitted to continue to represent the defendant during the application process and offered the defendant other options, such as continuing to

sion, appearing as amicus curiae in this case, threw cold water on that notion. In fact, the commission's internal policy manual states flatly—after *Wang*—that it will not provide funding for experts to indigent defendants with private counsel. In its amicus brief to this court, the commission explains that, because *Wang* did not determine whether a defendant represented by private counsel could obtain state funding for costs, it has "adopted a policy that only indigent pro se litigants or individuals represented by a public defender or assigned counsel can access funding for experts or other expenses. If a person represented by a private attorney seeks funding, they must also accept representation from the public defender or proceed pro se. The private attorney must withdraw his appearance. The case will be referred to the local public defender office for an eligibility determination and, if the defendant is indigent, the case will be assigned to an attorney in the office or to assigned counsel if there is a conflict of interest."

The policy manual does provide a possible workaround—once private counsel is removed, the commission may appoint the same previously retained private counsel as assigned counsel if the best interest of the client so warrants. Although the commission has informed this court that this procedure recently has been followed in at least one other case, it is unclear whether it routinely allows indigent defendants to keep their previously retained private counsel. In fact, the commission's policy manual suggests that such an arrangement would be an exceptional circumstance.[7]

represent the defendant as a special public defender, standby counsel, or with cocounsel, to be determined later."

[7] The commission's policy manual states: "It is the policy of the [c]ommission that the Office of Chief Public Defender (OCPD) should not assign a case to any attorney for compensation as an [a]ssigned [c]ounsel after that attorney has been previously privately retained in that case, *unless the OCPD determines that such appointment would be in the best interests of the client.*" (Emphasis added.)

Thus, with the benefit of hindsight and briefing it is fine to parse the commission's position and conclude, as the majority does, that "we do not understand the [commission's] amicus brief to suggest that the relationship with private counsel must be terminated before the commission conducts an initial investigation of indigency and reviews the application for assistance with defense costs; rather, we understand that policy to suggest that any defendant seeking public funding for defense costs must ultimately accept representation from the public defender or proceed as a self-represented party prior to receiving such funding once eligibility is determined." (Emphasis omitted.) But the defendant in the present case had to decide what to do at a time when his trial was about to begin, and with at least some uncertainty, given the commission's articulated policy and litigation positions, as to whether he would end up with his constitutionally entitled counsel of choice: counsel who had prepared his case with him and already had begun picking a jury before the state's late disclosure.[8] The majority might not be "convinced that, simply by applying to the public defender's office, the defendant would be compelled to forgo his right to counsel in order for the public defender's office to make an indigency determination," but that was not of comfort to the defendant at the time. He had no assurances that he would receive counsel of his choice.

Nevertheless, because the defendant never applied to the commission in this case, and because we cannot know if the commission would have required the defendant to dismiss his private counsel to access funding

[8] I note that this could raise other constitutional concerns, for example, whether requiring a defendant to abide by the commission's stated procedure of requiring a defendant to fire his private counsel and accept representation by the commission to obtain funding for defense costs unconstitutionally burdens his rights to counsel and to present a defense. In the present case, the trial court's suggestions for how the commission might handle the situation appear merely speculative. However, because the defendant in the present case did not file an application with the commission, and thus we do not know if the commission would have required the defendant to fire his private counsel to obtain funding, the record is inadequate to review this issue.

for expert costs or would have found him indigent, we cannot reach the defendant's constitutional claim. I emphasize, however, that rather than setting up roadblocks, state actors should be cognizant of their responsibility to provide a clear pathway for indigent defendants to access the resources to which they are constitutionally entitled. It should be made clear to indigent defendants that, to access funding for defense costs, they first must apply with the commission but that if they are denied funding—for any reason—they may then seek review by the trial court. Under those circumstances, the trial court not only has the authority, but is obligated, to resolve any legal claims that arise, such as whether a defendant's right to counsel is violated by conditioning his constitutional right to funding for defense costs on representation by a public defender or an attorney assigned to him by the commission. Although the commission is the state entity responsible for determining indigency in the first instance and providing funding for defense costs, it is imperative that state actors—including the court and the prosecution—work in tandem to ensure that indigent defendants are aware of this procedure, especially when the need for additional funding is, at least in part, the byproduct of a state actor's untimely actions.

STATE OF CONNECTICUT *v.* RAASHON JACKSON (SC 20193)

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

Syllabus

Convicted of murder, conspiracy to commit murder, and four counts of assault in the first degree in connection with a shooting in which one person died and four others were injured, the defendant appealed, challenging various evidentiary rulings and the trial court's decision to deny a motion for a continuance to allow him to retain an expert to respond to the testimony of W, whom the state belatedly disclosed to the defense and called as an expert witness on cell site location information. On

the day of the shooting, the defendant and his friend, R, were driven by R's cousin to and from a housing complex where the shooting occurred. Approximately five to six months before his trial, the defendant filed a motion seeking disclosure of the expert witnesses the state intended to call and the opinions to which each witness was expected to testify. At a hearing on that motion approximately one week later, the court ordered the state to disclose to the defense any expert that it may ultimately select to testify about the proximity of the defendant's cell phone to a particular cell tower. Approximately three months later, the state provided the defense with a list of potential witnesses, including W, but did not identify him as an expert witness or describe the intended nature of his testimony. Approximately two months later, after voir dire commenced and seven days before evidence was to begin, the state provided the defense with W's resume and a copy of a certain computer software presentation that W had prepared and that purportedly charted the locations of the defendant's and R's cell phones around the time of the shooting. Thereafter, one day before evidence commenced, the defendant filed a motion in limine, seeking to preclude W's testimony. At the hearing on the defendant's motion, which the trial court conducted several days after evidence had begun, defense counsel requested that the court preclude W's testimony or, alternatively, grant a reasonable continuance of at least six weeks. The court denied the defendant's motion in limine insofar as he sought to exclude W's testimony, concluding, inter alia, that the defendant had not suffered prejudice as a result of the late disclosure. The court also denied counsel's request for a continuance. On appeal, the Appellate Court affirmed the judgment of conviction, concluding, inter alia, that the trial court had not abused its discretion in denying the motions in limine and for a continuance. On the granting of certification, the defendant appealed to this court, claiming that, contrary to the Appellate Court's conclusion, the trial court had abused its discretion in permitting W to testify in light of the state's late disclosure of W as an expert or, alternatively, in declining counsel's request for a continuance to obtain his own expert on cell site location information. *Held*:

1. The Appellate Court incorrectly concluded that the trial court had not abused its discretion when it allowed W to testify without first granting the defense a reasonable continuance so that it could retain its own expert witness on cell site location information, and, because the trial court's error was harmful, the defendant was entitled to a new trial: there was no valid reason why the disclosure of W was not made until after voir dire began and only one week before evidence was to begin, and the defendant was prejudiced by the late disclosure, as W's testimony included information that was beyond the knowledge of the average juror, it was essential for the defense to be able to retain its own expert in order to meaningfully understand and challenge W's testimony, and the two brief continuances that the trial court did afford the defense to obtain clarification from W regarding certain changes that W had

made to his computer software presentation before he was to testify, did not meaningfully alleviate that prejudice; moreover, contrary to the state's claim, defense counsel did not abandon his request for a continuance by not renewing it after the state's direct examination of W, as counsel noted numerous times after W's testimony that the defendant was prejudiced by the denial of counsel's request for a reasonable continuance, and counsel's statement that he was not seeking a further continuance was merely in response to the trial court's misunderstanding that the defense was seeking a continuance before proffering the testimony of its investigator on cell site location information; furthermore, the trial court's error of allowing W to testify without first giving the defense a reasonable continuance to obtain its own expert was harmful because, in view of the centrality of W's expert testimony to the state's case, which was the only objective evidence placing the defendant's cell phone in the same area as R's cell phone around the time of the shooting and the only evidence identifying the defendant as the second suspect in the shooting, this court could not conclude that it had a fair assurance that the error did not substantially affect the verdict.

2. This court declined to address the defendant's claims that the Appellate Court improperly upheld the trial court's exclusion of his investigator's testimony and that the Appellate Court incorrectly concluded that the defendant had failed to preserve his claim that the trial court was required to hold a hearing in accordance with *State* v. *Porter* (241 Conn. 57) before allowing W to testify because those claims were not sufficiently likely to arise during the defendant's retrial, and also declined to address the defendant's claim that the trial court abused its discretion by admitting evidence regarding his failure to appear in court on unrelated criminal charges as evidence of consciousness of guilt, as the record could look different on retrial.

Argued September 25, 2019—officially released March 3, 2020

Procedural History

Substitute information charging the defendant with four counts of the crime of assault in the first degree, and with one count each of the crimes of murder, conspiracy to commit murder, and criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kavanewsky*, *J.*, granted the defendant's motion to sever the charge of criminal possession of a firearm; thereafter, the court granted the state's motion to consolidate for trial the defendant's case with that of another defendant, and the cases were tried to the jury; subsequently, the court denied in part the defendant's motion to preclude cer-

tain evidence and denied the defendant's motions for a continuance, for a mistrial, and to introduce certain evidence; verdict of guilty; thereafter, the court denied the defendant's motion for a judgment of acquittal or a new trial; subsequently, the state entered a nolle prosequi as to the charge of criminal possession of a firearm, and the court rendered judgment in accordance with the verdict, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Lavine*, *Alvord* and *Beach*, *Js.*, which affirmed the judgment of the trial court, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, *C. Robert Satti, Jr.*, supervisory assistant state's attorney, and *Pamela J. Esposito*, senior assistant state's attorney, for the appellee (state).

Opinion

McDONALD, J. The defendant, Raashon Jackson, appeals from the Appellate Court's judgment affirming his conviction of one count of murder in violation of General Statutes § 53a-54a (a), one count of conspiracy to commit murder in violation of General Statutes §§ 53a-48 (a) and 53a-54a (a), and four counts of assault in the first degree in violation of General Statutes § 53a-59 (a) (5). See *State* v. *Jackson*, 183 Conn. App. 623, 627, 193 A.3d 585 (2018). The defendant claims, among other things, that it was an abuse of discretion for the trial court to permit the state's expert witness on cell site location information (CSLI) to testify as to what that information revealed about the location of the defendant and his associates during the time the crimes occurred because the state disclosed the expert after voir dire began and only one week before evidence

started, despite a court order issued six months earlier requiring the state to disclose any experts. Alternatively, the defendant argues that it was an abuse of discretion for the trial court to deny his related motion for a continuance to obtain his own CSLI expert. We conclude that it was an abuse of discretion for the trial court to allow the state's late disclosed expert witness to testify without first granting the defendant a reasonable continuance to obtain his own expert. Because we also conclude that this error was harmful, we reverse the judgment of the Appellate Court.

The Appellate Court's opinion sets forth the facts that the jury could reasonably have found; see id., 627–29; which we summarize in relevant part as follows. On September 10, 2013, Roderick Rogers called his cousin, David Anderson, for a ride from Rogers' home in Bridgeport. Before Anderson arrived, a social worker, William Muniz, came to Rogers' house at 2:10 p.m. to discuss a job opportunity. Rogers informed Muniz that he had to leave but would be back in one hour. As Muniz was leaving, Anderson arrived. Because Anderson was on probation, he wore a global positioning system (GPS) device that tracked his movements.

Anderson and Rogers left the house in Anderson's car, and Rogers directed Anderson to drive toward Palisade Avenue, on the east side of Bridgeport. On Palisade Avenue, Rogers saw the defendant, a friend whom he called Red Dreads, and directed Anderson to stop the car. The defendant got into the backseat of Anderson's car. Rogers then directed Anderson to drive to the "Terrace," a reference to the Beardsley Terrace housing complex located in the north end of Bridgeport. After arriving at the housing complex, Rogers told Anderson to park on a side street off Reservoir Avenue. Rogers asked Anderson if he had an extra shirt, and Anderson told him to check the trunk. Rogers asked Anderson to wait because he and the defendant would be right back. Rogers and the defendant got out of the car, went

to the open trunk, shut the trunk, and walked down a hill.

At that time, a group of young men was gathered outside the housing complex. Rogers and the defendant approached the group, remarked, "y'all just came through the Ave shooting Braz, you all f'ed up," and either Rogers or the defendant began shooting at the group. One of the shooting victims, LaChristopher Pettway, sustained a fatal gunshot wound to his back. Four other victims, Tamar Hamilton, Leroy Shaw, Jauwane Edwards, and Aijahlon Tisdale, sustained nonfatal wounds.

Rogers and the defendant then left the scene of the shootings and returned to Anderson's car. Rogers told Anderson to drive down Reservoir Avenue. Anderson then drove to the corner of Stratford Avenue and Hollister Avenue, where Anderson parked the car on the side of the street. The defendant got out of the car, and Anderson drove Rogers home. Rogers called Muniz at 2:46 p.m., and Muniz returned to Rogers' home by 3 p.m.

The record reveals the following procedural history. On September 16, 2013, Rogers was arrested. That same day, Rogers sent the defendant a text message stating that "[d]ey taken [me]." Thereafter, the defendant also was arrested and charged in the operative information with murder, conspiracy to commit murder, and four counts of assault in the first degree.[1] The trial court granted the state's motion to consolidate for trial the defendant's case with Rogers' case.

Anderson testified as a witness for the state. Over defense counsel's objection, the state also presented the testimony of the state's CSLI expert, Sergeant Andrew Weaver of the Hartford Police Department, who testi-

[1] The defendant also was charged with one count of criminal possession of a firearm. The court granted the defendant's motion to sever that count from the state's information. The state subsequently entered a nolle prosequi as to that count.

fied to the location of Rogers' and the defendant's cell phones and Anderson's GPS monitor. The court also took judicial notice, over the defendant's objection, of facts surrounding the defendant's failure to appear in court, on unrelated charges, following the shootings as evidence of consciousness of guilt in this case.

The jury found the defendant guilty of all counts,[2] and he was sentenced to a total effective term of fifty-five years of incarceration. He appealed from the trial court's judgment, challenging various evidentiary rulings and the trial court's decision to deny his motion for a continuance to allow him to obtain an expert to respond to the state's belatedly disclosed expert. The Appellate Court rejected each of the defendant's arguments and affirmed the judgment of conviction. See *State* v. *Jackson*, supra, 183 Conn. App. 669.

We thereafter granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly hold that the trial court's denial of the motion to preclude the state's late disclosed expert witness [on CSLI] and related motion for continuance was not an abuse of discretion and, even if an abuse of discretion, was not harmful error?" (2) "Did the Appellate Court properly [uphold] the trial court's exclusion of [testimony from the defendant's investigator on the issue of the defendant's cell phone location]?" (3) "Did the Appellate Court properly conclude that the trial court did not abuse its discretion by admitting evidence regarding the defendant's failure to appear in court on unrelated criminal charges as evidence of consciousness of guilt in this case?" And (4) "Did the Appellate Court properly conclude that the defendant had failed to preserve his claim that, pursuant

[2] The jury also found Rogers guilty of the same offenses. See *State* v. *Rogers*, 183 Conn. App. 669, 671–72, 193 A.3d 612 (2018), petition for cert. filed (Conn. September 28, 2018) (No. 180205). Rogers' conviction is not at issue in this appeal.

to *State* v. *Edwards*, 325 Conn. 97, 156 A.3d 506 (2017), the trial court was required to hold a hearing in accordance with *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997) [cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)], before allowing the state's expert to give expert testimony regarding the defendant's cell phone location?" *State* v. *Jackson*, 330 Conn. 922, 922–23, 193 A.3d 1214 (2018). We conclude that it was an abuse of discretion for the trial court to allow the state's late disclosed expert witness to testify without first granting the defendant a reasonable continuance to obtain his own expert. We also conclude that this error was harmful. In light of this conclusion, we do not reach the remaining, certified issues.

I

We begin with the defendant's claim that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion either when it allowed the state's late disclosed expert witness to testify or when it declined to grant the defendant a continuance to obtain his own expert witness.

The record reveals the following additional facts relevant to this issue. In April, 2014, the defendant served on the state a request for disclosure, which included a request for reports or statements of any experts. In response, the state disclosed certain information but did not include any information pertaining to an expert. One year later, the defendant filed a motion, dated April 21, 2015, seeking disclosure of the expert witnesses the state intended to call at trial and the opinions to which each witness was expected to testify. At an April 29 pretrial hearing on the motion, defense counsel specifically stated that it was unclear whether the state had obtained a CSLI expert and, if so, what that expert's opinion might be with respect to the defendant's cell phone location. The defendant indicated that, depending what the opinion was, he "would anticipate

that [he] may file a motion in limine to . . . preclude entirely or to limit the scope of the testimony . . . .'' The court confirmed that, ''what you're asking for is, if the state's going to call an expert to give opinion evidence about the proximity of [the defendant's] cell phone or a tower somewhere that you [would] like to know who that is and [what] they're going to say?'' The defendant confirmed that this was the information he sought. The state raised no objection to this second disclosure request but stated that it ''can't definitively say who that might be at this time because [it is] still analyzing the data . . . .'' The court responded: ''But . . . if you select somebody and they say, look, in my opinion, this cell phone was within, like, 100 feet of this tower . . . which is on this building, you'll disclose that to the defense?'' The state replied that it would do so.

More than three months later, when jury selection began on August 3, 2015, the state provided the defendant with a list of 128 potential witnesses. The thirty-sixth name on the list was Weaver, under the heading ''Hartford Police [Department].'' Weaver was not identified as an expert witness or described in any other way. On October 1—nearly two months after that general disclosure, after voir dire had commenced, and seven days before evidence began—the state provided the defendant with Weaver's resume and a copy of a PowerPoint computer software presentation Weaver had prepared that purportedly charted the locations of the cell phones associated with the defendant and Rogers, as well as the GPS unit worn by Anderson around the time of the shootings.

On October 7, 2015, one day before evidence commenced, the defendant filed a motion in limine seeking to preclude Weaver's testimony, ''particularly as it concerns [CSLI], or, at a minimum, a reasonable continuance in order that a defense expert may be retained

(e.g., apply for and obtain funding authorization from the Office of the Chief Public Defender, allow for [the] expert's review of necessary materials, etc.)." The defendant argued that the state had not provided him foundational information for Weaver's opinion and that the late disclosure unduly prejudiced him and his right to present a defense. The defendant noted that, because Weaver's name had been among those that the state had read to venire panels since the start of jury selection, nearly two months prior, "the state knew for *at least* two months that it intended to call [Weaver] for purposes of offering his PowerPoint presentation but waited until the literal eve of trial to disclose it to the defense, a course that deprived [the defendant] of the opportunity to inquire about the potential impact of cell phone data on [a venireperson's] decision-making and/or to ascertain [a venireperson's] familiarity with cell phone data and towers." (Emphasis in original.) The defendant asserted that, if Weaver were permitted to testify, the defendant would need to obtain his own expert and that he could not identify, hire, and obtain funding for an expert, provide the expert with the material for review, and confer with the expert on the presentation of the defendant's defense in the short time before evidence was set to begin.

The trial court took no action on the motion in limine until several days after evidence began on October 8, 2015. The court held a hearing on the motion on October 20. The court noted the defendant's arguments regarding the state's late disclosure and stated that it understood that the defendant was also challenging the reliability of the software that Weaver had used to generate the maps contained in his PowerPoint presentation and whether he was qualified to conduct his analysis. Defense counsel clarified, "I don't think we ever really contested that this type of information can be presented to a jury if coming in through a proper expert. And in terms of [Weaver's] qualifications, we

would just like to voir dire him during his testimony if he's allowed to testify."[3]

Voir dire of Weaver then occurred outside the presence of the jury. Weaver testified that the state had first contacted him "[t]wo to three weeks ago," told him that it had phone records and records related to a GPS monitor that it wanted to have mapped, and provided him with cell phone records for the defendant, Rogers, and Anderson, and records for Anderson's GPS monitor. Weaver learned that the records associated with the defendant's phone contained the wrong set of tower information, so he downloaded the correct information from the National Cellular Assistance Data Center in the form of a Microsoft Excel spreadsheet. Weaver testified that he included that spreadsheet on a compact disc (CD) that he created, made a copy for the defense, and advised the Office of the State's Attorney in Bridgeport that the records were complete. Weaver also e-mailed the PowerPoint presentation to the state. The state told Weaver that it believed that it had the information it needed based on the PowerPoint presentation and never picked up either the original or the copy of the CD from him in Hartford.

Following Weaver's testimony, defense counsel argued that the state had violated Practice Book § 40-11[4] by failing to disclose Weaver as its expert in a timely

[3] Because the defendant does not challenge Weaver's qualifications as an expert, we do not evaluate those qualifications or assess whether he would be qualified to testify as an expert.

[4] Practice Book § 40-11 (a) provides in relevant part: "Upon written request by a defendant filed in accordance with Section 41-5 and without requiring any order of the judicial authority, the prosecuting authority, subject to Section 40-40 et seq., shall promptly, but no later than forty-five days from the filing of the request, unless such time is extended by the judicial authority for good cause shown, disclose in writing the existence of, provide photocopies of, and allow the defendant in accordance with Section 40-7, to inspect, copy, photograph and have reasonable tests made on any of the following items . . . (3) Any reports or statements of experts made in connection with the offense charged including results of physical and mental examinations and of scientific tests, experiments or comparisons which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial . . . ."

fashion. The defendant also argued that he had never received the CD from the state that Weaver prepared, which contained not only the Excel spreadsheet but also a version of Weaver's PowerPoint presentation containing a video depicting the movement of Anderson's GPS monitor, rather than a still image. Defense counsel noted that, despite not having the underlying data from the state, he had attempted to obtain an expert witness following the state's October 1 disclosure but had not yet been successful. He argued that he had been prejudiced in his ability to meaningfully challenge Weaver's testimony and requested that the court preclude Weaver's testimony or, alternatively, grant him a "reasonable continuance . . . for at least six weeks."

The state explained that it thought the court's April 29, 2015 order required it to disclose expert opinion evidence to the defense only after the state received it. The state noted that it had provided the defense with Weaver's name on August 3, approximately two months before the state even contacted Weaver, and that the defendant was "aware that [CSLI data] was an issue we were looking into." The state claimed that it did not meet with Weaver until the end of September because it was in the process of jury selection for this trial and it was preparing for other trials. Finally, the state noted that it had "no answer" to explain why it did not pick up the CDs from Weaver or disclose them to the defendant.

In an oral ruling, the court stated: "[T]he problem I'm having is, while I know we are all busy people, I don't think it's a fair interpretation of what the Practice Book requires and what the court orders were in this case to say that, okay, as soon as we have it, we'll give it to you notwithstanding when we have it. I mean, what does that mean? Now, that would mean that you engage an expert and you have the product that you intend to offer through him the date before the evidence starts. I know that didn't happen here, but the product was

delivered . . . October the first or thereabout and the evidence started on October the eighth. . . . [T]hese obligations for . . . disclosure, which were filed, [somewhat] generic, others were much more specific made months ago. And while I don't disagree with the state that this type of evidence cannot be said to be unanticipated, the problem is that, until the defense knows . . . what the state is going to present . . . it can't prepare to . . . meet that evidence by either consulting other experts or retaining other experts or what have you. That's the problem I have. That's the problem I have here.

"I'm not saying that there was bad faith involved. I'm just saying that, notwithstanding our schedules, I believe that . . . this was all an avoidable situation. . . . [T]he state could well have said, Your Honor, I need two days off from jury selection to go meet with expert so and so to see if we're going to use him, and that didn't happen. I'm just troubled by the way that this all unfolded. Again, not that there was bad faith involved, but this was . . . in my mind, an avoidable situation."

The court ultimately concluded, however, that the defendant had not suffered prejudice as a result of the late disclosure. It reasoned that "cell phone evidence, the movement of these phones and . . . the GPS, is not what I would call a . . . matter that is so novel or cutting edge or unusual that the defendant would suffer prejudice as a result of allowing its use here in court in testimony through the witness."[5] Accordingly, the

[5] The court did not explain why, if CSLI evidence was not "novel or cutting edge or unusual," the state would nonetheless require an expert to present this evidence. We note, however, that, when the trial court denied the defendant's motion in limine, it did not have the benefit of our decision in *State* v. *Edwards*, supra, 325 Conn. 97. In *Edwards*, we held that a court must conduct a hearing pursuant to *State* v. *Porter*, supra, 241 Conn. 57, before admitting testimony and evidence regarding CSLI because "the process [the CSLI witness] used to arrive at his conclusions [is] beyond the ken of [the] average juror." *State* v. *Edwards*, supra, 128, 133.

court denied the defendant's motion in limine insofar as he sought to exclude Weaver's testimony in its entirety, but it did preclude two slides of the PowerPoint presentation, one containing the video that the defendant never received and another containing hearsay.

Defense counsel asked whether the court was also denying the defendant's request for a continuance. The court replied, "[y]es. You can renew your motion if . . . need be at the . . . end of direct [examination]. But based upon what I've heard so far, been presented with so far, I'm denying the request for a continuance." The defendant then moved for a mistrial, which the court denied. The state thereafter provided the defense with copies of Weaver's Excel spreadsheet and CD.

The next day, before Weaver was set to testify before the jury, defense counsel informed the court that, in addition to redacting the precluded information from the PowerPoint presentation, Weaver had also changed the representation of cell site coverage areas depicted in his visual presentation from ovals to pie wedges, which narrowed the coverage areas. The court ordered a ten minute recess to allow defense counsel to meet with Weaver regarding the changes he had made to the presentation. Following the recess, defense counsel stated that, although he had a better understanding of the changes to the PowerPoint presentation, he was still unclear as to the reason for them. Defense counsel renewed his requests for preclusion and for a mistrial, and, in the alternative, asked for a continuance to at least the next day to review the new material and to prepare for cross-examination. The court granted the continuance until the following morning.

The next morning, defense counsel stated that, outside of court, Weaver had provided "some clarification" about the changes he made to his presentation. He renewed his objection to the late disclosure and argued

that the revised presentation magnified the prejudice caused to the defendant because he was prevented from obtaining his own expert. The court asked defense counsel whether the changes to the presentation "impair your ability to cross-examine the witness to any greater extent than you feel you may have been impaired when [the defendant] first made the motion to preclude . . . ." Defense counsel acknowledged that the additional time had helped him prepare for cross-examination regarding the changes to the presentation.

Thereafter, Weaver testified, and his PowerPoint presentation was shown to the jury. Weaver testified that the state's attorney's office had provided him with logs for Anderson's GPS monitor and call records for three phone numbers, and asked him to map the location of both Anderson's GPS monitor and of phone calls made and received for two of the phone numbers, which the state attributed to Rogers and the defendant. Using commercial mapping software, Weaver plotted these locations, which were depicted on the maps as a person figure in the center of 120 degree pie shaped coverage areas. The placement of the figure in the center did not mean that was the exact location of the cell phone; rather, it meant that the phone was generally within the cell tower's coverage area.

Weaver's PowerPoint presentation contained fifteen different snapshots of time. The maps and descriptions indicated Anderson's GPS location and whether the defendant's or Rogers' cell phone connected to a cell site with a "generally expected coverage area" in which Anderson's GPS was located. Snapshots nine through thirteen showed that the defendant's phone connected to a cell site whose coverage area included Anderson's GPS. Specifically, snapshot nine depicted the defendant's phone connected to a cell site whose coverage area included the location of the shootings. Snapshots ten through twelve also showed the defendant's phone

as being in the same coverage area as Anderson's GPS. Finally, snapshot thirteen showed that the defendant's phone, Rogers' phone, and Anderson's GPS were all in the area of Stratford Avenue and Hollister Avenue. Weaver opined that these maps showed that the "phones moved together or met with before and/or after . . . the [victim's] murder. They either traveled to or traveled from. [Rogers' phone] moved toward the [victim's] murder with [Anderson's] GPS. And the [defendant's] phone . . . moved away and then when they actually made phone calls all together . . . within this area of Stratford and Hollister after the homicide."

On cross-examination, Weaver admitted that the prosecutor had directed him to map only those calls made when the phones were in the same proximity, and, consequently, there were several calls that had not been mapped. Specifically, Weaver did not include a phone call made from Rogers' phone to the defendant's phone at 2:14 p.m. He explained that he was asked only to plot the points and times when the two phones were together, and, because the defendant's phone was not near Rogers' at that time, he did not include it. He also did not include other cell towers that were in the area, and, as such, his presentation did not depict any coverage overlap between towers. Weaver's snapshots also did not depict the movement of the phones.

Following the jury's verdict, the defendant filed a motion for a judgment of acquittal or, in the alternative, a new trial. In support of his motion, the defendant claimed that the state's late disclosure of Weaver and the court's failure to preclude Weaver's testimony or to afford the defendant a reasonable continuance deprived the defendant of a fair trial. The court denied the motion.

On appeal, the Appellate Court concluded that the trial court had not abused its discretion in denying the motions in limine and for a continuance. *State* v. *Jack-*

son, supra, 183 Conn. App. 641. With regard to Weaver's testimony, the court reasoned that the suppression of otherwise admissible evidence is a severe sanction, and the defendant was not challenging Weaver's qualifications or the reliability of the software he used. Id., 641–42. With respect to the continuance, the court concluded that the defendant was prejudiced by the late disclosure but that this prejudice was adequately mitigated by defense counsel's effective cross-examination of Weaver. Id., 643. It also noted that, although "the requested continuance likely would have cured any then existing prejudice to the defendant as a result of the late disclosure," had the trial court considered the feasibility of a continuance, it could have concluded that the six week continuance that defense counsel requested would be too disruptive to the trial. Id., 644.

Nonetheless, the court acknowledged that the question of whether the trial court abused its discretion in failing to order a continuance was a "close one." Id., 646. It therefore went on to conclude that, even if the denial of the continuance was an abuse of discretion, the defendant had not demonstrated that the error was harmful. Id., 648. It explained that "Weaver's testimony, although important to the state's case, also was corroborative of other testimony presented to the jury," such as Anderson's detailed description of the events on the day of the shootings and surveillance videos. Id., 648–49. It also noted that the "state's case against the defendant was relatively strong" based on Anderson's testimony, as well as other circumstantial evidence, including consciousness of guilt evidence. Id., 649.

On appeal to this court, the defendant claims that the trial court's failure to order any sanction for the state's late disclosure was an abuse of discretion because he should not have been obligated to anticipate Weaver's testimony and the state offered no good reason for its dilatory inaction. The defendant argues that permitting the state's expert to testify without providing him

an opportunity to secure his own expert was harmful because it deprived him of the opportunity to effectively undermine Weaver's expert opinion, and the state's case was not strong without Weaver's testimony.

The state claims that the Appellate Court correctly concluded that the trial court did not abuse its discretion because the trial court afforded the defendant brief continuances to permit review of any belatedly disclosed materials, and it allowed extensive cross-examination. It further argues that the facts of this case do not warrant the "draconian remedy" of precluding Weaver's testimony. The state also argues that the trial court did not abuse its discretion when it denied defense counsel's request for a six week continuance because, "in substance, it granted two brief continuances, after which the defendant abandoned his request for a lengthier one." Finally, the state argues that, even if the admission of Weaver's testimony was an abuse of discretion, such error was harmless because his testimony was corroborative of other testimony and evidence and the state's case was "remarkably strong . . . ."

Resolution of this issue is controlled by well settled principles. Pursuant to Practice Book § 40-11 (a) (3), upon written request by a defendant, the state shall disclose any "reports or statements of experts made in connection with the offense charged including results of . . . scientific tests, experiments or comparisons which are material to the preparation of the defense or are intended for use by the prosecuting authority as evidence in chief at the trial . . . ." The state has a continuing duty to disclose such documents, and, if there is a failure to comply with disclosure, the trial court *must* take appropriate action, including the imposition of an appropriate sanction. See, e.g., *State* v. *Festo*, 181 Conn. 254, 265, 435 A.2d 38 (1980); see also Practice Book §§ 40-3 and 40-5.

Practice Book § 40-5 gives broad discretion to the trial judge to fashion an appropriate remedy for non-

compliance with discovery. See, e.g., *State* v. *Respass*, 256 Conn. 164, 186, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001). The court may enter such orders "as it deems appropriate, including . . . (2) Granting the moving party additional time or a continuance . . . (4) Prohibiting the noncomplying party from introducing specified evidence . . . (5) Declaring a mistrial . . . [or] (8) Entering such other order as it deems proper." Practice Book § 40-5. "[T]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the state for its allegedly improper conduct. As we have indicated, the formulation of an appropriate sanction is a matter within the sound discretion of the trial court. . . . In determining what sanction is appropriate for failure to comply with [court-ordered] discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." (Internal quotation marks omitted.) *State* v. *Respass*, supra, 186. As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and " 'the ultimate issue is whether the trial court could reasonably conclude as it did.' " *State* v. *Arthur H.*, 288 Conn. 582, 595, 953 A.2d 630 (2008). "In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 555, 122 A.3d 555 (2015).

The determination of whether to grant a request for a continuance is similarly within the discretion of the trial court. See, e.g., *State* v. *Hamilton*, 228 Conn. 234, 239, 636 A.2d 760 (1994). The court, in exercising its

discretion, may weigh various factors in considering a request for a continuance, including "the likely length of the delay . . . the impact of delay on the litigants, witnesses, opposing counsel and the court . . . the perceived legitimacy of the reasons proffered in support of the request . . . [and] the likelihood that the denial would substantially impair the defendant's ability to defend himself . . . ." (Internal quotation marks omitted.) *State* v. *Lopez*, 280 Conn. 779, 787, 911 A.2d 1099 (2007). "In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis." *State* v. *Hamilton*, supra, 242.

In the present case, we need not decide whether the trial court's decision to permit the state's late disclosed expert witness to testify was, in and of itself, an abuse of discretion. Instead, we conclude that this action was an abuse of discretion in the absence of affording the defendant a reasonable continuance to obtain his own expert. Cf. *State* v. *Festo*, supra, 181 Conn. 266 (it is appropriate for trial court to afford "the defendants more time to examine and analyze the [late disclosed] evidence in lieu of granting their motions for a mistrial and motions for suppression of evidence").

The state disclosed Weaver as an expert on October 1—only seven days before evidence began—despite knowing for at least two months that it may call Weaver, a Hartford police sergeant unconnected to the legal investigation of a Bridgeport crime, to testify.[6] The

[6] The state contends that the trial court did not abuse its discretion in denying the request for a continuance because the "coordinates (except those in the . . . spreadsheet related to Rogers' phone) had been provided through discovery well before trial," and, thus, the defendant could have secured an expert witness to review the records. We are not persuaded. The disclosure of the cell phone records did not give the defendant notice that the state would call an expert who would generate a PowerPoint presentation and testify that he believed the defendant was in the area at the time of the shootings. As the trial court noted, "the problem is that, until the defense knows . . . what the state is going to present . . . it can't prepare to . . . meet that evidence by either consulting other experts or retaining other experts . . . ."

defendant had filed a motion for disclosure of the state's expert witnesses more than five months prior to the state's disclosure. Pursuant to Practice Book § 40-11 (a) (3) and the trial court's April 29 discovery order, the state was required to timely disclose to the defendant that it anticipated calling a CSLI expert. As we have explained, the rules of practice impose "on parties to a criminal proceeding a continuing duty to disclose material previously requested. . . . Practice Book [§ 40-3] requires notification *as soon as practicable under the prevailing circumstances*." (Emphasis added.) *State* v. *Gunning*, 183 Conn. 299, 306, 439 A.2d 339 (1981).

The trial court concluded that the late disclosure was avoidable, rejecting the state's explanations for the timing—that it was involved in jury selection for this case and preparing for other cases, and that it interpreted the court's April 29, 2015 discovery order to require the state to disclose expert opinion evidence only when the state received it. We agree that there was no valid reason why disclosure was not made until after voir dire began and only one week before evidence began. The state's failure to prepare for trial in a timely fashion is not a valid reason for a late disclosure of an expert witness to the defense. Late disclosure rendered the defendant's opportunity to prepare a meaningful defense effectively nonexistent. The same exigency the state cited—that it was involved in jury selection in this case—was true for the defense as well. The only meaningful difference between the state and the defense was that the state was afforded the opportunity to disclose its expert late, but the defendant was not similarly afforded a reasonable continuance to adjust his trial strategy to respond to that eleventh hour disclosure. Indeed, we have explained that timely disclosure is designed to prevent this precise situation. See, e.g., *State* v. *Festo*, supra, 181 Conn. 265 ("[t]he purpose of criminal discovery is to prevent surprise and to afford

the parties a reasonable opportunity to prepare for trial").

We also conclude that the defendant was prejudiced as a result of the late disclosure. As the Appellate Court properly recognized, "the defendant was prevented from consulting with, and potentially presenting the testimony of, his own expert."[7] *State* v. *Jackson*, supra, 183 Conn. App. 643. This is not a case in which the reasons the defendant proffered in support of the continuance were speculative. Cf. *State* v. *Delgado*, 261 Conn. 708, 714–15, 805 A.2d 705 (2002) ("trial court does not act arbitrarily or unreasonably when it denies a motion for a continuance that is supported by mere speculation").

The trial court's prejudice analysis focused on the substance of Weaver's testimony, and the court concluded that Weaver's testimony was not "so novel or cutting edge or unusual." This conclusion is inconsistent with this court's decision in *State* v. *Edwards*, supra, 325 Conn. 97. In *Edwards*, we concluded that the process of analyzing CSLI data is " 'beyond the ken of the average juror.' "[8] Id., 128. In order to meaningfully understand and challenge Weaver's testimony, it was essential for the defendant to be able to obtain his own CSLI expert. We are not persuaded that the two brief continuances the trial court gave to the defendant to

[7] The Appellate Court also noted, however, that, "[a]lthough the late disclosure deprived the defendant of the opportunity to consult with his own expert, defense counsel conducted an effective cross-examination of Weaver." *State* v. *Jackson*, supra, 183 Conn. App. 643. We agree with the defendant that the fact that he elicited some favorable testimony during cross-examination does not remedy the fact that he was deprived of the opportunity to present his own expert witness who might have opined that the defendant was not in the area at the time of the shooting and who might have provided assistance to his attorney by identifying other areas in which he should question Weaver. The expert also might have explained why Weaver's opinion and methodology were faulty.

[8] As we previously noted, at the time the trial court denied the defendant's motion in limine, it did not have the benefit of our decision in *State* v. *Edwards*, supra, 325 Conn. 97. See footnote 5 of this opinion.

obtain clarification from Weaver meaningfully alleviated the prejudice because they did not afford the defendant sufficient time to obtain funding for an expert from the Office of the Chief Public Defender and, subsequently, to secure his own CSLI expert. Consultation with the opposing expert is not a promising means of obtaining information about the weaknesses of that expert's views, which is why adverse parties typically retain their own experts.

A reasonable continuance almost undoubtedly would have rectified the prejudice. See, e.g., *State* v. *Cooke*, 134 Conn. App. 573, 579, 39 A.3d 1178 (granting continuance to allow defendant's expert to review late disclosed supplemental DNA report alleviated any prejudice to defendant), cert. denied, 305 Conn. 903, 43 A.3d 662 (2012); *State* v. *Van Eck*, 69 Conn. App. 482, 498–99, 795 A.2d 582 (court did not abuse discretion in electing to continue matter for almost one month for defendant to obtain records, which were not previously disclosed to him), cert. denied, 260 Conn. 937, 802 A.2d 92 (2002), and cert. denied, 261 Conn. 915, 806 A.2d 1057 (2002). As we have explained, "[a] continuance is ordinarily the proper method for dealing with a late disclosure. . . . A continuance serves to minimize the possibly prejudicial effect of a late disclosure . . . ." (Citations omitted; internal quotation marks omitted.) *Rullo* v. *General Motors Corp.*, 208 Conn. 74, 79, 543 A.2d 279 (1988). The Appellate Court also acknowledged as much. See *State* v. *Jackson*, supra, 183 Conn. App. 644 ("we recognize that the requested continuance likely would have cured any then existing prejudice to the defendant as a result of the late disclosure").

The Appellate Court nonetheless concluded that granting a six week continuance would have caused a substantial disruption to the trial, which was well under way. See id. This problem, however, was not of the defendant's making, but only he shouldered the burden of the problem created by the state's late disclosure.

The defendant filed the motion in limine only six days after the state disclosed Weaver's PowerPoint presentation and one day *before* evidence began. It is unclear why the court did not hold a hearing on the motion until thirteen days later, after the start of trial, just before Weaver was called to testify. The court was on notice before trial began that the defendant sought a continuance as an alternative form of relief.

In the defendant's motion, he requested a "reasonable continuance." It was only during the hearing on the motion that he suggested that a reasonable continuance would be for "at least six weeks." Had the trial court concluded—despite not holding a hearing on the motion until thirteen days after the defendant filed it—that it would be too disruptive to the proceedings to grant a six week continuance, the court could have granted a shorter continuance. See, e.g., *State* v. *Nelson*, 118 Conn. App. 831, 846, 986 A.2d 311 (it was not abuse of discretion for court to grant one month continuance when defendant asked for two month continuance), cert. denied, 295 Conn. 911, 989 A.2d 1074 (2010); *United States* v. *Turner*, 897 F.3d 1084, 1101–1102 (9th Cir. 2018) (it was not abuse of discretion to provide shorter continuance than requested), cert. denied, U.S. , 139 S. Ct. 1234, 203 L. Ed. 2d 247 (2019); see also *State* v. *Respass*, supra, 256 Conn. 186 (court has broad discretion to afford remedy under Practice Book § 40-5). We acknowledge that defense counsel failed to adequately explain specifically why his request for a six week continuance was reasonable or to request a continuance for a shorter period of time. Nonetheless, defense counsel's failure to engage in such a discussion with the trial court does not excuse the resulting prejudice to the defendant. Accordingly, we conclude that it was an abuse of discretion for the trial court to allow the state's late disclosed expert witness to testify without first providing the defendant with a reasonable continuance to obtain his own expert.

The state argues that the trial court did not abuse its discretion in declining to order a continuance because defense counsel abandoned his request by not renewing it after the state's direct examination of Weaver, as the court had suggested. The state notes that defense counsel proceeded with his cross-examination of Weaver and, subsequently, proffered his own investigator as a witness on cell phone location. The state points out that, when defense counsel proffered the investigator's testimony, he stated, "I'm not seeking a further continuance."

We agree with the Appellate Court that defense counsel did not abandon his request for a continuance. See *State* v. *Jackson*, supra, 183 Conn. 646. Defense counsel noted numerous times after Weaver's testimony that the defendant was prejudiced by the denial of counsel's request for a continuance. Defense counsel's statement that he was "not seeking a further continuance" was in response to the trial court's misunderstanding that the defense was seeking a continuance before proffering the testimony of its investigator on CSLI. The court stated that, "before [Weaver] took the stand yesterday and today . . . you had said that you were not looking for a *further continuance*, that you were ready to go forward *preserving your grounds for the motion to preclude* that you had articulated before." (Emphasis added.) In response, defense counsel stated, "I'm not seeking a further continuance. We would be able to call [the investigator] this afternoon."[9]

[9] Defense counsel explained that he was calling his investigator to "ameliorate the harm [in] some limited way to be able to put what we've identified in terms of . . . where that cell tower was located [at the 2:14 p.m. call]." Specifically, defense counsel sought to have his investigator testify that, based on CSLI data, the defendant's cell phone was on the west side of Bridgeport during the 2:14 p.m. call with Rogers, which would have made it "practically impossible" for him to get to the east side of the city where Anderson had allegedly picked him up shortly after the call. The state did not object to this testimony. Nevertheless, the court subsequently precluded the defendant's investigator from testifying. Thus, to the extent there was any further opportunity for the court to mitigate the prejudice from the

Having concluded that it was an abuse of discretion for the trial court to allow the state's late disclosed expert witness to testify without first giving the defendant a reasonable continuance to obtain his own expert, we must now determine whether that error was harmful. "[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *Eleck*, 314 Conn. 123, 129, 100 A.3d 817 (2014). "[A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Pascual*, 305 Conn. 82, 93, 43 A.3d 648 (2012).

After reviewing the evidence in the present case, we cannot conclude that we have a fair assurance that the admission of Weaver's testimony, without affording the defendant a reasonable continuance to obtain his own expert to meaningfully challenge Weaver's testimony, did not substantially affect the verdict in this case. The state's case was based primarily on the testimony of Weaver and Anderson. There is no doubt that Weaver's expert testimony was central to the state's case because his testimony and PowerPoint presentation were the only objective evidence that placed the defendant's

state's late disclosure of Weaver by permitting the defendant's investigator to testify, it was lost.

phone in the same area as Rogers' phone and Anderson's GPS around the time of the shootings. Although several eyewitnesses identified Rogers as a shooter, the identity of the second suspect was a central issue in the case, and the only objective evidence identifying the defendant as the second suspect was Weaver's expert testimony.[10] There can be little doubt that jurors would have viewed as highly convincing Weaver's expert opinion; the testimony was presented in technical terms and used impressive visual displays to convey important information, and it came from a law enforcement officer unconnected to the department that investigated the crime. Cf. *State* v. *Boyd*, 295 Conn. 707, 744, 992 A.2d 1071 (2010) (evidentiary error was harmless because, among other things, "cell phone records provided strong evidence that the defendant had been in the area" where murder occurred), cert. denied, 562 U.S. 1224, 131 S. Ct. 1474, 179 L. Ed. 2d 314 (2011). No eyewitnesses identified the defendant as one of the perpetrators. Moreover, the defendant's DNA was never found in Anderson's car.

The Appellate Court acknowledged that Weaver's testimony was "important to the state's case" but concluded that it was "corroborative of other testimony presented to the jury. The jury heard Anderson's detailed description of the events on the day of the shootings. Anderson identified the defendant as the man he picked up on Palisade Avenue on the afternoon of the shootings. Anderson testified that he dropped the defendant and Rogers off near the scene of the shootings and heard 'firecracker sounds' while they were gone." *State* v. *Jackson*, supra, 183 Conn. App.

[10] The state contends that the state's case was "remarkably strong," based on Anderson's testimony and because the defendant was "linked to Rogers through cell phone call logs," a bandana found in Rogers' home, and the text Rogers sent to the defendant when he was arrested. This evidence, however, establishes nothing more than an association between Rogers and the defendant, and does not establish that the defendant was a passenger in Anderson's car at the time of the shootings.

648–49. Anderson, however, had both a motive to testify falsely and credibility issues. When Anderson first met with the police, they asked if he knew anyone called "Red Dreads,"[11] and Anderson asked if they meant "Little Red." The police then asked him if he knew someone called "Little Red Dreads," and he replied no. During a second meeting with the police eight days later, the police showed Anderson a photographic array containing the defendant's picture, but Anderson did not identify the defendant. It was not until nearly five months later, after Anderson had been charged with conspiracy to commit murder and was being held in prison, that he requested a third meeting with the police, at which he identified the defendant as the individual he had picked up. Prior to that third meeting, Anderson had attended a court proceeding where he saw the defendant and heard people calling the defendant "Red Dreads." After requesting the third meeting with the police, Anderson asked the police whether Red Dreads was the name of the individual they had previously asked him about. He then chose the defendant's photograph from an array, asserting that he was Red Dreads. Anderson signed an agreement that gave him immunity for anything he told to the police, and the state promised it would let the judge know how he performed as a witness against the defendant and Rogers when he was sentenced. After the defendant was sentenced, the state dismissed Anderson's conspiracy to commit murder charge, and he pleaded guilty to hindering prosecution in the second degree, for which he received an unconditional discharge.

The Appellate Court also noted that surveillance videos corroborated much of Anderson's testimony. Id., 649. The surveillance videos, however, do not clearly

[11] Anderson subsequently testified that Red Dreads was the defendant and that Red Dreads was the individual he picked up on Palisade Avenue. Anderson also testified, however, that the individual he picked up was wearing sunglasses and that Anderson did not know him.

depict the backseat passenger in Anderson's car. The footage that the state points to as depicting the backseat passenger, state's exhibit 34, simply depicts a figure that appears to be a man opening and closing the rear passenger door of Anderson's car and then exiting the car at Stratford Avenue and Hollister Avenue, approximately fifteen minutes after the shootings. That individual appears to have dreadlocks and is wearing a hat with a logo. Although the state introduced evidence that the defendant had dreadlocks and a hat with a similar logo, no eyewitnesses to the shootings described the second suspect as wearing a hat or having dreadlocks. In fact, the video shows the individual that exited Anderson's car was wearing jeans, while some eyewitness testimony described the second suspect as wearing khaki pants. Finally, the video captured the period approximately fifteen minutes *after* the shootings, which allows for the possibility that the individual exiting the car at Stratford Avenue and Hollister Avenue is not the second suspect involved in the shootings but, rather, someone else who subsequently entered Anderson's car.[12]

In sum, the defendant was prevented from meaningfully challenging the state's late disclosed expert witness because he could not obtain his own expert. Given the centrality of Weaver's expert testimony to the state's case—because it was the only objective evidence placing the defendant in the same area as Rogers around the time of the shootings—we cannot conclude, with a fair assurance, that the error did not substantially affect the verdict. Accordingly, we conclude that the error was harmful and that the defendant is entitled to a new trial.

[12] We note that state's exhibit 29, a surveillance video taken from Grandview Avenue around the time of the shootings, depicts Anderson's car pulling to the side of the road and two individuals exiting the car. One individual is wearing dark colored pants and a hooded sweatshirt with the hood pulled over his head, and the other individual is wearing khaki pants. No distinguishing features of the backseat passenger are depicted in the video.

II

Although our conclusion in part I of this opinion is dispositive of the appeal, in the interest of judicial economy, we consider whether any of the other claims raised by the defendant are sufficiently likely to arise in a new trial that we should address them. See, e.g., *State* v. *Norman P.*, 329 Conn. 440, 454, 186 A.3d 1143 (2018); *State* v. *Chyung*, 325 Conn. 236, 260 n.21, 157 A.3d 628 (2017). The defendant's claim that the Appellate Court improperly upheld the trial court's exclusion of his investigator's testimony is not likely to occur in a new trial because the defendant sought to introduce this testimony to "ameliorate the harm" caused by his inability to secure his own expert. The defendant will be able to obtain his own CSLI expert on retrial. The defendant's fourth claim is not likely to arise in a new trial because, pursuant to *State* v. *Edwards*, supra, 325 Conn. 97, if the defendant requests a hearing in accordance with *State* v. *Porter*, supra, 241 Conn. 57, prior to the admission of CSLI expert testimony, the trial court would be required to hold one.

Finally, we decline to address the defendant's third claim, namely, that the trial court abused its discretion by admitting evidence regarding the defendant's failure to appear in court on unrelated criminal charges as evidence of consciousness of guilt in this case. We recognize that whether the trial court abused its discretion by admitting this consciousness of guilt evidence presents an interesting question, but we need not address it here because the record could look different on retrial. Cf. *State* v. *Rizzo*, 266 Conn. 171, 250 n.44, 833 A.2d 363 (2003). We leave it to the trial court to further evaluate the issue if the state pursues it on remand.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for a new trial.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

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STATE OF CONNECTICUT *v.* GEOVANNY ZILLO

The defendant's petition for certification to appeal from the Appellate Court, 124 Conn. App. 690 (AC 30998), is denied.

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

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

Decided February 18, 2020

MONICA PETERS *v.* NUMAN SENMAN

The plaintiff's petition for certification to appeal from the Appellate Court, 193 Conn. App. 766 (AC 40438), is denied.

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

Monica L. Szymonik, self-represented, in support of the petition.

Decided February 18, 2020

BANK OF AMERICA, NATIONAL ASSOCIATION *v.* FABIOLA DERISME ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 193 Conn. App. 903 (AC 41476), is denied.

Fabiola Derisme, self-represented, in support of the petition.

Joseph J. Cherico, in opposition.

Decided February 18, 2020

GEOVANNY ZILLO *v.* COMMISSIONER OF CORRECTION

The petitioner Geovanny Zillo's petition for certification to appeal from the Appellate Court, 195 Conn. App. 71 (AC 41330), is denied.

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

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

Decided February 18, 2020

STATE OF CONNECTICUT *v.* WILLIAM HYDE BRADLEY

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 36 (AC 42061/AC 42062), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the defendant did not have standing to raise a due process challenge to his prosecution under a criminal statute, namely, General Statutes § 21a-277 (b), that he claims was enacted for the purpose of discriminating against minority groups to which he does not belong?

"2. If the answer to the first question is 'no,' was § 21a-277 (b) enacted for the purpose of discriminating against African Americans and/or Mexican Americans?"

Naomi T. Fetterman, assigned counsel, in support of the petition.

James M. Ralls, assistant state's attorney, in opposition.

Decided February 18, 2020

STATE OF CONNECTICUT *v.* JAMES JARMON

The defendant's petition for certification to appeal from the Appellate Court, 195 Conn. App. 262 (AC 42357) is denied.

Alice Osedach, assistant public defender, in support of the petition.

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

Decided February 18, 2020

APEX PROPERTIES, LLC, ET AL. *v.* DEUTSCHE BANK NATIONAL TRUST COMPANY

The plaintiff Ophni Davis' petition for certification to appeal from the Appellate Court (AC 43551) is denied.

John M. Kelly, in support of the petition.

Pierre-Yves Kolakowski, in opposition.

Decided February 18, 2020

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jury administrator to collect and maintain prospective jurors' racial and demographic data in accordance with statute (§ 51-232 [c]) concerning the issuance of questionnaires to prospective jurors; certification improvidently granted.

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CONNECTICUT APPELLATE REPORTS

Vol. 196

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* ALBERT D.*
(AC 42745)

Alvord, Moll and Bishop, Js.

Syllabus

Convicted, after a jury trial, of six counts of risk of injury to a child, three counts of sexual assault in the fourth degree, two counts of sexual assault in the first degree, and one count of attempt to commit sexual assault in the first degree, the defendant appealed to this court. He claimed that he was entitled to a new trial on the basis of alleged

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

prosecutorial improprieties during the state's rebuttal closing argument which resulted in a denial of his due process right to a fair trial pursuant to the six factor test set forth in *State* v. *Williams* (204 Conn. 523). *Held*:

1. The prosecutor's remarks on her own credibility and the credibility of one of the state's witnesses in rebuttal closing argument did not constitute improper vouching for the state's credibility: the state's response was reasonable in light of the defendant's sharp comments in closing argument, and the prosecutor also stated, on numerous occasions throughout her rebuttal argument, that it was the jury's job to assess credibility; moreover, the prosecutor's comments were directly tied to the defense's interpretation of the evidence adduced at trial and did not improperly extend beyond the record.
2. The prosecutor's comments in rebuttal closing argument that the state's experts were not allowed, as a matter of law, to meet with the victims were improper and constituted an impropriety, as our law does not prohibit expert witnesses from meeting with children who are complainants of sexual assault: the prosecutor explicitly stated that the state's experts could not meet with the victims because doing so would usurp the jury's role in assessing credibility and, although the state correctly articulated that the experts could speak about the behavioral characteristics of child abuse victims only in general terms, such a principle is rooted in our courts' concern for improper vouching, and is not borne out of a rule precluding experts from meeting with complainants of sexual assault; moreover, the prosecutor's comments explicitly misstated the law and, although they may have been intertwined with proper remarks relating to the jury's role in assessing credibility, the jury likely could have misunderstood that the reason for the experts' general testimony was because of their purported inability under the law to meet with the victims.
3. The defendant was not deprived of his due process right to a fair trial even though a prosecutorial impropriety occurred; under the six factor test set forth in *Williams*, the trial, as a whole, was not fundamentally unfair and the impropriety did not so infect the trial with unfairness as to make the defendant's convictions a denial of due process, as the defense initially argued that one of the state's experts was precluded from meeting with the victims, the severity of the impropriety was lessened by the fact that the defendant did not object to the state's closing argument, the prosecutor's misstatement of the law was not frequent and was confined to rebuttal argument, the impact of the impropriety was minimal as the jury acquitted the defendant of two counts, demonstrating its ability to filter out improper statements and make independent assessments of credibility, any improper effect was reduced by the court's final instructions to the jury following closing arguments, and the state's case was fairly strong, even without physical evidence.

Argued November 21, 2019—officially released March 3, 2020

Procedural History

Substitute information, in one case, charging the defendant, with six counts of the crime of risk of injury to a child, three counts of the crime of sexual assault in the first degree, two counts of sexual assault in the fourth degree, and one count of the crime of attempt to commit sexual assault in the first degree, and substitute information, in a second case, charging the defendant with the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of Tolland, where the cases were consolidated and tried to the jury before *Seeley*, *J.*; verdict and judgment of guilty in the first case of five counts of risk of injury to a child, two counts each of sexual assault in the first degree and sexual assault in the fourth degree, and one count of attempt to commit sexual assault in the first degree, and, in the second case, verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

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

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and, *Elizabeth C. Leaming*, senior assistant state's attorney, for the appellee (state).

Opinion

MOLL, J. The defendant, Albert D., appeals from the judgments of conviction, rendered following a jury trial, of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2),[1] one count

[1] General Statutes § 53a-70 provides in relevant part: "(a) A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person . . . ."

of attempt to commit sexual assault in the first degree in violation of General Statutes §§ 53a-49 (a)[2] and 53a-70 (a) (2), three counts of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (A),[3] and six counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[4] On appeal, the defendant claims that he is entitled to a new trial on the basis of alleged prosecutorial improprieties during the state's rebuttal closing argument. Specifically, the defendant contends that the prosecutor (1) incorrectly stated that the state's experts were not allowed to meet with the victims, and (2) improperly vouched for her own credibility and the credibility of one of the state's witnesses. The defendant further argues that the improprieties resulted in a denial of his due process

[2] General Statutes § 53a-49 (a) provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[3] General Statutes § 53a-73a (a) provides in relevant part: "A person is guilty of sexual assault in the fourth degree when: (1) Such person subjects another person to sexual contact who is (A) under thirteen years of age and the actor is more than two years older than such other person . . . ."

Although § 53a-73a has been amended by the legislature several times since the events underlying the present case; see, e.g., Public Acts 07-143, § 2; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[4] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts . . . of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of . . . a class B felony for a violation of subdivision (2) of this subsection, except that, if the violation is of subdivision (2) of this subsection and the victim of the offense is under thirteen years of age, such person shall be sentenced to a term of imprisonment of which five years of the sentence imposed may not be suspended or reduced by the court."

Although § 53-21 has been amended by the legislature several times since the events underlying the present case; see, e.g., Public Acts 07-143, § 4; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

right to a fair trial pursuant to the six factor test set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). We conclude that the prosecutor's comments with regard to the purported inability of the state's experts to meet with the victims constituted an impropriety that, nevertheless, did not deprive the defendant of his due process right to a fair trial. We further conclude that the prosecutor's comments with respect to her own credibility and the credibility of one of the state's witnesses were not improper. Accordingly, we affirm the judgments of conviction.

The jury reasonably could have found the following facts. Sometime in 2003, the victims, T and A, and their parents moved into a house in Willington. T is A's older sister. T was in second grade and approximately eight years old. The defendant and his wife, who are the victims' paternal grandparents, lived in a neighboring house.[5] T saw her grandparents every day, and most of these visits occurred at her grandparents' home. T testified that she would often spend time in the defendant's bedroom watching television while the defendant slept in his bed. While T would watch television, the defendant began to sexually abuse her by way of digital anal penetration. T testified that A, who had a particularly close relationship with the defendant's wife, would also be at the defendant's home, yet would remain downstairs during these episodes. T further testified that this sexual abuse would occur "[v]ery often" and "almost every time" that she would visit her grandparents' home, from the time she began second grade in 2003 until prior to the beginning of sixth grade, when her family moved to North Carolina in 2007.[6] In addition, T described several other forms of sexual abuse perpetrated by the defendant. Each of those abuses occurred one time.

[5] The victims' father, L, is the defendant's son.

[6] The evidence at trial revealed that the victims lived in North Carolina for one year and thereafter returned to Connecticut. T testified that, upon returning from North Carolina, she and A lived with the defendant and his wife for a period of time.

In 2005 or 2006, when A was eight or nine years old, she was watching television in the defendant's bedroom while the defendant appeared to be sleeping next to her on the bed. The defendant then lifted her shirt and proceeded to touch her breasts. A maintained that this occurrence was the only instance of abuse she suffered from the defendant. The defendant did not abuse T or A once they returned from North Carolina.

On July 14, 2015, T disclosed to her father that she had been sexually abused by the defendant. Her father drove to the defendant's residence and confronted the defendant about the accusation. Patrick O'Brien, a patrol trooper with the Connecticut State Police, responded to the defendant's home as a result of the defendant's call to the police, indicating that he had been accosted by the victims' father, who had accused the defendant of sexually assaulting T. In order to investigate further, Trooper O'Brien proceeded to the victims' residence, which was approximately twenty or thirty minutes away. Once there, Trooper O'Brien spoke with both victims but did not record a statement at that time.[7]

Scott Crevier, a detective with the Connecticut State Police, took written statements from T and A on July 15, 2015. T explained that she believed the abuse began in 2001. On August 10, 2015, T provided a second statement wherein she stated that the abuse actually began in 2003. Detective Crevier also interviewed the defendant and his wife on two occasions in August and September, 2015. In his two statements, the defendant explained that during "several strange incidents," T had initiated inappropriate sexual contact with him while he was napping in his bedroom, and he confirmed that he never told

[7] Trooper O'Brien took the statement of the defendant's wife on August 4, 2015, wherein she stated, among other things, that one time T told her that the defendant put his arm around T while in his bedroom and that made her feel "uncomfortable." According to the defendant's wife, the defendant responded that he had "barely touched her."

anyone about them.[8] The defendant was later arrested pursuant to two arrest warrants.

By way of amended substitute informations, the state charged the defendant in two separate informations[9] with respect to the abuse of his granddaughters. With regard to T, the operative information charged the defendant with three counts of sexual assault in the first degree, one count of attempted sexual assault in the first degree, two counts of sexual assault in the fourth degree, and six counts of risk of injury to a child. With regard to A, the operative information charged the defendant with one count of sexual assault in the fourth degree and one count of risk of injury to a child. The defendant pleaded not guilty to all counts and elected to be tried by a jury.

On November 3, 2017, following a jury trial, the defendant was convicted of all counts charged with respect to T, with the exception of one count of sexual assault in the first degree and one count of risk of injury to a child, and both counts charged with respect to A. On March 6, 2018, the court imposed a total effective sentence of twenty-five years of incarceration, followed by ten years of special parole with a lifetime sex offender registration. This appeal followed. Additional facts will be provided as necessary.

On appeal, the defendant's sole claim relates to two instances of purported prosecutorial impropriety during the state's rebuttal closing argument, which he con-

[8] The defendant denied that anything of a sexual nature happened between him and A. Specifically, with regard to T, the defendant stated that, on several occasions, he woke up from a nap with T's hand on his penis. He stated that, on other occasions, T would rub her genital area on his leg and groin area. According to the defendant, the "last time [he] took a nap" was when he woke up to T on his chest "moving [her vagina] around . . . a couple of inches from [his] face." The defendant was "surprised [by] this." The statement was signed by the defendant as an attestation of its accuracy.

[9] With respect to the allegations concerning T, the state charged the defendant in Docket No. TTD-CR-15-0108192-T. With respect to the allegations regarding A, the state charged the defendant in Docket No. TTD-CR-16-0108519-T. The matters were tried together.

cedes were not objected to at trial. We first set forth the standard of review and the general principles of law applicable to claims of prosecutorial impropriety.

"[I]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . . that the remarks were improper . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 761–62, 51 A.3d 988 (2012). "Once prosecutorial impropriety has been alleged . . . it is unnecessary for a defendant to seek to prevail under *State* v. *Golding*, [213 Conn. 233, 239–40, 567 A.2d 823 (1989)], and it is unnecessary for an appellate court to review the defendant's claim under *Golding*. . . . The reason for this is that the touchstone for appellate review of claims of prosecutorial [impropriety] is a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by this court in [*Williams*]." (Internal quotation marks omitted.) *State* v. *King*, 289 Conn. 496, 509–10, 958 A.2d 731 (2008).

If we conclude that prosecutorial impropriety occurred, we then decide whether the defendant was deprived of his due process right to a fair trial by considering "[1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Citations omitted.) *State* v. *Williams*, supra, 204 Conn. 540. "As is evident

upon review of these factors, it is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole. . . . In addition, the fact that the defendant did not object to the remarks at trial is part of our consideration of whether a new trial or proceeding is warranted . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Weatherspoon*, 332 Conn. 531, 556–57, 212 A.3d 208 (2019).

I

A

The defendant first argues that the prosecutor committed an impropriety in her rebuttal closing argument by arguing that the state's experts were not allowed as a matter of law to meet with the victims. In response, the state contends that the statements at issue must be viewed in the context in which they were made. According to the state, that context makes clear that the prosecutor was simply explaining why the experts must testify in general terms and why their generalizations were still relevant to the case. We agree with the defendant that the prosecutor's statements that the state's experts were not allowed as a matter of law to meet with the victims constituted an impropriety.

The following additional facts are relevant to our analysis. During the trial, the state presented the testimony of two experts. First, Lisa Murphy-Cipolla, a clinical services coordinator at the Greater Hartford Children's Advocacy Center, testified that she had conducted approximately 1900 diagnostic interviews with children who claimed to be abused. She testified that there was "general agreement in the field that disclosures [of sexual abuse] are usually delayed." She further opined on the reasons for the delayed disclosure. Murphy-Cipolla did not interview either T or A, and she acknowledged that her opinions were generalizations. Second, Dr. Nina Livingston testified as an expert pediatrician in the field of child abuse and neglect. She testified that, in her experience, children often delayed dis-

closing sexual abuse. She also explained why children who suffer from sexual abuse akin to that allegedly suffered by the victims in the present case often do not show physical symptoms. She did not examine T or A.

During closing arguments, defense counsel argued in relevant part: "So the expert's testimony is all generalizations. She never saw [T] and she never saw [A]. And yet, she can't testify in specifics about either one of these girls, not because she not only didn't see them because she's not allowed to, but it's all generalizations. And so to say oh, well, she didn't tell because nobody responds to her. And she didn't tell because of this, and she should tell at this point in her time. It's all generalization. So the expert's testimony, give it the credit that you want to give it, but it's not specific to either one of these girls here." Defense counsel later argued: "Finally, the experts. Eh, they are what they are. They're not a good—talk in generalizations. Take them for what they're worth. They didn't see [T]. They didn't see [A]. The doctor, the doctor's useless. She was a nice woman, very smart, went to Harvard. She explained to you what the vagina is, and she told you that there would be no injury. But we didn't expect to see any injury [ten] years later, so that's not news to anybody, not you guys, nobody."

In the state's rebuttal closing argument, the prosecutor made the following remarks: "I don't think we can throw our hands up and say, eh, the experts. Yeah, they're useless. What do they really tell us? They talk in generalities. Well as you'll hear the judge instruct you, we have to talk in generalities. These, these experts can't come and meet with our complainants. It's not proper. It usurps your role as a juror. It's your decision as to what to believe and who to believe and who gets credibility. So it'd be improper to have an expert speak to that persons or people specifically. So the law only allows us to bring in experts to talk about the dynamics of child sexual abuse in generalities." The defendant

specifically takes issue with the prosecutor's comment that "these experts can't come and meet with our complainants. It's not proper."

In *State* v. *Spigarolo*, 210 Conn. 359, 380, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989), our Supreme Court held that, "where defense counsel has sought to impeach the credibility of a complaining minor witness in a sexual abuse case, based on inconsistency, incompleteness or recantation of the victim's disclosures pertaining to the alleged incidents, the state may offer expert testimony that seeks to demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents." "Our cases following *Spigarolo* continue to recognize the value of generalized expert testimony to explain to the jury what might seem to the layperson to be atypical behavior exhibited by victims of various kinds of assaults, so long as that opinion testimony does not directly vouch for their credibility or veracity. . . . Subsequent case law has, however, emphasized the danger of an expert witness, *particularly one who has treated or evaluated a complainant*, vouching indirectly for that complainant's credibility as well." (Citations omitted; emphasis altered.) *State* v. *Favoccia*, 306 Conn. 770, 788, 51 A.3d 1002 (2012).

Notably, the state does not attempt to argue on appeal that expert witnesses in child sexual assault cases are prohibited as a matter of law from meeting with the complainants. Indeed, our law contains no such prohibition. Instead, the state contends that the prosecutor's remarks, when viewed in context, correctly stated that the experts could not vouch for the victims' credibility.[10]

[10] As our Supreme Court has held, "our concerns about indirect vouching . . . require us to limit expert testimony about the behavioral characteristics of child sexual assault victims admitted under *State* v. *Spigarolo*, supra, 210 Conn. 378–80, to that which is stated in general or hypothetical terms, and to preclude opinion testimony about whether the specific complainant has exhibited such behaviors." (Citations omitted.) *State* v. *Favoccia*, supra, 306 Conn. 803.

We do not agree with this characterization. The prosecutor explicitly stated that the state's experts could not meet with the victims because doing so would usurp the jury's role in assessing credibility. Although the state correctly articulated that the experts could speak about the behavioral characteristics of child abuse victims only in general terms, such a principle is rooted in our courts' concern for improper vouching, and not borne out of a rule precluding the experts from meeting with the complainants of sexual assault.

The state relies on *State* v. *Frasier*, 169 Conn. App. 500, 519, 150 A.3d 1176 (2016), cert. denied, 324 Conn. 912, 153 A.3d 653 (2017), in support of its position that the prosecutor did not misstate the law. In *Frasier*, the prosecutor, during his closing arguments, argued that he was unsure what the defendant's theory of defense was. Id., 516–17. Throughout his arguments, the prosecutor repeatedly reminded the jury that the state bore the burden of proof. Id., 517. On appeal, the defendant argued that the state committed an impropriety when it "unfairly shifted" the burden of proof to the defendant by arguing that the defendant needed to produce a "successful theory of defense for the jury . . . ." (Internal quotation marks omitted.) Id., 516–17. This court disagreed, concluding that "it [was] unlikely the jury would have understood the argument in the manner claimed by the defendant." Id., 519. Specifically, "the prosecutor speculated what the defendant might argue on his closing argument and questioned the plausibility of the defendant's arguments." Id.

The state's reliance on *Frasier* is misplaced. In *Frasier*, the state did not imply that the defendant needed, as a matter of law, to raise a defense; rather, it questioned the viability of the defense presented. Id. In contrast, the prosecutor in the present case expressly stated that "*experts can't come and meet with our complainants. It's not proper.* It usurps your role as a juror. It's your decision as to what to believe and who

to believe and who gets credibility. *So it'd be improper to have an expert speak to that persons or people specifically*." (Emphasis added.) Unlike the comments made in *Frasier*, which the defendant unsuccessfully argued had implicitly misstated the law, the comments in the present case explicitly misstated the law. While the remarks may have been intertwined with proper remarks relating to the jury's role in assessing credibility, we are persuaded that the jury likely could have misunderstood the reason for the experts' general testimony to be a function of their purported inability under the law to meet with T or A. Because "prosecutors are not permitted to misstate the law"; *State* v. *Otto*, 305 Conn. 51, 77, 43 A.3d 629 (2012); and our law does not prohibit expert witnesses from meeting with children who are complainants of sexual assault, the state's comments in closing arguments to the contrary were improper. Having found prosecutorial impropriety, we set forth our analysis of the *Williams* factors in part II of this opinion.

B

The defendant also claims that it was improper for the prosecutor to remark on her own credibility and the credibility of one of the state's witnesses. The state argues that these statements were proper responses, tied to evidence in the record, to defense counsel's closing argument which essentially accused the prosecutor of putting words in T's mouth and Detective Crevier of putting falsehoods in the witnesses' statements. We agree with the state.

The following additional facts are relevant. On direct examination, the following exchange occurred between the state and T:

"Q. Do you recall, [T], giving a statement to the police ultimately about these events in your early childhood back in July and August of 2015?

"A. Yes, I do.

"Q. And when you were interviewed by the [state] police, were you asked to estimate your age when these different sexual acts occurred?

"A. Yes.

"Q. Were you also asked to provide dates and years that these acts occurred?

"A. Yes, I was.

* * *

"Q. Okay. So initially what age did you believe that this began?

"A. Between the ages of five and six.

"Q. And from there you did the math to figure out the year?

"A. Yes.

"Q. And what year did you provide them?

"A. 2001.

"Q. And when did you indicate to them that you believed it ended?

"A. When I turned ten.

* * *

"Q. Did there come a point in time when you realized that those were not accurate ages, either the start time or the end time?

"A. Yes, I did.

"Q. And how was it that you came to realize that?

"A. I realized it when I thought back and remembered that it had happened when I was in second grade which puts me a little bit older.

"Q. Okay. In fact when—did you report that to me that you remembered being in second grade?

"A. Yes, I did.

* * *

"Q. Are you confident in your testimony today that the abuse had began when you moved to Willington and started second grade?

"A. Yes, I am.

"Q. And that it concluded when you moved to North Carolina?

"A. Yes."

Thereafter, the state called Detective Crevier to testify with respect to his interviews of the victims and the defendant. During direct examination by the prosecutor, Detective Crevier testified about his interview procedure as follows:

"Q. [W]hat is your normal procedure when interviewing a complainant of sexual assault? Do you type as they speak to you, or do you have a conversation with them and then reduce it to writing afterward?

"A. Me, personally, I would interview them first, would gain the particulars of the events, the situation, the who, what, when, where, and then I would transpose that into a written statement on the computer, reviewing it at times if I have to with the complainant. And ultimately my partner or whoever else is sitting in with us would obviously bring up some reminders if we had to add anything in as well the complainant at the time."

Defense counsel elicited the following testimony from Detective Crevier with respect to T's statements on cross-examination:

"Q. Okay. So it's not her recollection that she just says, oh this took place in 2001, I know I was five, and you accept that. You say, sure it wasn't your birthday or you sure it wasn't summer or could it have been fall. You, you sort of ask those kind of questions.

"A. If, if there's any discrepancies on any time frames, we would try to narrow it down—

"Q. Okay.

"A. —to a specific timeframe or year or class, age, what have you.

"Q. Okay. If there was a problem with say the statute of limitations in 2001, would you want to change that date so that it would happen in 2003?

"A. No.

"Q. Okay. But she initially told you it took place in 2001, and that's in her statement. Correct?

"A. I believe so, correct.

"Q. All right. And then—

"A. Began in 2001.

* * *

"Q. [T] comes back and gives you another statement on August 10, 2015 and says that she believes that she was some of these instances probably took place in 2003.

"A. Correct. . . .

* * *

"Q. Now, when you're talking to her, is she telling you—and again, this is not her speaking to you and you typing verbatim what she's saying. This is a back and forth and coming to conclusions or coming to a something that is either suggested or that, that triggers her memory and then she says, yeah that sounds right, and then it's put into the statement as she agrees with it.

"A. The interview would be back and forth, and then as I'm typing it I might review it a little bit with her. And if there's any concern that I want to clarify, I'll, I'll turn back to her and go over what we went over for just so I know it's correct. And then we would do the same at the end too and after, as well as when we print it up and she reads it all, so.

"Q. Okay.

"A. So it, it could change several times, yes.

"Q. And—

"A. Or additions could be made."

Detective Crevier also testified on cross-examination with respect to his interview of the defendant as follows:

"Q. So you, you then tell [the defendant] that when this is done that he has time to read this report and are these his, is this his statement.

"A. Correct.

"Q. Correct?

"A. Correct. There's anything he wants to change, I make note of it. We'll go back in and change it and everything like that.

"Q. But it's not his statement. These are not his words. These are your words.

"A. Correct.

"Q. Okay.

"A. Correct.

"Q. So—

"A. We don't, we don't let anybody type out a statement.

"Q. All right. Or to handwrite a statement?

"A. They may handwrite, come in, and then we may type it and, and tweak it some and everything like—it's been done like that before unless they have an affidavit signed by a notary or something in previous cases.

"Q. So you tweak it. You change it.

"A. We would—correct. We make sure it fits the elements of the crimes and to add things in there to the events we're looking into and to our knowledge of the situation.

"Q. So you tweak it so that it fits what would fit the elements of the crime.

"A. Well, no. We would, we would, we would type it so that it is consistent to what we spoke about.

"Q. Okay.

"A. His—during his interview.

"Q. Okay.

"A. I mean, we're not putting in any, anything that wasn't spoken about or anything like that.

"Q. But I think you just said we would tweak it to fit the elements of the crime.

"A. Well, obviously, if I want to know how many times an incident happened, I'd have to talk to the suspect and get his possible recollection on how many times it would happen.

"Q. Okay.

"A. Because then it would fit the elements of the crime for counts and everything like that.

"Q. Okay. Well counts aren't an element of a crime. Is it?

"A. No . . . ."

Finally, on redirect examination, Detective Crevier testified with regard to T's statements as follows:

"Q. And in this, this particular case, you did in a second interview with [T] help to—attempt to pinpoint when some of those subsequent acts occurred, the ones that were different than what was usually going on with her.

"A. Correct.

"Q. And so you did do that in this case. Correct?

"A. Correct.

"Q. And were you always operating under the assumption that the start date, the start time was in 2001, because she believed she was approximately five or six years of age?

"A. Correct.

"Q. Did you ever try to dissuade her from that? Did you have to explore that any further with her, or did you always operate under that assumption?

"A. She was pretty adamant that that was the date it started.

"Q. Did you ever feel the need to go further with her to determine perhaps what grade she was in at the time?

"A. No, I did not."

Defense counsel devoted a portion of closing argument to discrediting T's testimony regarding the timing of the abuse, as well as Detective Crevier's investigatory methods. Defense counsel argued that "[T] says she was five. She signed a signed sworn statement. Signed the statement saying she was five. It was the state who told her that she was in second grade, because it's the only way her story made sense. The state said do you and I have a chance to talk to each other. Does, did that remind you? Did that make you remember that you

would go to second grade? Yes. So you must've been eight as you were living with your grandfather. That's the only way the story makes sense."

Defense counsel further argued: "And then [Detective Crevier] said a couple of other really interesting things. When I asked is this, is this [the defendant's] statement or is this statement yours, he said that's mine. It's mine. . . . That's beyond—that's unconscionable. This is a signed, sworn statement, something that a person supposedly giving to you to account for an event. And when a person that's a suspect, your prime suspect in a case who's going to be arrested based on his statement, comes to you, and you say—use your words instead of his and [then] have him sign it. That's almost criminal, almost. Then, on top of it, he said well, we tweaked his statements, I tweaked the statements to fit the element of the crime. I tweak the statements to fit the element of the crime? Really? So if the guy's not giving you the right answer, you're going to put it in there. . . ." Defense counsel continued: "[Detective Crevier] is skilled. He has taken how many courses. He's been a—he's been a detective for twenty years. Twenty years, he's never made a mistake. That's because he's skilled at interviewing, getting confessions, getting people to tell him what he really wants to hear, tweaking those confessions, tweaking those statements, taking those advanced, advanced interviewing technique classes that he says he's taken so many of. Oh he was proud to tell us what he could do, and he did it."

During rebuttal argument, the prosecutor made the following comments that the defendant claims were improper. "I'm not quite sure I know where to begin. . . . I've been accused of putting words in my witnesses' mouths. But for accusations that the state police have put words in statements that aren't true in order to accomplish what they're trying to accomplish. These are very serious accusations, and I would submit to you that there is no place in the evidence to support

those accusations. And frankly, I find it offensive." With respect to Detective Crevier's interview, the prosecutor argued: "He's not going to write things in there like what kind of weather it was out that day if it's not relevant to the crime. He's not going to talk about erroneous things that aren't related to the crimes that are being investigated. When he says he tweaked the statement to include—to fit the elements of the crime, he means he [is] putting information in there to meet the elements of the crime. Because that's what we need as state's attorneys. Can we prove this case? Can we—do we have sufficient evidence to meet the elements of the crime. Because we take this seriously. We take meeting the elements of every charge in every information very seriously, because that is our job. And we take the credibility of our witnesses very seriously as we review their testimony and their statements to ensure that there's consistency and that it makes sense. That is our job. And that is the job of the detective."

The defendant claims that these comments constituted improper vouching for the state's credibility. We do not agree. "The prosecutor may not express his own opinion, either directly or indirectly, as to the credibility of witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony. . . . These expressions of opinion are particularly difficult for the jury to ignore because of the special position held by the prosecutor. . . . The jury is aware that he has prepared and presented the case and consequently, may have access to matters not in evidence . . . which the jury may infer to have precipitated the personal opinions. . . . While the prosecutor is permitted to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom, he is not permitted to vouch personally for the truth or veracity of the state's witnesses." (Citation omitted; internal quotation marks omitted.) *State* v. *Payne*, 260 Conn. 446, 454, 797 A.2d 1088 (2002).

Our careful review of the record reveals that the prosecutor's statements in rebuttal closing argument did not constitute improper vouching. "A prosecutor's mere use of the words 'honest,' 'credible,' or 'truthful' does not, per se, establish prosecutorial impropriety." *State* v. *Ciullo*, 314 Conn. 28, 41, 100 A.3d 779 (2014). Although the state explained that it takes the issue of witness credibility seriously, its response was reasonable in light of the defendant's sharp comments that Detective Crevier's method of transcribing statements was "unconscionable" and "almost criminal," and the corresponding inference that he would nefariously "tweak" and place favorable information into the statements. See *State* v. *Thompson*, 266 Conn. 440, 469, 832 A.2d 626 (2003) (state did not improperly vouch for police when it explained, in part, that detectives " 'want to see that justice is served' " because remarks were in response to defendant's theory that statements obtained by police were product of coercion). The state also stated, on numerous occasions throughout its rebuttal argument, that it was the jury's job to assess credibility.

In support of his claim that the prosecutor's rebuttal argument was improper, the defendant cites to several cases in which the court concluded that the statements at issue improperly expanded the record during closing argument. See, e.g., *State* v. *Ancona*, 270 Conn. 568, 600–601, 854 A.2d 718 (2004) (prosecutor's reference to " 'blue code' " of silence among police officers who witness criminal conduct by another officer was improper when no evidence of " 'blue code' " was presented at trial), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005); *State* v. *LaVallee*, 101 Conn. App. 573, 582, 922 A.2d 316 (prosecutor's statement that officer had warned witness of penalties accompanying filing of false statement was not adduced at trial), cert. denied, 284 Conn. 903, 931 A.2d 267 (2007).

These authorities are readily distinguishable from the present case. Here, the prosecutor's comments, which were in direct response to the arguments of defense counsel, did not expand the record by arguing that the state takes its job seriously. As reflected in the portions of direct examination and cross-examination recited previously in this opinion, the defense clearly sought to undermine Detective Crevier's interview techniques, as well as T's claim of when the sexual abuse began. During closing argument, defense counsel suggested that Detective Crevier would "tweak" statements provided to him in order to strengthen the state's case. On the basis of our review of the record as a whole, we are not convinced that the prosecutor's rebuttal to those allegations—in particular, that the state took its prosecutorial responsibilities and witnesses' credibility seriously—was improper; her comments were directly tied to the defense's interpretation of the evidence adduced at trial and did not improperly extend beyond the record.[11] See *State* v. *Moore*, 293 Conn. 781, 814–15, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010).

II

Having found that prosecutorial impropriety occurred, as explained in part I A of this opinion, "we ask whether the trial as a whole was fundamentally unfair and [whether] the [impropriety] so infected the

[11] Assuming, arguendo, that the state's comments described in part I B of this opinion constituted improper vouching for the credibility of the state and the police, we would nevertheless conclude that the defendant's due process claim would fail under our assessment of the *Williams* factors. Specifically, the comments were invited by defense counsel because of her own comments regarding T's and Detective Crevier's credibility during closing argument. The state's comments were not frequent, as they only occurred during rebuttal closing argument. Although the credibility of the witnesses was a central issue in this case, as it was without physical evidence, the trial court explained that the arguments of counsel were not evidence and that it was the jury's job to assess credibility. Finally, the state's case was fairly strong because it was buttressed by the testimony of various witnesses that corroborated the victims' testimony and version of events. See part II of this opinion.

trial with unfairness as to make the conviction a denial of due process." (Internal quotation marks omitted.) *State* v. *Felix R.*, 319 Conn. 1, 16, 124 A.3d 871 (2015). Our determination of whether the defendant's due process right to a fair trial was denied as a result of the impropriety is aided by an examination of the following six factors elucidated in *Williams*: "[1] [T]he extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Internal quotation marks omitted.) Id., quoting *State* v. *Williams*, supra, 204 Conn. 540. After applying these factors to the prosecutor's misstatements that the state's experts were prohibited as a matter of law from meeting with the victims, we agree with the state that the defendant was not deprived of his due process right to a fair trial.

Turning to the first *Williams* factor, the state contends that the defense invited the impropriety when defense counsel argued in closing "[a]nd yet, she can't testify in specifics about either one of these girls, not because she not only didn't see them *because she's not allowed to*, but it's all generalizations." (Emphasis added.) We agree that such remark reflects that it was the defense who initially argued that one of the state's experts was precluded from meeting with the victims.

With respect to the second *Williams* factor, the severity of the impropriety is lessened by the fact that the defendant did not object to the state's closing argument. "Indeed, counsel's failure to object at trial, while not by itself fatal to a defendant's claim, frequently will indicate on appellate review that the challenged comments do not rise to the magnitude of constitutional error . . . [necessary] . . . [to] clearly depriv[e] . . . the defendant of a fair trial . . . ." (Internal quotation

marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 112, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018). Even assuming that the misstatement of the law was severe, "the severity of the impropriety is often counterbalanced in part by the third *Williams* factor, namely, the frequency of the [impropriety] . . . ." (Internal quotation marks omitted.) Id., 113. To that end, the prosecutor's misstatement of the law was not frequent and was confined to her rebuttal argument. The defendant does not argue otherwise, and it is evident that the improprieties, stated in quick succession, were not sufficiently severe or frequent to deprive the defendant of a fair trial. Therefore, we weigh the second and third factors in favor of the state.

The fourth *Williams* factor, the centrality of the impropriety to the critical issues in the case, weighs slightly in favor of the defendant. The state's experts opined on how children victimized by sexual abuse generally respond to the abuse and their abusers. The prosecutor's statements that the experts had to speak in generalizations because they were not permitted to meet with the victims was directly aimed at reinforcing the credibility of T and A vis-à-vis the experts' opinions. Because this case was based solely on testimony and was not corroborated by any physical evidence, the prosecutor's statements were aimed at the central issue of credibility. When viewed in the context of the entire trial, however, the impact of the impropriety was minimal. That is, the jury acquitted the defendant of two counts in the case against T, demonstrating its ability to "filter out the allegedly improper statements and make independent assessments of credibility." *State* v. *Ciullo*, supra, 314 Conn. 60.

The fifth *Williams* factor also weighs in favor of the state. Although the trial court did not address the prosecutor's misstatement with any specific curative instructions, any improper effect was reduced by the court's

final instructions to the jury following closing arguments. Specifically, the court explained that it was solely the jury's function to assess credibility and that none of the arguments made by the attorneys constituted evidence. Moreover, the court correctly instructed the jury that the law required the experts to testify in general terms. See, e.g., *State* v. *Dawson*, 188 Conn. App. 532, 566–70, 205 A.3d 662 (prosecutor's misstatement of law of constructive possession three times during closing argument constituted impropriety that did not deprive defendant of fair trial, especially given trial court's correct statement of law to jury), cert. granted on other grounds, 333 Conn. 906, 215 A.3d 731 (2019). "In the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that it heeded them." (Internal quotation marks omitted.) *State* v. *Thompson*, supra, 266 Conn. 485.

Finally, the sixth factor weighs in the state's favor because the state's case was fairly strong, even without physical evidence. As our Supreme Court has said, "[i]n sexual abuse cases . . . the absence of conclusive physical evidence of sexual abuse does not automatically render [the state's] case weak . . . ." (Internal quotation marks omitted.) *State* v. *Felix R.*, supra, 319 Conn. 18. "The sexual abuse of children is a crime which, by its very nature, occurs under a cloak of secrecy and darkness."[12] Id. Significantly, "our Supreme Court has never stated that the state's evidence must have been overwhelming in order to support a conclusion that prosecutorial [impropriety] did not deprive

[12] In *Felix R.*, our Supreme Court further explained that, on the facts of that case, "[i]t is not surprising, therefore, for there to be a lack of corroborating physical evidence in cases that are factually similar to the present case, where the victim submitted to the sexual abuse of her father in the face of his threats to physically harm her and send her back to the Dominican Republic if she told anyone. Given the rarity of physical evidence in these circumstances, a case is not automatically weak just because a child's will was overborne and he or she submitted to the abuse of his or her own parent. To conclude otherwise would place an insurmountable obstacle in the path of many sexual assault prosecutions." *State* v. *Felix R.*, supra, 319

the defendant of a fair trial." (Internal quotation marks omitted.) *State* v. *Ross*, 151 Conn. App. 687, 705, 95 A.3d 1208, cert. denied, 314 Conn. 926, 101 A.3d 271 (2014).

As set forth previously in this opinion, both T and A testified about the sexual abuse they endured by the defendant. Although there was no physical evidence corroborating their testimony, it was supported by several other witnesses offered by the state in its case-in-chief as evidenced by the following additional facts. T and A repeatedly explained that they delayed disclosing the abuse because they were afraid of the possible repercussions. Murphy-Cipolla substantiated those reasons as bases for delayed disclosure in her testimony. Additionally, the defendant's daughter, M,[13] testified that A had told her on the night of July 14, 2015, that the defendant touched her breast. She also testified that, just prior to T and A's move to North Carolina, neither girl wanted to spend time at the defendant's home and that such behavior "seemed different" than it had been in the past. The defendant's daughter-in-law, J, testified that, in the summer of 2015, T told her that she had been sexually assaulted by the defendant and feared for J's children, who were living with the defendant at that time. Moreover, T's girlfriend, C, testified that she met T in 2012 and that sometime in 2013, T told C that the defendant sexually assaulted T during the time period and in the manner consistent with T's testimony.[14] Therefore, even if we were to assume that

Conn. 18–19. Although the factual circumstances in *Felix R.*, evidenced from this quoted passage, are different from those in the present case, our Supreme Court's guidance is no less apropos here.

[13] The victims are M's nieces.

[14] In its final instructions to the jury, the court gave the following charge with respect to, inter alia, C's, J's, and M's testimony: "[I]n cases involving an allegation of a sexual offense, the state is permitted in certain circumstances to introduce evidence of out-of-court statements to other persons about what occurred. The only reason that the evidence is permitted is to negate the inference that the complainant failed to confide in anyone about the sexual offense. In other words, the narrow purpose of the constancy evidence is to negate any inference that [T] or [A] failed to tell anyone about

the lack of physical evidence and the length of time between the crime and the disclosure tempered the strength of the state's case, "it was not so weak as to be overshadowed by a single improper comment . . . ." *State* v. *Carlos E.*, 158 Conn. App. 646, 669, 120 A.3d 1239, cert. denied, 319 Conn. 909, 125 A.3d 199 (2015).

The judgments are affirmed.

In this opinion the other judges concurred.

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the sexual offense and, therefore, that [T's] or [A's] later assertion to the police could not be believed.

"Constancy evidence is not evidence that the sexual offense actually occurred, or that [T] or [A] is credible. It merely serves to negate any inference that, because of [T's] or [A's] assumed silence, the offense did not occur. It does not prove the underlying truth of the sexual offense. Constancy evidence only dispels any negative inference that might be made from [T's] or [A's] assumed silence."

In his reply brief, the defendant appears to contend that the state's claim that its case was strong in light of, inter alia, C's, J's, and M's testimony was misleading because their testimony could be used only as constancy evidence. Not only is this claim inadequately briefed; see, e.g., *Getty Properties Corp.* v. *ATKR, LLC*, 315 Conn. 387, 413, 107 A.3d 931 (2015); we reiterate that "[c]onstancy of accusation testimony can properly be used to corroborate the victim's testimony." *State* v. *Salazar*, 151 Conn. App. 463, 472, 93 A.3d 1192 (2014), cert. denied, 323 Conn. 914, 149 A.3d 496 (2016). Congruent with that principle, the state's argument that the constancy witnesses' testimony strengthened their case is proper. We also note that the record reveals that in the defendant's cross-examination of T and A, they were asked several times about reporting the abuse. The victim in a sexual assault case may testify on "direct examination regarding the facts of the sexual assault and the identity of the person or persons to whom the incident was reported. . . . Thereafter, if defense counsel challenges the victim's credibility by inquiring, for example, on cross-examination as to any out-of-court complaints or delayed reporting, the state will be permitted to call constancy of accusation witnesses . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Daniel W. E.*, 322 Conn. 593, 629, 142 A.3d 265 (2016).

MICHELE MORTON *v.* NEIL SYRIAC
(AC 40608)

Alvord, Elgo and Devlin, Js.

Syllabus

The plaintiff sought a temporary and permanent injunction to, inter alia, prevent the defendant, her former husband, from limiting her access to a shared driveway, and for other relief. Pursuant to a separation agreement that was incorporated into the parties' dissolution judgment, the defendant quitclaimed his ownership interest in certain real property to the plaintiff, including an area known as the east branch. He provided an express easement that allowed the plaintiff to reach her quitclaimed property with access over the shared driveway on the property that he retained, known as the west branch, until he installed a similar driveway for her to use on the east branch. The plaintiff's property is landlocked without access to a right-of-way over either the east branch or the west branch. The plaintiff's and the defendant's properties lie northerly of and abut a portion of a discontinued highway known as the Old Connecticut Path. The defendant repeatedly obstructed the plaintiff's access to the quitclaimed property by various means, including placing objects, such as boulders and a gate, across the shared driveway. The trial court rendered judgment in favor of the plaintiff, granting her a permanent injunction, from which the defendant appealed to this court. Thereafter, the trial court denied the defendant's motions to open and to disqualify. *Held*:

1. The defendant could not prevail on his claim that the trial court wrongly issued a permanent injunction:

   a. Although, as the defendant claimed, the plaintiff did not allege irreparable harm or lack of an adequate remedy at law, the complaint provided adequate notice of the plaintiff's claim for a permanent injunction: the plaintiff explicitly sought a permanent injunction in her prayer for relief and clearly alleged that the defendant had consistently impeded her ability to use the shared driveway to access her property; moreover, the complaint further explained that the plaintiff asserted her right to use the shared driveway on the basis of the parties' separation agreement, providing the defendant with sufficient notice of the factual basis of the plaintiff's claims, the defendant's claim having been premised on a legal technicality, rather than a claim of prejudice or lack of notice.

   b. Although the defendant claims that, during the course of the trial, the plaintiff did not establish that, without a permanent injunction, she would suffer irreparable harm and lacked an adequate remedy at law, the trial court correctly determined that a permanent injunction was warranted: the plaintiff sustained her burden of proving that the defendant had yet to install a similar driveway on the east branch as required

by the separation agreement, and, although the defendant installed a serviceable means of allowing vehicular passage, the plaintiff does not yet and may never possess any marketable title that would allow the installation of a driveway on the east branch; moreover, there is a substantial likelihood that, in the absence of judicial intervention, the plaintiff stands to lose a valuable asset in the form of the quitclaimed property, which the defendant is uniquely poised to reacquire at a fire-sale price.

2. The defendant could not prevail on his claim that the trial court improperly allowed the plaintiff to modify the dissolution judgment by granting an injunction: as the defendant has not complied with the terms of the separation agreement because he has not installed a similar driveway as required in that agreement, the trial court effectuated, rather than modified, the terms of the separation agreement by determining that the plaintiff continues to have a right to access her property by crossing the defendant's property until the defendant satisfies his obligations under the separation agreement.

3. The defendant could not prevail on his claim that the trial court erred by allowing the plaintiff to present evidence that allegedly contradicted judicial admissions in her pleadings: although the defendant claimed that the plaintiff admitted in her pleadings that she had fee title to the east branch and that the defendant had complied with the separation agreement, the plaintiff's admission of fee simple ownership of the east branch has no bearing on the marketability of her property, and the plaintiff's admission that a driveway was constructed by the defendant was not conclusive of whether that driveway was "similar" to the defendant's driveway as required by the terms of the separation agreement and, therefore, those admissions were not dispositive of the marketability of the property or the similar characteristics of the driveway constructed on the east branch.

4. The trial court did not abuse its discretion by denying the defendant's motion to disqualify the trial judge nor did it err in denying the defendant a hearing before another judge: although the defendant alleged that the trial judge that ruled on the injunction should have been disqualified because that judge presided at the defendant's sentencing in his criminal trial on a charge of breaking into the plaintiff's residence and because the plaintiff's trial counsel worked as the deputy chief clerk at the same courthouse that the trial judge was assigned to in 2011, the defendant, claiming to be unaware of either of the alleged disqualifying factors until after judgment was rendered, waived his claim that the trial judge should be disqualified on the basis of his connection to the defendant's criminal trial, as the defendant had cause to know of his own prior interactions with the trial judge and consented to whatever impropriety, if any, existed as a result of those interactions, and, regarding the plaintiff's trial counsel, the only evidence offered in support of defendant's motion was that, for a very brief window of time, the trial judge and the plaintiff's trial counsel worked in the same building, any interaction

between the trial judge and the plaintiff's trial counsel occurred more than six years before the trial court case was decided, the defendant did not offer any further evidence to support his claim that the trial judge's impartiality was compromised by a suspected single interaction between the trial judge and the plaintiff's trial counsel, and the plaintiff's trial counsel worked as the deputy chief clerk for civil matters whereas the trial judge had been assigned to a criminal trial in the same courthouse; moreover, the trial court did not err in denying the defendant a hearing before another judge on the motion to disqualify regarding the allegations concerning the plaintiff's counsel because, in the absence of further allegations to substantiate the defendant's claim, there was no fair support to his claim that would have entitled him to a hearing.

Argued November 13, 2019—officially released March 3, 2020

Procedural History

Action seeking a temporary and permanent injunction to, inter alia, prevent the defendant from limiting the plaintiff's access to a shared driveway, and for other relief, brought to the Superior Court in the judicial district of Windham, and tried to the court, *Boland, J.*; judgment for the plaintiff, from which the defendant appealed to this court; thereafter, the court, *Cole-Chu, J.*, denied the defendant's motions to open and to disqualify. *Affirmed.*

Brian S. Mead, for the appellant (defendant).

Michael D. O'Connell, with whom, on the brief, was *Stan Michael D. Maslona*, for the appellee (plaintiff).

Opinion

DEVLIN, J. The defendant, Neil Syriac, appeals from the judgment of the trial court granting a permanent injunction enjoining him from obstructing the use of a shared driveway that runs across the defendant's property by the plaintiff, Michele Morton, who is his former wife. The defendant asserts that the trial court erred by (1) issuing a permanent injunction when the plaintiff neither alleged nor proved that she would suffer irreparable harm and that she lacked an adequate remedy at law, (2) modifying the separation agreement previously

stipulated to by the parties and incorporated into an earlier judgment of dissolution, (3) allowing the plaintiff to introduce evidence that contradicted judicial admissions contained in her complaint, and (4) denying his motion to disqualify the trial judge without a hearing. We affirm the judgment of the trial court.

The following facts and procedural history are relevant. This appeal arises from a property dispute originating with the April 13, 2010 dissolution of the parties' marriage. At that time, the parties entered into a separation agreement, incorporated into the dissolution judgment, that in relevant part divided between the parties two parcels of land located in Woodstock. The separation agreement provided that the defendant would quitclaim his ownership interest in 95 Rocky Hill Road to the plaintiff and the defendant would retain sole interest in 97 Rocky Hill Road. The separation agreement further provided that "[t]he defendant agrees to allow the plaintiff and or her agents access to the property located at 95 Rocky Hill Road, Woodstock . . . through 97 Rocky Hill Road, until . . . [the defendant], at his sole expense, install[s] a driveway *similar* to the driveway presently at use at 97 Rocky Hill Road, from the property located at 95 Rocky Hill Road to [Route] 171 in Woodstock . . . ." (Emphasis added.) The subsequent quitclaim deed that transferred ownership of 95 Rocky Hill Road to the plaintiff provided an express easement that conveyed "the right with others to pass and repass by foot and/or vehicle, and to install and maintain utilities, over and across that portion of the premises now or formerly of [the defendant] known or formerly known as 'Old Connecticut Path' from the herein described tract [95 Rocky Hill Road] westerly to Rocky Hill Road."

The trial court in the present action, *Boland*, *J.*, described the properties as follows: "[95 Rocky Hill Road's] westerly boundary is entirely coextensive with a portion of the easterly boundary of [the] defendant's tract . . . . Both these tracts lie northerly of and abut

upon a portion of a discontinued highway called the Old Connecticut Path, or OCP.

"The nearest public highway to the west of the two parcels is a town road named Rocky Hill Road. Rocky Hill Road runs northerly and westerly from State Route 171. Route 171, which runs generally in a north-south direction, is the nearest public highway to the east. The OCP connects these two thoroughfares, and if all three roads ran perfectly straight they would form the shape of a triangle.

"The plaintiff's property consists of about an acre of land lying almost dead center on the portion of the OCP connecting the two public roads. Absent a right-of-way either to the east or the west over the OCP, her piece is landlocked. The defendant's property is much larger, and in parts lies north, west, and south of the OCP. Similarly, his only access to a public highway is via the OCP. To the west of his land, and to the east of the plaintiff's, lie lands belonging to abutters who are not parties to this action.

"The defendant holds title to the stretch of the OCP leading in the westerly direction (the west branch), and that part of the path enables him to access Rocky Hill Road. The plaintiff has a claim to ownership of the portion of the path which leads to Route 171 on the east (the east branch), but present or former abutters also possess claims to that strip adverse to hers." (Internal quotation marks omitted.)

On August 10, 2015, the plaintiff filed a verified complaint seeking a "permanent injunction ordering the defendant to refrain [from] engaging in any action or omission thereto including building, erecting, constructing or allowing to be built any structures, temporary or permanent, within the easement area that would in any way limit or impede foot and/or vehicle access to 95 Rocky Hill Road from the Rocky Hill Road entrance

or circumvent or hamper the plaintiff's use and enjoyment of the easement." In her complaint, the plaintiff alleged that the defendant has repeatedly obstructed her access to 95 Rocky Hill Road through various means, including placing hay baling equipment, boulders, wire fencing, and a black metal gate across the shared driveway that runs across 97 Rocky Hill Road. The plaintiff further alleged that she has previously obtained a postjudgment order from the family court instructing the defendant to cease his obstruction of the easement. In response, the defendant alleged that, per the terms of the separation agreement, he has provided the plaintiff a "similar" driveway across the east branch and, thus, the plaintiff no longer has a right to cross the west branch.

On June 9, 2017, following a trial to the court, the court issued a memorandum of decision granting a permanent injunction. The court's judgment was based on the following findings of fact regarding the ownership of the two parcels of land at issue. "First, it was in 1922 that the town of Woodstock discontinued all public use of the [OCP]. Upon that event, any public easement encumbering the path was extinguished. In 1922, one William Buell owned all the land along both sides of the path between Rocky Hill Road and Route 171. At later times in the mid-twentieth century, William Buell or his heirs subdivided that large parcel. . . . [T]hey conveyed the easterly half to the predecessors in interest of [Jon] Grosjean, [Karen] Christie, and [Karen] Roy. Along with those conveyances went such title as Buell had to the east branch of the OCP. Separately, and at a later date . . . the westerly half of [Buell's] holdings, approximately 34.4 acres in size . . . were acquired by [the] defendant's father, Cyrille Syriac. As a result of these various transfers, Cyrille Syriac owned both the fee simple and all rights of usage to the western branch of the path.

"Conveyances in Cyrille Syriac's chain at times included a clause transferring to him 'any interest the

grantor may have in and to that section of the [OCP] running from Rocky Hill Road easterly for about 1500 feet,' that is, to the entire stretch of the path between the two public roads. . . .

"Eventually, in 1984, Cyrille Syriac conveyed his interest in the parcels to [the defendant]. As in the prior deeds of which he was the grantee, Cyrille attempted to provide that [the defendant] would also enjoy the right to use the entirety of the OCP by tendering him his 34.4 acres '[t]ogether with any interest the grantor may have in and to that section of the [OCP] running from Rocky Hill Road easterly for about 1500 feet.' . . .

"Next in the chain of title is a quitclaim deed dated December 31, 1986, by which [the defendant] conveyed to his brother, Eric, a tract about one acre in size. This is the parcel upon which stands the house now known as [95 Rocky Hill Road], and is the same tract the 2010 separation agreement and family court decree awarded to [the] plaintiff; the deed alludes to it as 'Tract A.' In addition to Tract A, the deed grants as 'Tract B' the east branch of the OCP, employing a newly devised metes and bounds description prepared from a survey [the defendant] had obtained sometime between 1984 and 1986. . . .

"The map depicts an inhibiting, triangular wedge of the path as belonging to Anna Petrone, an abutting predecessor in interest to Karen Roy; the Petrone piece alone cuts by half the usable width of so-called Tract B. On June 10, 1987, [the defendant] delivered to his brother an instrument captioned 'Grant of Easement' conveying to Eric a right-of-way over the west branch . . . which [the defendant] today opposes when demanded by [the plaintiff].

"No evidence was offered as to whether Petrone or Roy has had any interaction with the plaintiff or with either Syriac brother. However, in December of 1987, abutter [Jon] Grosjean declared an overt challenge to

Eric's claim to ownership of or right to use the east branch. Grosjean wrote to Woodstock's first selectman asserting his own interest in the path and objecting to Eric's making use of it. The controversy over the east branch did not abate, for in 1993 an attorney for Grosjean wrote directly to Eric Syriac challenging his erection of a fence at the Route 171 intersection of the path and threatening legal action to contest any claim that title to the path belonged to [Eric]. After that time, there is no evidence that Eric again used the east branch, but it is clear that the west branch became his primary if not exclusive means of access to [95 Rocky Hill Road].

"On May 11, 2005, via a survivorship warranty deed, Eric reconveyed all his interest in these various pieces to [the defendant] and the plaintiff, including the easement he obtained in 1987. Eric's deed to them also includes the vague reference to the right to use the OCP 'SUBJECT to the rights of others,' as exists in Cyrille's 1984 deed but which was absent from [the defendant's] 1986 deed. As to the east branch, Eric granted Tract B merely by adding to the house lot 'any rights the Mortgagor . . . may have in and to a certain parcel of land running easterly from the above described premises to . . . Route 171, formerly known as [the OCP].' . . .

"When [the defendant] conveyed his interest in that tract to [the plaintiff] on April 13, 2010, his deed again described two tracts as had the earlier instruments, and also included the right of access over the west branch." (Footnote omitted.)

On the basis of these findings of fact, the court concluded that the plaintiff did not possess marketable title to the east branch of the OCP. Accordingly, the court determined that the defendant has not yet provided a driveway that is "similar" to the current shared driveway to allow the plaintiff access to Route 171 across the east branch of the OCP. The court thereafter concluded that the defendant did not fully comply with the

separation agreement and issued a permanent injunction, enjoining the defendant from impeding the plaintiff's use of the westerly easement across 97 Rocky Hill Road. This appeal followed.

I

The defendant first claims that the court wrongly issued a permanent injunction because the plaintiff had neither alleged nor proven irreparable harm and a lack of an adequate remedy at law. We disagree.

We begin by setting forth the relevant standard of review. "A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . . Therefore, unless the trial court has abused its discretion . . . the trial court's decision must stand." (Internal quotation marks omitted.) *Commissioner of Correction* v. *Coleman*, 303 Conn. 800, 810, 38 A.3d 84 (2012), cert. denied sub nom. *Coleman* v. *Arnone*, 568 U.S. 1235, 133 S. Ct. 1593, 185 L. Ed. 2d 589 (2013). "How a court balances the equities is discretionary but if, in balancing those equities, a trial court draws conclusions of law, our review is plenary." (Internal quotation marks omitted.) *New Breed Logistics, Inc.* v. *CT INDY NH TT, LLC*, 129 Conn. App. 563, 571, 19 A.3d 1275 (2011).

A

We first address whether the plaintiff properly pleaded the requisite allegations of irreparable harm and lack of an adequate remedy at law necessary to warrant a permanent injunction. "[P]arties are bound by their pleadings. . . . Construction of pleadings is a question of law. Our review of a trial court's interpretation of the pleadings therefore is plenary." (Citation omitted; internal quotation marks omitted.) Id., 573.

"The purpose of the complaint is to limit the issues to be decided at the trial of a case and is calculated to prevent surprise. . . . A complaint should fairly put the defendant on notice of the claims against him. . . . The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . As long as the pleadings provide sufficient notice of the facts claimed and the issues to be tried and do not surprise or prejudice the opposing party, we will not conclude that the complaint is insufficient to allow recovery. . . . Whether a complaint gives sufficient notice is determined in each case with reference to the character of the wrong complained of and the underlying purpose of the rule which is to prevent surprise upon the defendant." (Internal quotation marks omitted.) *Prime Locations of CT, LLC* v. *Rocky Hill Development, LLC*, 167 Conn. App. 786, 802–803, 145 A.3d 317, cert. denied, 323 Conn. 935, 150 A.3d 686 (2016).

It is true, as the defendant argues, that the plaintiff never explicitly alleged in her complaint that she has suffered an irreparable harm or that she lacks an adequate remedy at law. There can, however, be no serious claim of surprise or prejudice by the defendant for the lack of these terms. Despite the absence of this precise language, the plaintiff explicitly sought a permanent injunction in her prayer for relief, and her complaint sufficiently gave the defendant notice of the basis upon which she sought an injunction. The plaintiff clearly alleged that the defendant has consistently, through a variety of means, impeded her ability to use the common driveway to access 95 Rocky Hill Road. The complaint further explains that the plaintiff asserts her right

to use that common driveway on the basis of the parties' separation agreement. Therefore, the defendant cannot claim that he did not have sufficient notice of the factual basis of the plaintiff's claims. Indeed, his claim is entirely premised on a legal technicality, rather than a claim of prejudice or lack of notice. We thus conclude that the complaint provided adequate notice of the plaintiff's claim for a permanent injunction.

B

We next address whether, during the course of the trial, the plaintiff established that, without a permanent injunction, she would suffer irreparable harm and lacked an adequate remedy at law.

The following additional facts and procedural history are relevant to this claim. As the court rightly summarized, the core "issue dividing the parties at present is . . . [i]f, as the defendant maintains, he has fulfilled the obligation he assumed [under the separation agreement] to build a driveway 'similar' to that which served both parcels historically, he is entitled to be free of the plaintiff's passage over the west branch. If he has not, as [the plaintiff] maintains, then by virtue of [the separation agreement] she has a continuing right to the use of that portion of the path until he does what he promised her he would do." Reflecting this dispute of terminology, the court, in its memorandum of decision, addressed in great depth the legal significance of the term "similar" as used in the separation agreement.

The court explained that "Webster's Third New International Dictionary defines 'similar' as '1: having characteristics in common . . . [or] 2: alike in substance or essentials . . . .' " The court further analyzed the word "similar," stating that it "is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat alike, or has a general likeness to some other thing . . . . Certainly the word similar has no meaning so fixed that a court,

reading the contract in the light of its subject matter and the surrounding circumstances, may not give to the phrase such reasonable construction as will fairly effectuate the intent of the parties. *Leo Foundation, Inc.* v. *Kiernan*, 5 Conn. Cir. 11, 15–16, 240 A.2d 218 (1967)." (Citation omitted; internal quotation marks omitted.) The trial court noted that "[t]his observation comports well with the black letter rule that 'a contract is considered as a whole so as to give effect to all its provisions without narrowly concentrating [on] some clause or language taken out of context.' *Gold* v. *Rowland*, 325 Conn. 146, 160, 156 A.3d 477 (2017)."

Thereafter, the court analyzed the various characteristics of the east branch to determine whether, as required by the separation agreement, a similar driveway existed on the east branch. First, the court addressed the physical qualities of the east branch of the OCP. The court recognized that, prior to the filing of this action, the "defendant spent more than $10,000 in construction of the east branch. This investment produced a serviceable means of allowing vehicular passage between Route 171 and . . . 95 Rocky Hill Road." Although the plaintiff claimed that the east branch is steep, the court concluded that "[n]othing the defendant did adversely altered the topographical features of the landscape so as to create this grade, and her contract with him cannot fairly be read to require that he undertake a massive land moving project to accommodate her desires." The plaintiff also claimed that the east branch was overgrown with brush, but the court held that, under the terms of the separation agreement, it was the plaintiff's responsibility to maintain the east branch.

The court next analyzed the title history of the OCP to determine whether the plaintiff currently has marketable title to the east branch. Drawing on the testimony from the plaintiff's expert witness, Gerald Stefon, the

court presented the following legal and factual analysis. At the time Cyrille Syriac acquired the west branch properties, "[a]ccording to Stefon . . . the grantors of [prior] instruments no longer possessed any transferrable rights to the east branch. Such rights as Buell earlier possessed had been conveyed away in the deeds he delivered to the east branch grantees. Stefon based this claim upon a rule of construction of deeds where highways are utilized as a bound, to the effect that when a highway forms such a bound, a conveyance 'to the highway' includes transfer of title to the center of the highway.

"The premise that a transfer of land bounded by a highway confers ownership to the middle thereof is well established in Connecticut law. Support for it appears as early as in the case of *Peck* v. *Smith*, 1 Conn. 103 [106] (1814), wherein . . . the court queried '[suppose] the lord of the manor should sell his land lying on the east side of the highway to A., bounding him on the highway west, and should sell the land lying on the west side of the highway to B., bounding him on the highway east. Has the lord of the manor any interest in the highway after this sale?' It answered that question in the negative, declaring that the purchasers on each side of the highway 'own each to the center of the road. . . .' *Antenucci* v. *Hartford Roman Catholic Diocesan Corp.*, 142 Conn. 349, 355, [114 A.2d 216] (1955), is a modern case holding that '[a]n abutting owner is presumed under the law of this state, no evidence having been offered to the contrary, to own the fee of the land to the center of the highway.' The Appellate Court cited *Antenucci* in *Mierzejewski* v. *Laneri*, 130 Conn. App. 306, [309, 23 A.3d 82, cert. denied, 302 Conn. 932, 28 A.3d 344] (2011), an even more recent case holding that a deed describing a tract as bounded '[s]outherly by [the] highway' conveyed to the center of that highway due to a 'common-law presumption that landowners whose property abuts a public highway own to the middle of the highway after the high-

way is discontinued or abandoned . . . .' Id., 318. The defendant offered no evidence to overcome that presumption, nor any evidence refuting Stefon's discussion of the various items in each of the chains of title he examined. Instead, he confined his response to a challenge to Stefon's resort to a rule of interpretation that has repeatedly and continuously been recognized by our appellate courts as a part of this state's real property jurisprudence."

The trial court thereafter explained that "[t]he legislature has enacted a bright line test for marketability in the form of General Statutes § 47-33c, which provides that only a 'person having the legal capacity to own land in this state, who has *an unbroken chain of title to any interest in land for forty years or more*, shall be deemed to have a marketable record title to that interest . . . .' (Emphasis added.) Because the root of the plaintiff's title is found in a 1986 intra-familial deed, she does not yet and may never possess any 'marketable' title to the eastern branch. At the time of his conveyance to her, [the defendant] was aware of the Grosjean and Petrone/Roy claims; [the plaintiff] was not. As a result of those claims, she is left with a house lot that has no marketable access route to the east. Indeed, even in 2011, Grosjean stated to the Woodstock Building Inspector that 'he did not give any permission for this road to be installed,' and that there had been 'much controversy on who owns this abandoned road.' In 2015, after she listed the property for sale and entered into a purchase and sale agreement containing a marketable title contingency clause, the buyer's attorney refused to issue a title insurance policy given the status of access over the east branch. In light of the land records and the circumstances known to [the defendant] when he transferred [95 Rocky Hill Road] to her, 'a real and substantial probability of litigation' over the east branch cannot be overlooked. . . .

"To construe the parties' use of the word 'similar' as constrained to the physical aspects of the two driveways, and not encompassing her ability to market her home, or, for that matter, to even get to it other than by helicopter, would deprive her of the benefit of a bargain she entered into in good faith. Absent legal access, the value of [95 Rocky Hill Road] obviously declines to near zero. As *Fellows* v. *Martin*, 217 Conn. 57, [65, 584 A.2d 458] (1991) informs us, 'equity abhors . . . a forfeiture,' and acceptance of the defendant's arguments here would yield just such an abhorrent result. Avoidance of such a result is an especially pertinent concern when the only likely beneficiary of her loss would be the defendant himself, positioned, as he is, to acquire her property rights for whatever she will take and then provide [95 Rocky Hill Road] with necessary access over the west branch.

"[I]n light of all the foregoing, the plaintiff has sustained her burden of proving that the terms of the 2010 [separation] agreement and court order remain substantially unsatisfied. The intent expressed in those documents remains unfulfilled, and the family court's final order granting the plaintiff the right to continue to use the west branch remains fully appropriate."

Following this discussion, the court further concluded that "[t]here is undoubtedly substantial likelihood here that in the absence of judicial intervention the plaintiff stands to lose a valuable asset. To prevent that result requires a fairly minimum burden being placed upon the defendant, requiring that he not interfere with the use of her easement over the west branch. Hers is a single-family residence generating little traffic, over a path he himself already uses for his own home and must maintain whether or not the plaintiff shares in its use. The defendant tolerated the burden of use of that easement for over two decades, first by his brother and then by tenants occupying [95 Rocky Hill

Road] between 2005 and 2010; only now that his ex-spouse demands the same right has he dug in his heels and said no. The court is also mindful both that he had superior knowledge of the potential roadblocks to use of the east branch when he negotiated that the plaintiff would use that route as her sole means of access, and that should she fail in achieving her goal here he is uniquely poised to take advantage of her predicament and reacquire possession of [95 Rocky Hill Road] at a fire-sale price."

Our examination of the record and briefs and our consideration of the arguments of the parties on this claim persuades us that the trial court correctly determined that a permanent injunction was warranted. Because the quoted portion of the court's memorandum of decision fully addresses the defendant's claim, we adopt it as the proper statement of the facts and applicable law on this issue. It would serve no useful purpose to repeat the discussion contained therein. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Samakaab* v. *Dept. of Social Services*, 178 Conn. App. 52, 54, 173 A.3d 1004 (2017).

II

The defendant next claims that the court improperly allowed the plaintiff to modify the separation agreement previously stipulated to by the parties and incorporated into the judgment of dissolution. The plaintiff, however, responds that the court was not modifying the judgment but, rather, was merely effectuating the separation agreement. We agree with the plaintiff.

"[O]ur courts have no inherent power to transfer property from one spouse to another in a marital dissolution proceeding. . . . Instead, that power rests upon an enabling statute, General Statutes § 46b-81 (a), which provides in relevant part: At the time of entering a decree . . . dissolving a marriage . . . the Superior Court may assign to either spouse all or any part of the

estate of the other spouse. . . . Critically, under § 46b-81 (a), the court does not retain continuing jurisdiction over any portion of the judgment that constitutes an assignment of property. . . . The court's authority to distribute the . . . property of the parties must be exercised, if at all, at the time that it renders judgment dissolving the marriage. Therefore, a property division order generally cannot be modified by the trial court after the dissolution decree is entered, subject only to being opened within four months from the date the judgment is rendered under General Statutes § 52-212a. . . .

"Although the court does not have the authority to modify a property assignment, a court, after distributing property . . . does have the authority to issue post-judgment orders effectuating its judgment. . . . This court has explained the difference between postjudgment orders that modify a judgment rather than effectuate it. A modification is [a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact. . . . In contrast, an order effectuating an existing judgment allows the court to protect the integrity of its original ruling by ensuring the parties' timely compliance therewith." (Citations omitted; internal quotation marks omitted.) *Richman* v. *Wallman*, 172 Conn. App. 616, 620–21, 161 A.3d 666 (2017).

In the present appeal, the defendant claims that the court modified the dissolution judgment because he, allegedly, has complied with the terms of the separation agreement and, thus, by granting an injunction, the court has modified the judgment to grant the plaintiff additional rights to the defendant's property. As we set forth in part I B of this opinion, however, the defendant has not, in fact, complied with the separation agreement. Instead, the court concluded, and we affirm, that

he has yet to provide a similar driveway to the plaintiff. Thereafter, in accordance with the terms of the separation agreement, the court determined that the plaintiff continues to have a right to access her property by crossing the defendant's property until the defendant satisfies his obligations under the agreement. In essence, the court's entire analysis and rulings were necessary to effectuate the terms of the separation agreement; therefore, it did not modify the dissolution judgment.

III

The defendant next claims that, in her pleadings, the plaintiff made multiple judicial admissions and the court erred by not prohibiting her from presenting evidence that contradicted these admissions. Specifically, the defendant claims that the plaintiff admitted that she had "fee title" to the east branch of the OCP and that the defendant had complied with the separation agreement. We disagree.

"Normally, a court's determination of whether a particular statement made by a party in litigation is a judicial admission involves a factual determination. . . . In this case, however, the court's determination involved an interpretation of the pleadings. The interpretation of pleadings is always a question of law for the court. . . . In such a circumstance, our review is plenary. . . .

"Judicial admissions are voluntary and knowing concessions of fact by a party or a party's attorney occurring during judicial proceedings. . . . They excuse the other party from the necessity of presenting evidence on the fact admitted and are conclusive on the party making them. . . . Factual allegations contained in pleadings upon which the case is tried are considered judicial admissions and hence irrefutable as long as they remain in the case. . . . An admission in pleading dispenses with proof, and is equivalent to

proof. . . . A party is bound by a judicial admission unless the court, in the exercise of a reasonable discretion, allows the admission to be withdrawn, explained or modified." (Citations omitted; internal quotation marks omitted.) *Mamudovski* v. *BIC Corp.*, 78 Conn. App. 715, 727–28, 829 A.2d 47 (2003), appeal dismissed, 271 Conn. 297, 857 A.2d 328 (2004).

Upon a careful reading of the defendant's brief, we can ascertain, at most, two admissions that the defendant claims were dispositive.[1] In her complaint, the plaintiff alleges that she "is the owner of fee title . . . to the property at 95 Rocky Hill Road . . . more particularly described in exhibit A." Exhibit A is a copy of the quitclaim deed that transferred 95 Rocky Hill Road to the plaintiff. Included with this quitclaim deed is a description of the property deeded to the plaintiff, which includes both 95 Rocky Hill Road and "any rights the Mortgagor may have in and to a certain parcel of land running easterly from the above described premises to Connecticut Highway Route 171, formerly known as the [OCP] . . . ." We presume that the defendant is claiming that the plaintiff, by incorporating exhibit A into her pleadings, admitted to owning the east branch of the OCP in "fee title." Otherwise, the argument would be nonsensical, because the plaintiff did not contest her ownership to 95 Rocky Hill Road. Second, the defendant alleged, in his counterclaim, that the separation agreement provided that he would construct a "similar" driveway and that he "constructed said driveway by June, 2010 . . . ." In her reply to the defendant's counterclaims, the plaintiff admitted these allegations "to the extent [the driveway] was constructed . . . ."

The defendant overstates the import of the plaintiff's pleadings. "Fee title" is a word of little legal signi-

[1] We note that the defendant's brief does not specifically identify the judicial admissions that he claims are binding on the plaintiff.

ficance. It does not appear in prominent legal dictionaries. Instead, "fee title" appears to be an inartful description of fee simple ownership, a term that merely reflects ownership of "a whole or unlimited estate." *Frank Towers Corp.* v. *Laviana*, 140 Conn. 45, 52, 97 A.2d 567 (1953). The evidence considered by the trial court, however, addressed whether the plaintiff has *marketable* title to the property. It is well settled that "marketable title is one that can be sold at a fair price to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money. . . . To render a title unmarketable, the defect must present a real and substantial probability of litigation or loss." (Citations omitted; internal quotation marks omitted.) Id., 52–53. The mere fact that the plaintiff admitted fee simple ownership of 95 Rocky Hill Road has no bearing on the marketability of the property. Similarly, the plaintiff's admission that a driveway was constructed across the east branch is not conclusive of whether the driveway was "similar" pursuant to the terms of the separation agreement. These admissions were not dispositive of the marketability of 95 Rocky Hill Road or the similar characteristics of the driveway constructed on the east branch. Therefore, the court did not err by admitting evidence concerning these issues.

IV

Lastly, the defendant claims that the court, *Cole-Chu*, *J.*, wrongly denied his motion to disqualify Judge Boland without a hearing. We disagree.

We first set forth the relevant standard of review. "Pursuant to our rules of practice; see Practice Book § 1-22; a judge should disqualify himself from acting in a matter if it is required by rule 2.11 of the Code of Judicial Conduct, which provides in relevant part that [a] judge shall disqualify himself . . . in any proceeding in which the judge's impartiality might reason-

ably be questioned . . . . In applying this rule, [t]he reasonableness standard is an objective one. Thus, the question is not only whether the particular judge is, in fact, impartial but whether a reasonable person would question the judge's impartiality on the basis of all the circumstances. . . . Moreover, it is well established that [e]ven in the absence of actual bias, a judge must disqualify himself in any proceeding in which his impartiality might reasonably be questioned, because the appearance and the existence of impartiality are both essential elements of a fair exercise of judicial authority. . . . Nevertheless, because the law presumes that duly elected or appointed judges, consistent with their oaths of office, will perform their duties impartially . . . and that they are able to put aside personal impressions regarding a party . . . the burden rests with the party urging disqualification to show that it is warranted. . . . A trial court's ruling on a motion for disqualification is reviewed for abuse of discretion. . . . 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." (Citation omitted; internal quotation marks omitted.) *Hoffkins* v. *Hart-D'Amato*, 187 Conn. App. 227, 231–32, 201 A.3d 1053 (2019).

The following additional facts and procedural history are relevant to this claim. On June 9, 2017, Judge Boland issued his memorandum of decision, which granted the plaintiff a permanent injunction. A little more than two months later, on August 17, 2017, the defendant filed a motion to disqualify Judge Boland. In his motion and accompanying affidavit, the defendant alleged that Judge Boland should be disqualified and a new trial should be granted for two reasons: first, Judge Boland presided as the sentencing judge in a criminal trial in

which the defendant was charged with breaking into the plaintiff's residence, 95 Rocky Hill Road, and the plaintiff attempted to offer testimony and evidence in support of the charges; and second, the plaintiff's trial counsel, Kimberly McGee, worked as the "chief deputy clerk" at the New London courthouse during the same time that Judge Boland was assigned there in 2011. The defendant further alleged that he was unaware of either of the disqualifying factors until after the judgment was rendered.

On September 18, 2017, Judge Boland held a hearing on the defendant's motion to disqualify. Judge Boland explained that he did "not intend to decide the motion to disqualify" and that, instead, he was going to "refer it to Judge Cole-Chu." During this hearing, Judge Boland clarified that the only time he served in the New London courthouse was when he presided over a criminal trial for four to five weeks that he believed spanned from 2010 to 2011. As the defendant claimed, Judge Boland recalled that McGee was the deputy civil clerk for the New London courthouse in 2011, but there was a separate deputy clerk for criminal matters. Judge Boland could recall no significant interaction with McGee and, at most, may have spoken to her briefly in the hallway once. At the conclusion of this hearing, Judge Boland referred the motion to Judge Cole-Chu.

In an order dated October 3, 2017, the court, *Cole-Chu, J.*, denied the defendant's motions to disqualify Judge Boland and to open the judgment. In that order, the court concluded that "the defendant has presented no sufficient evidence that Judge Boland's impartiality might reasonably be questioned, or even that Judge Boland should, under the circumstances, have disclosed (a) that he served in a judicial district in which the plaintiff's counsel was a deputy chief clerk, or (b) that he presided over a criminal case in which the defendant in this case was the defendant." The court further concluded that, in regard to the defendant's prior criminal

trial, the defendant waived his claim to disqualify Judge Boland by his pretrial silence.

We begin by noting that the court correctly determined that the defendant waived his claim that Judge Boland should be disqualified on the basis of his connection to the defendant's criminal trial. "It is well settled that, in both civil and criminal cases, the failure to raise the issue of [judicial] disqualification either before or during the trial, can be construed as the functional equivalent of consent in open court . . . . This is because we will not permit parties to anticipate a favorable decision, reserving a right to impeach it or set it aside if it happens to be against them, *for a cause which was well known to them before or during the trial*. We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal. . . . Thus, to consent in open court, the parties must know or have reason to know of the judge's participation in the trial proceedings and the facts that require the judge to disqualify himself, but, nonetheless, fail to object in a timely manner." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 530, 911 A.2d 712 (2006). As a defendant in the criminal proceeding before Judge Boland, the defendant certainly had cause to know of his own prior interactions with Judge Boland. Therefore, by not objecting until after Judge Boland issued a decision adverse to the defendant's interests, the defendant consented to whatever impropriety, if any, existed as a result of those interactions and waived his right to challenge Judge Boland's decision on this basis.

Next, we conclude that the court did not abuse its discretion when it denied the defendant's motion to

disqualify Judge Boland for his alleged prior interactions with McGee.[2] On appeal, the defendant claims that the court abused its discretion for two reasons: first, the court did not conduct a hearing on the motion for disqualification and, second, an objective observer would have concluded, on the basis of his prior connection to McGee, that Judge Boland could not have remained impartial.

"In order to require an evidentiary hearing before another judge on a motion for disqualification, the party asserting bias of the trial judge must state facts on the record which, if true, give fair support to his claim. If those facts, taken as true, give that fair support, the party is entitled to an evidentiary hearing on those facts before another judge." (Internal quotation marks omitted.) *Rozbicki* v. *Gisselbrecht*, 152 Conn. App. 840, 852, 100 A.3d 909 (2014), cert. denied, 315 Conn. 922, 108 A.3d 1123 (2015).

After a careful review of the record, we conclude that the defendant's two claims must fail for the same reason: the defendant offered insufficient evidence to support the disqualification of Judge Boland. The only evidence offered in support of the defendant's motion was that, for a very brief window of time, Judge Boland and McGee had worked in the same building. Any interaction between Judge Boland and McGee during this short period occurred more than six years before the present case was decided. The defendant did not offer any further evidence to support his claim that Judge Boland's impartiality was compromised by a single workplace interaction. Moreover, as Judge Boland clarified, McGee worked as a deputy chief clerk for civil matters whereas Judge Boland was assigned to a criminal trial in the same courthouse; consequently, the two

[2] We note that, unlike the defendant's other claim of impropriety, the defendant did not have reason to know of McGee's prior employment as the deputy civil clerk for the New London courthouse. Thus, he did not consent to this alleged issue by not raising McGee's connection to Judge Boland until after trial.

would have had little interaction during that brief period of time. In the absence of further allegations to substantiate the defendant's claim, there was no "fair support" to his claims that would have entitled him to a hearing. See id. Therefore, the court did not err by denying him a hearing before another judge nor did it abuse its discretion by denying his motion to disqualify Judge Boland.

The judgment is affirmed.

In this opinion the other judges concurred.

WENDY YOUNG *v.* HARTFORD HOSPITAL
(AC 41997)

Moll, Devlin and Beach, Js.

Syllabus

The plaintiff brought an action to recover damages for injuries she sustained while undergoing a surgical procedure at the defendant hospital when the camera to a robotic surgical system being used to assist in the procedure allegedly fell on her. The plaintiff claimed that the defendant's negligence regarding the use and placement of the camera created, inter alia, a dangerous condition. Thereafter, the trial court granted the defendant's motion to dismiss the action on the ground that the plaintiff failed to provide a certificate of good faith and opinion pursuant to the medical malpractice statute (§ 52-190a). On appeal, the plaintiff claimed that the trial court erred in determining that her complaint sounded only in medical malpractice and, therefore, erred in dismissing her complaint. *Held* that the trial court erred in dismissing the plaintiff's complaint for failing to comply with § 52-190a, as a reading of the complaint as drafted did not necessarily foreclose the possibility that her injuries were caused by ordinary negligence not involving the exercise of medical judgment and, therefore, would not require a certificate of good faith; although the defendant had been sued in its capacity as a health care provider, and the alleged negligence arose out of a medical professional-patient relationship, the factual scenario alleged in the complaint did not detail the precise circumstances claimed to have resulted in injury, and although this court did not express any opinion as to the whether the plaintiff's claims will be barred by the failure to file a certificate pursuant to § 52-190a, in light of the court's duty to construe the allegations in the light most favorable to the pleader, some of the allegations might support a conclusion of ordinary negligence and some might support

medical malpractice, as a reasonable reading of the complaint as drafted left little guidance as to the precise circumstances claimed to have resulted in injury.

(*One judge dissenting*)

Argued October 22, 2019—officially released March 3, 2020

Procedural History

Action to recover damages for, inter alia, the defendant's alleged negligence, brought to the Superior Court in the judicial district of Hartford, where the trial court, *Swienton, J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed; further proceedings.*

Stephen R. Bellis, for the appellant (plaintiff).

Stuart Johnson, with whom, on the brief, were *Michael R. McPherson* and *Andrew S. Wildstein*, for the appellee (defendant).

Opinion

BEACH, J. The plaintiff, Wendy Young, appeals from the trial court's judgment dismissing her complaint against the defendant, Hartford Hospital, for her failure to provide a certificate of good faith pursuant to General Statutes § 52-190a. The plaintiff claims that the trial court erred in determining that her complaint sounded only in medical malpractice and, consequently, dismissing her complaint for failure to file an accompanying certificate of good faith as required for medical malpractice claims by § 52-190a. We agree.

The following facts, as pleaded by the plaintiff in her complaint, and procedural history are relevant to our discussion. The complaint alleged that "[o]n . . . May 11, 2016 . . . the defendant was in possession and control of a robotic surgical system that it uses to assist in performing hysterectomies. . . . On said date, the plaintiff . . . was a business invitee who had robotic hysterectomy surgery performed by Catherine C. Graziani [a physician] . . . . On May 12, 2016, the plaintiff

experienced extreme pain on her left side with a black and blue [bruise] getting worse each day. . . . On May 16, 2016, the plaintiff contacted . . . Graziani's office because the left side of her torso was black and painful. . . . On May 17, 2016, the plaintiff saw . . . Graziani and was admitted to the emergency department for a CT scan. The plaintiff was put on morphine. . . . On June 10, 2016, the plaintiff was still bruised, swollen and in pain and, at an office visit with . . . Graziani, the plaintiff was told that the robotic camera fell on the plaintiff's left side. . . . Graziani had advised the defendant's employees in charge of the medical equipment, but the plaintiff was never told of said incident." The plaintiff instituted an action against the defendant, alleging that its negligence "created a dangerous condition by:

"a. allowing defective robotic equipment to be used in assisting with a surgical procedure;

"b. failing to inspect the robotic equipment prior to its use on the plaintiff;

"c. failing to properly secure the camera so that it does not fall on patients;

"d. failing to properly train its medical equipment personnel to recognize that the camera was not secure and could fall on patients;

"e. operating the robot in such a manner to cause the camera to fall;

"f. failing to notify the plaintiff that the camera fell on her;

"g. failing to warn the plaintiff that the camera could fall on her."

The complaint further alleged, that as a result of the defendant's negligence, the plaintiff sustained injury. The plaintiff did not attach a certificate of good faith to her complaint.

On June 7, 2018, the defendant moved to dismiss the complaint on the ground that the trial court lacked personal jurisdiction. The defendant argued that the plaintiff had alleged a medical malpractice action, which, pursuant to § 52-190a, required her to include with her complaint a certificate of good faith based on the opinion of a similar health care provider, and her failure to do so deprived the court of personal jurisdiction over it. The plaintiff filed a memorandum in opposition to the defendant's motion, and the defendant filed a reply to the plaintiff's opposition. On August 8, 2018, the trial court granted the defendant's motion to dismiss the complaint. This appeal followed.

The standard for reviewing a court's ruling on a motion to dismiss pursuant to Practice Book § 10-30 (a) (2) is well settled. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, 300 Conn. 1, 10–11, 12 A.3d 865 (2011). "Our Supreme Court has held that the failure of a plaintiff to comply with the statutory requirements of § 52-190a (a) results in a defect in process that implicates the personal jurisdiction of the court. . . . Thus, where such a failure is the stated basis for the granting a motion to dismiss, our review is plenary. . . . Further, to the extent that our review requires us to construe the nature of the cause of action alleged in the complaint, we note that [t]he interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." (Citations omitted; internal quotation marks omitted.) *Nichols* v. *Milford Pediatric Group, P.C.*, 141 Conn. App. 707, 710–11, 64 A.3d 770 (2013).

"When a motion to dismiss for lack of personal jurisdiction raises a factual question which is not determinable from the face of the record, the burden of proof is on the plaintiff to present evidence which will establish jurisdiction. . . . In order to sustain the plaintiff's burden, due process requires that a trial-like hearing be held, in which she has an opportunity to present evidence and to cross-examine adverse witnesses . . . ." (Citations omitted; internal quotation marks omitted.) *Kenny* v. *Banks*, 289 Conn. 529, 533, 958 A.2d 750 (2008).

On appeal, the plaintiff claims that she did not need to comply with the requirements set forth in § 52-190a (a) because the statute did not apply to her claim. If § 52-190a (a) does apply, subsection (c) provides that "[t]he failure to obtain and file the written opinion required by subsection (a) . . . shall be grounds for the dismissal of the action."

Section 52-190a (a) provides in relevant part: "No civil action . . . shall be filed to recover damages resulting from personal injury . . . in which it is alleged that such injury . . . resulted from the negligence of a health care provider, unless the . . . party filing the action . . . has made a reasonable inquiry as permitted by the circumstances to determine that there are grounds for a good faith belief that there has been negligence in the care or treatment of the claimant. The complaint . . . shall contain a certificate of the . . . party filing the action . . . that such reasonable inquiry gave rise to a good faith belief that grounds exist for an action against each named defendant . . . . To show the existence of such good faith, the claimant . . . shall obtain a written and signed opinion of a similar health care provider . . . that there appears to be evidence of medical negligence and includes a detailed basis for the formation of such opinion."

According to its plain language, the provision applies only when two criteria are met: the defendant must

be a health care provider, and the claim must be one of medical malpractice and not another type of claim, such as ordinary negligence. Although "health care provider" is not defined in § 52-190a, we note that General Statutes § 52-184b (a) defines the term, for the purpose of that section, as "any person, corporation, facility or institution licensed by this state to provide health care or professional services, or an officer, employee or agent thereof acting in the course and scope of his employment." General Statutes § 19a-490 (b) defines a hospital as "an establishment for the lodging, care and treatment of persons suffering from disease or other abnormal physical or mental conditions . . . ." We agree with the trial court's conclusion that the defendant is a health care provider for purposes of § 52-190a. The critical determination, then, is whether the trial court correctly determined that, as pleaded, the plaintiff's complaint sounded only in medical malpractice.

This court, in *Trimel* v. *Lawrence & Memorial Hospital Rehabilitation Center*, 61 Conn. App. 353, 764 A.2d 203, appeal dismissed, 258 Conn. 711, 784 A.2d 889 (2001), established a three part test for determining whether allegations sound in medical malpractice. "The classification of a negligence claim as either medical malpractice or ordinary negligence requires a court to review closely the circumstances under which the alleged negligence occurred. [P]rofessional negligence or malpractice . . . [is] defined as the failure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services. . . . Furthermore, malpractice presupposes some improper conduct in the treatment or operative skill [or] . . . the failure to exercise requisite medical skill . . . . From those definitions, we conclude that the

relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 357–58.

The plaintiff challenges the trial court's finding that each of the three prongs of the *Trimel* test was satisfied. First, she contends that the first prong of the *Trimel* test is not met. She argues that she sued the defendant in its capacity as a general place of business rather than in its specific capacity as a health care provider. The plaintiff posits that the fact that the alleged negligent conduct occurred within a medical facility does not automatically invoke the defendant's status as a health care provider for the purposes of § 52-190a. Citing *Multari* v. *Yale New Haven Hospital, Inc.*, 145 Conn. App. 253, 75 A.3d 733 (2013), the plaintiff contends that "[t]he fact that the defendant is a medical provider does not preclude a finding that [the plaintiff's] action sounds in ordinary negligence."

The defendant responds that the first prong is satisfied because it, in fact, is being sued in its capacity as an institution providing medical care. It argued in its memorandum of law in support of its motion to dismiss that, because "this is not an instance where the type of injury alleged and manner by which it occurred could have occurred on any type of premises," the defendant's specific status as a medical provider and not as a general business owner was invoked. The trial court agreed with the defendant and found that the first prong was met, stating: "The allegations demonstrate that [the defendant] is being sued in its capacity as a medical

provider, as the negligence alleged of [the defendant] —its employees, agents and servants—was during the operation of the robotic camera during a medical procedure and treatment of the plaintiff." (Emphasis omitted.)

We agree with the conclusions of the trial court. The robotic camera that allegedly "fell" onto the plaintiff was inferentially integral to surgical equipment that would not ordinarily be found in other business settings. Had the plaintiff's injuries occurred in circumstances not related to the alleged use of medical equipment but common to generic business premises, it may have been more appropriate to deem the defendant to have been sued in the capacity of an owner of ordinary business premises.

It is clear from the complaint that the plaintiff was a patient of the defendant and was receiving treatment at the time of the alleged negligence. The trial court noted that "[t]he plaintiff was at [the defendant] for the sole purpose of having a medical procedure." Cf. *Multari* v. *Yale-New Haven Hospital, Inc.*, supra, 145 Conn. App. 253 (plaintiff, who was visitor, brought negligence action against defendant hospital to recover for injuries she sustained when she slipped and fell as she exited hospital). In the present case, because the plaintiff was under the care of the defendant in its capacity as a medical provider and suffered injuries while under treatment, we conclude that the first prong of the *Trimel* test was met.

In its memorandum of decision, the trial court combined its analyses of the second and third prongs of the *Trimel* test, suggesting, at least in this case, that the two prongs rise or fall together. The court did not analyze the elements within each prong independently.[1]

[1] We interpret the second prong to consist of two related but separate elements, both of which must be met: (1) the alleged negligence is of a specialized medical nature, and (2) the alleged negligence arises out of the medical professional-patient relationship. Similarly, the third prong consists

We recognize some overlap, but find the considerations for evaluating some of the elements somewhat different.

The plaintiff contends that the second prong is not met. She argues that the alleged negligence is the defendant's failure, as an owner of business premises, to keep those premises reasonably safe for invitees, and is not negligence of a "specialized medical nature that arises out of the medical professional-patient relationship." She states in her brief: "The gravamen of the allegations in the complaint . . . do not allege negligence of a specialized medical nature. Equipment is not supposed to fall on business invitees, any more than a light fixture over the operating table is supposed to break during an operation and fall on the patient."

The defendant argues that both elements of the second prong are met because the alleged negligence and injury occurred while the plaintiff was the defendant's patient for the purpose of undergoing surgery. In support of its claim, the defendant cites to *Nichols* v. *Milford Pediatric Group, P.C.*, supra, 141 Conn. App. 707, and *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 966 A.2d 813, cert. denied, 292 Conn. 911, 973 A.2d 661 (2009).

In *Nichols*, the plaintiff similarly argued that he was not required to comply with § 52-190a (a) because he sought to recover on a theory of ordinary negligence arising from the defendant's failure adequately to hire, to train, and to supervise the employee who collected his blood sample, resulting in his fainting and suffering multiple injuries. *Nichols* v. *Milford Pediatric Group, P.C.*, supra, 141 Conn. App. 711, 714. Specifically, he

of two related but separate elements, both of which must be met: (1) the alleged negligence is substantially related to medical diagnosis or treatment, and (2) the alleged negligence involved the exercise of medical judgment. We consider each element separately.

argued that collecting his blood sample was a "wholly ministerial act," and, therefore, the act that ultimately led to his injuries was not of a specialized medical nature. Id., 714. This court found that because the blood collection was conducted as part of an overall medical examination by the defendant, it was of a specialized medical nature that arose out of a medical professional-patient relationship. Id.

In *Votre* v. *County Obstetrics & Gynecology Group, P.C*, supra, 113 Conn. App. 569, the plaintiff brought an action against her physicians and their medical practice for their failure to consult a certain high risk medical group concerning her case and their failure to refer her to that group regarding her pregnancy. Id., 573. This court held that the claim arose "out of the professional-patient relationship between the defendants and the plaintiff, as the facts underlying the claim occurred solely in the context of the defendants' ongoing medical treatment of the plaintiff. The claim is of a 'specialized medical nature' because it directly involves the plaintiff's medical condition: her high risk pregnancy." Id., 577.

In the present case, the trial court found that the second prong was met, stating that it "cannot imagine a scenario wherein the performance of surgery would *not* entail . . . the establishment of a medical professional-patient relationship." (Emphasis in the original.) We agree with the trial court insofar as it held that the complaint alleged injury arising out of the medical professional-patient relationship. Here, the injuries allegedly resulted from an occurrence during the plaintiff's surgery, and the performance of surgery inherently involves the establishment of a medical professional-patient relationship. The court did not expressly address the specialized medical nature element in concluding that the second prong was met. It is not clear to us that the injury necessarily was caused by negligence of a "specialized medical nature," or, relatedly,

that the alleged negligence involved the exercise of medical judgment.[2]

The plaintiff argues that, although the injury in this case occurred during her treatment, the negligent conduct that caused such injuries was not related to her treatment because they were caused by equipment that broke and fell onto her during the procedure. Although the context was medical, she claims that the negligence was not medical in nature.

In response, the defendant argues that the second and third prongs are easily met because "the mechanism of injury . . . was not a mere object on the premises . . . [but, rather], it was a medical device instrumental in providing medical treatment." In support of its argument, the defendant cites to a federal case from Louisiana, *Moll* v. *Intuitive Surgical, Inc.*, United States District Court, Docket No. 13-6086 (EEF) (E.D. La. April 1, 2014). In its brief, the defendant contends that *Moll* is highly instructive in analyzing whether the negligence was "of a specialized nature substantially related to the plaintiff's medical treatment," thereby combining one element of the second prong with another of the third prong. The defendant stated that, "[l]ike *Moll*, the gravamen of the plaintiff's claim here is that the hospital's clinicians should not have used the particular robotic equipment and that they operated the same 'in such a manner to cause the camera to fall.' " It cites *Moll* for the proposition that "[w]hen the tort [being] alleged relates to an injury caused by a m[a]lfunction in a medical device instrumental in providing medical services, the case for classifying the associated negligence as

[2] We consider together the issues of whether the alleged negligence was of a "specialized medical nature" (part of the second prong) and whether the negligence "involved the exercise of medical judgment" (part of the third prong). See *Trimel* v. *Lawrence & Memorial Hospital Rehabilitation Center*, supra, 61 Conn. App. 353.

medical malpractice becomes stronger." (Internal quotation marks omitted.) Id., *4. The court in *Moll* found, inter alia, that "the incident occurred during a surgical procedure, which is clearly within the context of the physician-patient relationship"; id.; and held that the plaintiff had alleged claims of medical malpractice and, thus, was required to comply with the applicable pleading requirements. Id.,*5. *Moll* is not binding on this court, of course, and there are also factual differences between *Moll* and the present case.

In *Moll*, the plaintiff similarly underwent a robotic assisted laparoscopic hysterectomy. According to the plaintiff, the defendant healthcare provider, who purchased the surgical system used during her surgery, "breached its duty to furnish its hospital with reasonably adequate surgical equipment . . . that [the defendant] had custody . . . [guard] . . . and control over the device and knew or should have known of [its] unreasonably dangerous nature." (Internal quotation marks omitted.) Id., *1. As a consequence, she alleged that "she suffered a left ureter cautery burn that prevented a post-operative stent . . . [and] had to undergo [a] ureteral re-implantation." Id. The facts relied on in *Moll*, then, are sufficiently specific to support the conclusion.

In the present case, the trial court concluded that "the allegations of negligence are substantially related to the medical treatment," as "[t]he plaintiff was undergoing a hysterectomy when the camera fell on her, causing the injuries she is alleging. It fell *during* the medical procedure." (Emphasis in original.)

The plaintiff argues that, even if the camera fell during a medical procedure, the medical judgment requirement is still not met. In her brief, she asserts that "[t]he accidental malfunction of the equipment . . . does not involve the medical judgment of the medical professional, because it was caused by the malfunction of the

equipment itself. The malfunction would not have been avoided by the exercise of . . . Graziani's medical judgment, instead, it could have been avoided by the defendant's exercise of its duty to provide a reasonably safe environment for its business invitees. It does not require medical judgment to regularly check and maintain the facility and the equipment in it to avoid situations in which the equipment breaks and falls onto patients." The defendant argues, on the other hand, that "whether and how to use the robot during surgery is a question involving the exercise of medical judgment, and cannot be determined by a lay jury without expert testimony." (Emphasis omitted.)

In addressing the medical judgment element, the trial court stated: "The use of the robotic equipment . . . clearly involves medical judgment. . . . The court cannot imagine a scenario wherein the performance of surgery would *not* entail the involvement of medical judgment . . . ." (Emphasis in original.) We are obligated, however, to follow the well established law that "[w]hen a . . . court decides a . . . question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Bennett* v. *New Milford Hospital, Inc.*, supra, 300 Conn. 10–11.

Our analysis is hampered by a paucity of facts. We, of course, must treat the facts alleged in the complaint as true, but there are very few facts alleged. The plaintiff has alleged that the defendant, at the time in question, "was in possession and control of a robotic surgical

system that it [used] to assist in performing hysterectomies" and that she was in significant pain after undergoing "robotic hysterectomy surgery." She alleges that she later was told that "the robotic camera fell on [her] left side." She then listed seven specifications of the defendant's alleged negligence.[3] Depending on the factual circumstances, some of the allegations might support a conclusion of ordinary negligence (e.g., "failing to properly secure the camera so that it does not fall on patients") and some might support medical malpractice (e.g., "operating the robot in such a manner to cause the camera to fall"). Neither we nor the trial court are assisted by any facts regarding a description of the camera, where it was, how it was used, whether a medical provider was manipulating the camera at the time it "fell," to state but a few questions.[4] A holistic and reasonable reading of the complaint as drafted does not necessarily foreclose the possibility that injuries were caused by ordinary negligence not involving the exercise of medical judgment.

The specific factual scenario, then, is far from clear. We are left without guidance as to the precise circumstances claimed to have resulted in injury. In light of the duty to construe the allegations in the light most favorable to the pleader, we are constrained to reverse the judgment of dismissal and to remand the matter to the trial court for further proceedings.[5] We, of course, express no opinion as to whether some or all of the allegations of negligence will be barred by the failure to file a certificate pursuant to § 52-190a.

The judgment is reversed and the case is remanded for further proceedings according to law.

In this opinion MOLL, J., concurred.

[3] See *Multari* v. *Yale New Haven Hospital, Inc.*, supra, 145 Conn. App. 260–61.

[4] *Trimel*, by contrast, was appealed to this court after summary judgment in the trial court, and the facts had been fully developed.

[5] Revised pleadings or limited discovery, for example, perhaps may serve to clarify the issue expeditiously.

DEVLIN, J., dissenting. In this lawsuit, the plaintiff, Wendy Young, seeks damages for injuries she allegedly received while undergoing a robotic hysterectomy at the defendant, Hartford Hospital. The plaintiff asserts that her complaint sounds only in ordinary negligence and, therefore, that the requirements to attach a good faith certificate and written opinion regarding medical negligence pursuant to General Statutes § 52-190a are inapplicable. The trial court disagreed and granted the defendant's motion to dismiss. The majority reverses based on its view that, when read "holistically and reasonably," the complaint, at least in part, alleges ordinary negligence. In my view, the plaintiff's complaint alleging injury suffered during major surgery caused by a sophisticated piece of medical equipment alleges medical negligence and only medical negligence. Accordingly, I respectfully dissent.

The plaintiff's complaint alleges the following relevant facts.[1] On May 11, 2016, the defendant possessed a robotic surgical system used to assist in performing hysterectomies. The plaintiff, on that same date, had a robotic hysterectomy performed by Catherine C. Graziani, a physician. In the days following the surgery, the plaintiff experienced pain and "a black and blue" on her left side. On June 10, 2016, at an office visit with Graziani, the plaintiff learned that a robotic camera fell on her left side. Graziani had told the defendant's employees in charge of the machine, but the plaintiff was not told of the incident.

[1] The majority aptly points out that the complaint alleges a "paucity of facts." Indeed, the central allegation of the mechanism of injury—"the plaintiff was told that the robotic camera fell on the plaintiff's left side"—is not an allegation of fact but rather of evidence. Notwithstanding such deficiencies, the court's role on a motion to dismiss is not to examine the sufficiency of the complaint but whether, as a matter of law, the plaintiff cannot state a cause of action that is properly before the court. See, e.g., *Egri* v. *Foisie*, 83 Conn. App. 243, 247–48, 848 A.2d 1266, cert. denied, 271 Conn. 931, 859 A.2d 930 (2004).

The plaintiff's complaint alleged seven specifications of negligence:

"a. allowing defective robotic equipment to be used in assisting with a surgical procedure;

"b. failing to inspect the robotic equipment prior to its use on the plaintiff;

"c. failing to properly secure the camera so that it does not fall on patients;

"d. failing to properly train its medical equipment personnel to recognize that the camera was not secure and could fall on patients;

"e. operating the robot in such a manner to cause the camera to fall;

"f. failing to notify the plaintiff that the camera fell on her;

"g. failing to warn the plaintiff that the camera could fall on her."

The issues raised in the defendant's motion to dismiss were (1) whether the plaintiff's complaint is brought against a health care provider and (2) whether it must be supported by a certificate of good faith and written opinion from a similar health care provider that there appears to be evidence of medical negligence. See General Statutes § 52-190a. It is undisputed that the complaint lacked such certificate and opinion. If the complaint had, in fact, been brought against a health care provider and alleged only medical negligence, this is a fatal defect.

The trial court concluded that the plaintiff commenced this action against the defendant in its capacity as a health care provider, and that the plaintiff's allegations against the defendant arose out of the medical

professional-patient relationship and were of a specialized medical nature, and were related to her medical treatment and involved the exercise of medical judgment. Accordingly, the court determined that the plaintiff's failure to attach to her complaint a certificate of good faith and a written opinion by a similar health care provider in accordance with § 52-190a mandated the dismissal of her claims.

The majority agrees, as do I, that the defendant is a health care provider under applicable Connecticut law; so the question comes down to whether the plaintiff's claim is one of ordinary negligence, as she asserts, or medical negligence. As the majority correctly states, this question is resolved by application of the three part test set forth in *Trimel* v. *Lawrence & Memorial Hospital Rehabilitation Center*, 61 Conn. App. 353, 764 A.2d 203, appeal dismissed, 258 Conn. 711, 784 A.2d 889 (2001). Based on *Trimel*, the relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship, and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involves the exercise of medical judgment. Id., 357–58.

As to the first prong of *Trimel*, the majority agrees that the defendant has been sued in its capacity as a health care provider. The majority further agrees that the alleged negligence arose out of the medical professional-patient relationship. In the majority's view, however, it is "not clear" that the injury necessarily was caused by negligence of a specialized medical nature or that the alleged negligence involved the exercise of medical judgment.

A review of the cases in this area, both in Connecticut and around the country, demonstrates that allegations like those in the present case involved alleged negligence of a specialized medical nature that is substantially related to medical treatment and necessarily involve the exercise of medical judgment.

In *Nichols* v. *Milford Pediatric Group, P.C.*, 141 Conn. App. 707, 64 A.3d 770 (2013), this court addressed a similar issue of whether negligence alleged during the drawing of a blood sample in the course of a physical exam satisfied the *Trimel* test and, thus, constituted a claim of medical negligence. While his blood was being collected, the plaintiff fell face first onto the floor of the examining room, sustaining an injury. Id., 708. This court stated: "A physical examination is care or treatment that requires compliance with established medical standards of care and, thus, necessarily is of a specialized medical nature." Id., 714. As to whether the alleged negligence related to medical diagnosis or treatment and involved the exercise of medical judgment, the plaintiff alleged that the defendant improperly trained and supervised the agent who collected the plaintiff's blood. Id., 714–15. This court stated that "[a] physical examination is related to medical diagnosis and treatment of a patient; therefore, any alleged negligence in the conducting of such examination is substantially related to medical diagnosis or treatment. Further, whether the defendant acted unreasonably by allowing a medical assistant to collect blood samples unsupervised and in the manner utilized and whether it sufficiently trained its employee to ensure that any blood collection was completed in a safe manner . . . clearly involves the exercise of medical knowledge and judgment." (Internal quotation marks omitted.) Id., 715.

In *Votre* v. *County Obstetrics & Gynecology Group, P.C.*, 113 Conn. App. 569, 966 A.2d 813, cert. denied,

292 Conn. 911, 973 A.2d 661 (2009), the plaintiff sought damages for the "falsehoods and broken promises" with respect to whether the defendant had consulted with and, should have referred the plaintiff to, the high risk pregnancy group at Yale-New Haven Hospital. Id., 573–75. In affirming the dismissal of the plaintiff's complaint, this court noted that, "[a]lthough the plaintiff denominated the claims in her complaint as sounding in tort and breach of contract, the factual allegations underlying the claims require proof of the defendant's deviation from the applicable standard of care of a health care provider . . . . It is not the label that the plaintiff placed on each count of her complaint that is pivotal but the nature of the legal inquiry." Id., 580.

In *Levett* v. *Etkind*, 158 Conn. 567, 265 A.2d 70 (1969), the issue was whether the case should have been presented to the jury under instructions for ordinary negligence or medical malpractice. The plaintiff, an eighty-one year old woman, fell while disrobing in a dressing room while a patient at the defendant physician's office. Id., 569. Our Supreme Court held that, contrary to the plaintiff's claims, "[t]he determination whether the [plaintiff] needed help in disrobing . . . called for a medical judgment on the part of the physician" and, thus, the case was properly categorized as medical malpractice. Id., 573.

The situations where our courts have supported the plaintiff's theory of ordinary negligence are clearly distinguishable from the present case. See, e.g., *Badrigian* v. *Elmcrest Psychiatric Institute, Inc.*, 6 Conn. App. 383, 386, 505 A.2d 741 (1986) (action based in ordinary negligence when patient receiving treatment at defendant's outpatient facility was struck and killed by car as he crossed street to get lunch at defendant's inpatient facility); see also *Multari* v. *Yale-New Haven Hospital*,

Inc., 145 Conn. App. 253, 259, 75 A.3d 733 (2013) (*Trimel* test was not satisfied when grandmother, who was ordered to take disruptive child and leave hospital, tripped and fell while carrying child).

Cases from other states have ruled that medical equipment failure amounts to medical malpractice. See, e.g., *Corbo* v. *Garcia*, 949 So. 2d 366, 370 (Fla. App. 2007) (The court found, in an action where the plaintiff's arms were burned while receiving treatment from a physical therapy machine, that, "[t]he basis for [the plaintiff's] claim is that the petitioners negligently administered a treatment modality. Therefore, her injury occurred during medical treatment, and in order to prove her claim, she must prove that the petitioners did not properly maintain their electrical stimulation equipment, which falls within the standard of care in treating a patient with that equipment. . . . The fact that the injury was caused by the use of the equipment during the rendering of medical treatment takes [the plaintiff's] claim into the realm of medical negligence."); *Goldman* v. *Halifax Medical Center, Inc.*, 662 So. 2d 367, 368, 370 (Fla. App. 1995) (medical malpractice notice requirements applicable to plaintiff's claim of injury when mammogram equipment, improperly calibrated, applied too much pressure, causing plaintiff's silicone breast implants to rupture).

In the present case, the defendant cites to *Moll* v. *Intuitive Surgical, Inc.*, United States District Court, Docket No. 13-6086 (EEF) (E.D. La. April 1, 2014), to support its claim that the plaintiff's complaint satisfies the *Trimel* test. The majority acknowledges *Moll* but ultimately finds it unpersuasive. To be sure, that case is not strictly binding on this court and the plaintiff's complaint in *Moll* was far more detailed than the present case. That said, the reasoning in *Moll* and its application of the Louisiana Supreme Court's six factor test for determining whether particular conduct is considered

medical malpractice; see *Coleman* v. *Deno*, 813 So. 2d 303, 315–18 (La. 2002); is instructive. *Moll* concerned the identical robotic hysterectomy procedure involved in the present case and the alleged malfunction of the robotic equipment allegedly caused the plaintiff's injury. In ruling that the claims were properly considered medical malpractice, the District Court noted that (1) the defect in the device is properly considered treatment because, unlike a hospital bed or other objects the hospital owns, the device is used only in medical procedures, (2) expert testimony is likely necessary to test the surgeon's decision as to whether and how to use the device, (3) the incident occurred during a surgical procedure, and (4) the injury would not have occurred if the plaintiff had not sought treatment. *Moll* v. *Intuitive Surgical, Inc.*, supra, United States District Court, Docket No. 13-6086.

The present case is not one in which a nonpatient is injured on hospital grounds under circumstances unrelated to medical treatment. To the contrary, the plaintiff was allegedly injured during a surgical procedure. Looking beyond the plaintiff's label and to the nature of the legal injury, the defendant's alleged conduct fits squarely within the definition of medical negligence set forth in *Trimel* as well as the cases cited herein. All of the plaintiff's allegations of negligence: allowing the use of the equipment in the surgery, inspection of the equipment prior to its use on the plaintiff, failing to secure the camera, failing to train medical equipment personnel, operating the robot, and failing to properly advise the plaintiff, relate to her medical treatment and involve the exercise of medical judgment. As such, these allegations should be supported by a certificate of good faith and written opinion as to medical negligence.

I would affirm the trial court's judgment of dismissal.

STATE OF CONNECTICUT *v.* NASIR R. HARGETT (AC 42405)

Lavine, Elgo and Moll, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. He claimed that the trial court violated his right to present a defense when it excluded certain evidence of an alleged statement made by a bystander and an autopsy toxicology report, violated his right to due process when it declined to give a jury instruction on self-defense, improperly admitted firearm related evidence including, inter alia, reports by a state firearms expert, R, and violated his right to a fair trial when it failed to grant his motions for sanctions, for a new trial or to dismiss the charges after the state's late disclosure of the firearms related evidence. He further claimed that he was denied the right to a fair trial due to prosecutorial impropriety. *Held*:

1. The trial court did not abuse its discretion or violate the defendant's right to present a defense by excluding evidence of a statement allegedly made by an unidentified bystander and the toxicology portion of the victim's autopsy report.

   a. The defendant failed to demonstrate the relevancy to his claim of self-defense or to lay an evidentiary foundation for the unidentified bystander's alleged statement; the defendant failed to lay the foundation necessary to admit the alleged statement as relevant to his state of mind, in that he failed to offer any testimony that the alleged statement influenced his assessment of the need to use deadly physical force against the victim and, as there was no evidence that the defendant heard the alleged statement, it was irrelevant to his motive.

   b. The trial court properly excluded the toxicology report from evidence: there was no causal relationship between the victim having PCP in his body and the defendant having shot him; moreover, at trial, the defendant failed to explain why the presence of PCP in the victim was relevant to his claim of self-defense or his intent and there was no evidence that the defendant feared the victim or that the victim threatened anyone and there was no evidence that the victim confronted the defendant with the imminent use of deadly force from which the jury could have inferred that the defendant acted in self-defense; furthermore, the state's evidence was sufficient to disprove self-defense beyond a reasonable doubt.

2. The trial court did not violate the defendant's right to due process by failing to give a self-defense jury instruction; no reasonable juror could have believed that the defendant was in imminent or immediate danger so as to warrant the use of deadly physical force, because there was no evidence that the defendant was afraid of the victim, there was no

evidence of a conversation between the defendant and the victim before the victim left the defendant's porch and there was no evidence that, after the defendant followed the victim down the street, the victim moved toward the defendant, made a threatening gesture or made a verbal threat indicative of immediate or imminent harm.

3. The trial court did not abuse its discretion by failing to sanction the state for its late disclosure of the murder weapon and, thus, properly denied the defendant's motion for a new trial or to dismiss the charges on the basis of the state's late disclosure of the murder weapon and related materials: although the disclosure of the murder weapon was late, it did not constitute bad faith, and the firearms evidence, including R's reports, was disclosed during jury selection and before R testified; moreover, the state disclosed R's report to the defendant as soon as the state was aware of the report and made R available to the defendant before trial but the defendant elected not to examine them, and the defendant was able to address R's reports and changes to them when R testified; furthermore, the court was willing to grant the defendant a continuance and offered the defendant the option to continue plea negotiations before evidence began, but the defendant did not elect to do either; moreover, the defendant failed to explain how a firearms expert could have assisted his theory of self-defense.

4. The defendant was not deprived of a fair trial by prosecutorial impropriety during closing arguments: although the prosecutor's statement that the defendant killed the victim "in cold blood" was improper, the defendant failed to object to the prosecutor's use of the phrase, defense counsel used the phrase himself, the prosecutor stated the phrase only once, the use of the phrase was not central to the case and the state's case against the defendant was strong; moreover, the prosecutor's argument that the case was a senseless American tragedy was not improper, as the statements were grounded in evidence and the jury reasonably could have concluded that the unexplained shooting death of the victim was a tragedy.

Argued September 10, 2019—officially released March 3, 2020

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Fairfield, where the court, *Pavia*, *J.*, denied the defendant's motion for sanctions; thereafter, the case was tried to the jury; subsequently, the court granted the state's motions to preclude certain evidence and denied the defendant's motion for sanctions; thereafter, the court denied the defendant's motion for judgment of acquittal and request for a jury

instruction; verdict and judgment of guilty, and sentence enhanced for the use of a firearm in the commission of a felony, from which the defendant appealed. *Affirmed.*

Ann M. Parrent, assistant public defender, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *John C. Smirga*, state's attorney, and *Ann P. Lawlor*, senior assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Nasir R. Hargett, appeals from the judgment of conviction, rendered after a jury trial, of one count of murder. In addition, the jury also found, pursuant to an interrogatory, that "the defendant employed the use of a firearm in the commission of a felony," and the court accordingly enhanced his sentence. On appeal, the defendant claims that the trial court (1) violated his sixth amendment right to present a defense by excluding from evidence (a) a statement purportedly made by a bystander and (b) an autopsy toxicology report, (2) violated his right to due process by declining to give a jury instruction on self-defense, (3) abused its discretion by admitting firearm related evidence, and (4) violated his right to a fair trial by failing to grant his motion for a new trial or to dismiss the charges. The defendant also claims that he was denied the right to a fair trial due to prosecutorial impropriety that occurred during final argument. We affirm the judgment of the trial court.

The following procedural history and facts the jury reasonably may have found beyond a reasonable doubt are relevant to our resolution of the defendant's claims on appeal. On October 13, 2014, the defendant was an eighteen year old high school student living with his parents on East Main Street in Bridgeport. At approximately noon that day, Kaishon McAllister and his friends Romy and Kahdeem were talking with the

defendant on the porch of the defendant's home when a man in a black coat, later identified as the victim, Davon Robertson, walked up. According to McAllister, the victim was acting "weird" and appeared to be "high." When the victim reached into his pocket, McAllister thought the victim was going to shoot up the porch, although McAllister did not see a weapon. McAllister was nervous and went inside the defendant's home with Romy and Kahdeem. The defendant remained on the porch. The victim approached the porch and snatched a bottle of soda that McAllister had set down there. The victim then left the area and walked toward Pearl Street.

After the victim moved on, McAllister exited the defendant's home, intending to walk to his own home on Pearl Street. Romy and Kahdeem were with him. The defendant, however, went into his home and retrieved a gun. McAllister described it as a big gun that was sawed off and could not be held in just one hand. The defendant caught up to McAllister, and the two followed the victim toward Pearl Street. McAllister stated to the defendant: "Whatever you do, don't do this . . . don't do this like your life is on the line." The victim turned on Pearl Street and walked toward Brooks Street. The defendant and McAllister continued to walk behind him. When the defendant was in front of McAllister's house, he called, "Yo" and the victim turned around. The defendant and the victim "locked eyes" and exchanged words. The defendant then fired the gun at the victim; McAllister gave contradicting testimony as to whether the victim was facing or turned away from the defendant. The defendant fired three shots: the first shot missed, the second one hit the victim, and the third shot struck him while he was on the ground near the corner of Pearl and Brooks Streets. McAllister, Romy, and Kahdeem were in shock and ran into McAllister's home. The defendant ran from the scene. The victim was taken to Bridgeport Hospital where he was pronounced dead. No weapon—gun or knife—was found on his body.

Later that day, the police searched the crime scene and recovered two .22 caliber shell casings and a soda bottle. They also executed a search warrant on the defendant's home and seized a hacksaw and a file from his bedroom. The police also interviewed McAllister and recorded his statement. The defendant was arrested the following day and charged with murder. The state subsequently filed an amended information charging the defendant with murder and use of a firearm in the commission of a felony.

Susan Williams, assistant state medical examiner, performed an autopsy of the victim's body, which revealed gunshot wounds to the victim's chest and lower right leg. She removed a bullet from the victim's chest and a bullet fragment from his leg. Williams opined that the cause of death was gunshot wounds to the left chest[1] and right leg; the manner of death was homicide.

On February 21, 2017, the defendant filed a motion for a speedy trial, which was granted by the court; jury selection commenced on February 27, 2017. At the conclusion of evidence and following arguments of counsel, the court charged the jury on murder, the lesser included offense of manslaughter, and use of a firearm in the commission of a felony. After the jury found the defendant guilty of murder and that he employed a firearm in the commission of a felony, the court imposed a total effective sentence of forty-five years in the custody of the Commissioner of Correction. Additional facts will be set forth as needed.

[1] Williams' report, which was placed into evidence, stated that the victim suffered a penetrating gunshot wound of the chest. The bullet entered "the left side of the [victim's] chest, [seventeen inches] below the top of the head and [six inches] to the left of midline . . . . The wound path extends rightward, backward and slightly downward through the skin, soft tissue and muscle of the left chest, passing into the chest cavity below the [fourth] left rib, passing through both lobes of the left lung, including passage through the hilar area, and into the lateral [eighth] thoracic vertebral body."

Williams testified, "So one bullet entered into the front of the body through the left upper chest."

I

On appeal, the defendant claims that the court violated his constitutional right to present a defense by excluding from evidence (a) a statement purportedly made by an unidentified woman who claimed that the victim had robbed her at knifepoint, and (b) the toxicology portion of the autopsy report (toxicology report). The defendant claims that the woman's statement and the toxicology report would have helped the jury determine, on the basis of "the imprecise account of one teenager,"[2] what was in the defendant's mind at the moment he fired a weapon that fatally wounded the victim. The state contends that the unidentified woman's statement and the toxicology report are irrelevant to the determination of the defendant's intent. We agree with the state.

The defendant also claims on appeal that the court abused its discretion by excluding the unidentified woman's purported statement and thereby prevented him from presenting evidence that he shot the victim in self-defense. We decline to review this evidentiary claim, as the defendant never proffered the woman's purported statement to show its alleged effect on his state of mind; see Conn. Code Evid. § 8-3 (4); and thus the evidentiary claim was unpreserved for appellate review. "[T]he standard for the preservation of a claim alleging an improper evidentiary ruling at trial is well settled. This court is not bound to consider claims of law

[2] McAllister was the only eyewitness who testified to the shooting. The jury, however, was able to view surveillance videos that depicted the defendant walking behind the victim toward the crime scene and running from it. McAllister testified that he did not remember everything that he had seen more than two years earlier. Our review of the transcript discloses that McAllister's testimony was at times inconsistent, but appellate courts do not find facts. See *State* v. *Copeland*, 205 Conn. 201, 208 n.3, 530 A.2d 603 (1987). It is the function of the jury to examine the evidence and to make factual and credibility determinations. See *State* v. *Livingston*, 22 Conn. App. 216, 228, 577 A.2d 734, cert. denied, 216 Conn. 812, 580 A.2d 63 (1990).

not made at trial." (Internal quotation marks omitted.) *State* v. *Miranda*, 327 Conn. 451, 464, 174 A.3d 770 (2018). "Appellate review of evidentiary rulings is ordinarily limited to the specific legal [ground] raised by . . . trial counsel. . . . To permit a party to raise a different ground on appeal than [that] raised during trial would amount to trial by ambuscade, unfair to both the trial court and to the opposing party." (Internal quotation marks omitted.) *State* v. *Jones*, 115 Conn. App. 581, 601, 974 A.2d 72, cert. denied, 293 Conn. 916, 979 A.2d 492 (2009). Even if the defendant had preserved this claim, the evidence was inadmissible as we explain herein.

The following additional facts are relevant to our resolution of the defendant's claims. Prior to trial, the state filed three motions in limine to preclude the admission of certain evidence, including the unidentified woman's purported statement and the results of the toxicology report, indicating the presence of PCP[3] in the victim's body.

As to the woman's statement, McAllister told police that a woman on the street stated, after the victim had walked away from the porch but prior to the shooting, that the victim had robbed her at knifepoint. The state argued that the woman's statement should not be admitted into evidence because it was hearsay and did not fall within any recognized exception to the hearsay rule. Moreover, the state argued that the woman's statement was irrelevant, would confuse the jury, and was prejudicial evidence of the victim's character. Counsel for the defendant argued that the woman's statement was relevant to show the defendant's intent and that he feared that the victim was armed and dangerous. Counsel also argued that the statement was admissible

[3] Phencyclidine, an hallucinogen, is commonly referred to as PCP. *State* v. *Benefield*, 153 Conn. App. 691, 697, 103 A.3d 990 (2014), cert. denied, 315 Conn. 913, 106 A.3d 305, cert. denied, U.S. , 135 S. Ct. 2386, 192 L. Ed. 2d 172 (2015).

under the excited utterance exception to the hearsay rule. The court deferred ruling until trial.

With respect to the toxicology report, the defendant claims that it was "unique scientific evidence that the substance influencing [the victim's] behavior may have been PCP." The state argued that the victim's death was caused by multiple gunshot wounds and that the presence of PCP in his body was irrelevant as it did not tend to make the existence of any material fact more or less probable that the defendant caused the victim's death. The state further argued that, even if the toxicology report were relevant, it should be excluded pursuant to § 4-3 of the Connecticut Code of Evidence[4] because its admission would prejudice the state as inadmissible character evidence, as it could turn the focus of the trial to the victim's having ingested an illegal substance. Again the court deferred its ruling until trial.

We begin our analysis by setting forth the standard of review. "It is well established that a trial court has broad discretion in ruling on evidentiary matters, including matters related to relevancy. . . . Accordingly, the trial court's ruling is entitled to every reasonable presumption in its favor . . . and we will disturb the ruling only if the defendant can demonstrate a clear abuse of the court's discretion. . . .

"The federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment right to compulsory process includes the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defen-

[4] Section 4-3 of the Connecticut Code of Evidence provides that "[r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."

dant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . The defendant's sixth amendment right, however, does not require the trial court to forgo completely restraints on the admissibility of evidence. . . . Generally, an accused must comply with established rules of procedure and evidence in exercising his right to present a defense. . . . A defendant, therefore, may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right is not violated. . . .

"Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . Evidence is relevant if it tends to make the existence or nonexistence of any other fact more probable or less probable than it would be without such evidence. . . . To be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion [for which it is offered], even to a slight degree." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Cerreta*, 260 Conn. 251, 260–62, 796 A.2d 1176 (2002).

"We first review the trial court's evidentiary rulings, if premised on a correct view of the law . . . for an abuse of discretion. . . . 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." (Internal quotation marks omitted.) *State* v. *David N.J.*, 301 Conn. 122, 133, 19 A.3d 646 (2011).

A

The defendant claims that the court denied him the right to present a defense when it sustained the state's objection to his cross-examination of McAllister regarding the unidentified woman's purported statement. We disagree.

Prior to the presentation of evidence, the court revisited the state's motions in limine in an effort to elicit more precisely the scope of the state's objection. The state argued that the statement was hearsay and irrelevant. The court stated that it would not prevent the defense from asking fact witnesses about their observations, but that counsel should address the basis of hearsay proffers and objections and speculation outside the presence of the jury.

During cross-examination of McAllister, defense counsel questioned him about an African-American woman who approached him, Romy, and Kahdeem as they left the porch of the defendant's home. Although the woman was yelling, McAllister did not think that she was excited. Defense counsel asked McAllister, "[I]f anything, what did the African-American woman tell you?" The state objected, and the court sustained the state's objection. Defense counsel argued that he was not offering the woman's statement for the truth of the matter asserted, but only to demonstrate that she made it. The court responded that "the fact that somebody said something certainly doesn't warrant an exception to the hearsay rule." Defense counsel did not ask that the jury be excused for further argument.[5] The question, therefore, is whether the court properly sustained the state's objection to the unidentified woman's statement on the grounds of relevancy and hearsay. See footnotes 4 and 6 of this opinion.

1

The defendant claims that the court abused its discretion by precluding him from placing the unidentified woman's purported statement into evidence on the

[5] The defendant subsequently filed a motion for articulation. The court articulated that it sustained the state's objection because defense counsel did not ask to be heard outside the presence of the jury or to make an offer of proof and did not advance an argument that the statement fit within one of the exceptions to the hearsay rule or articulate the basis of its relevancy.

ground of relevancy. We conclude that the court did not abuse its discretion.

As we previously noted, "evidence that is not relevant is inadmissible." *State* v. *Chiclana*, 149 Conn. App. 130, 144, 85 A.3d 1251, cert. denied, 311 Conn. 950, 90 A.3d 977 (2014). "To be admissible, [a] statement must . . . be relevant, both in the sense that it must relate to a material issue in the case and that it must have a logical tendency to aid the trier in the determination of a material issue." *State* v. *Esposito*, 223 Conn. 299, 315, 613 A.2d 242 (1992).

In the present case, the court found that the defendant had failed to demonstrate that the unidentified woman's purported statement that the victim had just robbed her at knifepoint was relevant. The proffered statement is, in essence, in the nature of character evidence. In other words, the defendant sought to present evidence of the victim's alleged propensity for violence. Although a victim's character *ordinarily is irrelevant* evidence in a murder trial, "[i]t is well settled . . . that an accused may introduce evidence of the violent, dangerous or turbulent character of the victim to show that the accused had reason to fear serious harm, *after laying a proper foundation by adducing evidence that he acted in self-defense* and that he was aware of the victim's violent character." (Emphasis added.) *State* v. *Miranda*, 176 Conn. 107, 109, 405 A.2d 622 (1978). Our Supreme Court has expanded the rule "to allow the accused to introduce evidence of the victim's violent character to prove that the victim was the aggressor, regardless of whether such character evidence had been communicated to the accused prior to the homicide." *State* v. *Smith*, 222 Conn. 1, 17, 608 A.2d 63, cert. denied, 506 U.S. 942, 113 S. Ct. 383, 121 L. Ed. 2d 293 (1992). The expansion of the rule permitting character evidence to show that a victim was in fact the aggressor, irrespective of the defendant's state of mind, does not, however,

obviate the need for the proponent of the evidence to lay an evidentiary foundation for a self-defense claim. See Conn. Code Evid. § 4-4 (a) (2)[6] (character evidence not admissible to prove conduct except under limited exceptions, including character of victim in homicide, "after laying a foundation that the accused acted in self-defense"); see also E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2018) § 4.9.1, pp. 158–59 (if self-defense not an issue, evidence of alleged victim's character immaterial); E. Prescott, supra, § 8.8.2, p. 514 (underscoring principle that "[s]tatements admitted to show the effect on the hearer are not hearsay, but they should not be admitted unless the hearer's state of mind or subsequent conduct is relevant").

Here, the defendant contends that (1) the unidentified woman's statement was admissible nonhearsay because "[t]he fact that the woman said [the victim] robbed her, regardless of whether it was true, was relevant to motive and specific intent and to complete the story of the charged crime by placing it in the context of nearby and nearly contemporaneous happenings" (emphasis omitted; internal quotation marks omitted), citing, among others, *State* v. *Taylor G.*, 315 Conn.734, 771, 110 A.3d 338 (2015), (2) "[t]he woman's statement tended to support an inference that [the defendant] believed [the victim] was armed, dangerous, and had

[6] Connecticut Code of Evidence § 4-4 (a) provides in relevant part: "Character evidence generally. Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion, except the following is admissible:

"(1) Character of the accused. Evidence of a specific trait of character of the accused relevant to an element of the crime charged offered by an accused, or by the prosecution to rebut such evidence introduced by the accused.

"(2) Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused. . . ."

just committed a violent crime," (3) the evidence was relevant to self-defense, and (4) the statement was also admissible for its truth under the spontaneous utterance exception to the hearsay rule. We disagree.

The defendant's reliance on *State* v. *Taylor G.*, supra, 315 Conn. 771, and *State* v. *Ali*, 233 Conn. 403, 427, 660 A.2d 337 (1995), is misplaced. Both cases address the admissibility of evidence of the defendant's prior misconduct, not the victim's. Those cases hold that a proponent who claims that the evidence will "complete the story" of the charged crime must establish the relevancy of such evidence. *State* v. *Taylor G.*, supra, 771; *State* v. *Ali*, supra, 427. The cases, therefore, are inapposite to the present case.

Moreover, even if the defendant had heard and believed the unidentified woman that the victim was armed, dangerous, and had just committed a violent crime, the defendant's failure to (1) claim and (2) lay an evidentiary foundation to demonstrate that he acted in self-defense makes that belief—and the statement itself—irrelevant. See *State* v. *Miranda*, supra, 176 Conn. 109. The record indicates that the defendant failed to satisfy two requirements for placing the purported statement in evidence: (1) laying a foundation that he acted in self-defense; and (2) offering the statement as relevant to his claim of self-defense. Rather, the defendant merely attempted to introduce the evidence as a nonhearsay statement without first having established the threshold requirements of relevancy.[7]

[7] In this regard, we find it significant that the defendant complied with the evidentiary requirements, albeit unsuccessfully, when he attempted to introduce evidence of the victim's violent character, as reflected in the record of his criminal convictions. In offering the victim's criminal record, the defendant *proffered* that the records were relevant to his claim of self-defense, which distinguishes it from his earlier attempt to place the unidentified woman's purported statement in evidence. In offering the criminal record, the defendant represented that McAllister had testified that the victim was acting in a manner in which the defendant and the victim locked eyes and that is when the defendant shot the victim. In doing so, the defen-

The evidentiary procedure for introducing character evidence for either a victim or a defendant to demonstrate he or she was the aggressor is the same. Our Supreme Court has instructed that evidence of a murder victim's violent character is inadmissible to show the defendant's state of mind unless two threshold requirements are met: (1) the defendant has laid a proper foundation "by adducing evidence that he acted in self-defense"; and (2) the defendant has laid a proper foundation by "adducing evidence that he . . . was aware of the victim's violent character."[8] Id. Otherwise, the proffered evidence is irrelevant. In the present case, the defendant never established an evidentiary foundation for his self-defense claim. The court, therefore, did not abuse its discretion by precluding the unidentified woman's purported statement as irrelevant.

2

The defendant also claims that the court abused its discretion by precluding the unidentified woman's statement to demonstrate his state of mind. We disagree.

In the present case, the defendant failed to lay the foundation necessary to admit the woman's statement.

dant attempted to satisfy the required evidentiary foundation. See footnote 6 of this opinion. The court, however, concluded that the evidence that the victim and the defendant "locked eyes" was an insufficient foundation for a claim of self-defense. The court, therefore, denied the defendant's motion to admit the victim's criminal record.

[8] Evidence of a victim's violent character may be admitted, regardless of whether the defendant knew of that character trait, if offered to prove that the defendant acted in self-defense due to the victim's initial aggression. The evidence may be admitted if (1) the defendant lays a proper foundation that he acted in self-defense, and (2) the evidence is introduced as reputation or opinion testimony, or evidence of the victim's conviction of crimes of violence. See Conn. Code of Evid. § 4-4 (a) (2); *State* v. *Smith*, supra, 222 Conn. 17–18. In the present case, the defendant failed to present evidence that he acted in self-defense, and the purported statement of the unidentified woman was not one of the permitted forms of evidence.

The defendant presented no evidence that he knew the victim or knew of his violent propensities, if any. The defendant's claim that the woman's statement was relevant to determine his state of mind at the time he fired the gun at the victim falls short for a number of reasons. First, McAllister told the police that he heard the woman's statement after the victim had left the area in front of the defendant's porch, not before the defendant retrieved his gun. Second, although McAllister heard the woman's statement, the defendant presented no evidence that he himself heard it.[9] More to the point, without evidence that the defendant heard the statement, the statement is irrelevant to his motive. Proffered evidence of this nature is irrelevant to a defendant's state of mind at the time of a shooting when the defendant has failed to offer any testimony that the evidence influenced his assessment of the need to use deadly physical force against the victim. See *State* v. *Harrison*, 32 Conn. App. 687, 702, 631 A.2d 324, cert. denied, 227 Conn. 932, 632 A.2d 708 (1993). The court, therefore, did not abuse its discretion by sustaining the state's objection to McAllister's testifying about the woman's statement.[10]

[9] In response to the state's argument that there is no evidence that the defendant heard the unidentified woman's statement, the defendant argues that the jury could have inferred that he heard it because McAllister testified that "at the time of the crime she told us that . . . ." The state objected, and McAllister was instructed not to say what the woman said. There is no evidence as to whom "us" refers, and whether it included the defendant or just McAllister, Romy, and Kahdeem, who were separated from the defendant when he went into his home to get the gun. Just because McAllister heard the woman's statement does not mean the defendant heard it.

[10] On appeal, the defendant also claims that the purported statement was admissible as an excited utterance. The state claims that the defendant did not preserve the claim at trial. During the pretrial hearing on the state's motion in limine with respect to the woman's statement, however, the defendant claimed that the woman's statement was admissible as an excited utterance. The court did not rule on the motion in limine at the time of the hearing, saying it would wait and see how the evidence came in during trial. The court instructed that, "if either side seeks to introduce something that is subject to a pending motion, they need to do that initially outside the

B

The defendant claims that the court violated his right to present a defense by excluding from evidence the toxicology report, which revealed the presence of PCP in the victim's body at the time of death. We do not agree.

The following facts are relevant to our analysis of this claim. At trial, Williams testified about the autopsy she performed on the victim's body. As part of the autopsy procedure, Williams collected fluid specimens from the body and sent them to an independent laboratory for evaluation. The independent laboratory, "NMS Labs," provided the Office of the Chief Medical Examiner with a report of its analysis. The defendant sought to have the toxicology report admitted into evidence as a business record of the medical examiner's office. The state objected and conducted the following voir dire of Williams.

"[The Prosecutor]: Now, with respect to the findings that you discussed in your—from your autopsy with—with respect to the cause and manner of death, did the NMS lab report have any—any impact on your conclusions with respect to the cause and manner of the death of [the victim]?

"[Williams]: It did not.

"[The Prosecutor]: So this postmortem toxicology is done but yet it would not impact—it did not impact your findings in any way of the autopsy report that you did—the six page autopsy report that you drafted following your autopsy?

"[Williams]: That is correct.

presence of the jury. Just so that nobody is surprised by it and that I can officially rule on everything appropriately." During trial, the defendant sought to introduce the woman's statement through McAllister and the state objected. The defendant failed to ask that the jury be excused so that he could make an offer of proof.

"[The Prosecutor]: And would it be fair to say that your conclusions with respect to the manner and cause of death were made prior to even getting back the toxicology from the NMS Lab?

"[Williams]: That is true."

The state argued that the toxicology report was not relevant because it had no impact on the conclusions Williams drew with respect to the manner and cause of the victim's death. Furthermore, the toxicology report contained commentary about the effects a certain drug may have on a person. The defense did not disclose an expert to testify or to explain how people behave or act under the influence of PCP or how the victim acted or could have acted under the influence of PCP. Moreover, the state argued that the report was prejudicial evidence of the victim's character regarding a drug that he ingested prior to his death and was not relevant.

The court questioned Williams as to whether the toxicology report had any bearing on her conclusion "in terms of this particular instance being a homicide." Williams stated that it did not. Thereafter, the court ruled that because the toxicology report had no bearing on Williams' conclusion, it was not "necessarily relevant." The court agreed with the state with respect to the extrinsic drug information contained in the toxicology report.

The defendant asked the court to reconsider its ruling, contending that the toxicology report was relevant because the victim appeared to McAllister to have "crazy eyes" and was intoxicated or was on crack or high at the time of the crime. In other words, the report was relevant to the victim's condition at that time and the jury should be permitted to review the report and make its own determinations. The court declined to alter its ruling, noting that the extraneous evidence in the toxicology report and the fact that the victim may have been high had no bearing on Williams' conclusion

that this case was a homicide and, therefore, the toxicology report was irrelevant. Thereafter, in response to voir dire by defense counsel, Williams testified that she was unable to say how the victim was acting prior to his death on the basis of the PCP numbers in the toxicology report. In fact, she did not consider the toxicology report because the obvious cause of the victim's death was gunshot wounds to the victim's chest and leg, which caused him to bleed out.

In ruling, the court cited *State* v. *Wilson-Bey*, 21 Conn. App. 162, 168, 572 A.2d 372, cert. denied, 215 Conn. 806, 576 A.2d 537 (1990), noting that a toxicology report may be admitted when it is relevant for purposes of medical diagnosis and treatment.[11] Williams testified that she did not consider the toxicology report as it was not relevant to her determination of the cause or manner of the victim's death.

On appeal, the defendant argues that *Wilson-Bey* is inconsistent with *State* v. *Fritz*, 204 Conn. 156, 168, 527 A.2d 1157 (1987). We disagree with the defendant as the facts are distinguishable. In *Fritz*, portions of the decedent's autopsy report were placed into evidence to demonstrate the amount of Demerol that was in her body at the time of a fatal, one car automobile crash. Id., 167. The amount of Demerol found in the decedent's body was ten times the normal therapeutic level. Id., 159. The evidence was relevant to demonstrate that the defendant physician had illegally prescribed medications. Id., 158. Our Supreme Court agreed with the trial court that the results of the decedent's autopsy were relevant to the charges against the defendant physician who prescribed the medication. Id., 169.

There is no similar causal relationship between the evidence of PCP in the victim's body and the defendant's having shot him. The defendant argues on appeal that

[11] The court stated that its ruling did not mean that the toxicology report may not be relevant at some later time. The record does not disclose that the defendant sought to place the toxicology report in evidence at a later time.

"the toxicology report tended to support the . . . contention that [the victim] was under the influence of PCP, which was relevant to both self-defense and specific intent. It did not need to be relevant to the cause of death." At trial, the defendant failed to explain why the presence of PCP in the victim's body was relevant to self-defense and his intent or otherwise lay a foundation for the admission of the toxicology report.

On appeal, the defendant argues that the evidence of the PCP in the victim's body would support the existence and reasonableness of the defendant's fear of him. Although McAllister testified that the victim was acting "weird" and appeared to be high when he approached the defendant's porch, which caused McAllister to be nervous, there is no evidence that the defendant feared the victim. In fact, he remained on the porch until the victim moved on down the street. The victim did not say anything to anyone and did not touch anyone. There is no evidence that the victim threatened anyone. Although the defendant was not threatened or harmed by the victim, who "acted weird" in front of his porch, after the victim moved on, the defendant went into his home, got a gun, followed the victim down the street, and shot him. There is no evidence that the victim confronted the defendant with the imminent use of deadly force from which the jury reasonably could infer that the defendant acted in self-defense. The state's evidence was sufficient to disprove self-defense beyond a reasonable doubt. See *State* v. *Pauling*, 102 Conn. App. 556, 571–72, 925 A.2d 1200 (state's burden to disprove self-defense), cert. denied, 284 Conn. 924, 933 A.2d 727 (2007). The court, therefore, properly excluded the toxicology report from evidence.

For the foregoing reasons,[12] we conclude that the court did not abuse its discretion with respect to its

[12] The defendant's claim regarding the trial court's alleged failure to admit the toxicology report, which indicated that the victim had PCP in his system at the time of his death, fails for the same reasons articulated in part I A 1 of this opinion.

evidentiary rulings and, therefore, did not violate the defendant's constitutional right to present a defense.

II

The defendant claims that the trial court violated his right to due process by refusing to give the jury an instruction on self-defense. We disagree.

Following the close of evidence, the court e-mailed its proposed jury charge to counsel and requested that they respond by return e-mail. In his response, counsel for the defendant requested that the court instruct the jury on self-defense. Thereafter, the court held an on the record charge conference during which defense counsel argued that a self-defense charge was warranted on the basis of McAllister's testimony that the victim and the defendant "locked eyes" and appeared to have an exchange of words before the defendant shot the victim. The prosecutor disagreed, stating that there was no evidence to warrant such an instruction and that "locking eyes, acting weird, going in a pocket, maybe being high, all things that simply without more do not constitute the need for a self-defense request." The court ruled that it would not instruct on self-defense because the facts presented to the jury would not support a self-defense charge.[13]

"[T]he fair opportunity to establish a defense is a fundamental element of due process of law . . . . This fundamental constitutional right includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault

[13] The court also stated: "And I think that it should be clear, just so that it is clear for the record, that self-defense was something that was discussed . . . early on and throughout the course of this trial and it may have warranted a self-defense charge had the evidence presented itself. It is just that the way that the evidence came in and the case that the jury has now to deliberate on, it is this court's opinion that simply locking eyes is not sufficient to warrant a charge on self-defense."

was not justified. . . . Thus, [i]f the defendant asserts [self-defense] and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to [an] . . . instruction [on self-defense]. . . . Before an instruction is warranted, however, [a] defendant bears the initial burden of producing sufficient evidence to inject self-defense into the case. . . . To meet that burden, the evidence adduced at trial, whether by the state or the defense, must be sufficient [if credited by the jury] to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. . . . This burden is slight, however, and may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible . . . ." (Internal quotation marks omitted.) *State* v. *Best*, 168 Conn. App. 675, 686, 146 A.3d 1020 (2016).

To raise a claim of self-defense sufficiently to warrant an instruction, "a defendant must introduce evidence that the defendant reasonably believed his adversary's unlawful violence to be imminent or immediate. . . . Under General Statutes § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that his attacker is using or about to use deadly force against him and that deadly force is necessary to repel such attack. . . . The Connecticut test for the degree of force in self-defense is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable. . . . Moreover, the evidence must be such that the jury must not have to resort to speculation in order to find that the defendant acted in justifiable self-defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Lewis*, 245 Conn. 779, 811, 717 A.2d 1140 (1998). "In determining whether the defendant is entitled to an instruction on self-defense . . .

we must view the evidence most favorably to giving such an instruction." Id., 812.

Viewed in the light most favorable to the defendant, the record discloses that McAllister was nervous and fearful of the victim when he appeared in front of the defendant's porch. He, therefore, retreated into the defendant's house with Romy and Kahdeem. There was no evidence that the defendant himself was fearful of the victim. The defendant remained on his porch even though, as McAllister testified, the victim appeared to be high, was acting weirdly, and put his hand in his pocket. In essence, the defendant is asking us to attribute McAllister's fear of the victim to him. This we decline to do. Moreover, after the victim took McAllister's soda from the porch, he walked away without threatening or harming the defendant. There is no evidence of any conversation between the two of them at that time.

After the victim left the vicinity of the defendant's porch, McAllister exited the defendant's home intending to go to his own home on Pearl Street. Although the victim was gone, the defendant went into his home and returned with a gun. He caught up with McAllister and the others, as they all walked behind the victim as he traveled from East Main Street onto Pearl Street. The defendant called, "Yo" to the victim, who turned and "locked eyes" with him. There was an exchange of words, but what was said is not known. There was no evidence that the victim moved toward the defendant, made a threatening gesture, or voiced a verbal threat indicative of immediate or imminent harm. The defendant fired three shots at the victim.[14] The trial court concluded that locking eyes and exchanging words were not sufficient to warrant a charge on self-defense.

[14] According to McAllister, the third shot struck the victim as he lay on the ground. Williams' autopsy tends to support McAllister's testimony as the fatal bullet entered the victim's left chest and traveled to the right and slightly downward. See footnote 1 of this opinion.

On the basis of our review of the evidence, we agree with the court, concluding that no reasonable juror would find that the defendant believed that he was in imminent or immediate danger so as to warrant the use of deadly force. Although the bar for giving such an instruction is admittedly very low, given the facts of this case, we conclude that the court did not violate the defendant's right to due process by failing to give a self-defense instruction.

III

The defendant claims that the court improperly refused to sanction the state for its late disclosure of the murder weapon and related materials, namely, the hacksaw and the file, and thereby denied him the right to due process. He therefore claims that he is entitled to a new trial or to have the charges against him dismissed. We disagree.

The following facts are relevant to the defendant's claim. A public defender was appointed to represent the defendant when he was arraigned on October 14, 2014. On March 11, 2015, the defendant asked the state to disclose any tangible objects, documents, and reports or statements of experts, including the results of physical examinations or scientific tests that it intended to offer into evidence during its case-in-chief or that were material to the defendant's case. The case was placed on the trial list on September 29, 2015. New counsel appeared for the defendant on October 24, 2016, and filed a motion for a speedy trial on February 21, 2017. The speedy trial motion was granted, and jury selection commenced on February 27, 2017. Jurors were informed that evidence would begin on March 20, 2017, and conclude by the end of March.

On March 7, 2017, the state disclosed that it intended to offer the murder weapon (gun) into evidence. The gun had been seized by the Bridgeport police in connection with a robbery that occurred on December 12,

2014.[15] The state also supplemented its disclosure with a report concerning the firearms evidence that was dated December 15, 2014, which had been prepared by Marshall Robinson, a firearms expert. Robinson's report stated that the shell casings recovered from the crime scene and the bullet and fragment recovered from the victim's body had been fired in the gun used by the defendant. On March 9, 2017, the state further supplemented its disclosure by producing a report authored by Robinson dated October 20, 2014.[16]

On March 13, 2017, the defendant filed a motion for sanctions, contending that he was prejudiced by the state's late disclosure in that he did not have enough time to prepare his defense before the presentation of evidence commenced. He argued that a continuance was an improper remedy because a continuance would violate his right to a speedy trial and force him to choose between his constitutional rights to due process and to a speedy trial. He asked the court to dismiss the charges against him or to prohibit the state from putting the gun and related evidence before the jury.

The court heard argument on the motion for sanctions on March 17, 2017. Defense counsel represented

[15] The Bridgeport police seized the gun in case number 141209. The defendant in that case, Qashad Fields, pleaded guilty to the charges against him and was sentenced in 2015. Apparently, information in Fields' file and the defendant's file were not cross-referenced even though both cases were handled in the same office of the state's attorney.

[16] In his original report, Robinson stated that the shell casings recovered at the scene of the crime were nine millimeter casings; his revised report stated that they were .22 caliber casings. Robinson testified that his field notes indicated that the casings taken at the scene were .22 caliber casings and the error in his report was a scrivener's error. The court did not consider the late disclosure of Robinson's reports to be a discovery violation given that the mistake in Robinson's original report was "pretty clear" given "all of the police reports had consistently indicated a .22 caliber. It was pretty clear that [Robinson's] report was in error in terms of the referencing of a nine millimeter [shell casings] and that [Robinson] then went back and authored a supplemental report to correct that error."

that the robbery defendant was prosecuted by the same office of the state's attorney prosecuting the defendant. The robbery defendant pleaded guilty and was sentenced in September, 2015, and the gun was then available for inspection in the present case. See footnote 15 of this opinion. The defendant contended that the late disclosure constituted a surprise, as he previously had been advised that the state did not have the murder weapon or ballistics tests, and that there was no causal connection between the .22 caliber bullets found during the autopsy and the nine millimeter shell casings recovered at the scene. He claimed that, as a result of the late disclosure, the case against him was different from the one for which he had prepared. Moreover, during pretrial negotiations, he did not have the benefit of knowing all of the evidence against him.[17]

The prosecutor argued that the late disclosure was not the result of bad faith. Robinson's report was not in the state's file and that, as soon as the prosecutor became aware of it, she disclosed it to the defendant and made Robinson available to him. The defendant did not take advantage of speaking with Robinson. In addition, the state was at a similar disadvantage because it too had just learned that the gun was available.

The court ruled that, although the state's disclosure of the gun was late and not the best practice, it did not constitute bad faith.[18] With respect to Robinson's

[17] The state acknowledged that the murder weapon and related evidence were not part of pretrial negotiations.

[18] The court stated: "[B]ased upon what I have read, the reports of Marshall Robinson, the arguments that we have had on this matter, make a finding that while it may not certainly be the best practice in terms of how the police departments are able to cross reference this information and make sure that the state's attorneys on the different files are aware of this information, I am going to make a finding that there is no evidence of bad faith. . . .

"[T]he state's attorney, just like defense counsel, is an officer of the court, the indication is that the state's attorney, when she became assigned this particular file, then went to the police department to review all the evidence and at that moment was told that, in fact, the murder weapon had been

reports, the court found that the disclosure was not late and that the defendant could address the changes Robinson made in them when he testified. In addition, the court found that Robinson and the firearms evidence had been available to the defendant for at least nine days, but that he had elected not to examine them. Nonetheless, the court stated that it was willing to grant the defendant a continuance to have an expert examine the gun. The court also found that the defendant's defense was not prejudiced by the late disclosure. The court declined to issue a blanket ruling excluding the firearms evidence on the basis of late disclosure, but it stated that it would permit the defendant to raise specific objections during trial. The court, however, recognized that the late disclosure of the gun had prejudiced the defendant with respect to plea negotiations and offered him the option to continue plea negotiations before evidence began.

At trial, Robinson testified that the .22 caliber shell casings that the police found at the scene were fired in the Marlin .22 caliber sawed-off shotgun that the state put into evidence. He also testified that the tool marks on the barrel of the gun could have been made by the file found in the defendant's bedroom or "another one like it." The state proffered the hacksaw and file that the police found in the defendant's bedroom into evidence. The defendant objected, arguing that the tools had no probative value because it was speculative whether they were used to alter the gun.[19] The court overruled the defendant's objection, stating that the tools were relevant because Robinson testified that the

recovered in another arrest and then that information was then immediately disclosed to the defense."

[19] Lieutenant Christopher LaMaine could not confirm that the tools were used to modify the gun. The police seized the tools because a witness stated that the defendant had used a sawed-off gun to shoot the victim. The state argued that the tools were relevant to demonstrate that the defendant had access to them and conceded that the jury may give no weight to them.

murder weapon was a sawed-off gun. Following the verdict, the defendant filed a motion for a new trial on the ground that the state's late disclosure and the court's failure to exclude the gun and tools from evidence denied him due process, but declined the court's offer to request additional time to look at the matter. The court denied the motion.[20]

On appeal, the defendant raises numerous arguments, claiming that the court's denial of his motion for sanctions and his motion for a new trial rested on legal error and clearly erroneous factual findings resulting in abuse of discretion because the court's decision was predicated on improper and irrelevant factors. More specifically, he argues that two of the court's factual find-

[20] In denying the defendant's motion for a new trial, the court stated that the state immediately provided full disclosure and made all witnesses immediately available to the defense, including Robinson. Also, as the court noted, "the defense chose not to meet with or have [Robinson] go over the report or see the evidence, or go over the evidence with [Robinson]. Additionally, the defense chose not to ask for additional time, which this court offered, in terms of the defendant's desire to speak with another expert of [his] own choosing or to provide the evidence to another expert, because it was also part of this court's ruling that the state had to, in fact, provide the physical evidence to the extent that they had anything so that that could be reviewed by [his] own expert to make sure that the police department accommodated any need that the defendant had. And the defense chose not to do that for what were tactical reasons.

"And those reasons are within the defendant's control. So, to say that the late disclosure prohibited the defense from being able to avail itself of its speedy trial rights and/or its rights to a fair trial, I think, is a mischaracterization of what occurred. Certainly, the court was willing and indicated its willingness to entertain a level of continuance on the trial for any need that the defense had. The defense never asked for that and, therefore, the trial continued with its course.

"But again, because we were in jury selection the date certainly could have been modified. And we're not talking about months; we're talking about whatever was necessary. And the defense indicated no necessity for continuance or for bringing in an expert on this issue.

"I will also note for the record that one of the things that occurs is obviously the finding of this evidence made the state's case stronger as opposed to weaker, and, as the defense is indicating, up until this point did not necessarily know that the weapon had been found. And so this court provided the opportunity for the defense to go back down to the pretrial judge, *Devlin*, *J.*, to then be able to discuss any offers that were on the

ings are clearly erroneous, namely, (1) the defendant declined to have his own expert examine the evidence for tactical reasons,[21] and (2) there is no factual basis for the court to have rejected counsel's representation that the "defense does not have adequate time to properly prepare his defense for the March 20, 2017 trial date." (Internal quotation marks omitted.) With respect to his tactical decision not to retain an expert, the defendant argues that he did not seek a continuance because it would have compromised his right to a speedy trial. As to the adequacy of time to retain an expert, the defendant contends that the court merely assumed that there was adequate time to address the late disclosure without ascertaining whether the defendant could retain an expert in the required time, develop

table at the time that the defendant chose to ask for a trial and a speedy trial in this case."

[21] In its brief, the state points out that the record discloses that defense counsel made a tactical decision not to talk to Robinson. The following colloquy took place before the presentation of evidence. Defense counsel stated that, although the state made Robinson available to the defendant, Robinson himself was not immediately available.

"[Defense counsel]: I made phone calls to [Robinson], left him a message, he did not return my phone calls, it was not until Monday the thirteenth that he had called that I said, 'Well, maybe we can talk on the fourteenth,' so I just want to make sure that the window was not as large as . . . .

"The Court: Okay.

"[The Prosecutor]: Can I just respond to that though?

"The Court: Yeah.

"[The Prosecutor]: I just want the record to be clear that the state did comply with the court's orders with respect to [Robinson] and I was told yesterday by counsel, 'What is the point.' So, he has not tried to talk to [Robinson], I just want the record to be clear of that. He has made a decision, a tactical decision apparently on his part, and that is all I am going to say. Thank you.

"The Court: All right, so, fair enough. So, what the—what you are both saying is, however, that whether or not the ability to talk to [Robinson] before the thirteenth or fourteenth, that even after having that ability on the thirteenth or fourteenth, the defense has chosen not to pursue that area of inquiry and has not met with or has not asked [Robinson] to review any documents or had their own expert come in and analyze any of the documents. So, that is clear on the record.

"All right, so, we will see everybody in chambers, and we are adjourned until Monday for the beginning of evidence."

a legal strategy to address the validity of Robinson's conclusions, and reformulate a theory of defense.[22]

The defendant also contends that the court's decision not to impose sanctions was predicated on "irrelevant and improper factors," citing *State* v. *Peeler*, 271 Conn. 338, 416, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). He claims that the court determined that there was no bad faith on the part of the state without ascertaining why the office of the state's attorney does not employ procedures to ensure timely discovery disclosure. In addition, the court failed to consider relevant circumstances when it assumed that the defendant could obtain an expert witness within the time frame of trial. For example, he posits that, at the time of the state's supplemental disclosure, the public defender's office no longer was available to provide financial support for an expert because the defendant had secured private counsel. The court also did not consider the effect a continuance might have on the members of the jury who were told the trial would be over by the end of March.

In response, the state acknowledges that it should have taken steps to learn of the gun and disclose it to the defendant in a more timely manner. We agree that the state should have disclosed the gun timelier, but we also agree with the state that the court reasonably exercised its discretion by denying the defendant's request for sanctions because the firearms evidence was disclosed during jury selection and before Robinson testified. The state, therefore, argues that the defendant was not prejudiced.

We first set forth the relevant law and standard of review. "Practice Book § 40-5 gives broad discretion to

[22] On appeal, tellingly, the defendant failed to explain how a firearms expert could help him reformulate his theory of defense that he shot the victim in self-defense. He speculates that the firearms expert might have testified that, due to the modification of the gun, it no longer shot accurately and that he did not aim the gun at the victim to kill him. He also failed to explain how he would have known of the gun's inaccuracy, if any.

the trial judge to fashion an appropriate remedy for noncompliance with discovery. . . . Generally, [t]he primary purpose of a sanction for violation of a discovery order is to ensure that the defendant's rights are protected, not to exact punishment on the state for its allegedly improper conduct. As [our Supreme Court has] indicated, the formulation of an appropriate sanction is a matter within the sound discretion of the trial court. . . . In determining what sanction is appropriate for failure to comply with court ordered discovery, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances. . . . Suppression of relevant, material and otherwise admissible evidence is a severe sanction which should not be invoked lightly." (Citations omitted; internal quotation marks omitted.) *State* v. *Respass*, 256 Conn. 164, 186, 770 A.2d 471, cert. denied, 534 U.S. 1002, 122 S. Ct. 478, 151 L. Ed. 2d 392 (2001).

"The purpose of criminal discovery is to prevent surprise and to afford the parties a reasonable opportunity to prepare for trial. To achieve these goals and to assure compliance with the rules, the trial court must impose an appropriate sanction for failure to comply. In determining what sanction is appropriate, the trial court should consider the reason why disclosure was not made, the extent of prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." *State* v. *Festo*, 181 Conn. 254, 265, 435 A.2d 38 (1980).

In the present case, the court found that the state's late disclosure was not the result of bad faith but the failure of the police department's records to be placed in the defendant's criminal file in the office of the state's attorney. The defendant points to no evidence in the record indicating bad faith on the part of the state and, significantly, the defendant failed to take up the court's

offer to continue the case. As soon as the prosecutor found the records and learned of the gun, she disclosed them to the defendant. The state made Robinson available to the defense, as the court ordered it to do. The court also gave the defense a reasonable opportunity to meet with Robinson, but defense counsel declined to do so.[23] The defendant also declined to consult with his own expert. Most importantly, the court offered the defendant the opportunity to return to plea negotiations. The defendant declined to do so. As to the inconsistencies in Robinson's reports regarding the size of the shell casings, the defendant was given a full opportunity to cross-examine him at trial. It was for the jury to determine the facts.

Despite the defendant's constitutional claim, he has failed to persuade us that he was meaningfully prejudiced by the late disclosure of the gun given the facts of the case against him. The defendant's theory of defense was that he shot the victim in self-defense. He failed to explain how an expert's examination of the gun might have affected that defense. The question for the jury to decide was the defendant's state of mind when he shot the gun at the victim. The state presented a strong case with eyewitness testimony that the defendant shot the victim and that the victim died as a result of having been shot. We conclude, therefore, that the court did not abuse its discretion by failing to sanction the state for its late disclosure of the gun and, therefore, did not deprive the defendant of due process or a fair trial.[24] The court, therefore, properly denied the defendant's motion for a new trial or to dismiss the charges.

[23] Although the defendant argues on appeal that there was inadequate time to consult with a firearms expert, he failed to contest the prosecutor's representation before the trial court that he did not consult with Robinson or an expert for tactical reasons. See footnote 21 of this opinion.

[24] The defendant also claims that *State* v. *Festo*, supra, 181 Conn. 265–66, does not adequately protect his rights and that this court should reverse his conviction pursuant to our supervisory powers. A reviewing court's supervisory powers are an "extraordinary remedy to be invoked only when

IV

The defendant's final claim is that he is entitled to a new trial on the basis of prosecutorial impropriety committed during closing argument that violated his right to due process. We agree, as the state concedes, that one of the prosecutor's statements was improper but conclude that the cumulative effect of the prosecutor's closing argument did not deprive the defendant of a fair trial and that a new trial is not warranted.

The defendant claims that the prosecutor was guilty of impropriety when she (1) argued the "defendant murdered [the victim] in cold blood," (2) argued "[w]e can't make sense out of a senseless act of murder, but what we can do is hold people accountable," (3) repeatedly asked the jury to hold the defendant "accountable for this senseless murder," (4) labeled the case an "American tragedy" and asked the jury to consider that this "senseless loss of life" should not occur in Bridgeport or surrounding towns, and (5) argued facts not in evidence. Despite raising numerous claims of prosecutorial impropriety on appeal, he objected only to the prosecutor's argument of facts not in evidence at trial.

We review "claims of prosecutorial impropriety under a two step analytical process. We first examine

circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Coward*, 292 Conn. 296, 315, 972 A.2d 691 (2009). Even if this court had the power to overrule decisions of our Supreme Court, which it does not; see *State* v. *Smith*, 107 Conn. App. 666, 684–85, 946 A.2d 319 (appellate court not at liberty to overrule decisions of Supreme Court), cert. denied, 288 Conn. 902, 952 A.2d 811 (2008); the present case does not present the type of extraordinary situation that our supervisory powers may address.

In addition, the defendant claims that this court should order a new trial because the reliability of firearm and tool mark identification evidence must be established in a *Porter* hearing. See *State* v. *Porter*, 241 Conn. 57, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998). The record is inadequate for review of this claim as it was not

whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial." (Internal quotation marks omitted.) *State* v. *Elmer G.*, 176 Conn. App. 343, 363, 170 A.3d 749 (2017), aff'd, 333 Conn. 176, 214 A.3d 852 (2019). "Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry." *State* v. *Fauci*, 282 Conn. 23, 32, 917 A.2d 978 (2007).

"[I]n analyzing [harm], we ask whether the prosecutor's conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. . . . We do not, however, focus only on the conduct of the state's attorney. The fairness of the trial and not the culpability of the prosecutor is the standard for analyzing the constitutional due process claims of criminal defendants alleging prosecutorial [impropriety]. . . .

"To determine whether . . . [an] impropriety deprived the defendant of a fair trial, we must examine it under each of the *Williams* factors.[25]. . . Specifically, we must determine whether (1) the impropriety was invited by the defense, (2) the impropriety was severe, (3) the impropriety was frequent, (4) the impropriety was central to a critical issue in the case, (5) the impropriety was cured or ameliorated by a specific jury charge, and (6) the state's case against the defendant was weak due to a lack of physical evidence." (Citations omitted; footnote added; internal quotation marks omitted.) Id., 50–51.

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . [B]ecause closing arguments often have a rough and tumble quality about them, some leeway

raised in the trial court. See *State* v. *Medina*, 170 Conn. App. 609, 613–14, 155 A.3d 285, cert. denied, 325 Conn. 914, 159 A.3d 231 (2017).

[25] See *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987).

must be afforded to the advocates in offering arguments to the jury in final argument. [I]n addressing the jury, [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Elias V.*, 168 Conn. App. 321, 347, 147 A.3d 1102, cert. denied, 323 Conn. 938, 151 A.3d 386 (2016).

"[T]he prosecutor, as a public official seeking impartial justice on behalf of the people of this state, has a heightened duty to avoid argument . . . that strays from the evidence or diverts the jury's attention from the facts of the case. . . . Nonethless, [our Supreme Court has] recognized that the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Albino*, 312 Conn. 763, 772, 97 A.3d 478 (2014). We now address the defendant's claims of prosecutorial impropriety.

A

Prosecutorial Impropriety

1

The prosecutor commenced her final argument as follows: "You cannot make sense out of senseless violence and that's what this case is about. You simply cannot make sense out of senseless violence. [The victim] was a twenty-four year old man who was walking down a Bridgeport street in the early afternoon of October 13, 2014, when he was senselessly and fatally wounded by gunshots in the area of Pearl and Brooks Streets. The facts during this trial have shown that the defendant *murdered* [*the victim*] *in cold blood* and left him to bleed out in the middle of the street." (Emphasis added.) The defendant claims that the words "murdered

the victim in cold blood" were improper because the court gave a lesser included offense charge of manslaughter at the state's request.

In a divided opinion by our Supreme Court in *State* v. *Albino*, supra, 312 Conn. 774, the majority concluded that the prosecutor's "gratuitous comments about the defendant 'executing' [the victim] and committing 'murder in cold blood' were improper, considering that the defendant's evidence was deemed sufficient to warrant jury instructions on lesser included offenses inconsistent with a wholly unprovoked act of brutality that has been deemed by courts to justify the use of such terms." In the present case, at the state's request, the court gave a lesser included instruction, thus bringing the *Albino* rule into play. On appeal, the state, therefore, concedes that the prosecutor's "in cold blood" statement was improper. Notwithstanding the apparently brutal and unprovoked nature of the murder in this case, *Albino* compels us to conclude that the prosecutor committed an impropriety by arguing that the defendant murdered the victim in cold blood.[26] The jury reasonably could have inferred that the defendant's shooting the

[26] In *Albino*, however, our Supreme Court did not issue a blanket rule prohibiting a prosecutor from arguing that a defendant murdered a victim "in cold blood" but acknowledged that such an argument may be proper in certain circumstances. It cited cases in which an in cold blood argument was found to be proper, including *Commonwealth* v. *Murphy*, 442 Mass. 485, 496, 813 N.E.2d 820 (2004), in which the Supreme Judicial Court held that a statement that the victims were murdered in cold blood was not improper where the evidence permitted an inference that the murders were unprovoked, senseless, and brutal. See *State* v. *Albino*, supra, 312 Conn. 775. Our Supreme Court also cited *People* v. *Walton*, Docket No. 259584, 2006 WL 2033999, *2 (Mich. App. July 20, 2006), for the proposition that the prosecutor's characterization of the offense as an execution was not improper because it was clearly supported by evidence that the defendant and his accomplices made the unarmed victims lie down on floor and then shot them, and *State* v. *Harris*, 338 N.C. 211, 229, 449 S.E.2d 462 (1994), for the proposition that at a trial for first degree murder involving calculated armed robbery and unprovoked killing, it was not improper for the prosecutor to refer to the defendant as a cold blooded murderer. *State* v. *Albino*, supra, 775.

victim "was a wholly unprovoked act of brutality"; *State* v. *Albino*, supra, 774; even though the jury had the option of finding that the defendant did not have the intent to murder the victim.

2

The defendant also claims that the following portions of the prosecutor's final argument were improper. The prosecutor argued "[w]e can't make sense out of a senseless act of murder, but what we can do is hold people accountable," and repeated the words "accountable" and "this senseless murder" elsewhere in her argument. The prosecutor labeled the case an "American tragedy" and stated that the senseless loss of life should not occur in Bridgeport or surrounding towns. The defendant claims that the prosecutor's argument drew the jury's attention from a dispassionate examination of the evidence of specific intent. We disagree that the prosecutor's argument was improper.

When reviewing claims of prosecutorial impropriety, we are mindful "of the unique responsibilities of the prosecutor in our judicial system. A prosecutor is not only an officer of the court, like every other attorney, but is also a high public officer, representing the people of the [s]tate . . . . By reason of his [or her] office, [the [prosecutor] usually exercises great influence [on] jurors. [The prosecutor's] conduct and language in the trial of cases in which human life or liberty [is] at stake should be forceful, but fair, because he [or she] represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice or resentment. . . . That is not to say, however, that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument. . . . Indeed, this court give[s] the jury the credit of being able to differentiate between argument on the evidence and attempts

to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The [prosecutor] should not be put in a rhetorical straitjacket of always using the passive voice, or continually emphasizing that [she] is simply saying I submit to you that this is what the evidence shows, or the like. . . .

"[P]rosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument. . . . Thus, as the state's advocate, a prosecutor may argue the state's case forcefully, [provided the argument is] fair and based upon the facts in evidence and the reasonable inferences to be drawn therefrom. . . . Moreover, [i]t does not follow . . . that every use of rhetorical language or device [by the prosecutor] is improper. . . . The occasional use of rhetorical devices is simply fair argument." (Citation omitted; internal quotation marks omitted.) *State* v. *Fasanelli*, 163 Conn. App. 170, 174–76, 133 A.3d 921 (2016).

Moreover, "[a] prosecutor is not precluded from using descriptive language that portrays the nature and enormity of the crime when supported by the evidence. Thus, to the extent the prosecutor's language appealed to the jurors' emotions, it did so because of the nature of the crime and not because of the terminology the prosecutor used to get [her] point across." *State* v. *Andrews*, 313 Conn. 266, 301, 96 A.3d 1199 (2014).

Given the evidence and the standard by which we assess the final arguments of a prosecutor, we conclude that the prosecutor's argument was not improper when she labeled the case a senseless American tragedy. Any

jury reasonably could conclude that the shooting death of a twenty-four year old man by a teenager, for no discernible reason, is a tragedy for the victim and the defendant, as well as their families and friends. The fact that the shooting occurred at midday on a street corner in the greater community from which the jury was selected was tragic, as well. The victim's death certainly was senseless as the reason the defendant shot him is unexplained. The complained of portion of the prosecutor's argument was grounded in the evidence and, therefore, not improper.

B

Williams Analysis

We focus on whether the prosecutor's argument that the defendant committed murder in cold blood violated the defendant's right to a fair trial. We conclude that the prosecutor's comment did not violate the defendant's right to a fair trial.

"[O]ur determination of whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on factors set forth in *State* v. *Williams*, [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that [impropriety] was objected to at trial. . . . These factors include: [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . [6] and the strength of the state's case. . . . The question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties. . . . Under the *Williams* general due process standard, the

defendant has the burden to show both that the prosecutor's conduct was improper and that it caused prejudice to his defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Papantoniou*, 185 Conn. App. 93, 110–11, 196 A.3d 839, cert. denied, 330 Conn. 948, 196 A.3d 326 (2018).

It is significant that, not only did the defendant fail to object to the prosecutor's use of the phrase "in cold blood," but also in his closing argument, defense counsel stated: "So what intent, what—what reason does someone who just wakes up at 11:30 in the morning have to go out and . . . kill someone in cold blood in the middle of the street?" Defense counsel could not have perceived the prosecutor's use of the phrase "in cold blood" to be prejudicial to the defendant or severe, if he himself used it in his final argument. The defendant did not ask the court to take any curative measures in light of the prosecutor's use of the phrase, "in cold blood." In its general instructions, the court stated, in part, that the arguments of counsel are not evidence and that the jurors must base their verdict on the evidence.

The prosecutor's use of the phrase "in cold blood" was not invited by the defense, and she stated it only once. The prosecutor's use of the phrase was not central to the case. The defendant's intent when he shot the victim was central to the case. Finally, the state's case against the defendant was strong. McAllister was an eyewitness to the shooting and testified that the defendant shot at the victim three times. We conclude, therefore, that the defendant was not deprived of a fair trial.

The judgment is affirmed.

In this opinion the other judges concurred.

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* MARGIT MADISON ET AL.
(AC 42228)

Keller, Elgo and Bright, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant M following her default on a promissory note secured by the mortgage, which was executed by M on behalf of the defendant D in favor of M Co., as nominee for A Co. Thereafter, M Co. assigned the mortgage to the plaintiff, who then commenced this foreclosure action against the defendants. The plaintiff subsequently filed a motion for summary judgment as to liability, which the trial court granted. Thereafter, the trial court granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, in which it determined the amount of the outstanding debt and the fair market value of the property and set the law days. M then filed notice of her pending chapter 7 bankruptcy petition pursuant to the rule of practice (§ 14-1) pertaining to bankruptcy stays. In the schedule of creditors filed by M in the bankruptcy proceeding, she listed the plaintiff as having a claim secured by the subject property but did not identify the claim as contingent, unliquidated or disputed. She also represented that none of the plaintiff's claim was unsecured. The bankruptcy trustee of M's estate thereafter determined that there was no property available for distribution from the estate and that the estate was fully administered and requested that he be discharged as trustee. The Bankruptcy Court granted the discharge and closed the bankruptcy case. After the law days had passed during the pendency of M's bankruptcy proceedings, the plaintiff filed a motion to reenter the judgment after termination of the bankruptcy stay to, inter alia, make new findings as to the debt and fair market value of the property, reenter the judgment of strict foreclosure and set new law days. M filed an objection to the motion, arguing that she was not authorized to execute the subject note and mortgage to M Co. on behalf of D because D did not validly execute the power of attorney that ostensibly appointed her as his attorney-in-fact, and, therefore, the improperly executed power of attorney rendered the note and mortgage nugatory. The trial court overruled M's objection, concluding that she lacked standing to raise that defense. After granting the plaintiff's motion to reenter the judgment, the trial court rendered a judgment of strict foreclosure, and M appealed to this court. *Held* that M could not prevail on her claim that the trial court erred by concluding that she lacked standing to object to the plaintiff's motion to reenter the judgment of strict foreclosure: M lacked standing to pursue her defense to the plaintiff's interest in the property that the mortgage on the

property may be invalid due to the alleged improper power of attorney, as her failure to notify the bankruptcy trustee of that defense by not disclosing it as an asset of the bankruptcy estate on the relevant bankruptcy form, precluded her from raising the defense after the discharge of the bankruptcy estate; moreover, M's contentions that *Beck & Beck, LLC* v. *Costello* (178 Conn. App. 112), which this court applied in reaching its decision, is inapplicable and that the plaintiff's reliance on it conflates a debtor's claim for money damages as an asset of the bankruptcy estate with a debtor's defense to enforcement of an invalid lien were unavailing, as her arguments circumscribed far too narrowly her disclosure obligations to the bankruptcy trustee because the relevant bankruptcy form required M to state whether the plaintiff's claim was contingent or disputed, and, therefore, necessarily, she was required to disclose her purported defense, and her failure to do so deprived her of standing to assert the defense in the trial court; furthermore, M's claim that either the bankruptcy trustee or any creditor could move to reopen the bankruptcy estate if the trial court were to find that the mortgage is invalid ignored the threshold issue that M lacked the legal capacity to raise the defense, and, therefore, the trial court lacked the jurisdiction to hear it, as M's failure to list the defense as an asset of the bankruptcy estate caused the defense to remain the property of the estate and to vest with the trustee, thereby precluding her from pursuing it for her own benefit.

Argued October 11, 2019—officially released March 3, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the defendant Eric Demander, Jr., was defaulted for failure to appear; thereafter, the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability; subsequently, the court granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon; thereafter, following the termination of the named defendant's bankruptcy stay, the court, *Hon. Anthony V. Avallone*, judge trial referee, granted the plaintiff's motion to reenter the judgment and rendered a judgment of strict foreclosure, from which the named defendant appealed to this court. *Affirmed.*

Earle Giovanniello, for the appellant (named defendant).

Matthew B. Johnson, for the appellee (plaintiff).

Opinion

BRIGHT, J. The defendant Margit Madison[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, U.S. Bank, National Association, as Trustee for MASTR Adjustable Rate Mortgages Trust 2007-1, Mortgage Pass-Through Certificates, Series 2007-1, following the termination of the defendant's bankruptcy stay. On appeal, the defendant claims that the court erred by concluding that she lacked standing to object to the plaintiff's motion to reenter the judgment of strict foreclosure. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On April 18, 2017, the plaintiff commenced a foreclosure action by service of process on the defendant and Eric Demander, Jr.[2] The plaintiff alleged in its complaint that, on October 11, 2006, Eric S. Demander, who is now deceased, executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for American Brokers Conduit, which secured a debt evidenced by a $268,000 promissory note executed on the same date and made payable to American Brokers Conduit.[3] To secure the note, Eric S. Demander mortgaged to MERS the premises known as 124 Seymour Road in Woodbridge (property). On September 26, 2016, MERS assigned the mortgage to the plaintiff, which, at all times since then, was the party entitled to collect the debt

[1] Eric Demander, Jr., was a nonappearing defendant in the trial court. He also is not a party to this appeal. Accordingly, we refer to Madison as the defendant in this opinion.

[2] The plaintiff alleged in its complaint that Eric Demander, Jr., may claim an interest in the subject property by virtue of a mortgage in the amount of $82,500 dated July 17, 2009. On July 17, 2017, Eric Demander, Jr., was defaulted in the underlying foreclosure proceeding for failure to appear.

[3] The note and mortgage were signed by the defendant as Eric S. Demander's attorney-in-fact pursuant to a power of attorney executed on September 25, 2006.

and to enforce the mortgage.[4] The plaintiff further alleged that the defendant was the owner of record of the property by virtue of a certificate of devise dated February 22, 2010, and recorded in the Woodbridge land records on March 5, 2010. The plaintiff alleged that the note and mortgage were in default due to nonpayment of monthly installments of principal and interest due on March 1, 2016, and every month thereafter. The plaintiff thus declared the entire balance of the note due and payable and sought the remedy of foreclosure of the mortgage.

After the defendant filed an answer denying the essential allegations of the plaintiff's complaint, the plaintiff moved for summary judgment as to liability against the defendant. On January 16, 2018, the court granted the plaintiff's motion. The plaintiff then moved for a judgment of strict foreclosure, which the court granted on February 26, 2018. The defendant did not file an opposition to either motion. The court determined that the debt owed to the plaintiff was $333,155.40 and that the fair market value of the property was $326,000, and it set the law days to begin on June 4, 2018. On May 24, 2018, the defendant, pursuant to Practice Book § 14-1, filed notice of her pending chapter 7 bankruptcy petition.

In the schedule of creditors the defendant filed in the bankruptcy proceeding before the United States Bankruptcy Court for the District of Connecticut, the defendant listed the plaintiff as having a claim of $334,138.20, secured by the property, which she valued at $326,000. She did not identify the plaintiff's claim as contingent, unliquidated, or disputed. She also represented that none of the plaintiff's claim was unsecured. On July 11, 2018, the bankruptcy trustee of the defendant's estate, George I. Roumeliotis, reported: "I have

[4] The plaintiff alleged in its complaint that the unpaid balance due pursuant to the terms of the note was $300,517.27, plus interest from February 1, 2016, and late charges and collection costs.

neither received any property nor paid any money on account of this estate; that I have made a diligent inquiry into the financial affairs of the debtor(s) and the location of the property belonging to the estate; and that there is no property available for distribution from the estate over and above that exempted by law. Pursuant to [Rule 5009 of the Federal Rules of Bankruptcy Procedure], I hereby certify that the estate of the above-named debtor(s) has been fully administered. I request that I be discharged from any further duties as trustee." The Bankruptcy Court granted the discharge on August 29, 2018, and closed the case on September 5, 2018.

After the law days originally set by the court passed during the pendency of the defendant's bankruptcy proceedings, the plaintiff filed a motion to reenter the judgment after termination of the bankruptcy stay on September 20, 2018. In its motion, the plaintiff requested that the court (1) make new findings as to the debt and fair market value of the property, (2) reenter the judgment of strict foreclosure, (3) set new law days, and (4) award the plaintiff additional attorney's fees and applicable filing fees. The defendant filed an objection to the plaintiff's motion on October 4, 2018, arguing that she was not authorized to execute the subject note and mortgage to MERS because Eric S. Demander did not validly execute the power of attorney that ostensibly appointed her as his attorney-in-fact. Accordingly, the defendant maintained that the improperly executed power of attorney rendered the note and mortgage nugatory. The court overruled the defendant's objection, concluding that the defendant lacked standing to raise that defense. After granting the plaintiff's motion, the court, on October 9, 2018, rendered a judgment of strict foreclosure.[5] This appeal followed. Additional facts will be set forth as necessary.

[5] In its notice of judgment of strict foreclosure, the court found that the updated debt was $338,411.46 and the updated fair market value was $302,000. The court also set the new law days to begin running on December 10, 2018.

We begin by setting forth the relevant standard of review. "The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a threshold issue for our determination. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . . Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, [the standard of] review is plenary." (Citation omitted; internal quotation marks omitted.) *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 183 Conn. App. 128, 134–35, 192 A.3d 455 (2018), rev'd in part on other grounds, 334 Conn. 374, A.3d (2020).

The plaintiff maintains that the defendant lacks standing to pursue her defense to the plaintiff's interest in the property because she failed to identify the defense as an asset of the bankruptcy estate. In other words, the plaintiff contends that the defendant's failure to notify the bankruptcy trustee that the mortgage on the property may be invalid due to the alleged improper power of attorney precludes her from raising that defense after the discharge of the bankruptcy estate. Conversely, the defendant argues that she has standing to object to the plaintiff's motion because her defense to the foreclosure of the mortgage was not an asset of the bankruptcy estate. We agree with the plaintiff.

"As noted by our Supreme Court, the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all their assets. The courts will not permit a debtor to obtain relief from the [B]ankruptcy [C]ourt by representing that no claims exist and then

subsequently to assert those claims for his own benefit in a separate proceeding." (Internal quotation marks omitted.) *Manning* v. *Feltman*, 149 Conn. App. 224, 235, 91 A.3d 466 (2014).

"The act of filing a bankruptcy petition transfers a debtor's assets to the bankruptcy estate, and these assets remain assets of the bankruptcy estate unless returned to the debtor by the operation of law. . . . [I]t is a basic tenet of bankruptcy law . . . that all assets of the debtor, *including all* [*prepetition*] *causes of action belonging to the debtor*, are assets of the bankruptcy estate that must be scheduled for the benefit of creditors . . . . [A]n asset must be properly scheduled in order to pass to the debtor through abandonment under 11 U.S.C. § 554 (c).[6] . . .

"[W]here a debtor fails to list a claim as an asset on a bankruptcy petition, the debtor is without legal capacity to pursue the claim on his or her own behalf [postdischarge]. . . . This is so regardless of whether the failure to schedule causes of action is innocent." (Citations omitted; emphasis added; footnote added; internal quotation marks omitted.) *Beck & Beck, LLC* v. *Costello*, 178 Conn. App. 112, 117–18, 174 A.3d 227, cert. denied, 327 Conn. 1000, 176 A.3d 555 (2017).

In *Beck & Beck, LLC*, the defendant filed a chapter 7 bankruptcy petition after the trial court rendered a judgment in favor of the plaintiff in the amount of $750 for unpaid legal fees. Id., 115. In his voluntary bankruptcy petition, the defendant included the $750 judgment owed to the plaintiff as an unsecured nonpriority

[6] Title 11 of the 2012 edition of the United States Code, § 554 (c), provides: "Unless the court orders otherwise, any property scheduled under section 521 (a) (1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title."

Title 11 of the 2012 edition of the United States Code, § 521 (a), provides in relevant part: "The debtor shall— (1) file— (A) a list of creditors; and (B) unless the court orders otherwise— a schedule of assets and liabilities . . . ."

claim. Id. However, on his schedule B—personal property form, the defendant did not list any contingent claims or counterclaims as assets of the estate.[7] Id. He failed to do so despite the fact that he had asserted, and still was litigating, counterclaims against the plaintiff and cross claims against the plaintiff's principal.[8] Id. After the defendant's filing, the bankruptcy trustee determined that there was no property available for distribution from the estate and requested a discharge. Id. The bankruptcy court granted the defendant's discharge and closed the case. Id.

When the defendant then pursued his counterclaims and cross claims pursuant to this court's remand order; see footnote 8 of this opinion; the trial court dismissed the claims, concluding that the defendant lacked standing to raise them. *Beck & Beck, LLC* v. *Costello*, supra,

[7] The schedule B—personal property form requires that the debtor provide a description of "[o]ther contingent and unliquidated claims of every nature, including . . . counterclaims of the debtor . . . ." (Internal quotation marks omitted.) *Beck & Beck, LLC* v. *Costello*, supra, 178 Conn. App. 112.

[8] In response to the plaintiff's complaint, the defendant in *Beck & Beck, LLC*, filed a four count counterclaim alleging breach of contract, breach of the implied covenant of good faith and fair dealing, professional malpractice, and a violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq. *Beck & Beck, LLC* v. *Costello*, supra, 178 Conn. App. 114. The plaintiff moved to strike all four counts, arguing that the defendant's claims were legally insufficient because he could not establish proximate cause or damages. Id. The court granted the plaintiff's motion to strike, prompting a motion from the defendant to cite in the plaintiff's principal, Attorney Kenneth A. Beck, individually, as a counterclaim defendant. Id. The court granted the defendant's motion, and the defendant filed an amended answer and special defense, as well as a counterclaim against the plaintiff and a parallel cross claim against Beck, both of which alleged virtually identical claims to the defendant's stricken counterclaim. Id. The plaintiff again moved to strike, and the court granted its motion, concluding that the defendant failed to submit a justiciable claim, thereby depriving the court of subject matter jurisdiction. Id., 115. Thereafter, the defendant appealed from the court's judgment granting the plaintiff's motion to strike. Id. The plaintiff's judgment, which triggered the defendant's bankruptcy filing, was rendered while the defendant's appeal was still pending. Id. In that appeal, this court concluded that the trial court improperly granted the motion to strike, reversed the judgment of the court, and remanded the case for further proceedings. See *Beck & Beck, LLC* v. *Costello*, 159 Conn. App. 203, 208–209, 122 A.3d 269 (2015).

178 Conn. App. 112. The defendant appealed and this court was faced with the question of whether the trial court properly had granted the plaintiff's motion to dismiss the defendant's amended counterclaims and cross claims on the ground that the defendant, by failing to list those claims in his schedule B—personal property form, lost legal capacity to pursue them postdischarge. Id., 116. This court concluded: "The case law makes it clear that upon the filing of a bankruptcy petition, all prepetition causes of action become the property of the bankruptcy estate . . . and that in order to revest in the debtor through abandonment, the assets must be properly scheduled. . . . A review of the defendant's schedule B—personal property form shows that when asked to list '[o]ther contingent and unliquidated claims of every nature, including . . . counterclaims of the debtor,' the defendant checked '[n]one.' Although the defendant noted the underlying action and the $750 judgment that the plaintiff had against him, the bankruptcy trustee was not made aware of the counterclaims and cross claims that the defendant had pending against the plaintiff. Therefore—even if omission of the counterclaims and cross claims was innocent—the trustee did not abandon the counterclaims and cross claims when she issued the report of no distribution and closed the defendant's bankruptcy case in 2014." (Citations omitted.) Id., 118–19.

Applying these principles and the relevant precedent to the present case, we conclude that the court did not err in finding that the defendant lacked standing to object to the plaintiff's motion to reenter the judgment by challenging the enforceability of the documents on which the plaintiff's claim was based. The defendant failed to disclose her defense to the plaintiff's property interest in her schedule D filing.[9] The defendant's fail-

[9] The schedule D form, otherwise known as form 106D, is an itemized list of creditors who have claims secured by property against the debtor. The form requires that the debtor list the names of its creditors, the debtor or debtors that owe the debt, the amount of the claim, the address of the

ure to indicate that she disputed the plaintiff's interest in the property constituted a representation to the bankruptcy trustee that the defendant had no equity in the property and that she did not dispute the plaintiff's claim. That omission is significant because, had the bankruptcy trustee known about a defense that potentially could invalidate the mortgage on the property, he might not have requested a discharge of the bankruptcy estate. This precisely is why, as our Supreme Court has stated, "the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all of their assets." (Internal quotation marks omitted.) *Assn. Resources, Inc.* v. *Wall*, 298 Conn. 145, 170, 2 A.3d 873 (2010).

The defendant contends that *Beck & Beck, LLC*, is inapplicable and that the plaintiff's reliance on it conflates a debtor's claim for money damages as an asset of the bankruptcy estate with a debtor's defense to enforcement of an invalid lien. We are not persuaded.

The defendant's argument circumscribes far too narrowly her disclosure obligations to the bankruptcy trustee. "The Bankruptcy Code provides that [d]ebtors' foremost responsibility is to cooperate with the [c]ourt and the [t]rustee and to facilitate the accurate and proper performance of their duties. See 11 U.S.C. § 521. [Because] bankruptcy schedules and statements are carefully designed to elicit certain information necessary for the proper administration of cases, [d]ebtors' have a duty to complete these documents thoughtfully and thoroughly. See *In re Phillips*, C/A No. 02-10461-W, slip. op. [4] (Bankr. D.S.C. Feb[ruary] 21, 2003). Furthermore, *accuracy, honesty, and full disclosure are critical to the functioning of bankruptcy and are inherent in the bargain for a debtor's discharge.* See [id., 3] (citing *Kesetell* v. *Kesetell*, 99 F.3d 146, 149 (4th Cir. 1996)). Therefore, debtors are responsible for

secured property, the value of the property as collateral, and whether the claim is "[c]ontingent," "[u]nliquidated," or "[d]isputed" at the date of filing.

disclosing *an accurate and complete schedule of assets with proper values and a truthful statement of affairs in order to convey a complete and accurate portrayal of their financial situation*. See [id., 3] ('Debtors bear the burden of proving that their [p]lan meets the confirmation requirements of [the applicable statute], and part of this burden includes proving that the values used in their [p]lan are adequate.'); *Siegel* v. *Weldon* (*In re Weldon*), 184 B.R. 710, 715 (Bankr. D.S.C. 1995) ('The critical time for disclosure is at the time of the filing of a petition and the [d]ebtor has the responsibility to do so. Bankruptcy law requires debtors to be honest and to take seriously the obligation to disclose all matters.'). Furthermore, there is no allowance for selectivity in asset disclosure. Id. ('To allow the [d]ebtor to use his discretion in determining the relevant information to disclose would create an [end run] around this strictly crafted system.'). As a result of debtors' *duty to accurately and completely disclose assets and the corresponding values*, if complete and full disclosure is not made in the schedules and statements, debtors run the risk of having their entire case dismissed or converted to [c]hapter 7 or not receiving a [c]hapter 7 discharge. *In re Phillips*, [supra] C/A No. 02-10461-W, slip op. [4]." (Emphasis added.) *In re Simpson*, 306 B.R. 793, 797–98 (Bankr. D.S.C. 2003). In addition, the schedule provided by the Bankruptcy Court and completed by the defendant required her to state whether the plaintiff's claim was contingent or disputed. This necessarily means that the defendant was required to disclose a defense that would call the plaintiff's claim into question.

The defendant's failure to disclose to her bankruptcy trustee her defense to the plaintiff's foreclosure action resulted in her misstating the value of a material asset of her bankruptcy estate: the property at issue. The nature of the defense she seeks to assert in this case, if successful, would invalidate the mortgage on the property, thereby dramatically increasing the value of the asset. Furthermore, it is beyond question that

she is disputing the plaintiff's claim. She, therefore, was required to disclose her purported defense, and her failure to do so deprives her of standing to assert the defense in the trial court. To hold otherwise, as argued by the defendant, would encourage selective disclosure by debtors and create an end run around the carefully crafted bankruptcy system, whereby a defendant could recoup an asset, the value of which inaccurately was disclosed to the trustee. As set forth previously in this opinion, the disclosure requirements of the bankruptcy code, which include stating whether the plaintiff's claim was contingent or disputed, were designed to prevent such a windfall.

Moreover, the defendant's argument that either the bankruptcy trustee or any creditor could move to reopen the bankruptcy estate if the trial court finds that the mortgage is invalid ignores the threshold issue that the defendant lacks the legal capacity to raise the defense, and, therefore, that the trial court lacks the jurisdiction to hear it. It is well established by our state, federal, and bankruptcy courts that a debtor's failure to list a legal claim as an asset of the bankruptcy estate causes the claim to remain the property of the estate and vest with the trustee, thereby precluding the debtor from pursuing it for her own benefit. See, e.g., *Tilley* v. *Anixter*, *Inc.*, 332 B.R. 501, 507 (D. Conn. 2005) ("[a] debtor or former debtor does not have standing to pursue claims that constitute property of a bankruptcy estate"); *In re Lozier*, Docket No. 17-201107 (JJT), 2018 WL 2176280, *4 (Bankr. D. Conn. May 10, 2018) ("[c]ourts have held that because an unscheduled claim remains the property of the bankruptcy estate, the debtor lacks standing to pursue the claim after emerging from bankruptcy, and the claims must be dismissed"); *Manning* v. *Feltman*, supra, 149 Conn. App. 234 ("[i]f the plaintiff lacks standing, the court must dismiss the action; it has no jurisdiction to take any further action, such as ordering a stay of the foreclosure proceeding to seek the advice of the federal bankruptcy court").

We see no reason why this long-standing principle also would not apply to the failure to disclose to the bankruptcy trustee a legal defense that disputes a claim and materially affects the value of the asset disclosed. Because the bankruptcy trustee was discharged from further duties and the defendant's bankruptcy estate was closed, neither the trustee nor the Bankruptcy Court is supervising the defendant or the assets of her estate. Consequently, the trustee, the Bankruptcy Court, and the defendant's creditors would have no notice if the defendant prevailed on the assertion of her defense in the trial court. Thus, permitting her to assert the defense would have the same effect as permitting a discharged debtor to assert an undisclosed claim. Both could receive the windfall of an asset that was undisclosed or not properly disclosed as part of the bankruptcy estate. Put another way, the result of a debtor's failure to meet her disclosure obligations to the Bankruptcy Court should be the same, whether the right asserted is labeled a claim or a defense.

The judgment is affirmed and the case is remanded for the purpose of setting new law days.

In this opinion the other judges concurred.

CHESWOLD (TL), LLC, BMO HARRIS BANK, N.A. *v.* MATTHEW J. KWONG ET AL.
(AC 42221)

Alvord, Devlin and Pellegrino, Js.

Syllabus

The plaintiff, C Co., sought to foreclose municipal tax liens on certain real property owned by the defendant K. Following K's failure to pay his property taxes for a number of years, the town of Newtown imposed liens on the subject property and recorded them on the town land records. Thereafter, the tax liens were assigned to C Co., which recorded the assignment on the town land records. After C Co. had commenced this action, it assigned the tax liens to A Co., which was substituted as the plaintiff. The assignment to A Co. was not recorded on the town land records. K thereafter moved to dismiss the action for lack of subject

matter jurisdiction on the ground that A Co. lacked standing to foreclose the property because the assignment of the tax liens to it was not recorded. The trial court denied K's motion to dismiss, concluding that A Co.'s failure to record the assignment did not deprive it of standing. Thereafter, the trial court rendered a judgment of foreclosure by sale, from which K appealed to this court. *Held* that the trial court properly denied K's motion to dismiss, as that court correctly determined that A Co. had standing to pursue the foreclosure action; contrary to K's claim, A Co.'s failure to record the assignment of the tax liens on the town land records did not deprive it of standing, as the more specific statute (§ 12-195h) and rule of practice (§ 10-70) governing the assignment and foreclosure of tax liens, which do not require recordation to confer standing, take precedence over the more general land transfer statute (§ 47-10), which does require it, and, furthermore, a tax lien, similar to a mechanic's lien, is more analogous to a transfer of debt than to a transfer of title and, as such, is not considered a conveyance under § 47-10.

Argued November 18, 2019—officially released March 3, 2020

Procedural History

Action to foreclose municipal tax liens on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendant Capitol One Bank (USA), N.A., et al. were defaulted for failure to appear; thereafter, ATCF REO Holdings, LLC, was substituted as the plaintiff; subsequently, the court, *Mintz*, *J.*, denied the named defendant's motion to dismiss and rendered a judgment of foreclose by sale, from which the named defendant appealed to this court. *Affirmed.*

Matthew J. Kwong, self-represented, the appellant (named defendant).

David L. Gussak, for the appellee (substitute plaintiff).

Opinion

PELLEGRINO, J. The self-represented defendant, Matthew J. Kwong,[1] appeals from the trial court's judgment of foreclosure by sale of his property located at 9 Bradley Lane in the village of Sandy Hook in Newtown

[1] Capitol One Bank (USA), N.A., and Portfolio Recovery Associates, LLC, were named as defendants in this case as subsequent encumbrancers in

(property). He claims that the court erred in denying his motion to dismiss for lack of subject matter jurisdiction on the ground that the substituted plaintiff, ATCF REO Holdings, LLC (ATCF),[2] lacked standing to foreclose the property because the assignment of certain municipal tax liens to ATCF was not recorded on the Newtown land records. Accordingly, the principal issue in this appeal is whether the assignment of a municipal tax lien is required to be recorded on the land records in order for the assignee to have standing to foreclose the property, which is an issue of first impression for this court. For the following reasons, we conclude that such recording is not required and affirm the judgment of the trial court.

The following undisputed facts are relevant to our disposition of this appeal. From 2009 to 2014, the defendant failed to pay municipal taxes to the town of Newtown (town). As a result, the town imposed tax liens on the defendant's property and recorded them on the town's land records. The town then assigned the tax liens to American Tax Funding, LLC, and recorded the assignment on the land records. The tax liens were then assigned to Cheswold (TL), LLC, BMO Harris Bank, N.A. (Cheswold), which recorded the assignment.

On April 6, 2015, Cheswold commenced this foreclosure action. On May 8, 2015, Cheswold filed a motion for default against the defendant for his failure to appear, which the court granted. At that point, the defendant had not yet filed an appearance in the case. Cheswold subsequently filed a motion for a judgment of strict foreclosure. The trial court rendered a judgment of foreclosure by sale and set a sale date. The defendant filed an appearance on August 24, 2015, and, thereafter, filed

interest. Neither of these defendants is a party to this appeal. We therefore refer in this opinion to Kwong as the defendant.

[2] The original plaintiff in this case, Cheswold (TL), LLC, BMO Harris Bank, N.A., filed a motion to substitute ATCF as the party plaintiff, which was granted by the trial court.

a motion to open and vacate the judgment, which the trial court granted.

While the case was pending, Cheswold assigned the tax liens to ATCF. The assignment was not recorded on the town land records. Cheswold then filed a motion to substitute ATCF as a party plaintiff in this case. The trial court granted the motion and substituted ATCF as the party plaintiff. Thereafter, ATCF filed a motion for default as to the defendant for failure to plead, which the trial court denied.

Following the denial of the motion for default, ATCF filed a motion for a judgment of strict foreclosure. At the April 26, 2018 hearing on the foreclosure motion, the defendant, by oral motion, sought to dismiss the action for lack of standing because ATCF failed to record the assignment of the tax liens. The trial court, *Mintz*, *J.*, faced with a question of subject matter jurisdiction, suspended the hearing and gave both parties an opportunity to file briefs on the issue of whether the assignment of the tax liens to ATCF must be recorded on the town land records in order for the substituted plaintiff to have standing to foreclose the liens, as argued by the defendant. In response, the parties stipulated that if the motion to dismiss was denied, then the action would be disposed of by a foreclosure by sale in accordance with the findings that the parties had agreed on.[3] On September 14, 2018, the trial court denied the defendant's motion to dismiss, finding that there was no requirement that the assignment be recorded on the town land records. Consequently, the court rendered a judgment of foreclosure by sale and set a sale date of March 9, 2019. This appeal followed.

On appeal, the defendant claims that the trial court improperly found that ATCF had standing to pursue

[3] The trial court rendered the judgment of foreclosure by sale with the following agreed on findings: "Debt: $61,264.03 as of [September 13, 2018]"; "Attorney's Fees: $5850"; "Total: $67,114.03"; "Appraisal Fee: $700"; "Title

the foreclosure action because the assignment of the tax liens on the defendant's property had not been recorded on the town land records.

We begin by setting forth the well established standard of review. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . Our review of this question of law is plenary." (Citations omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013). "In ruling [on] whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . If . . . the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." (Citation omitted; internal quotation marks omitted.) *Burton* v. *Dominion Nuclear Connecticut, Inc.*, 300 Conn. 542, 550, 23 A.3d 1176 (2011).

This is a case of first impression. The sole issue before this court is whether the trial court erred in denying the defendant's motion to dismiss for ATCF's alleged lack of standing. The defendant maintains that ATCF lacks standing to foreclose the property because the assignment of the tax liens was not recorded. The defendant contends that General Statutes § 47-10,[4] the land

Search Fee: $225"; "Fair Market Value: $160,000"; "Land: $75,000"; and "Improvements: $85,000."

[4] General Statutes § 47-10 (a) provides: "No conveyance shall be effectual to hold any land against any other person but the grantor and his heirs, unless recorded on the records of the town in which the land lies. When a

transfer recordation statute, requires that all "conveyances" be recorded in order to be effective and that tax liens are "conveyances" for the purposes of that statute. ATCF disagrees, arguing that Practice Book § 10-70, which governs the foreclosures of municipal tax liens, and General Statutes § 12-195h, detailing the rights and obligations of assignees of municipal tax liens, are the "prevailing and controlling authority, neither of which impose the requirement that an assignment of the tax lien must be recorded in order to maintain a foreclosure action of the lien."

In its memorandum of decision, the trial court cited this court's decision in *Astoria Federal Mortgage Corp.* v. *Genesis Ltd. Partnership*, 167 Conn. App. 183, 143 A.3d 1121 (2016), which addressed a similar issue in the context of a mechanic's lien. In that case, the defendant appealed, claiming that the trial court improperly concluded that the defendant lacked standing to foreclose a mechanic's lien, which was otherwise validly assigned, because the assignment of the lien was not recorded. Id., 185. This court reversed the judgment concluding that the trial court incorrectly had applied the recordation requirements of § 47-10. Id., 202. This court, applying principles of statutory interpretation, determined that the more specific statutes governing mechanic's liens, which did not require recordation, should apply over more general statutes governing transfers of title, which required recordation, namely, § 47-10.[5] Id., 199.

conveyance is executed by a power of attorney, the power of attorney shall be recorded with the deed, unless it has already been recorded in the records of the town in which the land lies and reference to the power of attorney is made in the deed."

[5] This court explained: "In conducting this inquiry, we are guided by the statutory interpretation principle that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. . . . The provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage." (Internal

The court in *Astoria Federal Mortgage Corp.* further determined that the assignment of a mechanic's lien was more akin to a transfer of debt than to a transfer of title. Id., 201. It relied on General Statutes § 49-33 (i), which provides that "[a]ny mechanic's lien may be foreclosed in the same manner as a mortgage." See *Astoria Federal Mortgage Corp.* v. *Genesis Ltd. Partnership*, supra, 167 Conn. App. 200. This court explained that mortgage foreclosures are governed by General Statutes § 49-17, which provides that "a valid assignee of a mortgage note has standing to foreclose irrespective of whether that assignee records the assignment prior to instituting the action." Id., 202. In addition, this court concluded that "the failure of an assignee of a mechanic's lien to record an otherwise valid assignment of the lien does not deprive the assignee of the lien of standing to commence a foreclosure action." Id., 204.

Relying on *Astoria Federal Mortgage Corp.*, the trial court in the present case determined that ATCF did not lack standing to foreclose for failure to record the assignment of the municipal tax liens. The trial court stated that the specific procedures governing the foreclosure of tax liens, found in General Statutes § 12-195h[6] and Practice Book § 10-70,[7] do not contain any

quotation marks omitted.) *Astoria Federal Mortgage Corp.* v. *Genesis Ltd. Partnership*, supra, 167 Conn. App. 199.

[6] General Statutes § 12-195h provides in relevant part: "Any municipality . . . may assign . . . any and all liens filed by the tax collector . . . . [and] the assignee or assignees of such liens shall have and possess the same powers and rights at law or in equity as such municipality . . . would have had if the lien had not been assigned with regard to the precedence and priority of such lien, the accrual of interest and the fees and expenses of collection and of preparing and recording the assignment. The assignee shall have the same rights to enforce such liens as any private party holding a lien on real property including, but not limited to, foreclosure and a suit on the debt. . . ."

[7] Practice Book § 10-70 (a) provides in relevant part: "In any action to foreclose a municipal tax or assessment lien the plaintiff need only allege and prove: (1) the ownership of the liened premises on the date when the same went into the tax list, or when said assessment was made; (2) that

requirement that the assignment of a tax lien be recorded in order for the owner of the lien to have standing to foreclose. Further, the trial court concluded that the assignment of a tax lien, similar to that of a mechanic's lien, is more closely akin to the assignment of a mortgage rather than a conveyance of title and that, as such, the failure to record the assignment is not fatal to standing.

On the basis of our review, we agree with the trial court's analysis and conclusion that the assignee's failure to record the assignment of a tax lien does not deprive it of standing to bring a foreclosure action. As in *Astoria Federal Mortgage Corp.*, we conclude that the more specific statutes governing tax liens, which do not require recordation, should take precedence over the more general land transfer statutes, which do require it. Here, § 12-195h and Practice Book § 10-70 control both the assignment and foreclosure of municipal tax liens. They do not require that the assignment of liens be recorded to confer standing. Further, we agree with the trial court that a tax lien, similar to a mechanic's lien, is more analogous to a transfer of debt than to a transfer of title and, as such, is not considered a "conveyance" under § 47-10. Therefore, we conclude that the trial court properly denied the defendant's motion to dismiss and rendered judgment of foreclosure by sale in accordance with the findings as stipulated by the parties.

The judgment is affirmed and the case is remanded for the purpose of setting a new sale date.

In this opinion the other judges concurred.

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thereafter a tax in the amount specified in the list, or such assessment in the amount made, was duly and properly assessed upon the property and became due and payable . . . (4) that no part of the same has been paid; and (5) other encumbrances as required by the preceding section."

WINDHAM SOLAR, LLC *v.* PUBLIC UTILITIES REGULATORY AUTHORITY ET AL.
(AC 41918)

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

Syllabus

The plaintiff, W Co., sought to sell to the defendant E Co. the energy and capacity from twenty-six solar electric generating facilities. E Co. agreed to purchase the energy, but not the capacity, and rejected W Co.'s offer to sell the energy at a rate equal to the anticipated avoided costs over the life of the proposed thirty year contract. W Co. then filed a petition with the defendant Public Utilities Regulatory Authority, pursuant to statute (§ 16-243a), seeking an order to compel E Co. to enter into the contract to purchase the energy and the capacity in accordance with W Co.'s proposed pricing. W Co. claimed that E Co. had failed to negotiate in good faith to arrive at a contract that fairly reflected the requirements of § 16-243a and the anticipated avoided costs over the life of the contract. The authority denied W Co.'s petition, concluding that E Co. did not need the capacity offered by W Co. and that the avoided cost of the proffered capacity was zero. The authority further determined that W Co.'s petition sought a declaratory judgment and held that it would open a separate proceeding to consider whether its regulations required modification or amendment. After W Co. appealed to the trial court, that court granted an unopposed request from the authority to remand the matter to the authority to consider the effect of recent rulings by the Federal Energy Regulatory Commission on the authority's denial of W Co.'s petition. The court retained jurisdiction over W Co.'s appeal. The authority thereafter reversed its initial decision denying W Co.'s petition, concluding that W Co.'s claims should be addressed through the authority's rule-making proceeding. The authority then filed a motion to dismiss W Co.'s appeal on the ground that the court lacked subject matter jurisdiction because W Co. was not aggrieved by the authority's two decisions and that the appeal had become moot as a result of the authority's reversal of its initial decision. The court granted the authority's motion to dismiss, concluding that it lacked subject matter jurisdiction because W Co. had failed to plead facts sufficient to establish aggrievement and that W Co.'s appeal was moot as a result of the authority's reversal of its initial decision. The court thereafter rendered judgment for the authority, and W Co. appealed to this court, claiming that the trial court improperly concluded that it did not have standing and that its claims were moot. *Held* that the trial court improperly granted the authority's motion to dismiss W Co.'s petition, as W Co. had standing to appeal, having satisfied the requirements of the test for classical aggrievement, and its claims were not moot because there was practical relief that it could have been afforded by the trial court: W Co. had a specific, personal and legal interest in the issue at hand in

that it sought an order from the authority to approve and to compel the execution of the power purchase agreement and alleged that it had been specially and injuriously affected by the authority's refusal to compel E Co. to execute the contract, and, in determining that W Co.'s claims were moot as a result of the authority's second decision, the trial court conflated notions of relief that may be afforded to W Co. with relief to which W Co. was entitled when it improperly addressed the merits of W Co.'s claims and discussed the authority's options to address those claims directly or generically through the authority's regulatory proceeding; moreover, the court could have afforded W Co. practical relief by reversing the authority's decision to address the petition through its rule-making proceeding and remanding the matter with direction to consider the issues presented by the petition, or the court could have addressed issues the authority decided in its initial decision that it did not reverse or left unresolved in its subsequent decision.

Argued November 19, 2019—officially released March 3, 2020

Procedural History

Appeal from the decision by the named defendant denying the plaintiff's petition to compel the defendant Connecticut Light and Power Company, doing business as Eversource Energy, to enter into a certain contract for the sale of energy, brought to the Superior Court in the judicial district of New Britain, where the court, *Huddleston, J.*, granted the motion to intervene as a defendant filed by the Office of Consumer Counsel; thereafter, the court granted the named defendant's motion to remand the matter to the named defendant for further proceedings; subsequently, the court, *Hon. Joseph M. Shortall*, judge trial referee, granted the named defendant's motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed*; *further proceedings*.

Thomas Melone, for the appellant (plaintiff).

Seth A. Hollander, assistant attorney general, with whom was *Robert L. Marconi*, assistant attorney general, for the appellee (named defendant).

Vincent P. Pace, assistant general counsel, with whom, on the brief, was *Jennifer Galiette*, senior counsel, for the appellee (defendant Connecticut Light and Power Company, doing business as Eversource Energy).

Opinion

DEVLIN, J. In this administrative appeal seeking regulatory remedies with respect to a proposed contract for the sale of energy, the plaintiff, Windham Solar, LLC, appeals from the judgment of dismissal rendered by the trial court on the ground that it lacked subject matter jurisdiction. The plaintiff claims that the court erred in concluding that it did not have standing to bring this administrative appeal and that, even if it did, its claims were moot. We agree with the plaintiff and reverse the judgment of the trial court.

The record reveals the following undisputed factual and procedural history. On January 22, 2016, the plaintiff offered to sell to Connecticut Light & Power, doing business as Eversource Energy (Eversource),[1] all of the energy and capacity from twenty-six solar electric generating facilities, all of which are qualifying facilities under the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 2601 et seq. See 16 U.S.C. § 796 (17) (C) (2012). In response, Eversource acknowledged its obligation under General Statutes § 16-243a (b) (2) to purchase the power offered by the plaintiff,[2]

[1] Eversource and the Office of Consumer Counsel also are defendants in this proceeding.

[2] To implement the provisions of PURPA, the Connecticut legislature enacted § 16-243a. Section 16-243a (b) provides in relevant part: "Each electric public service company, municipal electric energy cooperative and municipal electric utility shall: (1) Purchase any electrical energy and capacity made available, directly by a private power producer or indirectly under subdivision (4) of this subsection . . . ."

Subsection (d) of § 16-243a provides: "When any person, firm or corporation proposes to enter into a contract to sell energy and capacity as a private power producer, an electric public service company, municipal electric energy cooperative or municipal electric utility shall respond promptly to all requests and offers and negotiate in good faith to arrive at a contract which fairly reflects the provisions of this section and the anticipated avoided costs over the life of the contract. Upon application by a private power producer, the authority may approve a contract which provides for payment of less than the anticipated avoided costs if, considering all of the provisions, the contract is at least as favorable to the private power producer as a contract providing for the full avoided costs. The contract may extend for

but agreed to purchase only the energy, not the capacity, and rejected the plaintiff's offer to sell the energy at the rate equal to the anticipated avoided costs over the life of the proposed thirty year contract.

As a result of Eversource's refusal to accept the terms of its offer, the plaintiff filed a petition with the defendant Public Utilities Regulatory Authority (PURA), alleging that Eversource had failed to "negotiate in good faith to arrive at a contract which fairly reflects the provisions of [§ 16-243a] and the anticipated avoided costs over the life of the contract," and sought an order from PURA compelling Eversource to enter into a thirty year contract to purchase energy and capacity in accordance with its proposed pricing.[3]

On August 24, 2016, PURA issued a written decision denying the plaintiff's petition to compel Eversource to enter into a contract on the plaintiff's terms. PURA found, inter alia, that Eversource did not need the capacity offered by the plaintiff and that "the avoided cost of the proffered capacity is zero." PURA further explained that "[the plaintiff's] petition is properly understood as asking whether PURA's long-standing implementation of . . . [PURPA], through § 16-243a and various orders of [PURA], is consistent with federal law." PURA thus "interpreted [the plaintiff's] petition as a request for a declaratory ruling pursuant to [General Statutes] § 4-176" and held that it would "open a separate proceeding to consider whether its regulations promulgated pursuant to . . . § 16-243a require modification or amendment."

The plaintiff thereafter appealed to the trial court from PURA's August 24, 2016 decision. While that

a period of not more than thirty years at the option of the private power producer if it has a generating facility with a capacity of at least one hundred kilowatts."

[3] The plaintiff sought a thirty year rate in order to attract investors to the project.

appeal was pending, the Federal Energy Regulatory Commission (FERC) issued an order construing PURPA to require a real-time price offering and also an option under which avoided costs are forecasted at the time the contract is executed. Consequently, PURA requested, and was granted, a voluntary and unopposed remand from the trial court, while the court retained jurisdiction over the plaintiff's appeal, to consider the effect of the FERC ruling on PURA's August 24, 2016 decision.

As a result of that reconsideration on remand, PURA issued a decision on January 10, 2018, reversing its August 24, 2016 decision, and holding that its earlier decision "incorrectly determined that PURPA's requirements are satisfied by real-time avoided cost offerings only, and that forecasted avoided cost rates are not necessary." PURA further concluded "that its PURPA regulations should be amended to incorporate a forecasted avoided cost rate methodology and other changes necessary as a result of electric restructuring and [the Federal Energy Policy Act of 2005], and [it] will address these issues in the [r]egulations [p]roceeding." PURA explained in a letter to the plaintiff's counsel that it was "not required, as a matter of law, to resolve [the plaintiff's claims] on a case-by-case basis . . ." but, rather, that it had " 'the statutory authority to revisit its implementation of FERC's rules, either through a new rule making, a case-by-case adjudication, or other reasonable method.' *Allco Renewable Energy Ltd.* v. *Massachusetts Electric Co.*, [875 F.3d 64, 74 (1st Cir. 2017)] . . . . [PURA] concludes that it should revisit its implementation of FERC's rules through a regulations proceeding." PURA thus determined that the issues presented by the plaintiff's petition "should be addressed generically through PURA's rule-making proceeding."

Dissatisfied with PURA's decision, the plaintiff, on February 1, 2018, filed a motion to restore its case to the trial court docket, asking that its original appeal be permitted to proceed. PURA filed an objection to the plaintiff's motion to restore its appeal to the docket, and a motion to dismiss the plaintiff's appeal on the ground that the court lacked subject matter jurisdiction over the plaintiff's appeal because the plaintiff was not aggrieved by PURA's decisions and the plaintiff's appeal had become moot as a result of PURA's reversal of its August 24, 2016 decision. The plaintiff filed an objection to PURA's motion to dismiss, arguing, inter alia, that, although PURA "overturned much of its [August 24, 2016] decision, it concluded that it would not address the particular circumstances of [the plaintiff's] petition, or address the relief sought by [the plaintiff]."

The trial court agreed with PURA that the plaintiff failed to plead facts sufficient to establish aggrievement and, thus, that the court lacked subject matter jurisdiction over the plaintiff's appeal. The court further determined that the plaintiff's appeal was moot by virtue of PURA's January 10, 2018 decision reversing its earlier determination that "facilities like [the] plaintiff's are not entitled to sell their output to a utility at a forecasted avoided-cost rate. [PURA] has undertaken to develop via regulation a methodology for calculating such a rate." The court thus granted PURA's motion to dismiss, and this appeal followed.

"As a preliminary matter, we set forth the standard of review. A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision to] grant . . . the motion to dismiss will be de novo. . . .

"[I]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged. . . . Because a determination regarding the trial court's subject matter jurisdiction raises a question of law, our review is plenary." (Citations omitted; internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 213–14, 982 A.2d 1053 (2009).

The plaintiff first challenges the trial court's determination that it failed to demonstrate that it was aggrieved by PURA's decisions and was thus without standing to appeal from them. "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless [it] has . . . some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the [party] whose standing is challenged is a proper party to request an adjudication of the issue. . . . Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that it has suffered or is likely to suffer]. Similarly, standing exists to attempt to vindicate arguably protected interests. . . .

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved. . . . The fundamental test for determining [classical] aggrievement encompasses a [well settled] twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members

of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) Id., 214–15.

Here, in considering the plaintiff's claim that it was aggrieved by PURA's decisions,[4] the court concluded that, "[c]onstruing the complaint[5] in a manner most favorable to [the] plaintiff, it may allege the 'specific, personal and legal interest in the subject matter of the controversy,' which is the first element necessary to make out classical aggrievement: '[The plaintiff] filed a petition . . . with [PURA] under . . . § 16-243a to compel and approve the execution of the power purchase agreement offered by [the plaintiff] to Eversource. [PURA's] final decision rejected [the plaintiff]'s petition.' . . . No matter how generously construed, however, the complaint fails to allege facts supporting the second essential element of classical aggrievement, i.e., how that interest has been 'specially and injuriously affected' by [PURA's] decision." (Citation omitted; footnote added.)

On the basis of our review of the plaintiff's pleadings, we conclude that the plaintiff satisfies the requirements of classical aggrievement and, therefore, has standing to appeal from the decisions of PURA. First, it cannot

[4] The trial court concluded that "it is clear from a careful reading that the complaint makes no claim that [the] plaintiff is statutorily aggrieved by [PURA's] decision." The plaintiff now challenges that conclusion. Because we conclude that the plaintiff is classically aggrieved by PURA's decisions, we need not address the plaintiff's claim that it also is statutorily aggrieved.

[5] To be sure, the abnormal and convoluted format of the plaintiff's complaint presented difficulty in identifying the factual allegations upon which it was relying in asserting aggrievement.

reasonably be disputed that the plaintiff has a specific, personal and legal interest in the issue at hand because its petition to PURA sought an order to approve and compel the execution of the power purchase agreement under which the plaintiff offered to sell to Eversource all of the energy and capacity from twenty-six solar electric generating facilities to Eversource but which Eversource rejected in part. The plaintiff likewise has alleged that its specific legal interest in the petition to compel the execution of the contract has been specially and injuriously affected by PURA's refusal to compel Eversource to execute the contract. Because we conclude that the plaintiff has satisfied the requirements of the test for demonstrating classical aggrievement, it has standing to appeal from PURA's decisions.

The plaintiff also challenges the trial court's dismissal of its claims as moot. "[I]t is not the province of [the] courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . When . . . events have occurred that preclude [the] court from granting any practical relief through its disposition of the merits, a case has become moot." (Internal quotation marks omitted.) *Abel* v. *Johnson*, 194 Conn. App. 120, 149–50, 220 A.3d 843 (2019), cert. granted on other grounds, 334 Conn. 917, A.3d (2020). Our review of the trial court's conclusion that the plaintiff's claims are moot is plenary. Id., 150.

Here, PURA argues, and the trial court agreed, that the plaintiff's appeal was rendered moot as a result of PURA's January 10, 2018 reversal of its August 24, 2016 decision rejecting the pricing and terms of the plaintiff's offer to Eversource. We disagree.

In ruling on the plaintiff's petition on August 24, 2016, PURA explained that the petition "is properly understood as asking whether PURA's long-standing implementation of . . . [PURPA], through . . . § 16-243a

and various orders of [PURA], is consistent with federal law. Upon review of the entire record of this proceeding, [PURA] interpreted [the plaintiff's] petition as a request for a declaratory ruling pursuant to § 4-176." Thus, when PURA reversed its August 24, 2016 decision, it did so in the limited context of its having "treated [the plaintiff's] petition as asking whether PURA's long-standing implementation of PURPA was consistent with federal law." Although that is certainly one aspect of the plaintiff's petition, PURA did not address the substance of the plaintiff's petition per se, as it did not contemplate the entirety of the plaintiff's requested relief. PURA articulated that it was "not required, as a matter of law, to resolve [the] issues [raised by the plaintiff's petition] on a case-by-case basis" but that it was within its rights to address the plaintiff's petition "generically though PURA's rule-making proceeding." PURA's articulation underscores the fact that PURA's reversal of its August 24, 2016 decision did not render the plaintiff's appeal from that decision moot.

In concluding that the plaintiff's claims became moot as a result of PURA's January 10, 2018 decision, the trial court specifically discussed PURA's authority to address the plaintiff's claims either generically through the regulatory proceeding or directly. In so doing, the trial court was addressing the propriety of PURA's decision and, thus, the merits of the plaintiff's claims. The analysis that the trial court conducted to determine whether the plaintiff's claims were moot was improper, however, because, "[i]n determining mootness, the dispositive question is whether a successful appeal would benefit the plaintiff or defendant in any way." (Internal quotation marks omitted.) *Estela* v. *Bristol Hospital, Inc.*, 165 Conn. App. 100, 107, 138 A.3d 1042, cert. denied, 323 Conn. 904, 150 A.3d 681 (2016). The availability of practical relief to a party for his or her claims is a question separate from whether the court will ultimately determine that it is appropriate to provide that

party with any relief that is available to him or her. See *Iacurci* v. *Wells*, 108 Conn. App. 274, 276, 947 A.2d 1034 (2008) (court must determine whether case is moot *before* addressing merits of defendants' appeal). Indeed, determining whether practical relief is available to a party necessarily precedes a court's assessing the merits of that party's claims because "[i]f a case has become moot, [the court] lack[s] subject matter jurisdiction to *address its merits*." (Emphasis added.) *State* v. *Walczyk*, 76 Conn. App. 169, 172, 818 A.2d 868 (2003). Thus, in the present case, the trial court improperly conflated the notions of relief that may afforded to the plaintiff and relief to which the plaintiff is entitled.

Although the plaintiff may not be entitled to the relief that it seeks, there is practical relief that the trial court may afford to it. For instance, the court may reverse PURA's decision to address the plaintiff's petition generically through its rule-making proceeding and remand the matter with direction to consider specifically the issues presented by the plaintiff's petition. The court may also address issues decided by PURA in its August 24, 2016 decision that it did not reverse in its January 10, 2018 decision. In its appeal to the trial court, the plaintiff claimed that PURA improperly made factual findings, such as the finding that Eversource did not have a capacity obligation, without affording the plaintiff either the opportunity to conduct discovery or an evidentiary hearing. PURA's January 10, 2018 decision did not address those findings, leaving the plaintiff's claims regarding them unresolved. Likewise, PURA's January 10, 2018 decision did not address the plaintiff's claim that Eversource violated its obligation under § 16-243a (d) to negotiate in good faith and its argument that such obligation was "independent of whatever schedules have been, or should have been, published under § 16-243a (c)."

It is not the role of this court, at this juncture, to determine the merits of the plaintiff's claims for relief. The limited issue with which we are faced is whether the trial court properly concluded that it did not have subject matter jurisdiction over the plaintiff's claims. Because there was practical relief that the trial court could have afforded, we conclude that the plaintiff's claims were not moot and, thus, that the court has subject matter jurisdiction over them. Accordingly, the trial court erred in granting PURA's motion to dismiss.

The judgment is reversed and the case is remanded with direction to deny PURA's motion to dismiss and for further proceedings according to law.

In this opinion the other judges concurred.

AMERICAN TAX FUNDING, LLC *v.* FIRST EAGLE CORPORATION ET AL.
(AC 42610)

Lavine, Moll and Flynn, Js.

Syllabus

The plaintiff, an assignee of municipal tax liens for the tax years 2005, 2006, 2007, and 2008, sought to collect the unpaid taxes on the 2006 through 2008 tax liens. The tax liens had been assigned to the plaintiff by the city of Hartford pursuant to statute (§ 12-195h), which grants to the assignee the same powers and rights the municipality would have if the lien had not been assigned. The plaintiff previously brought a separate action to foreclose on the 2005 tax lien, in which it obtained a judgment of strict foreclosure that it later assigned. In the collection action, the defendant property owner asserted various special defenses, including that the plaintiff's claims were extinguished pursuant to statute (§ 12-195) because the plaintiff had obtained a judgment of strict foreclosure on the 2005 tax lien, and that the defendant's debt had been satisfied. Section 12-195 provides that when a municipality acquires real estate by foreclosure, the acquisition is deemed a cancellation by the municipality as against the tax collector for unpaid taxes. The trial court rendered judgment in favor of the defendant on these two special defenses, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly found that, pursuant to § 12-195 and the controlling precedent of *Municipal Funding, LLC* v. *Gallulo* (72 Conn. App. 755), the 2006 through 2008 tax liens were extinguished by the judgment of strict foreclosure rendered in favor of the plaintiff or its assignee in the foreclosure action on the 2005 tax lien and, thus, barred the plaintiff from recovering in this action; moreover, because the plaintiff or its assignee acquired title to the property by foreclosure, pursuant to § 12-195, all of its claims, in whatever form those claims might take, were extinguished, a result that coincides with the common-law rule that prohibits double recovery and provides that a plaintiff may be compensated only once.

2. This court declined to review the plaintiff's claim that the trial court erred when it concluded that the defendant's debt had been satisfied as the plaintiff failed to present an adequate record for review.

Argued January 15—officially released March 3, 2020

Procedural History

Action to recover certain unpaid municipal taxes brought to the Superior Court in the judicial district of Hartford, where the action was withdrawn as against 207 Main Street Investors, LLC; thereafter, the case was tried to the court, *Cobb, J.*; judgment for the named defendant, from which the plaintiff appealed. *Affirmed.*

David L. Gussak, for the appellant (plaintiff).

Gregory W. Piecuch, for the appellee (named defendant).

Opinion

FLYNN, J. In this collection action, the plaintiff, American Tax Funding, LLC, appeals from the judgment of the trial court rendered in favor of the defendant First Eagle Corporation[1] on two of its special defenses. The court concluded that the plaintiff, the assignee of municipal tax liens, was barred from recovery. On appeal, the plaintiff claims that the court (1) improperly determined that its claims were extinguished pursuant

[1] The action was withdrawn as to the defendant 207 Main Street Investors, LLC. All references to the defendant are to First Eagle Corporation.

to General Statutes § 12-195, and (2) erred when concluding that the defendant's debt to the plaintiff had been satisfied. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts, as found by the trial court, are relevant. The defendant failed to pay its property taxes on real property, located at 40 John Street in Hartford (property), for the tax years 2005, 2006, 2007, and 2008. This resulted in statutory tax liens in favor of the city of Hartford (city) for each of those tax years in the respective amounts of $12,100.55, $10,360.15, $9,465.50, and $10,723.31. On June 26, 2008, June 18, 2009, and June 25, 2010, the city assigned to the plaintiff its rights as to the four tax liens, pursuant to General Statutes § 12-195h, which permits a municipality to assign for consideration liens filed by the tax collector. Each assignment provided that the city assigned "all of the [c]ity's right, title and interest in and to certain liens created by law in favor of the [c]ity of Hartford, Connecticut to allow the tax collector of such [c]ity to secure unpaid taxes on real property . . . . By execution of the [a]ssignment, the [c]ity is assigning and the [a]ssignee is assuming, all of the rights at law or in equity, obligations, powers and duties as the [c]ity of Hartford and the [c]ity's tax collector would have with respect to the above liens . . . ."

On February 17, 2015, the plaintiff initiated a separate foreclosure action seeking to foreclose on the 2005 tax lien only. The plaintiff failed to identify in its foreclosure complaint the 2006 through 2008 tax liens that it also held, despite the requirement under Practice Book §§ 10-69 and 10-70[2] that all encumbrances of record be

[2] Practice Book § 10-69 provides: "The complaint in all actions seeking the foreclosure of a mortgage or other lien upon real estate shall set forth, in addition to the other essentials of such complaint: All encumbrances of record upon the property both prior and subsequent to the encumbrance sought to be foreclosed, the dates of such encumbrances, the amount of each and the date when such encumbrance was recorded; if such encumbrance be a mechanic's lien, the date of commencing to perform services or furnish

pleaded in the complaint. On June 12, 2015, the plaintiff moved for a judgment of strict foreclosure. The plaintiff's affidavit of debt stated the amount of debt as $23,810.15. The plaintiff submitted an appraisal of the property and an affidavit of the appraisal, which established that the fair market value of the property was $105,000. The plaintiff's foreclosure worksheet, form JD-CV-77, represented the fair market value of the property to be $105,000. Foreclosure worksheets are filed by the plaintiff for the guidance of the court. The foreclosure worksheet also listed the total encumbrances prior to the plaintiff's 2005 lien to be $65,332.03, an amount equal to the 2006 through 2008 tax liens.[3]

On June 29, 2015, the court granted the plaintiff's motion for a judgment of strict foreclosure and found that the fair market value of the property was $105,000, and the debt was $23,810.15; the court set a law day of August 24, 2015. The law day passed without redemption. On August 26, 2015, the combined total of the 2005 through 2008 tax liens was $93,260.19, and the total payoff amount including attorney's fees and costs was $105,259. On August 27, 2015, the plaintiff assigned the foreclosure judgment to City Shelter, LLC (City Shel-

materials as therein recited; and if such encumbrance be a judgment lien, whether said judgment lien contains a reference to the previous attachment of the same premises in the same action, as provided by General Statutes § 52-380a."

Practice Book § 10-70 (a) provides in relevant part: "In any action to foreclose a municipal tax or assessment lien the plaintiff need only allege and prove . . . (5) other encumbrances as required by the preceding section. . . ."

[3] The plaintiff listed the 2006 through 2008 tax liens as prior encumbrances on the foreclosure worksheet, in contravention of Practice Book § 10-69, despite the fact that those liens are later in time and are therefore junior to the 2005 lien. The plaintiff did not set forth in its foreclosure complaint, which was admitted as a full exhibit in the present action, the 2006 through 2008 tax liens as either prior or subsequent encumbrances to the encumbrance sought to be foreclosed on, nor did the plaintiff set forth the date of such encumbrances or the amount of each and the date when such encumbrances were recorded.

ter).[4] The plaintiff filed a certificate of foreclosure on August 28, 2015, despite the fact that the plaintiff had assigned the foreclosure judgment to City Shelter. City Shelter sold the property on April 8, 2016, for $63,000, and received a net amount of $44,933.81 after expenses.

Prior to the passage of title to the property and in temporal proximity to the institution of the foreclosure action, the plaintiff initiated the present collection action by a complaint dated February 17, 2015, and filed February 25, 2015. The plaintiff sought to collect the taxes on the liens that the city had assigned to it for the tax years 2006, 2007, and 2008. The defendant filed an answer and asserted special defenses, including that the plaintiff's ability to recover was barred by (1) the judgment of strict foreclosure, and (2) the fact that the plaintiff had received payment and satisfaction of the debt through the foreclosure action.

In its February 5, 2019 memorandum of decision, the court stated that the plaintiff's position was that it had not been made whole because, even though it had obtained a judgment of strict foreclosure of the property, City Shelter sold the property for $63,000, which was less than the total value of the liens. The court noted that, "[a]t trial, the plaintiff's president admitted that their goal in this action was to obtain a double recovery, that is, the property valued at $105,000 and an $85,000 money judgment." Relying on *Municipal Funding, LLC* v. *Galullo*, 72 Conn. App. 755, 806 A.2d

[4] The plaintiff did not substitute City Shelter as the plaintiff in the foreclosure action. The trial court in the present action determined that the certificate of title filed by the plaintiff indicated that title to the property passed to City Shelter on August 29, 2015. It noted that neither the plaintiff nor the defendant argued that this assignment had any material effect on the issues in the collection action.

We note that the plaintiff did not amend the complaint to show the volume and page number of the assignment of the foreclosure judgment on the land records. The plaintiff did not raise as an issue on appeal that City Shelter was the entity that took title to the property. Therefore, for purposes of this appeal, we do not treat the assignment as having any material effect.

601, cert. denied, 262 Conn. 915, 811 A.2d 1292 (2002), the court reasoned that the plaintiff, which had stepped into the shoes of the municipality, was bound by § 12-195, which expressly provides that the acquisition by a municipality of real estate by foreclosure extinguishes all of its claims by the tax collector for unpaid taxes. The court concluded that "the assigned tax liens at issue were extinguished by the judgment of strict foreclosure, and, therefore, there exists no liens or debt for the plaintiff to collect upon in this case."

The court also found in favor of the defendant on its special defense of payment and satisfaction. The court found that, "[a]t the time of the foreclosure judgment, the plaintiff's four liens had a monetary value, with interest, of approximately $93,000, an amount just below the fair market value of the property of $105,000. Therefore, as the result of the foreclosure judgment, the plaintiff or its assignee received title to property that had a greater value than the four liens. Thus, the defendant's debt to the plaintiff, resulting from the assigned tax liens, was essentially satisfied by the transfer of the title to the property to the plaintiff or its assignee. The plaintiff cannot now recover again in this action."[5] This appeal followed.

I

The plaintiff claims that the court improperly concluded that the judgment of strict foreclosure rendered in favor of the plaintiff or its assignee in its foreclosure action on the 2005 tax lien extinguished the 2006 through 2008 tax liens, thereby barring the plaintiff from recovery in the present action. The defendant counters that the judgment of strict foreclosure bars the plaintiff from taking further action on the 2006 through 2008 tax liens and contends that to rule otherwise would require *Municipal Funding, LLC* v. *Galullo*, supra, 72

[5] The court did not find in favor of the defendant on its special defenses of judicial estoppel or laches.

Conn. App. 755, to be overruled, which the plaintiff does not ask this court to do. We agree with the defendant.

This claim requires us to interpret the statutes regarding municipal lien assignment and extinguishment, to which issue we afford plenary review. See Id., 761.

A municipality is a creature of the state and can only exercise powers that are expressly granted to it or which are otherwise necessary to the discharge of its duties. See *Bredice* v. *Norwalk*, 152 Conn. 287, 292, 206 A.2d 433 (1964). By statute, a municipality is authorized to assign tax liens. Section 12-195h provides in relevant part: "Any municipality . . . may assign, for consideration, any and all liens filed by the tax collector to secure unpaid taxes on real property as provided under the provisions of this chapter. . . . The assignee or assignees of such liens shall have and possess the same powers and rights at law or in equity as such municipality and municipality's tax collector would have had if the lien had not been assigned . . . ."

The plaintiff chose to pursue a foreclosure action on one of its tax liens and obtained a judgment of strict foreclosure, despite the fact that it had been assigned three additional subsequent tax liens by the city. As the assignee of municipal tax liens, the plaintiff stands in the shoes of the municipality and is bound by the extinguishment provision of the municipal tax liens statute, § 12-195, which provides in relevant part that "[w]hen any municipality acquires real estate by foreclosure . . . . [t]he acquisition of such real estate by the municipality shall be deemed a *cancellation* by such municipality of *all of its claims* against the tax collector for unpaid taxes and assessments, interest or lien fees assessed against such real estate. . . ." (Emphasis added.)

In *Municipal Funding, LLC* v. *Galullo*, supra, 72 Conn. App. 763–65, this court applied § 12-195 to facts similar to those in the present case. In *Galullo*, the

plaintiff was an assignee of the 1993, 1994, and 1995 municipal tax liens of the city of Waterbury for certain real property. Id., 757–58. The plaintiff took title to the subject property through an action to foreclose on the 1993 and 1994 tax liens. Id., 758. Prior to the passage of the law days, the property was damaged by fire, and the insurer of the former owner of the property issued a check for partial payment of the damage caused by the fire, and made the check payable to the plaintiff, the city, and three other entities. Id. The plaintiff filed an application for an order of mandamus asking the trial court to order the defendant, the tax collector of the city of Waterbury, to endorse the check to the plaintiff as payment for its liens. Id. In granting the defendant's motion for summary judgment, the trial court issued a "thoughtful and well reasoned" decision concluding that all of the plaintiff's tax liens, including the 1995 lien, had been extinguished when the plaintiff took title to the property. Id., 759. The trial court reasoned that § 12-195 "provides that when a municipality forecloses on a tax lien and acquires absolute title to the property, all other liens or claims held by the municipality against the property are cancelled." *Municipal Funding* v. *Galullo*, Superior Court, judicial district of Waterbury, Docket No. CV-00-0161141-S (April 30, 2001) (29 Conn. L. Rptr. 682, 684), aff'd, *Municipal Funding, LLC* v. *Galullo*, 72 Conn. App. 755, 806 A.2d 601, cert. denied, 262 Conn. 915, 811 A.2d 1292 (2002). On appeal, this court rejected the plaintiff's claim that because the fire had occurred before the law days passed, it was entitled to the insurance proceeds. *Municipal Funding, LLC* v. *Galullo*, supra, 762–64. This court held that "the critical fact is not whether the fire occurred before the first law day, but that the plaintiff took title to the property. Just as the plaintiff stepped into the shoes of the municipality as an assignee for purposes of precedence and priority, it also is bound by the extinguishment provision of . . . § 12-195. . . . [B]y taking title

to the property, the plaintiff lost its rights to collect on all of its liens, including its 1995 lien." Id., 762–63.

According to the express language of § 12-195, and the controlling precedent of *Municipal Funding, LLC* v. *Galullo*, supra, 72 Conn. App. 755, the plaintiff is barred from bringing the present collection action on the 2006 through 2008 tax liens because all of the plaintiff's tax liens, including the 2006 through 2008 tax liens, were extinguished when the plaintiff or its assignee took title to the property in the foreclosure proceeding. The plaintiff counters that § 12-195 does not extinguish its power to exercise a municipality's ability to institute a collection action on the underlying debt pursuant to General Statutes § 12-161.[6] The plaintiff contends that it released the 2006 through 2008 liens when City Shelter sold the property for $63,000 in 2016, but that it received no portion of the sale proceeds in return for the releases.[7] The plaintiff argues that it is permitted to bring a collection action on the 2006 through 2008 tax liens pursuant to § 12-195h, which provides in relevant part that "[t]he assignee shall have the same rights to enforce such liens as any private party holding a lien on real property including, but not limited to, foreclosure *and a suit on the debt.* . . ." (Emphasis added.) The plaintiff stresses that the language in § 12-195h regarding "a suit on the debt" was added in 2013, by No. 13-276 of the 2013 Public Acts, following the 2002 decision in *Galullo*. The amendment to § 12-195h does not affect our resolution of this issue because

[6] The plaintiff argues that the defendant did not plead or raise in the trial court that, under the circumstances of the present case, any and all of the plaintiff's remaining claims were extinguished pursuant to § 12-195. In the exercise of our plenary review over the interpretation of the pleadings; see *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012); we conclude that the defendant properly raised this defense.

[7] We note that the remedy of a deficiency judgment is not available to a municipality or its assignee. See *Winchester* v. *Northwest Associates*, 255 Conn. 379, 388, 767 A.2d 687 (2001).

our analysis is controlled by § 12-195, which has not been amended since 1998. Because the plaintiff or its assignee acquired title to the property by foreclosure then, pursuant to § 12-195, "*all* of its claims," in whatever form those claims might take, were extinguished. (Emphasis added.) This result coincides with the common-law rule prohibiting double recovery and providing that a plaintiff may be compensated only once. See, e.g., *Mahon* v. *B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 663, 935 A.2d 1004 (2007).

The plaintiff further argues that General Statutes § 12-172 specifically excludes the extinguishment of the 2006 through 2008 liens. Section 12-172 provides in relevant part that "[n]o sale of real estate for taxes or foreclosure of any lien shall divest the estate sold of any existing lien for other taxes." The plaintiff's argument was rejected by this court in *Galullo*. In that case, this court concluded that its holding that the plaintiff lost its rights to collect on all of its liens by taking title to the property did not conflict with § 12-172. *Municipal Funding, LLC* v. *Galullo*, supra, 72 Conn. App. 763. Relying on the express language in § 12-172, the court reasoned that " '[n]o sale of real estate for taxes or foreclosure of any lien shall divest the estate sold of any existing lien for other taxes' " and concluded that "the plain language of § 12-172 and its relationship to other language in the statutory municipal foreclosure scheme indicates that this section applies only to real estate sales or foreclosure by sale. It does not apply to instances of strict foreclosure. . . . In addition to the plain language limiting § 12-172 to foreclosures by sale, we note that in 1998, the legislature amended § 12-195 to distinguish between strict foreclosures and foreclosures by sale or auction. See Public Acts 1998, No. 98-35, § 1. Speaking in favor of the amendment, which added the words 'foreclosure by sale or auction' to the statute, Representative John S. Martinez stated that 'this

bill would allow municipalities to cancel unpaid taxes on parcels of land acquired by municipalities through foreclosure by sale or auction. Presently, the [statutory reference to 'foreclosure'] only allow[s] municipalities to cancel such taxes when a parcel is acquired through strict foreclosure.' 41 H.R. Proc., Pt. 5, 1998 Sess., p. 1601. We conclude that the reverse also is true. Because § 12-172 refers only to sales of real estate for foreclosure of liens, we conclude that it does not apply to strict foreclosure. Accordingly, § 12-172 does not save the plaintiff's 1995 lien from extinguishment." (Emphasis omitted.) Id., 763–64. Because § 12-172 does not apply to instances of strict foreclosure, the plaintiff cannot prevail on this argument.

For the foregoing reasons, we conclude that the court properly found in favor of the defendant on its special defense of extinguishment pursuant to § 12-195. Accordingly, the court properly precluded the plaintiff from recovering in the present collection action.

II

Although we have concluded that the court properly found in favor of the defendant on its defense of extinguishment, we briefly discuss the plaintiff's claims regarding the second special defense, namely, satisfaction of the debt. This claim is unreviewable. Although the plaintiff claims that our review standard is plenary, our resolution of the issues raised requires us to determine whether there is evidence in the record to support the court's findings or, even if there is such support in the record, whether, on the basis of a review of the entire evidence, we are left with a definite and firm conviction that a mistake has been committed.[8] See, e.g., *ARB Construction, LLC* v. *Pinney Construction*

[8] The plaintiff asserts that the standard of review on all of its claims is plenary. The arguments the plaintiff has made regarding the factual findings underpinning the court's conclusion regarding the defendant's second special defense involve questions of fact.

Corp., 75 Conn. App. 151, 156, 815 A.2d 705 (2003). It is axiomatic that it is the plaintiff's burden to prove its claims on appeal and show that the court's finding that the debt had been satisfied was clearly erroneous. Although the plaintiff challenges the court's factual findings, it has not provided us with transcripts. Practice Book § 61-10 (a) provides: "It is the responsibility of the appellant to provide an adequate record for review. The appellant shall determine whether the entire record is complete, correct and otherwise perfected for presentation on appeal."[9] Because the plaintiff has not met its burden of providing an adequate record for our review, we decline to review this claim.

The judgment is affirmed.

In this opinion the other judges concurred.

BARBARA WELLS *v.* MICHAEL WELLS
(AC 42217)

Lavine, Alvord and Keller, Js.

Syllabus

The plaintiff, whose marriage to the defendant previously had been dissolved, appealed to this court from the judgment of the trial court denying her motion for an order seeking payment of unallocated support. The plaintiff contended that the defendant failed to pay her the full amount due from a bonus payment the defendant received. The parties' separation agreement set forth three tiers for determining the amount of the defendant's income that would be paid to the plaintiff. The defendant calculated the payment under the second and third tiers solely using his bonus payment. The plaintiff contended the payment must be calculated using the defendant's total gross income, which was his base salary plus the bonus payment. The trial court agreed with the defendant's

[9] "The commentary for [Practice Book] § 61-10 provides . . . that '[t]he adoption of subsection (b) is not intended to preclude the court from declining to review an issue where the record is inadequate for reasons other than solely the failure to seek an articulation . . . .' " *Ippolito* v. *Olympic Construction, LLC*, 163 Conn. App. 440, 451 n.6, 136 A.3d 653, cert. denied, 320 Conn. 934, 134 A.3d 623 (2016).

interpretation of the separation agreement and denied the plaintiff's motion. *Held* that the trial court improperly denied the plaintiff's motion for order because it incorrectly interpreted the applicable provision of the separation agreement; the plain language of the separation agreement required that the second and third tiers be applied to the defendant's gross income, not solely to his bonus.

Argued December 2, 2019—officially released March 3, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford and tried to the court, *Hon. Arthur A. Hiller*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Brown, J.*, denied the plaintiff's postjudgment motion for order seeking certain payments, and the plaintiff appealed to this court. *Reversed*; *judgment directed*.

Barbara M. Schellenberg, with whom, on the brief, was *Annmarie P. Briones*, for the appellant (plaintiff).

Bonnie Amendola, for the appellee (defendant).

Opinion

ALVORD, J. In this marital dissolution action, the plaintiff, Barbara Wells, appeals from the judgment of the trial court denying her postdissolution motion for an order seeking payment of unallocated support owed by the defendant, Michael Wells, pursuant to the terms of the parties' separation agreement. On appeal, the plaintiff claims that the court improperly interpreted the applicable provision of the separation agreement. We agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

The record reveals the following facts and procedural history. The parties were divorced on May 25, 2017. The dissolution judgment incorporated by reference a separation agreement executed by the parties on the same date (separation agreement). Article III of the

separation agreement governs child support and alimony. Section 3.1 of article III provides, in relevant part: "Commencing June 1, 2017, the Husband shall pay to the Wife the following sums as unallocated support:

"Husband's income paid to the Wife—

"$0.00—$220,000 Wife shall receive 50% of the gross (paid via cash transfer or check to the Wife on the 15th and 30th of each month);

"$220,001—$420,000 Wife shall receive 40% of the gross (paid via cash transfer or check to the Wife within 5 days of receipt by the Husband); and

"$420,001—$600,000 Wife shall receive 30% of the gross (paid via cash transfer or check to the Wife within 5 days of receipt by the Husband).[1]

"The Wife shall not receive any share of the Husband's income that exceeds $600,000 per year. Annual income is defined as 'total gross income earned from employment plus any distributions deferred for income tax purposes.' The Husband shall not voluntarily defer any compensation from employment. The Husband shall provide proof of all income from employment to the Wife within 5 days of receipt by the Husband.

"All unallocated support shall be taxable to the Wife and deductible to the Husband." (Footnote added.)

Section 3.1 also provides that "[t]he alimony shall be payable until the soonest to occur of the following events: a) the death of the Husband; b) the death of the Wife; c) the Wife's remarriage or statutory cohabitation pursuant to [General Statutes §] 46b-86 (b) in which case the Court may modify, suspend or terminate the alimony; or d) May 31, 2025."

[1] The parties and the court refer to the "$0.00—$220,000" range as the "first tier," the "$220,001—$420,000" range as the "second tier," and the "$420,001—$600,000" range as the "third tier." We do the same in this opinion.

Article VI of the agreement governs taxes. Section 6.3 provides: "The parties shall be responsible for any additional tax liability incurred as a result of the Husband's bonus payment received in 2017 in proportion with their percentage of funds received prior to the dissolution. The Husband shall pay this tax liability from his bonus payment received in 2018 prior to the Wife's distribution per Paragraph 3.1."

After preparing the separation agreement, the parties appeared before the court, *Hon. Arthur A. Hiller*, judge trial referee, and were canvassed by their respective counsel regarding the separation agreement. The court found the agreement fair and equitable and incorporated it into the divorce decree.

On May 3, 2018, the plaintiff filed a postjudgment motion for order, in which she alleged that the defendant had failed to pay the full amount of unallocated support due to her from a $480,000 bonus the defendant received in January, 2018. Specifically, the plaintiff alleged that the defendant had paid her $82,000 from his bonus and that this $82,000 payment did not represent the full amount owed to her pursuant to section 3.1 of the separation agreement. On September 17, 2018, the parties appeared before the court, *Brown, J.*, which heard the testimony of the parties and other evidence.

The central dispute between the parties was their differing interpretations of the calculations to be performed under the second and third tiers of section 3.1 to determine the amount of unallocated support due to the plaintiff.[2] According to the defendant, the $480,000 bonus he received is considered separately under the

[2] The parties agreed that the defendant was in compliance with his ongoing obligation under the first tier of section 3.1 of the separation agreement to pay 50 percent of his total gross income up to $220,000 on the fifteenth and thirtieth of every month. Both parties further agreed that the $220,000 amount represented the defendant's base salary at the time of the dissolution judgment. The defendant testified that, subsequent to the dissolution judgment, he had received an increase in his base salary to $250,000. That salary increase was not the subject of the plaintiff's motion for order.

second and third tiers outlined in section 3.1. Specifically, he contended that from his $480,000 bonus, he owed the plaintiff $80,000 under the second tier (($420,000 minus $220,001) multiplied by 40 percent equals $80,000) and $18,000 under the third tier (($480,000 minus $420,001) multiplied by 30 percent equals $18,000). From this $98,000 obligation under the second and third tiers, he was to subtract the tax liability, which the parties agree was $16,028. Accordingly, under the defendant's interpretation, he owed the plaintiff approximately $82,000.

According to the plaintiff, the calculation under the separation agreement requires that the defendant's total gross income earned from employment, which was $700,000 ($220,000 salary plus the $480,000 bonus) for 2018, be considered in full under the second and third tiers. In her view, the defendant correctly calculated the amount owed under the second tier ($80,000), but incorrectly calculated the amount owed under the third tier. Considering that the agreement precluded her from receiving any share of the defendant's income that exceeded $600,000 per year, she maintained that the amount owed under the third tier was $54,000 (($600,000 minus $420,001) multiplied by 30 percent equals $54,000). From this total $134,000 obligation calculated by adding the result of the second and third tiers, the defendant was to subtract the tax liability, which, as noted previously, the parties agree was $16,028. Accordingly, under the plaintiff's interpretation, the defendant owed her $117,972 ($80,000 plus $54,000 minus $16,028 equals $117,972). Because he paid her only $82,000, she alleged that he underpaid her by $35,972.

On October 15, 2018, the court issued a memorandum of decision, in which it accepted the defendant's interpretation of section 3.1 of the separation agreement and rejected the plaintiff's claim that she was owed any additional payments. Accordingly, the court denied the plaintiff's motion for order. This appeal followed.

On appeal, the plaintiff's sole claim is that the court improperly interpreted the clear and unambiguous language of section 3.1 of the separation agreement when it substituted "gross remainder of [the defendant's] bonus" for "gross income" when calculating the amount the plaintiff was owed under the third tier. The defendant agrees that the provision is unambiguous, but contends that the court properly interpreted the provision. We agree with the plaintiff.

We first set forth our standard of review. "Our interpretation of a separation agreement that is incorporated into a dissolution decree is guided by the general principles governing the construction of contracts. . . . A contract must be construed to effectuate the intent of the parties, which is determined from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a contract must emanate from the language used in the contract rather than from one party's subjective perception of the terms. . . . If the language of a contract is clear and unambiguous, the intent of the parties is a question of law, subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Eckert* v. *Eckert*, 285 Conn. 687, 692, 941 A.2d 301 (2008).

Applying the foregoing principles to the present matter, we conclude, and the parties agree, that the language of the relevant provision is clear and unambiguous. Section 3.1 of the separation agreement provides that the plaintiff shall receive certain percentages of

the gross income of the defendant according to a three-tiered arrangement. The agreement defines "[a]nnual income" as "total gross income earned from employment plus any distributions deferred for income tax purposes." Because the separation agreement clearly defines annual income and is structured to provide for the payment of certain percentages of such annual income according to three tiers, the language is clear and unambiguous. Accordingly, our review is plenary.

Having determined our standard of review, we now turn to the actions of the trial court. In accepting the defendant's interpretation that the second and third tiers of section 3.1 applied only to his bonus, the court reached a conclusion inconsistent with the words used by the parties in the separation agreement. "It is hornbook law that courts do not rewrite contracts for parties. . . . Put another way, [a] court simply cannot disregard the words used by the parties or revise, add to, or create a new agreement." (Citation omitted; internal quotation marks omitted.) *Nassra* v. *Nassra*, 139 Conn. App. 661, 669, 56 A.3d 970 (2012).

The defendant argues that the plaintiff's "calculation does not acknowledge that she had already received payment for her share of the [d]efendant's base salary in 2017 and will continue to do so in 2018, and to include said amount in her claim of what was due and owing from his bonus payment paid in 2018 amounts to double counting." We fail to see how applying the tiered structure to the defendant's total income constitutes double counting. To the contrary, it does no more than account for the defendant's total income in accordance with the plain language of the provision. As noted previously, the income ranges contained within each of the tiers refers to the gross income of the defendant, and the definition of his annual income includes his "total gross income earned from employment . . . ." There simply is no language contained in the second and third tiers that could be construed as limiting their applicability only to the defendant's bonus.

We conclude that the plain language of the separation agreement requires that the percentages stated in the second and third tiers be applied to the defendant's gross income, not solely to his bonus. Therefore, the court improperly denied the plaintiff's motion for order. Given that the parties do not dispute the amount of the plaintiff's claim, we conclude that the defendant underpaid the plaintiff by $35,972.[3]

The judgment is reversed and the case is remanded with direction to grant the plaintiff's motion and to render judgment in favor of the plaintiff in the amount of $35,972.

In this opinion the other judges concurred.

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[3] Although the plaintiff requested various forms of relief in her motion for order, the relief sought by the plaintiff on appeal requests only "that the judgment of the trial court . . . be reversed and that the case . . . be remanded to the trial court with direction to enter judgment in [the] plaintiff's favor in the amount of $35,972."

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 196

JUDSON BROWN *v.* COMMISSIONER OF CORRECTION
(AC 42514)

Elgo, Moll and Bishop, Js.

Argued February 11—officially released March 3, 2020

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

Per Curiam. The appeal is dismissed.

STATE OF CONNECTICUT *v.* LUIS TORRES
(AC 42360)

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

Argued February 11—officially released March 3, 2020

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

Per Curiam. The judgments are affirmed.

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assuming that this court's mandate in first appeal did not encompass claims of certain plaintiffs to quiet title, equitable relief, and fees and costs, trial court improperly denied their motion to open to provide them with their requested relief; claim that trial court violated several state and federal constitutional rights of certain plaintiffs by failing to hear or grant their postjudgment motions.

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Murder; claim that trial court's exclusion of evidence deprived defendant of right to present defense; whether defendant demonstrated relevancy of alleged statement; whether defendant laid evidentiary foundation for claim of self-defense; whether there was causal relationship between toxicology report and cause of death of victim; whether there was evidence that defendant had reason to believe deadly physical force was required; claim that trial court violated defendant's right to

due process by refusing to give self-defense jury instruction; whether reasonable juror could have concluded that defendant believed himself to be in imminent or immediate danger; whether trial court properly denied defendant's motion for new trial or to dismiss charges for state's late disclosure of firearm related evidence; whether late disclosure constituted bad faith; whether defendant was prejudiced in plea bargaining or trial by late disclosure of evidence; claim that defendant was denied fair trial by prosecutorial impropriety in closing argument; whether prosecutor's improper statement harmed defendant.

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Foreclosure; motion for summary judgment as to liability; motion for judgment of strict foreclosure; motion to reargue; claim that trial court lacked subject matter jurisdiction because plaintiff did not have standing because it was not holder of subject note; claim that note was nonnegotiable instrument pursuant to relevant statute (§ 42a-3-104 (a)) because it was not for fixed amount of money and was governed by federal law; claim that trial court improperly granted plaintiff's motion for summary judgment as to liability; whether trial court abused its discretion by granting motion for judgment of strict foreclosure; whether plaintiff complied with requirement in applicable rule of practice (§ 23-18) that preliminary statement of monetary claim be filed no less than five days prior to hearing on motion for judgment of strict foreclosure; claim that trial court abused its discretion when it denied defendant's motion to reargue judgment of strict foreclosure.

Wells *v.* Wells 309

Dissolution of marriage; postjudgment motion for order; whether trial court improperly interpreted provision of separation agreement; whether trial court improperly denied motion for order.

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Administrative appeal; appeal from decisions by defendant Public Utilities Regulatory Authority concerning plaintiff's petition, pursuant to statute (§ 16-243a), to compel defendant utility to enter into contract with plaintiff for purchase of energy and capacity from solar electric generating facilities; whether trial court improperly granted authority's motion to dismiss appeal; whether trial court properly concluded that it lacked subject matter jurisdiction because plaintiff had failed to plead facts sufficient to establish aggrievement and because plaintiff's appeal was moot.

Young *v.* Hartford Hospital 207

Medical malpractice; certificate of good faith and opinion required by statute (§ 52-190a) for negligence action against health care provider, discussed; whether trial court improperly granted defendant's motion to dismiss plaintiff's action on ground that plaintiff failed to provide certificate of good faith and opinion pursuant to § 52-190a; whether plaintiff's claims were based on ordinary negligence or medical malpractice.

SUPREME COURT PENDING CASES

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

MAURICE ROSS *v.* COMMISSIONER OF CORRECTION, SC 20281
Judicial District of Tolland

Habeas; Whether Appellate Court Correctly Determined that Petitioner Precluded by Collateral Estoppel From Litigating Whether Defense Counsel's Failure to Object to Prosecutor's Improper Comments Resulted in Prejudice to the Defense as Contemplated by *Strickland* v. *Washington*. The petitioner was convicted of murder in connection with the shooting death of his girlfriend, and he appealed, claiming that prosecutorial impropriety during closing arguments deprived him of a fair trial. The Appellate Court affirmed his conviction, ruling that, while at least one of the prosecutor's comments was improper, that impropriety did not, either individually or taken together with other alleged improprieties, deprive the petitioner of a fair trial. Subsequently, the petitioner brought this habeas action, claiming that his trial counsel provided ineffective assistance by failing to object to improprieties in the prosecutor's closing arguments. Under *Strickland* v. *Washington*, 466 U.S. 668 (1984), a petitioner, in order to prevail on a claim of ineffective assistance of counsel, must establish both that counsel's performance was deficient and that the deficiency prejudiced the defense. The habeas court rejected the petitioner's claim on the ground that the petitioner had failed to satisfy the prejudice prong of *Strickland* v. *Washington*. The petitioner appealed, and the Appellate Court (188 Conn. App. 251) affirmed the habeas court's judgment. The Appellate Court ruled that its determination in the petitioner's direct appeal that the prosecutor's improper comments did not prejudice the petitioner or deprive him of a fair trial constituted a valid final judgment that precluded the relitigation of that issue under the doctrine of collateral estoppel. The petitioner was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly determined that the doctrine of collateral estoppel precluded the petitioner from litigating the issue of whether defense counsel's failure to object to the prosecutor's improper comments during the petitioner's criminal trial prejudiced him. If the doctrine of collateral estoppel does not preclude the petitioner from litigating the issue of prejudice, the Supreme Court will decide whether the petitioner can prevail under *Strickland* v. *Washington*.

STATE *v.* WAGNER GOMES, SC 20407
Judicial District of Fairfield

Criminal; Whether "Investigative Inadequacy" Jury Instruction Prejudiced Defendant; Whether Supreme Court Should Overrule or Limit *State* v. *Williams* and *State* v. *Collins* and Invoke its Supervisory Authority to Prescribe a Jury Instruction on Investigative Inadequacy. The defendant was convicted of assault in the second degree after he struck a woman in the head with a bottle outside of a bar in Bridgeport. The defendant appealed, claiming that the trial court deprived him of his right to present a defense of investigative inadequacy when it omitted from its instructions to the jury certain language in his written request to charge providing that the jury "may consider evidence of the police investigation as it might relate to any weaknesses in the state's case." The defendant claimed that, without the language he requested, the jury would not have understood how to use the evidence he elicited at trial about the inadequacies of the police investigation. The Appellate Court (193 Conn. App. 79) affirmed the conviction, holding that the trial court did not mislead the jury or violate the defendant's right to present a defense by omitting the requested language from its instructions. The Appellate Court noted that the trial court's jury charge was identical to the model jury instruction provided on the Judicial Branch's website. The Appellate Court also noted that the trial court's jury instruction was in keeping with long-standing Connecticut law, as nearly identical instructions were upheld by the Supreme Court in *State* v. *Williams*, 169 Conn. 322 (1975), and *State* v. *Collins*, 299 Conn. 567 (2011). The Appellate Court further noted that the defendant presented his evidence to the jury and cross-examined the state's witnesses regarding the alleged inadequacy of the police investigation and that the trial court did not direct the jury to disregard that evidence or argument but, rather, specifically instructed the jury to consider all of the evidence before it. Finally, the Appellate Court noted that the trial court, in its charge on investigative inadequacy, repeated to the jury its responsibility to determine whether the state, in light ofall the evidence, had proved beyond a reasonable doubt that the defendant was guilty of the crime with which he was charged. The defendant was granted certification to appeal, and the Supreme Court will consider (1) whether the Appellate Court correctly concluded that the trial court's "investigative inadequacy" jury instruction did not mislead the jury or otherwise prejudice the defendant; and (2) whether the Supreme Court should overrule or limit its decisions in *Williams* and *Collins*, as they relate to the investigative inadequacy jury instruction, and invoke its supervisory authority to prescribe a jury instruction such as the one proposed by the defendant.

AMAADI COLE *v.* CITY OF NEW HAVEN et al., SC 20425
Judicial District of New Haven

Negligence; Governmental Immunity; § 52-557n; Whether Police Officer Entitled to Discretionary Act Immunity from Negligence Claims Arising From Motor Vehicle Accident; Whether Trial Court Properly Determined that Identifiable Victim, Imminent Harm Exception to Discretionary Act Immunity Did Not Apply. The plaintiff was operating a dirt bike on a New Haven street, and he crashed into a tree when he swerved to avoid a collision with a police cruiser. The plaintiff brought this personal injury action against the police officer and the city of New Haven, alleging that the officer negligently caused his injuries by driving her cruiser into oncoming traffic and that the city is liable for the officer's negligence pursuant to General Statutes § 7-465. Generally, a municipal employee is liable for the misperformance of ministerial acts that are to be performed in a prescribed manner, but has a qualified immunity in the performance of discretionary acts requiring the exercise of judgment. The plaintiff claimed that that the officer was not entitled to discretionary act immunity here because she breached a ministerial duty imposed on her by state traffic laws and the police department's general order prohibiting officers from executing a roadblock while in pursuit of a suspect. The trial court rendered summary judgment in favor of the defendants, ruling that the police officer enjoyed discretionary act immunity from the plaintiff's claims under General Statutes § 52-557n (a) (2) (B) and that the imminent harm, identifiable victim exception to discretionary act immunity—which applies when the circumstances make it apparent to the municipal employee that her failure to act would be likely to subject an identifiable person to imminent harm—did not apply here. The court rejected the plaintiff's claim that the traffic laws and the department's general order regarding police pursuits imposed a ministerial duty on the officer to not drive her cruiser in the manner alleged. The court found that the officer had not initiated a pursuit at the time of the accident, but rather that she was on patrol in her cruiser performing the typical functions of a police officer, which involve the exercise of discretion. The plaintiff appeals, claiming that the trial court erred in rejecting his claims that the traffic laws and the department's general order imposed a ministerial duty on the officer not to drive her cruiser into oncoming traffic. He also claims that the trial court erred in rejecting his claim that the imminent harm, identifiable victim exception to discretionary act immunity applied under the facts here.

DENNIS COOKISH *v.* COMMISSIONER OF CORRECTION, SC 20433

Judicial District of Tolland

Habeas Corpus; Summary Disposition; Whether Habeas Court Properly Dismissed Petition Sua Sponte under Practice Book § 23-29 Prior to Appointment of Counsel and Without Notice and an Opportunity to be Heard; Whether Habeas Petition Could Be Treated as Petition for Writ of Error Coram Nobis. In 1974, the petitioner pleaded guilty to and was convicted of sexual contact in the first degree, and he received a sentence of one and a half to six years of incarceration. In 2018, while incarcerated in federal prison, the petitioner filed a petition for a writ of a habeas corpus as a self-represented litigant, claiming that he was actually innocent of the sexual contact charge and that his guilty plea had not been voluntary. The habeas court granted the petitioner's request for the appointment of counsel and a waiver of fees. It then sua sponte dismissed the petition without holding a hearing, however, concluding that it lacked subject matter jurisdiction under Practice Book § 23-29 (1) because, 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 filed a petition for certification to appeal the habeas court's judgment of dismissal, which the habeas court denied. The petitioner appeals, and the Supreme Court will decide whether the habeas court abused its discretion in denying certification to appeal and whether it erred in sua sponte dismissing the habeas petition under Practice Book § 23-29 (1) prior to appointing counsel for the petitioner and without providing him with notice and an opportunity to be heard. The Supreme Court will also decide whether, after dismissing the habeas petition under § 23-29 (1), the habeas court should nonetheless have treated the habeas petition as a petition for a writ of error coram nobis and decided it on the merits on that basis. Finally, the Supreme Court may consider the commissioner's claim that the habeas court's judgment can be affirmed on the alternative ground that the habeas court should have declined to issue the writ of habeas corpus under Practice Book § 23-24 (a) (1), which provides in relevant part that a habeas court "shall issue the writ unless it appears that . . . the court lacks jurisdiction."

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

CONNECTICUT PORT AUTHORITY

Notice of Intent to Amend Operating Procedures

In accordance with Conn. Gen. Stat. § 1-121, the Connecticut Port Authority (the ''Port Authority'') hereby gives notice that it intends to amend its Operating Procedures.

Statement of the substance and purpose of the proposed amendments: The Port Authority intends to amend certain sections of its current Operating Procedures that were originally approved by its Board on March 1, 2017. The sections proposed to be amended and a description of the substance and purpose of the proposed amendments is included below.

Proposed Amendments to Section IV: Adoption of Annual Operating Budget and Plan of Operation.

The section is proposed to be amended to require that the Authority's Board, at the end of the second and third quarters of the fiscal year, and more frequently, if appropriate, modify the annual Operating Budget if any line item contains or is projected to contain a deficit. Another proposed amendment indicates that the use of surplus funds in the annual Operating Budget, or for any other purpose, must be approved by the Board.

Proposed Amendments to Section VI: Acquisition and Conveyance of Interest in Real Property and Section VII. Contracting for Personal Services and Personal Property.

The proposed amendments would replace Sections VI and VII of the current Operating Procedures with a revised procurement and contracting section related to real and personal property, personal services and other goods and services. This new section contains provisions that would:

- Expands the policy to cover other goods and services, with exceptions as noted in the policy
- Requires verbal or written quotes for smaller purchases between $5,000 and $50,001.
- Continues to require bidding for purchases over $50,000.
- Allows waiving of quotes for smaller purchases or bidding requirements for contracts over $50,000, provided written justification is provided and Board notification given for sole purchases over $25,000.
- Provides for alternative procurement methods through use of State or other quasi-public contracts or other group purchasing arrangements.
- Requires Board approval prior to any purchase over $50,000 (all real estate transactions require Board approval).
- Records must be retained in single file related to a procurement for specified timeframes.
- Internal Revenue Service guidelines must be consulted when contracting with individuals
- Requires Board approval for unbudgeted expenditures over $5,000.

A copy of the proposed amendments to the Connecticut Port Authority's Operating Procedures is available on Port Authority's website (https://ctportauthority.com/rfqs-rfps-3/) under ''Public Notices.''

Manner of presenting views: All interested persons are invited to present their views in writing no later than ***April 2, 2020***. Comments are to be submitted to the Connecticut Port Authority, Andrew Lavigne either by e-mail to alavigne@ctportauthority.com (please put ''Public Comment'' in the subject line) or by postal mail addressed to him at: Connecticut Port Authority, 455 Boston Post Road, Suite 204, Old Saybrook, CT, 06475.

David Kooris, *Chairman*, Connecticut Port Authority

NOTICES

Superior Court Operations

Small Claims/Motor Vehicle Magistrate Appointments

The Judicial Branch is now accepting applications for Small Claims/Motor Vehicle Magistrate appointments pursuant to C.G.S. § 51-193*l*. Attorneys interested in being considered for appointment for the term beginning July 1, 2020 should complete and email an application and supporting materials to magistrate matters at Magistrate.Matters@jud.ct.gov. Fillable PDF versions of the forms are available at www.jud.ct.gov. Applications will be considered on a rolling basis.

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on January 29, 2020, in Docket No. HHD-CV19-6121010-S, Eric M. Parham, Juris No. 417565 of Montreal, Canada was suspended from the practice of law for a period of one (1) year, effective January 29, 2020

The Respondent shall comply with all the terms and conditions of Practice Book § 2-47B (Restrictions on the Activities of Deactivated attorneys.)

The Respondent shall apply for reinstatement pursuant to the provisions of Practice Book § 2-53.

The Respondent shall not be eligible to apply for reinstatement unless he is current with all orders of child support, arrears and costs as ordered by the Superior Court of Justice Family Court Branch, Ottawa, Ontario, Canada, has updated his registration with the statewide Grievance Committee, has paid all his Client Security Fund fees, which may be due and payable, and is otherwise in good standing.

The Respondent shall not be eligible to apply for reinstatement unless he is in good standing with the New York bar.

David Sheridan
Presiding Judge

Notice of Interim Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on January 28, 2020, in Docket No. HHD-CV20-6122743-S, KENT D. MAWHINNEY, Juris No. 403415 is placed on interim suspension from the practice of law, effective immediately, until further order of the court.

Pursuant to Practice Book § 2-64, Attorneys Anthony D. Collins, Juris No. 403959, of Wethersfield, Connecticut, and Nancy Martin, Juris No. 420876, of Wethersfield, Connecticut are appointed Co-Trustees, with the power to act jointly and/or severally, to take such steps as are necessary to protect the interests of Respondent's clients, inventory the client files, receive the business mail, and take control of Respondent's clients' funds, IOLTA, and all fiduciary accounts. The trustee shall not make any disbursements from said accounts without the prior authorization of the court. The Trustee shall notify all active clients of the Respondent's suspension and the need to arrange for their self-representation or successor counsel.

The respondent shall cooperate with the Trustees to the extent he is able to do so.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated attorneys.)

Should this interim suspension continue for a period of one year or more, then any application for reinstatement shall be made pursuant to the provisions of Practice Book § 2-53.

David Sheridan
Presiding Judge

Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on January 30, 2020, in Docket No. HHD-CV19-6119252-S, Kelly Anne Carden, Juris No. 429212 of Coventry, Rhode Island was suspended from the practice of law in Connecticut for a period of five (5) months, retroactive to January 1, 2020.

Upon termination of the five (5) month suspension the Respondent will automatically be reinstated to the practice of law provided that she is otherwise eligible.

During the term of suspension the Respondent shall comply with all terms and conditions of Practice Book § 2-47B; Restrictions on the Activities of Deactivated attorneys.

David Sheridan
Presiding Judge

Notice of Interim Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on January 30, 2020, in Docket No. HHD-CV19-6121466-S, Syed Zaid Hassan, Juris No. 429184 is placed on interim suspension from the practice of law, effective immediately, until further order of the Court.

A Trustee will be appointed to take such steps as are necessary to protect the interests of Respondent's clients, to inventory Respondent's files, and take control of the Respondent's clients' funds accounts. The Respondent shall cooperate with the Trustee in this regard. The Trustee shall not be permitted to make any disbursements from said accounts without the prior authorization of the Court.

The Respondent shall not deposit to, disburse any funds from, withdraw any funds from, or transfer any funds out of his Connecticut client's funds accounts, IOLTA and/or fiduciary accounts until further order of the Court.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated attorneys.)

The Respondent shall hire a bookkeeper and shall cooperate with an audit of his IOLTA account to be conducted by the Statewide Grievance Committee to cover and initial period beginning June 29, 2018 through the present date.

The Respondent shall comply with Practice Book § 2-53 if the Respondent remains suspended for one (1) year or more.

David Sheridan
Presiding Judge

Appointment of Trustee

Pursuant to Practice Book § 2-64, on January 31, 2020 in docket number HHD-CV-19-6121466-S, Attorney Thomas C. McNeill, Jr, Juris No. 101413 of Avon, CT is appointed as Trustee to take such steps as are necessary to protect the interests of Respondent Syed Zaid Hassan's clients, to inventory Respondent's files, and to take control of the Respondent's clients' funds accounts. The respondent shall cooperate with the Trustee in this regard. The Trustee shall not make any disbursements from said accounts without the prior authorization of the Court.

David Sheridan
Presiding Judge