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# CONNECTICUT REPORTS

# Vol. 334

CASES ARGUED AND DETERMINED

IN THE

## SUPREME COURT

OF THE

## STATE OF CONNECTICUT

# IN RE TRESIN J.*

## (SC 20267)

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

*Syllabus*

The respondent father appealed to the Appellate Court from the trial court's judgment terminating his parental rights with respect to his minor child, T. The respondent had been incarcerated when T was two years old, and T had last spoken with the respondent around that time. While the respondent was incarcerated, T was placed in the custody of the petitioner, the Commissioner of Children and Families, after the petitioner became aware that T's mother, who was the custodial parent, was experiencing mental health and substance abuse issues. The petitioner thereafter filed a petition to terminate the respondent's parental rights on the statutory (§ 17-112 [j] [3] [D]) ground that he had no ongoing parent-child relationship with T. In terminating the respondent's parental rights with respect to T, the trial court found that T, who was six years old at the time of the termination hearing, did not know who his father was or have any positive parental memories of the respondent. On appeal, the respondent claimed, inter alia, that the trial court, in concluding that he had no ongoing parent-child relationship with T, failed to consider the petitioner's interference with the development of that relationship and his own positive feelings toward T in light of T's young age at the time the respondent was incarcerated. The Appellate Court disagreed and affirmed the trial court's judgment, concluding that there was no evidence that the respondent sought visitation with or attempted to contact T while he was incarcerated, and that there was no evidence that T's mother, who had custody of T during that period, had interfered with the development of an ongoing parent-child relationship, or that the petitioner's alleged interference led to the lack of such relationship. On the granting of certification, the respondent appealed to this court. *Held* that the Appellate Court properly upheld the trial court's termination of the respondent's parental rights on the ground that there was clear and convincing evidence of a lack of an ongoing parent-child relationship, and the virtual infancy and interference exceptions to the lack of an ongoing parent-child relationship ground for termination did not apply in this case: at the time of the termination hearing, T had no

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the Appellate Court.

knowledge or memory of the respondent as his father; moreover, the virtual infancy exception did not apply because, although T was two years old when he was separated from the respondent as a result of his incarceration, it is the child's age at the time of the termination hearing that controls for purposes of that exception, and T was six years old at the time of the respondent's termination hearing and able to communicate that he lacked present memories of the respondent as his parent; furthermore, the respondent could not prevail on his claim that the interference exception applied on the basis of the apparent inability of T's mother to foster a relationship between T and the respondent during the respondent's incarceration, as that exception is triggered only by the conduct of the petitioner rather than that of a third party or some other external factor that occasioned the separation between parent and child.

Argued September 18—officially released December 31, 2019**

*Procedural History*

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *C. Taylor*, *J.*; judgment terminating the respondents' parental rights, from which the respondent father appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Beach*, *Js.*, which affirmed the trial court's judgment, and the respondent father, on the granting of certification, appealed to this court. *Affirmed.*

*David J. Reich*, assigned counsel, for the appellant (respondent father).

*Sara Nadim*, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare Kindall*, solicitor general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

*Opinion*

ROBINSON, C. J. In this certified appeal, we consider whether the parental rights of a father were properly

** December 31, 2019, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

terminated for lack of an ongoing parent-child relationship when, at the time of the termination trial, the six year old child had no knowledge or memory of his father, who had been incarcerated when the child was two years old. The respondent father, Aceion B., appeals, upon our grant of his petition for certification,[1] from the judgment of the Appellate Court affirming the judgment of the trial court in favor of the petitioner, the Commissioner of Children and Families, which terminated his parental rights as to the child, Tresin J., pursuant to General Statutes § 17a-112 (j) (3) (D).[2] *In*

[1] We originally granted the respondent's petition for certification, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court, which terminated the respondent father's parental rights based on the absence of an ongoing parent-child relationship, was not required to apply the infancy exception recognized in *In re Carla C.*, 167 Conn. App. 248, 143 A.3d 677 (2016)?" *In re Tresin J.*, 331 Conn. 909, 202 A.3d 1022 (2019).

We note that the original certified question does not completely reflect the issues in this appeal, particularly in the wake of our decision in *In re Jacob W.*, 330 Conn. 744, 762–64, 200 A.3d 1091 (2019), which clarified that there exist two distinct exceptions to the lack of an ongoing parent-child relationship ground for the termination of parental rights, for virtual infancy and interference. Indeed, the Appellate Court considered the interference claims; see *In re Tresin J.*, 187 Conn. App. 804, 811–13, 203 A.3d 711 (2019); which the petitioner briefed in this certified appeal and which we understand to be factually and legally intertwined with the respondent's virtual infancy claims in light of *In re Jacob W.* Accordingly, our analysis in this appeal reflects a rephrasing of the certified question to address the interference exception, as well. See, e.g., *In re Jacob W.*, supra, 747 n.1 (court may rephrase certified questions).

[2] General Statutes § 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (D) there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis

*re Tresin J.*, 187 Conn. App. 804, 805–806, 203 A.3d 711 (2019). Relying on the Appellate Court's decision in *In re Carla C.*, 167 Conn. App. 248, 143 A.3d 677 (2016), the respondent claims that the trial court should have applied the virtual infancy and interference exceptions to the lack of an ongoing parent-child relationship ground for the termination of parental rights because Tresin was only two years old when the respondent's incarceration separated them, and the circumstances of this case, particularly the deficiencies of Tresin's mother, rendered contact impossible during his incarceration. In light of our recent explication of these exceptions in *In re Jacob W.*, 330 Conn. 744, 200 A.3d 1091 (2019), we disagree with the respondent's claims. Accordingly, we affirm the judgment of the Appellate Court.

The record and the Appellate Court's opinion set forth the following background facts and procedural history. "Tresin was born in June, 2011. The respondent last spoke to Tresin in April, 2013, when Tresin was less than two years old. In May, 2013, the respondent was convicted of possession of marijuana, his probation was revoked,[3] and he was sentenced to a term of incarceration. The respondent subsequently was taken into custody by federal authorities and detained for immigration violations. The respondent remained in federal custody until the fall of 2017."[4] (Footnote in original.) *In re Tresin J.*, supra, 187 Conn. App. 806.

the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . ."

[3] "The respondent previously had been convicted of drug related offenses. In 2008, the respondent was convicted of possession of marijuana, and in 2011, he was convicted of possession of marijuana with intent to sell." *In re Tresin J.*, supra, 187 Conn. App. 806 n.2.

[4] We note that the respondent testified at trial that he had been released from federal immigration custody after the United States Court of Appeals for the Second Circuit determined that his offenses were not deportable in nature. The respondent did not, however, introduce evidence of the federal

The Department of Children and Families (department) became involved with Tresin in May, 2015. The department initiated an investigation when it was notified after one of Tresin's half siblings was not picked up from school on time. The department learned during its investigation that Tresin and his two half siblings were not up to date medically and that Tresin's mother recently had been evicted and had been experiencing substance abuse difficulties; it referred her to mental health and substance abuse treatment programs, but she failed to comply with those programs' requirements over the ensuing year. Tresin's mother subsequently failed to arrange mental health evaluations and care for Tresin's older half sibling, who had been experiencing severe behavioral issues in school over the course of that year. In July, 2016, the department invoked a ninety-six hour hold with respect to Tresin and his two half siblings after Tresin's mother informed her caseworker that her life was in danger and she planned to flee the state with the children.

Subsequently, the petitioner "filed a neglect petition with respect to Tresin and his two [half siblings], who were in the care of Tresin's mother. In addition, the petitioner obtained an order of temporary custody with respect to all three children.

"In August, 2017, the petitioner filed a petition to terminate the parental rights of the respondent. The

court's judgment affording him relief, and the trial court deemed his immigration status "precarious," there being "[n]o credible evidence . . . produced to show that his future residence in this country is anything other than uncertain." Our independent research has confirmed the existence of a Second Circuit decision concluding that the United States Immigration Court had committed reversible error in denying the respondent's application for deferral of removal to Jamaica under the Convention Against Torture. See *Brown* v. *Lynch*, 665 Fed. Appx. 19, 20–21 (2d Cir. 2016). We agree with the trial court, however, that there is no evidence in the record confirming that this is the decision that definitively granted him relief from deportation or otherwise indicating his immigration status after the Second Circuit's remand of his case to the Immigration Court.

petitioner alleged that, pursuant to § 17a-112 (j) (3) (D), the respondent had no ongoing parent-child relationship with Tresin. The termination of parental rights trial was held on February 5 and March 9, 2018.

"In a thoughtful memorandum of decision, issued on May 22, 2018, the court found that the petitioner had proved by clear and convincing evidence that there was no ongoing parent-child relationship with respect to the respondent and Tresin. In reaching its conclusion, the court found that 'Tresin does not know who his father is and has no positive parental memories of his biological father.' "[5] Id., 806–807.

The respondent appealed from the judgment terminating his parental rights to the Appellate Court, claiming that the trial court incorrectly "determined, pursuant to § 17a-112 (j) (3) (D), that no ongoing parent-child relationship exists between the respondent and Tresin."[6] Id., 808–809. The respondent argued specifically that the trial court's conclusion was inconsistent with the Appellate Court's decision in *In re Carla C.*, supra, 167 Conn. App. 248, because the trial court failed to consider "(1) the petitioner's interference with the development of the parent-child relationship between himself and Tresin, and (2) Tresin's young age, in light of which the respondent's feelings toward Tresin are significant." *In re Tresin J.*, supra, 187 Conn. App. 809. The Appellate Court rejected the respondent's arguments, observing first that he "presented no evidence that he sought visitation or attempted to call Tresin during those three years [that he was incarcerated]. The respondent does not allege any interference by the

[5] "The [trial] court also determined that it would be detrimental to Tresin's best interests to allow further time for a relationship with the respondent to develop. The respondent does not challenge this determination." *In re Tresin J.*, supra, 187 Conn. App. 807 n.3.

[6] "The parental rights of Tresin's mother also were terminated, and she has not appealed." *In re Tresin J.*, supra, 187 Conn. App. 806 n.1.

child's mother, who had custody of Tresin during that time." Id., 811. The Appellate Court also emphasized that the petitioner had "presented undisputed evidence that, in July, 2016, when Tresin was placed into the petitioner's custody and before any alleged interference took place, Tresin did not know who his father was. Therefore, unlike in *In re Carla C.*, the respondent did not present evidence that the petitioner's alleged interference *led to* the lack of an ongoing parent-child relationship between the respondent and Tresin." (Emphasis in original.) Id., 811–12. Accordingly, the Appellate Court affirmed the judgment of the trial court, having concluded that "the trial court properly applied the law . . . and that its legal conclusion that the petitioner established the elements of § 17a-112 (j) (3) (D) [was] supported by clear and convincing evidence." Id., 813. This certified appeal followed. See footnote 1 of this opinion.

On appeal, the respondent relies on the Appellate Court's decision in *In re Carla C.*, supra, 167 Conn. App. 248, and claims that the virtual infancy exception to the lack of an ongoing parent-child relationship ground for the termination of parental rights is applicable to this case because Tresin, like the child in *In re Carla C.*, was two years old when the respondent was incarcerated, meaning that both the trial court and the Appellate Court improperly focused on Tresin's lack of memory of the respondent at the time of trial rather than the respondent's positive feelings for Tresin. The respondent argues that the dispositive issue "is whether the child was old enough to remember [his or her] father when he was separated from the child," rendering the age of the child at separation the controlling factor. The respondent also contends that the trial court should have applied the interference exception by considering the abilities of the custodial parent at the time of separation. Specifically, he argues that Tresin's mother,

although not actively interfering in their relationship, was unable to facilitate visits while he was incarcerated.

In response, the petitioner contends that the Appellate Court's decision is in full accord with the legal analysis set forth in *In re Jacob W.*, supra, 330 Conn. 744, and *In re Carla C.*, supra, 167 Conn. App. 248. The petitioner argues that *In re Carla C.* is factually distinguishable because the present case lacks "interference by any party to the proceeding" prior to the institution of termination proceedings, and, as of the day of removal, "Tresin already had no positive memories of [the respondent, and], thus no ongoing parent-child relationship already existed." The petitioner also contends that the virtual infancy exception is inapplicable because Tresin was six years old at the time of the termination trial and could communicate his present feelings. To this end, the petitioner relies on *In re Carla C.* and *In re Alexander C.*, 67 Conn. App. 417, 787 A.2d 608 (2001), aff'd, 262 Conn. 308, 813 A.2d 87 (2003), and argues that incarceration does not trigger the virtual infancy exception, even when the incarceration and separation occur during infancy. Instead, the petitioner emphasizes that, in such cases, the applicable exception is interference, with consideration given to deliberate interference by the petitioner and the efforts, or lack thereof, by the respondent to maintain a relationship during the period of incarceration.[7] We agree with

[7] The petitioner also relies on the trial court's finding "by clear and convincing evidence that no parental relationship ever existed between [the] respondent and Tresin" because, inter alia, the respondent "has never extended paternal support to the child and has never provided or shown interest in providing necessities to meet his daily needs." The petitioner suggests that the trial court, as the finder of fact, did not find credible the respondent's testimony that he had purchased diapers, clothes, and toys at the request of Tresin's mother and "pretty much [did] everything for Tresin before [he] was incarcerated." The trial court's decision not to credit the respondent's testimony on this point does not—in the absence of other evidence—support the opposite factual proposition, namely, that the petitioner has never provided material support to Tresin. See, e.g., *Ventura* v. *East Haven*, 330 Conn. 613, 641–42, 199 A.3d 1 (2019) ("although the plaintiff is correct that the

the petitioner and conclude that the respondent was not entitled to invoke the interference or virtual infancy exceptions to the lack of an ongoing parent-child relationship ground for the termination of his parental rights.

"We begin with the applicable standard of review and general governing principles. Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . To the extent we are required to construe the terms of [§ 17a-112 (j) (3) (D)] or its applicability to the facts of this case, however, our review is plenary. . . .

"Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . .

jury was free to disbelieve all or any portion of [the witness'] testimony, it was not permitted to draw a contrary inference on the basis of that disbelief" [internal quotation marks omitted]). Nevertheless, this is harmless error because it remains undisputed that Tresin had no present memory of or positive feelings toward the respondent, which provides an independent statutory ground for the judgment terminating his parental rights.

grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The commissioner . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun." (Citations omitted; internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 525–27, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018).

We begin with a review of the lack of an ongoing parent-child relationship ground and its exceptions. Section 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in sections 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (D) there is no ongoing parent-child relationship, which means the relationship that ordinarily develops as a result of a parent having

met on a day-to-day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of such parent-child relationship would be detrimental to the best interest of the child . . . .''

In *In re Jacob W.*, supra, 330 Conn. 754–55, we recently considered the application of the near identical lack of an ongoing parental relationship provision in General Statutes § 45a-717 (g) (2) (C), which governs actions for termination of parental rights brought in Probate Court by private petitioners.[8] We discussed our previous decisions in *In re Valerie D.*, 223 Conn. 492, 613 A.2d 748 (1992), *In re Jessica M.*, 217 Conn. 459, 586 A.2d 597 (1991), and *In re Juvenile Appeal (Anonymous)*, 177 Conn. 648, 420 A.2d 875 (1979), along with the Appellate Court's decision in *In re Carla C.*, supra, 167 Conn. App. 248, and explained that the ''inquiry . . . is a two step process. First, the court must determine whether the petitioner has proven the lack of an ongoing parent-child relationship. Only if the court answers that question in the affirmative may it turn to the second part of the inquiry, namely, whether allowance of further time for the establishment or reestablishment of the relationship would be contrary to the child's best interests. . . .

''In interpreting the parameters of [§ 17a-112 (j) (3) (D)], we must be mindful of what is at stake. [T]he termination of parental rights is defined . . . as the complete severance by court order of the legal relation-

[8] Because the provisions governing the termination of parental rights under § 17a-112, which governs petitions regarding children previously committed to the custody of the department, and § 45a-717, which is ''the correspondent statute for proceedings in the Probate Court'' that governs such petitions brought by private parties; *In re Egypt E.*, supra, 327 Conn. 529; are virtually identical, case law applying either statute is instructive in termination of parental rights cases. See, e.g., id.; *In re Valerie D.*, 223 Conn. 492, 497 n.3, 613 A.2d 748 (1992); *In re Brian T.*, 134 Conn. App. 1, 12 n.3, 38 A.3d 114 (2012).

ship, with all its rights and responsibilities, between the child and his parent . . . . It is, accordingly, a most serious and sensitive judicial action. . . . Although the severance of the parent-child relationship may be required under some circumstances, the United States Supreme Court has repeatedly held that the interest of parents in their children is a fundamental constitutional right that undeniably warrants deference and, absent a powerful countervailing interest, protection. . . .

"Moreover . . . the fact of incarceration, in and of itself, cannot be the basis for a termination of parental rights. . . . At the same time, a court properly may take into consideration the inevitable effects of incarceration on an individual's ability to assume his or her role as a parent. . . . Extended incarceration severely hinders the department's ability to offer services and the parent's ability to make and demonstrate the changes that would enable reunification of the family. . . . This is particularly the case when a parent has been incarcerated for much or all of his or her child's life and, as a result, the normal parent-child bond that develops from regular contact instead is weak or absent. . . . .

"The lack of an ongoing parent-child relationship is a no fault statutory ground for the termination of parental rights. . . . This court has explained that the ground of no ongoing parent-child relationship for the termination of parental rights contemplates a situation in which, regardless of fault, a child either has never known his or her parents, so that no relationship has ever developed between them, or has definitively lost that relationship, so that despite its former existence it has now been completely displaced. . . . *The ultimate question is whether the child has some present memories or feelings for the natural parent that are positive in nature.* . . .

"In its interpretation of the language of [the lack of an ongoing parent-child relationship ground], this court has been careful to avoid placing insurmountable burden[s] on noncustodial parents. . . . Because of that concern, we have explicitly rejected a literal interpretation of the statute, which defines the relationship as one that ordinarily develops as a result of a parent having met on a continuing, day-to-day basis the physical, emotional, moral and educational needs of the child . . . . [D]ay-to-day absence alone, we clarified, is insufficient to support a finding of no ongoing parent-child relationship. . . . We also have rejected the notion that termination may be predicated on the lack of a *meaningful* relationship, explaining that the statute requires that there be *no* relationship." (Citations omitted; emphasis altered; internal quotation marks omitted.) *In re Jacob W.*, supra, 330 Conn. 755–58; see *In re Jessica M.*, supra, 217 Conn. 470 ("It is not unlikely that most parent-child relationships in which state intervention is required, including custody disputes incidental to divorce, will exhibit signs of strain. While evidence of a child's ambivalent feelings toward a noncustodial parent would not alone justify a finding that 'no ongoing parent-child relationship' exists, it is nevertheless reasonable to construe this statutory ground for termination to require a finding that no positive emotional aspects of the relationship survive.").

We summarized our analysis in *In re Jacob W.* by reciting "the proper legal test to apply when a petitioner seeks to terminate a parent's rights on the basis of no ongoing parent-child relationship . . . . We reiterate[d] that the inquiry is a two step process. In the first step, a petitioner must prove the lack of an ongoing parent-child relationship by clear and convincing evidence. In other words, the petitioner must prove by clear and convincing evidence that the child has no present memories or feelings for the natural parent that

are positive in nature. If the petitioner is unable to prove a lack of an ongoing parent-child relationship by clear and convincing evidence, the petition must be denied, and there is no need to proceed to the second step of the inquiry. If, and only if, the petitioner has proven a lack of an ongoing parent-child relationship does the inquiry proceed to the second step, whereby the petitioner must prove by clear and convincing evidence that to allow further time for the establishment or reestablishment of the relationship would be contrary to the best interests of the child. Only then may the court proceed to the disposition phase.

"There are two exceptions to the general rule that the existence of an ongoing parent-child relationship is determined by looking to the present feelings and memories of the child toward the respondent parent. The first exception . . . applies when the child is an infant, and that exception changes the focus of the first step of the inquiry. . . . [W]hen a child is virtually a newborn infant whose present feelings can hardly be discerned with any reasonable degree of confidence, it makes no sense to inquire as to the infant's feelings, and the proper inquiry focuses on whether the parent has positive feelings toward the child. . . . Under those circumstances, it is appropriate to consider the conduct of a respondent parent.[9]

"The second exception . . . applies when the petitioner has engaged in conduct that inevitably has led to the lack of an ongoing parent-child relationship

[9] This virtual infancy inquiry, which focuses on the conduct of the respondent parent rather than the present feelings and memories of the child, is akin to the separate abandonment ground for the termination of parental rights set forth in §§ 45a-717 (g) (2) (C) and 17a-112 (j) (3) (A). See *In re Jacob W.*, supra, 330 Conn. 768 ("[a]n inquiry similar to that of the abandonment ground cannot be applied to assess whether a petitioner has established a lack of an ongoing parent-child relationship unless the child is an infant at the time of the inquiry").

between the respondent parent and the child. This exception precludes the petitioner from relying on the lack of an ongoing parent-child relationship as a basis for termination. Under these circumstances, even if neither the respondent parent nor the child has present positive feelings for the other, and, even if the child lacks any present memories of the respondent parent, the petitioner is precluded from relying on [the lack of an ongoing parent-child relationship] as a basis for termination." (Citation omitted; footnote added; internal quotation marks omitted.) *In re Jacob W.*, supra, 330 Conn. 762–64. The interference "inquiry properly focuses not on the petitioner's intent in engaging in the conduct at issue, but on the consequences of that conduct. *In other words, the question is whether the petitioner engaged in conduct that inevitably led to a noncustodial parent's lack of an ongoing parent-child relationship*. If the answer to that question is yes, the petitioner will be precluded from relying on the ground of 'no ongoing parent-child relationship' as a basis for termination regardless of the petitioner's intent—or not—to interfere." (Emphasis added.) Id., 762.

Applying these principles to the present case,[10] we begin with the respondent's claim that the virtual

[10] The respondent argues that our recent decision in *In re Jacob W.*, supra, 330 Conn. 744, does not control because it was decided after both the termination trial and the appeal before the Appellate Court in this case had concluded. We disagree. It is a well established general principle that "a rule enunciated in a case presumptively applies retroactively to pending cases," which includes decisions interpreting existing statutes. (Internal quotation marks omitted.) *State* v. *Elias G.*, 302 Conn. 39, 45, 23 A.3d 718 (2011); see id., 45–46 (concluding that this court's interpretation of juvenile transfer statute applied retroactively to certified appeal that was pending when decision was issued). The defendant has not advanced any specific arguments seeking relief from that general rule, and none is apparent to us on the record of the present case, insofar as *In re Jacob W.* broke no new ground but instead represents a distillation of existing case law. Cf. *Campos* v. *Coleman*, 319 Conn. 36, 61, 123 A.3d 854 (2015) (discussing "the [three part] test set out in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 92 S. Ct. 349, 30 L. Ed. 2d 296 [1971], for determining whether a decision must be applied prospectively only . . . [under which a] common-law decision will be

infancy exception to the lack of an ongoing parent-child relationship ground applies because Tresin was two years old when the respondent was incarcerated. We disagree. This claim is squarely controlled by *In re Jacob W.*, in which we rejected a parent's claim that the virtual infancy exception applied when the parent was separated from the child by incarceration when the child was one year old and the termination hearing was held when the child was four years old. Id., 767–68 and n.5. We emphasized in *In re Jacob W.* that it was not the child's "age at the time of the respondent's incarceration three years prior to the termination hearing that controls for purposes of the application of the virtual infancy exception, but [the child's] age . . . at the time of the termination hearing. To determine whether a petitioner has established the lack of an ongoing parent-child relationship, the trial court must be able to discern a child's present feelings toward or memories of a respondent parent. The virtual infancy exception takes account of the particular problem that is presented when a child is too young to be able to articulate those present feelings and memories. . . . . It would make no sense to require a trial court to resolve whether a child's feelings *could have been determined* at some time prior to the termination hearing. The inability of the court to discern or to be presented with evidence regarding a virtual infant's *present* feelings drives the exception. *That finding must be made at the time of the termination hearing.*" (Citation omitted; emphasis altered.) Id., 768 n.5.

applied nonretroactively only if: [1] it establishes a new principle of law, either by overruling past precedent on which litigants have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . [2] given its prior history, purpose and effect, retrospective application of the rule would retard its operation; and [3] retroactive application would produce substantial[ly] inequitable results, injustice or hardship" [internal quotation marks omitted]). But cf. *In re Daniel N.*, 323 Conn. 640, 652–53, 150 A.3d 657 (2016) (discussing retroactive application of decisions in which this court exercises its supervisory authority over administration of justice).

Having reviewed the record, we conclude that it amply supports the trial court's conclusion, upheld by the Appellate Court, that the virtual infancy exception did not apply in this case. As of the time of the termination trial in February and March of 2018, Tresin was six years old, and the respondent had not spoken or visited with him since August, 2013, prior to his incarceration, when Tresin was two years old. The department's social study, which was admitted into evidence, noted that "Tresin has not seen his father since he was two years old. Tresin would not recognize his father, as [the respondent] is essentially a stranger to Tresin. *Tresin does not have any positive memories of his time with his father, and, at the time of his removal in July of 2016, Tresin was unclear about the identity of his father and believed that his father was a long-term boyfriend of* [*his mother*], *who was not* [*the respondent*]." (Emphasis added.) We conclude, therefore, that the virtual infancy exception does not apply in this case because Tresin was six years old at the time of trial and able to communicate that he lacked present memories of the respondent as his parent.[11]

[11] Even if we were to conclude that the virtual infancy exception applies as a matter of law, rendering the respondent's testimony about his positive feelings toward Tresin relevant to this appeal, we note that "the parent's perpetuation of the lack of a relationship by failing to use available resources to seek visitation or otherwise maintain contact with the child may establish the lack of an ongoing parent-child relationship." *In re Carla C.*, supra, 167 Conn. App. 272–73. "[E]vidence of the existence of a parent-child relationship is to be viewed in the light of circumstances that limited visitation . . . including the conduct of the child's custodian at the time of the petition." (Citation omitted.) Id., 273. The record indicates that the respondent was represented by counsel during his immigration proceedings and had relatives in the Hartford area, including a sister whom he had identified as a potential placement resource for Tresin. There is, however, no evidence that the respondent attempted to use those resources to foster a relationship with Tresin, regardless of the apparent inability of Tresin's mother to assist in that capacity. As his attorney conceded at oral argument before this court, the respondent's lack of effort was consistent with his belief that he was going to be deported to Jamaica after his imprisonment. See footnote 4 of this opinion. Accordingly, we disagree with the respondent's argument that the trial court improperly found that he lacked the requisite positive feelings

Compare *In re Jacob W.*, supra, 330 Conn. 768 n.5 ("The trial court had no difficulty discerning [the four year old child's] present memories of or feelings toward the respondent. The court expressly found that [the child] had 'little to no memory' of him. Accordingly, there was no need to apply the virtual infancy exception."), with *In re Jessica M.*, supra, 217 Conn. 474 (guardians of child who petitioned to terminate mother's parental rights could not rely on lack of ongoing parent-child relationship ground when trial court's findings "indicate that the child recognizes the respondent as her mother, that she would suffer some sense of loss if not permitted to visit with her, and that the relationship between the child and her mother is 'an affectionate one and one of mutual interest' ").

We also disagree with the respondent's contention that the interference exception applies because of the apparent inability of Tresin's mother to foster their relationship during the respondent's incarceration. He argues that Tresin's mother, although not actively interfering in their relationship, "was barely able to parent her children" and lacked "the wherewithal or

toward Tresin with respect to the lack of an ongoing parent-child relationship ground. See *In re Ilyssa G.*, 105 Conn. App. 41, 47–48, 936 A.2d 674 (2007) (The lack of an ongoing parent-child relationship ground supported the termination of the respondent father's parental rights when he had not seen his nine year old child since she was one year old, and "his efforts to be involved in her life consisted of visiting the department once in 2004, more than one year after she had been removed from her mother's care, and calling the residential care facility where the child was to inquire about her care. The respondent also admitted that he had not informed the department or anyone else involved with the case of his whereabouts after he had moved from his last address on file."), cert. denied, 285 Conn. 918, 943 A.2d 475 (2008); *In re Alexander C.*, supra, 67 Conn. App. 425–27 (concluding that "the record does not reveal that the respondent had positive feelings toward the child" because, during his term of incarceration, he did not seek modification of protective order entered in light of allegations of his physical and sexual abuse of infant child's sibling, did not inquire about child's health or well-being, and did not seek out "parenting classes that would promote the development of a relationship . . . [or] inquire about the availability of individual counseling or sex offender treatment classes available at his correctional facility").

motivation to try to contact [the respondent] when he was in prison. As a result, [the respondent] had no knowledge regarding Tresin until the department obtained custody of Tresin. Once Tresin was in custody, [the respondent] kept in contact with the department and requested contact with his son.'' Our case law makes clear that the interference exception is akin to the equitable doctrine of "clean hands" and is triggered only by the conduct of the petitioner rather than that of a third party or some other external factor that occasioned the separation.[12] Compare *In re Jacob W.*, supra, 330 Conn. 766–67 (interference exception was inapplicable to grandparent petitioners who "played no role in setting the protective order" that effectively precluded respondent father from contacting children during his incarceration), and *In re Alexander C.*, supra, 67 Conn. App. 424–25 (interference exception was inapplicable because, although child was placed in foster care within days of birth, "the respondent, rather than the commissioner, created the circumstances that caused and perpetuated the lack of an ongoing relationship'' by committing physical and sexual abuse of minor child's sibling that resulted in his incarceration and entry of protective order), with *In re Valerie D.*, supra, 223 Conn.

[12] By reference to his Appellate Court brief, we note that the respondent obliquely argues that the actions of the department also constituted interference with his attempts to reestablish contact with Tresin. Specifically, the respondent argues that, after the department located him in federal immigration custody in Alabama, he expressed interest in having contact with Tresin, but the department "made no efforts to allow [him] to have any contact and opposed [his] efforts to have contact." We disagree with this reading of the interference exception, which applies when the actions of the petitioner rendered inevitable the *initial* lack of a relationship, which in this case had occurred several years before the department became involved with the respondent and his family. See *In re Jacob W.*, supra, 330 Conn. 766–67; *In re Valerie D.*, supra, 223 Conn. 533–34. Put differently, it was not the department's opposition to visitation on the recommendation of Tresin's clinicians, who deemed it potentially disruptive to the progress that he was making with his foster mother, which resulted in the separation that led to the lack of a parent-child relationship.

531–34 (department was precluded from relying on lack of ongoing parent-child relationship ground when it took temporary custody of child within days of her birth because of mother's continued cocaine use, with only few months having elapsed between department taking custody and termination hearing, because "once the child had been placed in foster care . . . a finding of a lack of an ongoing parent-child relationship three and one-half months later was inevitable . . . because absent extraordinary and heroic efforts by the respondent, the petitioner was destined to have established the absence of such a relationship"), and *In re Carla C.*, supra, 167 Conn. App. 253–56, 262 (interference exception was applicable when petitioner mother, who was custodial parent, obtained order from prison in which respondent father was incarcerated barring him from all oral or written communication with her and child, discarded cards and letters that he sent to child, and filed motion to suspend child's visitation with father on ground that it was "unworkable"). We conclude, therefore, that the Appellate Court properly upheld the trial court's termination of the respondent's parental rights on the ground that there was clear and convincing evidence of a lack of an ongoing parent-child relationship, with the interference and virtual infancy exceptions being inapplicable as a matter of law.[13]

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[13] We agree with Justice Ecker's apt observation that "the social reality operating beneath the surface of . . . cases involving incarcerated parents who lose their children as a collateral consequence of the separation that incarceration entails" presents a serious question of public policy, and we join him in commending it to the legislature for further study. See, e.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 438–39, 119 A.3d 462 (2015) (noting "the legislature's primary responsibility in pronouncing the public policy of our state" and that legislature is better positioned to "evaluate . . . competing policy interests" [internal quotation marks omitted]).

ECKER, J., with whom PALMER and McDONALD, Js., join, concurring. I agree with and join Chief Justice Robinson's opinion holding that neither the virtual infancy nor the interference exception to the statutory lack of an ongoing parent-child relationship ground for the termination of parental rights is applicable to the facts of this case, and, therefore, I am compelled to conclude that the parental rights of the respondent father, Aceion B., properly were terminated, even though he was incarcerated for most of his young child's life. I write separately to describe very briefly the social reality operating beneath the surface of this and many other such cases involving incarcerated parents who lose their children as a collateral consequence of the separation that incarceration entails. The problem I describe is not, in my opinion, well suited for judicial resolution on a case-by-case basis in the first instance, at least in the absence of more particularized legislative guidance regarding the proper legal considerations and standards that judges should take into account when deciding these cases. A legislative solution also offers the advantage of including nonjudicial remedial components that the legislature may deem necessary and appropriate on the basis of the many policy considerations that presumably would inform any such initiative.

There are approximately 2.2 million people incarcerated in the United States, and more than half of them have children under the age of eighteen. E. Hager & A. Flagg, The Marshall Project, "How Incarcerated Parents Are Losing Their Children Forever," (December 2, 2018), available at http://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever (last visited December 30, 2019); see also 3 M. Mushlin, Rights of Prisoners (4th Ed. 2009) § 16:4, pp. 488–90. Of the estimated 74 million children in the United States in 2007, 2.3 percent, or approximately 1.7 million children, had an incarcerated parent. L. Glaze &

L. Maruschak, Office of Justice Programs, United States Department of Justice, "Parents in Prison and Their Minor Children," Bureau Just. Stat. Spec. Rep. (Rev. March 30, 2010) p. 2, available at http://www.bjs.gov/content/pub/pdf/pptmc.pdf (last visited December 30, 2019). These statistics are even bleaker in minority communities; "[one] in [ten] black children have a parent behind bars, compared with about [one] in [sixty] white youth . . . ." E. Hager & A. Flagg, supra.[1]

The rise in incarceration rates over the past fifty years has been the subject of much attention and controversy. See, e.g., National Research Council et al., "The Growth of Incarceration in the United States: Exploring Causes and Consequences" (J. Travis et al. eds. 2014) p. 260 (reporting on recent study showing that number of children with father in prison rose from 350,000 in 1980 to 2.1 million in 2000, or "about 3 percent of all U.S. children in 2000"). Whatever its causes, the rise in the United States prison population has coincided with changes in child welfare policy, which are intended "to reduce children's stay in foster care in favor of a permanent home . . . ." A. Iskikian, Note, "The Sentencing Judge's Role in Safeguarding the Parental Rights of Incarcerated Individuals," 53 Colum. J.L. & Soc. Probs. 133, 135 (2019). Under the Adoption and Safe Families Act, for example, "the State shall file a petition to terminate the parental rights of" a parent whose child "has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . ."[2]

[1] The statistics recited in this concurring opinion reflect national data and are not specific to Connecticut. I would be surprised if the relevant statistics in Connecticut differed materially from the national numbers, but I cannot be certain because the local information is not readily available. The need for more empirical information of this kind is another reason why the legislature is far better equipped in the first instance to consider the matter and devise proper legal standards for case-by-case application.

[2] Connecticut has codified this federal statutory requirement at General Statutes § 17a-111a (a), which provides in relevant part that "[t]he Commissioner of Children and Families shall file a petition to terminate parental rights pursuant to section 17a-112 if (1) the child has been in the custody of the commissioner for at least fifteen consecutive months, or at least

42 U.S.C. § 675 (5) (E) (2012). Because the average sentence of incarceration exceeds fifteen months,[3] incarcerated parents whose children are placed in foster care have their parental rights terminated at a "disproportionate rate . . . ." A. Iskikian, supra, 135. Indeed, "[o]ne in eight children placed into foster care due to a parent's incarceration alone will lose that parent forever." E. Hager & A. Flagg, supra. "Female prisoners, whose children are five times more likely than those of male inmates to end up in foster care, have their rights taken away most often." Id.

Part of the problem fueling this "family separation crisis"; (internal quotation marks omitted) id.; is the fact that many termination of parental rights statutes, like General Statutes § 17a-112 (j) (3) (D), focus on the existence of an "ongoing parent-child relationship." See generally G. Sarno, Annot., "Parent's Involuntary Confinement, or Failure to Care for Child As Result Thereof, As Evincing Neglect, Unfitness, or the Like in Dependency or Divestiture Proceeding," 79 A.L.R.3d 417 (1977). In Connecticut, an "ongoing parent-child relationship" is statutorily defined as "the relationship that ordinarily develops as a result of a parent having met on a day-to-day basis the physical, emotional, moral and educational needs of the child . . . ." General Statutes § 17a-112 (j) (3) (D). A parent who is separated from his or her child by a sentence of incarceration cannot develop and/or maintain the type of parent-child relationship that ordinarily results from day-to-day contact. Although this court has been careful to "avoid

fifteen months during the twenty-two months, immediately preceding the filing of such petition . . . ."

[3] "The average time served by state prisoners released in 2016, from their date of initial admission to their date of initial release, was 2.6 years. The median amount of time served (the middle value in the range of time served, with 50 [percent] of offenders serving more and 50 [percent] serving less) was 1.3 years . . . ." D. Kaeble, Bureau of Justice Statistics, Office of Justice Programs, "Time Served in State Prison, 2016," U.S. Dept. Just. Bull., November, 2018, p. 1, available at http://www.bjs.gov/content/pub/pdf/tssp16.pdf (last visited December 30, 2019).

placing insurmountable burden[s] on noncustodial parents" by "explicitly reject[ing] a literal interpretation of the statute," we nonetheless find ourselves constrained by the language of the statute to require, at the very least, a showing that "the child has some present memories or feelings for the natural parent that are positive in nature." (Internal quotation marks omitted.) *In re Jacob W.*, 330 Conn. 744, 757, 200 A.3d 1091 (2019).

I am inclined to believe that many incarcerated parents—including loving and devoted parents—could have tremendous difficulty making the required showing under some circumstances. As this court has acknowledged, "when a parent has been incarcerated for much or all of his or her child's life . . . the normal parent-child bond that develops from regular contact . . . is weak or absent." (Internal quotation marks omitted.) Id., 756–57. The fact of incarceration also interferes with "the parent's ability to make and demonstrate the changes that would enable reunification of the family"; (internal quotation marks omitted) id., 756; because incarcerated parents cannot attend juvenile court hearings, visit the child, attend parenting classes, or provide financial support. A. Iskikian, supra, 53 Colum. J.L. & Soc. Probs. 158–59. "Parents in prison thus face a high likelihood of incurring the double punishment of both incarceration and the permanent deprivation of their relationship[s] with their children." Id., 165–66. Depending on the age of the child, the financial resources of the family, the willingness of the custodial parent or guardian to facilitate contact, and the resourcefulness of the incarcerated parent and his or her ability to navigate the maze of logistical impediments that accompany the loss of liberty in prison, it may be difficult or impossible for the incarcerated parent to meet the existing statutory standard.

Several states have responded to this increasingly serious problem by enacting legislation to protect the fundamental rights of incarcerated parents and to pre-

serve the parent-child bond. For example, California and New York have enacted legislation requiring that incarcerated parents be provided with reunification services, such as parenting classes and visitation with their minor children. See Cal. Welf. & Inst. Code § 361.5 (e) (1) and (2) (Deering Supp. 2018);[4] N.Y. Soc. Serv. Law

[4] Section 361.5 (e) of the California Welfare and Institutions Code provides in relevant part: "(1) If the parent or guardian is incarcerated, institutionalized, or detained by the United States Department of Homeland Security, or has been deported to his or her country of origin, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration, institutionalization, or detention within the reunification time limitations described in subdivision (a), and any other appropriate factors. In determining the content of reasonable services, the court shall consider the particular barriers to an incarcerated, institutionalized, detained, or deported parent's access to those court-mandated services and ability to maintain contact with his or her child, and shall document this information in the child's case plan. Reunification services are subject to the applicable time limitations imposed in subdivision (a). Services may include, but shall not be limited to, all of the following:

"(A) Maintaining contact between the parent and child through collect telephone calls.

"(B) Transportation services, when appropriate.

"(C) Visitation services, when appropriate.

"(D) (i) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.

"(ii) An incarcerated or detained parent may be required to attend counseling, parenting classes, or vocational training programs as part of the reunification service plan if actual access to these services is provided. The social worker shall document in the child's case plan the particular barriers to an incarcerated, institutionalized, or detained parent's access to those court-mandated services and ability to maintain contact with his or her child.

"(E) Reasonable efforts to assist parents who have been deported to contact child welfare authorities in their country of origin, to identify any available services that would substantially comply with case plan requirements, to document the parents' participation in those services, and to accept reports from local child welfare authorities as to the parents' living situation, progress, and participation in services.

§ 384-b (7) (f) (McKinney Cum. Supp. 2019).[5] Nebraska and New Mexico have gone even further by enacting legislation prohibiting the state from terminating parental rights if the sole basis for the termination is parental incarceration. See Neb. Rev. Stat. § 43-292.02 (2) (b)

"(2) The presiding judge of the juvenile court of each county may convene representatives of the county welfare department, the sheriff's department, and other appropriate entities for the purpose of developing and entering into protocols for ensuring the notification, transportation, and presence of an incarcerated or institutionalized parent at all court hearings involving proceedings affecting the child pursuant to Section 2625 of the Penal Code. The county welfare department shall utilize the prisoner locator system developed by the Department of Corrections and Rehabilitation to facilitate timely and effective notice of hearings for incarcerated parents."

[5] Section 384-b (7) (f) of the New York Social Services Law requires an "authorized agency" of the state to make " 'diligent efforts' . . . to assist, develop and encourage a meaningful relationship between the parent and child" by "(5) making suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. When no visitation between child and incarcerated parent has been arranged for or permitted by the authorized agency because such visitation is determined not to be in the best interest of the child, then no permanent neglect proceeding under this subdivision shall be initiated on the basis of the lack of such visitation. Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional facility, and providing or suggesting social or rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent's ability to maintain contact with the child. When the parent is incarcerated in a correctional facility located outside the state, the provisions of this subparagraph shall be construed to require that an authorized agency make such arrangements with the correctional facility only if reasonably feasible and permissible in accordance with the laws and regulations applicable to such facility; and

"(6) providing information which the authorized agency shall obtain from the office of children and family services, outlining the legal rights and obligations of a parent who is incarcerated or in a residential substance abuse treatment program whose child is in custody of an authorized agency, and on social or rehabilitative services available in the community, including family visiting services, to aid in the development of a meaningful relationship between the parent and child. Wherever possible, such information shall include transitional and family support services located in the community to which an incarcerated parent or parent participating in a residential substance abuse treatment program shall return."

(Cum. Supp. 2018);[6] N.M. Stat. Ann. § 32A-4-28 (D) (2010).[7]

Within constitutional limits, it is a question of public policy how best to strike the appropriate balance between and among the competing values and interests at stake, and, "[i]n areas where the legislature has spoken . . . the primary responsibility for formulating public policy must remain with the legislature." *State* v. *Whiteman*, 204 Conn. 98, 103, 526 A.2d 869 (1987). As I previously explained, § 17a-112 (j) (3) (D) in its present form plainly provides for the termination of parental rights if, among other things, the child has no positive memories or feelings for the natural parent. Despite the nearly insurmountable hurdles posed by incarceration to many inmates who find themselves unable in the prison setting to develop and maintain the parental relationship necessary to satisfy the statutory standard, I agree with Chief Justice Robinson's opinion holding that the trial court did not commit error applying the statutory standard on this record. Accordingly, I concur in Chief Justice Robinson's opinion.

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[6] Section 43-292.02 (2) (b) of the Nebraska Revised Statutes provides in relevant part that "[a] petition shall not be filed on behalf of the state to terminate the parental rights of the juvenile's parents or, if such petition has been filed by another party, the state shall not join as a party to the petition if the sole factual basis for the petition is that . . . the parent or parents of the juvenile are incarcerated. . . ."

[7] Section 32A-4-28 (D) of the New Mexico Statutes Annotated provides that "[t]he department shall not file a motion, and shall not join a motion filed by another party, to terminate parental rights when the sole factual basis for the motion is that a child's parent is incarcerated."

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*Felony murder; home invasion, conspiracy to commit home invasion; criminal possession of firearm; claim that trial court improperly overruled defendant's objection, pursuant to* Batson *v.* Kentucky *(476 U.S. 79), to prosecutor's use of peremptory challenge to excuse prospective African-American juror; certification from Appellate Court; whether Appellate Court incorrectly concluded that trial court had properly overruled defendant's* Batson *objection; whether prosecutor's explanation for exercising challenge was race neutral; claim that this court should overrule* State *v.* King *(249 Conn. 645) and its progeny, holding that distrust of police and concern regarding fairness of criminal justice system constitute race neutral reasons for exercising peremptory challenge; shortcomings of* Batson *in addressing implicit bias and disparate impact that certain race neutral explanations for peremptory challenges have on minority jurors, discussed;* Batson *reform in Connecticut, including convening of Jury Selection Task Force to study issue of racial discrimination in selection of juries and to propose necessary changes, discussed.*

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# CONNECTICUT APPELLATE REPORTS

# Vol. 195

CASES ARGUED AND DETERMINED

IN THE

## APPELLATE COURT

OF THE

## STATE OF CONNECTICUT

# JOSEPH KOLASHUK *v.* KYLE HATCH
## (AC 41571)

Lavine, Alvord and Lavery, Js.

*Syllabus*

The plaintiff in error, A, who was the attorney for the defendant, H, filed a writ of error, challenging the imposition of sanctions and the award of attorney's fees against him by the trial court. In the underlying personal injury action, the defendant in error, K, by and through his mother and next friend, sought to recover damages from H for, inter alia, negligence in connection with personal injuries sustained by K when K, who was riding his bicycle, and a motor vehicle operated by H collided. The complaint alleged, inter alia, that H was operating his vehicle while typing, sending, and/or reading text messages from his cell phone. During the discovery phase, H testified at his deposition that, minutes before the collision, he had sent a text message on a cell phone. H stated that the cell phone was a company work phone and that the account was in the name of his employer, H Co. Subsequently, the law firm representing K filed a motion to compel production of the relevant cell phone records from the date of the collision, which the trial court granted. A did not provide the requested cell phone records, and K's attorney, R, filed motions for sanctions for A's alleged violation of the court's order. In response to R's motions, A claimed that he had fully complied with the court's order to the best of his abilities because A's client, H, did not own the cell phone records requested by R, and that it would have been illegal and unethical for him to provide R with records that H did not own. Prior to the hearing on R's second motion for sanctions, R obtained the relevant cell phone records from an attorney representing H Co., but the court, nevertheless, granted R's second motion for sanctions against A. Thereafter, R filed a request for attorney's fees, which the trial court granted in part. Subsequently, A filed a writ of error in our Supreme Court, which transferred the matter to this court. *Held*:

1. K could not prevail on his claim that this court lacked subject matter jurisdiction, which was based on his claim that A's writ of error should be dismissed because it was not taken from a final judgment in that the sanctions and the attorney's fees against A did not terminate a distinct and separate proceeding because the relevant orders were issued during the discovery phase of his personal injury case, the requested cell phone records were necessary to resolve K's case, and those records were inextricably intertwined with K's case: although the requested records may have been integral to K's personal injury action against H, those records were the property of H Co., and, thus, neither A nor his client, H, owned or had possession of the cell phone records, and K's reliance on the general rule that an interlocutory order requiring a witness to

submit to discovery is not a final judgment and, therefore, is not immediately appealable was unavailing, as A was neither a witness nor a party to the underlying personal injury action but, rather, was an attorney representing H, the defendant in the underlying action; moreover, K could not prevail on his claim that the imposition of sanctions and attorney's fees against A did not terminate a distinct and separate proceeding because the trial court did not find A to be in contempt, as our Supreme Court previously has concluded that a law firm that was not a party need not wait to be found in contempt for its good faith failure to comply with a discovery order to seek appellate review of that discovery order, and, in the present case, A did not comply with the trial court's discovery order on the basis of his good faith belief that to do so would violate a statute because H did not own the cell phone records, and, thus, A did not have to be found in contempt to seek judicial review of the sanctions and the attorney's fees awarded against him; accordingly, the imposition of sanctions and the award of attorney's fees against A, a nonparty to the underlying personal injury case, terminated a separate and distinct proceeding, and, thus, the writ of error was filed pursuant to a final judgment.

2. The trial court erred as a matter of law by ordering A to produce cell phone records that neither he nor H owned or possessed, issuing sanctions against A and awarding attorney's fees to counsel for K, as the court's orders regarding the imposition of sanctions and the award of attorney's fees against A constituted an abuse of discretion; this court has previously determined that a party may not be ordered to produce documents owned by or in the possession of third parties, and, in the present case, the trial court's order that A, a nonparty, turn over the relevant cell phone records that belonged to H Co., a separate, nonparty entity, constituted an abuse of discretion, and although R claimed that H's parents owned H Co. and that H, therefore, easily could have obtained the relevant cell phone records had A instructed him to do so, H and H Co. were separate legal entities, and A was sanctioned for failing to do something that he, in good faith, believed would violate a statute because H did not own or possess the cell phone records.

Argued October 15, 2019—officially released January 7, 2020

*Procedural History*

Writ of error from the orders of the Superior Court in the judicial district of New London, *Bates*, *J.*, granting the motion for sanctions filed by the defendant in error against the plaintiff in error, and *Calmar*, *J.*, awarding attorney's fees to the attorney of the defendant in error, brought to the Supreme Court, which transferred the

matter to this court. *Writ of error granted*; *remanded with direction.*

*Maury M. Garrett*, *Jr.*, with whom was *Lawrence H. Adler*, self-represented, for the plaintiff in error (Lawrence H. Adler).

*Kelly E. Reardon*, with whom, on the brief, was *Laura A. Raymond*, for the defendant in error (Joseph Kolashuk).

*Opinion*

LAVINE, J. The plaintiff in error, Lawrence H. Adler, the attorney for the defendant, Kyle Hatch, filed a writ of error with our Supreme Court,[1] challenging the sanctions issued against him by the trial court, *Bates*, *J.*, and the imposition of attorney's fees ordered by the trial court, *Calmar*, *J.* The case of *Bank of New York* v. *Bell*, 142 Conn. App. 125, 63 A.3d 1026, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013), and cert. denied, 310 Conn. 901, 75 A.3d 31 (2013), which stands for the proposition that a party may not be ordered to produce documents owned by or in the possession of third parties, is dispositive of Adler's claims. We, therefore, grant the writ of error.

The following facts, as found in the record, underlie Adler's claims. On March 5, 2016, the minor plaintiff/defendant in error, Joseph Kolashuk, was riding his bicycle on Raymond Hill Road in Oakdale when he and a motor vehicle operated by Hatch, collided. Kolashuk suffered injuries and, by and through his mother and next friend, Danielle Kolashuk, commenced a personal injury action against Hatch. The complaint sounded in negligence and statutory and common-law recklessness. It alleged, in relevant part, that Hatch was operating his motor vehicle while typing, sending, and/or

[1] Our Supreme Court transferred the writ of error to this court pursuant to Practice Book § 65-1.

reading text messages "from" his cell phone (phone) and operating his motor vehicle at a high rate of speed while using a phone in his hand.[2] The Reardon Law Firm, P.C. (firm), represented Kolashuk. Adler entered an appearance on behalf of Hatch.

On March 6, 2017, the firm noticed Hatch's deposition duces tecum, requesting that he produce at the deposition (1) any and all phone records of March 5, 2016, including bills, invoices, text messages and e-mails; and (2) the actual phone he used on March 5, 2016. On March 15, 2017, Hatch objected to both production requests and moved for a protective order, stating in part that the records were not within his knowledge or possession.[3]

On March 7, 2017, Attorney Robert I. Reardon, Jr., noticed the depositions of and issued subpoenas to the keepers of records for Verizon Wireless (Verizon) and AT&T, Inc., commanding that they produce "[a]ny and all . . . phone . . . records from March 5, 2016 between [10] and [11 a.m.] for phone number [for Hatch] including call details, text details, phone calls made and/or received, text messages sent and/or received, and [e-mails] sent and/or received." Hatch filed motions

[2] Hatch denied the material allegations of the complaint and alleged several special defenses, in part, that Kolashuk's injuries were due to his own carelessness and negligence in that he suddenly rode his bicycle into the street directly into the path of oncoming traffic.

[3] Hatch's objection to the records request stated in pertinent part: "*The information is not directed to the proper entity nor within* [*Hatch's*] *knowledge or possession.*

"[Kolashuk's] notice of deposition is simply being used as a way to circumvent the rules of discovery. This case is a standard motor vehicle accident case and, therefore, 'unless upon motion, the judicial authority determines that such interrogatories are inappropriate in the particular action,' only the standard form interrogatories are allowed. Practice Book § [13-6] (b). Here, [Kolashuk] has attached a production request which goes far beyond the standard discovery requests to the deposition notice, and seeks documentation that is not allowed for in the standard discovery requests, and is inappropriate for discovery in this matter." (Emphasis added.)

to quash the subpoenas duces tecum issued to the service providers and motions for a protective order, stating in relevant part that the request for production was not valid in that it violated General Statutes § 16-247u (b).[4]

During his deposition on March 17, 2017, Hatch testified, in part, that minutes before the collision, he had sent a text message on a phone with service provided by Verizon. On the record, Reardon articulated his efforts to obtain the phone records from the service providers and that he had been unsuccessful in doing so. He produced a facsimile received from Verizon, indicating that it had no records for the number in Hatch's name. Adler reviewed the facsimile and stated: "I will help you because I think you and I can probably agree, because it's ultimately going to be a nonissue, but I think the reason is because it's not in the account name of . . . Hatch. That is his number, but it's not in his name." Reardon asked Hatch whose name was on the account. Hatch stated that the phone was a company work phone and that the account is in the name of R & W Heating Energy Solutions, LLC (R & W Heating), his employer.[5] Following a discussion between counsel, Adler stated to Reardon: "You and I can probably, early next week, work out a parameter of a production. I can probably get you what you need."

At a point later in the deposition, Reardon asked Hatch if he had brought the phone with him. He had not; the phone's screen had broken, and although he

[4] General Statutes § 16-247u (b) provides in relevant part: "No person shall: (1) Knowingly procure, attempt to procure, solicit or conspire with another to procure a telephone record of any resident of this state without the authorization of the customer to whom the record pertains . . . (3) receive a telephone record of any resident of this state with the knowledge such record has been obtained without the authorization of the customer to whom the record pertains or by fraudulent, deceptive or false means."

[5] Hatch's parents are the owners of R & W Heating.

had it repaired, he did not know whether the phone still contained data. Reardon asked Hatch to give the phone to Adler to preserve. Adler agreed to hold the phone in escrow. Hatch's counsel filed a motion for a protective order regarding the phone on the ground that, pursuant to Connecticut statute, one may not request phone records from one to whom such records do not belong and that it is impermissible for a party to provide phone records belonging to third parties. Hatch's counsel invited Reardon to subpoena the phone records from R & W Heating or to subpoena the records from R & W Heating's service provider.

On March 23 and April 26, 2017, Reardon sent a letter to Adler requesting Hatch's phone records.[6] By motion dated April 13, 2017, the firm sought to compel production, asking the court to order Hatch to produce the phone records as requested in the notice of Hatch's deposition, among other things. On May 9, 2017, Judge Bates issued an order stating that "[t]he . . . phone records shall be produced for the time requested, which appears to the court to be reasonably limited in time."

Hatch did not produce the records, and by motion dated May 2, 2017, the firm filed a motion for a protective order for certain individuals whose depositions Adler had noticed and for sanctions against Hatch for his continued refusal to provide the phone records, "which is the subject of a pending motion to compel filed" on April 13, 2017. The firm also sought a sanction of $380.96 for the expenses the firm had incurred in

[6] In the March 23, 2017 letter, Reardon stated in relevant part: "Finally, we are still waiting for the documentation we requested from . . . Hatch regarding his cell phone usage and text message usage on the day of the incident. Please provide it at once, as you indicated you would during . . . Hatch's deposition."

In the April 26, 2017 letter, Reardon stated in relevant part: "In addition, pursuant to our telephone conversations and correspondence to you, you still have not . . . provided [Hatch's] cell phone records and the inspection of the cell phone that was in use at the time of the accident."

its effort to obtain the phone records of a third party whom Hatch allegedly called on the morning of the collision.[7] There was a further exchange of correspondence between counsel for the parties in which Joseph M. Barnes, an attorney at the firm, stated that during a status conference, Adler had confirmed "that [he] had the records we were requesting and could get them to my office by Monday, [May 22, 2017]." Adler replied by letter stating, "my client does not have possession or control of any records for the phone at issue. I also did not represent that I had them in my possession, but simply indicated what I believed they showed. I have asked repeatedly and will ask again, that you confirm that if I can obtain the records that you seem to be seeking and provide them to you, you withdraw any further requests for possession of my client's or his [parents'] business . . . phone or any broader requests for phone records beyond the time limit specified by Judge Bates. Once I receive this confirmation, I will make the arrangements for what I understand you are looking for with the appropriate parties."

On June 12, 2017, Reardon filed a motion for default and sanctions for violation of Judge Bates' order. In

[7] The motion to compel sought "an order that . . . Hatch produce the requested information himself or consent to the production of the information by Verizon. Specifically . . . any and all cellular phone records from March 5, 2016 including bills, invoices, text messages and e-mail; and the actual cellular phone [Hatch] used on March 5, 2016; or an order that [Hatch] consent to Verizon producing any and all cellular phone records from March 5, 2016 between [10] and [11 a.m.] for phone number [860-***-****] including call details, text details, phone calls made and/or received, text messages sent and/or received, and e-mails sent and/or received."

The firm represented that Adler promised to produce the records at issue and attached a portion of Hatch's deposition transcript. The transcript of Hatch's deposition, however, indicates that Adler stated to Reardon: "I'm sure [that] we can work something out. I don't have an objection to you getting any records. It was just as phrased. So, we'll try to work something out. . . . You and I can probably, early next week, work out a parameter of a production. I can probably get you what you need."

addition to a default against Hatch, Reardon sought attorney's fees, costs and a sanction of $5000 against Hatch for the time the firm spent attempting to obtain his phone records. Reardon also moved for an order of contempt against Adler for his wilful refusal to comply with the court's order.

On June 14, 2017, Reardon and Attorney Andrew B. Goodwin,[8] representing Hatch, appeared before Judge Bates. At that time, Goodwin stated in part: "I have stated to you repeatedly that my client does not have cell records, and you have heard from both me and from Verizon that the cell records are not in my client's name. It is only recently that you have been willing to limit the time period, as the court mandated, which was a significant portion of my objection. I also have a dispute about your entitlement effort to have access to the actual cell phone that has extensive unrelated material and, likely, attorney-client privileged material.

"Here, once again, is my suggestion. I will discuss with my client's employer turning over the cell records—my client's employer turning over the cell records with the limitations placed by the judge in terms of date and time period, in accordance with the order, of course. I will do that voluntarily if, and only if, they do not satisfy you with the parameters that you defined, which is, according to your May 31, 2017 letter, that the records produced are sufficient to determine when your—that's Mr. Hatch—client was on the phone from 10 a.m. to 11 a.m. on March 5, 2016.

"If you cannot make that determination after reviewing the records, I will agree to a judicial review of the phone to the extent this information is still on there, only for the date and time periods referenced. For rea-

[8] Goodwin is associated with the Adler Law Group, LLC.

sons stated above, I will not simply turn over the phone if I can obtain it from my client's employer."[9]

During the June 14, 2017 hearing, Judge Bates asked whether the order should be restructured because the owner of the phone is not a party to the action. Thereafter, the court stated: "I'm going to issue a clarification that when I referred to his cell phone records, I was referring, if unartfully, to the records of the cell phone he was using. I understand that . . . the record of the calls is in the hands of the attorney representing [Hatch], and *I order the attorney to turn those records over*. Again, it's for the two hour interval. And I'm not going to make a limit. You know, I'm not going to prevent counsel, if there is reason to get more cell phone records down the line, to request those. It's not going to be a condition of this order, but the order is only affecting that . . . two hour period of time. So, that will be a clarification. As to whether or not the difference which I referred to as being . . . *a difference without a* [*distinction*], I think that's going to be part of the sanctions argument that we'll have to have." (Emphasis added.) The court also ordered that the records be produced within five business days.[10]

[9] In Kolashuk's brief to this court, he represented that Hatch's counsel disclosed for the first time at the June 14, 2017 hearing that the phone and corresponding records were owned by Hatch's employer. As noted previously, during the March 17, 2017 deposition, Adler stated that the account was not in Hatch's name, and Hatch testified that the phone belonged to his employer, R & W Heating, a business owned by his parents.

[10] During the June 14, 2017 hearing, Reardon represented to the court that Adler had the records, i.e., "if you take a look at the letter from Mr. Adler, it says he has possession," referring to an exhibit attached to the motion. We, however, have reviewed Adler's letters that are attached to the motion in the court files. The letters reveal no representation that Adler was in possession of the records. A letter signed by Adler, dated June 5, 2017, states in part: "You are well aware that I represented to you that our position is in response to the Judge's order, that have nothing to comply with. The Judge ordered that my client . . . turn over *his* cell records for the time period identified. I have stated to you repeatedly that my client does not have cell records, and you have heard both from me and from Verizon that the cell records are not in my client's name." (Emphasis in original.) In a

By motion dated July 12, 2017, Reardon filed a second motion for sanctions due to what he termed Adler's "deliberate defiance" of the court's orders. The motion sought a sanction of $5000 against Adler, a finding of contempt against Adler, and a default against Hatch for wilful violation of a court order. On July 27, 2017, Judge Bates held an evidentiary hearing on Reardon's motion for sanctions. At the hearing, Hatch testified that his phone number is connected to whatever phone he is using, the phone he was using on the date of the collision belongs to R & W Heating, and he could not remember whether he had seen the phone records. In addition, his parents are the owners of R & W Heating. He presumed that the phone records are in his mother's possession. He also testified that he had turned the phone at issue over to his parents, as he and his parents decided that "it was better for them to keep it safe." He further testified that he and his parents had no objection to turning over the phone records to Reardon. The court opined that Hatch had constructive possession of the phone and that the defense was "*hiding behind a sort of legal technicality*" as to who owned the phone. (Emphasis added.) Adler argued that the phone is not what is at issue, the phone records are at issue. He also argued that Hatch never had possession of the phone records, which are in the possession of the owners of R & W Heating. The following colloquy transpired:

"[Adler]: Your Honor, the only thing I've been talking about in the entire [proceeding] is Your Honor's order, which is about the records. The phone is not the subject of anything pending.

letter dated May 18, 2017, to Barnes of the firm, Adler stated in part: "As I advised you, my client does not have possession or control of any records for the phone at issue. I also did not represent that I had them in my possession, but simply indicated what I believed they showed."

"[Judge Bates]: The phone—when I refer to the phone, I'm talking about the phone records. . . .

"[Adler]: We never had them. We didn't turn them over to the parents. We've never had the phone records. The parents get the bills, they pay the bills, they have them at their business." The hearing was continued.

On July 28, 2017, Ronald Goldstein, an attorney representing R & W Heating, gave Reardon the phone records.

Judge Bates continued the hearing on the motion for sanctions on August 2, 2017, and ordered Reardon to file time sheets and billing rates for an award of attorney's fees. On September 1, 2017, Judge Bates issued a memorandum of decision on Reardon's motion for sanctions, from which we quote in part. The court stated that Reardon had filed a motion for sanctions against Adler "on the basis that he failed to turn over or even seek to turn over [Hatch's] . . . phone records from the cell phone that [Hatch] used on the date of the subject collision. This court ordered [Hatch] on May 9, 2017 . . . to make those cell phone records available.

"[Adler] did not comply with the order of the court until July 28, 2017, when arrangements were made with attorneys for the owners of the company, R & W Heating, independently to turn over the requested cell phone logs. As a result of the delay over the requested documents, [Reardon] is seeking attorney's fees and costs in obtaining these documents and a sanction of $5000 against Attorney Adler for his alleged failure to comply with the court order.

"In response to [Reardon's] motions, [Adler] argues that [Hatch] has fully complied with the court's order to the best of his abilities because Adler's client . . . Hatch, did not own the cell phone records requested by [Reardon] and ordered produced by the court, and, therefore, had no obligation to comply.

"The court notes that in a deposition of . . . Hatch on March 17, 2017 . . . Adler, when asked if he could produce the cell phone records, assured . . . Reardon, 'I'm sure we can work something out. I don't have any objection to you getting any records, so we will try to work something out.' Adler, on that date, also said to Reardon, 'You and I could probably, early next week, work out a parameter of production. I can probably get you what you need.' It is undisputed that Adler failed to follow through on his commitment until outside counsel provided the necessary documentation several months later."[11]

The court continued: "[Kolashuk] submits that [Adler] needlessly and intentionally prolonged the discovery process by refusing to provide the requested cell phone records. However, [Adler] argues that it would have been illegal and unethical for him to provide [Reardon] with records that [Hatch] did not own. Specifically, [Hatch] relies solely on . . . § 16-247u (b), which provides in relevant part: 'No person shall: (1) Knowingly procure, attempt to procure, solicit or conspire with another to procure a telephone record of any resident of this state without the authorization of the customer to whom the record pertains . . . or (3) receive a telephone record of any resident of this state with the knowledge such record has been obtained without the authorization of the customer to whom the record pertains . . . .'

"However, § 16-247u (c) provides in relevant part: 'The provisions of this section shall not apply to any person acting pursuant to a valid court order . . . .'[12] This court's order . . . made clear that the cell phone

[11] On the basis of our review of the deposition transcript quoted by the court, we conclude that Adler did not state that he had possession of the records or that he himself would turn them over.

[12] In light of our discussion in part II of this opinion, we need not address § 16-247u (b) and (c) to resolve the present writ of error.

records were to be produced for the time requested by [Reardon], which was from 10 . . . to 11 a.m. on March 5, 2016, the date and time of the accident. Despite [Adler's] assurance in the deposition that he would arrange to have the cell phone records produced, he reneged on this assurance, stating [that] the cell phone records were owned by R & W Heating—a company owned by [Hatch's] parents, not by [Hatch] himself. Therefore, according to [Adler, Hatch] could not deliver on his promise to work things out and produce the records. However, [Adler] offered no evidence that he asked [Hatch] or the owners of R & W Heating to allow counsel to fulfill his assurance and provide access to cell phone records. Instead, [Adler] tried to use the production of the cell phone records as a lever to limit discovery, for example, seeking a quid pro quo that there would be no further request to examine the cell phone. . . .

"In the discovery context . . . the factors in imposing sanctions to be considered include: '(1) whether noncompliance was caused by inability, rather than wilfulness, bad faith or other fault; (2) whether and to what extent noncompliance caused prejudice to the other party, including the importance of the information sought to that party's case; and (3) which sanction would, under the circumstances of the case, be an appropriate judicial response to the noncomplying party's conduct.' *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, [257 Conn. 1, 15, 776 A.2d 1115 (2001)].

"Here, [Adler's] failure to respond to [Reardon's] discovery request and the violation of the court's order . . . were not caused by inability to comply. Rather, the correspondence between [counsel for the parties] demonstrates the contrary. . . . [Adler's May 18, 2017] letter demonstrates that, at the very least, [he] could have inquired with R & W [Heating] regarding its willingness to provide the records or sign a release, allowing

[him] to obtain the records in compliance with this court's order. There is no evidence that he did so.

"Furthermore, the information that was sought by [Reardon] is central to the . . . claims. Specifically, [Kolashuk] has alleged that [Hatch] was using a cell phone at the time of the collision on March 5, 2016. [Adler's] failure to comply with the court's order prejudiced [Reardon's] ability to fully investigate [Kolashuk's] claims against [Hatch]. . . .

"Having found that [Adler] is in violation of Practice Book § 13-14 (a), [Adler] will pay [Kolashuk] $2500 in sanctions within thirty days of this order. [Reardon] is also invited to present the court with an accounting of time spent by [the firm] seeking the cell phone records and a request for payment of legal fees based on counsel's customary hourly rate plus costs." (Citations omitted; footnote added.)

Reardon, thereafter, filed a request for attorney's fees in the amount of $41,277.26; the request was later reduced to $40,800. Adler objected, arguing that the request was not allowed pursuant to the rules of practice, was duplicative, and was unreasonable. On November 22, 2017, Judge Calmar held a hearing to determine the amount of attorney's fees Adler was to pay. Judge Calmar issued a memorandum of decision on January 30, 2018, in which he determined that attorney's fees in the amount of $5000 was reasonable and ordered Adler to pay Reardon that amount in addition to the sanction imposed by Judge Bates.

In February, 2018, Adler filed the present writ of error, in which he alleged, among other things, that the court improperly sanctioned him for failing to abide by an order that the court never gave Hatch,[13] and ordered

[13] Adler alleged that "the order directed that [Kolashuk's] time period was reasonable, while ignoring that the time period the court was referring to was contained in a subpoena of Verizon, not any subpoena directed at [Hatch]."

him to commit an illegal act in violation of a statute. He further alleged that it was inappropriate for the court to sanction him for failure to engage in an act that he believed, in good faith, would violate the statute. Moreover, he claimed that the court abused its discretion in finding that there was bad faith or misconduct on his part, erred in finding that he had a duty to engage in efforts to procure discovery from third parties, erred in placing the burden on him to secure discovery from third parties, rather than on Kolashuk, and abused its discretion in granting attorney's fees for his failure to provide documents and things belonging to third parties.

During oral argument before us, Adler's counsel, Maury M. Garrett, Jr., argued that *Bank of New York* v. *Bell*, supra, 142 Conn. App. 125, was controlling of the issues in the writ of error. Thereafter, we sua sponte ordered counsel to file supplemental memoranda addressing what effect, if any, the case of *Bank of New York* has on our analysis of the writ of error.

I

Before addressing the merits of the writ of error, we address Kolashuk's claim that this court lacks jurisdiction. We disagree.

Kolashuk claims that Adler's writ of error should be dismissed because it was not taken from a final judgment. "The statutory right to [a writ of error] is limited to appeals by aggrieved parties from final judgments. General Statutes §§ 52-263, 51-197a; see Practice Book § [72-1].[14] Because our jurisdiction over appeals, both criminal and civil, is prescribed by statute, we must always determine the threshold question of whether

[14] Practice Book § 72-1 (a) provides in relevant part: "Writs of error for errors in matters of law only may be brought from a final judgment of the Superior Court to the Supreme Court in the following cases: (1) a decision binding on an aggrieved nonparty . . . ." See footnote 1 of this opinion.

the [writ of error] is taken from a final judgment before considering the merits of the claim." (Footnote added; internal quotation marks omitted.) *Tappin* v. *Homecomings Financial Network, Inc.*, 265 Conn. 741, 750–51, 830 A.2d 711 (2003). "The lack of a final judgment implicates the authority of this court to hear [a] writ of error because it is a jurisdictional defect." Id., 750. "A challenge to the jurisdiction of the court presents a question of law." (Internal quotation marks omitted.) *Jimenez* v. *DeRosa*, 109 Conn. App. 332, 337, 951 A.2d 632 (2008). Our review of questions of law is plenary. *State* v. *Parrott*, 262 Conn. 276, 286, 811 A.2d 705 (2003).

Final judgment questions are decided pursuant to *State* v. *Curcio*, 191 Conn. 27, 463 A.2d 566 (1983). Our Supreme Court has "determined certain interlocutory orders and rulings of the Superior Court to be final judgments for purposes of appeal. An otherwise interlocutory order is appealable in two circumstances: (1) where the order or action terminates a separate and distinct proceeding, or (2) where the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id., 31. In the present case, we conclude that the imposition of sanctions and the award of attorney's fees against Adler, a nonparty to the underlying personal injury case, terminated a separate and distinct proceeding, and, thus, the writ of error was filed pursuant to a final judgment.

Kolashuk, however, contends that Adler fails to meet the first prong of the *Curcio* test because the sanctions and the attorney's fees against Adler do not terminate a distinct and separate proceeding, as the orders were issued during the discovery phase of his personal injury case. Moreover, he continues, the phone records were necessary to resolve his case; see *Niro* v. *Niro*, 314 Conn. 62, 71 n.4, 100 A.3d 801 (2014); and are inextricably intertwined with it. See *McConnell* v. *McConnell*, 316 Conn. 504, 513, 113 A.3d 64 (2015). We disagree. The facts and the discovery at issue in the present case are distinguishable from those in *Niro* and *McConnell*.

In *Niro*, a dissolution action, the plaintiff wife sought the financial records of businesses and trusts in which the defendant husband and his brother, a plaintiff in error, were partners. *Niro* v. *Niro*, supra, 314 Conn. 64–65. She sought the records to determine her share of the marital assets in the face of allegations that the assets of the businesses and trusts had been misappropriated. Id., 65. The brother objected to the disclosure of certain records and filed a motion to quash a subpoena duces tecum and a motion for a protective order. Id. Following a hearing, the trial court ordered the brother to produce certain records. Id., 66. The brother filed a writ of error, which our Supreme Court dismissed, concluding that the trial court's order to produce was an interlocutory order that did not arise out of a separate and distinct proceeding because the trial court needed the information in the records to distribute equitably the marital assets in the dissolution action. Id., 69–70, 73. The husband's brother was in possession of records that were integral to a central issue in the divorce action, i.e., the value of the marital assets. Id., 70. The records, therefore, were integral to the resolution of the dissolution matter in *Niro*. In the present case, the phone records may be integral to Kolashuk's case, but Adler did not own them and was not in possession of them. Hatch, Adler's client, also did not own the phone or its records, and was not in possession of them. The phone records at issue are the property of R & W Heating.

*McConnell* was a probate appeal. *McConnell* v. *McConnell*, supra, 316 Conn. 507. The issue before our Supreme Court was whether a trial court's order directing "attorneys who [were] not parties and who [were] not representing parties to underlying litigation to appear in court and subject themselves to examination, was a final judgment that may be challenged by way of a writ of error." Id. The plaintiff claimed that he did

not receive notice of a Probate Court hearing regarding family trust funds pursuant to an application for an accounting of a family trust filed by one of his sisters, which resulted in a distribution of significant trust funds primarily to the plaintiff's two sisters. Id., 508. The trial court ordered the lawyers who represented the sister in the Probate Court to appear at a hearing to show cause. Id., 507, 509. The lawyers, the plaintiffs in error, were ordered "to appear in court so that they could be examined about certain events that took place during the Probate Court proceedings on [the sister's] application. Because [the sisters] had invoked their fifth amendment right not to testify at the hearing on the order to show cause, the [lawyers] for the parties to the Probate Court proceedings were a critical source of information regarding the failure to give notice of those proceedings to [the plaintiff brother]. Thus, the discovery order was directed at materials that were required by the trial court in order to resolve the issues raised in [the probate] appeal, and, therefore, the order was inextricably intertwined with the underlying proceeding." Id., 512–13. Our Supreme Court determined that the writ of error was not taken from a final judgment. Id., 513. The discovery order was directed at materials that were required by the trial court to resolve the issues raised in the plaintiff's probate appeal, and, "therefore, the order was inextricably intertwined with the underlying proceeding." Id. The discovery order "did not constitute a final judgment under the first prong of *Curcio* merely because the [lawyers] were not parties to [the brother's] appeal." Id. In the present case, Adler was not present at the time of the collision, nor was he the owner of the phone or the phone records. Although the phone records in the present case may be integral to Kolashuk's personal injury action against Hatch, Adler did not represent the owner of the phone and its records, a fact that Judge Bates acknowledged.

Moreover, unlike the plaintiffs in error in the *Niro* and *McConnell* cases, Adler was found in violation of the court's order.

Kolashuk also argues that "[t]he general rule established by our [Supreme Court] case law is that an interlocutory order *requiring a witness* to submit to discovery is not a final judgment and, therefore, is not immediately appealable." (Emphasis added.) *Presidential Capital Corp.* v. *Reale*, 240 Conn. 623, 625, 692 A.2d 794 (1997). That argument fails because Adler is neither a witness, nor a party, to the underlying action. See part II of this opinion. He is a lawyer representing Hatch, a defendant in the underlying action.

Kolashuk asserts, citing *Green Rock Ridge, Inc.* v. *Kobernat*, 250 Conn. 488, 498, 736 A.2d 851 (1999), that the imposition of sanctions and attorney's fees against Adler did not terminate a distinct and separate proceeding because the trial court did not find Adler to be in contempt. In *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, 305 Conn. 750, 48 A.3d 16 (2012), our Supreme Court concluded that a law firm that was not a party need not wait to be found in contempt for its good faith failure to comply with a discovery order to seek appellate review of the discovery order. Id., 757, 762–69. In the present case, Adler did not comply with Judge Bates' discovery order on the basis of his good faith belief that to do so would violate a statute because Hatch did not own the phone records. Pursuant to *Woodbury Knoll, LLC*, he did not have to be found in contempt to seek judicial review of the sanctions and attorney's fees awarded against him.

In *Woodbury Knoll, LLC*, our Supreme Court analyzed the final judgment question pursuant to *Abreu* v. *Leone*, 291 Conn. 332, 968 A.2d 385 (2009). In *Abreu*, to determine "[w]hether there was subject matter jurisdiction, [our Supreme Court] reviewed its final judgment jurisprudence regarding appeals from discovery

orders and identified three points salient to determining whether a discovery order could be considered an appealable final judgment. First, the court's focus in determining whether there is a final judgment is on the *order* immediately appealed, not [on] the underlying action that prompted the discovery dispute. . . . Second, determining whether an otherwise nonappealable discovery order may be appealed is a fact specific inquiry, and the court should treat each appeal accordingly. . . . Third, although the appellate final judgment rule is based partly on the policy against piecemeal appeals and the conservation of judicial resources . . . there [may be] a counterbalancing factor that militates against requiring a party to be held in contempt in order to bring an appeal from a discovery order." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) *Woodbury Knoll, LLC* v. *Shipman & Goodwin, LLP*, supra, 305 Conn. 760–61.

Applying the three *Abreu* points to the facts of the present case, we conclude that Adler's writ of error emanates from a final judgment. Adler challenges the sanctions and attorney's fees imposed on him, a nonparty, which are entirely unrelated to Kolashuk's personal injury action. Moreover, Reardon and Kolashuk received the phone records they were seeking before the sanctions and attorney's fees were imposed on Adler. The sanctions are unrelated to the prosecution of the personal injury action, which we assume is proceeding apace now that the firm has the records. The imposition of the sanctions, therefore, terminated a distinct and separate proceeding from the personal injury case.

As our Supreme Court held in *Woodbury Knoll, LLC*, there are policy considerations that militate against Adler's having to wait until there is a judgment in Kolashuk's case before he challenged the sanctions and attorney's fees. Our Supreme Court concluded "that a counterbalancing factor exists to justify not subjecting [an

attorney] to the ordinary rule that one must be held in contempt in order to challenge a trial court's discovery order, namely, the concern of requiring an attorney, as an officer of the court, to violate a court order and otherwise to behave inconsistently with the Rules of Professional Conduct in order to bring an appeal." Id., 757. Adler was representing Hatch, the defendant, and believed that he was prohibited by statute from turning over the phone records, which, more significantly, neither he nor his client owned or possessed. Adler further argues that it would be profoundly prejudicial to a defendant client if the attorney were forced to continue to refuse to comply with discovery until the court found the attorney to be in contempt. It would create a conflict of interest whereby an attorney must be subjected to professional scorn and reputational harm to protect a client's right to appeal a discovery order. We find this argument persuasive.

For the foregoing reasons, we conclude that Adler's writ of error was taken from a final judgment and that this court has subject matter jurisdiction.

II

As noted, the principal issues presented by the writ of error are whether the trial court erred as a matter of law by (1) ordering Adler to produce records that neither he nor his client owned or possessed and (2) issuing sanctions against Adler and awarding attorney's fees to Kolashuk's counsel.[15] We grant the writ of error.

[15] In his brief on appeal, Adler claimed that the trial court (1) abused its discretion by sanctioning him for failing to comply with a court order, (2) improperly sanctioned him for purportedly not following a vague, ambiguous, and fatally flawed order, (3) abused its discretion by finding that there was bad faith or misconduct on his part, (4) erred by finding that he had a duty to engage in efforts to procure discovery from third parties he did not represent, (5) erred in awarding attorney's fees against him, and (6) erred in awarding attorney's fees for activities beyond the drafting of the motion for sanctions itself. Following the submission of the parties' supplemental briefs, Adler refined the issues.

As previously stated, the present case is controlled by *Bank of New York* v. *Bell*, supra, 142 Conn. App. 125, which held that it was improper for the trial court to order the plaintiff in that case to turn over documents that belonged to a separate, nonparty entity. Id., 133–34. *Bank of New York* involved the following facts. The trial court found the plaintiff, Bank of New York, as trustee for BS ALT A 2005-9, to be in contempt for failing for more than one year to respond fully to the defendant Jonathan S. Bell's interrogatories and requests for production. Id., 127. The court found that the failure constituted a wilful violation of its prior orders, which met the requirements of *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, supra, 257 Conn. 17–18.[16] Bell sought to obtain documents regarding all of the mortgage foreclosure cases relating to assets transferred by JPMorgan Chase Bank, N.A., to Bank of New York. *Bank of New York* v. *Bell*, supra, 128. The plaintiff appealed, claiming in part that the court "had no authority to order it to turn over documents that belonged to Bank of New York or that belonged to Bank of New York as trustee for any trust other than BS ALT A 2005-9. The plaintiff argue[d] that it is a separate entity from Bank of New York and that the court, therefore, improperly ordered it to turn over documents belonging to that separate entity, which ultimately led to the court's improper finding of contempt." Id., 131. This court agreed for the following reasons.

"Bank of New York was never a party to this action. Practice Book §§ 13-6[17] and 13-9[18] permit parties to an

[16] "[T]he requirements set by our Supreme Court in *Millbrook Owners Assn., Inc.* v. *Hamilton Standard*, [supra, 257 Conn. 17–18], of reasonable clarity, a trial court finding based on the record of actual violation and that the sanction imposed was proportional to the violation . . . ." *Bank of New York* v. *Bell*, supra, 142 Conn. App. 127.

[17] Practice Book § 13-6 is titled "Interrogatories; In General."

[18] Practice Book § 13-9 (a) provides in relevant part: "In any civil action . . . any party may serve . . . upon *any other party* a request to afford the party submitting the request the opportunity to inspect, copy, photograph . . . designated documents or to inspect . . . any tangible things in the

action to serve interrogatories and requests for production only on other parties to that action. Despite Bank of New York's nonparty status, the court broadened the scope of the interrogatories and requests for production to include the entire transaction between JPMorgan Chase [Bank, N.A.] and Bank of New York, a nonparty. Thus, pursuant to Practice Book §§ 13-6 and 13-9, the court had no authority to order the plaintiff to turn over documents that belonged to Bank of New York, a separate nonparty entity, nor did it have any authority in the circumstances of this case to order the plaintiff as trustee for BS ALT A 2005-9 to turn over documents from other trusts. The court had the authority to order the plaintiff to respond to discovery requests relating to BS ALT A 2005-9." (Footnotes added and omitted.) Id., 134.

In his supplemental brief in the present case, Adler argues that Judge Bates' order that he turn over the phone records that belonged to R & W Heating, a separate, nonparty entity, constituted an abuse of discretion, as the court was without authority to do so. It goes without saying that Adler is not a party to the personal injury litigation. See Practice Book § 13-9. Although *Bank of New York* concerned a finding of contempt, the orders of the judges in the present case flow from the same underlying abuse of discretion by issuing a discovery order against a nonparty—Adler—and punishing the nonparty for failing to comply with a court discovery order that violated our rules of practice. Moreover, Adler's client, Hatch, did not own or possess the phone records. Reardon argued in the trial court that Hatch's parents owned R & W Heating, and that Hatch easily could have obtained the phone records had Adler instructed him to do so. The relationship between Hatch and his parents is beside the point. The

possession, custody or control *of the party* upon whom the request is served . . . ." (Emphasis added.)

fact remains that Hatch and R & W Heating are separate legal entities and that Adler was sanctioned for failing to do something he believed would violate a statute. We conclude that the orders regarding the imposition of sanctions and the award of attorney's fees against Adler constitute an abuse of discretion. We, therefore, grant the writ of error and remand the case to the trial court.

The writ of error is granted and the case is remanded with direction to vacate the sanctions and the award of attorney's fees against Adler.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* SHOTA MEKOSHVILI (AC 42144)

Lavine, Devlin and Beach, Js.

*Syllabus*

Convicted, following a jury trial, of the crime of murder in connection with the stabbing death of the victim, the defendant appealed, claiming, inter alia, that the trial court erred by admitting certain testimony from the victim's wife and the victim's business partner, A. The victim, a taxi cab driver, was stabbed to death during his evening shift on a Tuesday night, and money was stolen from the taxi's glove compartment. During the trial, the victim's wife stated that on the night of the victim's murder, he returned home briefly to retrieve money to pay for his portion of a certain taxi fee and to send money to his family overseas. A testified that the victim regularly placed his portion of the taxi fee in the glove compartment on Tuesday nights for A to pay the following day. *Held:*

1. The defendant could not prevail on his claim that the wife's testimony regarding statements made to her by the victim was irrelevant as to whether the defendant killed the victim or whether he acted with criminal intent; the wife's testimony regarding the victim's statements reasonably could have made it more likely that the defendant had a financial motive in killing the victim and less likely that the killing was the result of self-defense, as claimed by the defendant, and the defendant's claim that the victim's statements to his wife were self-serving and backward looking and, thus, did not satisfy the state of mind exception to the

hearsay rule was unavailing, as the victim's statement to his wife indicated his intention to take money to pay the taxi company in the immediate future, and although the part of the statement indicating that he had taken money for that purpose was retrospective, it provided context as for the expression of his intention to pay his taxi fees and send money to his family, and at the time the victim made those statements to his wife, no crime had been committed nor was one foreseeable.

2. The defendant could not prevail on his claim that the trial court improperly allowed testimony from A, pursuant to the habit exception of the hearsay rule, regarding the victim's customary habit of leaving his portion of the taxi fee in the glove compartment of the taxi on Tuesday nights, as A's testimony was relevant to the issue of motive for the defendant to kill the victim; the jury reasonably could have inferred from A's testimony that the victim had placed money in the glove compartment of the taxi that was, thereafter, taken by the defendant, and that financial gain could have been the motive for murder, and the defendant's claim that the state failed to provide an adequate foundation for the admission of A's testimony regarding habit evidence was unavailing, as there is no particular numerical threshold that must be met in order for a person's conduct to rise to the level of habit, and A's testimony established that the victim's specific conduct of leaving his portion of the taxi fee in the glove compartment of the taxi on Tuesday nights constituted a sufficiently regular practice.

3. The trial court properly instructed the jury with a general unanimity charge and did not err in failing to grant the defendant's request for a specific unanimity charge as to the claim of self-defense; the jury instructions, viewed in their totality, were correct in law and fairly presented the case to the jury, as each of the four elements of a claim of self-defense were explained in detail and in accordance with the model jury charge, the factual scenario in the present case was not especially complex and the defendant's course of conduct did not comprise separate incidents, and because the trial court did not sanction a nonunanimous verdict, a unanimity instruction on the claim of self-defense was not required.

Argued September 23, 2019—officially released January 7, 2020

*Procedural History*

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Stamford and tried to the jury before *Blawie, J.*; verdict and judgment of guilty, from which the defendant appealed. *Affirmed.*

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

*Ronald G. Weller*, senior assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo, Jr.*, state's attorney, and *James Bernardi*, supervisory assistant state's attorney, for the appellee (state).

*Opinion*

BEACH, J. The defendant, Shota Mekoshvili, appeals from the judgment of conviction, rendered on a jury verdict of murder in violation of General Statutes § 53a-54a. He claims that the trial court erred by (1) admitting testimony under the state of mind exception to the hearsay rule, (2) admitting testimony regarding the victim's habit, and (3) refusing to include in the jury instructions a unanimity charge as to whether the state had disproven an element of the defendant's self-defense claim. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found from the evidence presented and the reasonable inferences drawn therefrom, and procedural history are relevant on appeal. The victim, Mohammed Kamal, operated a taxi with his business partner, Jean Antoine. Antoine worked the day shift, generally from 6 a.m. to 6 p.m., and the victim worked the night shift, generally from 6 p.m. to 6 a.m. The cab was registered with Stamford Taxi (company), and the partners paid a weekly fee totaling $475 to the company. The fee was due on Wednesdays at noon. The victim customarily placed his share of the fee in the glove compartment of the vehicle during his Tuesday night shift, and Antoine removed the money and delivered it to the company on Wednesday mornings.

On the evening of Tuesday, August 26, 2014, the victim left home for his shift in the taxi between 9 p.m. and 10 p.m. At approximately 12:30 a.m. on August 27, the victim briefly returned home and told his wife that he had forgotten to take the money for his share of the fee that he needed to leave in the taxi; he said he also

planned to send some money to his family in Bangladesh. The victim's wife observed him take money out of an armoire, after which the victim returned to his shift. At approximately 3 a.m., the defendant hailed the victim's taxi and directed the victim to drive to Doolittle Road, in Stamford. While on Doolittle Road, the defendant began to stab the victim repeatedly. At some point, the defendant opened the glove compartment, stole the money that the victim had set aside for the taxi fee and for his family in Bangladesh, took the victim's credit card, and fled the scene toward the defendant's apartment.

While fleeing from the scene, the defendant called a friend, Eugene Goldshtyen, several times and offered Goldshtyen $100 to pick him up. Goldshtyen met the defendant at the defendant's apartment and asked whether the defendant received his injuries during a burglary. The defendant falsely replied "yeah" and explained that he encountered the homeowner during the burglary and started fighting with the homeowner, whom he stabbed multiple times. The defendant said that "[w]hen the homeowner 'kept yelling' despite the defendant's order to 'shut up,' the defendant 'just kept stabbing him and stabbing him.' " Not believing the defendant's story, Goldshtyen called the police.

Later that morning, Stamford Police located the victim's body and the taxi at 150 Doolittle Road. The victim's body was found on the ground, and an autopsy revealed that the victim had been stabbed 127 times. The taxi's glove compartment was open and no money was found inside. The victim's and the defendant's blood was found on the rear driver's side passenger seat and door. The police arrested the defendant and charged him with murder in violation of § 53a-54a. The money, which the state claimed had been stolen, was not recovered.

Prior to trial, the state filed a motion in limine seeking to introduce the testimony of two witnesses: (1) testimony from the victim's wife that when the victim returned home briefly from his shift at 12:30 a.m., she saw him retrieve money from the armoire, and the victim then told her that "he intended to use this money to pay his dispatch fees and to send money home to Bangladesh"; and (2) testimony from the victim's taxi partner, Antoine, that it "was [the victim's] habit and custom to leave his share [of the taxi fee] in the glove compartment" for Antoine to give to the company the next morning. The trial court held a hearing on the matter and subsequently admitted the testimony of both witnesses.

The jury returned a verdict finding the defendant guilty of murder in violation of § 53a-54a. Thereafter, the court imposed a total effective sentence of sixty years of incarceration. The defendant filed an appeal in our Supreme Court, and the appeal was transferred to this court on September 24, 2018.

"Our standard of review for evidentiary matters allows the trial court great leeway in deciding the admissibility of evidence. The trial court has wide discretion in its rulings on evidence and its rulings will be reversed only if the court has abused its discretion or an injustice appears to have been done. . . . The exercise of such discretion is not to be disturbed unless it has been abused or the error is clear and involves a misconception of the law." (Internal quotation marks omitted.) *State* v. *Russo*, 62 Conn. App. 129, 133, 773 A.2d 965 (2001). In reviewing for an abuse of discretion, "the ultimate issue is whether the court could reasonably conclude as it did." *DiPalma* v. *Wiesen*, 163 Conn. 293, 299, 303 A.2d 709 (1972).

I

We first address the defendant's claim that the trial court erred in allowing testimony from the victim's wife

that the victim told her, after briefly returning home during his shift, that he was getting money to leave inside the taxi to pay his share of the taxi fee and to send to his family in Bangladesh after his shift. Specifically, the defendant claims that such statements (1) were irrelevant and (2) did not satisfy the state of mind exception to the hearsay rule because they were self-serving and backward looking. We disagree.

The following additional facts are relevant to this issue. At trial, the state called the victim's wife as a witness. She testified about statements that the victim had made to her when he briefly returned home during his night shift. She testified: "He took the money and he told me that he had to take the money because the next day, he had to make the taxi payment. The taxi payment was done once a week. The payment for the taxi was done once a week. And he also said to me that he needed more money to send to Bangladesh and the banks were closed at night, when he was on duty, so he was taking the money at night, so that the next day, when he got off duty, he was going to go to the bank and send some money to Bangladesh."

The defendant first claims that the victim's statements to his wife "had no relevant connection to a fact in issue." According to the defendant, the only facts at issue were whether the defendant had killed the victim and, if he had done so, whether he acted with criminal intent and without justification. He further asserts that "whether [the victim] had intended or planned to pay taxi related expenses the next day was simply inapposite to the matters to be decided by the jury, and to admit such evidence could only lead to confusion and speculation." We disagree.

The Connecticut Code of Evidence provides that "[a]ll relevant evidence is admissible, except as otherwise provided by the constitution of the United States,

the constitution of the state of Connecticut, the Code, the General Statutes or the common law." Conn. Code Evid. § 4-2. Relevant evidence is defined as "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. "The materiality of evidence turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law." Conn. Code Evid. § 4-1, commentary. "The trial court is given broad discretion in determining the relevancy of evidence and its decision will not be disturbed absent a clear abuse of that discretion." *State* v. *Holliman*, 214 Conn. 38, 50, 570 A.2d 680 (1990).

In the state's motion in limine, the state addressed the relevancy of the statements and claimed that it sought to introduce this evidence to controvert the defendant's claim of self-defense. The state explained: "[The defendant] claims he was fending off the aggressive sexual overtures of the victim. In such case the unexplained absence of valuables is of utmost relevance. The state intends to offer the [victim's] statements concerning his intent to bring sufficient money to satisfy his cab fees in order to show robbery as the motive." The proffered statements reasonably could have tended to make it more likely that the defendant had a financial motive in killing the victim and to make it less likely that the killing was a result of self-defense.

The defendant next claims that the statements by the victim to his wife were both backward looking and self-serving and, therefore, did not satisfy the state of mind hearsay exception. The Connecticut Code of Evidence provides exceptions to the hearsay rule, among them: "A statement of the declarant's then existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate

future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed." Conn. Code Evid. § 8-3 (4). "The hearsay statements of an unavailable declarant, made in good faith and not for a self-serving purpose, that express his or her present intentions to [do something] in the immediate future are admissible and allow the trier of fact reasonably to infer that the declarant's expressed intention was carried out." *State* v. *Santangelo*, 205 Conn. 578, 592, 534 A.2d 1175 (1987). "[F]orward-looking statements of intention are admitted while backward-looking statements of memory or belief are excluded because the former do not present the classic hearsay dangers of memory and narration." *State* v. *Saucier*, 283 Conn. 207, 225, 926 A.2d 633 (2007), citing 2 C. McCormick, Evidence (6th Ed. 2006) § 276, p. 279.

In its ruling on the motion in limine, the trial court explained that the victim's statement was "a declaration of an intention casting light upon the future, it is distinguishable from any declaration of memory pointing backward to the past and this is not the case here." We agree. The victim's statement to his wife indicated his intention to take money to pay the taxi company in the immediate future. It is true that part of the statement, to the effect that the victim *had* taken the money for that purpose, was retrospective, but his having taken the money only provided context for the expression of his intention. We also are unpersuaded by the defendant's claim that the victim's statement was self-serving. At that point, no crime had been committed nor was one foreseeable.

The trial court did not abuse its discretion in admitting the wife's testimony as to statements made to her by the victim pursuant to the Connecticut Code of Evidence § 8-3 (4).[1]

[1] The state also claimed in its brief on appeal that any error in introducing the evidence was harmless. In light of our conclusion that the evidence was

II

We next address the defendant's claim that the trial court improperly allowed testimony from the victim's business partner, Antoine, pursuant to the habit exception to the hearsay rule, that the victim routinely put his share of the taxi fees in the glove compartment of the vehicle before Antoine's day shift on Wednesdays. The defendant claims that such evidence was (1) irrelevant and (2) insufficient to establish a "habit" pursuant to the hearsay exception.

The following facts, as previously set forth, are relevant to this issue. Antoine testified about his business relationship with the victim and their arrangement for payment of the taxi fees to the company that were due weekly. According to Antoine, he and the victim jointly owned and operated a cab beginning approximately a year and a half to two years prior to the victim's murder, and that they paid a weekly fee to the company. He explained that they would each contribute $237.50 for the fees every week. Antoine further testified that the victim would always leave his half of the fees in the glove compartment, and when Antoine picked up the car on Wednesday mornings, he would take the money from the glove compartment and drop it off at the company, along with his half.

The defendant claims that Antoine's testimony was not relevant to any material issue; the only material issues were whether the victim was murdered by the defendant and, if so, whether the defendant was justified in killing the victim. The defendant contends that Antoine's testimony allowed the state to "confuse the jury and inject the specter of robbery into a case where it had charged none." The state, however, asserts that

properly admitted, we need not discuss harmless error. See *State* v. *Scott*, 191 Conn. App. 315, 320 n.4, 214 A.3d 871, cert. denied, 333 Conn. 917, 216 A.3d 651 (2019).

"evidence that the victim's habit was to leave money in the taxi's glove compartment for pick up on Wednesday mornings, coupled with the fact that the murder took place early Wednesday morning inside the taxi and that, after the murder, the glove compartment was found open without any money . . . allowed the jury to infer that the motive for the murder was to take the victim's money." We are persuaded by the state's claim that Antoine's testimony was relevant to the issue of motive for the defendant to kill the victim.

In *State* v. *Williams*, 90 Conn. 126, 96 A. 370 (1916), our Supreme Court upheld a trial court's admission of habit evidence regarding the victim's habit of carrying money in his pocketbook to show the defendants' motive for murdering the victim. Id., 130. It concluded that, based on the habit evidence, "the jury would be justified in presuming that [the victim] had his pocketbook where he usually carried it, in his pocket . . . and it was there found, and thence taken by the [defendants]." Id. In the present case, the jury reasonably could have inferred from Antoine's testimony that the victim had placed money in the glove compartment of the taxi that was thereafter taken by the defendant. Although robbery was not charged, financial gain could well have been the motive for murder. Accordingly, we conclude that the trial court properly found that such evidence was relevant.

Next, we turn to the defendant's claim that the state failed to provide an adequate foundation for the admission of the habit evidence. Specifically, he claims that the proffered evidence did not rise to the level of habit because there was insufficient evidence as to the number of times that the victim engaged in the conduct. According to the defendant, "[it] was not truly evidence of the decedent's personal habit of leaving money in the shared glovebox, so much as it was evidence of

Antoine's personal experience of having regularly paid taxi related expenses on a certain day of the week."

The Connecticut Code of Evidence provides that "[e]vidence of the habit of a person . . . is admissible to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit . . . ." Conn. Code Evid. § 4-6. "[H]abit is a person's regular practice of responding to a particular kind of situation with a specific type of conduct. . . . [H]abit . . . refer[s] to a course of conduct that is fixed, invariable, and unthinking, and generally pertain[s] to a very specific set of repetitive circumstances." (Citations omitted.) Conn. Code Evid. § 4-6, commentary.

We are unpersuaded by the defendant's contention that there is a particular numerical threshold that must be met in order for a person's conduct to rise to the level of a habit. Here, Antoine's testimony established that the victim's specific conduct of leaving his portion of the taxi fee in the glove compartment of the taxi on Tuesday nights constituted a sufficiently regular practice. As such, we conclude that the trial court properly admitted Antoine's testimony regarding the victim's habit, pursuant to Connecticut Code of Evidence § 4-6.[2]

III

Finally, we address the defendant's claim that the trial court improperly refused to instruct the jury that it could not reach a verdict of guilty unless it was unanimous as to the basis for rejecting the defendant's self-defense claim. He claims that the general unanimity instruction was insufficient and that the trial court's charge violated his state constitutional right to be convicted by the unanimous verdict of the jury. We disagree.

[2] See footnote 1 of this opinion.

"[I]ndividual jury instructions should not be judged in artificial isolation . . . but must be viewed in the context of the overall charge. . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error. . . . Accordingly, [i]n reviewing a constitutional challenge to the trial court's instruction, we must consider the jury charge as a whole to determine whether it is reasonably possible that the instruction misled the jury. . . . In other words, we must consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury. . . . A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." *State* v. *Berrios*, 187 Conn. App. 661, 705–706, 203 A.3d 571, cert. denied, 331 Conn. 917, 204 A.3d 1159 (2019).

The following additional facts are necessary for our discussion. The defendant testified at trial and presented a claim of self-defense. The following is the defendant's account of the events that transpired on the night of the murder. The victim invited him to ride along for free while he picked up another fare. The victim then instructed him to move into the front seat to allow the paying fare to ride in the back. At some point, the victim stopped the car and indicated to the defendant that he wanted to "have some fun." The victim subsequently grabbed the defendant's genitalia, and the defendant reacted by punching the victim in the face. The victim then grabbed a knife and began attacking the defendant. A struggle between them ensued, and the victim threatened to kill the defendant.

The defendant managed to wrestle the knife away from the victim and stabbed him repeatedly.

On May 10, 2017, the defendant's attorney filed a request to charge, requiring unanimity on whichever element of self-defense the jury might find to have been disproven.[3] The trial court held a hearing on the matter and denied the defendant's request.[4] In the course of its instructions, the court explained in detail each of the four elements of self-defense, pursuant to General Statutes § 53a-19, and in accordance with the model jury charge. See Connecticut Criminal Jury Instructions § 2.8-1, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited November 1, 2019). The elements were: (1) the defendant actually believed that the victim was using or about to use physical force against him; (2) the defendant's belief was reasonable; (3) the defendant actually believed that the degree of force he used was necessary to repel the attack; and (4) the defendant's belief was reasonable. Subsequently, the court explained that "the state can defeat the defense of self-defense by disproving any one of

[3] The defendant requested the court to charge as follows: "The state has the burden of disproving self-defenses, as I have instructed. To meet its burden as to this disproof, the state must persuade you unanimously as to any of the four elements on which I have instructed you. Thus, it is not enough for some of you to find the first element disproved while others find a different element disproved. Unless you unanimously agree that the state has disproven the same element, the state has failed to disprove self-defense."

[4] The court ruled: "I am going to be delivering a general unanimity charge instructing the jury that its verdict must be unanimous. And as in *Bailey* and *Diggs*, the court had serious reservations about the applicability of the unanimity requirement to self-defense.

"I believe the general instruction as drafted is sufficient to ensure that a unanimous verdict is reached. The encounter here between the defendant and the cab driver was a single incident which took place within a small area. While there are, obviously, some conflicts in the testimony, I don't believe that the issues this jury has to resolve with respect to what happened are so complicated that jury confusion would result if I did not give a specific unanimity charge."

the four elements of self-defense beyond a reasonable doubt to your unanimous satisfaction."

The defendant relies, in part, on the holdings in *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), and *State* v. *Diggs*, 219 Conn. 295, 592 A.2d 949 (1991), to support his claim that a more specific unanimity instruction was required. Where alternative ways to commit an offense are alleged, *Gipson* set out a "conceptual distinctiveness" criterion, specifying that a charge requiring unanimity as to the specific act found proved by the jury is required only if the alternative acts are conceptually distinct from each other. See *United States* v. *Gipson*, supra, 458.

Applying *Gipson* to this case, the defendant claims that each "element" of self-defense is analogous to a conceptually distinct basis of liability. Noting that the unanimity challenge in *Gipson* was raised as to an offense charged, as opposed to a defense, our Supreme Court, in *State* v. *Bailey*, 209 Conn. 322, 334–35, 551 A.2d 1206 (1988), declined to require an instruction that the jury must agree unanimously on the element it found disproved in rejecting a claim of self-defense. Our Supreme Court did, however, leave open the possibility that, under certain circumstances, such an instruction may be warranted even in the context of self-defense. Id., 336. "Despite serious reservation about the applicability of the unanimity requirement to self-defense, we do not, at this juncture, express the opinion that a specific unanimity charge would never be required for claims of self-defense, for it is clear that the requirement as refined by case law in the wake of *Gipson* does not apply to the facts of the present case." Id., 336.

Our Supreme Court was presented with the same issue in *State* v. *Diggs*, supra, 219 Conn. 302, and concluded: "As in *Bailey*, the defendant here is unable to provide us with any authority for the proposition that

a unanimity instruction was required as to the factual basis for the jury's rejection of his self-defense claim, nor have we been able to locate any. A determination of that issue, however, is not necessary for the resolution of the instant case." Our Supreme Court noted that "the encounter between the victim and the defendant was a single incident, which was brief and took place within a small area. . . . We do not perceive in the record a complexity of evidence or any other factors creating jury confusion and a consequent need for a specific unanimity charge. . . . We are, therefore, not persuaded that the trial court was required to deliver such an instruction concerning the statutory exemptions to the defendant's self-defense claim." (Citations omitted.) Id., 302–303.

The defendant addresses the notion of complexity and the policy considerations arising therefrom. First, he suggests that the determining consideration is not necessarily the complexity of the case or its underlying facts, but the complexity of the instructions. He contends that analyzing the four different "elements" involved in a self-defense claim is a complex task for a jury to undertake. As such, the defendant claims that the best policy is to require a specific unanimity charge to guide the jurors and to ensure that they fully understand the state's burden, and, further, that they must be unanimous in finding which element(s) of the defense the state has disproven. He highlights the risk that, absent the instruction, individual jurors may find different elements of the defense disproven. "Simply put, it would be intellectually dishonest, logically inconsistent, and factually incoherent to say that a jury was unanimous as to the factual basis of the offense, and the conduct committed by the defendant, if some jurors concluded that the defendant did not actually believe that he was under attack, while other jurors concluded that the defendant actually believed he was under attack

but that such belief was unreasonable. Similarly, it would be no less problematic if some jurors concluded that the defendant reasonably believed he was under attack but that he either did not actually believe the degree of force he used was necessary, or that such belief was unreasonable." He notes the well established law that only the state has a burden of persuasion regarding a self-defense claim; it must disprove the defense beyond a reasonable doubt. *State* v. *Pauling*, 102 Conn. App. 556, 571, 925 A.2d 1200, cert. denied, 284 Conn. 924, 933 A.2d 727 (2007). The defendant posits a logical inconsistency in explicitly requiring unanimity on each element of a state's charged offense, but not the "elements" of a defense that the state must disprove, given that it has the same burden of persuasion.

Our Supreme Court held in *State* v. *Rivera*, 221 Conn. 58, 76, 602 A.2d 571 (1992), however, that "where, as here, the trial court did not sanction a nonunanimous verdict, a unanimity instruction on self-defense is not required." At oral argument, the defendant conceded that the trial court did not sanction a nonunanimous verdict. As *Rivera* makes clear, because the trial court in this case did not sanction such a nonunanimous verdict, "that ends the matter." Id.

In light of *Rivera*, we cannot, then, hold that a specific unanimity charge should have been given. The jury instructions, viewed in their totality, were correct in law and fairly presented the case to the jury. As in *Diggs*, the factual scenario was not especially complex; as in *State* v. *Bailey*, supra, 209 Conn. 336, the defendant's course of conduct did not comprise "separate incidents."[5] Accordingly, we conclude that the trial

[5] *Bailey* may be read to suggest a reasonable distinction between the need for a specific unanimity instruction when separate incidents are material and the lack of need for the instruction when only one course of conduct is considered. Id.

court properly instructed the jury with a general unanimity charge and did not err in failing to grant the defendant's request for a specific unanimity charge as to the claim of self-defense.

The judgment is affirmed.

In this opinion the other judges concurred.

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## HSBC BANK USA, NATIONAL ASSOCIATION, TRUSTEE *v.* GERARD M. KARLEN ET AL.
## (AC 41432)

Elgo, Bright and Devlin, Js.

*Syllabus*

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendant C, who, together with the defendant K, had executed a certain promissory note in 2006, which was secured by a mortgage on the subject property. In its complaint, the plaintiff alleged, inter alia, that the note was affected by a 2010 loan modification agreement, that the mortgage was assigned to the plaintiff in 2012, that the plaintiff was the holder of the note, that the note was in default for nonpayment, and that the plaintiff had elected to accelerate the balance due on the note and to declare the note due in full. Thereafter, the plaintiff filed a motion for summary judgment as to liability and attached an affidavit from D, the vice president for loan documentation for the plaintiff's servicing agent, who attested concerning the history of the 2006 note, including averring that the defendants had defaulted on the note by failing to make their May, 2013 payment or any payment thereafter. D attached to her affidavit a copy of the 2006 note and mortgage, the 2012 assignment and a notice of default letter sent by the plaintiff to the defendants in November, 2013, but she did not mention or attach the 2010 loan modification agreement. The defendants did not file an objection to the motion for summary judgment. The trial court granted the plaintiff's motion for summary judgment as to liability and, thereafter, rendered a judgment of foreclosure by sale, from which the defendants appealed to this court. *Held* that the trial court improperly granted the plaintiff's motion for summary judgment as to liability, the plaintiff having failed to establish an undisputed prima facie case for foreclosure: despite the allegations in the plaintiff's complaint, D's supporting affidavit and the attached documents regarding the defendants' default on the 2006 loan, the plaintiff pleaded that a 2010 loan modification agreement affected the 2006 note but, thereafter, failed to provide the trial court

with a copy of that agreement or any evidence of its terms, and, therefore, that court had no way to assess whether the agreement had a substantive effect on the 2006 note or to ascertain whether the agreement modified any conditions precedent to foreclosure, whether the defendants were in default of the agreement or whether the plaintiff was in compliance with its terms, and although the defendants did not file an objection to the motion for summary judgment or raise an issue concerning the absence of the agreement via a special defense or otherwise before the trial court, it was the plaintiff's burden to establish its prima facie case; moreover, there was no merit to the plaintiff's contention that it presented evidence that the defendants defaulted on the loan as modified in 2010, as the notice of default letter was not proof of any default, D did not aver in her affidavit to a default on the modified note, and the fact that the plaintiff provided the trial court with an affidavit averring to a default without producing evidence of the underlying obligation that is in default was insufficient to establish entitlement to summary judgment.

Argued October 25, 2019—officially released January 7, 2020

*Procedural History*

Action to foreclose a mortgage on certain real property owned by the defendant Carla Rivers Karlen, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Randolph*, *J.*, granted the plaintiff's motion for summary judgment as to liability; thereafter, the court, *Genuario*, *J.*, rendered a judgment of foreclosure by sale, from which the named defendant et al. appealed to this court. *Reversed*; *further proceedings*.

*Thomas P. Willcutts*, with whom, on the brief, was *Michael J. Habib*, for the appellants (named defendant et al.).

*Sean R. Higgins*, for the appellee (plaintiff).

*Opinion*

BRIGHT, J. The defendants Gerard M. Karlen and Carla Rivers Karlen[1] appeal from the judgment of foreclosure by sale rendered by the trial court in favor of

[1] The Internal Revenue Service has an interest in the subject property and was named as a defendant in this case, but has not participated in this appeal. We, therefore, refer to Gerard M. Karlen and Carla Rivers Karlen as the defendants throughout this opinion.

the plaintiff, HSBC Bank USA, National Association, as Trustee for Wells Fargo Asset Securities Corporation, Mortgage Pass-Through Certificates, Series 2007-2. On appeal, the defendants claim that the trial court improperly granted the plaintiff's motion for summary judgment as to liability.[2] We reverse the judgment of the trial court.

In 2014, the plaintiff commenced the underlying foreclosure action against the defendants with regard to property located at 10 Pheasant Lane in Westport. The plaintiff alleged the following facts in its complaint. On November 2, 2006, the defendants executed and delivered to Mortgage Electronic Registration Systems, Inc., as nominee for Wall Street Mortgage Bankers, Ltd., doing business as Power Express, a note for a loan in the original principal amount of $800,000, which was secured by a mortgage on the property.[3] The note was thereafter affected by a loan modification agreement dated effective November 17, 2010. The mortgage subsequently was assigned to the plaintiff by virtue of an assignment of mortgage dated February 2, 2012, and the plaintiff is the holder of the note. The note was in default, and the plaintiff elected to accelerate the balance due and declared the note to be due in full. When payment was not made, the plaintiff filed this action to foreclose the mortgage that secured the note.

[2] The defendants also had claimed that the court erred in failing to grant their motion for a continuance. During oral argument before this court, however, the defendants' counsel acknowledged that he could not demonstrate prejudice flowing from the trial court's failure to grant the defendants' motion for a continuance. Accordingly, the defendants cannot succeed on this claim, and we afford it no review. See *Bove* v. *Bove*, 93 Conn. App. 76, 84, 888 A.2d 123 ("[a]bsent a showing of actual prejudice, the court will not be found to have abused its discretion when denying the defendant's motion for a continuance" [internal quotation marks omitted]), cert. denied, 277 Conn. 919, 895 A.2d 788 (2016).

[3] On July 6, 2012, Carla Rivers Karlen became the owner of the property by way of a quit claim deed.

In their answers and in a later disclosure of defenses, the defendants denied the essential allegations of the plaintiff's complaint and alleged defenses, including lack of jurisdiction, lack of standing, misapplied payments, and the lack of a contract between the parties.

On May 17, 2016, the plaintiff filed a motion for summary judgment as to liability. Attached to the plaintiff's motion was the affidavit of Diane F. Duckett, the vice president of loan documentation for Wells Fargo Bank, N.A., the servicing agent for the plaintiff. Duckett averred that the defendants executed a promissory note dated November 2, 2006, in the amount of $800,000, with the first payment being due on or about January 1, 2007, and the final payment being due on December 1, 2036. She further averred that the note was endorsed in blank and that the plaintiff was in possession of the note when this foreclosure was commenced in 2014. Duckett averred that the defendants executed a mortgage, also on November 2, 2006, conveying the property to Mortgage Electronic Registration Systems, Inc., as nominee for Wall Street Mortgage Bankers, Ltd., doing business as Power Express, which thereafter was assigned to the plaintiff in an assignment dated January 31, 2012. Duckett averred that the "unpaid balance of the note [was] $846,894.50 plus interest from [April 1, 2013]," and that the defendants had failed to make their May 1, 2013 payment or any payment thereafter. Duckett attached a copy of the November 2, 2006 note and mortgage to her affidavit. She also attached the January 31, 2012 assignment and a default letter sent by the plaintiff to the defendants on November 26, 2013, notifying them that they had past due payents of $50,602.86.[4] She did not mention or attach the November 17, 2010 loan modification agreement. Nevertheless, the plaintiff's memorandum of law in support of

[4] The 2006 note attached to Duckett's affidavit demonstrates that the defendants' monthly payments were $4990.96. Duckett averred that the defendants were "in default under the terms of the [n]ote and [m]ortgage

its motion for summary judgment did state that the note "was modified by virtue of a [m]odification [a]greement dated effective November 17, 2010."

On August 11, 2017, the defendants filed a motion for an extension of time to respond to that plaintiff's motion for summary judgment so that they could pursue additional discovery, which the court granted, extending the filing deadline for the defendants' opposition to October 10, 2017. The defendants, however, did not file a response to the plaintiff's motion. The court scheduled the short calendar hearing on the plaintiff's motion for summary judgment as to liability for December 18, 2017. On December 15, 2017, the defendants filed a motion for continuance of the December 18, 2017 hearing on the ground that their counsel was unavailable on that date; they requested a one to two week continuance. Despite the defendants' request for a continuance and the plaintiff's acknowledgment to the court that such a motion had been filed, the court stated that it did not have the motion for continuance in front of it, and it granted the plaintiff's motion for summary judgment, without argument and in the defendants' absence.

On February 7, 2018, the plaintiff filed a motion for a judgment of strict foreclosure, to which the defendants objected. On February 20, 2018, the court rendered a judgment of foreclosure by sale, setting a sale date of April 28, 2018. This appeal followed.

On appeal, the defendants claim that the court improperly granted the plaintiff's motion for summary

by failing to make the payment due for [May 1, 2013] and every payment thereafter." The default letter attached to Duckett's affidavit, dated November 26, 2013, states that the defendants owe past due payments of $50,602.86 and other fees of $2855, for a total delinquency as of that date of $53,457.86. If the defendants had failed to make seven successive monthly payments of $4990.96, it appears that their past due amount would be $34,936.72. Neither the default letter nor Duckett's affidavit explains the significant difference in these amounts.

judgment as to liability. Specifically, they argue that although the plaintiff readily acknowledged in both its complaint and in its memorandum of law in support of its motion for summary judgment that the parties had entered into a loan modification agreement on November 17, 2010 (2010 modification agreement), neither the plaintiff nor its affiant, Duckett, ever alleged that the defendants were in default of the 2010 modification agreement; the only allegation of default was as to the original November 2, 2006 promissory note (2006 note), which, the plaintiff acknowledges in its complaint, was "affected" by the 2010 modification agreement. The defendants further argue that the plaintiff also failed to provide a copy of the 2010 modification agreement to the court or to set forth its terms. Accordingly, they argue, the court improperly rendered summary judgment because it had no way of ascertaining whether the defendants were in default of the 2010 modification agreement or whether the plaintiff, itself, was in compliance with the terms of that agreement. We agree.

"In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit

documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Allstate Ins. Co.* v. *Barron*, 269 Conn. 394, 405–406, 848 A.2d 1165 (2004).

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied. . . . Thus, a court may properly [render] summary judgment as to liability in a foreclosure action if the complaint and supporting affidavits establish an undisputed prima facie case and the defendant fails to assert any legally sufficient special defense." (Citations omitted; internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013).

In the present case, the plaintiff, in its complaint, alleged that it was the holder of the 2006 note that was secured by the defendants' mortgage on the property. See *U.S. Bank National Assn.* v. *Eichten*, 184 Conn. App. 727, 744, 196 A.3d 328 (2018) ("[a] holder of a note is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage under [General Statutes § 49-17]" [internal quotation marks omitted]). This allegation is supported by the

affidavit of Duckett and by copies of the 2006 note and mortgage attached to her affidavit. The plaintiff also alleged in its complaint that the defendants were in default of the 2006 note and mortgage; this allegation also is supported by Duckett's affidavit in which she attests that the defendants have failed to make their May 1, 2013 payment on the 2006 note and that they failed to make every payment thereafter. The plaintiff also alleged in its complaint that it complied with the conditions precedent to foreclosure, as established by the 2006 note and mortgage; this allegation also is supported by Duckett's affidavit and her supporting documents.

Nevertheless, despite these allegations and the supporting affidavit and documents, the plaintiff's complaint also alleged that the 2006 note was the subject of a modification agreement in 2010; Duckett's affidavit, however, contains no mention of the 2010 modification agreement or its terms. The complaint also failed to set forth the terms of the 2010 modification agreement and what effect that agreement had on the 2006 note. Additionally, there is no copy of the 2010 modification agreement in the record, which may have allowed the court to assess whether the agreement had a substantive effect on the 2006 note on which the defendants were alleged to have defaulted. The trial court also had no way of assessing whether the 2010 modification agreement modified any conditions precedent to foreclosure. See id. (to establish prima facie case in foreclosure action, plaintiff must prove, among other things, that it satisfied all conditions precedent to foreclosure).

Although the plaintiff argues that the defendants did not file an objection to its motion for summary judgment or raise an issue concerning the absence of the 2010 modification agreement via a special defense or otherwise before the trial court, because it is the plaintiff's burden to establish its prima facie case before it is

entitled to summary judgment, this argument is not persuasive. See *Bayview Loan Servicing, LLC* v. *Frimel*, 192 Conn. App. 786, 795, 218 A.3d 717 (2019) (trial court, before granting motion for summary judgment as to liability in foreclosure action, first must determine whether plaintiff has established prima facie case, even if defendant has not filed opposition). The plaintiff pleaded the existence of a loan modification agreement that "affected" the 2006 note and, thereafter, failed to produce that agreement or to provide any evidence of its terms.

Alternatively, the plaintiff argues that it did present evidence that the defendants defaulted on the loan as modified in 2010. In particular, the plaintiff argues that Duckett averred that the defendants defaulted on their obligations in May, 2013, more than two years after the modification and that the notice of default attached to Duckett's affidavit is dated November 26, 2013, more than three years after the modification. We are not persuaded.

The default notice is nothing more than an allegation of a default. It is not proof of any default. Furthermore, Duckett's affidavit avers that the defendants "are in default under the terms of the [n]ote and [m]ortgage . . . ." The affidavit defines the note as "a [p]romissory [n]ote . . . dated [November 2, 2006] . . . ." Nowhere in Duckett's affidavit does she aver a default on the modified note. Finally, there is little question that merely providing the court with an affidavit averring to a default without producing evidence of the underlying obligation that is in default would be insufficient for the court to render summary judgment.

Accordingly, in the present case, the plaintiff did not establish an undisputed prima facie case, and we conclude that the court improperly granted the plaintiff's motion for summary judgment as to liability. See *U.S.*

*Bank National Assn.* v. *Eichten*, supra, 184 Conn. App. 744 (court properly may grant motion for summary judgment as to liability in foreclosure action only if complaint and supporting affidavits establish undisputed prima facie case).

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

In this opinion the other judges concurred.

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*Contracts; breach of parties' marital separation agreement; mootness; claim that trial court erred by concluding that action was barred by applicable statute of limitations (§ 52-576 [a]) and determining that it lacked continuing jurisdiction to enforce parties' separation agreement; whether claim that plaintiff's breach of contract action was not barred by statute of limitations was moot where plaintiff failed to challenge independent ground for court's adverse ruling.*
Kolashuk *v.* Hatch. . . . . 131
*Writ of error; claim that this court lacked subject matter jurisdiction; claim that writ of error should be dismissed because it was not taken from final judgment; claim that sanctions and attorney's fees issued against plaintiff in error did not terminate distinct and separate proceeding because relevant orders were issued during discovery phase of underlying personal injury case, requested cell phone records were necessary to resolve defendant in error's case, and those records were inextricably intertwined with defendant in error's case; claim that interlocutory order requiring witness to submit to discovery is not final judgment and, therefore, is not immediately appealable; claim that imposition of sanctions and attorney's fees against plaintiff in error did not terminate distinct and separate proceeding because trial court did not find plaintiff in error to be in contempt; whether trial court erred as matter of law by ordering plaintiff in error to produce cell phone records that neither he nor his client, who was defendant in underlying action, owned or possessed, and by issuing sanctions against plaintiff in error and awarding attorney's fees to counsel for defendant in error.*
La Morte *v.* Darien (Memorandum Decision) . . . . . 901
Licari *v.* Commissioner of Correction (Memorandum Decision) . . . . . 902
Michael D. *v.* Commissioner of Correction. . . . . 6
*Habeas corpus; claim that petitioner's trial counsel provided ineffective assistance in failing to challenge admission of pornographic magazine into evidence; whether habeas court properly determined that trial counsel's conduct in attempting to*

*preclude magazine did not constitute deficient performance; claim that trial counsel provided ineffective assistance by failing to request instruction that jury must unanimously agree on factual basis for each guilty verdict; whether habeas court properly determined that petitioner failed to establish prejudice resulting from trial counsel's failure to request specific unanimity instruction.*

Rossell *v.* Rossell (Memorandum Decision) . . . . . 902

Starboard Fairfield Development, LLC *v.* Gremp . . . . . 21

*Vexatious litigation; breach of contract; slander of title; intentional interference with contract; breach of fiduciary duty; claim that trial court improperly determined that defendants breached general release by pursuing civil action against plaintiffs; failure to brief claim adequately; claim that trial court improperly found that defendants slandered plaintiff's title to certain property by filing lis pendens and affidavit of fact pertaining to property on certain land records; whether trial court, as trier of fact, was free to discredit evidence provided at trial; whether this court was persuaded that trial court's finding of slander of title was either legally incorrect or factually unsupported; claim that trial court improperly found that defendants intentionally interfered with plaintiff's contract to sell certain property to third party; claim that trial court improperly awarded interest on amount held in escrow; whether defendants failed to brief argument beyond mere abstract assertion; claim that there was insufficient evidence for trial court to find that interference caused any actual loss; claim that trial court improperly awarded punitive damages without providing defendants adequate notice of hearing in accordance with rules of practice; whether defendants demonstrated that due process rights were violated or that trial court committed reversible error in calculating amount of punitive damages; whether record demonstrated that defendants had ample notice of hearing on punitive damages.*

State *v.* Bradley . . . . . 36

*Sale of controlled substance; violation of probation; claim that trial court erred in denying motions to dismiss charges; whether defendant, who is Caucasian, lacked standing to raise claim that his prosecution under Connecticut's statutes criminalizing possession and sale of marijuana violated his rights under equal protection clause of United States constitution because such statutes were enacted for illicit purpose of discriminating against persons of African-American and Mexican descent; whether trial court misapplied rule set forth in* State *v.* Long *(268 Conn. 508); whether defendant demonstrated that he had personal interest that had been or could be injuriously affected by alleged discrimination in enactment of relevant statute (§ 21a-277 [b]); whether defendant's claim alleged specific injury to himself beyond that of general interest of all marijuana sellers facing conviction under § 21a-277 (b); whether balancing of factors set forth in* Powers *v.* Ohio *(499 U.S. 400) pertaining to third-party standing weighed against defendant having standing to raise equal protection claim on behalf of racial and ethnic minorities who possessed constitutional rights that were allegedly violated; whether relationship between defendant and subject minority groups was close; whether there existed hindrance to ability of criminal defendant who is member of racial or ethnic minority group charged under § 21a-277 (b) from asserting his or her own constitutional rights in his or her own criminal prosecution.*

State *v.* Colon (Memorandum Decision) . . . . . 902

State *v.* Francis . . . . . 113

*Murder; claim that trial court improperly denied motion for judgment of acquittal; whether there was sufficient evidence for jury to have found defendant guilty of murder beyond reasonable doubt; claim that there was insufficient evidence to establish that defendant caused death of victim or that he had specific intent to cause victim's death; consciousness of guilt evidence; request for this court to change its long-standing standard of review with respect to sufficiency of evidence claims to more rigorous standard that would require this court to determine if there was reasonable view of evidence that would support hypothesis of innocence; whether, as intermediate appellate court, this court could overrule Supreme Court authority.*

State *v.* Mekoshvili . . . . . 154

*Murder; self-defense; claim that testimony regarding statements made by victim was irrelevant as to whether defendant killed victim or whether he acted with criminal intent; whether testimony demonstrated that defendant had financial motive in killing victim; claim that victim's statements to wife were self-serving and backward looking, and did not satisfy state of mind exception to hearsay*

*rule; whether trial court improperly allowed, pursuant to habit exception of hearsay rule, testimony regarding victim's customary habit of leaving portion of taxi fee in glove compartment of taxi; whether testimony was relevant to issue of motive for defendant to kill victim; claim that state failed to provide adequate foundation for admission of testimony regarding habit evidence; whether trial court properly instructed jury with general unanimity charge and did not err in failing to grant defendant's request for specific unanimity charge as to claim of self-defense.*

State *v.* Mukhtaar . . . . . 1

*Murder; whether trial court improperly dismissed motion for second sentence review hearing and determined that it lacked subject matter jurisdiction to consider motion; whether defendant had right to second sentence review hearing.*

State *v.* Tanner (Memorandum Decision) . . . . . 901

U.S. Bank, National Assn. *v.* Bennett . . . . . 96

*Foreclosure; special defenses; counterclaims; whether trial court properly rendered summary judgment as to vexatious litigation counterclaim; whether vexatious litigation counterclaim was premature; whether trial court properly rendered summary judgment as to abuse of process counterclaim; claim that genuine issues of material fact existed regarding trial court's previous dismissal of foreclosure action for failure to establish proper chain of custody; whether trial court properly determined that no genuine issues of material fact existed that plaintiff's primary purpose in filing present action was to prosecute foreclosure and that plaintiff was owner of note and mortgage; whether abuse of power counterclaim was premature; claim that trial court improperly relied on plaintiff's uncontested evidence of debt without holding evidentiary hearing.*

Zillo *v.* Commissioner of Correction . . . . . 71

*Habeas corpus; sexual assault in first degree; risk of injury to child; ineffective assistance of trial counsel; whether habeas court abused its discretion when it denied petitioner's request to reinstate claim that had been withdrawn that trial counsel was deficient in failing to present certain medical testimony; claim that habeas court should have allowed into evidence documents that related to petitioner's medical condition; claim that trial counsel was ineffective in failing to pursue motion to dismiss based on statute of limitations in (§ 54-193a); whether there was any credible evidence to show actual commencement of statute of limitations in March, 1999; claim that trial counsel was ineffective in failing to object to allegedly harmful, inflammatory language in substitute information that was read by court clerk to jury; claim that trial counsel was ineffective by failing to assist petitioner in freely choosing whether to testify in own defense; claim that trial counsel was deficient in failing to pursue hearing pursuant to* Franks *v.* Delaware *(438 U.S. 154) in pretrial stage of criminal proceedings; claim that trial counsel was ineffective in failing to obtain victim's education records in order to undermine allegations; whether petitioner demonstrated any harm that was caused by absence of education records; claim that trial counsel provided ineffective assistance by failing to file motion to suppress evidence concerning photographs taken of petitioner's apartment during allegedly illegal search.*

# NOTICES

## Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

**Certified as of December 11, 2019**:

| | |
|---|---|
| Thomas S. Kugler | DMT Solutions Global Corp. d/b/a BlueCrest |

**Certified as of December 13, 2019**:

| | |
|---|---|
| Nikki A. Crewe | Beiersdorf, Inc. |
| Haley E. Garrett | Viking Global Investors LP |
| Steven M. Monroe | Beazley USA Services, Inc. |
| Peter W. Overs, Jr. | BCK Capital Management L.P. |
| Monica Reyes Grajales | Titan Advisors, LLC |
| Brendan T. Silhan | Nestle USA, Inc. |
| Darrin M. Simmons | Charter Communications |
| Katherine M. Whalen | Azelis Americas, LLC |

**Certified as of December 16, 2019**:

| | |
|---|---|
| Andrew Gould | Barings LLC |
| Nicholas H. Lam | Pratt & Whitney |
| Lawrence A. Levendosky | Hartford Financial Services Group |

Hon. Patrick L. Carroll III
*Chief Court Administrator*

## Notice of Suspension of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on December 5, 2019, in Docket Number HHD-CV-19-6117566-s Lawrence Alan Weissmann juris # 305800 of West Nyack, NY was suspended from the practice of law for a period of two years, retroactive to September 20, 2019, as reciprocal discipline for his Supreme Court of the State of New York, Appellate Division: Second Judicial Department suspension.

Until reinstated, the Respondent shall comply with all the terms and conditions of Practice Book § 2-47B regarding the activities of deactivated attorneys.

The respondent shall apply for reinstatement pursuant to Practice Book § 2-53. The Respondent may apply for reinstatement on or after March 19, 2021; however the Respondent shall not apply for reinstatement until such time as he is eligible to apply for reinstatement to the bar in the State of New York.

David Sheridan
*Presiding Judge*

## Notice of Interim Suspension of Attorney

Pursuant to Practice Book Section 2-54, notice is hereby given that on December 2, 2019, in Docket Number HHD-CV19-6106333 David V. Chomick (juris# 428595) of Glastonbury, CT was placed on interim suspension until further order of the court.

Marshall K. Berger
*Judge*

## Notice of New Case Type-Abandoned and Blighted Property Receiverships

The Judicial Branch has created case type M 15 for petitions filed pursuant to Public Act 19-92 (''Act'') for the appointment of a receiver for abandoned and blighted property. The case type will be available for petitions filed on or after January 1, 2020, the effective date of the Act.

Hon. Patrick L. Carroll III
*Chief Court Administrator*