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ORDERS

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STARBOARD RESOURCES, INC. *v.* CHARLES HENRY III ET AL.

The petition of the defendants Gregory Imbruce, Asym Energy Investments, LLC, Glenrose Holdings, LLC, Asym Capital III, LLC, Hunton Oil Genpar, LLC, Giddings Genpar, LLC, and Giddings Investments, LLC, for certification to appeal from the Appellate Court, 196 Conn. App. 80 (AC 41922), is denied.

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

Richard S. Gora and *Nicole O'Neil*, in support of the petition.

David W. Rubin and *Jonathan D. Jacobson*, in opposition.

Decided May 26, 2020

STATE OF CONNECTICUT *v.* TYRONE ROSA

The defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 480 (AC 42267), is denied.

Daniel J. Krisch, assigned counsel, in support of the petition.

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

Decided May 26, 2020

JUDSON BROWN *v.* COMMISSIONER OF CORRECTION

The petitioner Judson Brown's petition for certification to appeal from the Appellate Court, 196 Conn. App. 902 (AC 42514), is granted, limited to the following issue:

"Did the Appellate Court properly dismiss the petitioner's appeal challenging the propriety of the habeas court's sua sponte dismissal of the petition for a writ of habeas corpus under Practice Book § 23-29 prior to the appointment of counsel for the self-represented petitioner and without providing the petitioner with notice and an opportunity to be heard?"

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

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

Decided May 26, 2020

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE
v. MELISSA L. MAMUDI ET AL.

The petition of the defendants John Pastor and Wellsville Properties, LLC, for certification to appeal from the Appellate Court, 197 Conn. App. 31 (AC 42415), is denied.

Christoper G. Brown, in support of the petition.

Scott M. Harrington and *Tara L. Trifon*, in opposition.

Decided May 26, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 197

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* EDWARD F. TAUPIER (AC 42115)

Keller, Prescott and Harper, Js.

Syllabus

Convicted, on a conditional plea of nolo contendere, of five counts of threatening in the second degree in connection with posts he made on Facebook that contained several threatening statements directed toward Superior Court judges and court employees, the defendant appealed. The defendant had been convicted of similar charges in 2014 in connection with sending a threatening e-mail to a Superior Court judge during his contentious divorce proceedings. In 2017, while on house arrest and while his appeal from his prior conviction was pending in our Supreme Court, the defendant posted several statements on Facebook that threatened the Cromwell Police Department and called for the killing of judges and court employees and the arson of courthouses. The trial court denied the defendant's motion to dismiss, concluding that a jury reasonably could find that the defendant's statements, in light of the context in which they were made, were not protected by the first amendment because they were advocacy directed at inciting or producing imminent lawless action and were likely to do so and because the statements constituted true threats. On appeal to this court, the defendant claimed that the trial court improperly denied his motion to dismiss because the statements were not true threats and, thus, were constitutionally protected free speech. *Held* that the trial court properly denied the defendant's motion to dismiss, as there was probable cause to support continuing a constitutional prosecution against the defendant under each count for threatening to commit a crime of violence in reckless disregard of the risk of causing such terror; the uncontested facts in the record, viewed in the light most favorable to the state, would allow a person of reasonable caution to believe that at least five of the defendant's statements were highly likely to be perceived by a reasonable person as serious threats of physical harm, the defendant's history of having a contentious relationship with certain judges and judicial employees, his prior conviction for similar threats, the details contained in the defendant's statements that illustrated how seriously he considered exacting revenge against those affiliated with the court system, the reactions to the defendant's statements, especially that of a court employee identified in one of the statements, who immediately reported the post to the authorities on the same day he discovered the posts, and the defendant's failure to express contrition for his statements thereafter and his additional statements of hostility toward Superior Court judges and court employees supported a determination that the statements reasonably could be interpreted as serious expressions of intent to inflict harm against judges and court employees.

Argued October 15, 2019—officially released June 9, 2020

Procedural History

Information charging the defendant with five counts each of the crimes of inciting injury to person or property and threatening in the second degree, brought to the Superior Court in the judicial district of New London, geographical area number ten, where the court, *Green*, *J.*, denied the defendant's motion to dismiss; thereafter, the state entered a nolle prosequi as to the charges of five counts of inciting injury to person or property; subsequently, the defendant was presented to the court, *Carrasquilla*, *J.*, on a conditional plea of nolo contendere to five counts of threatening in the second degree; judgment of guilty in accordance with the plea, from which the defendant appealed to this court. *Affirmed*.

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

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

Opinion

PRESCOTT, J. This case asks us to apply the "true threats" doctrine to assess whether the first amendment protects from criminal prosecution a person who posted on Facebook a series of statements that, among other things, advocated the killing of judges and the arson of courthouses. We conclude that, under the circumstances of this case, such statements constituted true threats for which an individual may be convicted without violating his right to free speech.

The defendant, Edward F. Taupier, appeals from the judgment of conviction, rendered after a conditional plea of nolo contendere, of five counts of threatening in the second degree in violation of General Statutes § 53a-62. On appeal, the defendant claims that the trial court improperly denied his motion to dismiss the

charges because his statements were protected speech under the first amendment to the United States constitution and article first, § 4, of the Connecticut constitution. Because we determine that at least five of the defendant's statements constituted "true threats" as a matter of law and, thus, were not protected speech, we conclude that the court properly declined to dismiss the charges to which the defendant pleaded nolo contendere and that the defendant's conviction must be affirmed.

The following procedural history and facts are relevant to the defendant's claim. The defendant has been involved for some time in a highly contentious marital dissolution proceeding in the family court involving, among other things, a custody dispute relating to the defendant's minor children. In the course of that proceeding, the defendant sent, in 2014, a threatening e-mail to other individuals regarding Judge Bozzuto, the presiding judge in his case. That e-mail contained the following statements: "(1) [t]hey can steal my kids from my cold dead bleeding cordite filled fists . . . as my [sixty] round [magazine] falls to the floor and [I'm] dying as I change out to the next [thirty rounds]; (2) [Bo]zzuto lives in [W]atertown with her boys and [n]anny . . . there [are] 245 [yards] between her master bedroom and a cemetery that provides cover and concealment; and (3) a [.308 caliber rifle] at 250 [yards] with a double pane drops [one-half inch] per foot beyond the glass and loses [7 percent] of [foot pounds] of force [at] 250 [yards]—nonarmor piercing ball ammunition . . . ." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 156–57, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

As a result of this e-mail, the defendant, after a trial to the court, was convicted of threatening in the first degree in violation of General Statutes § 53a-61aa (a) (3), two counts of disorderly conduct in violation of General Statutes § 53a-182 (a) (2), and breach of the

peace in the second degree in violation of General Statutes § 53a-181 (a) (3). Id., 154. Our Supreme Court subsequently affirmed the defendant's conviction after rejecting his claims that the statements contained in his e-mail were constitutionally protected free speech. Id., 155.

While he was on house arrest and his appeal from his prior conviction was pending in our Supreme Court, the defendant, in January, 2017, posted on Facebook the statements for which he ultimately was convicted in the present case. Those statements will be described in detail later in this opinion.

With respect to those statements, on August 10, 2017, the state obtained a warrant charging the defendant with five counts of inciting injury to person or property in violation of General Statutes § 53a-179a and five counts of threatening in the second degree in violation of § 53a-62. Following the defendant's arrest and arraignment on these charges, the defendant filed, pursuant to Practice Book § 41-8 (5), (8) and (9), a motion to dismiss the charges against him. See also General Statutes § 54-56. In his motion, the defendant asserted that the statements he posted on Facebook were constitutionally protected speech, pursuant to the first and fourteenth amendments to the United States constitution and article first, § 4, of the Connecticut constitution.[1] Specifically, he contended that, as a matter of

[1] Although the defendant referenced the state constitution in his motion to dismiss, he did not independently brief a state constitutional claim or argue that the state constitution provides greater protection of speech than that provided by our federal constitution. The defendant's motion to dismiss also appears to contain a scrivener's error by referring to article first, § 7, of the state constitution. The defendant represents in his brief on appeal that he had intended to refer to article first, § 4. In any event, presumably because the defendant did not independently brief a state constitutional claim, the trial court did not address whether the defendant's statements were protected by our state constitution.

The defendant, on appeal, claims that his statements that are described in the affidavit are protected speech under article first, §§ 4, 5, and 14, of the Connecticut constitution because those provisions require that, in order

law, his statements did not rise to the level of advocacy of imminent lawless action as defined in *Brandenburg* v. *Ohio*, 395 U.S. 444, 447–48, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), or "true threats" as defined in *Virginia* v. *Black*, 538 U.S. 343, 359–60, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

On February 8, 2018, the court conducted a hearing on the defendant's motion to dismiss. At that hearing, no witnesses testified. The defendant represented that, for purposes of adjudicating his motion to dismiss, he did not contest the facts that were contained in the affidavit accompanying the arrest warrant (affidavit). Accordingly, the court relied solely on the averments contained in the affidavit to assess whether the defendant's statements on Facebook were constitutionally protected.

In a memorandum of decision dated May 23, 2018, the court denied the motion to dismiss. In doing so, the court construed the facts in the light most favorable to the state. The court also separately analyzed the factual averments contained in the affidavit as they related to the five counts of inciting and as they related to the five counts of threatening in the second degree. The court ultimately concluded that a jury reasonably could find that the defendant's statements, in light of the context in which they were made, were not protected by the first amendment because they (1) were advocacy directed at inciting or producing imminent lawless

for a statement to be classified as an unprotected true threat, the statement's maker must have made the statement with a specific intent to terrorize the target of the threat. Our Supreme Court, however, rejected this same claim. See *State* v. *Taupier*, supra, 330 Conn. 174–75. In *Taupier*, our Supreme Court stated that "the Connecticut constitution does not require the state to prove that a defendant had the specific intent to terrorize the target of the threat before that person may be punished for threatening speech directed at a[n] . . . individual." Id. Thus, we reject this claim on its merits in light of *Taupier*; see id.; and need not address it in further detail.

action and were likely to do so, and (2) they constituted true threats.

The defendant and the state subsequently entered into a plea agreement that was accepted by the court on September 5, 2018. Pursuant to that agreement, the state entered a nolle prosequi on each of the five counts of inciting and the defendant pleaded nolo contendere to five counts of threatening in the second degree, conditioned on the defendant retaining his right to appeal the court's denial of his motion to dismiss the charges. See Practice Book § 61-6 (a) (2) (A). The court accepted the defendant's conditional plea of nolo contendere after concluding that the prior ruling on the defendant's motion to dismiss would be dispositive of the case. The court, in accordance with the plea agreement, then imposed on the defendant a total effective sentence of five years of incarceration, execution suspended after four months, and three years of probation. This appeal followed.

I

The defendant's principal claim[2] on appeal is that the court improperly denied his motion to dismiss because the statements contained in the affidavit were not true threats and, thus, were constitutionally protected free speech. We disagree.

The affidavit sets forth the following relevant facts: "2. That on Wednesday, January 25, 2017, Superior Court Chief Judicial Marshal Relford Ward of the [j]udicial [d]istrict of [Middlesex] contacted the Connecticut

[2] At oral argument before this court, the defendant conceded that the only claim that he makes on appeal is that the trial court improperly denied his motion to dismiss because the statements contained in the affidavit were not *true threats* and, thus, constituted speech that was constitutionally protected. Accordingly, we address only the five counts charging the defendant with threatening in the second degree in violation of § 53a-62 and do not address the five counts charging him with inciting injury to person or property in violation of § 53a-179a.

State Police Troop F in Westbrook to request an [i]nvestigation into communications received by court staff that they believed to be threatening in nature.

"3. That on Wednesday, January 25, 2017 . . . Trooper First Class Reid . . . met with and interviewed Chief Clerk Jonathan Field of the [j]udicial [d]istrict of [Middlesex]. Field reported that on Wednesday, January 25, 2017, at approximately [12 p.m.] he received a phone call from a concerned citizen regarding Facebook posts [he or she] had viewed and found to cause concern for Field and others at the court and [the] Cromwell Police Department. Field said the concerned citizen identified the posts [to be] from the Facebook profile of Edward Taupier. . . . Field reported that upon reading the posts, he found them to be very disturbing and he stated he considered the posts to be a threat to his own safety and possibly to others at Middlesex Judicial District Court. . . .

"4. . . . Detective Dunham searched the name 'Edward Taupier' on Facebook and was able to locate and view the profile page that contained the posts . . . of concern to Field: 'I JUST GOT NOTICE OF CONTEMPT FROM THE STATE [WEBSITE] WITHOUT GETTING OFFICIAL SERVICE . . . . I GUESS THE JEWS THAT RUN THE MIDDLETOWN [CLERK'S] OFFICE (JOE BLACK - JONATHAN FIELD) DON'T NEED TO GET OFFICIAL SERVICE TO SCHEDULE A HEARING. THIS IS WHY WE NEED TO START KILLING WITH LOVE THOSE THAT VIOLATE THE CIVIL RIGHTS OF SOCIETY THAT ARE JUDGES WHO HAPPEN TO PRACTICE THE JEWISH FAITH' (posted [on January 9, 2017]) 'CROMWELL POLICE DUPED BY MENTALLY ILL EX TO THINK CHILDREN ARE ENDANGERED. . . . THEY SAY THEY DON'T NEED WARRANTS TO COME IN HOME. . . . POLICE DON'T NEED WARRANTS, THEY WILL NEED BODY BAGS NEXT TIME.' (posted [on January 8, 2017]) KILL

COURT EMPLOYEES AND SAVE THE COUNTRY. . . . Stop driving the SUV and save a planet . . . this is what a liberal would say . . . .' (posted [on January 9, 2017]). This post also included a reply from 'Edward Taupier' that was a repost of an 'internet meme' (photograph with words or phrases) that referenced Judge Elizabeth Bozzuto. The content of the 'internet meme' includes the text 'JUDGE BOZZUTO FOR LIBERTY TREE CHALLENGE' 'The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. Thomas Jefferson' The comment, added above the picture [of] 'Edward Taupier,' is 'Nominate Judge Bozzuto to Liberty Tree Refreshment Challenge. Spill some blood, save a tree!'

"5. . . . 'Edward Taupier's' post on [January 9, 2017, states], 'I JUST GOT NOTICE OF CONTEMPT FROM THE STATE [WEBSITE] WITHOUT GETTING OFFICIAL SERVICE . . . I GUESS THE JEWS THAT RUN THE MIDDLETOWN [CLERK'S] OFFICE (JOE BLACK - JONATHAN FIELD) DON'T NEED TO GET OFFICIAL SERVICE TO SCHEDULE A HEARING. THIS IS WHY WE NEED TO START KILLING JUDGES. . . .' [This post] suggests [inflicting] violence against judges and a follower ('Jennifer Mariano') of 'Edward Taupier' agreed to join him by responding 'I had someone else in mind, but we can start with the judges.'

"6. That Detective Dunham viewed numerous posts and comments on 'Edward Taupier's' Facebook profile page from the present going back as far as December 15, 2016, that call for 'killing judges,' 'burning courts' and advocating violence against court employees'. . . .

* * *

"13. That Facebook records showed several concerning posts, some threatening in nature that this affiant observed by reviewing the Facebook records under the screen name of Edward Taupier. The posts observed

on January [8] and January [9], 2017 were previously identified by Detective Dunham and Trooper First Class Reid. The posts on January [6], [11], [12], [13] and [14] were newly identified.

"14. That on January [6], 2017, at [12:34:59 a.m.], the following message was posted on Taupier's Facebook. '856 days [as a] political prisoner by Dan Fucktard Malloy – with [J]udge Gold and Brenda Hans.' . . .

"16. That also on January [8], 2017, at [9:43:29 p.m.], Edward Taupier added [seven] new photographs onto his Facebook account with the following message 'Cromwell Police duped by mentally ill ex to think children are endangered . . . . They say they don't need warrants to come in home. . . . Police don't need warrants, they will need body bags next time.' These photographs were added to the timeline photos and contained an upload IP address . . . . These photographs appeared to be of Edward Taupier, his two kids and their dog.

"17. That on January [9], 2017 at [5:04:28 p.m.] the user 'Edward Taupier' . . . posted the following text on his Facebook account. 'I just got notice of contempt from the state [website] without getting official service, I guess the [J]ews that run the Middletown [clerk's] office (Joe Black – Jonathan Field) don't need to get official service to schedule a hearing . . . . This is why we need to start killing judges . . . .' This post received a response at [5:07:21 p.m.] from user Jennifer Mariano . . . who stated, 'I had someone else in mind, but we can start with the judges.' This post followed with a posted status at [5:06:08 p.m.] that stated the following: 'I just got notice of contempt from the state [website] getting official service . . . . I guess the [J]ews that run the Middletown [clerk's] office (Joe Black – Jonathan Field) don't need to get official service to schedule a hearing . . . this is why we need to start

killing with love those that violate the civil rights of society that are judges who happened to practice the [J]ewish faith. . . .' This post followed a response at [5:06:46 p.m.] from user Edward Taupier . . . stating 'kill court employees and save the country. . . . stop driving the SUV and save a planet. . . . this is what a liberal would say . . . .' This post received a response from user Adrienne Baumgartner . . . at [5:07:29 p.m.] stating 'for that comment [E]d you no doubt could get arrested [and] also [have it] use[d] against you in [your] custody case.' User Adrienne Baumgartner continued with another response that stated, 'you really should either edit or delete that.' User Edward Taupier . . . responded at [5:13:56 p.m.] by posting Free Speech containing the Internet meme of Judge Bozzuto for liberty tree challenge.

"18. That on January [11], 2017, at [8:07:45 p.m.] user Edward Taupier . . . posted the following text: 'I was given [five years] for disturbing [the] peace . . . no judicial retaliation in [Connecticut] with [j]udges . . . [by the way, Judge] Devlin said he felt sorry for the cop . . . and wanted to make it right despite the girl and her family wanting the maximum . . . [I'm] on $1.3 [million] bond for disturbing the peace . . . kill every one of these judges.'

"19. That on January [12], 2017 at [3:28:17 p.m.] user Edward Taupier . . . posted the following text 'we the public have no trust in the [Connecticut] judiciary . . . time to burn the courts down!!'

"20. That on January [13], 2017, at [1:27:57 a.m.] the following posted status appeared on Taupier's Facebook page 'News flash I am incarcerated-house arrest for 860+ days, like DT-Rip.' This was followed by a response from user Edward Taupier . . . stating 'for disturbing peace on 1.3 million dollar bond.' User Edward Taupier continued and stated '[J]udge David

[P.] Gold lives in Middlefield . . . if you want to ask him why at his house.'

"21. That on January [14], 2017, at [1:57:35 p.m.] the following memory was shared from two years ago on Taupier's Facebook page. '[Connecticut] courts destroy this every sec of every day! . . . The family courts in [Connecticut] are run by Beth Bozzuto, the mother [of] destroying families across the state! Time to burn down the courts.'

"22. That according to the State of [Connecticut] Judicial [Branch] website Edward Taupier was found guilty by a [j]ury on October [2], 2015, for threatening [in the first] [d]egree, [two counts of] [d]isorderly [c]onduct . . . and [b]reach of [the] [p]eace [in the second] [d]egree.

"23. . . . Vanessa Valentin, who is Edward Taupier's [p]robation [o]fficer . . . confirmed that the Facebook posting on Taupier's Facebook page on January [13], 2017, was correct regarding the days mentioned in his posted status for the house arrest. Valentin also confirmed that Judge Gold was the sentencing judge in Taupier's criminal case. . . .

* * *

"27. That an inquiry into the protection order registry indicated an active protection order against Edward Taupier. The order was effective as of [January 15, 2016] and listed Judge Elizabeth Bozzuto as the protected person. The protection order did not have a set expiration date. The conditions of the protective order were [the following]: Do not assault, threaten, abuse, harass, follow, interfere with, or stalk the protected person (CT01). Stay away from the home of the protected person and wherever the protected person shall reside (CT03). Do not contact the protected person in any matter, including by written, electronic or telephone

contact, and do not contact the protected person's home, workplace or others with whom the contact would be likely to cause annoyance or alarm to the protected person (CTO5). . . .

* * *

"35. *That this affiant believes Facebook posts on January* [*8*], *January* [*9*], *January* [*11*], *January* [*12*] *and January* [*14*], *2017 were threatening in nature.* These posts threaten the Cromwell Police Department, call for the killing of judges, court employees and [the] burning of . . . courts. This affiant also believes that these posts advocate, encourage and incite violence against persons and property. In addition, Edward Taupier has been previously arrested for similar crimes, [including] [t]hreatening [in the first] [d]egree, [d]isorderly [c]onduct and [b]reach of [the] [p]eace [in the second] [d]egree by the [s]tate [p]olice.

"36. That a State Police Record Check (SPRC) showed the following arrest and convictions for Edward Taupier . . . [t]hreatening [in the first] [d]egree, [two counts of] [d]isorderly [c]onduct . . . and [b]reach of [the] [p]eace [in the second] [d]egree.

"37. That based on the aforementioned facts and circumstances, the affiant believes that probable cause [exists] and requests that an arrest warrant be issued for Edward Taupier . . . charging him with inciting [i]njury to [p]ersons [in] violation of [§] 53a-179a (5 counts) and [t]hreatening [in the second degree in] violation of [§] 53a-62 (5 counts)."[3] (Emphasis added.)

A

We begin our analysis with the standard of review applicable to the defendant's claim. The defendant's "motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the [state]

[3] In the information that it filed, the state reiterated that the defendant's statements that resulted in him being charged with five counts of threatening in the second degree were made on January 8, 9, 11, 12, and 14, 2017.

cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . Accordingly, [o]ur review of the trial court's ultimate legal conclusion and resulting [decision to deny] . . . the motion to dismiss [is] de novo." (Citations omitted; internal quotation marks omitted.) *State* v. *Cyr*, 291 Conn. 49, 56, 967 A.2d 32 (2009); see also *State* v. *Pelella*, 327 Conn. 1, 9 n.9, 170 A.3d 647 (2017) (affording plenary review to trial court's decision to grant defendant's motion to dismiss). With respect to a motion to dismiss in a criminal case on the ground that the conduct alleged by the state is protected as free speech, our Supreme Court also has stated: "The standard to be applied in determining whether the state can satisfy this burden in the context of a pretrial motion to dismiss under General Statutes § 54-56 and Practice Book § 41-8 (5) is no different from the standard applied to other claims of evidentiary sufficiency. General Statutes § 54-56 provides that [a]ll courts having jurisdiction of criminal cases . . . may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial. When assessing whether the state has sufficient evidence to show probable cause to support continuing prosecution [following a motion to dismiss under § 54-56], the court must view the proffered [evidence], and draw reasonable inferences from that [evidence], in the light most favorable to the state. . . . The quantum of evidence necessary to [overcome a motion to dismiss] . . . is less than the quantum necessary to establish proof beyond a reasonable doubt at trial . . . . In [ruling on the defendant's motion to dismiss], the court [must] determine whether the [state's] evidence would warrant a person of reasonable caution to believe that the [defendant had] committed the crime. . . . Thus, the trial court must ask

whether the evidence would allow a person of reasonable caution, viewing the evidence presented in the light most favorable to the state, to believe that the statement at issue was highly likely to be perceived by a reasonable person as a serious threat of physical harm. If that evidence would support such a finding—regardless of whether it might also support a different conclusion—then the motion to dismiss must be denied." (Citations omitted; emphasis omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Pelella*, supra, 327 Conn. 18–19.

Although the state agrees that this court should engage in plenary review of the trial court's ultimate conclusion that the defendant's speech constituted true threats that were not protected by the first amendment, it asserts that the trial court's "factual findings" in this case are subject to the "clearly erroneous" standard of review that is typically employed to review a trial court's findings of fact. We are not persuaded by the state's assertion.

In this case, the trial court did not make any findings of fact. The court did not hear any testimony at the hearing on the motion to dismiss and did not make any credibility determinations. Instead, the court engaged in a legal review of the uncontested factual averments contained in the affidavit, viewed in the light most favorable to the state, in order to determine whether a person of reasonable caution could view the defendant's statements as true threats. In these circumstances, the clearly erroneous standard simply does not apply and no deference to the trial court's recitation of the facts is required.[4] See *State* v. *Lewis*, 273 Conn. 509, 516–17,

[4] In support of its assertion that this court must accept the trial court's subsidiary factual findings unless they are clearly erroneous, the state relies on *State* v. *Krijger*, 313 Conn. 434, 447, 97 A.3d 946 (2014). That reliance is misplaced. The defendant in *Krijger* appealed from a judgment of conviction rendered after a jury trial, in which the jury heard witnesses, made credibility determinations, and found facts. Thus, *Krijger* involves a different procedural posture from the present case.

871 A.2d 986 (2005) ("[a]lthough we generally review a trial court's factual findings under the 'clearly erroneous' standard, when a trial court makes a decision based on pleadings and other documents, rather than on the live testimony of witnesses, we review its conclusions as questions of law"); see also *State* v. *Pelella*, supra, 327 Conn. 9 n.9 (engaging in de novo review of facts where trial court not required to make any credibility or other factual findings).

We also highlight two issues regarding the record in this case that make our review of the defendant's conviction more difficult. First, the affidavit in the record recites approximately ten statements that the defendant made on Facebook. The record is unclear, however, regarding which five statements recited in the affidavit constitute the statements on which the defendant was convicted of five counts of threatening in the first degree.[5] Accordingly, in our view, as long as we are able to conclude that the affidavit recites five

[5] When the court conducted the plea canvass of the defendant, the state recited the factual basis underlying the defendant's written plea of nolo contendere as follows: "[I]n early January . . . 2017, court personnel in the Middletown courthouse were alerted to some information that had been posted online . . . that they considered very threatening to various employees of the courthouse there.

"During the course of the investigation, it was learned that approximately from January 8, 2017, going on to approximately January 14, 2017, the defendant posted and allowed to continue to be posted various threats to various employees of the state.

"Specifically, there were comments that police would be in body bags the next time they came without a warrant. There were threats directed specifically to kill the court employees at these courts. There were threats to kill the judges of the court, and with some identifying features. I don't want to put the names of them, but of specific judges that were listed on that.

"There was also threats to . . . burn down the courthouse. And in fact, he did that twice, a specific threat to burn down the courthouse, threatened the court employees, including judges, with bodily harm. And at one point, I would note, gave out the town where one of the judges resided.

"Taken together, Your Honor, the threats to specifically harm specific employees, a specific place to do damage, and obviously, cause fear to the people that work there, the state would say that those charges would satisfy the requirements, at this point anyway, for the charges of threatening."

statements made by the defendant that can be characterized as true threats, it is of no moment that other of the defendant's statements recited in the affidavit do not rise to the level of a true threat. Counsel for the defendant conceded as much during oral argument to this court.[6]

Second, the record also is unclear as to the statutory subsection and subdivision of § 53a-62 under which the defendant was charged and convicted.[7] When the court put the defendant to plea and conducted its plea canvass of him, neither the court nor the defendant specified that he was pleading nolo contendere to a particular statutory subsection or subdivision of § 53a-62.[8] In addi-

[6] See footnote 11 of this opinion for the methodology that we used to select the five statements that we assess for purposes of our true threats analysis.

[7] General Statutes § 53a-62 provides in relevant part: "(a) A person is guilty of threatening in the second degree when: (1) By physical threat, such person intentionally places or attempts to place another person in fear of imminent serious physical injury, (2) (A) such person threatens to commit any crime of violence with the intent to terrorize another person, or (B) such person threatens to commit such crime of violence in reckless disregard of the risk of causing such terror . . . ."

[8] "The Court: All right. And the state's recitation regarding the plea agreement, is that your understanding of the plea agreement that you are submitting today?

"[The Defendant]: Yes. And I can appeal. That's correct, right?

"[Defense Counsel]: Yes.

"The Court: Okay. So, Mr. Taupier, you have filed your plea under nolo contendere. And by doing so, you're saying that you don't contest the case, and believe that it's in your best interest to enter a plea of nolo contendere and accept the proposed disposition, rather than risk going to trial and potentially face a greater sentence if convicted, is that correct, sir?

"[The Defendant]: Yes.

"The Court: All right. And you understand that I will still be making a finding of guilty though?

"[The Defendant]: Yes.

* * *

"The Court: All right. And did your attorney explain to you what you're pleading guilty to, sir? *You're pleading guilty to five counts of threatening in the second degree.*

"[The Defendant]: *Yes.*

"The Court: All right. Did your attorney explain to you the elements of each crime that you're pleading guilty to?

tion, the information did not specify the subsection or subdivision of § 53a-62 under which the state charged the defendant. Accordingly, in light of the defendant's failure to clarify with the trial court the subsection or subdivision of § 53a-62 to which he was pleading nolo contendere, this court must affirm his conviction if we determine that at least five of the statements described in the affidavit can be characterized as unprotected true threats prohibited by *any* subsection or subdivision of § 53a-62.

For purposes of our analysis, we assess whether the defendant's five statements constituted unprotected true threats under § 53a-62 (a) (2) (B).[9] This means that we must assess whether there was probable cause to support continuing a constitutional prosecution against the defendant under each count for "threaten[ing] to commit [a] crime of violence in reckless disregard of the risk of causing such terror . . . ." General Statutes § 53a-62 (a) (2) (B).

B

Having established this court's standard of review and having addressed other issues germane to our review of the defendant's claim on appeal, we now consider the merits of the defendant's claim that the trial

"[The Defendant]: Yes.

"The Court: And did he go over with you the evidence which would prove each element beyond a reasonable doubt?

"[The Defendant]: Yes.

* * *

"The Court: Okay. And did he go over with you the terms of the plea agreement, sir?

"[The Defendant]: Yes." (Emphasis added.)

[9] We select this particular subdivision because it requires proof of recklessness rather than specific intent and, therefore, is most easily satisfied. Under this subdivision, the defendant's five statements are clearly unprotected true threats for which there is probable cause to believe that he threatened to commit a crime of violence (i.e., murder and arson) with reckless disregard of the risk of causing terror.

court improperly denied his motion to dismiss because his statements were not true threats as a matter of law and were, indeed, protected speech under the first amendment to the United States constitution. In essence, the defendant argues that none of the statements that he made that are set forth in the affidavit constitute true threats because an objective listener would not readily interpret these statements to be true threats.[10] Moreover, the defendant asserts that the court improperly denied his motion to dismiss because the affidavit, even when viewed in the light most favorable to the state, would not allow a person of reasonable caution to believe that at least five of his statements were highly likely to be perceived by a reasonable person as a serious threat of physical harm. We are not persuaded.

We begin with a review of the first amendment principles applicable to statutes that criminalize threatening speech. "The [f]irst [a]mendment, applicable to the [s]tates through the [f]ourteenth [a]mendment, provides that Congress shall make no law . . . abridging the freedom of speech. The hallmark of the protection of free speech is to allow free trade [of] ideas—even

[10] The defendant argues that, in order to criminalize speech, the speech must meet *both* the standard of advocacy of imminent lawless action, as set forth in *Brandenburg* v. *Ohio*, supra, 395 U.S. 447–48, *and* that of true threats, as set forth in *Virginia* v. *Black*, supra, 538 U.S. 359–60. We disagree.

Our Supreme Court has stated that advocacy of imminent lawless action and true threats theories of criminal liability are distinct. See *State* v. *Parnoff*, 329 Conn. 386, 394–95, 405, 186 A.3d 640 (2018). In *Parnoff*, the court declined to consider whether the defendant's words constituted true threats because the state pursued the case under an advocacy of imminent lawless action theory of criminal liability and not a true threats theory. See id. Indeed, to consider whether a statement is a true threat by using the same analysis used to determine whether a statement constitutes advocacy of imminent lawless action is the equivalent of forcing a " 'square peg [into a] round hole' . . . ." Id., 405. Thus, for the reasons articulated by our Supreme Court, we disagree with the defendant and conclude that a person's statement may, indeed, be a true threat as a matter of law while not constituting advocacy of imminent lawless action.

ideas that the overwhelming majority of people might find distasteful or discomforting. . . . Thus, the [f]irst [a]mendment ordinarily denies a [s]tate the power to prohibit dissemination of social, economic and political doctrine [that] a vast majority of its citizens believes to be false and fraught with evil consequence. . . .

"The protections afforded by the [f]irst [a]mendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the [c]onstitution. . . . The [f]irst [a]mendment permits restrictions [on] the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Internal quotation marks omitted.) *Haughwout* v. *Tordenti*, 332 Conn. 559, 570, 211 A.3d 1 (2019).

"Thus, for example, a [s]tate may punish those words [that] by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . Furthermore, the constitutional guarantees of free speech and free press do not permit a [s]tate to forbid or proscribe advocacy of the use of force or of law violation except [when] such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. . . . [T]he [f]irst [a]mendment also permits a [s]tate to ban a true threat." *State* v. *Krijger*, 313 Conn. 434, 449, 97 A.3d 946 (2014).

"[T]rue threats . . . encompass those statements [through which] the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition

to protecting people from the possibility that the threatened violence will occur. . . .

"[W]e must distinguish between true threats, which, because of their lack of communicative value, are not protected by the first amendment, and those statements that seek to communicate a belief or idea, such as political hyperbole or a mere joke, which are protected. . . . In the context of a threat of physical violence, [w]hether a particular statement may properly be considered to be a [true] threat is governed by an objective standard—whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault. . . . [A]lleged threats should be considered in light of their entire factual context, including the surrounding events and reaction of the listeners. . . .

"[T]o ensure that only *serious* expressions of an intention to commit an act of unlawful violence are punished, as the first amendment requires, the state [actor] must do more than demonstrate that a statement *could* be interpreted as a threat. When . . . a statement is susceptible of varying interpretations, at least one of which is nonthreatening, *the proper standard to apply is whether an objective listener would readily interpret the statement as a real or true threat; nothing less is sufficient to safeguard the constitutional guarantee of freedom of expression*. To meet this standard [the state actor is] required to present evidence demonstrating that a reasonable listener, familiar with the entire factual context of the defendant's statements, would be highly likely to interpret them as communicating a genuine threat of violence rather than protected expression, however offensive or repugnant." (Citations omitted; emphasis added; internal quotation marks omitted.) *Haughwout* v. *Tordenti*, supra, 332 Conn. 571–72. In determining whether an objective listener or reader

would consider a statement to be a true threat, our inquiry is more dependent on whether the statement reasonably could be interpreted as a *serious expression* of intent to inflict harm rather than whether the statement conveys an intent to *imminently* inflict harm. See *State* v. *Pelella*, supra, 327 Conn. 11–17.

In analyzing whether the trial court properly denied the defendant's motion to dismiss, we consider the following five statements that the defendant made in January, 2017, and that are described in the affidavit: (1) his January 9, 2017 Facebook post, in which he, in part, stated, "THIS IS WHY WE NEED TO START KILLING WITH LOVE THOSE THAT VIOLATE THE CIVIL RIGHTS OF SOCIETY THAT ARE JUDGES WHO HAPPEN TO PRACTICE THE JEWISH FAITH"; (2) his January 9, 2017, Facebook post, in which he, in part, stated, "KILL COURT EMPLOYEES AND SAVE THE COUNTRY"; (3) his January 11, 2017 Facebook post, in which he, in part, stated "kill every one of these judges"; (4) his January 12, 2017 Facebook post, in which he, in part, stated, "time to burn the courts down!!"; and (5) his January 14, 2017 Facebook post, in which he, in part, stated, "[t]ime to burn down the courts."[11] In sum, these five statements consist of alleged threats to kill judges and court employees and to burn courthouses.

[11] Although the record is unclear regarding which five statements recited in the affidavit constitute the statements on which the defendant was convicted of five counts of threatening in the second degree; see part I A of this opinion; the affidavit states that Facebook posts made by the defendant on January 8, 9, 11, 12, and 14, 2017, were "threatening in nature." There are seven Facebook posts made by the defendant on these dates that are described in the affidavit. At oral argument before this court, the defendant conceded that, when reviewing his claim, this court could analyze the statements he made on these dates for purposes of determining whether the court properly denied his motion to dismiss the charges.

In the foregoing analysis, we conclude that at least five of these statements could be characterized as true threats. We take no position on whether the remaining statements in the affidavit constitute true threats as a matter of law.

Indeed, in the absence of any factual context, these statements, viewed in the light most favorable to the state, reasonably could be interpreted by themselves as serious expressions of the defendant's intent to inflict harm against judges and court employees.

We are mindful, however, that "a determination of what a defendant actually said is just the beginning of a threats analysis. Even when words are threatening on their face, careful attention must be paid to the context in which those statements are made to determine if the words may be objectively perceived as threatening." *State* v. *Krijger*, supra, 313 Conn. 453. Thus, our Supreme Court has stated that "[a]lleged threats should be considered in light of their entire factual context . . . ." (Internal quotation marks omitted.) *State* v. *Pelella*, supra, 327 Conn. 12. Moreover, our Supreme Court has identified several factors that a court may use to assess the factual context in which an alleged threat is made, including (1) the history of the relationship between the person who made the alleged threat and the person or group to whom it was addressed, (2) the reaction of the statement's recipients, and (3) whether the person who made the statement showed contrition immediately after the statement was made. Id., 12, 20–22 (in determining whether statement is true threat, reviewing court should consider history of relationship between defendant and threatened person and reaction of statement's listener or reader); *State* v. *Krijger*, supra, 457–59 (whether defendant was immediately contrite after making alleged threat is a factor in determining whether objective listener would interpret statement as true threat); *State* v. *Cook*, 287 Conn. 237, 256, 947 A.2d 307 (considering relationship between defendant and threatened person to determine whether "the evidence necessarily was insufficient to support a finding that the defendant's statements and conduct amounted to a true threat"), cert. denied, 555 U.S. 970,

129 S. Ct. 464, 172 L. Ed. 2d 328 (2008); *State* v. *DeLoreto*, 265 Conn. 145, 156–57, 827 A.2d 671 (2003) (in determining whether statement is true threat, surrounding events and reaction of listeners should be considered). Having assessed the entire factual context in which these five statements were made, we conclude for the following reasons that these statements reasonably could be interpreted as serious expressions of intent to inflict harm, and thus, an objective listener could interpret them as true threats.

1

Parties' Prior Relationship

In determining whether the defendant's five statements about killing judges and court employees and burning courthouses are serious expressions of intent to inflict harm on these groups, we first consider the relationship between the defendant and the judges and court employees, which are the groups of individuals whom his statements concern. See *State* v. *Pelella*, supra, 327 Conn. 20–21. We conclude that the history of this relationship supports a determination that these statements constituted serious expressions of intent to inflict harm on judges and court employees.

Significant to our assessment of this factor is that the defendant had *previously been convicted for sending a threatening e-mail about a judge*. See *State* v. *Taupier*, supra, 330 Conn. 156–57, 164. Indeed, the defendant had undergone a contentious divorce proceeding and had made threatening remarks about Judge Bozzuto, the judge presiding over the proceeding. In that case, our Supreme Court observed that there was a "contentious history between the defendant and Judge Bozzuto . . . ." Id., 184. Moreover, in that case, the court stated that the trial court could "reasonably . . . [infer] . . . that the defendant harbored [animosity and frustration] toward the family court system, which Judge Bozzuto represented." Id., 192. Thus, prior to making the

five statements in which he allegedly threatened to kill judges and court employees and to burn courthouses, the defendant already had a contentious relationship with at least one judge.

Furthermore, the defendant's other statements described in the affidavit add context to the threatening nature of the five statements under review and support a conclusion that the defendant had a contentious relationship with the court system that was colored by the defendant's frustration with the manner in which his family matter was being adjudicated. Indeed, even while on house arrest for making threatening statements about Judge Bozzuto in 2014, he *continued* to express hostility toward her in his January, 2017 Facebook posts. In one post, the defendant stated that "the family courts in [Connecticut] are run by Beth Bozzuto," and then he referred to Judge Bozzuto as "the mother [of] destroying families across the state . . . ." In another post, the defendant "[n]ominate[d] Judge Bozzuto [for] the Liberty Tree Refreshment Challenge." He stated that "[t]he tree of liberty must be refreshed from time to time with the blood of patriots and tyrants" and then called for "[s]pill[ing] some blood [to] save a tree . . . ."

His disdain for judges, however, was not limited to Judge Bozzuto. Indeed, the defendant also expressed contempt and hostility toward two other judges with whom he had prior dealings. In one post, the defendant wrote disapprovingly of Judge Devlin, stating, "I was given [five years] for disturbing [the] peace . . . no judicial retaliation in [Connecticut] with [j]udges . . . [by the way, Judge] Devlin said he felt sorry for the cop . . . and wanted to make it right despite the girl and her family wanting the maximum . . . [I'm] on $1.3 [million] bond for disturbing the peace. " The defendant also made a statement about Judge Gold, who presided over his sentencing following his first conviction. In

one post, he wrote, "News flash I am incarcerated-house arrest for 860+ days, like DT-Rip . . . for disturbing peace on 1.3 million dollar bond." He then continued, "[J]udge David [P.] Gold lives in Middlefield . . . if you want to ask him why at his house."

The defendant's hostility toward the court system manifested in statements that he made about others affiliated with the court system. Indeed, in one post, he alluded to receiving notice of a hearing in an improper manner, which he blamed on two judicial employees. In this post, the defendant stated, "JUST GOT NOTICE OF CONTEMPT FROM THE STATE [WEBSITE] WITHOUT GETTING OFFICIAL SERVICE, I GUESS THE JEWS THAT RUN THE MIDDLETOWN [CLERK'S] OFFICE (JOE BLACK - JONATHAN FIELD) DON'T NEED TO GET OFFICIAL SERVICE TO SCHEDULE A HEARING."

Moreover, the details contained in the other statements in the affidavit and those statements for which he had been previously convicted weigh in favor of concluding that the five statements under review were, indeed, serious expressions of intent to inflict harm on judges and court employees. In particular, the detail laden statements that the defendant made about Judges Bozzuto and Gold support this conclusion.

With respect to Judge Bozzuto, the defendant investigated where she lived and described, in detail, a plan to fire bullets into the window of her master bedroom. See *State* v. *Taupier*, supra, 330 Conn. 156–57. Specifically, he stated, " '[Bo]zzuto lives in [W]atertown with her boys and [n]anny . . . there [are] 245 [yards] between her master bedroom and a cemetery that provides cover and concealment'; and . . . 'a [.308 caliber rifle] at 250 [yards] with a double pane drops [one-half inch] per foot beyond the glass and loses [7 percent] of [foot pounds] of force [at] 250 [yards]—nonarmor

piercing ball ammunition . . . .' " Id. Similarly, the defendant researched where Judge Gold lived and, on Facebook, the defendant posted the town in which Judge Gold resided so that readers could go to his home to ask him why he sentenced the defendant in the way that he did.

The details contained in these statements, which included the towns in which these judges reside and a well calculated plan to fire into Judge Bozzuto's master bedroom, weigh against concluding that the five statements under review were merely "spontaneous outburst[s], rooted in the defendant's anger and frustration, [which, by themselves, are] insufficient to establish that [the statement] constituted a true threat." *State* v. *Krijger*, supra, 313 Conn. 459. Rather, these details reflected a degree of planning or research and, thus, support an interpretation of the statements under review as serious expressions of the defendant's intent to harm those affiliated with the court system.

In sum, the defendant's 2017 Facebook posts indicate that his disdain for the court system had not abated since he sent a threatening e-mail about Judge Bozzuto in 2014. Indeed, despite being convicted for statements that he made in 2014 about Judge Bozzuto, the defendant *continued* making statements in which he expressed his hostility toward her. In addition to what he stated about Judge Bozzuto, he made statements about others affiliated with the court system, including Judge Devlin, Judge Gold, Black and Field, as well as Jewish judges and court employees, generally. Moreover, the details contained in some of the defendant's statements illustrate how seriously he considered exacting revenge against those affiliated with the court system. Viewing the uncontested facts in the affidavit in the light most favorable to the state, we conclude that the defendant's history of having a contentious relationship with certain judges and judicial employees,

as well as his detail laden statements about them, support a determination that the five allegedly threatening statements under review reasonably could be interpreted as serious expressions of intent to inflict harm against judges and court employees.

2

Reaction of the Statement's Recipient

Next, we consider the reaction of those subjected to the defendant's remarks. This consideration, too, weighs in favor of concluding that the defendant's five statements about killing judges and court employees and burning down courthouses reasonably could be interpreted as serious expressions of intent to inflict harm.

In determining whether a statement is a true threat, although we ask whether an *objective* listener or reader would interpret it as such, the subjective reaction of the statement's listener or reader is a factor that this court may consider in determining what an objective listener's or reader's interpretation might be. See *State* v. *Krijger*, supra, 313 Conn. 459–60. In weighing this factor, we are mindful that "the listener's reaction of concern or fear need not be dramatic or immediate, and the apparently mixed emotions of the listeners are not dispositive." *Haughwout* v. *Tordenti*, supra, 332 Conn. 581. A court, however, may conclude that this factor weighs against determining that an objective listener would not interpret a statement as a true threat if, after listening to or reading the statement, the listener or reader delays in reporting it to authorities, responds to the statement's maker in an antagonistic manner, or states that he or she did not believe that the statement's maker had threatened to harm him or her. See *State* v. *Krijger*, supra, 313 Conn. 459 n.12 (defendant's remarks not true threat, in part, because person at whom alleged threat was directed waited two days to report threat

to police); cf. *State* v. *Moulton*, 310 Conn. 337, 369 n.26, 78 A.3d 55 (2013) ("the fact that [the listener] took no immediate action following the defendant's [alleged threat] and waited [two days] . . . to [report] the matter [is] . . . relevant evidence as to whether the [defendant's statement] was perceived as a real or true threat"). But see *State* v. *Taupier*, supra, 330 Conn. 158–59, 191–92 (defendant's statement in e-mail is true threat, even though reader of e-mail waited several days to report it).

Moreover, assessing the reactions of those who hear or read the statement is instructive in determining the extent to which the alleged threat has generated "the social costs of . . . apprehension and disruption directly caused by the threat . . . ." *State* v. *Pelella*, supra, 327 Conn. 17. Indeed, speech with significant social costs is more likely to fall under a category of content that may be restricted because it is "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Virginia* v. *Black*, supra, 538 U.S. 358–59; *State* v. *Pelella*, supra, 10.

The reactions to the defendant's Facebook posts are the sorts of feelings of fear and the disruptions that courts have sought to prevent by not providing shelter to statements that are true threats under the umbrella of the first amendment. See *Haughwout* v. *Tordenti*, supra, 332 Conn. 571. Indeed, the defendant's January 9, 2017 post, in which he called for court employees to be killed, drew swift condemnation. One Facebook user replied, "for that comment [E]d, you no doubt could get arrested [and] also [have that] use[d] against you in [your] custody case." She continued, "you really should either edit or delete that."[12]

[12] We note that, in addition to the user who condemned the defendant's call to kill court employees, another user appeared encouraged by the defendant's call to kill judges. Indeed, in response to the defendant's post, this other user wrote, "I had someone else in mind, but we can start with the judges."

On January 25, 2017, a concerned individual, who wished to remain anonymous, contacted Field about statements posted on Facebook by the defendant that this individual "found to cause concern for Field and others at the court and the Cromwell Police Department."[13] After reading copies of the posts that the concerned individual sent to him, Field, who was named in one of the defendant's posts, "found them to be very disturbing and . . . stated [that] he considered the posts to be a threat to his own safety and possibly to others at [the] Middlesex Judicial District Court." Indeed, Field was so concerned by the post containing his name, that he reported it to the authorities on the same day that the concerned individual had contacted him.

Viewing the uncontested facts in the affidavit in the light most favorable to the state, we conclude that the reactions to the defendant's statements, especially that of Field, who worked for the court system and was named in one of the posts, weigh in favor of concluding that the defendant's five statements reasonably could be interpreted as serious expressions of intent to inflict harm against judges and court employees.

3

The Defendant's Contrition

Finally, we assess the extent to which the defendant expressed contrition for making the alleged threat and the temporal proximity of the contrition to when the threat was made. Our Supreme Court has stated that a "defendant's contrition immediately following [an alleged threat being made] is decidedly at odds with the view that, just moments beforehand, [the defendant] had communicated a serious threat to inflict grave

[13] The affidavit does not specify the amount of time that lapsed between the concerned individual reading the defendant's statements and his or her reporting them to Field on January 25, 2017.

bodily injury or death on [the allegedly threatened person].'' *State* v. *Krijger*, supra, 313 Conn. 458. If the defendant was contrite immediately after making the alleged threat, this may indicate that the defendant's statement was merely ''a spontaneous outburst, rooted in the defendant's anger and frustration, [which, by itself, is] insufficient to establish that [the statement] constituted a true threat.'' Id., 459. Indeed, in *Krijger*, our Supreme Court determined that the fact that the defendant in that case ''immediately . . . apologized for his behavior'' weighed against concluding that his statement was a true threat. See id., 457–59.

In the present case, however, the defendant not only expressed no contrition immediately after January 9, 2017,[14] but he made *many more* threatening statements on and after that date. In this case, the defendant's conduct after making his first allegedly threatening statement in January, 2017, is, indeed, a far cry from the defendant's immediate contrition in *Krijger*. See id., 457–58. Viewing the uncontested facts in the affidavit in the light most favorable to the state, we conclude that the third factor weighs in favor of concluding that the defendant's five statements reasonably could be interpreted as serious expressions of intent to inflict harm against judges and court employees. Having reviewed the factual context of the defendant's five statements, we conclude that they reasonably could be interpreted as serious expressions of intent to inflict harm against judges and court employees and that an objective listener or reader could interpret these statements as true threats.

[14] The defendant published one Facebook post on January 6, 2017, and one on January 8, 2017. Of the five statements we analyze in this opinion, the earliest was made on January 9, 2017. Thus, for purposes of our analysis, we assess the manner in which the defendant behaved (i.e., subsequent Facebook posts he made) from January 9 to 14, 2017, which is the date of the last of the defendant's Facebook posts described in the affidavit.

Because the uncontested facts in the affidavit before the court, viewed in the light most favorable to the state, would allow a person of reasonable caution to believe that at least five of the defendant's statements in the affidavit were highly likely to be perceived by a reasonable person as serious threats of physical harm, we conclude that there was probable cause to support continuing a constitutional prosecution against the defendant under each count for "threaten[ing] to commit [a] crime of violence in reckless disregard of the risk of causing such terror." General Statutes § 53a-62 (a) (2) (B). Thus, the trial court properly denied the defendant's motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

USAA FEDERAL SAVINGS BANK *v.* CHARLES DONALD GIANETTI ET AL.
(AC 42037)

Lavine, Moll and Sheldon, Js.

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant. The trial court granted the plaintiff's motion for summary judgment as to liability and rendered judgment of strict foreclosure. The trial court then granted the plaintiff's motion to strike a counterclaim filed by the defendant and denied the defendant's motion to open the judgment, and the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion in denying his motion to open the judgment of strict foreclosure as the court acted well within its discretion in determining that the defendant had not established good cause for opening the judgment: although the defendant pleaded that he informed the court through a colleague at the earliest opportunity that he could not attend the hearing on the motion for a judgment of strict foreclosure due to medical reasons, he acknowledged that the transcript of the hearing in question did not reflect that any such information had been received by the court; moreover, the court did not receive any information about why or how the defendant's failure to attend court that day had prevented him from making any material input to the court's decision whether to grant the plaintiff's motion for a judgment of strict foreclosure.

2. This court did not address the defendant's claim challenging, on due process grounds, the manner in which his motion to open was adjudicated, as that claim was not preserved for appellate review because it was not been presented to and decided by the trial court.

3. This court did not review the defendant's claim that the trial court erred in adjudicating the plaintiff's motion for summary judgment, the defendant having failed to timely appeal from the rendering of the underlying judgment of strict foreclosure, which was based on the plaintiff's motion for summary judgment.

4. This court did not have subject matter jurisdiction over the defendant's claim that the trial court erred in granting the plaintiff's motion to strike his counterclaim, the defendant having failed to replead the counterclaim after it was stricken, or move the court to render judgment against him on that claim, resulting in a lack of a final judgment on the counterclaim.

Argued March 9—officially released June 9, 2020

Procedural History

Action to foreclose a mortgage, brought to the Superior Court in the judicial district of Fairfield, where the named defendant filed a counterclaim; thereafter, the court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability; subsequently, the court granted the plaintiff's motion for judgment and rendered judgment of strict foreclosure; thereafter, the court granted the plaintiff's motion to strike the named defendant's counterclaim; subsequently, the court denied the named defendant's motion to open the judgment, and the named defendant appealed to this court. *Appeal dismissed in part*; *affirmed*; *further proceedings*.

Charles D. Gianetti, self-represented, the appellant (named defendant).

Jeffrey M. Knickerbocker, for the appellee (plaintiff).

Opinion

PER CURIAM. In this case, the plaintiff, USAA Federal Savings Bank, brought this action against several

defendants,[1] including the named defendant, Charles Donald Gianetti, and Gianetti's judgment creditor, Foster Young,[2] to foreclose a mortgage on Gianetti's real property located at 149 Seeley Road in Easton. Gianetti had given the mortgage to secure a note in the amount of $500,000, pursuant to which he was required to make monthly payments of principal and interest until the note was repaid in full. The plaintiff alleged in its complaint that Gianetti had defaulted on the note by not making all payments due from him thereunder. Gianetti answered the complaint, admitting that he owned the mortgaged property and that he had executed the note and mortgage, but he denied the plaintiff's claim that it was entitled to foreclosure on the mortgage on the basis of several special defenses, including equitable and promissory estoppel, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, unclean hands, and unconscionability. The plaintiff denied each of Gianetti's special defenses.

On July 14, 2017, the plaintiff moved for a judgment of strict foreclosure. Young was defaulted for failure to appear on July 27, 2017. Thereafter, on October 24, 2017, the plaintiff filed a motion for summary judgment as to liability only against all other defendants. Gianetti failed to file any documents or materials in opposition to the motion. On March 15, 2018, in a memorandum of decision, the trial court, *Hon. Alfred J. Jennings, Jr.*, judge trial referee, granted the plaintiff's motion for summary judgment as to liability only.

On February 13, 2018, while the motion for summary judgment was pending, Gianetti filed a counterclaim alleging that the plaintiff had breached its promise

[1] Glenn Siglinger, Laura Siglinger, and Peter A. Vimini were also named as defendants in the underlying action, however, they are not participating in this appeal.

[2] Young is not participating in this appeal.

to offer him a new loan. Three days later, the plaintiff moved to strike the counterclaim.

On May 10, 2018, the plaintiff filed a two count amended complaint. In count one, the plaintiff repleaded its claim for foreclosure. In count two, which it labeled, "Quiet Title," the plaintiff sought a declaratory judgment that Young's judgment lien against the mortgaged property was no longer valid. On June 13, 2018, the plaintiff filed a motion for judgment as to count two of the amended complaint.

On June 18, 2018, the court granted the plaintiff's motion for judgment as to count two. On that same day, the court granted the plaintiff's earlier motion for a judgment of strict foreclosure, setting the law days to commence on August 14, 2018. Gianetti did not file a timely appeal within twenty days from the rendering of that judgment.

Thereafter, on July 22, 2018, the court granted the plaintiff's motion to strike Gianetti's counterclaim on the ground that any claim based on the plaintiff's alleged failure to enter into a new loan agreement would necessarily be based on a separate transaction from the making of the original loan pursuant to the note and mortgage at issue in this case. The court therefore ruled that any such claim could only be brought in a separate action. Gianetti did not replead his counterclaim after it was stricken or move that judgment be rendered against him on the counterclaim so that he could appeal from the granting of the motion to strike.

Approximately five weeks after the court granted the plaintiff's motion for a judgment of strict foreclosure, Gianetti filed a motion to open that judgment on the ground that he had been unable, for unspecified "medical reasons," to attend the hearing at which the motion was heard. On August 13, 2018, the court denied the motion to open but set new law days to commence on

October 16, 2018. Thereafter, on August 30, 2018, the defendant filed the present appeal.

In his appeal, Gianetti, who is self-represented, makes four separate claims of error: (1) the trial court abused its discretion in denying his motion to open the judgment of strict foreclosure; (2) the trial court erred in granting the plaintiff's motion to strike his counterclaim; (3) the trial court erred in divers ways in adjudicating the plaintiff's motion for summary judgment as to liability only; and (4) the trial court violated his right not to be deprived of his property without due process of law by the manner in which it adjudicated his motion to open the judgment of strict foreclosure, having allegedly been put under pressure to resolve the matter quickly, before all necessary discovery on the motion could be conducted. For the following reasons, we conclude that none of these claims furnishes a ground for granting the relief that Gianetti seeks in this appeal.

I

REVIEWABILITY

Our power to review Gianetti's previously specified claims of error is strictly limited by their respective procedural histories. For the following reasons, we conclude that only the first of those claims can be reviewed on the merits.

We note initially that, although Gianetti timely appealed from the denial of his motion to open the judgment of strict foreclosure rendered against him—within twenty days of that ruling—he did not timely appeal from the rendering of the underlying judgment he thereby sought to open. For that reason we will not review his third claim of error challenging the granting of plaintiff's motion for summary judgment as to liability only, on which the judgment of strict foreclosure was squarely based. Such review is barred by our case law. See *Wells Fargo Bank, N.A.* v. *Ruggiri*, 164 Conn. App.

479, 484, 137 A.3d 878 (2016) ("[w]hen a motion to open is filed more than twenty days after the judgment, the appeal from the denial of that motion can test only whether the trial court abused its discretion in failing to open the judgment and not the propriety of the merits of the underlying judgment" (internal quotation marks omitted)).

As for Gianetti's timely filed first and fourth claims of error concerning the denial of his motion to open, only the first of those claims was presented to and decided by the trial court. Because the defendant's fourth claim of error, challenging on due process grounds the manner in which his motion to open was adjudicated, was not preserved for appellate review, we cannot reach and decide that claim now. See Practice Book § 60-5 ("[t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial").

Turning finally to Gianetti's challenge to the granting of the plaintiff's motion to strike his counterclaim, we note that he neither repleaded the counterclaim after it was stricken nor moved the court to render judgment against him on that claim.[3] See Practice Book § 10-44; see also *Breen* v. *Phelps*, 186 Conn. 86, 89, 439 A.2d 1066 (1982) (granting of motion to strike does not, on its own, constitute final judgment); *Pellecchia* v. *Connecticut Light & Power Co.*, 139 Conn. App. 88, 90, 54 A.3d 658 (2012) ("[t]he granting of a motion to strike . . . ordinarily is not a final judgment because our rules of practice afford a party a right to amend deficient pleadings" (internal quotation marks omitted)), cert. denied, 307 Conn. 950, 60 A.3d 740 (2013). In the absence of a final judgment on the counterclaim, this court has no subject matter jurisdiction over Gia-

[3] The parties were advised to be prepared to argue the issue of whether the defendant's appeal challenging the trial court's ruling striking his counterclaim should be dismissed for lack of a final judgment.

netti's claim on appeal that it was improperly stricken. See *McGuinness* v. *McGuinness*, 155 Conn. App. 273, 276, 108 A.3d 1181 (2015) ("The subject matter jurisdiction of this court and our Supreme Court is limited by statute to final judgments. . . . Our appellate courts lack jurisdiction to hear an appeal that is not brought from a final judgment. . . . The lack of a final judgment is a jurisdictional defect that mandates dismissal." (Internal quotation marks omitted.)).

In sum, we limit our review of the merits of Gianetti's claims on appeal to his first claim alleging that the trial court abused its discretion in denying his motion to open the judgment of strict foreclosure rendered against him.

II

MOTION TO OPEN

Pursuant to General Statutes § 49-15 (a) (1), upon the written motion of any person having an interest in the judgment, a trial court that has rendered a judgment of strict foreclosure has the discretion to open the judgment for good cause shown. "[G]ood cause for opening a [judgment] pursuant to § 49-15 . . . cannot rest entirely upon a showing that the original foreclosure judgment was erroneous. Otherwise that statute would serve merely as a device for extending the time to appeal from the judgment." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Grogins*, 189 Conn. App. 477, 485, 208 A.3d 662, cert. denied, 332 Conn. 902, 208 A.3d 659 (2019).

In reviewing the denial of a motion to open a judgment of strict foreclosure, we are limited to determining whether the court abused its discretion in so ruling or based its ruling on some error of law. If neither such error is established, the court's ruling must be upheld. See *Countrywide Home Loans Servicing, L.P.* v. *Peterson*, 171 Conn. App. 842, 848–49, 158 A.3d 405 (2017).

In this case, Gianetti's motion to open stated only that he could not attend the June 18, 2018 hearing on the plaintiff's motion for a judgment of strict foreclosure "because of medical reasons." Although Gianetti further pleaded that he informed the court of his medical problem through a colleague, and did so at the earliest opportunity, he acknowledged that the transcript of the hearing in question did not reflect that any such information had been received by the court. Having not received any information about the nature of Gianetti's medical problems or the reasons why they prevented him from coming to court on the date the motion was heard—much less why or how his failure to attend court that day had prevented him from making any material input to the court's decision whether to grant the plaintiff's motion—the court acted well within its discretion in determining that Gianetti had not established good cause for opening the judgment of strict foreclosure rendered on June 18, 2018.

III

CONCLUSION

For the foregoing reasons, we affirm the trial court's judgment denying Gianetti's motion to open the judgment of strict foreclosure and remand this case to the trial court to set new law days. Gianetti's appeal from the granting of the plaintiff's motion to strike his counterclaim is dismissed for lack of a final judgment, without prejudice to any right he may still have to seek permission to replead or move for a final judgment on the stricken counterclaim.

The appeal is dismissed only as to the granting of the motion to strike the counterclaim; the judgment is affirmed as to the denial of the motion to open the judgment of strict foreclosure, and the case is remanded for the purpose of setting new law days.

BRYAN JORDAN *v.* COMMISSIONER OF CORRECTION (AC 42250)

Lavine, Prescott and Sheldon, Js.

Syllabus

The petitioner, who previously had been convicted of the crimes of manslaughter in the first degree with a firearm and carrying a pistol or revolver without a permit, sought a writ of habeas corpus, claiming that his trial counsel, D, provided ineffective assistance. He claimed, inter alia, that D was deficient in failing to adequately investigate and present available witnesses in support of his claim of self-defense and by failing to raise the defense of third-party culpability. D died prior to the petitioner's habeas trial and, thus, the habeas trial did not hear testimony regarding D's investigative efforts, trial strategy, or other tactical decisions. The habeas court rendered judgment granting the habeas petition, from which the respondent, the Commissioner of Correction, on the granting of certification, appealed to this court. *Held*:

1. The habeas court improperly concluded that D provided constitutionally deficient representation with regard to the petitioner's self-defense claim: the petitioner failed to meet his burden of demonstrating that D's investigation or decision not to call certain witnesses constituted deficient performance as he failed to present testimony regarding D's investigative efforts and, thus, failed to overcome the strong presumption that D engaged in an objectively reasonable investigation, and he failed to present any evidence regarding D's trial strategy and, thus, failed to overcome the presumption that any decision not to call certain witnesses was sound trial strategy; furthermore, the habeas court's conclusion that the witnesses who testified at the habeas trial were credible and could have lent additional support to the petitioner's claim of self-defense was premature in the absence of a determination that D's performance was deficient.
2. The habeas court improperly determined that D provided ineffective assistance because she failed to pursue a third-party culpability defense: the court failed to consider whether D's decision might be viewed as a reasonable strategic decision and the petitioner failed to present evidence that this decision constituted deficient performance; the record was clear that, although D did not request a third-party culpability instruction, she did argue to the jury that the victim was killed by a bullet fired by someone other than the petitioner, and there were a number of reasons why D may have chosen to present the third-party culpability defense in this manner.

Argued November 12, 2019—officially released June 9, 2020

Procedural History

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

James A. Killen, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Rebecca A. Barry*, supervisory assistant state's attorney, for the appellant (respondent).

Daniel J. Krisch, assigned counsel, for the appellee (petitioner).

Opinion

PRESCOTT, J. This appeal highlights the significant hurdle a habeas corpus petitioner faces in seeking to prove a claim of ineffective assistance of trial counsel after trial counsel has died and, thus, is unavailable to provide evidence of counsel's strategic decisions regarding, inter alia, the pursuit of defenses for her client and calling witnesses in support of those defenses. The death of the petitioner's trial counsel prior to a habeas corpus trial, however, does not absolve a petitioner of his heavy burden of overcoming the strong presumption that counsel provided effective assistance. See *Strickland* v. *Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *Slevin* v. *United States*, 71 F. Supp. 2d 348, 358 n.9 (S.D.N.Y. 1999) ("[b]ecause the death of a petitioner's trial counsel is just as, if not more, likely to prejudice the respondent, it does not relieve the petitioner of his heavy burden of proving ineffective assistance" (internal quotation marks omitted)), aff'd, 234 F.3d 1263 (2d Cir. 2000).

The respondent, the Commissioner of Correction, appeals from the judgment of the habeas court granting a petition for a writ of habeas corpus filed by the petitioner, Bryan Jordan. The respondent claims on appeal that the habeas court improperly determined that the petitioner's trial counsel rendered ineffective legal assistance by failing to investigate adequately and to present available witnesses in support of the petitioner's claim of self-defense and, alternatively, by failing to raise the defense of third-party culpability. We agree with the respondent that the habeas court failed to hold the petitioner to the requisite burden of proof and, accordingly, reverse the judgment of the habeas court.

In the underlying criminal matter, the petitioner was charged with murder in violation of General Statutes § 53a-54a (a) and carrying a pistol or revolver without a permit in violation of General Statutes § 29-35. A jury found the petitioner not guilty of murder, but guilty of the lesser included offense of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a). The jury also found the petitioner guilty of carrying a pistol or revolver without a permit. The court sentenced the petitioner to a total effective sentence of forty-five years of imprisonment.[1]

This court briefly summarized the facts underlying the petitioner's criminal conviction in its opinion affirming the judgment of conviction. See *State* v. *Jordan*, 117 Conn. App. 160, 161 978 A.2d 150, cert. denied, 294 Conn. 904, 982 A.2d 648 (2009). "The charges in this case stem from the shooting death of Curtis Hannons [(victim)] on September 19, 2005. On the day of the

[1] Specifically, the court sentenced the petitioner to the maximum permitted sentence of five years of imprisonment on the weapons charge, a class D felony; see General Statutes §§ 29-37 (b) and 53a-35a (8); which was ordered to run consecutively to the forty year maximum sentence of incarceration that the court imposed for the manslaughter charge. See General Statutes § 53a-35a (5).

shooting, the [petitioner], the victim and the victim's brother, [Jason Kelly, also known as Mookie] got into an argument. After the argument was broken up, the [petitioner] got into his car and left. A few minutes later, the [petitioner] returned, and another heated discussion took place with the victim. Several people congregated near the two and tried to calm down the [petitioner] and the victim. Three eyewitnesses gave slightly varying accounts of what happened next. All agreed that they heard a gunshot and that the [petitioner] then pulled out a gun and shot the victim once in the head. The [petitioner] ran away, and the witnesses heard about six or seven more gunshots. The victim was transported to a hospital, where he died. The [petitioner] was arrested in Georgia some time later." (Internal quotation marks omitted.) Id., 161–62.

On direct appeal, this court rejected the petitioner's claims that prosecutorial improprieties that occurred during the state's closing argument had deprived him of a fair trial[2] and that the trial court improperly had precluded him from presenting evidence regarding illegal drugs that were found on the victim. Id., 161, 170. In so concluding, this court indicated that "the state's case [against the petitioner] was strong" and "[t]here was sufficient testimony for the jury to conclude that the [petitioner had not been] acting in self-defense . . . ." Id., 170.

[2] In particular, this court concluded that the prosecutor improperly had argued to the jury that the jury could infer the defendant's intent from the "extra effort" and "more conscious action" it takes to fire a revolver rather than a semiautomatic pistol because the state's firearms expert never testified to those particular facts. *State* v. *Jordan*, supra, 117 Conn. App. 166. This court also concluded that, under the circumstances presented, the prosecutor's repetitive use of the rhetorical phrase "doesn't it offend your common sense" was improper. Id., 167. Despite those improprieties, however, this court determined on the basis of our analysis of the various factors set forth in *State* v. *Williams*, 204 Conn. 523, 535–40, 529 A.2d 653 (1987), that the defendant was not deprived of his right to a fair trial. See *State* v. *Jordan*, supra, 168–70.

The petitioner filed the underlying petition for a writ of habeas corpus on February 11, 2015, which was his third habeas petition challenging his manslaughter conviction.[3] Appointed habeas counsel filed the operative eight count revised amended petition on September 26, 2017. Count one alleged that the petitioner's criminal trial counsel, Diane Polan, had provided ineffective assistance of counsel by failing to conduct a proper investigation and by failing to present available evidence supporting the petitioner's assertion that he had shot the victim in self-defense. Count two alleged that Polan also had provided ineffective assistance by failing to impeach one of the state's witnesses, Detective Clarence Willoughby, who had conducted the police investigation of the shooting. Count three alleged a *Brady* violation[4] regarding the state's alleged failure to disclose potential impeachment evidence pertaining to Willoughby. Count four alleged ineffective assistance of counsel by Polan premised on her failure to raise a third-party culpability defense. Count five alleged that Polan provided ineffective assistance of counsel with respect to an issue of alleged juror misconduct. Count six alleged a second *Brady* violation, this one premised on the state's failure to correct allegedly false testimony by one of its witnesses. Count seven alleged that Polan provided ineffective assistance by failing to object to the

[3] The habeas court permitted the petitioner to withdraw the two prior habeas petitions without prejudice, both times just before the start of a trial on the merits. The petitioner also filed a fourth habeas petition subsequent to the present petition in which he alleged that the respondent had entered into, and subsequently breached, an agreement to award him certain earned risk reduction credits. That fourth petition was dismissed by the habeas court. See *Jordan* v. *Commissioner of Correction*, 190 Conn. App. 557, 558, 211 A.3d 115 (affirming judgment of habeas court on ground that petition had failed to implicate cognizable liberty interest sufficient to invoke subject matter jurisdiction of habeas court), cert. denied, 333 Conn. 905, 215 A.3d 159 (2019).

[4] See *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

prosecutorial impropriety that occurred during closing argument or to request a curative instruction with respect to that impropriety. Finally, count eight alleged that the state improperly failed to disclose evidence of pending criminal charges against one of the state's witnesses. The respondent filed a return that left the petitioner to his proof on all counts of the petition.[5]

The habeas court, *Kwak*, *J.*, conducted a trial on January 22 and February 5, 2018. Significantly, the habeas court did not hear any testimony from Polan regarding her investigative efforts, trial strategy, and other tactical decisions because she had died prior to the habeas trial. Rather, the habeas court heard testimony from the petitioner and eight additional witnesses called on his behalf. Specifically, the petitioner elicited testimony from Polan's former private investigator, Mike O'Donnell, and Attorney Robert McKay, who testified as the petitioner's expert witness on professional standards. The court also heard testimony from the following six witnesses, all of whom allegedly had witnessed events at or around the time of the shooting, but whom Polan did not call to testify at the criminal trial: Alexis Jordan, the petitioner's niece; the petitioner's sisters, Jymisha Freeman and Audrey Jordan; Flonda Jones, a friend of both the petitioner and the victim; James Walker, a relative of the victim; and Billy

[5] The respondent also raised the defense of abuse of the writ. In support of that defense, the respondent asserted that the petitioner raised the same issues in the current habeas petition that he had raised in two prior petitions, each of which he had withdrawn on the day trial was scheduled to commence, purportedly due to the unavailability of witnesses. "Decisions concerning abuse of the writ are addressed to the sound discretion of the trial court." *James L.* v. *Commissioner of Correction*, 245 Conn. 132, 143, 712 A.2d 947, 953 (1998); see id., 140 n.8 (noting that successive petitions are not necessarily abuse of writ but declining to "delineate how these two habeas doctrines differ or overlap"). The respondent did not pursue the abuse of the writ defense in his posttrial brief, and the habeas court did not address that defense in its decision on the merits. Because the respondent has not raised abuse of the writ as an issue on appeal, we deem it abandoned.

Wright, an acquaintance of both the petitioner and the victim. The court also admitted into evidence as full exhibits copies of the transcripts of the entire criminal trial. A written statement given by Jones to O'Donnell prior to the criminal trial also was admitted as a full exhibit.

Following the habeas trial, both parties submitted posttrial briefs, and the petitioner filed a posttrial reply brief. In his posttrial brief, the petitioner withdrew counts three, five, six, and eight of his petition, electing to pursue only the remaining four counts, all of which alleged ineffective assistance by Polan as trial counsel.

The habeas court issued a memorandum of decision on October 1, 2018, in which it granted the petition for a writ of habeas corpus on the basis of two of the four counts of ineffective assistance. Specifically, the habeas court determined that, with respect to counts one and four, the petitioner had met his burden of demonstrating that Polan had rendered constitutionally deficient performance by failing to investigate properly or to present available evidence in support of the petitioner's claim of self-defense and by failing properly to investigate, raise, or present evidence in support of a third-party culpability defense. The habeas court further determined that the petitioner had demonstrated that these deficiencies in counsel's performance had prejudiced him by unduly diminishing his due process right to establish a defense. The habeas court rejected the petitioner's other claims of ineffective assistance.[6] The

[6] As part of his preliminary papers on appeal, the petitioner raised as an alternative ground for affirmance pursuant to Practice Book § 63-4 (a) (1) that the habeas court also should have granted the petition on the basis of Polan's having allowed her chief investigator, O'Donnell, to assist her at counsel table during the trial. The habeas court had found that Polan's decision to allow O'Donnell to sit at counsel table was unreasonable as a defense strategy and, thus, amounted to deficient performance, because, as a result of the criminal court's sequestration order, Polan was precluded from calling O'Donnell to impeach a witness who testified at trial inconsistently with a pretrial statement made to O'Donnell. The habeas court, how-

habeas court vacated the petitioner's manslaughter conviction and remanded the matter to the trial court for further proceedings. Following the granting of his petition for certification to appeal,[7] the respondent filed the present appeal. Additional facts will be set forth as needed.

I

We begin our discussion by setting forth guiding principles of law as well as our standard of review, which are well settled. "A criminal defendant's right to the effective assistance of counsel extends through the first appeal of right and is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution.

ever, concluded that the petitioner had failed to demonstrate that he was unduly prejudiced by Polan's decision. Because the petitioner did not brief this alternative ground for affirmance in his appellee's brief, we deem it abandoned. See *State* v. *Rowe*, 279 Conn. 139, 143 n.1, 900 A.2d 1276 (2006).

[7] The respondent filed a petition for certification to appeal on October 15, 2018. The habeas court initially denied the petition on October 16, 2018, without explanation. In response to that ruling, the respondent filed a motion for articulation asking the court to state the basis for its denial of the petition for certification. In that motion, the respondent sought to excuse any perceived delay in the filing of the petition by noting that counsel for the respondent had been out of the country, that counsel was informed by the clerk's office that it measured the ten day filing period governing petitions for certification to appeal as set forth in General Statutes § 52-470 (g) by counting business days, not calendar days (which would mean the October 15, 2018 petition was timely filed), and that counsel filed the petition immediately after returning to the office. The habeas court, in response to the motion for articulation, issued an order on October 25, 2018, vacating its prior order and granting the respondent's petition for certification to appeal. The court explained that, although, in its view, it properly had interpreted the ten day statutory filing deadline to mean ten calendar days, it nonetheless had reconsidered its earlier ruling in light of the facts set forth in the motion for articulation and because the time period for filing a petition for certification to appeal is not jurisdictional in nature. See *Iovieno* v. *Commissioner of Correction*, 242 Conn. 689, 700, 699 A.2d 1003 (1997) (holding that whether to entertain untimely petition for certification fell within court's discretion, to be exercised after considering reasons for delay).

. . .[8] To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment." (Citations omitted; footnote added; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 712–13, 946 A.2d 1203, cert. denied sub nom., *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). "To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong." (Internal quotation marks omitted.) *Antwon W.* v. *Commissioner of Correction*, 172 Conn. App. 843, 849–50, 163 A.3d 1223, cert. denied, 326 Conn. 909, 164 A.3d 680 (2017).

On appeal, "[a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts

[8] "[T]he state and federal constitutional standards for review of ineffective assistance of counsel claims are identical" and the rights afforded are "essentially coextensive" in nature and, thus, do not require separate analysis. (Internal quotation marks omitted.) *State* v. *Drakeford*, 261 Conn. 420, 431, 802 A.2d 844 (2002), citing *State* v. *Fernandez*, 254 Conn. 637, 652, 758 A.2d 842 (2000), cert. denied, 532 U.S. 913, 121 S. Ct. 1247, 149 L. Ed. 2d 153 (2001).

of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Internal quotation marks omitted.) *Gonzalez* v. *Commissioner of Correction*, 308 Conn. 463, 469–70, 68 A.3d 624, cert. denied sub nom. *Dzurenda* v. *Gonzalez*, 571 U.S. 1045, 134 S. Ct. 639, 187 L. Ed. 2d 445 (2013).

Because our resolution of the present case turns on our review of the performance prong, some additional explication of that prong is necessary.[9] "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable. . . . Nevertheless, [j]udicial scrutiny of counsel's performance *must be highly deferential*. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court *must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance*; that is, the [petitioner] must overcome the presumption that, under the

[9] Because we determine on the basis of our plenary review that the petitioner failed to satisfy his burden under the performance prong of *Strickland*, it is unnecessary for us to reach the respondent's claim that the petitioner also failed to satisfy the prejudice prong. See *Antwon W.* v. *Commissioner of Correction*, supra, 172 Conn. App. 858.

circumstances, the challenged action *might* be considered sound trial strategy. . . .

"Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. . . . At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . .

"Inasmuch as [c]onstitutionally adequate assistance of counsel includes competent pretrial investigation . . . [e]ffective assistance of counsel imposes an obligation [on] the attorney to investigate all surrounding circumstances of the case and to explore all avenues that may potentially lead to facts relevant to the defense of the case. . . .

"Nevertheless, strategic choices made after thorough investigation of law and facts relevant to plausible options *are virtually unchallengeable*; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

"The reasonableness of counsel's actions may be determined or substantially influenced by the [petitioner's] own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the [petitioner] and on information

supplied by the [petitioner]. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. . . .

"Defense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of the witness and that the attorney, without a reasonable investigation *and without adequate explanation*, failed to call the witness at trial. The reasonableness of an investigation must be evaluated not through hindsight but from the perspective of the attorney when he was conducting it. . . . Furthermore, [t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense. . . .

"Finally, our habeas corpus jurisprudence reveals several scenarios in which courts will not second-guess defense counsel's decision not to investigate or call certain witnesses or to investigate potential defenses, such as when: (1) counsel learns of the substance of the witness' testimony and determines that calling that witness is unnecessary or potentially harmful to the case; (2) the defendant provides some information, but omits any reference to a specific individual who is later determined to have exculpatory evidence such that counsel could not reasonably have been expected to have discovered that witness without having received

further information from his client; or (3) the petitioner fails to present, at the habeas hearing, evidence or the testimony of witnesses that he argues counsel reasonably should have discovered during the pretrial investigation." (Citations omitted; emphasis added; footnotes omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 679–82, 51 A.3d 948 (2012); see also *Meletrich* v. *Commissioner of Correction*, 332 Conn. 615, 628, 212 A.3d 678 (2019) ("decision whether to call a particular witness falls into the realm of trial strategy, which is typically left to the discretion of trial counsel" (internal quotation marks omitted)).

"[T]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." (Internal quotation marks omitted.) *Meletrich* v. *Commissioner of Correction*, supra, 332 Conn. 637. The United States Supreme Court has cautioned that a reviewing court, in considering whether an attorney's performance fell below a constitutionally acceptable level of competence pursuant to the standards set forth herein, must "properly apply the strong presumption of competence that *Strickland* mandates" and is "*required* not simply to give [trial counsel] the benefit of the doubt . . . but *to affirmatively entertain the range of possible reasons* [*that*] *counsel may have had for proceeding as* [*she*] *did*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Cullen* v. *Pinholster*, 563 U.S. 170, 196, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011). This strong presumption of professional competence extends to counsel's investigative efforts; see *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 698, 27 A.3d 86, cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011); as well as to choices made by counsel regarding what defense strategy to pursue. See *Veal* v. *Warden*, 28 Conn. App. 425, 434, 611 A.2d

911, cert. denied, 224 Conn. 902, 615 A.2d 1046 (1992). With the foregoing legal principles in mind, we turn to our discussion of the merits of the respondent's claims on appeal.

II

The respondent first claims that the habeas court improperly determined that Polan rendered ineffective assistance of counsel with respect to the petitioner's claim of self-defense. Specifically, the respondent argues that the habeas court's determination that Polan failed to investigate adequately the shooting and to interview potential witnesses whose testimony could have supported the petitioner's self-defense claim was wholly unsupported by the record presented. Furthermore, the respondent argues that the habeas court never expressly considered if Polan may have had a reasonable and strategically sound basis for not calling certain witnesses, including Jones, as self-defense witnesses during the criminal trial and, to the extent that a negative answer to that question is implicit in the court's ruling, neither the law nor the facts of this case supports it. We agree that the habeas court improperly concluded that Polan's handling of the petitioner's self-defense claim necessarily fell below the minimal constitutional standard required by the sixth amendment.

A

We first set forth the well settled substantive principles underlying a defendant's claim of self-defense. In Connecticut, self-defense is codified in General Statutes § 53a-19. "As interpreted by our Supreme Court, § 53a-19 (a) provides that a person may justifiably use deadly physical force in self-defense only if he reasonably believes both that (1) his attacker is using or about to use deadly physical force against him, or is inflicting or about to inflict great bodily harm, and (2) that deadly

physical force is necessary to repel such attack." (Emphasis omitted; footnote omitted; internal quotation marks omitted.) *Miller* v. *Commissioner of Correction*, 154 Conn. App. 78, 88–89, 105 A.3d 294 (2014), cert. denied, 315 Conn. 920, 107 A.3d 959 (2015).

Our self-defense statute nonetheless also provides that "a person is not justified in using deadly physical force if he or she knows that he or she can avoid the necessity of using such force with complete safety . . . by retreating." General Statutes § 53a-19 (b) (1). "Thus, a defendant who raises a claim of self-defense is required to retreat in lieu of using deadly physical force if the state establishes beyond a reasonable doubt that a completely safe retreat was available and that the defendant actually was aware of it." *State* v. *Saunders*, 267 Conn. 363, 374, 838 A.2d 186, cert. denied, 541 U.S. 1036, 124 S. Ct. 2113, 158 L. Ed. 2d 722 (2004).

Furthermore, "[a] defendant who acts as an initial aggressor is not entitled to the protection of the defense of self-defense . . . [unless] he withdraws from the [initial] encounter and effectively communicates to such other person his intent to do so." (Citations omitted; internal quotation marks omitted.) *State* v. *Berrios*, 187 Conn. App. 661, 715, 203 A.3d 571, cert. denied, 331 Conn. 917, 204 A.3d 1159 (2019); see General Statutes § 53a-19 (c). Importantly, "a person may respond with physical force to a reasonably perceived threat of physical force without becoming the initial aggressor and forfeiting the defense of self-defense. Otherwise, in order to avoid being labeled the aggressor, a person would have to stand by meekly and wait until an assailant struck the first blow before responding. If an assailant were intending to employ deadly force or inflict great bodily harm, such an interpretation of the statute would be extremely dangerous to one's health. Such a bizarre result could not have been intended by the

legislature." *State* v. *Jimenez*, 228 Conn. 335, 341, 636 A.2d 782 (1994).[10]

"[A] defendant has no burden of persuasion for a claim of self-defense; he has only a burden of production. That is, he merely is required to introduce sufficient evidence to warrant presenting his claim of self-defense to the jury. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt. . . . Accordingly, [u]pon

[10] The criminal trial court's detailed instructions to the jury on self-defense included the following instructions pertaining to the initial aggressor exception to self-defense as well as the statutory duty to retreat. "The initial aggressor is the person who first acts in such a manner that creates a reasonable belief in another person's mind that physical force is about to be used upon that other person. The first person to use physical force is not necessarily the initial aggressor.

"Before an initial aggressor can . . . use any physical force, the initial aggressor must withdraw or abandon the conflict in such a way that the fact of withdrawal is perceived by his opponent so that such opponent is aware that there is no longer any danger from the original aggression.

"If the initial aggressor so withdraws or abandons the conflict and his opponent not withstanding continues or threatens the use of physical force, the initial aggressor may be justified in using physical force to defend himself.

"If you find that the state has proven beyond a reasonable doubt that the defendant was the initial aggressor and that the defendant did not effectively withdraw from the encounter or abandon it in such a way that his opponent knew he was no longer in any danger from the defendant, you shall then find the defendant was not justified in using any physical force.

* * *

"[A] person is not justified in using deadly physical force upon another person if he knows he can avoid the necessity of using such force by retreating with complete safety. This means that retreat was both completely safe . . . and available and that the defendant knew it.

"Completely safe means without any injury to him whatsoever. As I have said, self-defense requires you to focus on the person claiming self-defense, on what he reasonably believed under the circumstances, and it presents a question of fact as to whether a retreat with complete safety was available and whether the defendant knew it.

"The law stresses that self-defense cannot be retaliatory. It must be defensive and not punitive. So you must ask yourself, did the defendant know he could avoid the use of deadly force by retreating with complete safety? If so and yet he chose to pursue the use of deadly force then you shall reject that self-defense claim."

a valid claim of self-defense, a defendant is entitled to proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified. . . . As these principles indicate, therefore, only the state has a burden of persuasion regarding a self-defense claim: it must disprove the claim beyond a reasonable doubt." (Internal quotation marks omitted.) *Miller* v. *Commissioner of Correction*, supra, 154 Conn. App. 90–91.

B

We next discuss the state's and the defense's theories of the underlying criminal case, which are necessary to place our subsequent analysis in its proper context. At the criminal trial, the state advanced the following theory of the case to the jury during its closing argument. The petitioner and the victim, who were acquaintances, had become engaged in an argument in an area outside the housing projects on South Genesee Street. The victim's brother, Mookie, initially was involved in the argument. A number of area residents were present and observed all or part of the events at issue and attempted to defuse the situation. Although the initial argument between the petitioner, the victim, and Mookie ended with the petitioner leaving the area in his car, he returned shortly afterward and the confrontation between him and the victim resumed. According to multiple eyewitnesses, the confrontation ended after a bystander to the argument fired a shot, at which point the petitioner drew a gun and fired it at the victim, who was standing only a few feet in front of him. The victim, who had attempted to duck or turn away from the petitioner just prior to the petitioner shooting, was struck by a bullet that entered his skull just above his right ear and exited the upper left side of his skull. The victim fell to the ground only after the petitioner fired his gun at the victim, and a forensic examination of

the stippling around the wound demonstrated that the bullet that hit the victim had been fired from close range. The petitioner not only fled the immediate scene but also could not be located by law enforcement personnel investigating the shooting because he left the state, which the state claimed evidenced his consciousness of guilt and supported its claim that he did not act in self-defense.

The defense attacked the state's case first by challenging the credibility of the state's witnesses and pointing out the numerous factual inconsistencies in their testimony about the shooting, which the defense argued created reasonable doubt as to the trustworthiness of the evidence presented as a whole. The defense also argued that it was the victim, and not the petitioner, who had restarted the argument after initially walking away from the confrontation. Although not disputing that he had been armed or even that he had fired his gun, the petitioner asserted that he had fired only out of fear for his life in response to the first shot fired, which had hit the ground near his feet. The petitioner argued that events happened so fast that he never formed any specific intent to kill or cause serious physical injury to anyone, including the victim. Further, he argued on the basis of the autopsy evidence regarding the trajectory of the bullet that struck the victim, coupled with the fact that no bullets or casings were ever recovered, that reasonable doubt clearly existed about whether his bullet had struck the victim rather than a bullet fired by someone else, perhaps even a ricochet from the first shot fired. Finally, he argued that he was not the initial aggressor and that he reasonably believed, on the basis of his observations, that the victim and others present were armed and that his own life was in danger at the time he fired his weapon and, accordingly, his actions were justified as self-defense.

The state rebutted the petitioner's claim of self-defense, arguing to the jury that the evidence presented at trial established beyond a reasonable doubt that the petitioner's belief that he needed to use deadly physical force under the circumstances was objectively unreasonable. The state also asserted that it had established that the petitioner was the initial aggressor and that he had failed effectively to retreat from the conflict but, instead, having briefly left, had returned to continue the confrontation.

C

Our de novo consideration of whether Polan's efforts to prepare and present the petitioner's self-defense claim were objectively reasonable under the circumstances necessitates that we begin with a more comprehensive discussion of the evidence of self-defense that was before the jury at the criminal trial. Only after considering the evidence actually presented to the jury can we properly assess the significance of the evidence presented by the petitioner at the habeas trial and, in particular, the testimony provided by those habeas witnesses whom the petitioner offered in support of his allegations that Polan had not conducted a proper investigation and improperly had failed to call as a trial witness at least one eyewitness to the shooting whom Polan knew of and had subpoenaed for trial.

Roger B. Williams, Sr., was a key witness for the state at the petitioner's criminal trial. Williams lived in the area of the shooting and knew both the victim and the petitioner. He testified that he was present throughout the relevant events and saw the petitioner shoot the victim. During the confrontation that took place shortly before the first shot was fired, Williams stated that the petitioner was standing only a few feet in front of the victim. According to Williams, Wright, Mookie, and others were all nearby during that initial confrontation

between the petitioner and the victim. Mookie, however, was no longer present when the argument continued and the victim was shot. According to Williams, both the victim and Wright pulled out their guns before the petitioner. Next, a shot was fired, ostensibly by Wright,[11] and the petitioner then pulled out a gun, pointed it at the victim, and fired. Williams testified that the victim, having seen the petitioner drawing his gun, "kinda threw his hands up and turned, turned away from him." The victim did not fall to the ground until after the petitioner fired his weapon. Williams' testimony, if credited by the jury, could have demonstrated that the victim and others nearby were armed at the time the victim was shot and that the victim had drawn a weapon before the petitioner fired a shot. This evidence, if credited, supported the petitioner's claim that he feared that deadly force was about to be used against him and that he had fired only in self-defense. Williams' testimony also tended to show that the petitioner had not fired first, and thus that he may have done so in response to the initial shot fired.

Kimberly Stevenson also was called by the state as a witness at the petitioner's criminal trial. The victim and Stevenson had children together. She testified that she was looking out her bedroom window at the time of the shooting. She stated that she had spent the afternoon leading up to the shooting with the victim and that she never saw him with a gun during that time. She said that she only heard the first gunshot and did not see who fired it. She claimed that, after hearing that first shot, however, she saw the petitioner pull a revolver from his pants and fire at the victim's head.

[11] We note that the state's theory of the case did not turn on the identity of who fired the first shot. Williams' trial testimony implicated Wright without directly identifying him as the shooter, whereas at least one of the habeas witnesses indicated that the first shooter was Mookie.

On cross-examination, Stevenson, like Williams, testified that Mookie was not present at the time the shooting occurred. She also denied that she had told O'Donnell prior to trial that she had seen Wright with a gun in his hand at the time the first shot was fired. Similar to Williams, Stevenson indicated that the victim was turning away from the petitioner when he was shot. Although Stevenson's testimony was damaging to the petitioner in some ways, she testified consistently with other witnesses that a shot was fired before the petitioner shot the victim, thereby lending some support to the defense claim that the petitioner feared for his life and fired in response to a perceived threat.

Andre Martin, who was a friend of the petitioner and an eyewitness to the shooting, was called to testify at the criminal trial by the state but indicated on the stand that he had no memory of what had transpired at the time of the shooting. Pursuant to § 6-10 of the Connecticut Code of Evidence and *State* v. *Whelan*, 200 Conn. 743, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), the criminal trial court admitted into evidence for substantive purposes a transcript of a recorded oral statement given by Martin to the police.[12] In that statement, Martin indicated that he saw the petitioner draw a gun, point it at the victim, and then fire one shot. Martin's testimony was particularly damaging to the defense, but Polan, through her cross-examination of Martin, attempted to discredit the veracity of Martin's statement to the police by drawing the jury's attention to the fact that the statement was given while Martin was in custody on charges unrelated to the present case and facing a charge of violation of probation.

[12] Neither the transcript of Martin's statement nor the tape recording itself, both of which were admitted as full exhibits at the criminal trial, was submitted as an exhibit at the habeas trial and, thus, any review of the contents of Martin's statement is limited to that portion described on the record at the criminal trial.

Two officers who responded to the scene shortly after the shooting, Matthew Myers and Willie Ponteau, each testified at trial on behalf of the state. Ponteau, who lived near the crime scene and was home at the time of the shooting, heard two gunshots fired in close succession to one another, which were then followed by multiple shots. Although Ponteau had no way of knowing who fired the shots that he heard, his testimony regarding the number of shots and their timing relative to one another was not inconsistent with the testimony of other witnesses who indicated that the petitioner had fired immediately after the initial shot. Both officers testified that they did not observe any type of weapon on or near the victim. Ponteau, however, remembered seeing Stevenson near the body when he arrived and, on cross-examination by Polan, Ponteau admitted that he had no knowledge of whether someone may have removed a gun from the victim before the police arrived. This testimony did not undermine other evidence that the victim had been armed, which lent support to the defense argument that the petitioner reasonably feared that he was in danger of having deadly force used against him when he shot the victim.

The petitioner testified on his own behalf in support of his claim of self-defense. According to the petitioner, before the first gunshot was fired, he was standing about five feet away from, and directly in front of, the victim. The petitioner did not know whether the victim actually had a gun but had observed him fumbling with his pocket in a way that suggested he might be armed. The petitioner also indicated that he believed Mookie had a gun based on "the way he was acting." The petitioner testified that he pulled out his handgun only in response to the first gunshot and fired it in the direction of the victim because he believed that that was the direction from which the first shot had been fired. According to the petitioner, the victim was still standing

after the petitioner fired and started running away from the scene.

The state, through its cross-examination of the petitioner, was able to undermine the petitioner's direct testimony. Specifically with respect to his self-defense claim, the state was able to undermine the petitioner's assertion that he was in fear when he fired at the victim, getting him to admit that he was familiar with guns, he often carried one, he had heard gunshots fired near him in the past and, in fact, he "had been shot at before." The petitioner also testified on cross-examination that, on the day of the shooting, he was not always sure when he was in actual possession of his gun, indicating that sometimes he left it in the glove compartment of his vehicle. Although the petitioner never disputed having a weapon or firing it toward the victim, the jury reasonably could have inferred from his testimony that he may not have had his gun when the argument with the victim first begun and that he left the argument initially only to return to his car and retrieve his gun, facts relevant both to the duty to retreat and to whether the petitioner was the initial aggressor. Finally, the jury was provided with testimony from Susan Williams, the medical examiner who performed the autopsy of the victim. She provided testimony that the victim had a one-quarter inch entrance wound on the right side of his head, approximately two inches above and behind his right ear, and an approximately three inch exit wound on the left side of his forehead. She described the path of the bullet that made the wounds as travelling "leftward, forward, and slightly upward." She further explained that stippling around the entrance wound, which is caused when gunpowder expelled along with the bullet abrades the skin, indicated that the gun from which the bullet had come was fired within approximately two feet of the victim. The evidence concerning the trajectory and location of the bullet wound provided

a basis for Polan to suggest to the jury that reasonable doubt existed concerning the source of the bullet that killed the victim. Specifically, it tended to support an argument that the bullet could not have come from the petitioner's weapon because he was standing directly in front of the victim when he fired, rather than to the victim's right. It was also consistent with the defense theory that it was the result of a ricochet from the first shot fired because the bullet entered the right side of the victim's skull travelling upward. Of course, both arguments failed to account for the testimony that the victim had been turning away from the petitioner when the petitioner fired or for the presence of the stippling, which tended to show that the wound had been caused by a bullet fired directly from a weapon at close range.

Polan, attempting to capitalize on the inconsistent factual testimony of the state's own witnesses, began her closing argument by attempting to persuade the jury that there was reasonable doubt about what had occurred, including as to whether the state had proven that the petitioner intended to kill the victim when he fired his weapon or whether it was the petitioner's bullet that killed the victim. Polan later also advanced the argument that, even if the petitioner's bullet had hit the victim, the petitioner had fired his weapon in self-defense. Polan emphasized to the jury that as long as the petitioner had presented some evidence that would support his claim of self-defense, the burden shifted to the state to disprove self-defense beyond a reasonable doubt, which Polan argued the state had failed to do. She highlighted the petitioner's testimony that he believed he was in imminent danger of being shot, and, in fact, that he initially thought that he had been shot. She also noted that the state could not demonstrate that the petitioner's belief was objectively unreasonable because all of the state's witnesses had testified that

someone else had fired a shot before the petitioner discharged his weapon.

Polan also highlighted Williams' testimony that the first shot hit the dirt near the petitioner's feet. Polan argued to the jury that the state could not prove that the petitioner had used unreasonable force under the circumstances when he fired his gun, stating that it was undisputed that the petitioner was being shot at, the petitioner "had his back against the wall, there was no way he could get out, and he used deadly force because deadly force was being used against him." She argued that although the state could defeat the petitioner's self-defense claim if it could prove that the petitioner had been the initial aggressor, the evidence did not support such a finding beyond a reasonable doubt. She stated: "There is no evidence in this case that [the petitioner] drew his weapon or made any movement [as] if he was going to draw a weapon before either [the victim] was reaching for his pocket as [Williams] says or a shot was fired at [the petitioner's] feet, that's the reality."

Polan ended her closing argument by summarizing her theory of the defense, stating: "This is a tragic killing, it's a tragedy that [the victim] is . . . not with us today but it's not a murder. It's not a murder because the state cannot prove the specific intent to kill beyond a reasonable doubt and again there is ample evidence here that [the petitioner] acted in self-defense. He was shot at [and] didn't know where the shots were coming from. It all happened so quickly that he did not form a specific intent to kill [the victim]. Yes, he shot in his direction he told you that when he testified here yesterday but his intent was not to kill [the victim]. [His] intent was to protect himself." After the state's rebuttal argument, the court instructed the jury on the law, which included a detailed and lengthy instruction on self-defense. See footnote 10 of this opinion. Ultimately, the jury acquitted the petitioner of the murder

charge, but found him guilty of the lesser included offense of manslaughter in the first degree with a firearm, rejecting the petitioner's self-defense argument.

By way of summary, and as this court indicated in deciding the petitioner's direct criminal appeal, the trial witnesses gave partially conflicting or inconsistent accounts of the shooting. Their testimony differed as to who was present when the victim was shot, where people were standing with respect to one another, and who was carrying a weapon. Although the state's case against the petitioner was strong, consisting of more than one eyewitness who observed the petitioner shoot the victim in the head at close range, sufficient evidence nonetheless was introduced to the jury through those same witnesses that, if credited by the jury, could have supported the petitioner's claim that he nonetheless had acted in self-defense. The jury ultimately concluded in convicting the petitioner of manslaughter in the first degree with a firearm that the state had disproven self-defense beyond a reasonable doubt. Nevertheless, our review of the criminal trial transcripts does not reflect any evidence from which reasonably to conclude that Polan either lacked adequate preparation for trial or was not knowledgeable about the facts of the case. In fact, Polan made effective use of the available evidence in her closing argument to the jury.

D

Turning to the habeas proceedings, the habeas court nevertheless concluded that Polan had provided ineffective assistance with respect to the petitioner's claim of self-defense. The habeas court based that conclusion principally on two reasons. First, the habeas court concluded that Polan had not conducted an adequate pretrial investigation, which, according to the court, resulted in her having failed to discover several additional witnesses that the habeas court concluded would

have helped her raise reasonable doubt regarding self-defense. In reaching that conclusion, the habeas court appears to have relied exclusively on the testimony of the witnesses offered by the petitioner at the habeas trial, whom the habeas court found to be credible. The court specifically attributed Polan's failure to call the witnesses whom the petitioner presented at the habeas trial to "Polan's deficient investigation." Second, the habeas court concluded that Polan acted deficiently by not calling Jones to testify at the criminal trial, although Polan allegedly knew of Jones and had subpoenaed her as a witness for trial.

The respondent, however, contends that the habeas court's findings regarding the investigation were clearly erroneous because they were unsupported by any evidence in the record and, in fact, suggests that the record directly contradicts the court's findings. The respondent also maintains that, although the court found the habeas witnesses credible, it failed to consider (1) whether Polan may have had an objectively reasonable strategic reason for not seeking out additional witnesses beyond those already identified by the state or through the efforts of her investigator or (2) whether knowledge of the habeas witnesses' testimony would have caused a reasonably competent defense counsel to have altered the defense strategy pursued at trial. We find the respondent's arguments persuasive, partly because the habeas court's conclusions are not supported by relevant and necessary factual findings regarding Polan's investigative efforts and partly because of the lack of any apparent consideration by the court of whether a sound strategic reason might have existed for Polan's decisions regarding various witnesses. Furthermore, the court's conclusions are legally and logically flawed because they impermissibly shift the evidentiary burden of persuasion away from the petitioner and to the respondent.

The flaws in the habeas court's conclusions are apparent from our review of the habeas trial transcripts. More specifically, they are apparent from the testimony of the witnesses on which the court relied in concluding (1) that Polan had failed to conduct a sufficient investigation of the shooting, and (2) that a proper investigation would have uncovered witnesses whose testimony would have bolstered in some significant way the petitioner's claim of self-defense. In considering that testimony, we focus our attention on what evidence the petitioner produced that directly pertained to Polan's investigative efforts, her knowledge or lack of knowledge of each particular witness, and, with respect to witnesses who were known or likely known to Polan, whether she may have had a reasonable strategic reason for not calling them to testify at the criminal trial. "Although it is incumbent on a trial counsel to conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . counsel need not track down each and every lead or personally investigate every evidentiary possibility. . . . In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation . . . but by demonstrable realities." (Internal quotation marks omitted.) *Johnson* v. *Commission of Correction*, 285 Conn. 556, 583–84, 941 A.2d 248 (2008).

1

The petitioner first called O'Donnell, Polan's investigator, to testify at the habeas trial. O'Donnell had very limited memory of his work in this matter. O'Donnell's testimony generally was unhelpful in establishing the petitioner's habeas claims because O'Donnell was unable to provide any insight into the extent of Polan's efforts to investigate or to locate witnesses in this case, or to describe the fruits of any discussions that Polan

had with the petitioner. Rather, O'Donnell's testimony tended to show that, at a minimum, Polan had taken the reasonable step of hiring an investigator to look into aspects of the case. Ultimately, although O'Donnell had sat with Polan at counsel table throughout the trial, his testimony was devoid of any insight into Polan's decision–making process in this case or her defense strategy. O'Donnell specifically indicated that he "never discussed the witness list with [Polan]." Certainly, nothing in his testimony aided the petitioner in proving his habeas claims.

2

Next, the petitioner presented testimony from three witnesses—Audrey Jordan, Alexis Jordan, and Jymisha Freeman—all of whom were closely related to each other and to the victim, and none of whom actually witnessed the shooting at issue. Because these three witnesses provided roughly the same factual testimony relative to the issue of self-defense, we address them together. It is important to stress at the outset that the habeas court made no subsidiary findings regarding whether Polan or O'Donnell knew of these witnesses, had spoken to them about the incident, the content of any conversation the defense may have had with the witnesses, or whether the witnesses' versions of events at that time differed from the version of facts to which they testified at the habeas trial. It was important for the petitioner to present these facts, particularly in light of Polan's unavailability, in order to overcome the presumption of constitutionally adequate performance.

Audrey is Alexis' mother and the sister of the petitioner and Jymisha. She testified at the habeas trial that she did not see the shooting, but only heard the gunfire from where she had been lying down inside her mother's house. She stated that when she arrived at the scene of the shooting, she saw Stevenson kneeling over the

victim's body and placed her hand on Stevenson's back. Audrey indicated that an unidentified person whispered something into Stevenson's ear, after which Stevenson went inside her house and brought back a white cloth. Stevenson used that cloth to pick up and wrap a gun that was lying within inches of the victim's body. Stevenson took the gun inside the house, then returned to her position beside the victim's body. Audrey indicated that she saw Williams at the scene but did not see Jones, who, as we will discuss later, also testified at the habeas trial as an eyewitness to the shooting. Audrey observed several bullet holes in the petitioner's car, which was still at the scene.

Alexis testified at the habeas trial that the petitioner was her uncle. She was eight years old at the time of the shooting, and testified that she did not witness the victim being shot. She only heard the gunshots, approximately ten in total, from where she was inside her grandmother's home. She stated that when she ran outside, she saw the victim lying on the ground and a gun lying a few inches from his body. She testified that she then saw Stevenson go inside the house and retrieve a cloth of some sort, which Stevenson used to wrap up the gun and remove it from the scene.

Jymisha Freeman is the petitioner's sister and Alexis' aunt. She was only ten or eleven years old at the time of the shooting, and testified at the habeas trial that she was with Alexis inside her mother's house when she heard more than ten gunshots. She followed Alexis outside after the gunfire stopped. She was standing farther back from the body than Alexis and never saw a gun herself. She testified, when asked on cross-examination, that she saw Stevenson exit her house with a towel or cloth, although she did not observe her do anything with it.

With respect to Polan's investigative efforts and her knowledge of these witnesses in particular, it cannot

reasonably be inferred from the testimony of these three witnesses that Polan failed to conduct a proper investigation or that she was unaware of what they could have told a jury if they had been called to testify at the criminal trial. Audrey testified that although she did not go to the police with her story, she eventually was interviewed by Detective Willoughby, who took notes of what she told him. She testified inconsistently about whether she also had provided a written statement. Importantly, she indicated that she spoke with both Polan and O'Donnell about what had happened on the day of the shooting, and that she was subpoenaed for trial but later was told that her testimony would not be needed. The petitioner never asked Audrey to testify about what she had told Polan or O'Donnell regarding the shooting. Alexis testified that she never had spoken with the police or any investigator about the incident, and could not recall if she ever had spoken to Polan. Similarly, Jymisha testified that she never spoke to the police and never spoke to Polan about the shooting. Audrey may have told Polan and O'Donnell not only about the details of the shooting but about Alexis' and Jymisha's presence that day and what they may have observed.

The petitioner, in his habeas trial testimony, also indicated that he had told Polan that he had seen Jymisha outside, so Polan also may have had this information when she spoke with Audrey. We do not know from this record whether these three witnesses' names also appeared in police reports, none of which were made part of the habeas record, or if they were mentioned to Polan or O'Donnell by prosecutors or other eyewitnesses. In light of the strong, albeit rebuttable, presumption that trial counsel's investigative efforts fall within the necessarily wide range of constitutionally adequate performance, it is unreasonable to infer that

Polan was unaware of these witnesses given the lack of evidence on this question.

Moreover, with respect to the petitioner's self-defense claim, these witnesses' testimony did not fill or implicate any critical or missing evidentiary element of self-defense. Their testimony, both independently and by way of corroboration of each other's testimony, only tended to demonstrate that a gun had been lying on the ground very near to the victim's body after he was shot, suggesting that it was the victim's gun and that he may have had it when he was shot. Williams, however, who testified on behalf of the state at the criminal trial and on whose testimony the state relied in support of its case, testified before the jury that the victim had drawn a gun prior to being shot by the petitioner. The habeas testimony regarding the presence of a gun after the fact was cumulative of, and not as compelling as, Williams' testimony, and certainly could not be considered essential to the defense.

Furthermore, whether the state successfully could disprove self-defense in this case did not depend on a determination of whether the victim *actually* had been armed, but only on the state disproving beyond a reasonable doubt that the petitioner had both a subjective and an objectively reasonable *belief* that the victim, or someone supporting the victim, was armed and about to use deadly force against the petitioner. Given Alexis' and Jymisha's young ages at the time of the shooting and the fact that the petitioner was a close family member to them and to Audrey, if Polan knew of their potential testimony, a fact that cannot be determined on this record, Polan reasonably may have made the strategic decision not to call them. After all, the state's own witnesses tended to establish at the criminal trial that persons other than the petitioner were armed, had drawn weapons, and had fired once prior to the petitioner firing his own gun. Although Polan's strategy with

respect to self-defense ultimately proved unsuccessful, that certainly did not render her strategic choices per se unreasonable.

3

We turn next to the habeas trial testimony provided by Jones. She testified at the habeas trial that she was a friend not only of the petitioner and his family, but also was friendly with the victim. She claimed that she was one of many persons present during the argument that preceded the victim being shot. According to Jones, during the argument with the victim, the petitioner stood only two or three feet in front of the victim. She testified that the victim's brother, Mookie, was standing close behind the victim at the time and that he too was involved in the argument. Jones testified that she never saw the petitioner leave and come back. Jones indicated that, as the argument got more and more heated, the victim reached multiple times for a gun that was tucked into his waistband, although she stated that he never drew it. Although Jones at first asserted that she saw Mookie fire the first shot, in subsequent testimony she indicated that she inferred it was Mookie who fired the first shot because she had observed dust or smoke coming from the gun he was holding immediately after the first shot was fired. According to Jones, it was not the first shot that killed the victim but a second shot that she claimed was fired by someone she did not see. Jones claimed that when the victim fell to the ground, his gun fell out of his waistband. Although she testified that she ran into the building where her sister lived shortly after the shots were fired, she also testified that she had observed Stevenson remove the gun from the scene and wrap it in a white towel.

It is undisputed that Polan was aware of Jones and had taken her statement about the events and, therefore, any decision not to call Jones at trial cannot be

attributed to a failure by Polan to investigate the shooting. Jones testified that she spoke with the police about the incident and gave them a statement. She also testified that she had met with O'Donnell several times prior to the criminal trial and had provided him with a statement. She claims that she was subpoenaed for trial by the defense but that ultimately she was told that her testimony would not be needed. The record is silent regarding the reason for Polan's decision. Notably, however, the pretrial statement that Jones provided to O'Donnell, which was admitted as an exhibit during the habeas trial, differed in some ways from the testimony that Jones provided at the habeas trial.

In her written statement, Jones claimed that she had observed the initial confrontation between the petitioner, the victim, and Mookie. After that initial argument ended, but before the petitioner left in his car, she heard the petitioner ask the victim, "you going to confront me with a gun?" Jones then observed the petitioner leave in his car but return about five minutes later and resume his argument with the victim and Mookie. She stated that Mookie pulled a gun from his waistband and fired a shot, at which time both the victim and the petitioner pulled out guns. Finally, she stated in her written statement that the victim did not fall to the ground until after the petitioner fired his gun.

Whether to call a particular witness at trial, however, is a tactical decision for defense counsel, and, to the extent that the decision "might be considered sound trial strategy," it cannot be the basis of a finding of deficient performance. See *Strickland* v. *Washington*, supra, 466 U.S. 689. Polan's strategic decision not to call Jones as a witness at the criminal trial can properly be evaluated only on the basis of what Polan knew about Jones' potential testimony at the time of trial, not on the basis of the testimony that Jones later gave at the habeas trial, regardless of whether the habeas

court deemed her later testimony credible. Jones' written statement, like her testimony at the habeas trial, indicated that she had information that was relevant to the petitioner's claim of self-defense.[13] There are a number of plausible reasons, however, why Polan may have decided that calling Jones to testify was either unnecessary or inadvisable because, even if she was believed by the jury, calling her might have opened up avenues of inquiry that would have hurt the defense's case.

First, Jones had a criminal record and was a friend of the petitioner and, therefore, her testimony would have been subject to significant impeachment by the state. Jones' account of the shooting contradicted that of other witnesses and the petitioner's own criminal trial testimony. For example, Jones claimed that Mookie was standing close to the victim both during the initial argument and at the time of the shooting, whereas Williams had testified at the criminal trial that Mookie was not present and the petitioner had testified that Mookie was "[s]tanding like off in the shadows." Further, and perhaps most importantly, the statement given by Jones to O'Donnell clearly indicated that she had heard the petitioner comment that he was aware that the victim was armed shortly before he drove off, returning a short time later. If Jones had stuck to that story at the criminal trial, as Polan might reasonably have expected, it could have undermined the petitioner's claim of self-defense by suggesting that he had left the scene in order to arm himself. In sum, after hearing the state's witnesses, Polan may have decided that Jones' testimony was not critical to her client's self-defense claim and that the

[13] Jones' story corroborated in some respects Williams' trial testimony that other participants, including the victim, were armed and that weapons had been drawn before the victim was shot. Her testimony, if believed, also helped corroborate the petitioner's own testimony that he fired because he feared for his life.

better strategic choice was to not call her as a witness. That is precisely the type of trial strategy that *Strickland* prohibits us from second-guessing postconviction.

4

Walker, who was a close friend of the victim, also testified at the habeas trial. He testified that he had witnessed the confrontation between the petitioner and the victim, claiming that he had stood about four feet from the victim during the argument leading up to the shooting. He testified that he saw the victim "flashing" a gun, but claimed that the gun stayed in the victim's waistband and that he never saw the victim "pull it out." Walker testified that he did not see who fired the first few shots because he was turned away but, when he looked back, he saw the victim on the ground. He also testified that he observed Mookie firing his weapon from where he had been standing on a stairway about ten or fifteen feet behind the victim. Walker further testified that he saw someone remove a weapon in a towel. When pressed, however, he said it was Williams who had done so, not Stevenson, as others had testified. Walker remembered seeing both Jones and Williams at the scene of the shooting.

Walker spoke with the police after the shooting but testified that he had never spoken to Polan or O'Donnell. He was not asked about the substance of his discussion with the police, however, and the habeas record contains no additional details about what he saw or said. Even so, according to the petitioner's testimony, he had discussed Walker with Polan. Further, as noted with other witnesses, the fact that Walker testified that he never spoke with any member of the defense team directly does not mean that Polan had not learned about Walker or his account of the shooting by reviewing police reports, interviewing the police, or discussing the case with prosecutors. Walker's testimony that the

victim never actually drew his weapon was less compelling for purposes of the petitioner's self-defense claim than the testimony of Williams, who claimed that the victim actually drew his weapon. Given that his testimony also conflicted factually in other respects with that of other witnesses, even if Polan was aware of his account, she reasonably might have chosen not to present his testimony, believing that she would have a better chance of persuading the jury by relying on the state's witnesses.

5

The final eyewitness to the relevant events presented by the petitioner at the habeas trial was Wright, the person who Williams testified at the criminal trial was present at the time of the shooting and was likely the person who had fired the first shot. Wright did not testify at the criminal trial. Wright testified at the habeas trial that he was friendly with both the victim and the victim's brother, Mookie. Wright stated that he was in the vicinity of the shooting when it occurred. Wright claimed that he saw the victim pull a gun from his waistband, at which point he decided to leave the scene. As he was leaving, however, he heard shots being fired. He denied that he personally had a gun at the time or that he was responsible for any gunshots that were fired either before or after the victim was shot.

As with Walker, there was no evidence presented to the habeas court that would have permitted the court to find, in contravention of the strong presumption of reasonable competence, that Polan or her investigator was either unaware of Wright's account or that Polan had failed to investigate him as a potential witness. See *Thompson* v. *Commissioner of Correction*, supra, 131 Conn. App. 698 (presumption of competent representation includes presumption of adequate investigation). Wright testified that he spoke with the police and

also with an investigator from the prosecutor's office. His name was also provided to Polan by the petitioner. Assuming that the version of events provided by Wright at the habeas trial was known to Polan, as were the accounts of the other habeas witnesses, his testimony did not add in any significant way to the theory of self-defense actually pursued by Polan at trial nor did his testimony advance any alternative theory of defense that she could have pursued. Furthermore, it is reasonable to assume that Polan did not think that Wright would provide credible testimony because he had been identified by Williams as someone who was armed and may have fired the first shot.

6

The petitioner also testified on his own behalf at the habeas trial, as he had at the criminal trial. With respect to Polan's investigative efforts, the petitioner stated only that he had given Polan the names of several witnesses, including Freeman, Jones and Walker. Polan had told the petitioner that Jones had given the defense a written statement and that she believed this was a self-defense case. The petitioner testified that he believed that his self-defense strategy would have included calling a number of additional witnesses. The petitioner, however, provided no testimony that adequately filled in the evidentiary gaps created by Polan's unavailability at the habeas trial, including details about her efforts in reviewing the case file, the discovery provided by the state, her conversations with witnesses, and what she may have learned through the efforts of O'Donnell and others. The petitioner likewise provided no insight regarding Polan's strategy at trial.

7

Finally, the petitioner presented expert testimony from McKay. Although McKay had no direct knowledge of Polan's investigation, he nonetheless opined, on the

basis of the habeas witnesses' testimony that was not presented at the criminal trial, that Polan "should have put more effort" into presenting the petitioner's self-defense claim to the jury. He testified that if Polan had presented the testimony of witnesses to establish that the victim had a gun, this would have strengthened the self-defense claim of the petitioner. Nevertheless, because the petitioner himself never claimed that he saw a gun, meaning the actual presence of a gun was not relevant to his subjective/objective perception of danger, whether other people had seen a gun or a gun actually was present would not have aided his claim of self-defense. Although he questioned the soundness of having O'Donnell sit at counsel table throughout the trial, which resulted in Polan's inability to call him as an impeachment witness, McKay's opinions about Polan's investigation amounted to little more than speculation. McKay admitted on cross-examination that he was unaware of the actual availability of the witnesses who testified at the habeas trial, how their stories may have differed from their accounts at the time of trial, or "what kind of baggage" those witnesses may have had that would have weighed against calling them as witnesses at the criminal trial.

E

Turning to our consideration of the totality of evidence presented at the habeas trial regarding Polan's investigative efforts to discover witnesses necessary to support the petitioner's assertion that he acted in self-defense, we cannot agree on the basis of our plenary review of the record that the petitioner met his burden of demonstrating that Polan's investigation in this case or her decision not to call Jones or other available witnesses known to her necessarily constituted deficient performance. Our review of the habeas court's memorandum reveals that the habeas court made its finding of an inadequate investigation without reference

to or analysis of the facts regarding the investigative efforts actually taken or not taken by Polan or her investigator. In fact, the habeas court does not discuss those efforts and makes no relevant subordinate findings. Rather, it appears that the habeas court reached its conclusion of ineffective assistance largely on the basis of its finding that the "witnesses who testified at the habeas trial were credible, both individually and collectively." The court concluded on the basis of this credibility determination that it lacked "confidence in the outcome of the jury trial."

In so concluding, however, the habeas court appears to have addressed the prejudice prong without having first made a determination that counsel's representation was deficient. Indeed, the habeas court's finding that the testimony of the habeas witnesses was credible and that these witnesses could have lent additional support to the petitioner's claim of self-defense, puts the cart before the horse and does not squarely address the issue of deficient performance, i.e., whether Polan's failure to call these credible witnesses was fairly attributable to a constitutionally deficient investigation or whether, if aware of a particular witness, she lacked any reasonable strategic reason for proceeding in the manner that she did. Instead, the conclusion that these witnesses would have been helpful to the petitioner's self-defense claim pertains, more directly, to prejudice. Although a habeas court certainly may *reject* a claim of ineffective assistance by addressing whichever prong of the analysis is easier, in order to conclude that a habeas petitioner has succeeded with respect to such a claim, it must engage in an independent consideration of both prongs, each of which must be satisfied independently. See *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 669, 159 A.3d 1112 (2017); see also *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 5, 188 A.3d 1 (2018) (to establish ineffective assistance, petitioner

must establish *both* that counsel's failure to secure evidence was "constitutionally inexcusable" *and* that proven deficiency "undermines confidence in the reliability of the petitioner's conviction"), cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019). Here, the habeas court appears to have employed the type of "hindsight" and after-the-verdict second-guessing of counsel that *Strickland* expressly warns against. See *Strickland* v. *Washington*, supra, 466 U.S. 689.

Although "trial counsel's testimony is not necessary to [a] determination that a particular decision might be considered sound trial strategy"; *Bullock* v. *Whitley*, 53 F.3d 697, 701 (5th Cir. 1995); "[a] habeas petitioner's failure to present trial counsel's testimony as to the strategy employed at a petitioner's criminal trial hampers both the court at the habeas trial and the reviewing court in their assessments of a trial strategy." *Franko* v. *Commissioner of Correction*, 165 Conn. App. 505, 519, 139 A.3d 798 (2016). In such circumstances, a habeas court "must examine all other available evidence from the trial record in order to determine whether the conduct complained of *might be* considered sound trial strategy." (Emphasis added.) Id.

As indicated by the United States Court of Appeals for the Fifth Circuit in *Bullock*, it is not necessary for a reviewing court to resolve what strategic decisions defense counsel *actually* made, but it is "required to presume that the challenged actions were within the wide range of reasonable professional conduct if, under the circumstances, it *might have been* sound trial strategy." (Emphasis added; internal quotation marks omitted.) *Bullock* v. *Whitley*, supra, 53 F.3d 701. The petitioner has the burden to overcome that presumption of reasonable professional conduct; id.; and Polan's death did not relieve the petitioner of the substantial burden of demonstrating that Polan's representation was less than constitutionally competent. See *Slevin* v. *United States*, supra, 71 F. Supp. 2d 358 n.9.

Therefore, as the respondent correctly argues, it was the petitioner's burden to show that Polan did *not* attempt to investigate various witnesses' accounts of the shooting. Polan was not available to testify about the investigation, and the petitioner was unable to elicit any relevant details from Polan's investigator, O'Donnell, about the efforts Polan or he took to locate and interview witnesses. Although it may be true that O'Donnell's testimony was of minimal utility because he asserted that he had virtually no memory of the investigation, this did not shift the burden to the respondent to prove an adequate investigation. In the absence of any evidence to overcome the strong presumption that Polan had engaged in an objectively reasonable investigation, it was improper for the habeas court to have speculated that the witnesses who testified at the habeas trial were not known to Polan[14] or that she had elected not to call them on the basis of anything other than a reasonable strategic choice.

Furthermore, because counsel is presumed to have acted reasonably in the absence of evidence to the contrary, without any evidence of Polan's trial strategy, the habeas court was required to consider whether there was *any* plausible reason for not calling the various witnesses. The habeas court's memorandum is silent with respect to possible rationales for limiting the investigation or not calling certain witnesses.

Rather, the habeas court observed that it had "no evidence directly from Polan about any of her trial strategies and the tactical decisions she made to accomplish them." This would include her investigative strategy. The petitioner had the burden of establishing that Polan's investigation fell outside the wide range of professional conduct considered reasonable, but such evidence is lacking here. Judging the reasonableness of

[14] Our review of the record would support an inference that Polan was aware of several of the witnesses. For example, both Jones and Jordan testified at the habeas trial that they had spoken with Polan or O'Donnell.

investigative efforts "depends critically" on the information that counsel receives from her client. See *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 681. Here, the petitioner testified at the habeas trial that he had made Polan aware of several witnesses, including Jymisha, Wright, Walker, and Jones. His testimony, however, offered no insight as to whom Polan or O'Donnell actually had interviewed, whether the defense team had knowledge of witnesses' potential testimony from their review of police records or discussions with the prosecutors or other witnesses, or whether Polan decided that she effectively had gathered the factual basis for the defenses she sought to pursue through the testimony of the state's trial witnesses.

Polan indisputably pursued a self-defense claim at trial in the present case. The petitioner concedes that Polan properly requested and received a jury instruction on self-defense, and a review of the trial transcript shows that she spent a portion of her closing argument attempting to persuade the jury that the petitioner had fired his weapon in self-defense. Furthermore, the self-defense case that Polan presented at the criminal trial was not markedly different than the one the petitioner advanced at the habeas trial. Polan was able to argue on the basis of the evidence presented at the criminal trial, largely through the state's own witnesses, that the petitioner fired his weapon toward the victim, whom he had reason to believe was armed, only after hearing a gunshot fired by an unknown person. The only additional information pertaining to self-defense that a jury could have gleaned from the habeas trial witnesses' testimony that was not presented at the criminal trial was that it was highly likely that the victim had, in fact, been armed at the time he was shot, because multiple witnesses either saw him with a gun before he was shot or saw someone remove a gun from near his body after he was shot. As the respondent persuasively argues,

however, these additional facts, even if presented to the jury, would only be marginally relevant to the petitioner's self-defense claim because "it was the reasonableness of the *petitioner's* subjective perception of the situation, as *he* saw it, not the perception of the other witnesses, that was relevant to the issue of self-defense." In other words, Polan did not need to demonstrate that the victim in fact had a gun, only that the petitioner reasonably believed him to be armed.

Finally, it must be noted that Polan's overall performance included presenting a defense that resulted in the petitioner's acquittal of murder, the most serious charge he was facing. The United States Supreme Court has observed that "while in some instances even an isolated error can support an ineffective-assistance claim if it is sufficiently egregious and prejudicial . . . it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (Citation omitted; internal quotation marks omitted.) *Harrington* v. *Richter*, 562 U.S. 86, 111, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). It is hard to label Polan's efforts on behalf of the petitioner as ineffective advocacy when those efforts resulted in a significant reduction in the petitioner's potential sentencing exposure through his acquittal on the murder charge. If the petitioner had been convicted of murder, he faced a sentence ranging from the mandatory minimum of twenty-five years to a maximum of life in prison. See General Statutes § 53a-35a (2). Instead, his manslaughter with a firearm conviction carried a lesser penalty, a five year mandatory minimum with a maximum sentence of forty years of incarceration. General Statutes § 53a-35a (5).

On the basis of our plenary review of the record presented to the habeas court, we conclude that, without resorting to impermissible speculation, the record contains insufficient evidence from which to gauge

whether Polan employed reasonable efforts to investigate the shooting to locate relevant witnesses in support of the petitioner's self-defense claim or whether she had strategic reasons for deciding not to call a particular witness to testify at trial.[15] Because the petitioner has the burden of proof, that evidentiary lacuna must be resolved in favor of the respondent.

Because we agree with the respondent that the habeas court improperly determined that Polan provided deficient performance with respect to the petitioner's self-defense claim, we need not address the respondent's additional argument that the habeas court also improperly determined that the petitioner proved prejudice relative to the issue of self-defense. Because, however, the habeas court's decision to grant the petition for habeas corpus was also founded on Polan's alleged ineffective assistance in failing to pursue a third-party culpability defense, we turn to the respondent's next claim.

III

The respondent also claims that the habeas court improperly determined that Polan rendered deficient performance because she failed to pursue a third-party culpability defense. Specifically, the respondent claims that the court improperly relied on its own opinion regarding the viability of a third-party culpability defense centered on the victim's brother, Mookie, rather than entertaining the possibility that a competent attorney, after careful consideration of the law and available evidence, reasonably might have disagreed with the

[15] In *Skakel*, our Supreme Court concluded that defense counsel provided ineffective assistance by failing to call an additional alibi witness, who, unlike the witnesses called at trial to support the defendant's alibi defense, was unrelated to the defendant and, thus, a neutral and disinterested witness. See *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 54. Here, none of the witnesses presented at the habeas trial could be described as neutral or disinterested. They were either related to or friends with the petitioner and/or the victim.

habeas court's assessment and considered the theory either too weak to present to a jury or having the potential to muddy or otherwise undermine the defense that she chose to pursue, which ultimately resulted in an acquittal on the most serious charge of murder. We agree with the respondent that, in light of the record presented, which, despite not seeking a third-party culpability instruction, includes the undisputed fact that Polan argued to the jury the possibility that the victim was killed by a bullet fired by someone other than the defendant, the habeas court improperly determined that Polan had provided ineffective assistance with respect to a third-party culpability defense.

We begin with a brief review of the standards governing the admissibility of third-party culpability evidence and the requirements that must be met to obtain an instruction on third party culpability. "It is well established that a defendant has a right to introduce evidence that indicates that someone other than the defendant committed the crime with which the defendant has been charged. . . . The defendant must, however, present evidence that directly connects a third party to the crime. . . . It is not enough to show that another had the motive to commit the crime . . . nor is it enough to raise a bare suspicion that some other person may have committed the crime of which the defendant is accused. . . .

"The admissibility of evidence of [third-party] culpability is governed by the rules relating to relevancy. . . . In other words, evidence that establishes a direct connection between a third party and the charged offense is relevant to the central question before the jury, namely, whether a reasonable doubt exists as to whether the defendant committed the offense. Evidence that would raise only a bare suspicion that a third party, rather than the defendant, committed the charged offense would not be relevant to the jury's determination." (Citations omitted; internal quotation

marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502, 514–15, 964 A.2d 1186, cert. denied sub nom. *Murphy* v. *Bryant*, 558 U.S. 938, 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009).

"It is not ineffective assistance of counsel . . . to decline to pursue a [third-party] culpability defense [if] there is insufficient evidence to support that defense." Id., 515; see also *Dunkley* v. *Commissioner of Correction*, 73 Conn. App. 819, 826–27, 810 A.2d 281 (2002), cert. denied, 262 Conn. 953, 818 A.2d 780 (2003). Furthermore, even if a witness' testimony might have supported a third-party culpability defense, this court on other occasions has concluded that defense counsel did not engage in deficient performance by failing to raise the defense or to call witnesses to testify in instances in which jurors likely would have found the testimony unreliable, inconsistent, or unpersuasive in light of the state's evidence against the petitioner. See, e.g., *Floyd* v. *Commissioner of Correction*, 99 Conn. App. 526, 531–32, 914 A.2d 1049 (testimony of drug dealers/gang members insufficient to render counsel's failure to raise third-party culpability claim deficient performance), cert. denied, 282 Conn. 905, 920 A.2d 308 (2007); *Daniel* v. *Commissioner of Correction*, 57 Conn. App. 651, 684, 751 A.2d 398 (failure to raise third-party culpability defense did not constitute deficient performance because inconsistent testimony regarding identity of third party), cert. denied, 254 Conn. 918, 759 A.2d 1024 (2000).

The following additional facts are relevant to this claim. At trial, there was uncontested evidence that, shortly before the petitioner fired his weapon at the victim, someone nearby, other than the petitioner, had fired a shot. Williams' testimony at trial suggested that the shooter was Wright, although other witnesses testified that Wright was not present when the first shot was fired. As previously indicated, Jones had provided

the defense with a statement suggesting that Mookie had fired the first shot. The medical examiner testified at trial that the bullet that killed the victim had entered his skull at a point behind his ear and exited through his forehead. The evidence was uncontested that the petitioner was standing directly in front of the victim just prior to him firing his gun.

Here, although Polan did not request a specific instruction on third-party culpability, she nevertheless strongly argued the essence of such a defense to the jury. Accordingly, we reject any notion that she failed to pursue the defense outright. In her closing argument, Polan effectively attempted to shift blame away from the petitioner and toward a third-party assailant by arguing to the jury on the basis of the forensic evidence presented that there was reasonable doubt that the bullet that killed the victim was fired by the petitioner. Specifically, she highlighted the fact that the bullet that killed the victim had entered the skull from behind the victim's right ear whereas all the witnesses had placed the petitioner standing directly in front of the victim at the time the victim was shot. If the jury believed that theory, or if it had created reasonable doubt in the jury's mind about the identity of the shooter, it could have resulted in an acquittal irrespective of whether Polan elected to request an instruction to the jury regarding third party culpability.

Moreover, there are a number of possible reasons why Polan may have chosen to present the third-party culpability defense in the manner that she did, including choosing to forgo seeking a third-party culpability instruction from the court. Polan reasonably might have believed that it would be easier to establish, on the basis of the forensic evidence, reasonable doubt as to whether the bullet that killed the victim had been fired by the petitioner rather than attempting to satisfy the more rigid requirements necessary for entitlement to a

third-party culpability instruction. See *Bryant* v. *Commissioner of Correction*, supra, 290 Conn. 515 (evidence of "direct connection between a third party and the charged offense" necessary for instruction on third-party culpability). Instead, she reasonably could have determined that, even in the absence of an instruction, she effectively could argue to the jury that an unidentified third person caused the death of the victim rather than the petitioner. That strategy could have been particularly compelling in a case like the present one in which there were conflicting witness accounts of who was present, who was armed, and who may have fired a shot.

Polan also reasonably may have believed that the third-party culpability defense was weaker than the petitioner's self-defense claim, and that, even if she were able to convince the court to give an instruction on third-party culpability, it may have unnecessarily distracted the jury from what she believed were more compelling arguments. The state, after all, had strong evidence to counter a third-party culpability narrative. All the witnesses testified that the victim did not fall to the ground until after the petitioner fired his gun, suggesting it was his shot, and not the first shot fired, that struck and killed the victim. Furthermore, Stevenson, Williams and the petitioner himself testified at the criminal trial that the victim had begun to turn or move away from the petitioner at the time the petitioner fired his gun, which could have explained away the forensic evidence that was central to the success of any third-party culpability claim. Thus, although not abandoning it completely, Polan chose not to make it more of a focus of her closing argument and risk confusing or alienating the jury.

Finally, as we have discussed already with respect to the petitioner's self-defense claim, specific evidence of Polan's reasons for pursuing or not pursuing any

particular defense strategy—something generally obtained at the habeas trial through the testimony of trial counsel or someone directly familiar with her strategy—was utterly lacking. Ordinarily, such evidence is crucial to meet the high hurdle imposed on a petitioner to show that his counsel's exercise of professional judgment fell outside the wide range considered competent for constitutional purposes. See *O'Neil* v. *Commissioner of Correction*, 142 Conn. App. 184, 190–91, 63 A.3d 986 (lack of testimony by defense counsel about strategy was factor in determining petitioner failed to meet burden of demonstrating deficient performance), cert. denied, 309 Conn. 901, 68 A.3d 656 (2013). Like the claim of ineffective assistance regarding self-defense, because the petitioner bears the burden of demonstrating that counsel's representation was deficient, the habeas court was required to consider whether Polan's decision not to pursue a formal third-party culpability instruction might be viewed as a reasonable strategic decision under the facts and circumstances of this case as viewed from the position of counsel at the time of the decision. The habeas court failed to conduct this inquiry and made no relevant factual findings.

To summarize, we agree with the respondent that the habeas court, in analyzing whether Polan's performance fell outside the wide range of competent performance, failed affirmatively to entertain whether Polan properly had weighed the pros and cons of various trial strategies and chose to defend the petitioner in a manner different than the strategy the habeas court thought she should have pursued. Although the death of counsel arguably made the petitioner's case more difficult to prove than it might otherwise have been, that unfortunate reality does not lessen the petitioner's significant burden. Because the petitioner was unable, due to a lack of evidence, to negate all possibility that Polan engaged in a reasonable, albeit only partially successful, defense

strategy on the record available, he failed to meet his burden and the habeas court should have denied his petition for a writ of habeas corpus.

The judgment is reversed and the case is remanded with direction to deny the petition for a writ of habeas corpus.

In this opinion the other judges concurred.

MICHAEL DEVINE, ADMINISTRATOR (ESTATE OF TIMOTHY DEVINE) *v.* LOUIS FUSARO, JR., ET AL. (AC 42164)

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

Syllabus

The plaintiff administrator of the estate of the decedent, D, sought to recover damages from the defendants, four members of the tactical unit of the State Police, for the wrongful death of D following his suicide after a standoff with law enforcement on certain public property in Groton. The plaintiff's complaint alleged that, in response to a Groton police captain's request for the assistance of the tactical unit, the defendants arrived at the scene of the standoff, and, after several hours of unsuccessful negotiations with D, who was suicidal and armed with a handgun, they used less than lethal ammunition on him. D then shot himself in the head and died as a result of the gunshot. The trial court granted the defendants' motion to dismiss on the ground that the action was barred by the doctrine of sovereign immunity. In reaching its decision, the court determined that the wrongful death action, as alleged in the complaint, satisfied the four criteria of the test set forth in *Spring* v. *Constantino* (168 Conn. 563), and, therefore, it was brought against the defendants in their official, rather than individual, capacities. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendants' motion to dismiss the plaintiff's action on the ground of sovereign immunity: contrary to the plaintiff's contention, the four criteria of the *Spring* test were satisfied, and, therefore, the defendants were sued in their official, rather than their individual, capacities, as the defendants were state officials, the action against them concerned a matter in which they were representing the state and acting in the scope of their official police duties, the state was the real party in interest because the damages sought by the plaintiff were premised entirely on injuries alleged to have been caused by the official acts of the defendants, and a judgment against the defendants would impact

how the State Police, and especially members of the tactical unit, respond to subsequent situations in which an armed individual occupies public property and is noncompliant with attempts to negotiate, as they may be hesitant to use less than lethal ammunition or similar tactics because of the risk of being sued in their individual capacities; moreover, notwithstanding the plaintiff's claim to the contrary, the trial court did not improperly consider a certain State Police manual in granting the motion to dismiss.

Argued January 14—officially released June 9, 2020

Procedural History

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendants' alleged recklessness and gross negligence, brought to the Superior Court in the judicial district of New London, where the court, *Knox*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Trent A. LaLima, with whom were *Virginia Paino*, certified legal intern, and, on the brief, *Hubert J. Santos*, for the appellant (plaintiff).

Stephen R. Finucane, assistant attorney general, with whom were *Matthew B. Beizer*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellees (defendants).

Opinion

KELLER, J. The plaintiff, Michael Devine, administrator of the estate of Timothy Devine (Devine), appeals from the judgment of the trial court rendered after the granting of the motion filed by the defendants, Louis Fusaro, Jr., Steven Rief, Michael Avery, and Kevin Cook, to dismiss his wrongful death action, which involves the suicide of Devine after a standoff with law enforcement, including the defendants, who are members of the tactical unit of the State Police. On appeal, the plaintiff claims that the court incorrectly dismissed the action on the ground that it was barred by sovereign immunity.

In granting the motion to dismiss, the court concluded that the facts alleged in the complaint satisfied all four criteria of the test set forth in *Spring* v. *Constantino*, 168 Conn. 563, 362 A.2d 871 (1975), rendering the lawsuit an action brought against the defendants in their official capacities. We affirm the judgment of the trial court.

On December 6, 2017, the plaintiff filed a complaint alleging a wrongful death claim against the defendants.[1] The plaintiff amended the complaint on January 12, 2018. In his amended complaint, the plaintiff alleged the following relevant facts. On July 23, 2012, a detective from the Groton Police Department contacted Devine and advised him that he was under investigation for alleged misconduct. Devine declined the detective's request to go to the police station for questioning. Instead, Devine informed the Groton Police Department that he was contemplating suicide. That evening, Devine went to the University of Connecticut's Avery Point campus in Groton with a handgun. Groton police officers located Devine between 10 and 11 p.m. Members of the Groton Police Department attempted to negotiate with Devine. Negotiations were unsuccessful, and a Groton police captain requested assistance from the

[1] The plaintiff brought two other actions related to Devine's death. The plaintiff brought a civil rights action under 42 U.S.C. § 1983 (2012) in federal court against the same officers named as defendants in this case. *Estate of Devine* v. *Fusaro*, United States District Court, Docket No. 3:14-cv-01019 (JAM) (D. Conn. January 14, 2016). On January 14, 2016, the District Court granted the defendants' motion for summary judgment on the basis of qualified immunity. The District Court declined to exercise supplemental jurisdiction over state law claims and dismissed them without prejudice. On January 23, 2017, the United States Court of Appeals for the Second Circuit affirmed the District Court's judgment. See *Estate of Devine* v. *Fusaro*, 676 Fed. Appx. 61, 64–65 (2017).

The plaintiff also filed a claim with the Connecticut Office of the Claims Commissioner, in which he sought the state's waiver of its sovereign immunity to allow him to bring his action against the state directly for negligence. That claim was withdrawn.

State Police tactical unit (tactical unit). "At approximately 11:45 p.m., the [tactical unit] including the defendants, arrived at the scene." Law enforcement officials continued to negotiate with Devine for several hours, without success.

"At 3:31 a.m. on July 24, 2012, [Fusaro] commanded members of the tactical [unit] to begin using [less than lethal] ammunition on Devine." Avery and Cook complied with Fusaro's orders and struck Devine with less than lethal ammunition. Rief subsequently ordered the tactical unit to fire less than lethal ammunition at Devine again. Avery and Cook complied with Rief's orders and struck Devine a second time. After the second round of less than lethal ammunition, Devine raised the handgun to his head and said to Rief, "Don't make me do this." Devine then lowered the handgun to his chest. Rief instructed the tactical unit to fire a third round of less than lethal ammunition at Devine. Devine was struck with less than lethal ammunition again. Devine then raised the handgun to his head and shot himself in the temple. Devine died as a result of the self-inflicted gunshot.

On February 13, 2018, the defendants filed a motion to dismiss and accompanying memorandum of law, claiming that the trial court lacked subject matter jurisdiction because the action was barred by the doctrine of sovereign immunity or, alternatively, that the defendants were statutorily immune from suit under General Statutes § 4-165. On March 15, 2018, the plaintiff filed a memorandum of law opposing the defendants' motion to dismiss. The plaintiff also filed additional pleadings including a request for leave to amend the complaint in an attempt to remove and amend language in his amended complaint. Specifically, the plaintiff sought to correct the service addresses for three of the defendants and to eliminate language referring to the defendants as police officers who were "acting under

color of law." The plaintiff also filed a partial withdrawal seeking to withdraw similar language from the complaint. The defendants objected to the plaintiff's attempts to amend the complaint. The court sustained the defendants' objections in its decision on the motion to dismiss. On June 21, 2018, using the January 12, 2018 amended complaint as the operative complaint, the court issued an order granting the motion to dismiss. In its memorandum of decision, the court outlined how it concluded that the cause of action alleged in the complaint satisfied the four criteria of the *Spring* test; see *Spring* v. *Constantino*, supra, 168 Conn. 568; and therefore was brought against the defendants in their official, rather than individual, capacities. In light of that conclusion, the court concluded that sovereign immunity shielded the defendants from suit, depriving the court of subject matter jurisdiction and, accordingly, dismissed the action.[2] This appeal followed.

We begin with the well established standard of review. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate conclusion and resulting grant of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *State* v. *Welwood*, 258 Conn. 425, 433, 780 A.2d 924 (2001). "[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Filippi* v. *Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005). "When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the

[2] In its memorandum of decision, the court stated that, "[b]ecause the court lacks subject matter jurisdiction due to sovereign immunity, the court does not reach the claim that the action is barred by statutory immunity."

allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader.§ (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200–201, 994 A.2d 106 (2010). "Claims involving the doctrines of common-law sovereign immunity and statutory immunity, pursuant to § 4-165, implicate the court's subject matter jurisdiction. . . . [A] subject matter jurisdictional defect may not be waived . . . [or jurisdiction] conferred by the parties, explicitly or implicitly. . . . [O]nce raised, either by a party or by the court itself, the question must be answered before the court may decide the case." (Citations omitted; internal quotation marks omitted.) *Kelly* v. *Albertsen*, 114 Conn. App. 600, 605, 970 A.2d 787 (2009).

"We have long recognized the common-law principle that the state cannot be sued without its consent. . . . We have also recognized that because the state can act only through its officers and agents, a suit against a state officer [or agent] concerning a matter in which the officer [or agent] represents the state is, in effect, against the state. . . . Therefore, we have dealt with such suits as if they were solely against the state and have referred to the state as the defendant. . . . The doctrine of sovereign immunity protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable." (Citation omitted; internal quotation marks omitted.) *Tuchman* v. *State*, 89 Conn. App. 745, 751, 878 A.2d 384, cert. denied, 275 Conn. 920, 883 A.2d 1252 (2005). Likewise, "[t]he doctrine of sovereign immunity protects state officials and employees from lawsuits resulting from the performance of their duty." (Internal quotation marks omitted.) *Kenney* v. *Weaving*, 123 Conn. App. 211, 215, 1 A.3d 1083 (2010).

"Whether a particular action is one against the state is not determined solely by referring to the parties of record. . . . If the plaintiff's complaint reasonably may be construed to bring claims against the defendants in their individual capacities, then sovereign immunity would not bar those claims. . . . To determine whether an action is against the state or against a defendant in his individual capacity, we look to the four criteria established by our Supreme Court in [*Somers* v. *Hill*, 143 Conn. 476, 479, 123 A.2d 468 (1956)] and as explained further in *Spring* v. *Constantino*, [supra, 168 Conn. 563]. If all four criteria are satisfied, the action is deemed to be against the state and, therefore, is barred. . . . The criteria are: (1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Citations omitted; internal quotation marks omitted.) *Kenney* v. *Weaving*, supra, 123 Conn. App. 215–16; see also *Sullins* v. *Rodriguez*, 281 Conn. 128, 136, 913 A.2d 415 (2007) ("test set forth in *Spring* . . . is an appropriate mechanism . . . to determine the capacity in which the named defendants are sued in actions asserting violations of state law").

We now turn to the *Spring* criteria as they relate to the present case. First, consistent with the allegations in his complaint, the plaintiff concedes that the defendants held positions as state officials at the time of the relevant conduct and, therefore, that the first criterion of the *Spring* test is met. The plaintiff argues, however, that the remaining three criteria are not met and, therefore, the defendants were sued in their individual, rather than official, capacities. We disagree with the plaintiff and conclude that the remaining three criteria of the *Spring* test are satisfied.

With regard to the second criterion, we conclude that the action concerns a matter in which the defendants represented the state. The plaintiff purports that the defendants' use of less than lethal ammunition on Devine was beyond the scope of their duties as police officers and should be classified as an assault. We disagree with the plaintiff's contention because the alleged facts contained in the amended complaint in no way indicate that the defendants acted outside the scope of their official duties. Rather, the complaint alleges that, "[a]t approximately 11:45 p.m., the [tactical unit] including the defendants, arrived at the scene." Further, the complaint alleges that when Avery and Cook fired the less than lethal ammunition at Devine, they were acting on direct orders from Fusaro and Rief.[3] The complaint does not contain any allegations to suggest that the defendants ceased to act pursuant to their duties as state employees, and, therefore, we conclude that the second criterion is met because the action concerns a matter in which the defendants represented the state. See *Cimmino* v. *Marcoccia*, 149 Conn. App. 350, 359, 89 A.3d 384 (2014) (holding that second criterion of *Spring* test was met because defendants were "acting in furtherance of a joint investigation authorized by statute and initiated by the state agencies that employed them"); *Kenney* v. *Weaving*, supra, 123 Conn. App. 216 (holding that second *Spring* criterion was met when "[t]he allegedly reckless actions of the defendant were related to his duties as commissioner of the [D]epartment [of Motor Vehicles]").

The plaintiff further argues that in determining that the second criterion of the *Spring* test was met, the court impermissibly relied entirely on language in the complaint alleging that the defendants were "acting

[3] The complaint alleges: "At 3:31 a.m. on July 24, 2012, [Fusaro] commanded members of the tactical [unit] to begin using [less than lethal] ammunition on Devine."

under color of law." We conclude, however, that the plaintiff mischaracterizes the court's analysis with respect to the second criterion. The plaintiff is correct that the court stated that "[the allegations with respect ciently show that the individual defendants represent the state." However, the court further states that, "[a]lthough this is sufficient to satisfy the second criterion, there is a separate bas[is] to do so. The additional factual allegations all concern the defendants acting in their official police functions. The plaintiff alleges that the . . . Groton police captain, Thomas Davoren, requested the presence of the [tactical unit], and the four defendants responded to the scene as members of and a part of the [tactical unit]." (Emphasis omitted.) We, therefore, reject the plaintiff's arguments and conclude that the court was correct in determining that the second *Spring* criterion was met.

Turning to the third criterion, we conclude that the state is the real party against whom relief is sought. Preliminarily, the plaintiff argues that when determining whether the action was brought against the defendants individually or in their official capacities, the court should consider the fact that the plaintiff specifically pleaded that the action was against the defendants in their individual capacities. We reject this portion of the plaintiff's argument for two reasons. First, we disagree that the action was specifically pleaded against the defendants in their individual capacities. Rather, the operative complaint pleaded that the action was brought against each of the defendants "who [were] employed as law . . . enforcement officer[s] by the state of Connecticut and acting under the color of law." Second, even if the plaintiff specifically pleaded against the defendants in their individual capacities, that fact would not be determinative of whether the state or the individual is the real party in interest. In *Cimmino* v. *Marcoccia*, supra, 149 Conn. App. 359, the plaintiff

argued that "he unequivocally sued the defendants in their individual capacities only and that these allegations establish that the state is not the real party against whom relief is sought." (Internal quotation marks omitted.) In rejecting the plaintiff's argument, this court stated: "That the plaintiff purports to sue the defendants only in their individual capacities is not, in itself, determinative of whether the state is the real party in interest. See *Sullins* v. *Rodriguez*, [supra, 281 Conn. 136] ('test set forth in *Spring* and *Miller* [v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003)] is an appropriate mechanism . . . to determine the capacity in which the named defendants are sued in actions asserting violations of state law'); *Kenney* v. *Weaving*, supra, 123 Conn. App. 215–16 (we do not determine whether action is against state solely by referring to parties of record)." *Cimmino* v. *Marcoccia*, supra, 359. Instead, in determining whether the third criterion of the *Spring* test was satisfied, this court also looked to whether "[t]he damages sought by the plaintiff are premised entirely on injuries alleged to have been caused by the defendants in performing acts that were part of their official duties." Id., 359–60. Other cases from our Supreme and Appellate Courts have held similarly. See, e.g., *Somers* v. *Hill*, supra, 143 Conn. 480 (state was real party in interest where damages sought were for injuries allegedly caused by state highway commissioner in carrying out acts for which state employed him); *Macellaio* v. *Newington Police Dept.*, 142 Conn. App. 177, 181, 64 A.3d 348 (2013) ("third criterion [of *Spring* test] is met because damages are sought for injuries allegedly caused by the defendant for performing acts that are a part of his official duties such that the state is the real party against whom relief is sought"); *Kenney* v. *Weaving*, supra, 123 Conn. App. 216–17 (third criterion of *Spring* test satisfied because "[d]amages are sought for injuries allegedly caused by the defendant for performing acts that are a part of his official duties").

Relying on the aforementioned case law, we conclude, on the basis of the operative complaint, that the defendants were acting pursuant to their official duties as members of the tactical unit when they deployed the use of less than lethal ammunition on Devine. The operative complaint alleges that following a request from the Groton police captain for the presence of the tactical unit, the defendants arrived on the scene at approximately 11:45 p.m. on July 23, 2012. The complaint also alleges that subsequently, the defendants began the use of less than lethal ammunition at 3:31 a.m. on July 24, 2012. The complaint cannot reasonably be construed to state that, at any point between the defendants' arrival and the commencement of their use of less than lethal ammunition, the defendants ceased to operate pursuant to their official duties as state employees. The allegations, viewed in the light most favorable to the plaintiff, state that the defendants arrived at the scene of a dangerous situation in which Devine was threatening to take his own life. Following unsuccessful negotiation attempts, which lasted for approximately four hours, the defendants made the strategic decision as members of the tactical unit to utilize less than lethal ammunition. Accordingly, because the damages sought by the plaintiff are premised on injuries allegedly caused by the official acts of the defendants, the state is the real party against whom relief is sought, and the third criterion of the *Spring* test is satisfied.

Finally, the fourth criterion of the *Spring* test is met because the judgment, though nominally sought against the officials, would operate to control the activities of the state or subject it to liability. A judgment against the defendants would impact how members of the State Police, and especially members of the tactical unit, respond and react to subsequent situations in which an armed individual occupies public property and is

noncompliant with attempts to negotiate. Specifically, at the risk of being sued in their individual capacities, state officials may be hesitant to use less than lethal ammunition or similar tactics. See *Cimmino* v. *Marcoccia*, supra, 149 Conn. App. 360 (holding that "[a]ny judgment against the defendants would impact the manner in which state officials conduct investigations" initiated by state child advocate and attorney general); see also *Henderson* v. *State*, 151 Conn. App. 246, 259, 95 A.3d 1 (2014) (holding that fourth criterion of *Spring* test met because "[a]ny judgment against the defendants would impact the manner in which state officials prosecute public nuisance actions and negotiate stipulated judgments"). Accordingly, we agree with the court's determination that the fourth criterion of the *Spring* test is satisfied. Because the four criteria of the *Spring* test have been satisfied, we determine that the defendants were not sued in their individual capacities but, rather, in their official capacities only.[4]

Finally, we address the plaintiff's argument that, in granting the motion to dismiss, the court should not have considered facts outside the complaint, namely, the Connecticut State Police Administration and Operations Manual (operations manual). We agree with the defendants' assertion that "there is absolutely nothing in the trial court's memorandum of decision suggesting that the trial court relied on the language from the

[4] There are three recognized exceptions to sovereign immunity: "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 349, 977 A.2d 636 (2009). The plaintiff does not assert on appeal, nor did he assert in the action before the trial court, that any of the exceptions apply.

operations manual. . . . Instead, the memorandum of decision addresses only the contents of the operative complaint." Indeed, the plaintiff even states that "the trial court did not indicate during argument or in its memorandum of decision whether the operations manual or the federal court's interpretation of it[5] factored into its ultimate ruling." (Footnote added.)The plaintiff's only claim is that the defendants referred to the operations manual in their memorandum of law in support of their motion to dismiss as well as during argument on the motion. Consistent with the weight of authority and in the exercise of our plenary review, we looked only to the facts in the operative complaint and did not extend our review to the contents of the operations manual. See, e.g., *Gold* v. *Rowland*, supra, 296 Conn. 200–201. We, therefore, reject the plaintiff's argument and conclude that the court did not improperly consider the operations manual in granting the motion to dismiss in favor of the defendants.

Accordingly, we conclude that the court properly granted the defendants' motion to dismiss on the ground of sovereign immunity.

The judgment is affirmed.

In this opinion the other judges concurred.

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[5] The federal court referred to the operations manual in its order granting the defendants' motion for summary judgment in *Estate of Devine* v. *Fusaro*, United States District Court, Docket No. 3:14-cv-01019 (JAM) (D. Conn. January 14, 2016).

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 197

PATRICIA SPICER *v.* JOHN
MONTAGNESE ET AL.
(AC 42839)

Prescott, Elgo and Devlin, Js.

Argued May 22—officially released June 9, 2020

Plaintiff's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Taggart D. Adams*, judge trial referee.

Per Curiam. The judgment is affirmed.

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Termination of parental rights; unpreserved claim that judicial bias deprived respondent father of fair trial; claim that certain of trial court's statements, findings and rulings constituted plain error; claim that trial court precluded father from calling witnesses to testify; claim that trial court improperly found that termination of father's parental rights was in children's best interests; whether trial court improperly found that there was clear and convincing evidence that father failed to rehabilitate himself, as required by statute (§ 17a-112 (j) (3) (B)); claim that trial court disregarded children's Muslim religious affiliation; claim that trial court's best interests finding should be overturned because court improperly placed children with foster parents who did not foster Muslim faith and who introduced them to religious beliefs that differed from father's Muslim beliefs; claim that trial court improperly found that department made reasonable efforts to reunify father with children; unpreserved claim that department was estopped from supporting children's petitions to terminate father's parental rights, where department initially recommended that reunification efforts continue but thereafter changed its position and adopted children's petitions for termination of his parental rights; claim that trial court improperly denied motion to revoke commitment of children to care and custody of Commissioner of Children and Families.

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Dissolution of marriage; claim that trial court lacked subject matter jurisdiction over real property; clam that trial court issued orders with respect to real property that were based on mistake and impossible to execute; claim that trial court abused its discretion by dividing real property between parties without determining its value; claim that trial court abused its discretion by failing to divide parties' personal property; claim that trial court improperly ordered defendant to pay percentage of cost of extracurricular activities of parties' child; claim that trial court abused its discretion by issuing financial orders in excess of defendant's ability to pay.

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Vexatious litigation; zoning appeals; whether trial court properly granted motion for summary judgment; whether trial court properly applied Noerr-Pennington *doctrine to zoning appeals challenging plaintiff's proposed real estate development plan in determining that they were immunized from suit; claim that defendant's zoning appeals were objectively baseless and, therefore, sham exception to* Noerr-Pennington *doctrine was applicable; claim that trial court misinterpreted sham exception to* Noerr-Pennington *doctrine in applying two part analysis.*

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Home invasion; burglary in first degree; sexual assault in third degree; claim that there was insufficient evidence to sustain defendant's conviction of home invasion and burglary in first degree; whether state failed to prove that defendant entered dwelling while victim was present in that dwelling as required by home invasion statute (§ 53a-100aa (a) (1)); whether state failed to prove beyond reasonable doubt that defendant entered victim's apartment with intent to commit crime; whether jury reasonably could have inferred from certain evidence defendant's intent to sexually assault victim; claim that trial court improperly allowed state to introduce testimony of police detective regarding statements made by

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State *v.* Lori T. 675
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CONNECTICUT APPELLATE REPORTS

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

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PURSUIT PARTNERS, LLC, ET AL. *v.* REED SMITH, LLP, ET AL.
(AC 41551)

Elgo, Moll and Devlin, Js.

Syllabus

The plaintiffs, M Co., O Co. and P Co., sought to recover damages from the defendant R Co., a law firm, for breach of contract for its alleged violation of a confidentiality provision of a settlement agreement executed by the plaintiffs and A Co., to which R Co. was a signatory. The plaintiffs and A Co. had executed a confidential settlement agreement to resolve certain litigation and arbitration proceedings. Thereafter, A Co. brought a related action, *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, (193 Conn. App. 381) (*Alpha Beta*), seeking damages for the alleged failure of the defendants, which included the plaintiffs in the present case, to provide A Co. with its proportionate share of the litigation proceeds secured by the settlement agreement. In *Alpha Beta*, the trial court found that the delayed payment of the proceeds to A Co. constituted a material breach of the settlement agreement by certain defendants in that action, relieving A Co. of its confidentiality obligations thereunder, and this court held that the court's finding was not clearly erroneous. Subsequently, the plaintiffs commenced this action against R Co., alleging that R Co. breached the confidentiality provision of the agreement when it communicated with S Co. in connection with litigation involving the plaintiffs in the present case. The trial court granted the motion for summary judgment filed by R Co. on defensive collateral estoppel grounds, concluding that, in *Alpha Beta*, the defendants were determined to be the culpable parties, excusing further adherence to the confidentiality provisions by A Co., and, once the court had ruled in favor of A Co., it found that R Co.'s obligation pursuant to the confidentiality provisions of the agreement also was excused. *Held:*

1. The plaintiffs could not prevail on their claim that the trial court improperly concluded that R Co. was bound by the confidentiality provision of the settlement agreement only to the extent of its client, A Co., which was based on their claim that the language of the agreement, coupled with R Co.'s signature on the agreement, was ambiguous and created a genuine issue of material fact regarding the capacity in which R Co. signed the agreement: the agreement was a contract that was entered into among A Co. and the plaintiffs and certain other companies for the principal purpose of settling certain litigation and arbitration proceedings; it was undisputed that R Co. was not a named party to the agreement, and the language of the agreement repeatedly referred to the parties and their respective counsel, indicating that R Co.'s obligations flowed from its role as A Co.'s counsel and, furthermore, R Co. signed the agreement as counsel for A Co.; viewing the agreement as a whole, this court concluded that any confidentiality obligation that R Co. undertook was limited to the extent of the obligation of A Co., its client; moreover, the trial court properly concluded that a certain affidavit on which the plaintiffs relied in opposition to R Co.'s motion for summary judgment did not create a genuine issue of material fact but, rather, contained conclusory allegations that did not constitute evidence sufficient to establish the existence of disputed material facts.
2. The trial court properly concluded that the finding in *Alpha Beta* that A Co. had been released from its confidentiality obligations under the settlement agreement by virtue of the material breach of the settlement agreement by certain defendants in that action had collateral estoppel effect that extended to R Co., as an agent of A Co.: it was undisputed that A Co. was released from compliance with the confidentiality provisions of the settlement agreement as a result of the prior material breach of that agreement by the defendants in *Alpha Beta*, and, in the absence of an independent contractual obligation on the part of R Co. to comply with the agreement that was untethered to its role as counsel for A Co., this court could conceive of no reason why collateral estoppel principles should not apply under the limited circumstances of this case; moreover, the fact that R Co. was not a party to the related action in *Alpha Beta* did not militate against its defensive use of collateral estoppel.

Argued October 9, 2019—officially released June 9, 2020

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where Pursuit Opportunity Fund I, LP, was substituted for the named plaintiff, and Pursuit Capital Management Fund I, LP, was added as a plaintiff; thereafter, the action

was withdrawn as to the defendant John Scott et al.; subsequently, the court, *Hon. Kenneth B. Povodator*, judge trial referee, granted the named defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Sabato P. Fiano, for the appellants (substitute plaintiff et al.).

William N. Wright, with whom, on the brief, were *John W. Cannavino* and *Robert M. Abrahams*, pro hac vice, for the appellee (named defendant).

Opinion

MOLL, J. The plaintiffs Pursuit Investment Management, LLC (PIM), Pursuit Opportunity Fund I, LP (POF), and Pursuit Capital Management Fund I, LP (PCM) (plaintiffs), appeal from the judgment of the trial court granting summary judgment in favor of the defendant Reed Smith, LLP (Reed Smith). POF and PCM are hedge funds[1] to which PIM provided investment management and advisory services. Reed Smith is a law firm that represented Alpha Beta Capital Partners, L.P. (Alpha Beta), an investor in POF and PCM. In the present action, the plaintiffs claim that Reed Smith violated a confidentiality provision of a settlement agreement executed by, among others, Alpha Beta and the plaintiffs, to which Reed Smith was a signatory. On appeal, the plaintiffs argue that the trial court erred by concluding that (1) the language of the settlement agreement bound Reed Smith to the confidentiality provision only to the extent of its principal, Alpha Beta, and (2) a

[1] "A hedge fund is [a] specialized investment group—[usually] organized as a limited partnership or offshore investment company—that offers the possibility of high returns through risky techniques such as selling short or buying derivatives." (Internal quotation marks omitted.) *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 390 n.3, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020).

finding in a related action, *Alpha Beta Capital Partners, L.P.* v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 415, 219 A.3d 801 (2019), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020) (*Alpha Beta*)[2]—namely, that the Pursuit Parties' material breach of the settlement agreement effectively released Alpha Beta from its confidentiality obligations thereunder—was entitled to collateral estoppel effect that extended to Reed Smith, as an agent of Alpha Beta.[3] We affirm the judgment of the trial court.

In order to put the present appeal in its proper context, we begin with an abbreviated recitation of the complex factual and procedural history of the related action, as recently set forth by this court in *Alpha Beta*. "In approximately 2007, [Alpha Beta] invested in both POF and PCM. . . . Also invested in POF and PCM at that time was the Schneider Group . . . . In 2007 and 2008, all of the [Pursuit Parties] were experiencing significant financial difficulties as a result of the volatility of the global securities market. More specifically, in 2007, POF Master and PCM Master had purchased certain securities known as collateralized debt obligations (CDOs) from UBS AG, or its affiliate, for substantial

[2] The defendants in the related action included POF, Pursuit Opportunity Fund I Master Ltd. (POF Master), PCM, Pursuit Capital Master (Cayman) Ltd. (PCM Master), Pursuit Partners, LLC (Pursuit Partners), PIM, Northeast Capital Management, LLC, Anthony Schepis, and Frank Canelas, Jr. Canelas and Schepis are individuals "who, together, formed, operated, and controlled all of the other defendants [in the related action]." *Alpha Beta*, supra, 193 Conn. App. 390–91. Pursuit Partners was not a party to the appeal in *Alpha Beta*; id., 388–89; and, although Pursuit Partners was the named plaintiff in the present action, it has been substituted as a plaintiff by POF. For ease of reference, we refer to the defendants in the related action, which included the plaintiffs in the present action, as the "Pursuit Parties."

[3] In its appellate brief, Reed Smith offers an alternative basis for affirming the judgment, namely, that the trial court's finding in the related action that the Pursuit Parties suffered no damages was entitled to collateral estoppel effect. Because we reject both of the plaintiffs' claims, we need not reach this alternative argument. See *Capen* v. *General Dynamics Corp./Electric Boat Division*, 38 Conn. App. 73, 80–81 n.7, 659 A.2d 735 (1995).

sums of money. Shortly thereafter, the value of the CDOs precipitously dropped and, in 2008, Pursuit Partners and PIM commenced a civil action in the Connecticut Superior Court against UBS AG and Moody's Corporation (UBS litigation) . . . .

"In 2010, [Alpha Beta] commenced a civil action in the Supreme Court of the state of New York (2010 New York action) against PIM, [Anthony] Schepis, and [Frank] Canelas [Jr.]. Therein, [Alpha Beta] alleged that [those parties] were liable for substantial damages caused by their 'tortious conduct involving the management of its investments in the hedge funds.' Contemporaneously, [Alpha Beta] filed a separate arbitration proceeding against POF and PCM, claiming similar losses for similar tortious conduct. In that proceeding, [Alpha Beta] alleged, among other things, that one or more of the [Pursuit Parties] had paid themselves compensation on the basis of a highly inflated value of the CDOs, notwithstanding their knowledge that the CDOs had little or no value.

"On or about April 8, 2011, [Alpha Beta], PIM, Schepis, Canelas, Pursuit Management, POF, and PCM executed the 'Confidential Settlement Agreement and Mutual Release' (CSA) to resolve the 2010 New York action and the arbitration proceeding. The CSA was comprised of fifteen sections and provided at the outset that 'the parties hereby agree as follows . . . .' In §§ 1, 2, 5, and 6, the CSA provided that [Alpha Beta] was to execute a dismissal with prejudice as to both the 2010 New York action and the parallel arbitration proceeding, and that [Alpha Beta] agreed to a mutual release with PIM, Schepis, Canelas, Pursuit Management, POF, and PCM of all claims that were, or could have been, raised therein.

"As consideration for [Alpha Beta's] withdrawal and release, § 3 of the CSA required PIM to pay [Alpha Beta] a settlement payment of $2.2 million and a redemption payment of $1,418,033. Pursuant to § 3 (b) (i) and

(iii) of the CSA, the amount of the redemption payment represented [Alpha Beta's] pro rata share, approximately 32.083612 percent, of the net asset value (NAV) in PCM as of February 28, 2011, minus a holdback[4] of '$250,000 for the purpose of funding necessary costs . . . associated with the ongoing [UBS litigation]' and minus 'an additional holdback in the amount [of] $200,000 to pay legal fees and expenses with respect to which PCM has an obligation to indemnify.' Section 3 (b) (ii) of the CSA provided detailed mandates regarding these holdbacks, including that PIM shall not use any prior holdbacks in connection with the UBS litigation, that [Alpha Beta] shall 'be entitled to periodic updates on the status of the holdbacks,' and that [Alpha Beta] 'will be provided with the opportunity to pay additional expenses necessary for the UBS [l]itigation' if the UBS litigation holdback was insufficient.

"In addition, § 4 of the CSA secured [Alpha Beta's] interest in two of PCM's contingent assets. . . . These contingent assets include (a) PCM's proportionate interest in the UBS [l]itigation; and (b) PCM's interest in a claim against Lehman Brothers International (Europe) . . . in the amount of approximately $14,000,000 [(LBIE claim)]. . . .

"Section 7 of the CSA was a confidentiality provision in which the parties agreed, among other things, 'to maintain in the strictest confidence and not disclose . . . the contents and terms of [the CSA] . . . [and] not to use or provide any information relating to any claim arising out of an investment in the [f]unds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in PCM, POF or any other investment vehicle managed by PIM.' Section 12 of the

[4] A holdback is "an amount withheld from the full payment of a contract pending the other party's completion of some obligation . . . ." (Internal quotation marks omitted.) *Alpha Beta*, supra, 193 Conn. App. 392 n.7.

CSA was a choice of law provision that provided: 'This [a]greement shall be construed and interpreted in accordance with the laws of the [s]tate of New York. Any disputes or litigation arising out of this [a]greement shall be governed by New York law.' . . .

"Shortly after the CSA was signed, the LBIE claim was sold for $9,334,141.55, and, on June 1, 2011, those funds were received [by PCM Master]. Nevertheless, no portion of the LBIE claim proceeds were remitted to [Alpha Beta] until October, 2011, when [Alpha Beta] received $1,022,022.36.[5] Thereafter, a series of communications occurred between Reed Smith and DLA Piper[6] regarding the distribution of the LBIE claim proceeds to [Alpha Beta].

"On November 9, 2011, DLA Piper sent an explanation to Reed Smith, stating that [Alpha Beta's] contingent interest in the LBIE claim was worth $2,691,641, which amount represented 32.08 percent of PCM's 90 percent interest in the LBIE claim owned by PCM Master, and that a performance fee also would be subtracted from that amount. On November 16, 2011, Reed Smith sent a letter in response, asserting that the [Pursuit Parties] had provided no documentation to support their valuation of [Alpha Beta's] proportionate interest in the LBIE claim, that Reed Smith had been in contact with the Schneider Group and their related entities, and that the Schneider Group was supporting [Alpha Beta's] demands. On November 26, 2011, DLA Piper sent another explanation to Reed Smith, stating that [Alpha Beta's] interest in the LBIE claim was reduced to

[5] There was an apparent dispute in the related action over the amount Alpha Beta was owed from the LBIE claim proceeds pursuant to the CSA. See *Alpha Beta*, supra, 193 Conn. App. 414–15. However, even assuming that the Pursuit Parties' calculation as to that amount was correct, the figure provided to Alpha Beta in October, 2011, was less than one half of the calculated entitlement. Id., 415.

[6] "During all relevant times, [Alpha Beta] was represented by . . . Reed Smith, and the [Pursuit Parties] were represented by the law firm DLA Piper." *Alpha Beta*, supra, 193 Conn. App. 391.

$2,132,559 to account for the performance fee due to the [Pursuit Parties], and that [Alpha Beta's] 'reserve balance in May, 2011, was adjusted upward in that amount.' Neither of DLA Piper's communications provided an explanation as to the basis for the performance fee or the balance reserve, nor the reason for which the [Pursuit Parties] had remitted less than 48 percent of the total amount that they finally had calculated [Alpha Beta's] interest in the LBIE claim to be worth. The [Pursuit Parties] did not remit any further amount of the LBIE claim at that time. . . .

"In March, 2013, after having received no further communication regarding the LBIE claim and concerned about the status of its holdbacks, [Alpha Beta] commenced a civil action in the Supreme Court of the state of New York against PIM, PCM, POF, and Pursuit Management (2013 New York action). In that action, [Alpha Beta] alleged that those defendants had breached the CSA by failing to pay [Alpha Beta] its pro rata portion of the LBIE claim proceeds, and by failing to provide [Alpha Beta] with periodic updates on the status of its holdbacks and contingent assets. . . .

"Soon after the commencement of the 2013 New York action, the [Pursuit Parties], or some of them, transferred to [Alpha Beta] approximately $700,000 in additional proceeds from the LBIE claim, for a total distribution of $1,722,022.36, which was approximately 81 percent of the total amount that the [Pursuit Parties] finally had calculated [Alpha Beta's] interest in the LBIE claim to be worth. The transmittal of the $700,000 was not accompanied by any explanation or accounting as to how the amount was calculated, the balance of the LBIE claim proceeds, or the status of the holdbacks. . . .

"In August and September, 2015, Pursuit Partners settled the UBS litigation for a total of $36 million; however, the [Pursuit Parties] have not provided [Alpha

Beta] with any portion of the settlement proceeds." (Footnotes added and omitted.) *Alpha Beta*, supra, 193 Conn. App. 391–98.

As a result, Alpha Beta brought the related action against the Pursuit Parties in Connecticut Superior Court seeking damages for their alleged failure to remit to Alpha Beta its share of the UBS litigation proceeds. Id., 398. Alpha Beta's operative complaint comprised seven counts: (1) breach of the CSA; (2) breach of the covenant of good faith and fair dealing; (3) unjust enrichment; (4) conversion; (5) statutory theft under General Statutes § 52-564; (6) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq.; and (7) civil conspiracy. Id. The Pursuit Parties' operative two count amended counterclaim asserted claims for breach of the CSA and fraud. Id., 399. "In particular, the [Pursuit Parties] alleged that [a] November, 2011 letter from Reed Smith to DLA Piper referencing [Alpha Beta's] communication with the Schneider Group, as well as the commencement of the 2013 New York action, had breached certain provisions of . . . the CSA . . . ." Id. Following a bench trial, the trial court, *Genuario*, *J.*, rendered judgment in favor of Alpha Beta on counts one and two of its complaint as to those defendants that were parties to the CSA, and on both counts of the Pursuit Parties' counterclaim. Id., 400–401. The court rendered judgment in favor of Pursuit Partners, PCM Master, and POF Master on counts one and two of the complaint and in favor of all of the Pursuit Parties on counts three through seven of the complaint. Id., 401. Particularly relevant for purposes of this appeal, the trial court in the related action made a finding, which was left undisturbed on appeal, namely, that the Pursuit Parties' prior partial delayed payment of the LBIE claim to Alpha Beta constituted a material breach of the CSA that, under New York law, relieved Alpha Beta of its obligations under the confidentiality provision of the CSA. Id., 413–15, 413 n.20.

On appeal, this court affirmed in part and reversed in part the judgment.[7] Id., 390. We held in relevant part that the trial court's finding that the Pursuit Parties' partial delayed payment of Alpha Beta's proportionate share of the LBIE claim relieved Alpha Beta of its obligations under the CSA's confidentiality provision was not clearly erroneous. Id., 413–15. Because the Pursuit Parties' breach in that regard occurred prior to Alpha Beta's communications with the United States Securities and Exchange Commission (SEC) and the Schneider Group, this court held that the trial court properly rejected the Pursuit Parties' breach of contract counterclaim. Id., 415.

Against this backdrop, we now turn to the relevant procedural background of the present action. In December, 2015, Pursuit Partners and PIM commenced the present action against Reed Smith, John Scott, who is a member of Reed Smith, and Philip Chapman, a principal of Alpha Beta. On April 20, 2016, the action was withdrawn as to Scott and Chapman. On April 25, 2016, POF was substituted as a plaintiff for Pursuit Partners, and PCM was added as a plaintiff. On January 18, 2017, the plaintiffs filed the operative amended complaint against Reed Smith, alleging one count of breach of contract. Specifically, the complaint alleged that Reed Smith breached the confidentiality provision of the CSA when Reed Smith communicated with, provided information to, and otherwise assisted the Schneider Group in separate litigation involving several of the Pursuit Parties.

On May 8, 2017, Reed Smith filed a motion for summary judgment, a supporting memorandum of law, a supporting affidavit from William N. Wright, Esq., and

[7] This court reversed the trial court's determination that Schepis and Canelas were, in part, liable in their individual capacities for damages to Alpha Beta with respect to their purported failure to provide UBS litigation settlement proceeds. *Alpha Beta*, supra, 193 Conn. App. 436–37.

appended exhibits. In support of its motion, Reed Smith argued, inter alia, that the plaintiffs' claim was barred on collateral estoppel grounds because the issue of the plaintiffs' prior material breach of the CSA, and the resulting release of Alpha Beta from its confidentiality obligations, was fully and fairly litigated, actually decided, and necessary to the judgment in the related action. Reed Smith contended that the principal basis for the motion was that any alleged breach of the confidentiality provision of the CSA on its part occurred after the plaintiffs materially breached the CSA by refusing to remit the LBIE claim settlement proceeds. Reed Smith further argued that, because the trial court in the related action considered the Pursuit Parties' breach to be "material," both Alpha Beta and Reed Smith were excused from performance under the CSA. On August 25, 2017, the plaintiffs filed their memorandum in opposition to Reed Smith's motion for summary judgment, as well as a supporting affidavit from Canelas (Canelas affidavit) and appended exhibits.[8]

On March 26, 2018, the trial court, *Hon. Kenneth B. Povodator*, judge trial referee, issued a comprehensive memorandum of decision, granting Reed Smith's motion for summary judgment on collateral estoppel grounds.[9] In connection with its collateral estoppel discussion, the court began with a review of the confidentiality provision, set forth in § 7 of the CSA, quoted previously in this opinion. Focusing in relevant part on the language obligating each signatory "not to use or provide any information relating to any claim arising

[8] The plaintiffs also simultaneously filed a cross motion for summary judgment as to liability only, which the trial court subsequently determined had been abandoned.

[9] On March 27, 2018, the trial court issued a supplemental order clarifying one aspect of its March 26, 2018 decision and holding that the doctrine of res judicata applied with respect to Reed Smith's November, 2011 letter to DLA Piper. In their principal appellate brief, the plaintiffs do not challenge the court's decision on the basis of res judicata. We therefore do not review the court's supplemental order.

out of an investment in the [f]unds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in PCM, POF or any other investment vehicle managed by PIM," the court concluded that such language could not reasonably extend to Reed Smith's communications with the SEC.[10] The court then examined Reed Smith's alleged communications with the Schneider Group. Acknowledging that these communications "appear to come within the scope of [§ 7 of the CSA] . . . or at least [were] sufficiently likely to be so categorized as to present a material issue of fact, unless otherwise explained or justified or excused," the court stated that "[t]he documents submitted . . . all reflect conduct of Alpha Beta through [Reed Smith] as its attorneys," and that "there has been no suggestion of any basis or reason why [Reed Smith], while representing Alpha Beta, might be communicating with the [Schneider Group] other than in furtherance of the interests of its client . . . ." Rather, Reed Smith's alleged "conduct seem[ed] to have been directed to applying pressure to the [Pursuit Parties] to provide the amounts claimed to be due to Alpha Beta." Turning to the findings underlying Reed Smith's collateral estoppel argument, the court observed that "[t]he court [in the related action] was addressing conduct that primarily if not exclusively was that of [Reed Smith], acting on behalf of Alpha Beta as the client."

The court then rejected the plaintiffs' argument that because Reed Smith was a separate signatory to the CSA, the language of the confidentiality provision binding "the [p]arties and their respective counsel" separately obligated Reed Smith, irrespective of whether Alpha Beta had been excused from its own confidentiality obligation. Noting the "irrationality" of a result in which an agent, i.e., Reed Smith, could be liable for a breach of confidentiality when its principal, i.e., Alpha

[10] The plaintiffs do not challenge on appeal this particular conclusion.

Beta, had already been excused from the identical obligation with respect to the same communication, the court concluded that, in the related action, "[the plaintiffs] were determined to be the culpable parties, excusing further adherence to the confidentiality provisions—and the conduct of Reed Smith was the primary if not the sole focus of the Pursuit [Parties'] claims. While perhaps not framed in this manner, effectively the conduct of the [Pursuit Parties] had frustrated the purpose of the obligation of confidentiality, including as to Reed Smith once the court had ruled in favor of Alpha Beta with respect to the claim that it had breached its confidentiality obligation." This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiffs first claim that the language of the CSA does not support the trial court's conclusion that Reed Smith was bound by the CSA's confidentiality provision only to the extent of its client, Alpha Beta. Reed Smith maintains that the trial court properly concluded that it signed the CSA solely in its representative capacity as Alpha Beta's agent, and that the plaintiffs' position that Reed Smith was effectively a separate obligor under § 7 of the CSA would lead to nonsensical results. We agree with Reed Smith.

We begin by setting forth the standard of review and applicable legal principles. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held 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." (Emphasis omitted; internal quotation marks omitted.) *Capasso* v. *Christmann*, 163 Conn. App. 248, 257, 135 A.3d 733 (2016).

"The standard of review for the interpretation of a contract is well established. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact [subject to the clearly erroneous standard of review] . . . [when] there is definitive contract language, the determination of what the parties intended by their . . . commitments is a question of law [over which our review is plenary]. . . . In light of the fact that the [plaintiffs'] claim is directed at the court's interpretation of the [CSA], as opposed to the court's factual findings, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Citation omitted; internal quotation marks omitted.) *Alpha Beta*, supra, 193 Conn. App. 403.

To determine the capacity in which Reed Smith signed the CSA, we continue by setting forth the applicable contract interpretation principles under New York law.[11] "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms . . . . We apply this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople . . . . In such cases, courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include . . . . [C]ourts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing . . . . We instead concern ourselves with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote . . . . Accordingly, before assessing evidence regarding what was in the parties' minds at the time of the agreement, we must first look to the agreement itself." (Citations omitted; internal quotation marks omitted.) *Ashwood Capital, Inc.* v. *OTG Management, Inc.*, 99 App. Div. 3d 1, 7, 948 N.Y.S.2d 292 (2012).

"A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion . . . ." (Citations omitted; internal quotation marks omitted.) *Agor* v. *Board of Education*, 115 App. Div. 3d 1047, 1048, 981 N.Y.S.2d 485 (2014). It is well established that, in order to determine whether an ambiguity exists under the CSA, we "should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be considered, not as if isolated from the context, but in the

[11] The parties agree that New York substantive law governs this contractual claim because of the choice of law provision in § 12 of the CSA, which provides in relevant part: "This [a]greement shall be construed and interpreted in accordance with the laws of the [s]tate of New York."

light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought." *Atwater & Co.* v. *Panama Railroad Co.*, 246 N.Y. 519, 524, 159 N.E. 418 (1927).

The following additional principles also apply to our resolution of this claim. "Agency is a legal relationship between a principal and an agent. It is a fiduciary relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other so to act. The agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority . . . ." (Citations omitted; internal quotation marks omitted.) *Faith Assembly* v. *Titledge of New York Abstract, LLC*, 106 App. Div. 3d 47, 58, 961 N.Y.S.2d 542 (2013). It is axiomatic that an attorney is an agent for his or her client. See *Aetna Casualty & Surety Co.* v. *Hambly Construction Co.*, 65 App. Div. 2d 612, 613, 409 N.Y.S.2d 552 (1978); see also New York Rules of Professional Conduct 1.2 (a). When a party materially breaches a contract, the nonbreaching party's performance thereunder is excused. *Grace* v. *Nappa*, 46 N.Y.2d 560, 567, 389 N.E.2d 107, 415 N.Y.S.2d 793 (1979). A breach is material if it "go[es] to the root of the agreement between the parties." (Internal quotation marks omitted.) *Frank Felix Associates, Ltd.* v. *Austin Drugs, Inc.*, 111 F.3d 284, 289 (2d Cir. 1997) (applying New York law). "A party's obligation to perform under a contract is only excused where the other party's breach of the contract is so substantial that it defeats the object of the parties in making the contract." Id.

Guided by these principles, we turn to the language of the CSA. We first note that the definitions of the terms "[p]arty" and "[p]arties" in the CSA do not include Reed Smith. However, the confidentiality provision of

the CSA, set forth in § 7 thereof, provides in relevant part: "The [p]arties *and their respective counsel* agree to maintain in the strictest confidence and not disclose . . . the contents and terms of this [a]greement, including but not limited to the [c]onsideration for this [a]greement. For the avoidance of doubt, this confidentiality provision expressly prohibits, among other things, the issuance of any press release regarding the [a]greement, and the . . . publication of the [a]greement or the terms of the [a]greement. . . . To further ensure the confidentiality of this [a]greement, the [p]arties *and their respective counsel* agree not to use or provide any information relating to any claim arising out of an investment in the [f]unds to any other person in connection with the initiation of any lawsuit, claim, arbitration or action related to or concerning any investment in PCM, POF or any other investment vehicle managed by PIM." (Emphasis added.) Although Reed Smith was not a "[p]arty" to the CSA, the CSA's signature block includes Reed Smith as a signatory with an accompanying parenthetical that reads "counsel for Alpha Beta."

The plaintiffs argue that the language in § 7 directed to "the [p]arties and their respective counsel," coupled with Reed Smith's signature to the CSA, is ambiguous and creates, at a minimum, a genuine issue of material fact regarding the capacity in which Reed Smith signed the CSA. In support of their position, they rely on the principle that a contract is unambiguous only "if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion . . . ." (Citation omitted; internal quotation marks omitted.) *Greenfield* v. *Philles Records, Inc.*, 98 N.Y.2d 562, 569, 780 N.E.2d 166, 750 N.Y.S.2d 565 (2002). The plaintiffs also contend that the Canelas affidavit raised a genuine issue of material fact, specifically, that they

would not have entered into the CSA unless Reed Smith agreed to its terms in an individual capacity. Reed Smith argues in contrast that the language of the CSA, including the signature block, demonstrates that it signed the CSA as Alpha Beta's counsel, and that requiring its compliance with the confidentiality provision after Alpha Beta was no longer bound thereby as a result of the plaintiffs' prior material breach would be a nonsensical, overly formalistic interpretation of the contract. We agree with Reed Smith.

The CSA is a contract that was entered into among Alpha Beta and PIM, Pursuit Capital Management, LLC, POF, PCM, Schepis, and Canelas for the principal purpose of settling the 2010 New York action and arbitration proceedings. It is undisputed that Reed Smith was not a named *party* to the CSA. Notably, § 7 of the CSA, the only section directed to the parties' counsel, repeatedly refers to the "[p]arties and their respective counsel," indicating that Reed Smith's obligations thereunder flowed from its role as Alpha Beta's counsel. Moreover, Reed Smith signed the CSA as "counsel for Alpha Beta." Cf. *Pepsi-Cola Buffalo Bottling Corp.* v. *Wehrle Drive Supermarkets, Inc.*, 123 App. Div. 2d 515, 515, 507 N.Y.S.2d 107 (1986) (agent's signature failed to show that he signed guarantee in representative capacity); see also *Georgia Malone & Co.* v. *Rieder*, 86 App. Div. 3d 406, 408–409, 926 N.Y.S.2d 494 (2011) ("agents of a company are not personally liable on a contract if they do not purport to bind themselves individually"), aff'd, 19 N.Y.3d 511, 973 N.E.2d 743, 950 N.Y.S.2d 333 (2012). Viewing the CSA as a whole, we conclude that any confidentiality obligation Reed Smith undertook pursuant to § 7 was limited to the extent of the confidentiality obligation of its client, Alpha Beta.

Any other reading of the CSA would strain the objective intentions of the contracting parties; see *Mencher* v. *Weiss*, 306 N.Y. 1, 7, 114 N.E.2d 177 (1953); and would lead to nonsensical results. See *Reiss* v. *Financial Performance Corp.*, 279 App. Div. 2d 13, 19, 715 N.Y.S.2d

29 (2000) ("Surely a court is not required to disregard common sense and slavishly bow to the written word where to do so would plainly ignore the true intentions of the parties in the making of a contract. Such formalistic literalism serves no function but to contravene the essence of proper contract interpretation, which, of course, is to enforce a contract in accordance with the true expectations of the parties in light of the circumstances existing at the time of the formation of the contract . . . ." (Citations omitted.)), aff'd as modified, 97 N.Y.2d 195, 764 N.E.2d 958 (2001). For example, taken to its logical conclusion, the plaintiffs' interpretation would have permitted Alpha Beta to communicate with the Schneider Group through anyone other than Reed Smith. Such a result would defy common sense and is incongruent with established contract and agency principles. See *Givati* v. *Air Techniques, Inc.*, 104 App. Div. 3d 644, 645, 960 N.Y.S.2d 196 (2013) (in interpreting contract, sensible meaning of words should be sought); see also *Georgia Malone & Co.* v. *Rieder*, supra, 86 App. Div. 3d 408–409. Rather, we construe § 7 of the CSA as the practical means to prevent a contracting party's circumvention of the confidentiality provision by communicating with third parties through their counsel in an attempt to avoid liability. The plaintiffs' contrary interpretation fails to provide a reasonable basis to conclude that Reed Smith had an ongoing contractual duty to comply with § 7 once Alpha Beta was excused from performance. Accordingly, the plaintiffs' reliance on the principle that an ambiguity exists when there is a reasonable basis for a difference in opinion as to the contract's meaning; see *Greenfield* v. *Phillies Records, Inc.*, supra, 98 N.Y.2d 569; is misplaced.

Furthermore, we, like the trial court, conclude that the Canelas affidavit on which the plaintiffs rely did nothing to create a genuine issue of material fact. The trial court described the Canelas affidavit as follows:

"The affidavit of . . . Canelas reads more like a supplemental brief than an affidavit. . . . [M]ost of the recitations seem to have been taken from a brief or draft brief, minimally modified to appear to be assertions by a speaker (the affiant), going so far as to even have section headings such as 'The issues before Judge Genuario and the New York [c]ourts are not the issues before this [c]ourt' . . . ." Among the examples noted by the court was the fact that the Canelas affidavit contained "a conclusion—complete with a heading in all capital letters and in boldface and underlined—reading: 'Based on the foregoing and all of the prior proceedings had herein, Pursuit respectfully requests that the [c]ourt enter summary judgment in its favor on liability . . . .' " The court further noted that the following sentence in the affidavit "epitomize[d] the extreme departure from anything approaching proper content in an affidavit": " 'In my view, Reed Smith's reliance on the Appellate Division Decision as barring the instant action on res judicata grounds is wholly without merit.' " The trial court concluded, and we agree, that "most of the twenty-three pages of the affidavit are more in the nature of arguments than competent factual statements, making it especially difficult to discern evidence that the court should consider (*can* properly consider)." What remain in the Canelas affidavit are conclusory allegations that "do not constitute evidence sufficient to establish the existence of disputed material facts." *Gupta* v. *New Britain General Hospital*, 239 Conn. 574, 583, 687 A.2d 111 (1996). The trial court's rebuke of the Canelas affidavit, and its conclusion that it lacked evidentiary value, were well founded. In sum, on the basis of our careful review of the Canelas affidavit, we agree with the trial court that, upon the proper burden shifting, the affidavit failed to demonstrate that there existed a genuine issue of material fact.

For the foregoing reasons, the plaintiffs' first claim fails.

II

The plaintiffs next claim that the finding in the related action—that their prior material breach of the CSA excused Alpha Beta from compliance with § 7 of the CSA (a finding that was left undisturbed in *Alpha Beta*)—does not extend to Reed Smith and is not entitled to collateral estoppel effect under the circumstances of the present case. We disagree.

The applicability of collateral estoppel to a particular set of facts presents a question of law over which this court exercises plenary review. *Rodriguez* v. *Saucier*, 108 Conn. App. 599, 601, 948 A.2d 1067, cert. denied, 289 Conn. 917, 957 A.2d 879 (2008). "The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality. . . . Collateral estoppel . . . prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim. . . . For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment." (Internal quotation marks omitted.) *Birnie* v. *Electric Boat Corp.*, 288 Conn. 392, 405, 953 A.2d 28 (2008). "If an issue has been determined, but the judgment is not dependent upon the determination of the issue, the parties may relitigate the issue in a subsequent action. . . . For collateral estoppel to apply, the issue concerning which relitigation is sought to be estopped must be identical to the issue decided in the prior proceeding. . . .

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined. An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly

rendered." (Citations omitted; internal quotation marks omitted.) *State* v. *Joyner*, 255 Conn. 477, 490, 774 A.2d 927 (2001).

At issue in the present case is Reed Smith's defensive use of the collateral estoppel doctrine, which "occurs when a defendant in a second action seeks to prevent a plaintiff from relitigating an issue that the plaintiff had previously litigated in another action against the same defendant *or a different party*. . . . It is well established that privity is not required in the context of the defensive use of collateral estoppel . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Marques* v. *Allstate Ins. Co.*, 140 Conn. App. 335, 340–41, 58 A.3d 393 (2013).

As a threshold matter, it is undisputed that the issues of whether the Pursuit Parties materially breached the CSA and whether such breach released Alpha Beta from compliance with § 7 of the CSA were actually litigated and necessarily determined in the related action. See *Alpha Beta*, supra, 193 Conn. App. 415 ("the evidence that, prior to any of the contested communications, [Alpha Beta] received less than one half of what the [Pursuit Parties] had calculated was [Alpha Beta's] entitlement, more than four months after the funds had been received by PCM without sufficient justification, supports the court's finding that the [Pursuit Parties] had materially breached the CSA"); id., 413–15 (concluding that evidence supported trial court's finding that Pursuit Parties had materially breached their obligations under CSA in October and November, 2011, prior to any of Alpha Beta's communications with SEC or Schneider Group, and that, as result, under New York law, Alpha Beta was discharged from its obligations under § 7 of CSA). It is also undisputed that the specific communications underlying the plaintiffs' breach of contract claim against Reed Smith in the present action are the identical communications that were at issue in the related action, and that Reed Smith

engaged in such communications solely on behalf of its client and principal, Alpha Beta, after the Pursuit Parties materially breached the CSA.[12] In the absence of an independent contractual obligation on the part of Reed Smith to comply with § 7 of the CSA that is untethered to its role and conduct as counsel for Alpha Beta, we can conceive of no reason why collateral estoppel principles—and the specific policy of judicial economy they serve—should not apply under the limited circumstances of this case.[13] Thus, we conclude that the trial court properly concluded that the plaintiffs' breach of contract claim against Reed Smith was precluded on the basis of defensive collateral estoppel.

The plaintiffs argue that the related action did not resolve an "identical issue" in the present action, that is, whether *Reed Smith* was excused from compliance under § 7 of the CSA. The plaintiffs' argument ignores the contract and agency principles discussed in part I of this opinion. Moreover, as stated previously, the fact that Reed Smith was not a party to the related action does not militate against the defensive use of collateral estoppel.[14] See *Marques* v. *Allstate Ins. Co.*, supra, 140

[12] During oral argument before this court, the plaintiffs' counsel acknowledged that Reed Smith engaged in all of the alleged conduct on behalf of Alpha Beta.

[13] Neither party points to a Connecticut case in direct support of its respective position, nor have we found one. Nevertheless, we note that several jurisdictions have applied defensive collateral estoppel to bar subsequent litigation in the specific context of a principal-agent relationship. See, e.g., *Griffin* v. *Sirva, Inc.*, 291 F. Supp. 3d 245, 247, 252–54 (E.D.N.Y. 2018) (concluding that plaintiff employees were collaterally estopped from relitigating, as against defendant, whether defendant's subsidiary violated state human rights law when earlier litigation resulted in jury verdict in favor of subsidiary); *Cook* v. *Detroit*, 125 Mich. App. 724, 734, 337 N.W.2d 277 (1983) (applying collateral estoppel to bar negligence action against city when earlier action against city police officers absolved them of negligence).

[14] "Historically, the doctrine of collateral estoppel, or issue preclusion, required mutuality of the parties. The general rule of issue preclusion is that [w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties,

Conn. App. 340–41; *Gionfriddo* v. *Gartenhaus Cafe*, 15 Conn. App. 392, 404, 546 A.2d 284 (1988), aff'd on other grounds, 211 Conn. 67, 557 A.2d 540 (1989).

The judgment is affirmed.

In this opinion the other judges concurred.

SUSAN AHRENS *v.* HARTFORD FLORISTS' SUPPLY, INC., ET AL.
(AC 42154)

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

Syllabus

The plaintiff, A, sought to recover damages from the defendants H Co. and D Co. pursuant to the Connecticut Product Liability Act (§ 52-572m et seq.) in connection with personal injuries she sustained that she alleged were caused by her handling of a bouquet of flowers that contained a fungus. A alleged that the flowers were put into the stream of commerce by D Co. and H Co. D Co. attempted to add P Co. and F Co. to the action by filing a third-party complaint. The court subsequently granted D Co.'s motion to implead P Co. and F Co. as third-party defendants, and, thereafter, the third-party defendants filed motions to dismiss the third-party complaint. The third-party defendants claimed that D Co. improperly served the third-party complaint because D Co. did not move to implead pursuant to statute (§ 52-102a) prior to serving the third-party complaint within the applicable one year statute of limitations (§ 52-577a (b)). The trial court granted the motions to dismiss, and, from the judgment rendered thereon, D Co. appealed to this court. *Held:*

1. D Co. could not prevail on its claim that the trial court applied an incorrect standard when it found that strict compliance with §§ 52-102a and 52-577a (b) was required to implead a third party into a product liability case: § 52-102a is plain and unambiguous, providing that a defendant

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whether on the same or a different claim. . . . Under the mutuality rule, [p]arties who were not actually adverse to one another in a prior proceeding could not assert collateral estoppel against one another in a subsequent action. . . .

"The mutuality requirement has, however, been widely abandoned as an ironclad rule. We have held that the [mutuality] rule will no longer operate automatically to bar the use of collateral estoppel . . . ." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Torres* v. *Waterbury*, 249 Conn. 110, 135–36, 733 A.2d 817 (1999).

"may" implead a third-party defendant, and requiring that, if a defendant chooses to implead a third-party defendant, it must seek permission from the court to do so prior to filing a third-party complaint, and D Co., having chosen to implead third-party defendants, failed to first seek permission from the court before it filed its third-party complaint, and nothing in § 52-102a indicates that a court should decide whether a defendant can implead a third-party defendant solely on equitable considerations.

2. The trial court did not err in concluding that there must be strict compliance with §§ 52-102a and 52-577a (b): although D Co. argued that the language of § 52-102a, that a "motion may be filed at any time before trial," demonstrated that the statute was solely administrative and not subject to any limiting time frame, this interpretation neglected to consider the language of § 52-102a in light of § 52-577a (b), the plain language of which provides that a third-party complaint must be served within one year from when the underlying action was returned to court; the court correctly determined that D Co. was required to file a motion to implead under § 52-102a before filing a third-party complaint that had to be served within the one year statute of limitations of § 52-577a (b).

3. D Co.'s claim that the trial court erred in concluding that the one year time limitation in § 52-577a implicated the court's jurisdiction was unavailing: D Co. was required to file a motion to implead prior to serving the third-party complaint within the prescribed one year time limitation, which was mandatory, not directory; moreover, although the time limitation in § 52-577a (b) is procedural, the court's jurisdiction was implicated by D Co.'s failure to comply with §§ 52-577a (b) and 52-102a, because § 52-577a (b) is a service provision, and the court correctly concluded that strict compliance with both §§ 52-102a and 52-577a (b) was required, and failure to so comply was a jurisdictional defect that implicated personal jurisdiction, and seeking permission to implead after already having served the third-party complaint did not remedy the initial defect in service of process.

Argued December 5, 2019—officially released June 9, 2020

Procedural History

Action to recover damages for, inter alia, personal injuries sustained as a result of an allegedly defective product, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the defendant Delaware Valley Floral Group, Inc., filed a third-party complaint; thereafter, the court, *Noble*, *J.*, granted the defendant Delaware Valley Floral Group, Inc.'s motion to implead as third-party defendants Fall River Florist Supply Corporation et al.; subsequently,

the plaintiff filed an amended revised complaint; thereafter, the court, *Noble*, *J.*, granted the third-party defendants' motions to dismiss the third-party complaint of the defendant Delaware Valley Floral Group, Inc., and rendered judgment thereon, from which the defendant Delaware Valley Floral Group, Inc., appealed to this court. *Affirmed*.

Cristin E. Sheehan, with whom were *James L. Brawley* and *Joseph R. Ciollo*, for the appellant (defendant Delaware Valley Floral Group, Inc.).

Erin Canalia, with whom, on the brief, was *Deborah Etlinger*, for the appellee (third-party defendant Fall River Florist Supply Corporation).

Stephen G. Murphy, for the appellee (third-party defendants Pennock Company et al.).

Opinion

DiPENTIMA, C. J. This appeal involves a dispute between Delaware Valley Floral Group, Inc. (Delaware), a defendant in the underlying tort action, and third-party defendants, Fall River Florist Supply Corporation (Fall River) and Pennock Company (Pennock).[1] Delaware appeals from the judgment of the trial court granting the third-party defendants' motions to dismiss its third-party complaint. On appeal, Delaware argues that the court erred in granting the motions by, inter alia, improperly construing General Statutes §§ 52-102a and 52-577a (b). We disagree and, accordingly, affirm the judgment of the trial court.

The plaintiff, Susan Ahrens, brought the underlying action against the defendants, Delaware and Hartford

[1] All involved parties are floral suppliers and wholesalers. Although Pennock Floral and Pennock Company d/b/a Pennock Floral were also listed separately as third-party defendants, we refer collectively to the three entities as "Pennock."

Florists' Supply, Inc. (Hartford), after allegedly sustaining severe eye injuries following her handling of a bouquet of flowers purchased from A Victorian Flowers & Gifts, LLC. In her initial complaint filed on September 6, 2016, the plaintiff alleged a product liability claim on the basis that a fungus on the flowers put into the stream of commerce by Delaware and Hartford caused her injuries.[2] She claimed that the existence of the fungus on the flowers rendered them defective and unreasonably dangerous. The plaintiff claimed that Delaware placed those flowers into the stream of commerce and, thus, was liable for her injuries pursuant to the Connecticut Product Liability Act, General Statutes § 52-572m et seq.

After the plaintiff filed her original complaint, the parties engaged in discovery. In August, 2017, Delaware discovered that the plaintiff may have been exposed to flowers that Fall River and Pennock had supplied to A Victorian Flowers & Gifts, LLC. On September 1, 2017, Delaware attempted to add Pennock and Fall River to the action by filing a third-party complaint against them. In this third-party complaint, Delaware alleged that "to the extent [that] the [p]laintiff . . . recovers damages in the original action against [Delaware], the third-party defendant[s], [Fall River and Pennock], may be liable for a proportionate share of such damages pursuant to . . . General Statutes [§§] 52-572h and 52-572o."

On January 30, 2018, nearly five months after the third-party complaints were served, Delaware filed a motion to implead Fall River and Pennock pursuant to

[2] The plaintiff filed an amended revised complaint on November 20, 2017, alleging that Fall River and Pennock were responsible for her injuries under General Statutes § 52-572m et seq. Subsequently, on February 23, 2018, the plaintiff filed an amended revised complaint, which again named Fall River and Pennock as defendants.

§ 52-102a[3] and Practice Book § 10-11.[4] The motion to implead was granted on February 11, 2018. On March 14 and 26, 2018, respectively, Pennock and Fall River filed motions to dismiss Delaware's third-party complaint.[5]

In their motions to dismiss, Fall River and Pennock both argued that Delaware improperly served the third-party complaint against them because it failed to move to implead pursuant to § 52-102a before serving the third-party complaint within the one year statute of limitations of § 52-577a (b).[6] Thus, Fall River and Pennock contended that the court did not have personal jurisdiction over them.

The court, *Noble*, *J.*, agreed with Fall River and Pennock and granted their motions to dismiss.[7] The court

[3] General Statutes § 52-102a (a) provides: "A defendant in any civil action may move the court for permission as a third-party plaintiff to serve a writ, summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The motion may be filed at any time before trial and permission may be granted by the court if, in its discretion, it deems that the granting of the motion will not unduly delay the trial of the action nor work an injustice upon the plaintiff or the party sought to be impleaded."

[4] Practice Book § 10-11 (a) provides in relevant part: "A defendant in any civil action may move the court for permission as a third-party plaintiff to serve a writ, summons and complaint upon a person not a party to the action who is or may be liable to such defendant for all or part of the plaintiff's claim against him or her. Such a motion may be filed at any time before trial and such permission may be granted by the judicial authority if, in its discretion, it deems that the granting of the motion will not unduly delay the trial of the action or work an injustice on the plaintiff or the party sought to be impleaded. . . ."

[5] On March 26 and 29, 2018, respectively, Fall River and Pennock filed motions to dismiss the counts of the plaintiff's amended revised complaint alleged against them. See footnote 2 of this opinion.

[6] General Statutes § 52-577a (b) provides: "In any [product liability] action, a product seller may implead any third party who is or may be liable for all or part of the claimant's claim, if such third party defendant is served with the third party complaint within one year from the date the cause of the action brought under subsection (a) of this section is returned to court."

[7] The court also granted the motions filed by Fall River and Pennock to dismiss the plaintiff's claims against them set forth in her revised amended

summarized the dispute between the parties as determining "the proper procedure for impleading a third party in a product liability action and, specifically, whether strict compliance, with both §§ 52-102a and 52-577a (b), is required." The court concluded that strict compliance with both statutes was required and, thus, that Delaware was required, under § 52-102a, to seek permission from the court to implead Fall River and Pennock before filing a third-party complaint against them within one year, pursuant to § 52-577a (b). Accordingly, since Delaware failed to seek permission from the court to implead Fall River and Pennock before filing the third-party complaint against them, Fall River and Pennock had not been brought into the action properly. Following the dismissal, Delaware brought this appeal.

We begin with the well settled standard for reviewing a trial court's decision on a motion to dismiss. "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *Metcalf* v. *Fitzgerald*, 333 Conn. 1, 6–7, 214 A.3d 361 (2019), cert. denied, U.S. , 140 S. Ct. 854, 205 L. Ed. 2d 460 (2020).

complaint. The plaintiff did not object to any of the motions, including the dismissal of her complaints against Fall River and Pennock. The plaintiff is not participating in this appeal.

On appeal, Delaware claims that the court improperly granted the motions to dismiss filed by Fall River and Pennock by (1) applying an incorrect standard when it found that strict compliance with both §§ 52-102a and 52-577a (b) was required when impleading a third party into a product liability case, (2) concluding that both §§ 52-102a and 52-577a (b) must be strictly complied with, and (3) concluding that the one year time limitation in § 52-577a implicates the jurisdiction of the court. We consider these arguments in light of the applicable law.

Section 52-102a (a) provides: "A defendant in any civil action may move the court for permission as a third-party plaintiff to serve a writ, summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The motion may be filed at any time before trial and permission may be granted by the court if, in its discretion, it deems that the granting of the motion will not unduly delay the trial of the action nor work an injustice upon the plaintiff or the party sought to be impleaded."

Section 52-577a (b) provides: "In any [product liability] action, a product seller may implead any third party who is or may be liable for all or part of the claimant's claim, if such third party defendant is served with the third party complaint within one year from the date the cause of action brought under subsection (a) of this section is returned to court."

"Issues of statutory construction raise questions of law, over which we exercise plenary review. . . . The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does apply. . . .

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation. (Footnote omitted; internal quotation marks omitted.) *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, 146 Conn. App. 169, 199, 78 A.3d 167 (2013), aff'd, 322 Conn. 541, 153 A.3d 574 (2016). Guided by these principles, we consider Delaware's arguments in turn.

I

First, Delaware claims that the trial court applied an incorrect standard when it found that strict compliance with both §§ 52-102a and 52-577a (b) was required when impleading a third party into a product liability case. Delaware specifically contends that, because § 52-102a is an administrative mechanism designed to achieve judicial economy, the proper inquiry of the court was whether allowing the litigation to proceed against Fall River and Pennock would have caused them prejudice. We disagree.

Delaware begins with the legislative history of § 52-102a, which, it contends, is an indication that the purpose of the statute is to encourage judicial economy,

avoid duplicative actions, and bring all litigants into the same action. It also emphasizes that the decision whether to grant a motion to implead lies within the discretion of the court, which is exercised according to equitable principles. Therefore, Delaware concludes that in deciding whether to dismiss Delaware's third-party complaint, the court should have considered equitable principles, specifically, whether Fall River and Pennock would have been prejudiced by Delaware's failure to comply with § 52-102a before filing its third-party complaint.

In making this argument, Delaware bypasses the critical first step involved in statutory interpretation: the plain meaning of the statutory language. It is only when the language of a statute is ambiguous that extratextual sources, such as the legislative history and the circumstances surrounding the statute's enactment, are looked to for guidance. See *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 210, 105 A.3d 210 (2014). The language of § 52-102a is plain and unambiguous; it prescribes the procedure for defendants to use if they seek to implead a third-party defendant. The permissive language in § 52-102a states that a defendant "may" implead a third-party defendant if that party is or may be liable for all or part of the plaintiff's claim; however, § 52-102a does not require a defendant to do so. Under § 52-102a, if a defendant does choose to implead a third-party defendant, however, it must seek permission of the court before filing a third-party complaint. Nothing in the statutory language indicates that a court should base its decision on whether a defendant can implead a third-party defendant solely on equitable considerations. Accordingly, the court correctly applied the plain language of the statute and did not consider the legislative history or equities in dismissing Delaware's third-party complaint.

II

Delaware next claims that the trial court erred in concluding that there must be strict compliance with §§ 52-102a and 52-577a (b). Delaware argues that the language in § 52-102a, that a "motion may be filed at any time before trial," demonstrates that the statute is solely administrative and not subject to any limiting time frame. In other words, Delaware argues that a motion to implead pursuant to § 52-102a need not be filed before a third-party complaint pursuant to § 52-577a. This interpretation, however, neglects a fundamental step in determining the plain meaning of a statute. "In seeking to determine [the plain meaning of a statute] . . . § 1-2z directs us first to consider the text of the statute itself and its *relationship to other statutes*." (Emphasis added; footnote omitted; internal quotation marks omitted.) *Western Dermatology Consultants, P.C.* v. *VitalWorks, Inc.*, supra, 146 Conn. App. 199. Thus, § 1-2z directs us to consider the language of § 52-102a in light of the other statute at issue in this case: § 52-577a.

It is well settled that "the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850, 937 A.2d 39 (2008). "If the statutes appear to be repugnant, but both can be construed together, both are given effect." (Internal quotation marks omitted.) *Malerba* v. *Cessna Aircraft Co.*, 210 Conn. 189, 195, 554 A.2d 287 (1989).

The plain language of § 52-577a (b) provides that a third-party complaint must be served within one year from when the underlying action was returned to court. In its decision, the trial court properly considered § 52-102a in light of its relationship with § 52-577a (b), as required by § 1-2z. The court, *Noble, J.*, noted that "§ 52-102a mandates that the defendant receive the court's permission before serving a third-party complaint, and § 52-577[a] mandates that such complaint be served within one year of the return date." In reaching this conclusion, the court considered the reasoning of another Superior Court case, *Adgers* v. *Hines Sudden Service*, Superior Court, judicial district of Hartford, Docket No. CV-98-0577380 (September 20, 1999) (25 Conn. L. Rptr. 500), which noted that our Supreme Court in *Malerba* "construed §§ 52-102a (a) and 52-577a (b) *together* as providing the authority and procedure by which to implead third parties in a product liability action. . . . [C]onsistent with [our] Supreme Court's treatment of . . . §§ 52-102a and 52-577a (b) in *Malerba* . . . both statutes must be construed together and given effect. Therefore, a defendant who wishes to assert a claim against a third party in a product liability action must first move for permission to implead under . . . § 52-102a."[8] (Citation omitted; emphasis in original; internal quotation marks omitted.) The trial court in the present case similarly and correctly determined that Delaware was required to file a motion to implead under § 52-102a before filing a third-party complaint that had to be served within the one year statute of limitations of § 52-577a (b).

Delaware's argument that § 52-102a allows for the motion to implead to be filed at any time before trial therefore fails. Section 52-102a must be understood in

[8] We note that *Malerba* involved the granting of a motion to strike addressing the sufficiency of the pleadings, and not a motion to dismiss implicating jurisdiction. *Malerba* v. *Cessna Aircraft Co.*, supra, 210 Conn. 191–92.

the context of its relationship to other statutes, and Delaware's argument overlooks this principle of statutory interpretation. Accordingly, the court did not err in reaching its conclusion.

III

Delaware finally claims that the trial court erred in concluding that the one year time limitation in § 52-577a implicates the jurisdiction of the court. Although Delaware served the third-party complaint on Fall River and Pennock within one year of the return date of the underlying action, under the court's correct conclusion that there must be strict compliance with both §§ 52-102a and 52-577a (b), Delaware was also required to file a motion to implead prior to serving the third-party complaint and within that one year time period. Delaware contends that because the one year time limitation is procedural, failure to comply with it does not deprive the court of jurisdiction. Therefore, it argues, the court improperly dismissed its complaint for lack of jurisdiction. We disagree.

Generally, "[a] claim that an action is barred by the lapse of the statute of limitations must be pleaded as a special defense . . . ." (Internal quotation marks omitted.) *Greco* v. *United Technologies Corp.*, 277 Conn. 337, 344 n.12, 890 A.2d 1269 (2006). There is an exception to this general rule, however, as noted by our Supreme Court, when "a statute gives a right of action which did not exist at common law, and fixes the time within which the right must be enforced, the time fixed is a limitation or condition attached to the right—it is a limitation of the liability itself as created, and not of the remedy alone." (Internal quotation marks omitted.) Id., 345 n.12.

The trial court in the present case concluded that Delaware's failure to comply with the one year time limitation in § 52-577a (b) could be properly raised in a motion to dismiss. In support of its conclusion, the

court cited Superior Court cases wherein the failure to comply with § 52-577a (b) was determined to deprive the court of personal jurisdiction. See *Iodice* v. *Ward Cedar Log Homes, Inc.*, Superior Court, judicial district of Waterbury, Docket No. CV-12-6013844-S (September 17, 2015) (60 Conn. L. Rptr. 926) (concluding that § 52-577a (b) "implicates whether the court can exercise personal jurisdiction over a putative third-party defendant [and] [a] failure to comply with this requirement is therefore appropriately raised by way of a motion to dismiss"); *Barringer* v. *Whole Foods Market, Inc.*, Superior Court, judicial district of Hartford, Docket No. CV-09-6005918-S (July 14, 2011) (52 Conn. L. Rptr. 262) (determining that third-party complaint cannot be pursued in context of underlying product liability action unless it is commenced within time frame prescribed for that purpose by law); *Garrity* v. *First & Last Tavern, Inc.*, Superior Court, judicial district of Middlesex, Docket No. CV-10-6002820-S (April 10, 2012) (53 Conn. L. Rptr. 771) (applying reasoning of *Barringer* and adjudicating motion to dismiss).

In contending that the time limit in § 52-577a (b) does not implicate the jurisdiction of the court, Delaware cites to our Supreme Court's decision in *Lostritto* v. *Community Action Agency of New Haven, Inc.*, 269 Conn. 10, 848 A.2d. 418 (2004). In *Lostritto*, our Supreme Court examined General Statutes § 52-102b and whether the 120 day time limit contained within that statute implicated the court's jurisdiction.[9] Id., 12–14. To address this issue, the court developed a two part test: "The test to be applied in determining whether a statute is mandatory or directory is whether the prescribed mode of action is the essence of the thing to be accomplished, or in other words, whether it relates

[9] Although our Supreme Court analyzed a different statute in *Lostritto*, the test developed by the court to determine if a time limit in a statute implicates the court's jurisdiction guides our analysis of the issues in the present case.

to a matter of substance or a matter of convenience. . . . If it is a matter of substance, the statutory provision is mandatory. If, however, the legislative provision is designed to secure order, system and dispatch in the proceedings, it is generally held to be directory, especially where the requirement is stated in affirmative terms unaccompanied by negative words." (Internal quotation marks omitted.) Id., 19. Next, the court examined whether the time limit in § 52-102b was substantive or procedural, stating that, "[i]n order to determine whether the . . . time limitation is substantive or procedural . . . we must . . . ascertain whether [the statute] created a right that did not exist at common law." Id., 23. In other words, first we examine whether the statute's language is mandatory or directory, and then we determine whether the statute affects a right substantively or has a procedural purpose.

In applying this test, Delaware erroneously contends that § 52-577a (b) is directory. In support of this argument, Delaware relies on the permissive language of the statute that provides that a defendant "may" implead a third-party defendant. Delaware's reliance on that permissive language is misplaced. The plain language meaning of "may" in § 52-577a (b) is similar to that used in § 52-102a, as discussed previously in this opinion. The plain language of § 52-577a (b) provides that a party may choose to implead a third party, but is not required to. If a defendant elects to implead a party, however, it must serve the third-party complaint within the prescribed one year time period. The language of § 52-577a (b) makes plain that if a defendant seeks to implead a third-party defendant, the ability to do so is contingent on the third-party complaint being served within one year. Thus, the requirement of § 52-577a (b) to serve the third-party complaint within one year of the case being returned to court is mandatory, not directory.

Subsequent to the trial court's decision in this case, our Supreme Court in *King* v. *Volvo Excavators AB*,

333 Conn. 283, 294, 215 A.3d 149 (2019), determined that the statute of limitations contained in § 52-577a is procedural because "the legislative history of the act [reveals] that the legislature was merely recasting an existing cause of action and was not creating a wholly new right for claimants harmed by a product. The intent of the legislature was to eliminate the complex pleading provided at common law: breach of warranty, strict liability and negligence." (Internal quotation marks omitted.) See also *Champagne* v. *Raybestos-Manhattan, Inc.*, 212 Conn. 509, 525, 562 A.2d 1100 (1989) ("Section 52-577a does not create a right of action in the product liability context. That right of action is created by the common law or the product liability act. Thus, § 52-577a must be considered procedural.").

While the time limit in § 52-577a (b) is procedural, and not substantive, the court's jurisdiction was still implicated by Delaware's failure to comply with the statutory scheme of §§ 52-577a (b) and 52-102a. The plain language of § 52-577a (b) indicates that this subsection of the statute is a service provision. See *Lostritto* v. *Community Action Agency of New Haven, Inc.*, supra, 269 Conn. 32–33 (noting how legislature often uses term " 'service' " when delineating required procedure by which court gains jurisdiction over party). "[W]hen a particular method of serving process is set forth by statute, that method must be followed. . . . Unless service of process is made as the statute prescribes, the court to which it is returnable does not acquire [personal] jurisdiction." (Internal quotation marks omitted.) Id., 31.

As discussed previously in this opinion, the court correctly concluded that strict compliance with both §§ 52-102a and 52-577a (b) was required. Accordingly, in order to comply with the service procedures of § 52-577a (b), Delaware was required to serve the third-party complaint on Fall River and Pennock within one year

from the date the underlying action was returned to court, *after* it filed a motion with the court seeking permission to implead the two parties pursuant to § 52-102a and received permission from the court. Its failure to do so was a jurisdictional defect that implicated personal jurisdiction. Although the third-party complaint was served in a timely manner, the service was defective because it did not comply with the statutory requirements, as we concluded in part II of this opinion.

The trial court correctly dismissed Delaware's third-party complaint due to its failure to implead properly Fall River and Pennock pursuant to §§ 52-102a and 52-577a and to bring the parties within the court's jurisdiction. Delaware was required to seek and receive the court's permission under § 52-102a before serving Fall River and Pennock with a third-party complaint. Subsequently seeking permission to implead after already having served the third-party complaint does not remedy the initial defect in service of process and retroactively extend personal jurisdiction over Fall River and Pennock.

We note that personal jurisdiction, unlike subject matter jurisdiction, can be waived if not challenged by a motion to dismiss filed within thirty days of the filing of an appearance. See Practice Book § 10-30. Both Fall River and Pennock filed appearances shortly after the court granted Delaware's motion to implead on February 11, 2018. Fall River filed an appearance on February 22, 2018, and Pennock did so on March 14, 2018, and they each filed motions to dismiss within thirty days of their respective appearances. See Practice Book §10-30. Thus, both parties filed timely motions to dismiss.[10]

[10] Delaware also claims that because it ultimately filed the third-party complaint within one year, as well as the motions to implead, it complied with all statutory requirements and its action against Fall River and Pennock should not have been dismissed. In making this argument, Delaware overlooks a tenet of statutory construction that requires courts to construe a statute in a manner that will not lead to absurd results. "We are required to construe a statute in a manner that will not thwart [the legislature's]

The trial court did not err in dismissing the third-party complaint for lack of personal jurisdiction.[11]

The judgment is affirmed.

In this opinion the other judges concurred.

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intended purpose or lead to absurd results. . . . We must avoid a construction that fails to attain a rational and sensible result that bears directly on the purpose the legislature sought to achieve." (Internal quotation marks omitted.) *State* v. *Innamorato*, 76 Conn. App. 716, 722, 821 A.2d 809(2003). When Delaware filed only the third-party complaint against Fall River and Pennock, and failed to seek permission from the court by neglecting to file the motion to implead, neither was made a party to the action. In response to the third-party complaint, both parties attempted to file motions to dismiss but were unable to do so, however, because Fall River and Pennock were never included on the docket. Thus, because Delaware did not properly comply with the relevant statutory scheme, for nearly five months Fall River and Pennock were unable to participate in the litigation. This cannot be the result the legislature intended.

[11] We note that Delaware is not without an avenue for relief in the event that it is found liable for the injuries sustained by the plaintiff in the underlying tort action and Fall River or Pennock contributed to those injuries. See General Statutes § 52-572o.

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Practice Book Revisions to the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

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Including Commentaries to Proposals

June 9, 2020

NOTICE

Public Hearing on Practice Book Revisions to the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On June 29, 2020, at 10 a.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure, which are being considered by the Justices and Judges, as well as any proposed new rule or any change to an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules follow this notice and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Because of the public health emergency and civil preparedness emergency declared by Governor Lamont on March 10, 2020, the public hearing will be conducted electronically using *Microsoft Teams* communication and collaboration platform. Individuals who would like to access the public hearing may do so by clicking here.

For every individual who wishes to access the public hearing, and for those who wish to speak at the public hearing, it is important that certain procedures be followed. All individuals who access the public hearing must at all times act in a professional and respectful manner. Any individual whose conduct is deemed by the co-chairs to be disruptive or inappropriate will be removed from the public hearing.

Individuals who would like to speak at the public hearing should access the hearing one-half hour before the hearing begins in order to

be recognized and queued to speak. Each speaker will be allowed a maximum of five minutes to offer their remarks. Anyone who believes that they may need to exceed the five minute limit or who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions may submit their comments to the Advisory Committee on Appellate Rules by e-mail at Jill.Begemann@connapp.jud.ct.gov.

Hon. Richard N. Palmer

Hon. Alexandra D. DiPentima

Co-Chairs, Advisory Committee on Appellate Rules

INTRODUCTION

The following are amendments to the Rules of Appellate Procedure that are being considered by the Justices of the Supreme Court and Judges of the Appellate Court. These amendments are indicated by brackets for deletions and underlined text for added language. This material should be used as a supplement to the Connecticut Practice Book until the 2021 edition of the Practice Book becomes available.

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CHAPTER 61 REMEDY BY APPEAL

Sec. 61-9. Decisions Subsequent to Filing of Appeal; Amended Appeals

Should the trial court, subsequent to the filing of a pending appeal, make a decision that the appellant desires to have reviewed, the appellant shall file an amended appeal within twenty days from the issuance of notice of the decision as provided for in Section 63-1.

The amended appeal shall be filed in the same manner as an original appeal pursuant to Section 63-3. No additional fee is required to be paid upon the filing of an amended appeal.

Within ten days of filing the amended appeal, the appellant shall file with the appellate clerk either a certificate stating that there are no changes to the Section 63-4 papers filed with the original appeal or any amendments to those papers. Any other party may file responsive Section 63-4 papers within twenty days of the filing of the certificate or the amendments.

If the original appeal is dismissed for lack of jurisdiction, **[**the**]** any amended appeal shall remain pending if it was filed from a judgment or order from which an original appeal properly could have been filed.

After disposition of an appeal where no amended appeals related to that appeal are pending, a subsequent appeal shall be filed as a new appeal.

If **[**the**]** an amended appeal is filed after the filing of the appellant's brief and appendix but before the filing of the appellee's brief and

appendix, the appellant may move for leave to file a supplemental brief and appendix. If **[**the**]** an amended appeal is filed after the filing of the appellee's brief and appendix, either party may move for such leave. In any event, the court may order that an amended appeal be briefed or heard separately from the original appeal.

If the appellant files a subsequent appeal from a trial court decision in a case where there is a pending appeal, the subsequent appeal **[**shall**]** may be treated as an amended appeal, and, if it is treated as an amended appeal, there **[**shall**]** will be no refund of the fees paid.

COMMENTARY: This proposed amendment clarifies that when an appeal is pending, a subsequent appeal may not necessarily be treated as an amended appeal, and, if there are multiple amended appeals, any amended appeal that was taken from a final judgment would survive the dismissal of the original appeal or any other amended appeal.

Sec. 61-16. Notice of [(1)] Bankruptcy Filing, [(2) Disposition of Bankruptcy Case and (3)] Order of Bankruptcy Court Granting Relief from Automatic Stay and Disposition of Bankruptcy Case

(a) If a party to an appeal files a bankruptcy petition or is a debtor named in an involuntary bankruptcy petition, that party shall immediately file a notice with the appellate clerk, including any supporting documentation from the Bankruptcy Court file, **[**with the appellate clerk**]** setting **[**. The notice shall set**]** forth the date the bankruptcy petition was filed, the **[**b**]**Bankruptcy **[**c**]**Court in which the petition was filed, the name of the bankruptcy debtor, **[**and**]** the docket number of the

bankruptcy case and how the automatic bankruptcy stay applies to the case on appeal. Any appearing party seeking to challenge the application of the automatic bankruptcy stay shall immediately file a notice with the appellate clerk, including any supporting documentation from the Bankruptcy Court file.

(b) **[**Upon resolution of the bankruptcy case, the party who filed for bankruptcy protection shall immediately file a notice with the appellate clerk that the case has been resolved in the bankruptcy court.**]** If the **[**b**]**Bankruptcy **[**c**]**Court grants relief from the automatic bankruptcy stay, in rem relief regarding the property or any other pertinent relief, the party obtaining such relief shall immediately file a notice with the appellate clerk **[**of the termination of the automatic stay**]** indicating such relief.

(c) Upon resolution of the bankruptcy case, the party who filed the bankruptcy petition or who was the debtor named in an involuntary bankruptcy petition shall immediately file a notice with the appellate clerk, including any supporting documentation from the Bankruptcy Court file, indicating that the case has been resolved in the Bankruptcy Court. Any other appearing party may also file a notice with the appellate clerk, including any supporting documentation from the Bankruptcy Court file, indicating that the case has been resolved in the Bankruptcy Court.

COMMENTARY: The purpose of this proposed amendment is to afford an appearing party the opportunity to respond to the filing of a bankruptcy notice and to sequentially address the filing of a notice

concerning a bankruptcy stay, a notice of relief from any stay, and a notice of the final resolution of the bankruptcy case.

CHAPTER 62

CHIEF JUDGE, APPELLATE CLERK AND DOCKET: GENERAL ADMINISTRATIVE MATTERS

Sec. 62-9. Withdrawal of Appearance

(a) An attorney or party whose appearance has been filed shall be deemed to have withdrawn such appearance upon failure to file a written objection within ten days after written notice has been given or mailed to such attorney or party that a new appearance has been filed in place of the appearance of such attorney or party in accordance with Section 62-8.

(b) An attorney may, by motion, withdraw his or her appearance for a party after an additional appearance representing the same party has been entered on the docket. A motion to withdraw pursuant to this subsection shall state that an additional appearance has been entered on appeal. The appellate clerk may as of course grant the motion if the additional appearance has been entered.

(c) Except as provided in subsections (a) and (b), no attorney whose appearance has been entered on the docket shall withdraw his or her appearance without leave of the court. A motion for leave to withdraw shall be filed with the appellate clerk in accordance with Sections 66-2 and 66-3. The motion shall include the current address of the party as to whom the attorney seeks to withdraw. No motion for leave to withdraw shall be granted until the court is satisfied that reasonable notice has been given to the party being represented and to other

counsel of record. Reasonable notice to the party or parties may be satisfied by filing along with the motion, a certified or registered mail return receipt signed by the individual party or parties represented by the attorney.

(d) (1) A motion for leave to withdraw appearance of appointed appellate counsel filed pursuant to Sections 23-41 (a) or 43-34, and supporting documentation, shall be filed under seal with the appellate clerk. Except as otherwise provided herein, the form of the motion shall comply with Sections 66-2 and 66-3. The brief or memorandum of law accompanying the motion shall comply with Sections 23-41 (b) or 43-35 in form and substance. The transcript of the relevant proceedings shall be filed concurrently with the motion to withdraw.

(2) The motion and supporting brief or memorandum of law shall be delivered to the petitioner or defendant. Counsel shall deliver a notice that a motion for leave to withdraw as appointed counsel has been filed, but shall not deliver a copy of the motion and supporting brief or memorandum of law to opposing counsel of record. The motion shall contain a certification that such notice has been delivered to opposing counsel of record and that a copy of the motion and supporting brief or memorandum of law has been delivered to the petitioner or defendant.

(3) The motion, brief or memorandum of law, and transcript shall be referred to the trial court for decision. If the trial court grants the motion to withdraw, counsel shall immediately notify his or her former client, by letter, of the status of the appeal, **[**and**]** of the responsibilities necessary to prosecute the appeal, and that, if the former client wishes

to challenge the trial court's decision allowing counsel to withdraw, the former client must file a motion for review with the Appellate Court in accordance with Section 66-6. Counsel shall file a copy of the letter with the appellate clerk. The trial court's decision shall be sealed and may be reviewed pursuant to Section 66-6. Subsequent motions regarding the trial court's decision on the motion to withdraw appointed counsel shall also be filed under seal.

(4) The appellate clerk shall maintain all filings and related decisions pursuant to this subsection under seal. The panel hearing the merits of the appeal shall not view any briefs and materials filed under seal pursuant to this subsection.

COMMENTARY: This proposed amendment requires counsel to inform his or her former client that, if the former client wishes to challenge the trial court's decision allowing counsel to withdraw, the former client must file a motion for review with the Appellate Court in accordance with Section 66-6. See *State* v. *Mendez*, 185 Conn. App. 476, 485 n.6 (2018) (*Prescott, J.*, concurring).

CHAPTER 63

FILING THE APPEAL; WITHDRAWALS

Sec. 63-4. Additional Papers To Be Filed by Appellant and Appellee [when Filing Appeal] Subsequent to the Filing of the Appeal

(a) Within ten days of filing an appeal, the appellant shall also file with the appellate clerk the following:

(1) A preliminary statement of the issues intended for presentation on appeal. If any appellee wishes to: (A) present for review alternative

grounds upon which the judgment may be affirmed; (B) present for review adverse rulings or decisions of the court which should be considered on appeal in the event the appellant is awarded a new trial; or (C) claim that a new trial rather than a directed judgment should be ordered if the appellant is successful on the appeal, that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues.

Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue.

(2) A certificate stating that no transcript is deemed necessary, or a copy of the transcript order acknowledgment form (JD-ES-038) with section I thereof completed, filed with the official reporter pursuant to Section 63-8. If any other party deems any other parts of the transcript necessary, that party shall, within twenty days from the filing of the appellant's transcript papers, file a copy of the order form (JD-ES-038), which that party has placed in compliance with Section 63-8.

If the appellant is to rely on transcript delivered prior to the taking of the appeal, an order form (JD-ES-038) shall be filed stating that an electronic version of a previously delivered transcript has been ordered. The detailed statement of the transcript to be relied on required by Section 63-8 also must be filed. If any other party deems any other parts of the transcript necessary, and those parts have not been delivered at the time of the taking of the appeal, that party shall have twenty days to order those additional parts. If any other party is to rely on transcript delivered prior to the taking of the appeal, an order

form (JD-ES-0̲38) shall be filed within twenty days, stating that an electronic version of a previously delivered transcript has been ordered.

(3) A docketing statement containing the following information to the extent known or reasonably ascertainable by the appellant: (A) the names and addresses of all parties to the appeal, the names, addresses, and e-mail addresses of trial and appellate counsel of record, and the names and addresses of all persons having a legal interest in the cause on appeal sufficient to raise a substantial question whether a judge should be disqualified from participating in the decision on the case by virtue of that judge's personal or financial interest in any such persons; (B) the case names and docket numbers of all pending appeals to the Supreme Court or Appellate Court which arise from substantially the same controversy as the cause on appeal, or involve issues closely related to those presented by the appeal; (C) whether a criminal protective order, civil protective order, or civil restraining order was requested or issued during any of the underlying proceedings; **[**(C)**]** (D) whether there were exhibits in the trial court; and **[**(D)**]** (E) in criminal and habeas cases, the defendant's or petitioner's conviction(s) and sentence(s) that are the subject of the direct criminal or habeas appeal**[**,**]** and whether the defendant or petitioner is incarcerated. **[**as a result of the proceedings in which the appeal is being filed.**]** If additional information is or becomes known to, or is reasonably ascertainable by the appellee, the appellee shall file a docketing statement supplementing the information required to be provided by the appellant.

When an appellant or an appellee is aware that one or more appellees have no interest in participating in the appeal, the appellant and any other appellees may be relieved of the requirement of certifying copies of filings to those appellees by designating the nonparticipating appellee(s) in a section of the docketing statement named ''Nonparticipating Appellee(s).'' This designation shall indicate that if no docketing statement in disagreement is filed, subsequent filings will not be certified to those appellees.

If an appellee disagrees with the nonparticipating designation, that appellee shall file a docketing statement indicating such disagreement within twenty days of the filing of that designation. All documents filed on or before the expiration of the time for an appellee to file a docketing statement in disagreement as stated above shall be delivered pursuant to Section 62-7 (b) to all counsel of record. If no docketing statement in disagreement is filed, subsequent filings need not be certified to nonparticipating appellees.

(4) In all noncriminal matters, except for matters exempt from a preargument conference pursuant to Section 63-10, a preargument conference statement.

(5) A constitutionality notice, in all noncriminal cases where the constitutionality of a statute has been challenged. Said notice shall identify the statute, the name and address of the party challenging it, and whether the statute's constitutionality was upheld by the trial court. The appellate clerk shall deliver a copy of such notice to the attorney general. This section does not apply to habeas corpus matters based on criminal convictions, or to any case in which the attorney general

is a party, has appeared on behalf of a party, or has filed an amicus brief in proceedings prior to the appeal.

(6) In matters in which documents are under seal, conditionally or otherwise, or limited as to disclosure, a notice identifying the time, date, scope and duration of the sealing order with a copy of the order. (See Section 77-2.)

(b) Except as otherwise provided, a party may as of right file amendments to the preliminary statement of issues at any time until that party's brief is filed. Amendments to the docketing statement may be filed at any time. Amendments to the transcript statement may be made only with leave of the court. If leave to file such an amendment is granted, the adverse party shall have the right to move for permission to file a supplemental brief and for an extension of time. Amendments to the preargument conference statement shall not be presented in writing but may be presented orally at the preargument conference, if one is held.

(c) Failure to comply with this rule shall be deemed as sufficient reason to schedule a case for sanctions under Section 85-3 or for dismissal under Section 85-1.

COMMENTARY: The purpose of this proposed amendment is to require the appellant, at the time of the filing of the appeal, to indicate in the docketing statement whether a criminal protective order, civil protective order, or civil restraining order was requested or issued during any of the underlying proceedings to better enable the appellate clerk to ensure that protected information is not published on the Internet.

CHAPTER 66

MOTIONS AND OTHER PROCEDURES

Sec. 66-1. Extension of Time

(a) Motions to extend the time limit for filing an appeal shall be filed with the clerk of the trial court. Except as otherwise provided in these rules, the judge who tried the case may, for good cause shown, extend the time limit provided for filing the appeal, except that such extension shall be of no effect if the time within which the appeal must be filed is set by statute and is a time limit that the legislature intended as a limit on the subject matter jurisdiction of the court in which the appeal is filed. In no event shall the trial judge extend the time for filing the appeal to a date which is more than twenty days from the expiration date of the appeal period. Where a motion for extension of the period of time within which to appeal has been filed at least ten days before expiration of the time limit sought to be extended, the party seeking to appeal shall have no less than ten days from issuance of notice of denial of the motion to file the appeal.

(b) Motions to extend the time limit for filing any appellate document, other than the appeal or a motion for review of a ruling concerning a stay of execution pursuant to Section 61-14, shall be filed with the appellate clerk. The motion shall set forth the reason for the requested extension and shall be accompanied by a certification that complies with Section 62-7. An attorney filing such a motion on a client's behalf shall also indicate that a copy of the motion has been delivered to each of his or her clients who are parties to the appeal. The moving party shall also include a statement as to whether the other parties

consent or object to the motion. A motion for extension of time to file a brief must specify the current status of the brief or preparations therefor, indicate the estimated date of completion, and, in criminal cases, state whether the defendant is incarcerated as a result of the proceeding in which the appeal has been filed.

(c) The appellate clerk is authorized to grant or to deny motions for extension of time promptly upon their filing. Motions for extension of time to complete any step necessary to prosecute or to defend the appeal, to move for or to oppose a motion for reconsideration, or to petition for or to oppose a petition for certification will not be granted except for good cause. Claims of good cause shall be raised promptly after the cause arises.

(d) An opposing party who objects to a motion for extension of time filed pursuant to subsection (b) of this section shall file an objection with reasons in support thereof with the appellate clerk within five days from the filing of the motion.

(e) A motion for extension of time shall be filed at least ten days before the expiration of the time limit sought to be extended or, if the cause for such extension arises during the ten day period, as soon as reasonably possible after such cause has arisen. No motion under this rule shall be granted unless it is filed before the time limit sought to be extended by such motion has expired.

(f) Any action by the trial judge pursuant to subsection (a) of this section or the appellate clerk pursuant to subsection (c) of this section is reviewable pursuant to Section 66-6.

COMMENTARY: The purpose of this proposed amendment is to make the rule consistent with Section 61-14, which requires that a motion for extension of time to file a motion for review of a ruling concerning a stay of execution must be filed in the trial court.

CHAPTER 67

BRIEFS

Sec. 67-8. The Appendix; Contents and Organization

(a) An appendix shall be prepared in accordance with Section 67-2.

(b) The appellant's appendix shall be divided into two parts.

(1) Part one of the appellant's appendix shall contain: a table of contents giving the title or nature of each item included; the docket sheets, a case detail, or court action entries in the proceedings below; in chronological order, all relevant pleadings, including the operative complaint and any other complaint at issue, motions, requests, findings, and opinions or decisions of the trial court or other decision-making body (see Sections 64-1 and 64-2); the signed judgment file, if applicable, prepared in the form prescribed by Section 6-2 et seq.; the appeal form, in accordance with Section 63-3; the docketing statement filed pursuant to Section 63-4 (a) (3); any relevant appellate motions or orders that complete or perfect the record on appeal; and, in appeals to the Supreme Court upon grant of certification for review, the order granting certification and the opinion or order of the Appellate Court under review.

A signed judgment file is not required in the following noncriminal matters: habeas corpus matters based on criminal convictions; pre- and postjudgment orders in matters claiming dissolution of marriage,

legal separation or annulment; prejudgment remedies under chapter 903a of the General Statutes; and actions of foreclosure of title to real property.

In administrative appeals, part one of the appellant's appendix also shall meet the requirements of Section 67-8A (a). In criminal or habeas appeals filed by incarcerated self-represented parties, part one of the appendix shall be prepared by the appellee. See Section 68-1. In these appeals, the filing of an appendix by incarcerated self-represented parties shall be in accordance with subsection (c) of this rule.

(2) Part two of the appellant's appendix may contain any other portions of the proceedings below that the appellant deems necessary for the proper presentation of the issues on appeal. Part two of the appellant's appendix may be used to include excerpts from lengthy exhibits, **[**or**]** to include excerpts **[**quotations**]** from the transcripts deemed necessary by any parties pursuant to Section 63-4 (a) (2), provided that the transcript cover page and certification page are included, or to comply with other provisions of the Practice Book that require the inclusion of certain materials in the appendix. To reproduce a full transcript or lengthy exhibit when an excerpt would suffice is a misuse of an appendix. Where an opinion is cited that is not officially published, the text of the opinion shall be included in part two of the appendix.

(c) The appellee's appendix should not include the portions of the proceedings below already included in the appellant's appendix. If the appellee determines that part one of the appellant's appendix does not contain portions of the proceedings below, the appellee shall

include any such items that are required to be included pursuant to Section 67-8 (b) (1) in part one of its appendix. Where an appellee cites an opinion that is not officially published and is not included in the appellant's appendix, the text of the opinion shall be included in part two of the appellee's appendix. Part two of the appellee's appendix may also contain any other portions of the proceedings below that the appellee deems necessary for the proper presentation of the issues on appeal. If the appellee includes excerpts from the transcripts deemed necessary pursuant to Section 63-4 (a) (2) in the appendix, the transcript cover page and the certification page shall be included with the excerpts.

(d) In appeals where personal identifying information is protected by rule, statute, court order or case law, and in appeals that have been ordered sealed in part or in their entirety or are subject to limited disclosure pursuant to Section 77-2, all briefs and appendices shall be prepared in accordance with Section 67-2.

COMMENTARY: The purpose of this proposed amendment is to require that the appellant's appendix include the operative complaint and any other complaint at issue, and to require that the cover page and the certification page be included with any transcripts included in the appellant's appendix and the appellee's appendix.

Sec. 67-10. Citation of Supplemental Authorities after Brief Is Filed

When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly file with the appellate clerk

a notice listing such supplemental authorities, including citations, with a copy certified to all counsel of record in accordance with Section 62-7. If the authority is an unreported decision, a copy of the text of the decision must accompany the filing, unless the authority is an advance release opinion of the Supreme or Appellate Court that is available on the Judicial Branch website or a slip opinion of the United States Supreme Court available on that court's website. [which] The filing shall concisely and without argument state the relevance of the supplemental citations and shall include, where applicable, reference to the pertinent page(s) of the brief. Any response shall be made promptly and shall be similarly limited.

This section may not be used after oral argument to elaborate on points made or to address points not made.

COMMENTARY: The purpose of this proposed amendment is to eliminate the requirement that unpublished, advance released opinions of the Connecticut Supreme and Appellate Courts and slip opinions of the United States Supreme Court that are available on the Internet accompany the notice of supplemental authority under this section.

CHAPTER 79a

APPEALS IN CHILD PROTECTION MATTERS

Sec. 79a-1. Child Protection Appeals Defined

Appeals in [C]child protection [appeals in juvenile] matters include all appeals from judgments in all proceedings concerning uncared for, neglected or abused children [and youth] within this state, termination of parental rights of children committed to a state agency, [petitions]

motions for transfers, removal or reinstatement of guardianship, motions for permanent guardianship and contested matters involving termination of parental rights or removal of guardian transferred or appealed from the Probate Court.

Sec. 79a-2. Time To Appeal

(a) **General provisions**

Unless a different period is provided by statute, appeals from judgments of the Superior Court in child protection matters shall be filed within twenty days from the issuance of notice of the rendition of the decision or judgment from which the appeal is filed. **[**The**]** A judge **[**who tried the case**]** may, for good cause shown, extend the time limit provided for filing the appeal. In no event shall the **[**trial**]** judge extend the time for filing the appeal to a date which is more than twenty days from the expiration date of the initial appeal period, except in the case of an appeal in a termination of parental rights proceeding, for which the time for filing an appeal may be extended to a date no more than forty days from the expiration of the initial appeal period. Where a motion for extension of the period of time within which to appeal has been filed at least ten days before expiration of the time limit sought to be extended, and such motion is denied, the party seeking to appeal shall have no less than ten days from issuance of notice of the denial of the motion for extension in which to file the appeal.

(b) **When appeal period begins**

If notice of the judgment or decision is given in open court, the appeal period shall begin on that day. If notice of the judgment or decision is given only by mail or by electronic delivery, the appeal

period shall begin on the day that notice of the judgment or decision is sent to counsel of record by the clerk for juvenile matters. The failure to give notice of judgment to a nonappearing party shall not affect the running of the appeal period.

(c) **How a new appeal period is created**

If a motion is filed within the appeal period that, if granted, would render the judgment or decision ineffective, then a new twenty day appeal period for filing the appeal shall begin on the day that notice of the ruling is given on the last such outstanding motion. Such motions include, but are not limited to, motions that seek: the opening or setting aside of the judgment; a new trial; reargument of the judgment or decision; or any alteration of the terms of the judgment. Motions that do not give rise to a new appeal period include those that seek: clarification or articulation, as opposed to alteration, of the terms of the judgment or decision; a written or transcribed statement of the trial court's decision; or reargument or reconsideration of a motion listed in this paragraph.

If, within the appeal period, any application is filed, pursuant to Section 79a-4, seeking waiver of fees, costs and security or appointment of appellate counsel, a new twenty day appeal period or statutory period for filing the appeal is not created. If a party files, pursuant to Section 66-6, a motion for review of the denial of any such application, a new appeal period shall begin on the day that notice of the ruling is given on the motion for review.

(d) **What may be appealed during new appeal period**

If a new appeal period is created under Section 79a-2 (c), the new appeal period may be used for appealing the original judgment or

decision and/or for appealing any order that gave rise to the new appeal period. Such period may also be used for amending an existing appeal pursuant to Section 61-9 to challenge the ruling that gave rise to the new appeal period. Rulings on applications for waiver of fees, costs and security or motions for appointment of appellate counsel may not be appealed during the new appeal period but **[**may**]** shall be challenged solely by motion for review in accordance with Section 66-6.

(e) **Limitation of time to appeal**

Unless a new appeal period is created pursuant to Section 79a-2 (c), the time to file a child protection appeal shall not be extended past forty days (the original twenty days plus one twenty day extension for appellate review pursuant to Section 79a-3) from the date of issuance of notice of the rendition of the judgment or decision, except in the case of an appeal in a termination of parental rights proceeding, for which the time for filing an appeal shall not be extended beyond sixty days (the original twenty days plus one forty day extension) from the date of issuance of notice of the rendition of the judgment or decision.

Any party seeking to extend the time to file a child protection appeal past the limited appeal periods in this subsection shall seek permission to file a late appeal from the Appellate Court pursuant to Section 60-2 (5). Any motion for permission to file a late appeal in a child protection matter shall state the current status of any motion or application pending in the Superior Court and shall include an appendix with: (1) the decision or order of the Superior Court sought to be appealed and (2)

a list of all parties to the case in the Superior Court with the names, addresses, telephone numbers, e-mail addresses and, if applicable, the juris numbers of their counsel.

Sec. 79a-3. Filing of the Appeal

(a) **General provisions**

Appeals in **[**juvenile**]** child protection matters shall be filed in accordance with the provisions of Section 63-3 and all required fees shall be paid in accordance with Sections 60-7 and 60-8.

(b) **Appeal by indigent party**

If a trial attorney who has provided representation to an indigent party through the Division of Public Defender Services declines to pursue an appeal, **[**and**]** that attorney shall ascertain that the indigent party expressly wishes to appeal**[**, the**]** and obtain the indigent party's current address, e-mail address and telephone number. The trial attorney shall explain to the indigent party the appellate review process set forth in this section. The trial attorney shall within twenty days of the decision or judgment simultaneously file with the court before which the matter was heard a motion for an additional twenty or forty day extension of time to appeal pursuant to Section 79a-2 (a) and (e), a sworn application signed by the indigent party for appointment of **[**an**]** appellate counsel **[**review attorney**]** and a waiver of fees, costs and expenses, including the cost of an expedited transcript. **[**and**]** If the court finds the indigent party still to be indigent, the court shall not grant the application for appointment of appellate counsel but shall first appoint an appellate review attorney for the sole purpose of determining whether there is any nonfrivolous ground on which to

appeal. The trial attorney shall immediately request an expedited transcript from the court reporter in accordance with Section 79a-5, the cost of which shall be paid for by the Division of Public Defender Services.

Any party who is indigent who wishes to appeal and was not provided with representation by the Division of Public Defender Services during the proceeding which resulted in the decision or judgment from which an appeal is being sought shall, within twenty days of the decision or judgment, simultaneously file with the court before which the matter was heard a motion for an additional twenty or forty day extension of time to appeal pursuant to Section 79a-2 (a) and (e), a sworn application signed by the indigent party for appointment of **[**an**]** appellate counsel **[**review attorney**]** and a waiver of fees, costs, and expenses, including the cost of an expedited transcript. The indigent party shall immediately request an expedited transcript from the court reporter in accordance with Section 79a-5, the cost of which shall be paid for by the Division of Public Defender Services.

(c) **Review by the Division of Public Defender Services**

(1) An appellate review attorney determining whether there is a nonfrivolous ground for appeal shall file a limited ''in addition to'' appearance with the trial court for the purpose of that determination. If the appellate review attorney determines that there is **[**merit to an**]** a nonfrivolous ground on which to appeal, that attorney shall **[**file**]** notify the court, and the application for appellate counsel shall be granted by the court. The appellate counsel so appointed shall file a limited ''in addition to'' appearance with the trial court for the purpose

of prosecuting the appeal and shall file the appeal in accordance with Section 63-3.

(2) In a child protection proceeding that has not resulted in the termination of parental rights, **[**I**]**if the appellate review**[**ing**]** attorney determines that there is no **[**merit to an**]** nonfrivolous ground on which to appeal, that attorney shall promptly make this **[**decision**]** determination known to the indigent party, the judicial authority**[**, to the party**]** and **[**to**]** the Division of Public Defender Services**[** at the earliest possible moment**]**. The reviewing attorney shall inform the indigent party, by letter, of his or her determination and of the balance of the time remaining to file an appeal as a self-represented party or to secure counsel, who may file an appearance to represent the indigent party on appeal at the indigent party's own expense. A copy of the letter shall be **[**sent to**]** filed with the clerk for juvenile matters forthwith.

(3) In a termination of parental rights proceeding, if the appellate review attorney determines that there is no nonfrivolous ground to appeal, that attorney immediately shall file, under seal, a motion for in-court review, which shall indicate that the appellate review attorney has thoroughly reviewed the record for potential errors and set forth the least meritless grounds that might arguably support an appeal and the factual and legal bases for the conclusion that an appeal would be frivolous. Simultaneous with the filing of the motion for in-court review, the appellate review attorney shall provide a copy of such motion to the indigent party seeking to appeal and shall serve counsel of record and the Division of Public Defender Services with a written notice that a motion for an in-court review by the appellate review

attorney has been filed, but shall not serve counsel of record or the Division of Public Defender Service with a copy of the motion or any supporting documentation. The clerk for juvenile matters shall schedule a hearing on the motion for in-court review with the presiding judge or other judge designated to hear the motion within ten days of the date of its filing.

(4) Unless the presiding judge was also the trial judge or is unavailable, the presiding judge shall conduct a non-evidentiary hearing to fully examine the motion for an in-court review and any argument or response by the indigent party, together with any relevant portions of the record. The presiding judge shall afford the indigent party an adequate opportunity to bring to the court's attention what he or she believes are appealable issues. In his or her discretion, such judge may require briefing. The hearing shall be closed except that the appellate review attorney and the indigent party shall attend. If the indigent party cannot attend the hearing for good cause shown, he or she may file, under seal, a written response to the motion for an in-court review prior to the date of the hearing. Absent compelling circumstances, the hearing shall not be continued if the indigent party does not appear.

(A) If after the in-court review, the presiding judge independently concludes that any appeal would be frivolous, such judge, within fourteen days of the date of the hearing, shall issue a decision, either written or oral, denying the indigent party's application for appellate counsel and setting forth the basis for his or her finding that an appeal would be frivolous. Any written or transcribed oral decision of the

presiding judge shall be filed under seal. The presiding judge also shall order the appellate review attorney to inform the indigent party, by letter, of the decision and the balance of the time remaining to file a motion for review and/or an appeal as a self-represented party or to secure counsel who may file an appearance to represent the indigent party for purposes of filing a motion for review and/or an appeal at the indigent party's own expense. A copy of the letter shall be filed with the clerk for juvenile matters forthwith. An indigent party may seek review of a denial of an application for appointment of appellate counsel on the basis of a finding by the presiding judge that any appeal would be frivolous solely by filing, under seal, a motion for review pursuant to Section 79a-2 (d). The Appellate Court shall expeditiously consider any such motion for review.

(B) If, after the in-court review, the presiding judge concludes that the indigent party's appeal is not frivolous, such judge shall grant the application for appointment of appellate counsel.

(5) Any presiding judge who also was the trial judge or is unavailable shall refer a motion for in-court review filed by an appellate review attorney to the chief administrative judge for juvenile matters for assignment to another judicial authority. If such presiding judge is also the chief administrative judge for juvenile matters, then the motion for in-court review shall be referred by the presiding judge to the administrative judge in the judicial district where the juvenile court hearing the motion for in-court review is located for assignment to another judicial authority.

(d) **Duties of clerk for juvenile matters for cases on appeal**

The appellate clerk shall send notice to the clerk for juvenile matters and to the clerk of any trial court to which the matter was transferred that an appeal has been filed. Upon receipt of such notice, the clerk for juvenile matters shall send a copy of the appeal form and the case information form to the Commissioner of Children and Families, to the petitioner upon whose application the proceedings in the Superior Court were instituted, unless such party is the appellant, to any person or agency having custody of any child who is a subject of the proceeding, the Division of Public Defender Services, and to all other interested persons; and if the addresses of any such persons do not appear of record, **[**such juvenile clerk**]** the clerk for juvenile matters shall call the matter to the attention of a judge of the Superior Court, who shall make such an order of notice as such judge deems advisable.

Sec. 79a-4. Waiver of Fees, Costs and Security

(a) Any written application to the court for appointment of **[**an**]** appellate counsel **[**review attorney**]** or the waiver of fees, costs and expenses must be personally signed by the indigent party under oath and include a financial affidavit reciting facts concerning the applicant's financial status. The judicial authority shall act without a hearing on the application. If the court is satisfied that the applicant is indigent and has a statutory right to the appointment of **[**an**]** appellate **[**review attorney**]** counsel or a statutory right to appeal without payment of fees, costs and expenses, the court may without a hearing**[**:**]** (1) waive payment by the applicant of fees specified by statute and of taxable costs, and (2) order that the necessary expenses of reviewing or prosecuting

the appeal be paid by the Division of Public Defender Services in accordance with Section 79a-3 (c). If the court is not satisfied that the applicant is indigent and has a statutory right to the appointment of **[**an**]** appellate **[**review attorney**]** counsel or a statutory right to appeal without payment of fees, costs and expenses, then an immediate hearing shall be scheduled for the application. If an application is untimely filed, the court may deny the application without hearing. The court may not consider the relative merits of a proposed appeal in acting upon an application pursuant to this section.

(b) The filing of the application for the appointment of **[**an**]** appellate **[**review attorney**]** counsel or waiver of fees, costs and expenses will not extend the appeal period unless a judge has extended the time limit provided for filing an appeal pursuant to Section 79a-2. A denial of the application may be addressed solely by motion for review under Section 66-6. See Section 79a-2 (c).

Sec. 79a-12. Inspection of Records

The records and papers of any **[**juvenile**]** child protection matter shall be open for inspection only to counsel of record and to others having a proper interest therein only upon order of the court. The name of the child **[**or youth**]** involved in any appeal from a **[**juvenile**]** child protection matter shall not appear on the record of the appeal.

Sec. 79a-13. Hearings; Confidentiality

(a) For the purpose of maintaining confidentiality, upon the hearing of an appeal from a **[**juvenile**]** child protection matter, the court may exclude any person from the court whose presence is unnecessary.

(b) All proceedings shall be conducted in a manner that will preserve the anonymity of the child**[** or youth**]**.

COMMENTARY: The purpose of these proposed amendments is to conform the child protection rules with *In re Taijha H.-B.*, 333 Conn. 297 (2019), in which our Supreme Court determined that it was necessary to have additional procedural safeguards for determining whether an indigent parent will be assigned counsel to appeal from a judgment terminating his or her parental rights. The proposed amendments provide for the appointment of appellate review counsel for the limited purpose of conducting an initial review for nonfrivolous appellate issues, notice and an opportunity for the parent to respond, judicial review if counsel determines that no nonfrivolous issue exists, and a limited extension of the appeal period to accomplish these ends. In addition, the proposed amendments change the word ''juvenile'' to ''child protection'' and delete the word ''youth,'' consistent with a recent statutory amendment and amendments to the Superior Court rules that became effective in January, 2020.

CHAPTER 81

APPEALS TO APPELLATE COURT BY CERTIFICATION FOR REVIEW IN ACCORDANCE WITH GENERAL STATUTES CHAPTERS 124 AND 440

Sec. 81-3A. Grant or Denial of Certification

A petition by a party shall be granted on the affirmative vote of three of the judges of the Appellate Court. Upon the determination of any petition, the appellate clerk shall enter an order granting or denying the certification in accordance with the determination of the court and

shall send notice of the court's order to the clerk of the trial court and to all counsel of record.

COMMENTARY: The purpose of this proposed new rule is to reflect the amendment to General Statutes Section 8-8 by the legislature requiring that three, rather than two, judges of the Appellate Court grant a petition for certification to appeal in zoning cases.

CHAPTER 86

RULE CHANGES; EFFECTIVE DATE; APPLICABILITY

Sec. 86-1. Publication of Rules; Effective Date

(a) Before the justices of the Supreme Court and the judges of the Appellate Court adopt a new rule or change to an existing rule, the proposed rule or change, or a summary thereof, shall be published in the Connecticut Law Journal with notice stating the time when, the place where, and the manner in which interested parties may present their views on the proposed rule or change.

(b) Any new **[**Each**]** rule **[**hereafter**]** or change to an existing rule adopted by the justices **[**of the Supreme Court**]** and **[**the**]** judges **[**of the Appellate Court**]** shall be **[**promulgated by being**]** published **[**once**]** in the Connecticut Law Journal. The new rule or change shall become effective **[**at such date**]** as of the date that the justices and judges **[**shall**]** prescribe, but not less than sixty days after **[**its promulgation**]** such publication. The justices and judges may waive the sixty day provision if they **[**deem**]** determine that circumstances require that a new rule or **[**a**]** change **[**in**]** to an existing rule be adopted expeditiously.

(c) The justices and the judges may waive the provisions of subsection (a) if they determine that the circumstances require that a new

rule or change to an existing rule be adopted expeditiously, provided that adoption in connection with such a waiver shall be on an interim basis. The justices and judges shall prescribe an effective date for any new rule or change adopted on an interim basis, and such rule or change shall be published in the Connecticut Law Journal before the interim rule becomes effective. Thereafter, notice shall be published in the Connecticut Law Journal stating the time when, the place where, and the manner in which interested parties may present their views on the interim rule or change, after which the justices and judges may finally adopt the rule or change in accordance with subsection (b).

COMMENTARY: This proposed amendment more closely aligns the rule with Section 1-9 concerning notice and opportunity for public comment prior to the adoption of a new rule or an amendment to an existing rule by the Supreme Court justices and Appellate Court judges.

SUPREME COURT PENDING CASES

The following appeal is assigned for argument in the Supreme Court on June 22, 2020

CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION et al. v. NED LAMONT et al., SC 20470
Judicial District of Waterbury

Standing; Political Question Doctrine; Whether Criminal Defense Lawyers Association and Individual Inmates Have Standing to Bring Mandamus Action Regarding Conditions at State Correctional Facilities During COVID-19 Pandemic; Whether Plaintiffs' Claims Justiciable. The plaintiffs in this action are the Connecticut Criminal Defense Lawyers Association (CCDLA), a statewide nonprofit organization whose members are criminal defense attorneys, and six individuals who are sentenced inmates or pretrial detainees at correctional facilities in Connecticut. They brought this action against the defendants, Governor Ned Lamont and Commissioner of Correction Rollin Cook, alleging that the defendants have failed to adequately mitigate the effects of the COVID-19 pandemic on the state's correctional facilities in violation of the federal and state constitutions and the defendants' statutory obligations. The plaintiffs asked that the trial court issue a writ of mandamus ordering the defendants to release inmates with heightened COVID-19 risk factors, reduce population density at state correctional facilities, and submit a plan to the trial court that addressed issues of sanitation, social distancing, and medical treatment. The defendants filed a motion to dismiss the action, arguing that the plaintiffs lacked standing to bring it and that their claims were nonjusticiable under the political question doctrine, which provides that an action is jurisdictionally defective when it involves a controversy that directly implicates the primary authority of the legislative or executive branch. The trial court granted the defendants' motion to dismiss. The trial court concluded that the CCDLA lacked associational standing or third party standing where the complaint failed to allege a direct injury suffered by the CCDLA or its members. The trial court also concluded that the individual plaintiffs lacked standing because the complaint failed to allege sufficient facts to support their claims of unconstitutional conditions of confinement. Specifically, the trial court determined that the plaintiffs had not sufficiently alleged that they had been denied "the minimal civilized measure of life's necessities" where they claimed that the defendants' failure to take adequate preventative measures resulted not in direct exposure to COVID-19 but rather in a heightened risk of

such exposure. The trial court also determined that the plaintiffs had not sufficiently alleged that the defendants had acted with "deliberate indifference" to inmate health and safety during the COVID-19 pandemic where their claims did not rise to the level of recklessness. Finally, the trial court held that dismissal of the action was warranted on the alternative ground that the plaintiffs' claims presented nonjusticiable political questions, noting that the defendants are vested by statute with discretion to decide whether to perform the very actions that the plaintiffs sought that they be compelled to perform. The plaintiffs appeal from the trial court's dismissal upon the granting of certification by the Chief Justice pursuant to General Statutes § 52-265a. The Supreme Court will decide whether the trial court properly dismissed the action on the ground that the plaintiffs lacked standing to bring it and on the ground that the action presents political questions that are not justiciable by a court.

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

John DeMeo
Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

Connecticut Housing Finance Authority

Notice of Intent to Amend Procedures

In accordance with Section 1-121 of the Connecticut General Statutes, NOTICE IS HEREBY GIVEN that the Connecticut Housing Finance Authority proposes to amend Procedures:

Statement of Purpose: To amend the Procedures of the Authority, specifically sections II.A. Rental Housing, Multifamily Rental Housing Program and IV.A. Tax Credit Programs, Low-Income Housing Tax Credit, as described below.

Summary of Proposed Procedures:

Multifamily Rental Housing Program Procedures are being amended to include:

- 30% AMI instead of 25% AMI to align with tax credit income averaging and other state and federal programs;
- Flexibility with respect to market studies and appraisals when warranted based on individual circumstances;
- Clarifying language is added regarding developer fee and various initial closing matters.

Low-Income Housing Tax Credit Procedures are being amended to remove operational activities to be published instead in the Qualified Allocation Plan of the Authority and include:

- Relocating the requirements related to maximum levels of tax credits per unit and per development for which an applicant may apply, and removing the credit limit waiver provision;
- Relocating the provisions on applicant eligibility related to capacity and performance.

Copies of the proposed Procedures (II.A. Rental Housing, Multifamily Rental Housing Program and IV.A. Tax Credit Programs, Low-Income Housing Tax Credit) may be obtained by visiting www.chfa.org. All interested persons may submit written data, views and arguments in connection with the above-stated proposed Procedures by email to PublicComment@chfa.org or by mail to attention Terry Nash Giovannucci, Connecticut Housing Finance Authority, 999 West Street, Rocky Hill, CT 06067 no later than 30 days after the publication of this notice.