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DEPARTMENT OF SOCIAL SERVICES *v.*
JUSTIN FREEMAN

The defendant's petition for certification to appeal from the Appellate Court, 197 Conn. App. 281 (AC 41561), is denied.

Jade Baldwin, in support of the petition.

Joan M. Andrews, assistant attorney general, in opposition.

Decided June 16, 2020

LUIS WILLIAMS *v.* COMMISSIONER
OF CORRECTION

The petitioner Luis Williams' petition for certification to appeal from the Appellate Court, 197 Conn. App. 901 (AC 42440), is denied.

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

Deborah G. Stevenson, assigned counsel, in support of the petition.

Linda F. Currie-Zeffiro, senior assistant state's attorney, in opposition.

Decided June 16, 2020

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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STATE MARSHAL ASSOCIATION OF CONNECTICUT, INC. *v.* ERIN JOHNSON, TAX COLLECTOR OF THE TOWN OF CANTON
(AC 42131)

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

Syllabus

The plaintiff, a voluntary association of deputized state marshals, sought a declaratory judgment that the actions of the defendant J, the tax collector of the town of Canton, in executing a contract with a law firm, P Co., violated certain provisions of the General Statutes (§§ 12-135 (a), 12-155, 12-157, and 12-162). J and P Co. entered into a contract stating that P Co. would assist J with the collection of delinquent tax, utility, and similar accounts. The plaintiff alleged that the legislature has outlined only certain classes of persons who were authorized to collect taxes due to a town, and that J lacked statutory authority to delegate or transfer the power to collect municipal taxes to a third party that did not fall within one of those classes. P Co. intervened as a defendant, and then filed a motion to dismiss, which J joined, claiming that the plaintiff lacked standing to maintain the declaratory action. The trial court granted the motion to dismiss and rendered judgment dismissing the action, and the plaintiff appealed to this court. *Held*:

1. The trial court properly concluded that the plaintiff lacked standing to maintain the declaratory action, as the plaintiff did not establish that its members were classically aggrieved by the challenged conduct: neither the plaintiff's pleadings, nor an affidavit submitted in opposition to the motion to dismiss, provided any basis to conclude that any member of the plaintiff possessed a specific, personal and legal interest with respect to those allegations not shared by the community as a whole, and the plaintiff failed to establish an interest in J's conduct pursuant to §§ 12-155 and 12-157 that was distinguishable from that of the general public; moreover, the plaintiff did not allege specific facts detailing how any of its members were directly injured, nothing in the record indicated that any member of the plaintiff association had ever engaged in the

collection of the town's taxes pursuant to §§ 12-135 and 12-162, and the plaintiff furnished no legal authority or factual allegations to substantiate its claim that its members sustained the requisite injury in the form of diminished business opportunities stemming from J's conduct.

2. The trial court properly concluded that the plaintiff lacked standing to maintain the declaratory action, as the plaintiff did not establish that its members were statutorily aggrieved by the challenged conduct: the plaintiff did not allege that one of its members suffered or was likely to suffer an injury as a result of J's conduct, and the plaintiff could not prevail on its contention that the declaratory judgment procedure embodied by statute (§ 52-29) and our rules of practice (§ 17-55) obviated the need for the plaintiff to allege an injury that it suffered or was likely to suffer as a result of the challenged conduct, as our decisional law was replete with instances in which a party seeking a declaratory judgment had been deemed to lack standing due to its failure to allege the requisite injury; moreover, assuming arguendo that our declaratory judgment procedure does not require allegations that the plaintiff was specially and injuriously affected by the challenged conduct, the plaintiff's allegations still fell short of the general considerations that govern declaratory actions because, even if a court were to declare J's conduct improper, it would have resulted in no practical relief to the plaintiff or its members, as J remained under no obligation to contemplate, let alone secure, the services of the plaintiff's members, and, as a result, the case was nonjusticiable, and the plaintiff was not a proper party to request an adjudication on the legal relationship between J and P Co., as any uncertainty as to the plaintiff's legal relations with the defendants or potential harm to the plaintiff was, on the record, merely theoretical.

3. The trial court did not abuse its discretion in denying the plaintiff's motion for reargument and reconsideration; although the plaintiff alleged that the court failed to address its claim of statutory aggrievement, the court, in its memorandum of decision, relied on Connecticut Supreme Court precedent indicating that, to satisfy the first prong of the associational standing test, a plaintiff must demonstrate how it was harmed in a unique fashion by the challenged conduct and must allege a colorable claim of direct injury, and the court's analysis in this case comported with the standing precepts that our Supreme Court has adhered to in resolving associational standing claims.

Argued November 12, 2019—officially released June 30, 2020

Procedural History

Action for a declaratory judgment, brought to the Superior Court in the judicial district of Hartford, where the court, *Schuman*, *J.*, granted the motion to intervene as a defendant filed by Pullman & Comley, LLC; thereafter, the court, *Hon. A. Susan Peck*, judge trial referee, granted the defendants' motion to dismiss and rendered

judgment thereon; subsequently, the court denied the plaintiff's motion to reargue and for reconsideration, and the plaintiff appealed to this court. *Affirmed.*

Andrew P. Barsom, for the appellant (plaintiff).

James J. Healy, with whom were *Barbara Curatolo*, and, on the brief, *Thomas J. Murphy*, for the appellee (intervening defendant).

Laura Pascale Zaino, with whom, on the brief, was *Michael C. Collins*, for the appellee (named defendant).

Opinion

ELGO, J. The plaintiff, State Marshal Association of Connecticut, Inc., appeals from the judgment of the trial court dismissing its declaratory action against the defendants, Erin Johnson, the tax collector of the town of Canton (town), and Pullman & Comley, LLC (Pullman).[1] On appeal, the plaintiff claims that the court improperly (1) concluded that it lacked standing to maintain the action and (2) denied the plaintiff's motion seeking reargument and reconsideration. We affirm the judgment of the trial court.

The procedural posture of this case governs our recitation of the facts underlying the appeal. "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.) *Traylor* v. *State*, 332 Conn. 789, 792–93 n.6, 213 A.3d 467 (2019).

[1] For purposes of clarity, we refer to Johnson and Pullman individually by name and collectively as the defendants.

The plaintiff is a voluntary association that was formed in April, 2017. It is comprised of deputized state marshals who, inter alia, are statutorily authorized to execute, enforce and collect taxes due to municipalities in this state. At all relevant times, Johnson was the duly appointed tax collector for the town.

On May 23, 2017, Johnson executed an engagement letter (contract) prepared by Pullman, a Connecticut law firm. With respect to the "[s]cope of [r]epresentation," the contract states in relevant part: "You have asked us to provide . . . assistance relating to the collection of delinquent tax, utility, and similar accounts. These collection efforts are expected to primarily include demand letters and property auctions under [General Statutes] §§ 12-155 and 12-157, but may also include litigation, bank levies, bankruptcy claims, or other mechanisms . . . . You will retain full discretion over which accounts you choose to refer to [us] for collection. For those accounts, you . . . deputize and authorize us to prepare, sign, and serve demands, warrants, notices, bank account inquiries, and similar documents on the [tax] collector's behalf and to endorse and process the payments we receive for you. You agree to recall all warrants given to marshals, all accounts given to debt collection agencies, and otherwise ensure that no third party will be authorized by you to simultaneously attempt to collect the same delinquencies you refer to [Pullman]."[2]

The plaintiff commenced the present action in December, 2017. Its complaint named Johnson, in her official capacity, as the sole defendant and contained four counts, which sought a judgment declaring that her actions in executing the contract violated the plain language of General Statutes §§ 12-135 (a), 12-155, 12-157, and 12-162 respectively. The salient portions of the plaintiff's complaint allege that the legislature has

[2] A copy of the contract was appended to the plaintiff's complaint and designated as exhibit A.

outlined only three classes of persons who are authorized to collect taxes due to the town: (1) the municipal tax collector; (2) any state marshal; and (3) any constable. The plaintiff thus alleged that Johnson lacked statutory authority to delegate or transfer the power to collect municipal taxes to a third party that does not fall within one of those classes.

Days after that action was filed, Pullman filed a motion to intervene as a defendant due to its status as "a party to the contract at issue," which the court granted. Pullman then filed a motion to dismiss on February 27, 2018, which Johnson joined,[3] claiming that the plaintiff lacked standing to maintain the declaratory action. More specifically, the defendants alleged that neither the plaintiff nor any of its members were a party to the contract and had not "suffered any injury from the . . . hiring [of Pullman] to provide . . . legal advice and assistance." The plaintiff filed an opposition to that motion, claiming that it was both classically and statutorily aggrieved by Johnson's execution of the contract with Pullman. The defendants filed a reply to that opposition.

The court heard argument on the motion to dismiss on April 23, 2018. In its subsequent memorandum of decision, the court concluded that the plaintiff was not aggrieved, stating in relevant part: "[T]he plaintiff's argument centers on its members' status as one of three classes authorized to collect taxes: tax collectors, marshals, and constables. Because [Pullman] does not fall under one of these three categories, the plaintiff maintains that it has a 'concrete and equitable interest' to bring the present action. Specifically, the plaintiff points to the language of the contract entered into by the defendants to show that marshals could potentially

[3] On March 1, 2018, Johnson filed a "motion to join in and adopt" the motion to dismiss that Pullman had filed two days earlier. The court granted that request.

have their assigned warrants to collect recalled by Johnson, thus causing an injury which confers standing. However, the plaintiff does not allege that any member has suffered such an injury as a result of the contract. Additionally, the plaintiff does not allege that any of its members ever acted on behalf of a tax collector in [the town] previously, or had the expectation of doing so going forward, which might show a colorable potential for injury. Rather, the facts as alleged demonstrate that the plaintiff is in the same position currently as it would be if Johnson decided to pursue the other two options statutorily available under § 12-135 (a), that is, handling collections personally in her capacity as tax collector or by utilizing a constable. Consequently, the plaintiff has not alleged a unique harm suffered. It has no interest distinguishable from that of the general public, and thus, lacks standing." (Footnotes omitted.) The court therefore rendered judgment dismissing the plaintiff's action.

In its memorandum of decision, the court did not distinctly address the plaintiff's claim of statutory aggrievement. As a result, the plaintiff filed a motion seeking reargument and reconsideration on that basis, which the court summarily denied. The plaintiff then sought an articulation of the court's reasoning for that denial, which the court also denied. This appeal followed.[4]

I

On appeal, the plaintiff claims that the court improperly determined that it lacked standing to maintain the present action. We disagree.

It is well established that "a party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One can-

[4] After commencing this appeal, the plaintiff filed a motion for review of the trial court's denial of its motion for articulation. This court granted review, but denied the relief requested.

not rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . Standing . . . is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented." (Citations omitted; internal quotation marks omitted.) *Webster Bank* v. *Zak*, 259 Conn. 766, 774, 792 A.2d 66 (2002). "Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." (Internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 309 Conn. 307, 318, 71 A.3d 492 (2013).

"When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . ." (Internal quotation marks omitted.) *State* v. *Long*, 268 Conn. 508, 531, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). "Because standing implicates the court's subject matter jurisdiction, the plaintiff . . . bears the burden of establishing standing." *Seymour* v. *Region One Board of Education*, 274 Conn. 92, 104, 874 A.2d 742, cert. denied, 546 U.S. 1016, 126 S. Ct. 659, 163 L. Ed. 2d 526 (2005); see also *Browning* v. *Van Brunt, DuBiago & Co., LLC*, 330 Conn. 447, 460, 195 A.3d 1123 (2018) (party seeking exercise of jurisdiction in its favor bears burden to allege facts demonstrating that it is proper party to invoke judicial resolution of dispute). Our review of the question of the plaintiff's standing is ple-

nary.[5] See *Weiss* v. *Smulders*, 313 Conn. 227, 239, 96 A.3d 1175 (2014).

The sole plaintiff in the present case is an association comprised of state marshals. Accordingly, our analysis begins with the question of associational standing.

In the seminal case of *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), the United States Supreme Court articulated a three part test to determine

[5] In its principal appellate brief, the plaintiff curiously invokes the plain error doctrine as the "appropriate standard of review" for its claims regarding standing. In so doing, it misconstrues the nature of that doctrine. As our Supreme Court has explained, plain error is a rule of reversibility, not reviewability. See *State* v. *Jamison*, 320 Conn. 589, 595–97, 134 A.3d 560 (2016). It is a bypass doctrine that permits review of an otherwise unpreserved claim. *State* v. *Leach*, 165 Conn. App. 28, 35, 138 A.3d 445, cert. denied, 323 Conn. 948, 169 A.3d 792 (2016); see also Practice Book § 60-5 (codifying plain error doctrine and providing that appellate courts "may in the interests of justice notice plain error *not brought to the attention of the trial court*" (emphasis added)); *State* v. *Myers*, 290 Conn. 278, 289, 963 A.2d 11 (2009) (explaining that plain error doctrine "is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, *although unpreserved*, are of such monumental proportion that they threaten to erode our system of justice" (emphasis added)).

In the present case, the defendants raised the issue of the plaintiff's standing in moving to dismiss this action. The plaintiff responded to that claim by filing an opposition to the defendants' motion to dismiss that was accompanied by both a memorandum of law and an affidavit in support thereof. In addition, the plaintiff filed a timely motion for reargument and reconsideration after the court rendered a judgment of dismissal, in which it further memorialized its claims regarding the standing issue. Accordingly, this is not a case that involves an unpreserved claim of error. Resort to the plain error doctrine, therefore, is unnecessary. See, e.g., *Villafane* v. *Commissioner of Correction*, 190 Conn. App. 566, 578 n.2, 211 A.3d 72 ("the claim at issue . . . was preserved at trial and, thus, is not a claim that falls within the ambit of the plain error doctrine"), cert. denied, 333 Conn. 902, 215 A.3d 160 (2019); *State* v. *Welch*, 25 Conn. App. 270, 274, 594 A.2d 28 (1991) ("[i]t is not necessary for us to embark into . . . plain error analysis because the issue was properly preserved for appeal"), rev'd in part on other grounds, 224 Conn. 1, 615 A.2d 505 (1992). Moreover, given that standing implicates the court's subject matter jurisdiction, and thus may be raised at any time; see *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 126, 74 A.3d 1225 (2013); the issue of preservation is largely an academic one.

whether an association possesses standing to maintain an action. It held that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Id., 343. Our Supreme Court subsequently "adopted that test as a matter of Connecticut law." *Connecticut Associated Builders & Contractors* v. *Hartford*, 251 Conn. 169, 185, 740 A.2d 813 (1999).

In the present case, the second and third prongs of that test plainly are met. In opposing the motion to dismiss, the plaintiff submitted the sworn affidavit of Lisa Stevenson, a state marshal and the advisor board chair of the plaintiff. In that affidavit, Stevenson stated in relevant part that the plaintiff was formed on April 13, 2017, approximately eight months before the commencement of this action, at which time its corporate bylaws were adopted. Those bylaws, Stevenson continued, indicate that its purpose is to "organize the [m]arshals, empowering them through a democratic decision-making and direct action to address the issues affecting the group."[6] (Internal quotation marks omitted.) Stevenson further averred that the claims asserted in the present action were ones "affecting [the] [p]laintiff's members" and had been authorized by a vote of those members in accordance with its bylaws. The substance of those averments was not disputed by the defendants in the proceeding in the trial court.[7] Mindful of our

[6] A copy of the plaintiff's bylaws was appended to Stevenson's affidavit.

[7] On appeal, the defendants claim that "the trial court was without jurisdiction to consider" Stevenson's affidavit. They are mistaken. It is well established that a 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.) *Cuozzo* v. *Orange*, 315 Conn. 606, 614, 109 A.3d 903 (2015). As our Supreme Court has explained, when the existing record includes supporting affidavits containing undisputed facts, "the court may

obligation to indulge every presumption favoring jurisdiction, we conclude that the plaintiff sufficiently demonstrated that the interests it seeks to protect through this litigation are germane to the association's purpose. Furthermore, there is no indication that this declaratory action required the participation of the plaintiff's members, nor have the defendants so argued in this appeal. Indeed, our Supreme Court has held to the contrary. See *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, 199 Conn. 609, 617, 508 A.2d 743 (1986) (because plaintiff was seeking declaratory judgment, "neither the claim asserted nor the relief requested" required participation of individual members of plaintiff association).

The remaining question under the first prong of the associational standing test is whether the plaintiff's members would have standing to pursue this declaratory action in their own right. To meet that prong, an association must demonstrate aggrievement on the part of its members. See *Fort Trumbull Conservancy, LLC* v. *New London*, 265 Conn. 423, 434–37, 829 A.2d 801 (2003) (applying traditional aggrievement precepts to resolve question of associational standing); *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, 218 Conn. 335, 343–48, 589 A.2d 356 (1991) (same); *Connecticut State Medical Society* v. *Board of Examiners in Podiatry*, 203 Conn. 295, 299–305, 524 A.2d 636 (1987) (same). An association satisfies that burden by establishing that at least

look to their content for determination of the jurisdictional issue . . . ." (Internal quotation marks omitted.) *Cogswell* v. *American Transit Ins. Co.*, 282 Conn. 505, 516, 923 A.2d 638 (2007); see also *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 227, 105 A.3d 210 (2014) (expressly considering affidavit filed in opposition to motion to dismiss to resolve question of standing); *Knipple* v. *Viking Communications, Ltd.*, 236 Conn. 602, 608, 674 A.2d 426 (1996) (noting that Supreme Court "has previously considered the undisputed factual allegations in the complaint as well as the undisputed factual allegations in the various affidavits when adjudicating the motion [to dismiss] where no evidentiary hearing has been held").

one of its members is aggrieved by the action in question. See, e.g., *Connecticut Associated Builders & Contractors* v. *Hartford*, supra, 251 Conn. 186 (concluding that first prong of associational standing test was not satisfied because "the association did not show that any of its . . . members" were aggrieved); *Connecticut State Medical Society* v. *Board of Examiners in Podiatry*, supra, 304–305 (concluding that first prong of associational standing test was satisfied by showing that one member of plaintiff association was aggrieved). Accordingly, resolution of the question of the plaintiff's associational standing hinges on whether the plaintiff has established that one of its members is aggrieved.

"It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. . . . There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features. . . . Classical aggrievement requires a two part showing. First, a party must demonstrate a specific, personal and legal interest in the subject matter of the [controversy], as opposed to a general interest that all members of the community share. . . . Second, the party must also show that the [alleged conduct] has specially and injuriously affected that specific personal or legal interest. . . . Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Citations omitted; internal quotation marks omitted.) *Trikona Advisers Ltd.* v. *Haida Investments Ltd.*, 318 Conn. 476, 485–86, 122 A.3d 242 (2015). We address each type of aggrievement in turn.

A

Classical Aggrievement

On appeal, the plaintiff contends that the court improperly concluded that it was not classically

aggrieved by Johnson's conduct in executing the contract with Pullman. To resolve that claim, the specific allegations of the four counts of the plaintiff's complaint require closer scrutiny.

1

Counts Two and Three

To establish classical aggrievement, the plaintiff first "must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole." (Internal quotation marks omitted.) *Browning* v. *Van Brunt*, *DuBiago & Co.*, *LLC*, supra, 330 Conn. 455. We conclude that the plaintiff has failed to do so with respect to the second and third counts of its complaint.

Counts two and three pertain to a tax collector's authority under §§ 12-155 and 12-157, respectively.[8] In

[8] General Statutes § 12-155 provides in relevant part: "(a) If any person fails to pay any tax, or fails to pay any water or sanitation charges within thirty days after the due date, the collector or the collector's duly appointed agent shall make personal demand of such person therefor or leave written demand at such person's usual place of abode or deposit in some post office a written demand for such tax or such water or sanitation charges, postage prepaid, addressed to such person at such person's last-known place of residence unless, after making reasonable efforts, the assessor is unable to identify the owner or persons responsible. . . .

"(b) After demand has been made in the manner provided in subsection (a) of this section, the collector for the municipality, alone or jointly with the collector of any other municipality owed taxes by such person, may (1) levy for any unpaid tax or any unpaid water or sanitation charges on any goods and chattels of such person and post and sell such goods and chattels in the manner provided in case of executions, or (2) enforce by levy and sale any lien or warrant upon real estate for any unpaid tax or levy upon and sell such interest of such person in any real estate as exists at the date of the levy for such tax. . . ."

General Statutes § 12-157 provides in relevant part: "(a) When a collector levies one or more tax warrants on real estate, he or she shall prepare notices thereof, containing the name of the taxpayer, a legal description of the real property or citation to an instrument in the land records, an assessor's map or another publicly available document identifying the real proper-

ty's boundaries, the street address, if such real property has one, the amount of the tax or taxes due, including any interest and charges attributable to the property as of the last day of the month immediately preceding the notice, a statement that additional taxes, interest, fees and other charges authorized by law accruing after the last day of the month immediately preceding the notice are owed in addition to the amount indicated as due and owing in the notice, and the date, time and place of sale. The collector shall post one notice on a bulletin board in or near the collector's office in the town where such real estate is situated, if any, or at some other exterior place near the office of the town clerk, which is nearest thereto; one shall be filed in the town clerk's office of such town and such town clerk shall record and index the same as a part of the land records of such town, which recording shall serve as constructive notice equivalent to a lis pendens for all purposes, and one shall be sent by certified mail, return receipt requested, to the taxpayer and each mortgage, lienholder and other encumbrancer of record whose interest is choate and will be affected by the sale. Such posting, filing and mailing shall be done not more than twelve and not less than nine weeks before the time of sale and shall constitute a legal levy of such warrant or warrants upon the real estate referred to in the notice. Such collector shall also publish a similar notice for three weeks, at least once each week, in a newspaper published in such town, or in a newspaper published in the state having a general circulation in such town. The first notice shall be published beginning not more than twelve and not less than nine weeks before the time of sale and the last shall be published not more than four weeks nor less than two weeks before such sale. He shall also send by certified mail, return receipt requested, to the delinquent taxpayer and to each mortgagee, lienholder and other encumbrancer of record whose interest in such property is choate and will be affected by such sale, a similar notice which shall not be required to list information pertaining to properties in which the person to whom the notice is directed has no interest. The notice shall be sent at least twice, the first not more than eight nor less than five weeks before such sale and the last not more than four weeks nor less than two weeks before such sale. The notice shall be addressed to his or her place of residence, if known to the collector, or to his or her estate or the fiduciary thereof if the collector knows him or her to be deceased, or to the address, or the agent of such person, to which such person has requested that tax bills be sent. If there is no address of such person, or if no such agent is given in the records of such town, the notice shall be sent to the place where such person regularly conducts business or other address as the collector believes will give notice of the levy and sale. If a person is a corporation, limited partnership or other legal entity, the notice may be sent to any person upon whom process may be served to initiate a civil action against such corporation, limited partnership or entity or to any other address that the collector believes will give notice of the levy and sale. If no place of residence or business is known and cannot be determined by the tax collector for any owner, taxpayer, mortgagee, lienholder or other encumbrancer whose interest in the property is choate and will be affected by the sale, in lieu of notice by certified mail as provided in this subsection, the notice, together with the list of mortgagees, lienholders, and other encumbrancers of record whose interests in the property are

both counts, the plaintiff alleges that Johnson lacked authority "to deputize or empower any party other than [Johnson] herself" to take action thereunder.[9] Neither the plaintiff's pleadings nor the affidavit submitted in opposition to the motion to dismiss provides any basis to conclude that any member of the plaintiff possesses a specific, personal and legal interest with respect to those allegations that is not shared by the community as a whole. Although the plaintiff broadly asserts an interest in "declaring the invalidity of [Johnson's] actions" pursuant to §§ 12-155 and 12-157, such a conclusory statement does not satisfy the first prong of the classical aggrievement test. See, e.g., *Bongiorno Supermarket, Inc.* v. *Zoning Board of Appeals*, 266 Conn. 531, 542–43, 833 A.2d 883 (2003) (mere statement that appellant is aggrieved insufficient without supporting allegations describing particular nature of aggrievement); *Concerned Citizens for the Preservation of Watertown, Inc.* v. *Planning & Zoning Commission*, 118 Conn. App. 337, 342, 984 A.2d 72 (2009) ("conclusory statements do not satisfy the appellant's burden

choate and will be affected by such sale, shall be published in a newspaper published in this state, having a general circulation in the town in which such property is located at least twice, the first not more than eight weeks nor less than five weeks before such sale and the last not more than four weeks nor less than two weeks before such sale. . . .

"(d) The collector shall post, at the time and place of the sale, a written notice stating the amount of all taxes, interest, fees and other charges authorized by law with respect to each property to be sold. The tax collector may publish or announce any rules for the orderly conduct of the auction and the making of payment by successful bidders which are not inconsistent with the requirements of law. The tax collector or the municipality may retain the services of auctioneers, clerks and other persons to assist the tax collector in the conduct of the sale and the cost of such persons paid for their services shall be added to the taxes due from the delinquent taxpayer. If more than one property is sold, the tax collector shall apportion all shared costs equally among all the properties. . . ."

[9] In count two, the plaintiff alleges in relevant part that "[t]he plain and unambiguous text of [§] 12-155 does not provide any authority for [Johnson] to deputize or empower any party other than [Johnson] herself to levy or enforce by sale of real property any delinquent tax balance due and owing to the [municipality]." In count three, the plaintiff alleges in relevant part that "[t]he explicit and unambiguous text of [§] 12-157 does not provide

of proving aggrievement"), cert. denied, 294 Conn. 934, 987 A.2d 1028 (2010). Indeed, any taxpayer in the town could levy the same complaint as that advanced by the plaintiff here. Because the plaintiff has not established an interest in Johnson's conduct pursuant to §§ 12-155 and 12-157 that is distinguishable from that of the general public, its claim of classical aggrievement under counts two and three necessarily fails. See *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, supra, 218 Conn. 348.

2

Counts One and Four

a

First Prong of Classical Aggrievement

We reach a different result with respect to counts one and four of the plaintiff's complaint. In those counts, the plaintiff alleges that it belongs to one of only three classes of persons that the legislature has authorized to effectuate tax collections pursuant to §§ 12-135 and 12-162.[10]

any authority for [Johnson] to deputize or empower any party other than [Johnson] herself to collect any delinquent tax balance due to the [municipality] . . . ."

[10] General Statutes § 12-135 (a) provides in relevant part: "Any collector of taxes, and any state marshal or constable authorized by such collector, shall, during their respective terms of office, have authority to collect any taxes and any water or sanitation charges due the municipality served by such collector for which a proper warrant and a proper alias tax warrant, in the case of the deputized officer, have been issued. Such alias tax warrant may be executed by any officer above named in any part of the state, and the collector in person may demand and collect taxes or water or sanitation charges in any part of the state on a proper warrant. Any such state marshal or constable so authorized who executes such an alias tax warrant outside of such state marshal's or constable's precinct shall be entitled to collect from the person owing the tax or the water or sanitation charges the fees allowed by law . . . ."

General Statutes § 12-162 (a) provides: "Any collector of taxes, in the execution of tax warrants, shall have the same authority as state marshals have in executing the duties of their office, and any constable or other officer authorized to serve any civil process may serve a warrant for the

In count one, the plaintiff alleges that "[t]he plain and unambiguous text of [§] 12-135 does not provide any authority for [Johnson] to deputize or empower any party other than herself, a state marshal or a constable to execute a tax warrant or seek to collect any taxes due to the [municipality]. [Johnson's] actions in purporting to deputize a third party which is not one of the three legislatively designated classes of persons statutorily authorized to execute and/or act upon a tax warrant for collection of taxes due to the [municipality] is contrary to the plain language of [the statute]." The plaintiff thus alleges that it "has a concrete legal and equitable interest in the [c]ourt determining the validity of [Johnson's] actions in delegating authority to execute tax warrants and seek to collect on taxes due to the [municipality] as members of one of the three statutorily designated classes of persons authorized to act on behalf of the [municipality] pursuant to [§] 12-135 (a)."

In count four, the plaintiff similarly alleges that "[t]he explicit and unambiguous text of [§] 12-162 does not, anywhere within its terms, provide any authority for [Johnson] to deputize or empower any party other than [Johnson] herself, a state marshal and/or a constable to execute an alias tax warrant; financial institution warrant; or a request for information directed to a financial institution on behalf of the [municipality]. [Johnson's] actions in purporting to deputize a third party which is not one of the three legislatively designated classes of persons statutorily authorized to execute and serve an alias tax warrant is contrary to the plain language of [§] 12-162. . . . The [plaintiff] has a concrete legal and

collection of any tax assessed or any water or sanitation charges imposed, and the officer shall have the same authority as the collector concerning taxes or water or sanitation charges committed to such officer for collection." Section 12-162 (b) (1) then sets forth suggested language to be used when an alias tax warrant is issued. The language begins by stating: "To a state marshal . . . or any constable of the Town of . . . ." General Statutes § 12-162 (b) (1).

equitable interest in the court declaring the invalidity of [Johnson's] actions as one of the three statutorily designated classes of persons authorized to act pursuant to [§] 12-162."

We conclude that, unlike counts two and three of the complaint, counts one and four allege a specific, personal and legal interest in the subject matter of the challenged action that is distinguishable from a general interest shared by the community as a whole. In those counts, the plaintiff claims membership in a narrow class of persons authorized by the legislature, in enacting §§ 12-135 and 12-162, to engage in tax collection on behalf of municipalities, which legislative imperative Johnson allegedly contravened in executing the contract at issue. Broadly construed, the allegations of counts one and four satisfy the first prong of the classical aggrievement test.

b

Second Prong of Classical Aggrievement

We, therefore, must consider the second prong of the classical aggrievement test, which requires the plaintiff to demonstrate how Johnson's execution of the contract with Pullman "resulted in a direct injury to [it]." *PNC Bank, N.A.* v. *Kelepecz*, 289 Conn. 692, 707, 960 A.2d 563 (2008). The plaintiff does not allege specific facts detailing how any of its members were directly injured, nor do the words "injury," "injured," or their ilk appear anywhere in the complaint.

On appeal, the plaintiff submits that the injury emanating from its complaint is "damage" to its members' "rights for appointment to collect municipal taxes . . . ." (Internal quotation marks omitted.) In response, the defendants maintain that the plaintiff has not alleged any factual basis on which a court could conclude that one of its members was directly injured by Johnson's conduct in the present case. We agree with the defendants.

The injury requirement of the classical aggrievement test is well established. Under our law, "the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]. . . . Mindful that it is a fundamental concept of judicial administration that no person is entitled to set the machinery of the courts in operation except to obtain redress for an injury he has suffered or to prevent an injury he may suffer . . . [a plaintiff is] required to plead and prove some injury in accordance with our rule on aggrievement." (Internal quotation marks omitted.) *Mayer* v. *Historic District Commission*, 325 Conn. 765, 781, 160 A.3d 333 (2017); see also *Fleet National Bank's Appeal from Probate*, 267 Conn. 229, 253, 837 A.2d 785 (2004) ("a party sufficiently has demonstrated classical aggrievement upon a showing of direct injury to a legally protected interest"). In the specific context of declaratory actions, the appellate courts of this state likewise have held that a party who had not "demonstrated how she was harmed in a unique fashion" by the challenged conduct failed to establish "a colorable claim of *direct* injury," and, accordingly, lacked standing to maintain the action. (Emphasis in original.) *Monroe* v. *Horwitch*, 215 Conn. 469, 473, 576 A.2d 1280 (1990); see also *Financial Consulting, LLC* v. *Commissioner of Ins.*, 315 Conn. 196, 224–25, 105 A.3d 210 (2014) (standing in declaratory action requires allegations of injury that plaintiff has suffered or is likely to suffer); *Wilson* v. *Kelley*, 224 Conn. 110, 121, 617 A.2d 433 (1992) (noting "the necessary injury to maintain a declaratory action"); *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, supra, 199 Conn. 613 (standing requires "some direct injury for which the plaintiff seeks redress" (internal quotation marks omitted)); *Stefanoni* v. *Dept. of Economic & Community Development*, 142 Conn. App. 300, 318, 70 A.3d 61 ("the plaintiffs here do not have a direct injury that would allow them to maintain

this action" and "have not shown a direct, unique injury resulting from" challenged conduct), cert. denied, 309 Conn. 907, 68 A.3d 661 (2013); *Smigelski* v. *Kosiorek*, 138 Conn. App. 728, 739, 54 A.3d 584 (2012) (court properly dismissed declaratory action when plaintiff failed to allege how he was specially and injuriously affected by challenged conduct), cert. denied, 308 Conn. 901, 60 A.3d 287 (2013).

Our Supreme Court has emphasized that fundamental tenet in analyzing a claim of associational standing. In *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 265 Conn. 425, the plaintiff association sought a declaratory ruling regarding certain conduct of the defendant city. Like the present case, the plaintiff's complaint in *Fort Trumbull Conservancy, LLC* contained general assertions of statutory violations, but no allegations of specific and direct injury to the plaintiff's members. As our Supreme Court explained: "[W]e conclude that the trial court properly determined that the plaintiff has failed to demonstrate classical aggrievement. Although the plaintiff alleges in its complaint . . . that the defendants' actions violated, inter alia, the constitutional and statutory rights of its members, the complaint contains no allegation of any specific and direct injury that the plaintiff's members have suffered or are likely to suffer as a result of these alleged constitutional infirmities and [statutory] violations. In other words, the plaintiff has failed to demonstrate how its members have been 'specially and injuriously affected' by the defendants' conduct." Id., 435. The court continued: "The complaint . . . contains no allegation that *any member of the plaintiff* was 'imminently threatened' by the city's [conduct]. . . . Inasmuch as the complaint contains insufficient facts from which it reasonably may be inferred that any of the plaintiff's members have suffered or are likely to suffer any direct and specific injury as a result of the implementation of the development plan, the plaintiff's claim of classical

aggrievement must fail." (Emphasis in original; footnote omitted.) Id., 436. Accordingly, the court held that the trial court properly dismissed the plaintiff's declaratory action. Id., 436–37.

That precedent compels a similar conclusion here. The plaintiff's complaint does not allege that any of its members have ever worked with the town or its tax collector to collect municipal taxes. There also is no allegation that any members of the plaintiff ever offered their services to the town or its tax collector. Although the contract at issue states in relevant part that Johnson would "recall all warrants given to marshals" regarding tax delinquencies referred to Pullman, the plaintiff has not alleged that Johnson ever issued any warrants to one of its members or that one of its members had such a warrant recalled pursuant to the terms of the contract. In short, nothing in the record indicates that any member of the plaintiff association *ever* has engaged in the collection of the town's taxes pursuant to the statutes in question.

On appeal, the plaintiff contends that implicit in its complaint is an allegation that its members sustained the requisite injury in the form of diminished business opportunities stemming from Johnson's conduct. It has furnished no legal authority or factual allegations to substantiate that claim. To the contrary, our Supreme Court has held that "a diminished possibility of potential work" was "too attenuated" and did not suffice to establish a direct injury on the part of the members of the plaintiff association. *Connecticut Associated Builders & Contractors* v. *Hartford*, supra, 251 Conn. 182–86. That precedent informs our analysis in the present case. The plaintiff's members are but one "of several means" by which a municipality may seek to collect delinquent taxes. *O'Brien-Kelley, LTD* v. *Goshen*, 190 Conn. App. 420, 423, 210 A.3d 641 (2019). Pursuant to §§ 12-135 and 12-162, municipal tax collectors such as Johnson are under no obligation to procure the services of the plain-

tiff's members. Because the plaintiff's complaint lacks any factual allegation that one of its members has ever provided tax collection services to the town's tax collector, their purported harm is but conjecture and too attenuated to constitute the requisite injury.[11] See *State* v. *Dixon*, 114 Conn. App. 1, 9, 967 A.2d 1242 ("aggrievement or standing to appeal requires something more than conjecture or speculation of injury"), cert. denied, 292 Conn. 910, 973 A.2d 108 (2009); *Goldfisher* v. *Connecticut Siting Council*, 95 Conn. App. 193, 198, 895 A.2d 286 (2006) ("mere speculation that harm may ensue is not an adequate basis for finding

[11] Under established Connecticut law, "[s]tanding requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]." (Internal quotation marks omitted.) *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 214, 982 A.2d 1053 (2009). At that same time, it is equally well established that a hypothetical injury does not suffice. See, e.g., *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 814, 967 A.2d 1 (2009) ("we must be satisfied that the case before the court does not present a hypothetical injury or a claim contingent upon some event that has not and indeed may never transpire" (internal quotation marks omitted)); *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, 236 Conn. 453, 465, 673 A.2d 484 (1996) (for association to have standing, it must allege invasion of legally protected interest that is concrete and particularized and actual or imminent rather than conjectural or hypothetical).

The plaintiff relies on *Bysiewicz* v. *DiNardo*, 298 Conn. 748, 6 A.3d 726 (2010), claiming that "[n]o party alleged an injury was present" in that case. The plain language of that decision reveals otherwise. The plaintiff in *Bysiewicz* was a declared candidate for the Office of Attorney General who sought a declaratory ruling on the qualifications for that office pursuant to General Statutes § 3-124. *Bysiewicz* v. *DiNardo*, supra, 752–54. In addressing the question of the plaintiff's standing, our Supreme Court first noted the familiar maxim that "a [party] ordinarily establishes . . . standing by allegations of injury [that he or she has suffered or is likely to suffer]." (Internal quotation marks omitted.) Id., 758. The court then concluded that the plaintiff had met her burden in establishing that she was likely to suffer an injury as a result of the application of § 3-124, stating: "In light of the potential injury to the plaintiff's interests if her claims are not adjudicated until after the election, as well as the potential injury to the public's interest in avoiding voter confusion and disruptions in the election process, including the possibility of a vacancy in the [O]ffice of [A]ttorney [G]eneral, we conclude that the action was ripe when it was brought even though the plaintiff had not yet been nominated or elected to the [O]ffice of [A]ttorney [G]eneral." Id., 760–61. The court thus held that the plaintiff possessed standing to pursue that declaratory action. Id., 761.

aggrievement"); see also *Clapper* v. *Amnesty International USA*, 568 U.S. 398, 416, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013) (plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending").

As in *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 265 Conn. 435, the complaint here alleges statutory violations on the part of Johnson, but contains no allegation of any specific and direct injury that the plaintiff's members have suffered or are likely to suffer. Because the plaintiff has not established that Johnson's conduct specially and injuriously affected its members; see *Mayer* v. *Historic District Commission*, supra, 325 Conn. 781; its claim flounders on the second prong of the classical aggrievement test.

B

Statutory Aggrievement

The plaintiff also alleges that its members are statutorily aggrieved by Johnson's conduct. "Statutory aggrievement exists by legislative fiat, not by judicial analysis of the particular facts of the case. In other words, in cases of statutory aggrievement, particular legislation grants standing to those who *claim injury* to an interest protected by that legislation." (Emphasis added; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC* v. *New London*, 282 Conn. 791, 803, 925 A.2d 292 (2007).

1

Declaratory Judgment Procedure

The plaintiff's claim of statutory aggrievement is predicated on General Statutes § 52-29,[12] our declaratory judgment statute, and the implementing rule

[12] General Statutes § 52-29 provides: "(a) The Superior Court in any action or proceeding may declare rights and other legal relations on request for such a declaration, whether or not further relief is or could be claimed. The declaration shall have the force of a final judgment.

of practice, Practice Book § 17-55.[13] Distilled to its essence, the plaintiff's claim is that declaratory actions in this state are governed by a relaxed aggrievement standard that does not require allegations of injury. The precedent of our Supreme Court indicates otherwise.

In *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, supra, 218 Conn. 346, a case concerning associational standing, the plaintiffs raised a nearly identical claim, contending that "the declaratory judgment provisions of § 52-29 (a) and Practice Book § 390 [now § 17-55] are more lenient as to standing . . . ." (Footnotes omitted.) In rejecting that claim, our Supreme Court reiterated the fundamental requirement that an association must demonstrate that its members had "standing to seek declaratory judgments because they allege direct, personal injury resulting from the conduct challenged by the association." (Internal quotation marks omitted.) Id. The court further noted that a plaintiff "who has not demonstrated how she was harmed in a unique fashion by the conduct she had challenged in a declaratory judgment action had failed to establish a colorable claim of *direct* injury, and accordingly lacked standing to maintain the action." (Emphasis in original; internal quotation marks omitted.) Id., 348; see also *Andross* v. *West Hartford*, 285 Conn. 309, 326–27, 330, 939 A.2d 1146 (2008) (quoting aforementioned language from *Connecticut Business & Industry Assn., Inc.*, and stating that "the principle on which this court relied . . . has deep roots in

"(b) The judges of the Superior Court may make such orders and rules as they may deem necessary or advisable to carry into effect the provisions of this section."

[13] Practice Book § 17-55 provides: "A declaratory judgment action may be maintained if all of the following conditions have been met:

"(1) The party seeking the declaratory judgment has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations;

"(2) There is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties; and

"(3) In the event that there is another form of proceeding that can provide the party seeking the declaratory judgment immediate redress, the court is

our common-law jurisprudence"). The plaintiff has not acknowledged that precedent in either its principal appellate brief or its reply brief to this court.[14]

That Supreme Court precedent is not groundbreaking but, rather, is consistent with the great weight of appellate authority in this state that requires a plaintiff pursuing a declaratory judgment action to allege an injury resulting from the challenged conduct. See, e.g., *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 224–25 (standing in declaratory action requires allegations of injury that plaintiff has suffered or is likely to suffer); *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 728, 737, 95 A.3d 1031 (2014) (noting that standing in declaratory action requires colorable claim of injury and concluding that plaintiff's "claim of injury [is] more than colorable"); *Liberty Mutual Ins. Co.* v. *Lone Star Industries, Inc.*, 290 Conn. 767, 814, 967 A.2d 1 (2009) (plaintiff pursuing declaratory judgment must demonstrate that case does not present hypothetical injury); *Fort Trumbull Conservancy, LLC* v. *New London*, supra, 265 Conn. 436 (declaratory action properly dismissed for lack of "classical or statutory aggrievement" because plaintiff's complaint contained "insufficient facts from which it reasonably may be inferred that any of the plaintiff's members have suffered or are likely to suffer any direct and specific injury as a result" of challenged conduct); *Wilson* v. *Kelley*, supra, 224 Conn. 121 (recognizing "the necessary injury to maintain a declaratory action"); *Monroe* v. *Horwitch*, supra, 215 Conn. 473 (plaintiff in declaratory action must demonstrate "how she was harmed in a unique fashion" by challenged conduct); *Connecticut Assn. of Health Care*

of the opinion that such party should be allowed to proceed with the claim for declaratory judgment despite the existence of such alternate procedure."

[14] The defendants expressly rely on that authority in their appellate brief. More importantly, the trial court relied on *Connecticut Business & Industry Assn., Inc.*, in its memorandum of decision dismissing the plaintiff's action for lack of standing.

Facilities, Inc. v. *Worrell*, supra, 199 Conn. 613 (noting basic principle that plaintiffs must have standing for court to have jurisdiction to render declaratory judgment and emphasizing that standing requires "some direct injury for which the plaintiff seeks redress" (internal quotation marks omitted)); *Emerick* v. *Commissioner of Public Health*, 147 Conn. App. 292, 297, 81 A.3d 1217 (2013) (plaintiff who has not demonstrated how he or she was harmed in unique fashion by challenged conduct in declaratory judgment action lacks standing because he or she failed to establish colorable claim of direct injury), cert. denied, 311 Conn. 936, 88 A.3d 551 (2014); *Stefanoni* v. *Dept. of Economic & Community Development*, supra, 142 Conn. App. 318 ("the plaintiffs here do not have a direct injury that would allow them to maintain this [declaratory] action" and "have not shown a direct, unique injury resulting from" challenged conduct); *Smigelski* v. *Kosiorek*, supra, 138 Conn. App. 739 (court properly dismissed declaratory action when plaintiff failed to allege how he was specially and injuriously affected by challenged conduct); *Pascarella* v. *Commissioner of Revenue Services*, 119 Conn. App. 771, 774, 989 A.2d 1092 (noting that statutory aggrievement involves claim that "particular legislation grants standing to those who *claim injury* to an interest protected by that legislation" (emphasis added; internal quotation marks omitted)), cert. denied, 296 Conn. 904, 992 A.2d 329 (2010).

In *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, 236 Conn. 453, 673 A.2d 484 (1996), our Supreme Court discussed in detail the necessity of allegations of injury in order to establish the standing of an association seeking a declaratory judgment. In that case, the plaintiff association sought a declaratory judgment that the defendants had violated certain statutes. Id., 458. On appeal, the defendants challenged the trial court's determination that the plaintiff possessed standing to maintain that action. Id., 463. The Supreme Court

began its analysis by reiterating the familiar precept that "[t]he requirements of justiciability and controversy are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity. . . . As long as there is some direct injury for which the plaintiff seeks redress, the injury that is alleged need not be great." (Citation omitted; internal quotation marks omitted.) Id., 463–64.

After setting forth the three part test for associational standing; see *Hunt* v. *Washington State Apple Advertising Commission*, supra, 432 U.S. 343; *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, supra, 199 Conn. 616; the court stated that the defendants were challenging "only the first prong of the test," which requires a showing that the association's members would otherwise have standing to sue in their own right. *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, supra, 236 Conn. 464–65. The court then noted that the defendants relied "on *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992), wherein the United States Supreme Court set forth a three part test to determine individual standing [that focused on the injury allegedly sustained]. First, a plaintiff must demonstrate an injury in fact, that is, an invasion of a legally protected interest that is concrete and particularized and actual or imminent rather than conjectural or hypothetical. . . . Second, there must be a causal connection between the defendants' conduct and the alleged injury. The injury must be fairly . . . trace[able] to the challenged action of the defendant[s], and not . . . th[e] result [of] the independent action of some third party not before the court. . . . Third, the alleged injury will likely, rather than speculatively, be redressed by a favorable decision." (Citations omitted; internal quotation marks omitted.) *Gay & Lesbian Law Students Assn.* v. *Board of Trustees*, supra, 465. In response, the plaintiff argued that

"because *Lujan* is a plurality opinion and has not yet been relied upon by Connecticut courts, it does not govern." Id., 465 n.9.

Our Supreme Court disagreed, stating that "[t]here is little material difference between what we have required and what the United States Supreme Court in *Lujan* demanded of the plaintiff to establish standing." Id., 466 n.10. The court emphasized that, under Connecticut law, "[s]tanding requires no more than a colorable claim of injury; a plaintiff ordinarily establishes his standing by *allegations* of injury." (Emphasis in original; internal quotation marks omitted.) Id., 466. The court then proceeded to analyze the first prong of the associational standing test in accordance with both *Lujan* and Connecticut's well established classical aggrievement standard. See id., 466–68 (concluding that "[t]he infringement of the rights of the plaintiff's members . . . was concrete and particularized as well as actual and imminent" and emphasizing that "the plaintiff's members . . . are not merely members of the general public who have failed to demonstrate how they have been harmed in some unique way"). This precedent of our Supreme Court further convinces us that an association must allege the requisite injury to one of its members in order to establish its standing to maintain a declaratory judgment action under the associational standing test.

The declaratory judgment procedure memorialized in § 52-29 and Practice Book § 17-55 "provides a valuable tool by which litigants may resolve uncertainty of legal obligations." *Milford Power Co., LLC* v. *Alstom Power, Inc.*, 263 Conn. 616, 625, 822 A.2d 196 (2003). At the same time, "[a] declaratory judgment action is not . . . a procedural panacea for use on all occasions, but, rather, is limited to solving *justiciable* controversies. . . . Invoking § 52-29 does not create jurisdiction where it would not otherwise exist." (Citation omitted; emphasis added; internal quotation marks omitted.) Id. As our Supreme Court recently observed, "[t]he declara-

tory judgment procedure, governed by § 52-29 and Practice Book § 17-54 et seq., does not relieve the plaintiff from justiciability requirements." *Mendillo* v. *Tinley, Renehan & Dost, LLP*, 329 Conn. 515, 524, 187 A.3d 1154 (2018); accord *Financial Consulting, LLC* v. *Commissioner of Ins.*, supra, 315 Conn. 225 ("[t]he declaratory judgment procedure . . . may be employed only to resolve a justiciable controversy" (internal quotation marks omitted)); *Wilson* v. *Kelley*, supra, 224 Conn. 121 ("[o]ur doctrines of standing and aggrievement obligate us to avoid adjudicating rights in a vacuum"); *Connecticut Assn. of Boards of Education, Inc.* v. *Shedd*, 197 Conn. 554, 558, 499 A.2d 797 (1985) ("[i]t is a basic principle of our law . . . that the plaintiffs must have standing in order for a court to have jurisdiction to render a declaratory judgment"). As an intermediate appellate tribunal, this court is not at liberty to modify, reconsider, or overrule that precedent. See *Hartford Steam Boiler Inspection & Ins. Co.* v. *Underwriters at Lloyd's & Cos. Collective*, 121 Conn. App. 31, 48–49, 994 A.2d 262, cert. denied, 297 Conn. 918, 996 A.2d 277 (2010), and case law cited therein.

Accordingly, plaintiffs pursuing a declaratory judgment must satisfy the prerequisites of justiciability. "[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter." (Internal quotation marks omitted.) *Keller* v. *Beckenstein*, 305 Conn. 523, 537–38, 46 A.3d 102 (2012). Our well established standing jurisprudence, in turn, requires allegations of injury. See, e.g., *Edgewood Village, Inc.* v. *Housing Authority*, 265 Conn. 280, 288, 828 A.2d 52 (2003) (standing requires showing that plaintiff has been specially and injuriously affected), cert. denied, 540 U.S. 1180, 124 S. Ct. 1416, 158 L. Ed. 2d 82 (2004); *Taylor* v. *Commissioner of Correction*, 137

Conn. App. 135, 141, 47 A.3d 466 ("because the plaintiff has failed to identify a legally protected interest that has been specially and injuriously affected, we conclude that he lacks standing to bring the present action"), cert. denied, 307 Conn. 927, 55 A.3d 569 (2012); *Johnson* v. *Rell*, 119 Conn. App. 730, 737, 990 A.2d 354 (2010) ("[a]n allegation of injury is both fundamental and essential to a demonstration of standing"). For that reason, our decisional law is replete with instances in which a party seeking a declaratory judgment has been deemed to lack standing due to its failure to allege the requisite injury. We therefore cannot agree with the plaintiff's contention that the declaratory judgment procedure embodied in § 52-29 and Practice Book § 17-55 obviates the need for a plaintiff to allege an injury that it suffered or is likely to suffer as a result of the challenged conduct.[15] Because the plaintiff has not

[15] Our conclusion is buttressed by the fact that "the rules of practice may not expand or contract the court's subject matter jurisdiction . . . ." *Batte-Holmgren* v. *Commissioner of Public Health*, 281 Conn. 277, 287, 914 A.2d 996 (2007); see also General Statutes § 51-14 (a) ("The judges of the Supreme Court, the judges of the Appellate Court, and the judges of the Superior Court shall adopt and promulgate and may from time to time modify or repeal rules and forms regulating pleading, practice and procedure in judicial proceedings in courts in which they have the constitutional authority to make rules, for the purpose of simplifying proceedings in the courts and of promoting the speedy and efficient determination of litigation upon its merits. . . . *Such rules shall not abridge, enlarge or modify . . . the jurisdiction of any of the courts*. . . ." (emphasis added)); *State* v. *McGee*, 175 Conn. App. 566, 582–83, 168 A.3d 495 ("[i]t is axiomatic in Connecticut jurisprudence that [rules of practice] do not ordinarily define subject matter jurisdiction" (internal quotation marks omitted)), cert. denied, 327 Conn. 970, 173 A.3d 953 (2017). In light of the foregoing, our Supreme Court has observed that it is "questionable that the judges may, pursuant to their rule-making authority under subsection (b) of § 52-29, limit [or enlarge] the subject matter jurisdiction created by subsection (a) of § 52-29." *Batte-Holmgren* v. *Commissioner of Public Health*, supra, 286; cf. *River Bend Associates, Inc.* v. *Water Pollution Control Authority*, 262 Conn. 84, 104, 809 A.2d 492 (2002) (emphasizing that provisions of our rules of practice cannot confer subject matter jurisdiction on the court and agreeing with defendant that Practice Book § 17-55 (3) is "a rule that merely establishes a test to determine the availability of declaratory relief"); *Wilson* v. *Kelley*, supra, 224 Conn. 116 (expressly declining to hold "that the declaratory judgment statute and rules created substantive rights that did not otherwise exist").

alleged that one of its members has suffered or is likely to suffer an injury as a result of Johnson's conduct, we conclude that it lacks standing to maintain this declaratory judgment action.

2

General Considerations

Even if we were to conclude otherwise, the plaintiff still could not prevail. Assuming arguendo that our declaratory judgment procedure does not require allegations that the plaintiff was specially and injuriously affected by the challenged conduct, the allegations of the plaintiff's complaint still fall short of the general considerations that govern declaratory actions.

a

Practical Relief

An essential prerequisite to the court's jurisdiction over a declaratory judgment action is that "the determination of the controversy must be capable of resulting in practical relief to the complainant." *Milford Power Co., LLC* v. *Alstom Power, Inc.*, supra, 263 Conn. 626. That prerequisite is lacking in the present case. Even if a court of this state were to declare Johnson's conduct in executing the contract with Pullman improper, it would result in no practical relief to the plaintiff or its members, as Johnson remains under no obligation to contemplate, let alone secure, the services of the plaintiff's members. Compare *Peterson* v. *Norwalk*, 150 Conn. 366, 382, 190 A.2d 33 (1963) (plaintiff entitled to declaration of validity of city's contract to maintain bridge, even though city had not yet been called on to expend funds for such maintenance; "contractual obligation to do so in the future is there now, even if some unforeseen event may alter or eliminate it") with *Manchester* v. *Rogers Paper Mfg. Co.*, 121 Conn. 617, 632, 186 A. 623 (1936) (insufficient reason for declaration of rights when serious doubt whether defendant ever will

be called upon to make payment). Apart from offering guidance on the statutory issue before it, the court here could provide "nothing more than . . . an advisory opinion" to the plaintiff and other interested parties. See *Mendillo* v. *Tinley, Renehan & Dost, LLP*, supra, 329 Conn. 527. As a result, the present case is nonjusticiable.

b

Legal Relationship between Defendants

It long has been the law of this state that a declaratory judgment action "does not lie merely to secure advice on the law." *McGee* v. *Dunnigan*, 138 Conn. 263, 268, 83 A.2d 491 (1951). Accordingly, our rules of practice require a plaintiff seeking a declaratory judgment to establish, inter alia, that "(1) [it] has an interest, legal or equitable, by reason of danger of loss or of uncertainty as to the party's rights or other jural relations; [and] (2) [t]here is an actual bona fide and substantial question or issue in dispute or substantial uncertainty of legal relations which requires settlement between the parties . . . ." Practice Book § 17-55; see also *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, supra, 312 Conn. 726; *Wilson* v. *Kelley*, supra, 224 Conn. 115. In the present case, there is no uncertainty as to the rights of the plaintiff's members under §§ 12-135 and 12-162—a municipal tax collector is permitted, but not obligated, to utilize their services for tax collection purposes. The plaintiff has provided this court with no authority to the contrary.

In addition, there is no uncertainty as to the plaintiff's legal relations with Johnson. The plaintiff's members are but one "of several means" by which Johnson, or any municipal tax collector in this state, may seek to collect delinquent taxes pursuant to the General Statutes. *O'Brien-Kelley, LTD* v. *Goshen*, supra, 190 Conn. App. 423. There also is no uncertainty as to the plaintiff's legal relations with Pullman, as it was not a party to the contract in question and possesses no legal relationship therewith.

Rather, the true dispute in the present case does not involve the plaintiff or its members at all. It concerns the legal relationship between the defendants, a municipal tax collector and a law firm that was engaged to assist in tax collection efforts. As was the case in *Lovell* v. *Stratford*, 7 Conn. Supp. 255, 258 (1939), "there is no uncertainty as to the legal relations *between the plaintiff and* [*the*] *defendants* which require[s] settlement. . . . It seems apparent therefore that the plaintiff is in no position to hail these defendants into court for a purpose not to settle any legal relations between him and them, but for an apparent purpose of having the defendants settle differences, if any, existing among themselves." (Emphasis added.) In *Lovell*, the court relied on the familiar maxim that "to maintain a bill for a declaratory judgment it should appear that the plaintiff has *present* rights against . . . the persons whom he makes parties defendants to the proceedings . . . ." (Emphasis altered.) Id., 257; accord *Costantino* v. *Skolnick*, 294 Conn. 719, 738, 988 A.2d 257 (2010) (party "impermissibly sought a declaratory judgment, not to settle a present controversy, but rather to avoid one in the future" [internal quotation marks omitted]); *Milford Power Co., LLC* v. *Alstom Power, Inc.*, supra, 263 Conn. 629 (emphasizing that declaratory action is proper only when commenced "to settle a present controversy" and dismissing action in that case because "[c]onduct by the defendants that could form the foundation for a real controversy between the parties . . . had not moved beyond the theoretical"). In the present case, any uncertainty as to the plaintiff's legal relations with the defendants or potential harm to the plaintiff is, on the record before us, merely theoretical.

In challenging the propriety of the legal relationship between the defendants, the plaintiff relies on a formal opinion issued by the attorney general in 1992, which concluded that "municipalities may utilize independent contractors to assist municipal tax collectors in collecting delinquent taxes, but only for the limited purpose

of making personal or written demand on delinquent taxpayers under [§] 12-155."[16] Opinions, Conn. Atty. Gen. No. 1992-018 (June 29, 1992) p. 4; see generally *Connecticut Hospital Assn., Inc.* v. *Commission on Hospitals & Health Care*, 200 Conn. 133, 143, 509 A.2d 1050 (1986) ("[a]lthough an opinion of the attorney general is not binding on a court, it is entitled to careful consideration and is generally regarded as highly persuasive"). In light of that authority, we agree with the plaintiff that a substantial question exists as to whether third parties such as Pullman are statutorily authorized to engage in municipal tax collection services pursuant to §§ 12-135 (a) and 12-162.

That determination, however, has little bearing on the present inquiry, as the issue before this court remains the standing of the plaintiff association. "The fundamental aspect of standing . . . [is that] it focuses on the party seeking to get his complaint before [the] court and *not* on the issues he wishes to have adjudicated. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue

[16] In their appellate brief, the defendants strongly dispute that conclusion, stating that it "flies in the face of numerous Connecticut statutes contemplating that a municipality can choose to hire counsel and other agents to assist in the collection of municipal taxes, and the related statutory authority permitting a town to charge those collection fees against delinquent taxpayers." The defendants direct our attention to General Statutes §§ 7-148 (c) (2) (B), 12-140, 12-141, 12-144b, 12-157 (d), 12-161a, 12-163a, 12-166 and 12-167a to substantiate that contention.

It is axiomatic that, in resolving the issue of a party's standing to maintain a cause of action, we do not consider the merits of that action. See, e.g., *Mendillo* v. *Tinley, Renehan & Dost, LLP*, supra, 329 Conn. 525 ("[i]n deciding whether the plaintiff's complaint presents a justiciable claim, we make no determination regarding its merits" (internal quotation marks omitted)); *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 581, 833 A.2d 908 (2003) (in determining question of standing, court does not consider merits of claim); *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn. 483, 492, 400 A.2d 726 (1978) ("[w]hen standing is put in issue, the question is . . . not whether . . . on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded"). We therefore express no opinion on the merits of the substantive allegations raised by the parties.

. . . .'' (Emphasis added; internal quotation marks omitted.) *Tremont Public Advisors, LLC* v. *Connecticut Resources Recovery Authority*, 333 Conn. 672, 689, 217 A.3d 953 (2019). Pursuant to our rules of practice and our decisional law, the critical question is not whether a substantial question exists in the abstract; the question is whether one exists that requires settlement between the parties. Practice Book § 17-55; *McAnerney* v. *McAnerney*, 165 Conn. 277, 283, 334 A.2d 437 (1973) (to maintain a declaratory judgment action, plaintiff must allege ''facts showing [that the substantial question] requires settlement between the parties''). Because the settlement of the statutory question presented in this case would result in no practical relief to the plaintiff, and because the plaintiff has established no harm resulting from Johnson's conduct, that requirement is not met. In light of the foregoing, we conclude that the plaintiff is not a proper party to request an adjudication on the legal relationship between Johnson and Pullman.[17]

C

Aggrievement Conclusion

At oral argument before this court, the plaintiff's counsel described the present action as a ''test case'' and an ''attempt to set a precedent'' that could be used in instances involving other municipalities. While we understand the plaintiff's desire to secure advice on this particular statutory question, ''[a] declaratory judgment action is not . . . a procedural panacea for use on all occasions, but, rather, is limited to solving justiciable controversies.'' (Internal quotation marks omitted.)

[17] In its reply brief, the plaintiff states that this appeal ''boils down to a simple question—if not the plaintiff then who or what entity would ever have standing to challenge [Johnson's] actions?'' We can think of at least two persons that would possess such standing: (1) any delinquent taxpayer who was the subject of collection efforts by Pullman on Johnson's behalf; and (2) any marshal who had a warrant recalled by Johnson on an account that was referred to Pullman, in accordance with the terms of the contract.

Mendillo v. *Tinley, Renehan & Dost, LLP*, supra, 329 Conn. 524; accord *Tilcon Connecticut, Inc.* v. *Commissioner of Environmental Protection*, 317 Conn. 628, 653 n.23, 119 A.3d 1158 (2015) ("a declaratory judgment action must not be used as a convenient route for procuring an advisory opinion" (internal quotation marks omitted)); cf. *Costantino* v. *Skolnick*, supra, 294 Conn. 738 (noting that party pursuing declaratory judgment conceded at oral argument that it was "seeking a 'black letter' ruling, applicable to all insurance companies and policyholders" and holding that "[s]uch a determination . . . is too abstract to be determined properly by a court").

In the present case, the plaintiff has not established that its members are either classically or statutorily aggrieved by the challenged conduct. Its claim of standing, therefore, fails the first prong of the associational standing test. See *Hunt* v. *Washington State Apple Advertising Commission*, supra, 432 U.S. 343 (articulating test); *Connecticut Associated Builders & Contractors* v. *Hartford*, supra, 251 Conn. 186 (concluding that first prong of associational standing test not satisfied because "the association did not show that any of its . . . members" were aggrieved). Accordingly, the trial court properly concluded that the plaintiff lacked standing to maintain this declaratory action.

II

The plaintiff also argues that the court improperly denied its motion for reargument and reconsideration. That claim is without merit.

Such a motion "is proper when intended to demonstrate to the court that there is some . . . principle of law which would have a controlling effect, and which has been overlooked . . . . Reargument is also meant for situations where there has been a misapprehension of facts. . . . Reargument may be used to address alleged inconsistencies in the trial court's memoran-

dum of decision as well as claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Citations omitted; internal quotation marks omitted.) *Carriage House I-Enfield Assn., Inc.* v. *Johnston*, 160 Conn. App. 226, 236–37, 124 A.3d 952 (2015). "We review a trial court's decision to deny a litigant's motion for reargument and reconsideration for an abuse of discretion. . . . [A]s with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did. . . . In addition, where a motion is addressed to the discretion of the court, the burden of proving an abuse of that discretion rests with the appellant." (Citations omitted; internal quotation marks omitted.) Id., 236.

The plaintiff has not met that burden. Although it alleges that the court failed to address its claim of statutory aggrievement, the court in its memorandum of decision relied on Connecticut Supreme Court precedent indicating that, to satisfy the first prong of the associational standing test, a plaintiff must demonstrate how it was harmed in a unique fashion by the challenged conduct and must allege a colorable claim of direct injury. See *Connecticut Business & Industry Assn., Inc.* v. *Commission on Hospitals & Health Care*, supra, 218 Conn. 348. Equally significant, the court's analysis in this case comports with the standing precepts that our Supreme Court has adhered to in resolving associational standing claims. We, therefore, conclude that the court did not abuse its discretion in denying the plaintiff's motion for reargument and reconsideration.

The judgment is affirmed.

In this opinion the other judges concurred.

PACK 2000, INC. *v.* EUGENE C. CUSHMAN
(AC 41350)
(AC 41351)

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

Syllabus

The plaintiff sought, in two separate actions, specific performance of two options to purchase certain real property that it had been leasing from the defendant. The parties executed two lease agreements, each of which contained an option to purchase the leased property. In declining to sell the property when the plaintiff exercised the options in 2003, the defendant claimed that the plaintiff had not complied with the conditions of the agreements and the plaintiff thereafter brought the present actions. The trial court rendered judgments for the plaintiff, concluding, inter alia, that the plaintiff was entitled to specific performance of the options because it had substantially complied with the conditions of the parties' agreements. On the defendant's appeal, this court reversed the trial court's judgments, concluding that the trial court improperly applied a substantial compliance rather than a strict compliance standard in determining whether the plaintiff had satisfied the conditions of the parties' agreements and that the trial court incorrectly concluded that the plaintiff had retained the right to exercise the options. On the granting of certification, the plaintiff appealed to the Supreme Court, which reversed this court's decision and remanded the case with direction to affirm the judgments of the trial court. The trial court thereafter rendered judgments and final orders thereon, setting the purchase price of each property based on the average of the present day value appraisals required by the court and submitted by the parties. On appeal to this court, the plaintiff claimed that the trial court erred in failing to determine the purchase prices based on appraisal values of the properties in 2003, and the defendant claimed in his cross appeal that the trial court abused its discretion in failing to use the current value appraisal set by his appraiser. *Held*:

1. The trial court erred in ordering a specific performance remedy that was contrary to the terms of the purchase options; having concluded that the plaintiff was entitled to a remedy of specific performance, the trial court, in accordance with the unambiguous language of the agreements, was required to order that the purchase price of each property was to be based on the appraised value of the property as of November 22, 2003, which was three months after the plaintiff exercised its options, the trial court, in basing the purchase prices of the properties on their values as of January, 2017, which was an improper application of the automatic appellate stay, deprived the plaintiff to its detriment of the Supreme Court's judgment, which affirmed the trial court's 2008 final judgments, by modifying its 2008 award of specific performance and

ordering a remedy inconsistent with the parties' agreements, and the trial court's present day valuation deprived the plaintiff of the benefit of its bargain while giving a significant windfall to the defendant.

2. The trial court erred in ordering the plaintiff to make rent and use and occupancy payments and by refusing to credit any such payments against the purchase prices the plaintiff was required to pay for the properties, as the plaintiff's lessee obligations terminated when it exercised its options on August 22, 2003, and thereafter became the equitable owner; although the defendant claimed that equitable conversion was inapplicable because the plaintiff failed to plead the doctrine in its complaint, equitable conversion was not a separate cause of action but, rather, a result that arose out of a successful claim for specific performance, and, although the plaintiff continued to pay rent after it exercised its options, such payments, which were required under the lease, did not constitute a judicial admission on behalf of the plaintiff that it was obligated to make such payments, and the parties were not required to complete the appraisal process and to establish purchase prices for the properties in order for equitable title to pass to the plaintiff, nor was the plaintiff required to tender payment when it exercised its options because payment was not a condition precedent in the purchase options, and the defendant's unexcused repudiation of the contracts was what prevented the completion of the appraisal process and the transfer of the properties to the plaintiff, and contrary to the defendant's argument, Connecticut case law does not require a showing of bad faith for the doctrine of equitable conversion to apply; moreover, the trial court erred in concluding that the plaintiff was not entitled to credit any rent or use and occupancy payments made after the plaintiff exercised its options and became the equitable owner of the properties as a reward of damages against the purchase price of the properties, the plaintiff was ordered to make certain such payments and did so to preserve its property rights, the defendant received more than the purchase price of the properties, and he had no legal or equitable entitlement to such funds; furthermore, the defendant could not prevail on his claim that he should receive interest on the purchase price of the properties based on their 2003 appraised values, as the defendant raised this issue for the first time on appeal and this court was not obligated to consider it.

3. The trial court did not err in failing to set the purchase price for one of the properties based on the appraised value submitted by the defendant, as there was no basis for concluding that the court made an erroneous factual finding based on documents regarding the appraisal conducted by the defendant and the plaintiff's purported acceptance of that appraisal, as such evidence was never admitted in the trial court; contrary to the defendant's claim, the record demonstrated that the plaintiff's agent believed that the appraisal submitted by the defendant would be averaged with the appraisal submitted by the plaintiff and that the evidence on which the defendant relied was only submitted as an attachment in support of a memorandum, and, in deciding a case, this court cannot resort to documents or exhibits which were not part of the record.

Argued October 23, 2019—officially released June 30, 2020

Procedural History

Action, in two cases, for specific performance of options to purchase certain of the defendant's certain real property, and for other relief, brought to the Superior Court in the judicial district of New London, where the matters were consolidated and tried to the court, *Abrams*, *J.*; judgments for the plaintiff, from which the defendant appealed to this court, *Lavine*, *Beach* and *Lavery*, *Js.*, which reversed the trial court's judgments and remanded the cases to the trial court with direction to render judgments for the defendant, and the plaintiff, on the granting of certification, appealed to the Supreme Court, which reversed this court's decision and remanded the cases to the trial court with direction to affirm the judgments of the trial court; thereafter, the trial court, *Abrams*, *J.*, rendered judgments setting the purchase prices of the properties, from which the plaintiff filed separate appeals, and the defendant filed cross appeals; subsequently, this court granted the plaintiff's motion to consolidate the appeals. *Reversed*; *judgments directed.*

Eric W. Callahan, for the appellant-cross appellee in AC 41350 and AC 41351 (plaintiff).

Ralph J. Monaco, with whom, on the brief, was *Eric J. Garofano*, for the appellee-cross appellant in AC 41350 and AC 41351 (defendant).

Opinion

BRIGHT, J. In these consolidated appeals, the plaintiff, Pack 2000, Inc., appeals from the judgments of the trial court, which determined the amount due the defendant, Eugene C. Cushman, for two properties he had contracted to sell to the plaintiff.[1] The plain-

[1] The plaintiff commenced the underlying actions by way of two separate complaints; see *Pack 2000, Inc.* v. *Cushman*, Superior Court, judicial district of New London, Docket No. CV-06-5001396-S (July 17, 2006), and *Pack 2000, Inc.* v. *Cushman*, Superior Court, judicial district of New London, Docket No. CV-06-5001397-S (July 17, 2006); seeking specific performance of separate lease with option agreements to purchase the Groton and New London

tiff claims that the trial court erred in concluding that (1) the purchase prices for the properties, located in Groton and New London, should be based on their current appraised values, rather than their appraised values in 2003, (2) the plaintiff was required to pay use and occupancy for its continued use of the Groton property retroactive to June 1, 2014, until the closing of the sale of the property to the plaintiff, and (3) the plaintiff was not entitled to credits toward the purchase price of each property for moneys paid as rent or use and occupancy after it exercised its options to purchase the properties. The defendant filed cross appeals, claiming that the trial court abused its discretion by failing to use the current appraised value set by his appraiser as the purchase price for the Groton property. We agree with the plaintiff on all of its claims and disagree with the defendant as to his cross appeals. Accordingly, we reverse the judgments of the trial court and remand the cases with direction to determine the purchase prices of the properties pursuant to the plaintiff's exercise of its options to purchase the properties in 2003, that the court credit against those purchase prices any payments made by the plaintiff to the defendant for use of the properties after its exercise of its purchase options, and, to the extent that the payments to the defendant on each property, after the option became effective, exceeded the purchase price of that property, that the court order any overpayment be refunded to the plaintiff.

This case returns to us after our Supreme Court's decision in *Pack 2000, Inc.* v. *Cushman*, 311 Conn. 662, 89 A.3d 869 (2014), in which the court reversed the decision of this court; see *Pack 2000, Inc.* v. *Cushman*, 126 Conn. App. 339, 11 A.3d 181 (2011); and remanded the case to us with direction to affirm the judgments

properties, respectively. The trial court consolidated both matters for trial on June 24 and July 2, 2008.

of the trial court.[2] Following our affirmance of the trial court's judgments, additional proceedings occurred in the trial court. We will address those proceedings and the judgments that followed, which are the subject of the present appeal, after setting forth the relevant facts.

The opinion of our Supreme Court sets forth the following relevant facts and procedural history, as supplemented by the record. "In July, 2002, the plaintiff, the defendant and ARCO Corporation (ARCO),[3] a corporation controlled by the defendant, entered into a business transaction in which two Midas . . . muffler shops[4] (shops) were to be transferred from ARCO to the plaintiff. As part of the transaction, the parties executed a number of agreements, including [1] two lease agreements, under which the defendant leased [to the plaintiff] the [real property on which] the shops are located . . . [2] a management agreement, under which the plaintiff assumed responsibility for the management and operation of the shops . . . [3] a letter of intent . . . and [4] two promissory notes . . . .

"Each lease agreement contains a clause . . . that provide[d] the plaintiff with an option to purchase the leased [property] subject to certain terms and conditions. The language of the two clauses is essentially identical. Each clause provides in relevant part: So long as [the plaintiff] has been in compliance with the terms and conditions of this [l]ease, the [l]etter of [i]ntent, and [m]anagement [a]greement . . . and is in compliance with such instruments when the option is exercised, [the plaintiff] shall have the option to purchase the real estate subject to this lease. . . .

[2] Our Supreme Court determined that (1) a substantial compliance standard—rather than a strict compliance standard—applies when an option to purchase property is conditioned on a lessee's compliance with a lease, (2) the plaintiff substantially complied with the lease requirements, and (3) the plaintiff was ready, willing, and able to purchase the properties when it exercised its options. *Pack 2000* v. *Cushman*, supra, 311 Conn. 662, 680–90.

[3] ARCO was not named as a defendant in the present actions and, consequently, is not a party to this consolidated appeal.

[4] One of the shops is located in the city of New London and the other is located in the town of Groton.

"Under the terms of the two lease agreements, the management agreement and the promissory notes, the plaintiff was required to make a number of periodic payments both to the defendant and to certain third parties in order to exercise the options.[5] Specifically, the plaintiff was required to pay rent to the defendant . . . to make payments on both promissory notes . . . until the notes were fully paid and to pay all accounts, including, but not limited to, utilities, telephone service, real estate taxes, and hazard and liability insurance as well as an equipment lease. . . .[6]

"On August 22, 2003, the plaintiff's vice president, M. Paulina Anderson, faxed a letter to the defendant in which she stated that she wanted to finalize the purchase of the shops and exercise the option[s] to purchase the real estate by the end of 2003." (Footnotes added and omitted; internal quotation marks omitted.) *Pack 2000, Inc.* v. *Cushman*, supra, 311 Conn. 660–68. Anderson further stated: "I have talked to our bank and they can finance the deal for us. The option in the leases indicates we need to agree on an appraiser, to come up with a price on the real estate. I want to use Arnold (Grant) whom I have used before. Please let me know if you agree to us using him, so I can order the appraisals." "On August 29, 2003, Anderson sent a second letter to the defendant in which she . . . indicated that Banterra Bank (bank) could not commit to financing the purchase until it had ascertained the value of the defendant's realty. [Anderson added: I have not heard from you on the appraisals. In order to get a price so we can close this year, I went ahead and (ordered) them. As I indicated on my fax to you last Friday, I worked with Arnold (Grant) before . . . . Please let me know your thoughts on this. If you elect to proceed with your own

[5] Specifically, both leases were for two terms of five years each, with the first term beginning in July, 2002 with an annual rent of $48,000 payable in monthly installments of $4000. The second term required an annual rent of $60,000 to be paid in monthly installments of $5000.

[6] This payment structure is also known as triple net rent.

appraisals please do so ASAP so we can still close this year.]

"On September 2, 2003, the defendant, on behalf of ARCO, sent a letter to Anderson in which he stated that the plaintiff was not in compliance with the terms and conditions of the management agreement. Specifically, the letter stated: The installment payment regarding the . . . [m]anagement [a]greement which was due September 1, 2003 has not been received. . . . Timely payment of the note was and is a material condition of the agreement. . . . You are hereby put on notice that this late payment, and all of the prior late payments, and any future late payments [put] you out of compliance with the terms and conditions of the Management Agreement. Subsequent acceptance of the September, 2003 payment (or any future payment tendered after the date due) will not cure the non-compliance, nor does ARCO . . . waive any rights or consequences which flow from your non-compliance. There is no record of the plaintiff having specifically responded to this letter. [It is apparent, however, that the parties treated this letter as the defendant's repudiation of the plaintiff's right to exercise the purchase options due to its late payments.] . . .

"On July 17, 2006, the plaintiff commenced these actions against the defendant claiming that it was entitled to specific performance of the options to purchase the defendant's realty. In its disclosure of defense, filed on August 4, 2006, the defendant argued that the plaintiff's claim was without merit because, among other things, the plaintiff had not complied with the terms of one of the promissory notes and the conditions of the lease at the time of its attempt to exercise the options, and, therefore, the options had been forfeited or terminated by the plaintiff's fault or noncompliance. . . .

* * *

"On August 11, 2008, the trial court rendered judgments in favor of the plaintiff. The court determined

that the plaintiff had retained the right to exercise the options because it had substantially complied with the terms and conditions of the [parties' agreements]. . . . The court also determined that the plaintiff had effectively exercised the options on August 22, 2003, and was entitled to specific performance. . . .

"The defendant appealed to the Appellate Court from the judgements of the trial court, claiming, inter alia, that the trial court was required to apply a strict rather than a substantial compliance standard in determining whether the plaintiff had satisfied the terms of the lease and management agreements and, in addition, that the trial court incorrectly concluded that the plaintiff had retained the right to exercise the options notwithstanding its late payments to the defendant. . . . The Appellate Court agreed with the defendant. . . . In accordance with these conclusions, the Appellate Court reversed the judgments of the trial court and remanded the case to that court with direction to render judgments for the defendant." (Citations omitted; footnotes added and omitted; internal quotation marks omitted.) *Pack 2000, Inc.* v. *Cushman*, supra, 311 Conn. 668–73. Our Supreme Court subsequently reversed this court's decision and remanded the case back to this court with direction to affirm the judgments of the trial court.[7] Id., 694.

On July 14, 2014, after we affirmed the judgments of the trial court, the plaintiff filed a motion for postjudgment orders. In its motion, the plaintiff requested that the trial court issue (1) an order setting the purchase prices of the Groton and New London properties to reflect the 2003 appraisal values rendered by Grant,[8] (2) an order confirming that, since August, 2003, the plaintiff—by way of monthly rent payments—has paid

[7] See footnote 2 of this opinion.

[8] According to Grant's 2003 appraisals, the purchase price for the Groton and New London properties were $415,000 and $385,000, respectively.

the entire purchase price for the Groton and New London properties, and, therefore, the defendant immediately must transfer the properties to the plaintiff free and clear of all liens and encumbrances, and (3) an order requiring the defendant immediately to reimburse the plaintiff the sum of the overpayments of the purchase price applicable to the properties. On November 17, 2014, the defendant filed a motion and memorandum in opposition to the plaintiff's motion. In its July 6, 2015 order addressing the plaintiff's motion, the court stated, "[i]n view of the fact that the parties could not proceed with the appraisal process until the recent termination of the appellate stay, they are ordered to [do] so immediately. The values of the property shall be present day and the court will not entertain any attempts to revisit its ruling by entertaining further evidence. None of the payments made by the plaintiff since its exercise of the option count toward the purchase price."[9]

On July 13, 2016, the plaintiff filed a motion for compliance, requesting that the court set a deadline for the exchange of appraisals. The defendant objected to the plaintiff's motion on July 22, 2016, arguing that the plaintiff had never issued a demand for the exchange of appraisals.[10] On December 6, 2016, the court ordered the parties to exchange appraisals on or before January 15, 2017. Grant appraised the Groton and New London properties, as of July 6, 2016, at $700,000 and $610,000, respectively. The defendant's appraiser, Robert Silverstein, appraised the Groton property as of January 4, 2017, at $1,100,000 and the New London property as

[9] On November 30, 2015, the plaintiff attempted to appeal from the court's order in each case. This court dismissed the plaintiff's appeals on January 27, 2016, for lack of a final judgment.

[10] In its objection, the defendant also asserted that the parties mutually agreed to use Robert Silverstein as the appraiser for the Groton and New London properties, an argument that the defendant first presented to the trial court on May 15, 2015, in his postappeal trial memorandum. The plaintiff has, at all times, disputed the defendant's contention, citing its July 14, 2014 motion for postjudgment orders as evidence that it intended to use Grant as its appraiser.

of September 21, 2016, at $720,000. On April 7, 2017, following the mutual exchange of appraisals, the plaintiff filed a motion for final judgments. On January 22, 2018, the trial court rendered judgment in each case, holding: "Based on the submitted appraisals, pursuant to prior court orders and [§] 2 (b) of the applicable leases, the sale price for the Groton property is $900,000 and the New London property is $650,000." On February 9, 2018, the plaintiff filed the present appeals challenging the trial court's judgments, as well as its July 6, 2015, and May 27, 2016 orders. The defendant's cross appeals followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the court erred when, as part of its award of specific performance, it determined the purchase prices of the Groton and New London properties based on the average of both parties' present day appraisals instead of determining the purchase prices based on 2003 appraisal values. The plaintiff claims that the court's judgment in each case is contrary to the parties' agreements. We agree.

We begin with the standard of review and legal principles relevant to our resolution of this claim. "[W]e note that the standard of review for a lease, which is a contract, is plenary. Although ordinarily the question of contract interpretation, being a question of the parties' intent, is a question of fact . . . [w]here there is definitive contract language, the determination of what the parties intended by their contractual commitments is a question of law." (Internal quotation marks omitted.) *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, 315 Conn. 596, 602, 109 A.3d 473 (2015).

"It is a general rule that a contract is to be interpreted according to the intent expressed in its language and not by an intent the court may believe existed in the

minds of the parties. . . . When the intention conveyed by the terms of an agreement is clear and unambiguous, there is no room for construction. . . . [A] court cannot import into [an] agreement a different provision nor can the construction of the agreement be changed to vary the express limitations of its terms."[11] (Citations omitted; internal quotation marks omitted.) *Levine* v. *Massey*, 232 Conn. 272, 278, 654 A.2d 737 (1995).

The following additional facts are relevant to our resolution of the plaintiff's first claim. In its August 11, 2008 memorandum of decision, the trial court determined that the plaintiff exercised its options to purchase the Groton and New London properties by way of a letter sent by fax to the defendant. The court stated: "In order for the exercise of an option to be effective, it must strictly comply with the contractual requirements regarding its exercise . . . . In this matter, the [m]anagement [a]greement and the [l]eases simply require the exercise of either option be in writing and occur within a given time period. The August 22, 2003 fax clearly fulfills both requirements."[12] The court also determined that the plaintiff was entitled to specific performance as a matter of equity. The court stated:

[11] We note that specific performance is an equitable remedy to be issued at the discretion of the trial court, and the trial court's decision whether to award specific performance is reviewed for an abuse of that discretion. *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, 125 Conn. App. 678, 695, 10 A.3d 61 (2010), cert. denied, 300 Conn. 914, 13 A.3d 1100 (2011). There is no challenge in this consolidated appeal to the trial court's decision to award the plaintiff specific performance. Consequently, the abuse of discretion standard of review is not implicated. Instead, the question is whether the court correctly interpreted the parties' agreements when it crafted its specific performance award. Thus, our standard of review is plenary.

[12] Section 10 (d) of the management agreement provides in relevant part: "The purchase prices shall be determined by a mutual[ly] acceptable MAI appraiser. If the parties cannot agree on a single appraisal, then each party shall appoint an MAI appraiser. The price shall be set by the average of the appraisals. . . . [The plaintiff] shall give [the defendant] written notice of its intention to exercise the option three (3) months in advance so that the appraisals may be performed."

"As set forth [previously], the court found that [the] plaintiff had the right to exercise the options at issue and that it did so effectively. To allow [the defendant] to enjoy the benefits of his bargain with [the] plaintiff while avoiding the less financially attractive elements of the transaction would be inequitable. As a result, the court finds that specific performance of the sale of the New London and Groton parcels pursuant to the terms set forth in the agreements between the parties is the appropriate remedy in this matter." The court then ordered the parties immediately to "proceed with the appraisal process on both the New London parcel and the Groton parcel pursuant to the terms contained in § 2 (b) of each [l]ease."[13]

In accordance with Practice Book § 61-11 (a), the proceedings to enforce the trial court's decision were stayed automatically until the plaintiff filed its appeals on November 21, 2008, after which time the proceedings were stayed until the cases were remanded to the trial court after our Supreme Court's final determination of the consolidated appeal in *Pack 2000, Inc.* v. *Cushman*, supra, 311 Conn. 662.[14]

On December 19, 2014, following the termination of the appellate stay, the plaintiff moved to clarify the court's August, 2008 memorandum of decision. Specifically, the plaintiff sought clarification with respect to the date that the court intended the parties to use for

[13] Section 2 (b) of the Groton lease, which is virtually identical to the New London lease, provides: "The purchase price is to be determined by a mutually acceptable MAI appraiser. If the parties cannot agree on a single appraisal, then each party shall appoint an MAI appraiser. The price shall be set by the average of the appraisals. [The plaintiff] shall pay the cost of the mutually acceptable appraiser or [the plaintiff's] appraiser. Should [the defendant] deem it necessary to retain an appraiser, [the defendant] shall pay for such appraiser."

[14] Practice Book § 61-11 (a) provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to file an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause. . . ."

appraisal purposes when valuing the Groton and New London properties. In its motion, the plaintiff maintained that requiring the parties to appraise the properties according to present day values would be wholly inconsistent with the court's determination that the plaintiff exercised its options in August, 2003. The defendant filed an objection to the plaintiff's motion on January 9, 2015, arguing that no purchase prices were established in 2003 because the parties never agreed on a mutually acceptable appraiser, and—pursuant to the terms of the lease agreements—each party would have needed to appoint its own appraiser for the court to establish a purchase price based on the average of the values rendered. On May 19, 2015, the court issued an order on the plaintiff's motion for clarification, stating: "The order does not permit the use of any prior appraisals nor does it limit itself to any particular time. In view of the fact that the parties could not proceed with the appraisal process until the recent termination of the appellate stay, they are ordered to [do] so immediately. The values of the property shall be present day and the court will not entertain any attempts to revisit its ruling by entertaining further evidence."[15]

In accordance with the court's order, the parties submitted to the court, and exchanged with each other, current appraisals of the properties as of July 6, 2016, September 21, 2016, and January 4, 2017. On the basis of the parties' appraisals, the trial court rendered judgment in each case and set the purchase price of the Groton property at $900,000 and the New London property at $650,000. The plaintiff claims on appeal that the court erroneously concluded that the automatic stay precluded the use of an appraisal date that preceded the Supreme Court's decision, in particular, August 22,

[15] The court's May 19, 2015 order in response to the plaintiff's motion for clarification was consistent with, and virtually identical to, its July 6, 2015 order requiring the parties to immediately proceed with the appraisal process based on present day values.

2003—the date that the plaintiff exercised its options. On the basis of the terms of the lease agreements and the court's determination that the plaintiff exercised its options on August 22, 2003, we agree that the trial court erred by ordering the parties to use present day appraisal values for the properties. We conclude, however, that the correct appraisal date, pursuant to the terms of the lease and management agreements, is November 22, 2003, three months after the plaintiff exercised its options.

As a preliminary matter, neither party argues on appeal that the terms of the purchase options are ambiguous. Instead, the parties disagree as to whether the appellate stay affected the relevant appraisal date and by extension, the purchase prices of the properties. We conclude that the appellate stay is irrelevant to our resolution of this claim. Furthermore, we need look no further than to the unambiguous terms of the purchase options and the plaintiff's exercise thereof to conclude that the court erred in fashioning a specific performance remedy that was contrary to the unambiguous terms of the parties' contracts.

As previously stated in this opinion, our Supreme Court, in May, 2014, affirmed the trial court's determination that the plaintiff exercised its options to purchase the Groton and New London properties in August, 2003. After remand, in its July, 2015 order, the trial court reiterated its decree of specific performance but held that the "values of the property shall be present day." The court reached this conclusion because its August 11, 2008 order that the parties immediately proceed with the appraisal process for the properties did "not permit the use of any prior appraisals nor [did] it limit itself to any particular time," and because the appellate stay prevented the parties from conducting appraisals at an earlier date.

We first address the trial court's reliance on the automatic appellate stay. Practice Book § 61-11 provides

that, during the time when an appeal can be taken and while a timely filed appeal is pending, "proceedings to enforce or carry out the judgment or order shall be automatically stayed until the . . . final determination of the cause." "The finality of a trial court judgment is not directly affected by the fact that an appeal automatically stays the enforcement of a judgment. See Practice Book § [61-11] (formerly § [4046]). The stay does not vacate the judgment obtained by the successful litigant. It merely denies that party the immediate fruits of his or her victory . . . in order to protect the full and unhampered exercise of the right of appellate review. . . .

"The finality of a judgment may, however, depend upon the outcome of the pending appeal. If the trial court's judgment is sustained, or the appeal dismissed, the final judgment ordinarily is that of the trial court. If, however, there is reversible error, the final judgment is that of the appellate court." (Citations omitted; internal quotation marks omitted.) *Preisner* v. *Aetna Casualty & Surety Co.*, 203 Conn. 407, 414–15, 525 A.2d 83 (1987). Because this court, after remand from the Supreme Court, affirmed the judgments of the trial court, the 2008 judgments of the court are the final judgments, and the plaintiff is entitled to the fruits of those judgments. The court, however, deprived the plaintiff of the benefits of those judgments. It essentially modified its 2008 award of specific performance, to the detriment of the plaintiff, by basing the purchase prices of the properties on the values of the properties as of January, 2017, approximately eight years after the final judgments. We conclude that this was an improper application of the automatic appellate stay.

We now turn to the court's rationale that its August 11, 2008 judgments did "not permit the use of any prior appraisals nor [did] it limit itself to any particular time." We view this statement as a reflection of the court's view that it had discretion to determine the appropriate

appraisal date. We conclude that the court did not have discretion to fashion a remedy inconsistent with the parties' agreements.

The purchase option language of the lease agreements is clear: "The option shall be exercised by [the plaintiff] giving [the defendant] three months advance notice in writing." Once the option is exercised, "[t]he purchase price is to be determined by a mutually acceptable MAI appraiser. If the parties cannot agree on a single appraisal, then each party shall appoint [a] MAI appraiser. The price shall be set by the average of the appraisals. [The plaintiff] shall pay the cost of the mutually acceptable appraiser or [the plaintiff's] appraiser. Should [the defendant] deem it necessary to retain an appraiser, [the defendant] shall pay for such appraiser." In its August 11, 2008 memorandum of decision, the trial court found that Anderson's August 22, 2003 fax to the defendant, in which she stated that the plaintiff was exercising its purchase option on both properties and identified Arnold Grant as the plaintiff's chosen appraiser, constituted an effective exercise of the plaintiff's purchase options under the lease agreements. That finding was affirmed on appeal. The court also expressly rejected the defendant's claim that the options expired by their own terms three months after they were exercised, because "it was [the defendant's] refusal to accept the option[s] that caused the period to lapse." Put another way, but for the defendant's repudiation of the contracts, the plaintiff would have been afforded an opportunity to purchase the properties at their late 2003 appraised values. Consequently, the court held that "specific performance of the sale of the New London and Groton [properties] *pursuant to the terms set forth in the agreements between the parties* is the appropriate remedy in this matter." (Emphasis added.)

"Specific performance is an equitable remedy permitting courts *to compel the performance of contracts* for

the sale of real property, and certain other contracts, pursuant to the principles of equity." (Emphasis added; internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *Chung Family Realty Partnership, LLC*, supra, 125 Conn. App. 695. "[T]he primary purpose of a decree of specific performance, which is always an equitable remedy, is to place an injured purchaser of property in a position that replicates, as nearly as possible, that which it would have enjoyed but for the vendor's unexcused breach." *State* v. *Lex Associates*, 248 Conn. 612, 631, 730 A.2d 38 (1999).

"As a general rule, equity, in deciding whether to grant specific performance in enforcing a contract, will consider the fairness of an agreement in accordance with the circumstances as they existed at the time of the execution of the contract even though the property contracted to be sold becomes considerably more valuable at the time performance is due." *Robert Lawrence Associates, Inc.* v. *Del Vecchio*, 178 Conn. 1, 19, 420 A.2d 1142 (1979); see *Texaco, Inc.* v. *Golart*, 206 Conn. 454, 462–63, 538 A.2d 1017 (1988); *Battalino* v. *Van Patten*, 100 Conn. App. 155, 158 n.3, 917 A.2d 595, cert. denied, 282 Conn. 924, 925 A.2d 1102 (2007).

Thus, the court's decree of specific performance should have compelled the defendant's performance of the purchase options under the agreements and should have put the plaintiff in the position it would have been but for the defendant's breach. The court, therefore, should have turned to the language of the parties' agreements and applied that language to the situation of the parties as it existed when the defendant repudiated the plaintiff's properly exercised options. According to the unambiguous terms of § 10 (d) of the management agreements, once the plaintiff exercised its options, which it did on August 22, 2003, the closings of the plaintiff's purchases of the properties were to take place within three months, or by November 22, 2003. Thus,

under the parties' agreements, the plaintiff was entitled to purchase the properties at their appraised values no later than that date.[16] Any alternative outcome, including the one ordered by the court, is inconsistent with the unambiguous terms of the contracts at the time they were executed.

The court's present day valuation deprives the plaintiff of the benefit of its bargain while giving a significant windfall to the defendant—the breaching party. The defendant has cited no authority, nor are we aware of any, that suggests that a lessor can benefit from a property's increase in value after its unexcused breach of a lease option. In fact, after a review of the contracts in the context of their execution in 2002, we are convinced to the contrary. "Otherwise, any lessor who regretted the terms of an option contract could disregard the exercise of the option and continue to collect rents until the end of the lease. In other words, *the defaulting lessor could reap an economic gain from its own misconduct.*" (Emphasis added.) *State* v. *Lex Associates*, supra, 248 Conn. 622.

Accordingly, we conclude that the court erred in fashioning a specific performance remedy that was contrary to the terms of the purchase options. Having concluded that the plaintiff was entitled to the remedy of specific performance of the agreements, the court, in accordance with the unambiguous language of those agreements, was required to order that the purchase prices of the properties be based on the appraised values of the properties as of November 22, 2003.[17]

[16] See footnote 12 of this opinion.

[17] On remand, the court is not required to use only appraisals that exist as of this date. It may rely also on appraisals subsequently prepared, so long as the appraisals value the properties as of November 22, 2003. To the extent that there is a variance in the MAI appraisals submitted by the parties, the court is required, pursuant to the terms of the leases, to set the purchase prices of the properties by averaging the appraisals.

II

The plaintiff next claims that it became the equitable owner of the Groton and New London properties when it exercised its options. Consequently, the plaintiff maintains that the court erred when it ordered the plaintiff to make rent and use and occupancy payments and when it concluded that such payments made by the plaintiff to the defendant after it exercised its purchase options should not be credited against the purchase prices of the properties. We agree.

The following additional facts are relevant to our resolution of the plaintiff's second claim. On November 19, 2014, the defendant filed a motion requesting that the court order the plaintiff to make use and occupancy payments for its continued use of the Groton property.[18] In his motion, the defendant argued that because the plaintiff had made use and occupancy payments from the time its lease term expired in July, 2012[19] until June 1, 2014, its continued business operations on the premises entitled the defendant to those payments as a matter of equity.[20] On January 22, 2015, the plaintiff filed an objection to the defendant's motion, arguing that it became the equitable owner of the properties in August, 2003, thereby excusing it from any obligation to make rental payments to the defendant. In its May 27, 2016 order ruling on the defendant's motion, the court stated: "While the plaintiff may be correct that it no longer has an obligation to make rental payments . . . it does not necessarily follow that it is not obligated to make use and occupancy payments. It has enjoyed possession of

[18] The defendant did not move for use and occupancy payments with respect to the New London property because the plaintiff vacated the premises at the end of its lease term in July, 2012. The plaintiff states on appeal that it fully reserves the right to acquire legal title to the New London property pursuant to its option in the lease and management agreement.

[19] See footnote 4 of this opinion.

[20] Our Supreme Court's May 20, 2014 decision in *Pack 2000, Inc.* v. *Cushman*, supra, 311 Conn. 662, prompted the plaintiff to cease making use and occupancy payments to the defendant.

the property since it attempted to exercise the option in 2003 and to allow it to do so for free would be inequitable." The court concluded that the plaintiff was liable to the defendant for use and occupancy payments of $5000 per month retroactive to June 1, 2014 through the present. The plaintiff has complied with the court's order and has made use and occupancy payments through the present day. Furthermore, in its order of July 6, 2015, the court held that "[n]one of the payments made by the plaintiff since its exercise of the option count toward the purchase price."

We begin by setting forth the applicable standard of review. Although we review a court's decision on whether to issue a decree of specific performance under the abuse of discretion standard; see *Hill* v. *Raffone*, 103 Conn. App. 737, 742, 930 A.2d 788 (2007); we afford plenary review to the present claim because the structure and terms of the court's equitable remedy were based on an interpretation of law. See *Horner* v. *Bagnell*, 324 Conn. 695, 708, 154 A.3d 975 (2017) (applying plenary review to question of whether plaintiff was entitled, as matter of law, to award of unjust enrichment). Moreover, whether an equitable remedy is available in any particular case is a question of law subject to plenary review. *Ed Lally & Associates, Inc.* v. *DSBNC, LLC*, 145 Conn. App. 718, 735, 78 A.3d 148, cert. denied, 310 Conn. 958, 82 A.3d 626 (2013). Therefore, the question of whether the court was precluded from ordering use and occupancy payments and not crediting any such payments against the purchase prices of the properties because the plaintiff was the equitable owner of the properties after it exercised its options to purchase them is a legal one subject to plenary review.

The law pertaining to option contracts and equitable conversion is well established. "[E]quitable conversion is a settled principle under which a contract for the sale of land vests equitable title in the [buyer]. . . . Under the doctrine of equitable conversion . . . the

purchaser of land under an executory contract is regarded as the owner, subject to the vendor's lien for the unpaid purchase price, and the vendor holds the legal title in trust for the purchaser. . . . The vendor's interest thereafter in equity is in the unpaid purchase price, and is treated as personalty . . . while the purchaser's interest is in the land and is treated as realty. . . . The doctrine is a legal fiction, *rooted in the principle that equity views a transaction as being completed at the time the parties enter into the transaction*, irrespective of whether a formal exchange of legal title has taken place." (Citations omitted; emphasis added; internal quotation marks omitted.) *Salce* v. *Wolczek*, 314 Conn. 675, 687–88, 104 A.3d 694 (2014).

"[A]n option to purchase . . . operates as a continuing offer to sell, irrevocable until the expiration of the time period fixed by the agreement of the parties, which creates in the option holder the power to form a binding contract by accepting the offer. . . . When a tenant exercises an option to purchase the leased premises, a new bilateral contract is created." (Citation omitted; internal question marks omitted.) *Howard-Arnold, Inc.* v. *T.N.T. Realty, Inc.*, supra, 315 Conn. 602–603.

"If such a lessor refuses proper tender of payment, a likely result . . . is that the former lessee and present equitable owner will remain in possession of the property pending the rendering of a judgment of specific performance. . . . [A] person who validly exercises an option and properly tenders the option price has duly performed all of the conditions to be performed on its part, and as of that date became the equitable owner of the property. [In such a circumstance] an equitable owner of the real property [has] no further obligations to make rental payments." (Internal quotation marks omitted.) *Bayer* v. *Showmotion, Inc.*, 292 Conn. 381, 401, 973 A.2d 1229 (2009).

Once a lessee becomes the equitable owner of the property, "[i]ts ownership rights superseded and

replaced its former leasehold obligations. That result follows from the logic of the situation. A lessor cannot retain a continued right to lease payments when those payments were made subsequent to the lessor's unexcused refusal to accept a proper tender of payment in full.[21] Otherwise, any lessor who regretted the terms of an option contract could disregard the exercise of the option and continue to collect rents until the end of the lease. In other words, the defaulting lessor could reap an economic gain from its own misconduct." (Footnote added.) *State* v. *Lex Associates*, supra, 248 Conn. 621–22.

The plaintiff contends that it was not obligated to make use and occupancy payments on the Groton and New London properties because it became the equitable owner of the properties after it exercised its options in August, 2003. The defendant first maintains that equitable conversion is inapplicable in this case for three procedural reasons, none of which is persuasive given the record and the relevant case law. Specifically, the defendant argues that equitable conversion is inapplicable because the plaintiff (1) failed to plead the doctrine in its complaint, (2) admitted it had an obligation to pay rent, and (3) did not appeal from the court's August, 2008 order of specific performance.

The defendant's first argument is misplaced because equitable conversion is not a separate cause of action but, rather, a result that arises out of a successful claim for specific performance. See *Southport Congregational Church–United Church of Christ* v. *Hadley*, 320 Conn. 103, 112, 128 A.3d 478 (2016) ("The basis of [equitable conversion] is the existence of a duty. . . .

[21] Although the plaintiff did not tender payment to the defendant for the properties, it was prevented from doing so by the defendant's unexcused breach of failing to participate in the appraisal process called for in the leases. Consequently, given the facts of this case, we reject the defendant's contention that, under *Bayer* and *Lex Associates*, the plaintiff did not become the equitable owner of the properties when it exercised its options. See part II C of this opinion.

[T]here must, in fact, be a clear duty on the part of the seller to convey the property, a duty enforceable by an action for specific performance. . . . The doctrine is firmly linked to the specific enforceability of the contract." (Internal quotation marks omitted.)). Therefore, the defendant's argument that equitable conversion does not apply to the present case because the plaintiff neglected to plead it fails.

The defendant's second argument also lacks merit. The plaintiff's acknowledgment that it continued to pay rent after it exercised its options, as required under the terms of the lease, does not constitute a judicial admission on behalf of the plaintiff that it was obligated to make rental and use and occupancy payments. Judicial admissions are voluntary and knowing concessions of fact, not law. See *Borrelli* v. *Zoning Board of Appeals*, 106 Conn. App. 266, 271, 941 A.2d 966 (2008). The plaintiff's statements that it continued to make payments to the defendant is a judicial admission of the fact of those payments. The plaintiff's characterization of those payments as rent or use and occupancy, however, is a legal conclusion that is not binding on this court.

The defendant's third argument ignores this case's extensive procedural history. The court ordered specific performance after determining that the plaintiff exercised its options and the defendant thwarted performance by repudiating the contract. It was not until the court's final judgments, dated January 22, 2018, that the plaintiff was able to file the present appeals. The defendant's argument lacks any sound basis in law and fact because (1) the plaintiff was precluded from appealing any of the court's orders of specific performance; see footnote 9 of this opinion; and (2) the court's final judgment orders relates back to its previous orders, including its orders of specific performance. Finally, any argument that the plaintiff needed to appeal the court's August, 2008 judgments to preserve its equitable conversion remedy is misguided because the

plaintiff was not aggrieved by the court's 2008 judgments, which granted the plaintiff the remedy of specific performance. It did not state how the remedy would be implemented, and the plaintiff had no reason to expect that the court would subsequently issue orders that were inconsistent with the plaintiff's rights under the parties' contracts. The plaintiff became aggrieved only when the trial court, on remand, issued such orders, from which the plaintiff timely appealed. In addition, as noted previously in this opinion, equitable conversion is not a separate remedy that needs to be sought, but is, instead, the logical result of an award of specific performance of a contract for the sale of real property.

We turn now to the defendant's substantive arguments that (1) a proper balancing of the equities favors the trial court's determination that the plaintiff is required to make use and occupancy payments retroactive to June, 2014, (2) the failure of the parties to determine a purchase price for the properties precludes the application of equitable conversion, (3) Connecticut law requires that the plaintiff tender the purchase price before equitable conversion can apply, and (4) Connecticut law requires a showing of bad faith in order for equitable conversion to apply. We disagree with all of the defendant's arguments and address each in turn.

A

The defendant contends that principles of equity favor the trial court's determination that the plaintiff should be required to make use and occupancy payments, and the application of equitable conversion would achieve an unjust result. We are not persuaded.

The defendant's argument is based on the faulty premise that specific performance and equitable conversion are separate and distinct remedies; essentially, that it is possible to order specific performance of a contract for the sale of property and at the same time

order that the purchaser under the contract is not yet the equitable owner of the property. This argument misses the fact that equitable conversion is not a separate remedy but, rather, is the legal effect of an enforceable contract to purchase property, and, by extension, an order that such a contract must be specifically performed. As our Supreme Court stated in *Lex Associates*, the conclusion that a lessee who exercises an option to purchase the leased property becomes the equitable owner of the property "follows from the logic of the situation." *State* v. *Lex Associates*, supra, 248 Conn. 621.

Consequently, once the court rendered judgments of specific performance, there were no equities to balance as to whether the plaintiff became the equitable owner of the properties. Its status as the equitable owner of the properties was just a legal and logical reality that resulted from the parties' agreements and the court's specific performance decree. See also *Southport Congregational Church–United Church of Christ* v. *Hadley*, supra, 320 Conn. 111 ("The foundation for the doctrine of equitable conversion is [the] presumed intention of the owner, equity regarding as done that which ought to be done. . . . The doctrine was adopted for the purpose of carrying into effect, *in spite of legal obstacles*, the supposed intent of a testator or settlor." (Citation omitted; emphasis added; internal quotation marks omitted.)).

Accordingly, we reject the defendant's contention that a balancing of the equities requires that the plaintiff make use and occupancy payments.

B

The defendant next argues that equitable conversion should not apply because the parties did not determine purchase prices for the properties. In his appellate brief, the defendant correctly states that equitable conversion does not apply when the seller's duty to convey title

is subject to a condition precedent. By arguing that completing the appraisal process was a condition precedent to the application of equitable conversion in the present case, however, the defendant misinterprets the terms of the purchase options and ignores the trial court's determination that the plaintiff strictly complied with those terms.

"A condition precedent is a fact or event which the parties intend must exist or take place before there is a right to performance. . . . When the seller's duty to convey title is conditional, and does not arise at execution, the buyer cannot immediately enforce the contract." (Citation omitted; internal quotation marks omitted.) Id., 113.

In its August, 2008 memorandum of decision, the court stated that a party to a contract must comply strictly with the terms of an option clause in order to exercise it. See *Bayer* v. *Showmotion, Inc.*, supra, 292 Conn. 409 ("[t]o be effective, an acceptance of an offer under an option contract must be unequivocal, unconditional, and in exact accord with the terms of the option"). The court also noted that the option clauses only required that the lessee, subject to its compliance with the terms and conditions of the leases (1) give notice of its exercise to the lessor in writing, and (2) give the lessor three months advance notice. The plaintiff strictly complied with both requirements, thereby exercising its options. In doing so, equitable title passed to the plaintiff because the contract did not condition exercise of the options on completion of the appraisal process. Put another way, the terms of the purchase options establish that the defendant's duty to convey title to the plaintiff arose at the moment the plaintiff gave written notice of its intent to exercise its options, not when the parties established purchase prices.

The defendant's argument to the contrary is essentially the same as its argument discussed previously in

this opinion that the plaintiff's options expired by their own terms three months after they were exercised because the parties had not completed the appraisal process. The trial court rejected this argument because it was the defendant's unexcused repudiation of the contracts that prevented completion of the appraisal process and the transfer of the properties to the plaintiff. The same analysis applies to this variation of that argument. The defendant cannot use his unexcused breach of the parties' agreements to prevent the equitable conversion of the properties to the plaintiff. In fact, permitting him to do so would be decidedly inequitable.

Accordingly, we reject the defendant's contention that the parties needed to complete the appraisal process and to have established a purchase price for each property in order for equitable title to pass to the plaintiff.

C

The defendant further contends that Connecticut law requires an optionee to tender the purchase price before equitable conversion can apply to an option contract. In support of his argument, the defendant cites to several cases in which the purchase option at issue expressly defined the purchase price of the property. The purchase options in the present case, however, only defined the method by which the parties were to determine the purchase prices. The narrow issue here, which has not yet been addressed by our courts, is whether the plaintiff was required to tender payment when it exercised its options, notwithstanding the fact that the parties had not yet established purchase prices.

In its May 27, 2016 order granting the defendant's motion for use and occupancy payments, the trial court distinguished the facts of *Lex Associates* from the present case, limiting the application of equitable conversion only to instances in which the optionee tenders the purchase price at the time it exercises its option.

The court instead, analogized the present case to the circumstances in *Powertest Corp.* v. *Evans*, 665 F. Supp. 134 (D. Conn. 1986), concluding that equitable conversion does not apply when the optionee is able to enjoy the continued use of the property to the detriment of the lessor, who does not get the benefit of the use of the purchase price. For the reasons that follow, we disagree with the court's narrow application of *Lex Associates* as well as its reliance on *Powertest Corp.*

In *Powertest Corp.*, the plaintiff lessee attempted to exercise its option to purchase a parcel of property from the defendants pursuant to the terms of a fixed price purchase option in the lease. Id., 135. The defendants, after receiving a third party offer to purchase the property, refused to convey it to the plaintiff, arguing that the plaintiff had not validly exercised its option under the terms of the lease. Id., 136. Both parties filed cross motions for summary judgment seeking declaratory relief. Id., 135. In addition to its claim that it validly exercised its purchase option, the plaintiff also argued that it was entitled to credit toward the property's sale price for the rental payments it made after exercising its option. Id.

Clause fifteen of the lease, the subject of the parties' dispute, contained provisions that set forth two ways in which the plaintiff could purchase the property. Id., 136. The first paragraph of clause fifteen granted the plaintiff a fixed price option to purchase the property "at any time during the last [thirty] days of the initial ten year period of this lease and during the last [thirty] days of any extension thereof, *for the sum of $50,000*. Such option may be exercised by written notice from [the plaintiff] to [the defendants] to that effect. . . . [The plaintiff] *shall tender the purchase price to* [*the defendants*] and [the defendants] at the time of such tender shall deliver to [the plaintiff] a full covenant and warranty deed conveying said premises . . . thereon to [the plaintiff] . . . ." (Emphasis added.) Id.

The second paragraph of clause fifteen granted the plaintiff a right of first refusal. Id. The provision stated in relevant part: "Without prejudice to the foregoing option, [the plaintiff shall have the pre-emptive right during the term of this lease or any extension thereof to purchase said premises . . . owned by [the defendants] on the same terms and conditions as those of any bona fide offer received by and acceptable to [the defendants] and [the defendants] before making any such sale or any agreement to sell, shall notify [the plaintiff] in writing of such terms and conditions. [The plaintiff] within sixty days after receipt of such notice, may exercise this pre-emptive right by written notice to [the defendants] to that effect." Id.

After notifying the plaintiff of a third party's offer to purchase the property for $400,000, the defendants argued that the fixed price option was extinguished and the plaintiff could only purchase the property on the same terms and conditions as the third party's offer. Id., 137. The court rejected the defendants' interpretation of the purchase option, noting that "the 'without prejudice' language used in the lease before this court appears to subordinate the right of first refusal to [the] plaintiff's rights under the [fixed price] option." Id., 138. The court relied on the principle that "purchase options in leases are normally inserted for the benefit of the lessee and should be interpreted in light of this purpose" and concluded that the defendants' interpretation of clause fifteen would nullify the plaintiff's benefit under the fixed price option, particularly in light of the unambiguous language of the lease. Id.

Having granted the plaintiff's motion for summary judgment as to the valid exercise of the fixed price option, the court was left with the plaintiff's claim that it was entitled to credit toward the purchase price for rental payments it made thereafter. Id., 141. The court rejected the plaintiff's claim, stating that "these rental payments are economically similar to interest payable

on the unpaid principal of a mortgage. The plaintiff has not yet paid the amount of this principal and the defendants have not had the benefit of the use of the funds. Because the plaintiff has been able to enjoy the continued use of the property without having to part with the [$50,000] purchase price, there is no reason to allow [the] plaintiff to receive credit for the amounts paid in rent since its attempt to exercise its [fixed price] option." Id.

The trial court's reliance on *Powertest Corp.* to reach its conclusion in the present case ignores the critical differences in the lease terms at issue. Most notably, the purchase option in *Powertest Corp.* explicitly stated that the purchase price of the property was $50,000. Conversely, the purchase options in the present case did not articulate purchase prices for the Groton and New London properties but, instead, provided only that the prices would be determined through an appraisal process. Like the plaintiff in *Powertest Corp.*, the plaintiff in the present case validly exercised its options by way of written notice to the defendant. The important distinction, however, is that the plaintiff in the present case was never afforded an opportunity to tender the purchase prices because of the defendant's refusal to participate in the appraisal process. In fact, it was his own improper repudiation of the contract that deprived the defendant of the benefit of the use of the purchase price funds, not the plaintiff's inaction. Were we to apply the court's analysis in *Powertest Corp.* to the present case, we would effectively reward the defendant for his breach. Furthermore, the court in *Powertest Corp.* did not discuss the doctrine of equitable conversion. Instead, it reached its conclusion by equating the plaintiff's rental payments to interest payments on a mortgage and the option payment to the principal of the mortgage. Regardless of whether such an approach was appropriate given the specific facts of *Powertest Corp.*, our Supreme Court made clear in *Lex Associates*

that a much different analytical framework applies to a lessor's repudiation of the lessee's exercise of its purchase option. We apply that framework in this case.

In *Lex Associates*, the plaintiff exercised its option to buy property that it had been leasing from the defendant and tendered the purchase price at the closing in accordance with the terms of the purchase option. *State* v. *Lex Associates*, supra, 248 Conn. 616. The defendant rejected the plaintiff's tender, and the plaintiff promptly filed an action for specific performance. Id. During the pendency of the case, the plaintiff continued to make rental payments to the defendant, eventually exceeding the purchase price of the property.[22] Id. The plaintiff argued that the excess payments were a setoff against the purchase price, while the defendant claimed that the payments simply were rent owed to it due to the plaintiff's continued use of the property pendente lite. The trial court granted the plaintiff's motion for summary judgment and allocated the pendente lite payments to the plaintiff as a setoff to the purchase price. Id. The court, however, awarded damages to the defendant in the form of interest on the purchase price. Id. On appeal, our Supreme Court affirmed the judgments of the trial court as to the plaintiff's setoff but reversed as to the defendant's award of interest. Id., 617.

In *Lex Associates*, our Supreme Court determined that, after exercising its option and becoming the equitable owner of the property, the plaintiff's "ownership rights superseded and replaced its former leasehold obligations." Id., 621. The court further stated: "Under the circumstances of the present case, therefore, we agree with the [plaintiff] that the trial court properly credited the postclosing payments against the purchase price. The [plaintiff] kept its tender open. . . . The

[22] The purchase price stipulated in the amended lease was $395,000, and the payments made by the plaintiff totaled $398,142. *State* v. *Lex Associates*, supra, 248 Conn. 616.

[plaintiff's] pendente lite payments to [the defendant] throughout the course of this protracted litigation do not diminish the rights that accrued to the [plaintiff] on October 15, 1990, the date of the tender of payment. Having demonstrated its right to specific performance of [the defendant's] promise to convey title, the [plaintiff] had a right to be placed, as nearly as practicable, in the same position as if [the defendant] had performed its contract obligations in timely fashion. . . . But for [the defendant's] unexcused refusal to convey title on October 15, 1990, [the defendant] would have had no possible claim to further payments from the [plaintiff]. [The defendant's] own breach of contract cannot entitle it to keep such payments now. . . .

"In sum, because [the defendant's] unexcused refusal to accept the [plaintiff's] tender of full payment on October 15, 1990 was a material breach of a valid lease contract, [the defendant] *cannot recover as rents any payments to which it would not have been entitled had it honored its contract obligations properly and promptly*." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 625.

As previously stated in this opinion, in the present case, both the trial court and our Supreme Court determined that the plaintiff fully complied with the terms of the lease options, despite never having completed the appraisal process. The defendant's argument that the plaintiff should have tendered payment for the properties when it exercised its options is misguided for two reasons. First, the defendant's argument asks us to insert a condition precedent in the purchase options that does not exist. In *Lex Associates*, the tender of the purchase price was required in order to exercise the purchase option. Such tender was not required in this case. Again, the option terms only required the plaintiff to give the defendant three months advance notice, in writing, of its exercise of its options. Once the plaintiff fully complied with those terms, a contract was formed

and equitable title passed from the defendant to the plaintiff. See *Salce* v. *Wolczek*, supra, 314 Conn. 688. There were no conditions in the lease regarding the amount that the plaintiff was required to tender or the manner in which the plaintiff was required to tender payment. To the contrary, the options contemplated future payment after completion of the appraisal process, which necessarily requires us to conclude that the plaintiff was under no obligation to tender undetermined purchase prices at the time it exercised its options.

Second, the defendant ignores the fact that he precluded the plaintiff from tendering payment by repudiating the contract and refusing to proceed with the appraisal process. After years of delay and protracted litigation, the defendant now argues that the plaintiff cannot invoke its right to equitable title because the plaintiff failed to tender the purchase prices that the defendant prevented it from determining. Were this court to accept the defendant's argument, any lessor of property could frustrate a lease's purchase option by refusing to perform an obligation necessary to enable the lessee to tender the purchase price. Put another way, a lessor could foreclose a lessee from exercising its option to purchase the property in favor of continued rent payments through the expiration of the lease. Such a conclusion is inconsistent with general principles of equity and contract law.[23]

Accordingly, given the specific facts of this case, we reject the defendant's contention that equitable title to

[23] General principles of contract law establish that an optionee has no duty to tender all or part of the purchase price at the time it exercises its option when the contract terms are silent as to the price or the time and method of tender. See *Matrix Properties Corp.* v. *TAG Investments*, 609 N.W.2d 737, 742–43 (N.D. 2000) ("[w]here the exercise of the option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option"); see also *Parkway Trailer Sales, Inc.* v.

the properties did not pass to the plaintiff because the plaintiff did not tender payment when it exercised its options.

D

The defendant also argues that Connecticut law requires a showing of bad faith on the part of the breaching lessor in order for equitable title to vest in the purchaser. In support of this contention, the defendant cites to *Heyman* v. *CBS, Inc.*, 178 Conn. 215, 217, 423 A.2d 887 (1979), and *State* v. *Lex Associates*, supra, 248 Conn. 616, neither of which supports his argument. In *Heyman*, the defendant exercised its option to purchase the subject property and the plaintiffs refused to convey, arguing that the option clause was unenforceable because of the statute of frauds. See *Heyman* v. *CBS, Inc.*, supra, 178 Conn. 217. Our Supreme Court rejected the plaintiffs' argument, concluding that the defendant exercised its option and became the equitable owner of the property when it tendered payment in accordance with the conditions of the option clause. Id., 220.

Wooldridge Bros., Inc., 148 Conn. 21, 25, 166 A.2d 710 (1960) ("The lease itself was silent as to the manner in which the option was to be exercised. It did not provide that the plaintiff had to pay the purchase price on or before the expiration of the lease. Rather it conferred a privilege upon the plaintiff which did not become binding upon any party until the plaintiff notified the defendants that it was taking up the option. This it did when its attorney sent the letter of April 17, 1957, to Wooldridge. Thereupon a binding bilateral contract came into being; it obligated the defendants to convey title by good and sufficient deed and obligated the plaintiff to accept the deed and pay the purchase price."); annot., 71 A.L.R.3d 1201, § 7 (1976) ("[i]n those cases in which the courts have been called upon to interpret option contracts which did not explicitly require the payment of the purchase price as a condition precedent to exercise of the option . . . the courts have generally been inclined to construe such agreements as calling simply for a promise by the optionee to pay the price, rather than for actual payment thereof, and as looking to formation, through the giving of such promise, of a bilateral contract of purchase and sale, with performance thereof by each of the parties to be completed within a reasonable time thereafter").

In *Lex Associates*, the defendant refused to convey the property at closing and argued on appeal that the purchase option was unenforceable because it was not supported by adequate consideration due to an alleged lack of mutuality of obligation. See *State* v. *Lex Associates*, supra, 248 Conn. 617. Our Supreme Court rejected the defendant's argument, concluding that the plaintiff was relieved of its rental obligations when it exercised its option and tendered payment in accordance with the lease terms. Id., 624–25.

The defendant maintains that both *Heyman* and *Lex Associates* stand for the proposition that equitable conversion is applicable only when a lessor or vendor breaches in bad faith. We are not persuaded. Like the defendant in the present case, the vendors in *Heyman* and *Lex Associates* did not refuse to convey the properties in bad faith. In fact, our Supreme Court makes no mention of bad faith in either case.

The defendant in the present case repudiated the contract on the basis of his mistaken belief that the plaintiff had not validly exercised its options. Our Supreme Court determined that the defendant's good faith refusal to convey the properties, like the vendors in *Heyman* and *Lex Associates*, was ultimately an unexcused breach of the lease options. The nature of the breach did not affect our Supreme Court's analysis in either *Heyman* or *Lex Associates*, nor does it affect ours in the present case.

Accordingly, we reject the defendant's contention that Connecticut law requires a showing of bad faith for equitable conversion to apply.

We, therefore, conclude that the plaintiff's lessee obligations terminated when it exercised its options and became the equitable owner of the properties. Consequently, the trial court erred by ordering that the plaintiff make rent and use and occupancy payments and by refusing to credit any such payments against the

purchase prices the plaintiff was required to pay for the properties.

III

The plaintiff's final claim is that the logical conclusion that flows from its right to credits against the purchase prices of the properties for any payments it made after it exercised its options is that it is entitled to a refund from the defendant to the extent that those payments exceeded the purchase prices of the properties. Conversely, the defendant argues that the plaintiff's mistake of law in paying rent and use and occupancy does not entitle it to an award of damages. Additionally, the defendant contends, for the first time on appeal, that the plaintiff owes interest on the purchase prices. The plaintiff argues that the defendant's claim for interest is improper because he never requested interest from the trial court and because the equities do not support such an award. We agree with the plaintiff on both damages and interest.

A

Because the trial court concluded that the plaintiff was not entitled to credit any rent or use and occupancy payments against the purchase prices of the properties, it never addressed the question of whether the plaintiff was entitled to an award of damages if such payments were greater than the total of the purchase prices. Nevertheless, we resolve the issue because it is purely a question of law that flows from our conclusion that the plaintiff became the equitable owner of the properties upon the exercise of its purchase options on August 22, 2003.

Our Supreme Court's analysis in *Lex Associates* informs our conclusion that the plaintiff is entitled to an award of damages for payments it made to the defendant in excess of the purchase prices of the properties. As previously stated in part II C of this opinion, the

plaintiff did not tender full payment of the purchase prices because it was foreclosed from doing so as a result of the defendant's repudiation of the contract. When it was forced to litigate its right to exercise its options, the plaintiff, as did the plaintiff in *Lex Associates*, continued making payments on both properties to avoid any claim that it had forfeited its rights to the properties. Although it eventually ceased making payments on the New London property when it vacated the premises in 2012, it has continued to make payments on the Groton property, including from June 1, 2014, to the present pursuant to the trial court's order. We see no logical basis to limit the credit to which the plaintiff is entitled to the amount of the purchase prices of the properties. The plaintiff was required to pay the defendant no more than the purchase prices determined pursuant to the parties' agreements, and the defendant was entitled to receive no more than those amounts. To the extent that the defendant has received, in total, more than the purchase prices of the properties, he has no legal or equitable entitlement to such funds and must return them.

The defendant attempts to avoid this conclusion by arguing that he is not responsible for the plaintiff's mistake of law in voluntarily continuing to make rent and use and occupancy payments to the defendant after the plaintiff exercised its options. We find this argument unavailing for two reasons. First, not all of the payments made by the plaintiff for which it seeks credit were made voluntarily. In reliance on our Supreme Court's decision in this case, the plaintiff stopped making monthly payments on the Groton property as of June 1, 2014. See footnote 8 of this opinion. Thereafter, in response to the defendant's motion for continued use and occupancy payments, the trial court ordered that the plaintiff make monthly use and occupancy payments on that property, retroactive to June 1, 2014. Thus, payments since June 1, 2014, were in no way

voluntary. For the defendant to suggest that such court ordered payments were the result of the plaintiff's own mistake of law is without merit.

Second, the defendant's argument would mean that the plaintiff's entitlement to damages turns entirely on the label assigned to its payments, thus elevating form over substance. As stated previously in this opinion, the plaintiff's characterization of its continued payments to the defendant as rent or use and occupancy is a legal conclusion—not a judicial admission—which is not binding on this court. Our analysis is guided by the fact that the plaintiff, despite being the equitable owner of the properties, continued to make payments to the defendant until May, 2014, in an effort to preserve its property rights. Once our Supreme Court determined that the plaintiff did, in fact, validly exercise its purchase options, it ceased making payments in accordance with its ownership rights. The fact that the defendant had no right to continued payments after the plaintiff exercised its options in August, 2003, turns on the legal conclusion that the plaintiff, at that point, became the equitable owner of the properties.[24] The same is true of the plaintiff's right to a return of any overpayments it made.

[24] In support of his argument that the plaintiff is not entitled to a damage award for moneys paid voluntarily under a mistake of law, the defendant cites to *Rockwell* v. *New Departure Mfg. Co.*, 102 Conn. 255, 128 A. 302 (1925). In *Rockwell*, the trial court held that the defendant employer was entitled to recover commissions paid to the plaintiff under a mistake of law. Id., 279. Our Supreme Court reversed, holding that "when the parties to a written contract stand on an equal footing as to means of knowledge of their contract obligations, money paid by one to the other, in part performance of the contract, in response to a claim made in good faith and based upon a permissible but erroneous construction of the contract, cannot be recovered back as money paid under a mistake of law." Id., 308–309. The defendant's reliance on *Rockwell* is misplaced.

In the present case, the plaintiff's continued rental payments to the defendant did not arise out of the plaintiff's mistaken interpretation of the parties' agreements. Nor were they made in part performance of the contract. Rather, the plaintiff's continued payments were the product of the defendant's repudiation of the contract. The plaintiff's payments were no more a mistake of law than were the plaintiff's continued payments in *Lex Associates*.

Accordingly, we agree with the plaintiff that, to the extent that the payments it has made since exercising its options exceeded the determined purchase prices of the properties, the plaintiff is entitled to an award of damages equaling the amount of the overpayment.

B

The defendant also claims that if we determine that the purchase prices of the properties should be determined based on their November, 2003 appraised values, he is entitled to interest on the purchase prices. We reject the defendant's claim for two reasons. First, the defendant is raising this issue for the first time on appeal and, therefore, we are under no obligation to consider it. See *Guddo* v. *Guddo*, 185 Conn. App. 283, 286–87, 196 A.3d 1246 (2018). Second, our Supreme Court considered and rejected a virtually identical claim in *Lex Associates*.

In *Lex Associates*, our Supreme Court noted that a necessary predicate of an award of prejudgment interest is a determination that the party against whom interest is to be awarded has wrongfully detained money owed to the aggrieved party. *State* v. *Lex Associates*, supra, 248 Conn. 628. Notwithstanding the trial court's determination that the plaintiff's tender of the full purchase price demonstrated that it did not wrongfully detain money owed to the defendant, the court still ordered that the plaintiff pay prejudgment interest. Id. In reversing the trial court, our Supreme Court stated: "In the absence of any wrongdoing by the [plaintiff], the best that can be said for [the defendant] is that it entertained a good faith but mistaken belief that the option contained in the lease was unenforceable. [The defendant's] *mistake does not provide an equitable basis for an award of interest to it as compensation for its own delay in conveying title* to the [plaintiff]. . . .

"It is true that, even though the [plaintiff] did not wrongfully withhold the purchase price from [the defendant], a tender of payment is not the equivalent of pay-

ment itself. Refusal of a tender of payment, however, while it does not discharge a debt, discharges any further accrual of interest if the purchase keeps the tender good pendente lite." (Emphasis added.) Id., 629.

Although the plaintiff in the present case did not tender payment when it exercised its options, the options did not require that it do so. Furthermore, the defendant's mistaken belief that the options were unenforceable is what caused the delay in conveying title to the plaintiff. The same logic that our Supreme Court applied in *Lex Associates* applies here. The plaintiff made every effort to close on the properties pursuant to the terms of the options and the defendant wrongfully prevented that from coming to fruition.[25]

Accordingly, we reject the defendant's contention that he should receive interest on the purchase price of the properties.

IV

Finally, we turn to the defendant's cross appeal. On appeal, the defendant claims that the parties agreed to an appraiser, Robert Silverstein, for the valuation of the Groton property and, in accordance with the terms of the purchase option for that property, Silverstein's valuation should determine its purchase price. The defendant argues that the court erred by averaging the appraisals of Silverstein and the plaintiff's appraiser, Grant. For the reasons that follow, we reject the defendant's claim.

Before addressing the merits of the defendant's claim, we set forth the applicable standard of review, which the defendant asserts is plenary because his cross

[25] We note also that the defendant's claim that he has been deprived of the use of the purchase prices of the properties is somewhat overstated given that the plaintiff has been paying the defendant monthly since it exercised its options and may very well have paid the defendant more than that to which he is entitled for the properties. To the extent that this is the case, the defendant has enjoyed the use of moneys he had no right to receive.

appeal involves an issue of contract interpretation. The defendant is mistaken, however, as the issue he raises is one concerning the trial court's conclusion as a matter of fact that the parties did not agree to a mutually acceptable appraiser. Although the defendant contends that the trial court erred by failing to use only Silverstein's appraisal, as purportedly required by the purchase option, the defendant is actually challenging the court's implicit factual finding that the parties never reached an agreement to use only Silverstein's appraisal.[26] Therefore, our standard of review is clearly erroneous. See *Valley National Bank* v. *Marcano*, 174 Conn. App. 206, 217, 166 A.3d 80 (2017).

The following additional facts and procedural history are relevant to our resolution of the defendant's claim. On June 24, 2008, at trial, the defendant cross-examined the plaintiff's vice president, Anderson, on her negotiations with the defendant, the appraisal process, and Silverstein's appraisals of the Groton and Westerly, Rhode Island properties.[27] When asked on cross-examination if the plaintiff agreed that it would purchase the Groton and Westerly properties in accordance with the Silverstein appraisal, Anderson replied "no." Anderson further testified that "[t]he reason we did . . . Silverstein's appraisal was after our offer—I realized that I couldn't force [the defendant] to take an appraisal, and I offered to pay—for him to select a MAI appraiser, and I was going to pay for the appraiser, and so—I did so. So, I paid for . . . Silverstein's appraisal, and I was expecting to average [it with Grant's appraisal] and proceed with the purchase of the Groton real estate." She also testified that "[t]he price was not to be set

[26] Although the court did not explicitly find that there was no agreement to use Silverstein, its valuation of the Groton property, based on an average of the parties' appraisals, necessarily means that it rejected the defendant's claim that the parties had agreed to use Silverstein exclusively.

[27] An additional parcel of property located in Westerly, Rhode Island, was involved in the parties' contract negotiations but is not at issue in this appeal.

by . . . Silverstein. The price was going to be set by both appraisals."

On July 2, 2008, at trial, the defendant also testified as to the parties' contract negotiations and the appraisal process. He testified that, in either late 2005 or early 2006, he and Anderson agreed that he would sell the Groton property to the plaintiff based on Silverstein's appraisal. He testified though, that any such sale was to be made outside the option process. In particular, when asked about his obligations under the purchase options on cross-examination, the defendant testified that "I made it clear to . . . Anderson . . . every single time I talked to them after 2003 that if we talked about selling any of these properties it would not be under the option. The option was done, it was complete; it was kaput. I made that perfectly clear, and we proceeded with the Westerly purchase on that basis, and it wasn't done under the options . . . it even says it in there that it is not done under the options." The defendant offered no other evidence at trial that the plaintiff agreed that Silverstein was to be the sole appraiser on the plaintiff's exercise of its option to purchase the Groton property.

After the case was remanded to the trial court, following our Supreme Court's May 20, 2014 decision, the defendant, on May 18, 2015, filed a postappeal trial memorandum regarding his position in light of the remand. In that memorandum, the defendant stated, as fact, that "[a]s part of the negotiating for the sale of the Westerly real property, on January 25, 2005, Anderson, at the suggestion of Cushman, proposed in writing that . . . Silverstein also be the mutually acceptable appraiser for the Groton and New London real properties. In that written proposal Anderson also stated that she would close on Groton within [two] months after receiving the Silverstein appraisal for Groton. (Proposed [e]xhibits 31 through 31G, series of [e-mails]

between Paulina Anderson and Cushman (ARCO Corp.), dated 25 to 26 January 2005, respectively)." The defendant, referring to additional "proposed exhibits," also represented that Anderson had engaged Silverstein to appraise the Groton property, and that Silverstein had appraised the property as having a value, as of February 23, 2005, of $625,000. Despite his reference to proposed exhibits, the defendant did not attach any such exhibits to his postappeal trial memorandum. Nor did he move to open the evidence in the case to introduce these documents. However, in his memorandum of law dated December 21, 2017, filed in anticipation of the trial court's hearing after remand, the defendant, for the first time, attached copies of alleged e-mails between Anderson and Cushman, in which Anderson purportedly proposed that Silverstein act as the parties' mutually acceptable appraiser for the Groton property.

In his appellate brief before this court, the defendant argues that the trial court failed to consider Anderson's trial testimony and her e-mails with him when it calculated the purchase price of the Groton property based on an average of the parties' appraisals, instead of relying solely on the Silverstein appraisal. The defendant maintains that this evidence establishes that the parties mutually had agreed on an appraiser in accordance with the Groton lease terms and, therefore, the court abused its discretion by failing to set the purchase price in accordance with Silverstein's appraisal. We disagree.

First, the defendant has mischaracterized Anderson's testimony. She testified that she thought Silverstein's appraisal would be averaged with Grant's appraisal. Thus, it was not clearly erroneous for the court to rely on an average of the parties' appraisals when it determined the purchase price for the Groton property.

Second, the e-mails on which the defendant relies were never admitted as evidence before the trial court. "This court is limited in its review to matters contained

within the record. In deciding a case, this court cannot resort to matters extraneous to the formal record, to facts which have not been found and which are not admitted in the pleadings, *or to documents or exhibits which are not part of the record*." (Emphasis added.) *Blakeman* v. *Planning & Zoning Commission*, 82 Conn. App. 632, 641 n.8, 846 A.2d 950, cert. denied, 270 Conn. 905, 853 A.2d 521 (2004).

During oral argument before this court, the defendant conceded that the documentary evidence regarding the Silverstein appraisal and the plaintiff's purported acceptance of it was not entered into evidence, as it was only submitted as an attachment to its December 21, 2017 memorandum.[28] There is simply no basis for concluding that the court made an erroneous factual finding based on documents that were never submitted into evidence. Accordingly, we conclude that the court did not err in failing to set the purchase price for the Groton property at Silverstein's appraised value.

The judgments are reversed and the cases are remanded with direction to determine the purchase prices of the properties as of November 22, 2003, pursuant to the plaintiff's exercise of its options to purchase the properties in 2003 and the appraisals submitted by the parties regarding the values of the properties as of

[28] During oral argument before this court, counsel for the defendant described the filing to which the proposed exhibits were attached as a postappeal motion for further findings. We have been unable to locate any such filing on the trial court's docket. Furthermore, the only filing we could locate to which the proposed exhibits were attached was the defendant's December 21, 2017 memorandum. During argument at the December 21, 2017 hearing before the trial court, counsel for the defendant did make reference to the proposed exhibits by stating that the defendant could "make a record" that the communications constituted "business records between the plaintiff and the defendant." However, there is nothing in the record to show that the defendant actually moved to open the evidence, or that the trial court denied such a motion. In any event, it is clear that the proposed exhibits were never admitted as full exhibits. It is equally clear that the defendant has not argued in his cross appeal that the trial court erred in failing to admit into evidence the proposed exhibits.

November 22, 2003, to credit against those purchase prices any payments made by the plaintiff to the defendant for use of the properties after it exercised its purchase options, and to order the defendant to refund to the plaintiff the amount of its payments made that exceeded the purchase prices of the properties.

In this opinion the other judges concurred.

CAROLE AUDIBERT *v.* WESLEY HALLE
(AC 42654)

Keller, Bright and Bishop, Js.

Syllabus

The plaintiff sought to recover damages from the defendant for negligence in connection with personal injuries she sustained in a motor vehicle accident in which her vehicle was struck by the defendant's vehicle. Following a trial, the jury returned a verdict in favor of the plaintiff. Thereafter, the plaintiff filed a motion to set aside the verdict and for a new trial, claiming that the defendant's counsel had violated rule 3.4 (5) of the Rules of Professional Conduct during closing argument by alluding to matters that were not relevant or supported by the evidence, asserting personal knowledge of the facts, stating his personal opinion as to the plaintiff's credibility and improperly appealing to the emotions and passions of the jurors by attacking the plaintiff's character. The trial court denied the plaintiff's motion and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Held*:

1. This court declined to review the plaintiff's claim, raised for the first time on appeal, that the trial court improperly admitted evidence of a subsequent motor vehicle accident in which the plaintiff was involved because the evidence was not relevant, the plaintiff having failed to adequately preserve this claim for appellate review, as her counsel failed to specify the basis of his objections to any of the questions by the defendant's counsel regarding the subsequent accident.
2. The plaintiff's claim that the trial court improperly failed to provide a curative instruction to the jury, as she had requested, in response to certain improper remarks by the defendant's counsel during closing argument was unavailing; that court properly exercised its discretion in denying the plaintiff's request for a curative instruction, as the court's numerous instructions to the jury were sufficient to inform the jury of its responsibilities and the duties of counsel.
3. The trial court did not abuse its discretion in denying the plaintiff's motion to set aside the verdict and for a new trial; although certain remarks by the defendant's counsel during closing argument on the credibility

of a witness intended to appeal to the emotions, passions and prejudices of the jurors were improper, those remarks were not so overly prejudicial as to deprive the plaintiff of a fair trial, as there was little risk that they distracted the jury from focusing on the relevant issues and deciding the case solely on the basis of the evidence, and they did not result in manifest injury to the plaintiff.

Submitted on briefs February 18—officially released June 30, 2020

Procedural History

Action to recover damages for the defendant's alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Elgo*, *J.*; verdict for the plaintiff; thereafter, the court denied the plaintiff's motion to set aside the verdict and for a new trial and rendered judgment in accordance with the verdict, from which the plaintiff appealed to this court. *Affirmed.*

J. Xavier Pryor filed a brief for the appellant (plaintiff).

Lewis S. Lerman filed a brief for the appellee (defendant).

Opinion

BISHOP, J. The plaintiff, Carole Audibert, brought this personal injury action against the defendant, Wesley Halle, for injuries she alleges she sustained as the result of an automobile accident on April 12, 2013, caused by the defendant's negligence. The case was tried to the jury, which returned a verdict in favor of the plaintiff. The plaintiff appeals from the judgment of the trial court, rendered in accordance with the jury's verdict. The plaintiff claims that (1) the court improperly admitted irrelevant evidence, (2) the court improperly failed to provide a curative instruction to the jury, (3) the defendant's counsel violated rule 3.4 (5) of the

Rules of Professional Conduct[1] during closing argument, depriving the plaintiff of a fair trial, and (4) the court abused its discretion by failing to set aside the verdict and to grant the plaintiff a new trial. We affirm the judgment of the court.

The jury reasonably could have found the following facts. On April 12, 2013, the plaintiff was involved in a motor vehicle accident with the defendant in Tolland. The plaintiff was travelling in the northbound lane of a two lane road when she came to a stop behind another stopped vehicle. After stopping, the plaintiff's vehicle was struck in the rear by the defendant's vehicle, pushing the plaintiff's vehicle off the roadway and up an embankment. After the collision, both parties exited their vehicles and verbally confirmed to each other that they were all right. Thereafter, emergency personnel arrived on the accident scene, where they placed a cervical collar on the plaintiff, and she was transported to Rockville General Hospital. Once at the hospital, the plaintiff was transferred to the emergency room for a computerized axial tomography scan and an X-ray. While there, she was prescribed pain medication but she did not fill the prescriptions. Approximately ten days after the accident, the plaintiff visited her primary care physician, Michael Keenan, during which she complained of shoulder and mid-back pain. Keenan referred her to Robert O'Connor, an orthopedic surgeon.

O'Connor ordered a magnetic resonance imaging (MRI) scan for the plaintiff, and, after reviewing the results, he recommended that she start physical therapy for her injuries. The plaintiff completed numerous physical therapy sessions at Mansfield Physical Therapy but

[1] Rule 3.4 (5) of the Rules of Professional Conduct provides in relevant part: "A lawyer shall not . . . (5) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused . . . ."

continued to experience pain. Thereafter, she met with Daniel Veltri, a sports medicine and orthopedic surgeon. To relieve the plaintiff's pain, Veltri injected her with a steroid in her right shoulder. Veltri also ordered an MRI, from which he determined that the plaintiff's neck injuries might be the reason for her pain and discomfort. He recommended to the plaintiff that she continue physical therapy, return to see him in six weeks, and complete an additional MRI that he ordered. Additionally, he referred the plaintiff to Howard Lanter, a neurosurgeon. After examining the plaintiff, Lanter did not recommend that she undergo surgery to relieve the pain and discomfort.

In January, 2015, the plaintiff was in a subsequent motor vehicle accident in which her car struck another vehicle from behind, causing her car's airbag to deploy. As a consequence of this accident, the plaintiff's car was totaled. In March, 2015, the plaintiff returned to see Veltri for an evaluation due to ongoing symptoms. Despite Veltri's earlier recommendations in 2014, the plaintiff had neither completed the additional MRI nor returned to see him six weeks after her last appointment, and she had not returned to physical therapy.

The following procedural history also is relevant to our resolution of this appeal. The plaintiff brought this civil action against the defendant on March 18, 2014, alleging that, as a result of the defendant's negligence in causing the accident, the plaintiff had suffered serious injuries, including, but not limited to, a cervical sprain, shoulder pain, thoracic spine and back pain, and reduced motion in her back and shoulder. On May 27, 2014, the defendant filed an answer to the complaint, leaving the plaintiff to her burden of proof on the issues of liability, causation, and damages. On May 4, 2016, the evidence portion of the jury trial took place during which the plaintiff and a damages witness testified and the defendant presented the videotaped testimony of

Steven Selden, an orthopedic physician who had conducted a medical records review pertaining to the plaintiff.

At the conclusion of the evidence, both parties delivered closing argument to the jury, and, thereafter, the court instructed the jury and provided it with interrogatories and a plaintiff's verdict form.[2] The jury answered the interrogatories, finding that the plaintiff was entitled to damages caused by the defendant's negligence in the amount of $17,000, consisting of $11,293.55 in economic damages and $5760.45 in noneconomic damages. The jury then completed the plaintiff's verdict form in accordance with its findings.

After the court accepted the jury's verdict, the plaintiff filed a motion to set aside the verdict and for a new trial, claiming that the defendant's counsel had violated rule 3.4 (5) of the Rules of Professional Conduct in his closing argument. In her memorandum of law in support of the motion, she argued that the defendant's counsel alluded to matters that were not relevant or supported by the evidence, asserted personal knowledge of the facts, stated his personal opinion as to the plaintiff's credibility, and improperly appealed to the emotions and passions of the jurors by attacking the plaintiff's character. The defendant objected, arguing that counsel did not violate the Rules of Professional Conduct and that the court should not set aside the verdict and order a new trial because counsel's conduct did not result in manifest injury to the plaintiff.

By memorandum of decision, the court rejected the claims raised by the plaintiff and denied the motion. The court ruled that setting aside the verdict and ordering

[2] The record does not disclose the basis for the court's decision to submit only a plaintiff's verdict form to the jury. We will not speculate as to the court's reasoning except to note that the record reflects that the parties' disagreement revolved around the extent of the plaintiff's injuries, and not whether the defendant had been negligent in causing the accident.

a new trial was unwarranted because, on the basis of the record, the plaintiff was not deprived of a fair trial. The court stated that its instructions to the jury were sufficient to charge the jurors properly on their responsibilities and obligations. This appeal followed. Additional facts and procedural history will be provided as necessary.

I

The plaintiff first claims that the court improperly admitted evidence of her January, 2015 motor vehicle accident. Specifically, she claims that any evidence of the subsequent motor vehicle accident was irrelevant under § 4-2 of the Connecticut Code of Evidence[3] because the defendant only introduced the evidence in order to confuse the jury. In response, the defendant argues that the plaintiff's claim fails because she failed to properly preserve her objection to evidence concerning the subsequent accident. We agree with the defendant.

Our standard of review of a claim alleging an improper evidentiary ruling at trial is well established. "Unless an evidentiary ruling involves a clear misconception of the law, the [t]rial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling . . . ." (Internal quotation marks omitted.) *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 688, 981 A.2d 497 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010). "In order to preserve an evidentiary ruling for review, trial counsel must object properly. . . . In objecting to evidence, counsel must properly articulate the basis of the objection so as to apprise the trial

[3] Section 4-2 of the Connecticut Code of Evidence provides in relevant part: "Evidence that is not relevant is inadmissible."

court of the precise nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling. . . . Once counsel states the authority and ground of his objection, any appeal will be limited to the ground asserted." (Internal quotation marks omitted.) *Daley* v. *McClintock*, 267 Conn. 399, 404–405, 838 A.2d 972 (2004). "These requirements are not simply formalities. They serve to alert the trial court to potential error while there is still time for the court to act. . . . Assigning error to a court's evidentiary rulings on the basis of objections never raised at trial unfairly subjects the court and the opposing party to trial by ambush." (Internal quotation marks omitted.) *State* v. *Bell*, 113 Conn. App. 25, 40, 964 A.2d 568, cert. denied, 291 Conn. 914, 969 A.2d 175 (2009).

The essence of the plaintiff's evidentiary claim relates to evidence adduced by the defendant regarding the plaintiff's subsequent motor vehicle accident in 2015. For the first time on appeal, the plaintiff asserts that such evidence was not relevant. The following additional facts are relevant to our resolution of this issue.

In the plaintiff's initial responses to discovery, she failed to disclose her 2015 motor vehicle accident. Additionally, when questioned by the defendant's counsel at her deposition, the plaintiff initially testified that she was not involved in any subsequent motor vehicle accidents. At trial, the defendant's counsel questioned the plaintiff about initially denying involvement in the subsequent accident during her deposition. In response, the plaintiff admitted that she had been involved in an accident in January, 2015.

While the defendant's counsel was cross-examining the plaintiff about the January, 2015 accident, the plaintiff's counsel objected to counsel's initial questions of whether the plaintiff was in a subsequent accident. Specifically, the defendant's counsel asked the plaintiff, "in between your visit to Dr. Veltri in April of 2014 and

your visit to him in March of 2015 you had a car accident, didn't you?" The plaintiff responded "yes," to which the defendant's counsel asked, "[a]nd that was in January of 2015. Correct?" The record reflects that the plaintiff's counsel objected to these initial questions but did not state a basis for doing so. After the court invited counsel to approach the bench and conducted a sidebar discussion with counsel, the court overruled the plaintiff's objection. The record, however, does not reflect the basis of the objection, and there is no indication of the basis on which the court overruled it.

Once the objection by the plaintiff's counsel to the defendant's initial questions were overruled, the defendant's counsel continued cross-examination. The plaintiff's counsel, however, failed to object to questions regarding the details of the January, 2015 accident, relating to the damage to the vehicles. Thereafter, the defendant's counsel continued: "And at your deposition, when you were asked about being involved in any motor vehicle accidents after the one we're here for today, the one that occurred on April 12, 2013, didn't you originally state that you had not been involved in any subsequent motor vehicle accidents?" The plaintiff's counsel objected to that question, again without stating the basis for the objection, and another sidebar discussion took place. After the sidebar discussion, the court overruled the objection but did not specify its basis for doing so.

In sum, our careful review of the record indicates that, at trial, the plaintiff's counsel failed to specify the basis of his objections to any of the questions by the defendant's counsel regarding the plaintiff's subsequent motor vehicle accident. As noted, and as our decisional law demonstrates, the plaintiff's counsel was required to specify the authority and basis of any objections to the cross-examination of the plaintiff. Because the plaintiff's counsel failed to do so, this claim is not preserved adequately for any meaningful review on appeal. Accordingly, we decline to review it.

II

The plaintiff next claims that the court improperly failed to provide a curative instruction to the jury in response to improper remarks of the defendant's counsel during closing argument. We are not persuaded.

The following additional facts are relevant to our resolution of this issue. Before the commencement of evidence, the court instructed the jury to decide the case solely on the basis of the evidence presented and that it had the responsibility to weigh the testimony of the witnesses and to resolve any conflicts to determine the truth. At the conclusion of the evidence and before the start of closing argument, the court again charged the jury on its responsibilities. In this instruction, the court reminded the jury that lawyers are not permitted to state their personal opinions as to the facts of the case or the credibility of witnesses. After closing argument, but before the court's final instructions, the parties engaged in a colloquy with the court, outside the presence of the jury, regarding certain comments made by the defendant's counsel during closing argument. It is noteworthy that, during closing argument, neither counsel made any objection to the arguments of opposing counsel. Nevertheless, after closing argument concluded, the plaintiff's counsel requested that the court issue a curative instruction regarding the closing argument of the defendant's counsel.

When discussing the plaintiff's testimony, the defendant's counsel stated in his closing argument: "This is all about money. You couldn't see it more clearly than we see that . . . . If someone wants to get money, and this is what it's about, whether they do it on purpose or they trick themselves into thinking that things are different . . . they might . . . say things that are going to benefit them. . . . Clearly if she was asymptomatic, she was living with this condition, this arthritis in her spine, she's saying it was symptomatic—it never

bothered her . . . . She might have had it in the past. She could have . . . had it and not be telling the truth about it today . . . it can go away because you can have that condition in your back, obviously, because it preexisted [the accident]." When discussing the plaintiff's medical treatment, counsel stated: "It's probably not what she wanted to hear. I don't want to go to physical therapy. Maybe she's feeling completely better, but she doesn't do those things. . . . That doesn't seem like someone who's trying to get better. That doesn't sound like someone who actually has pain and discomfort. . . . She can't make the excuse that she's got other things to do and, you know, I can't make it. She has all the time in the world to go to physical therapy. . . . She didn't go to physical therapy . . . [s]he didn't do it, and she lied to her doctor. Looks that way, and she misled him. . . . She goes back to Dr. Veltri months later . . . to get the rating. . . . [She] [h]as misled you . . . the records are clear when she's in there . . . and the therapy is working out . . . . You know, maybe she's not really thinking that . . . she says, yeah, I'm doing better. . . . I'm doing better, but then she [is thinking]—you know, [about the] lawsuit . . . . Attorney Pryor's the one that's . . . on the letter in January not long after this accident; so that's what's going on."

Further, the defendant's counsel stated: "She told [her story] in the very first visit probably before she kind of formulated the idea that this could be a lawsuit and everything. . . . [W]hen I asked her [questions regarding the accident] she said I was stopped right behind the other vehicle, five inches behind it . . . for a minute. I don't think she was stopped for a minute. . . . I think the thing—she said she stopped for a minute . . . but that doesn't fit the narrative well when you want to sue somebody. You want to say that I was stopped there and that I did nothing wrong, nothing unusual happened, and then he collided with me. . . .

So she's changed the story on a very important thing . . . . "

In response, the defendant's counsel stated that, on the basis of the parties' previous discussions with the judge in chambers, the best approach would be not to provide an instruction specific to defense counsel's argument. The court agreed and concluded that, although the defendant's counsel had crossed the line during closing argument, its careful instructions to the jury adequately charged it regarding its responsibilities and duties and the role of counsel during closing arguments, and, thus, the court concluded a curative instruction was unnecessary. Thereafter, during the final charge, the jury was instructed concerning the rules governing attorney conduct, and, again, the court reminded the jury that the arguments and statements of counsel are not evidence.

The standard we use for determining whether the court erred in failing to provide a curative instruction is abuse of discretion. See *Pin* v. *Kramer*, 119 Conn. App. 33, 45, 986 A.2d 1101, aff'd, 304 Conn. 674, 41 A.3d 657 (2012); *Fonck* v. *Stratford*, 24 Conn. App. 1, 5, 584 A.2d 1198 (1991). Further, we note that, in the absence of a showing that the jury failed or declined to follow the court's instructions, we presume that the jury followed them. See *State* v. *Reynolds*, 264 Conn. 1, 131, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

During its colloquy with counsel, the court articulated the reasons for its decision not to give the requested curative instruction. First, the court stated that its instructions were sufficient to inform the jury of its responsibilities and the duties of attorneys. Second, the court stated that, during rebuttal argument, the plaintiff's counsel "effectively underscored [the court's] charge to the jury with respect to closing arguments." Third, the court stated that reiterating the instructions

yet again "might unduly prejudice the defendant." On the basis of this record, we conclude that the court soundly exercised its discretion in denying the plaintiff's request and that the court's numerous instructions to the jury were sufficient.

III

The plaintiff next claims that the defendant's counsel violated rule 3.4 (5) of the Rules of Professional Conduct during closing argument by stating his personal opinion as to the plaintiff's credibility and by expressing opinions on evidence by asserting personal knowledge of the underlying facts in an effort to appeal to the passions and prejudices of the jurors, and, consequently, deprived the plaintiff of a fair trial. The plaintiff also claims that, because the defendant's counsel made improper remarks during closing argument, the court abused its discretion by not setting aside the verdict and granting the plaintiff a new trial. We are unpersuaded.

To assess the plaintiff's claims, we use a two step analysis. First, we must determine whether the remarks of the defendant's counsel were improper, and, second, if we conclude that the remarks were improper, we must determine whether a new trial is necessary. See *Palkimas* v. *Lavine*, 71 Conn. App. 537, 546, 803 A.2d 329, cert. denied, 262 Conn. 919, 812 A.2d 863 (2002).

A

We first examine whether, on the basis of the plaintiff's claim that he violated rule 3.4 (5) of the Rules of Professional Conduct during closing argument, the remarks of the defendant's counsel to the jury were improper.

"Under current case law, the test for whether there has been impropriety in the remarks of a prosecutor and whether a new trial must be ordered requires a more intense scrutiny in criminal cases than in civil cases because the duty of fairness on the part of a

state's attorney exceeds that of other advocates. . . . This does not excuse counsel, however, in civil cases from adhering strictly to the Rules of Professional Conduct regarding conduct during the trial and during closing argument. Comments of attorneys that are proscribed in both civil and criminal cases are (1) comments on the veracity of a witness' testimony, (2) personal expressions of opinion on evidence, (3) references to matters not in evidence and (4) appeals to the emotions, passions and prejudices of the jurors." (Citation omitted; internal quotation marks omitted.) *Palkimas* v. *Lavine*, supra, 71 Conn. App. 546–47.

We agree with the plaintiff that the remarks made by the defendant's counsel in closing argument as set forth in part II of this opinion were improper statements on the credibility of a witness intended to appeal to the emotions, passions and prejudices of the jurors.[4]

B

Because we have determined that the remarks of the defendant's counsel were improper, we next address whether the plaintiff's motion to set aside the verdict and for a new trial should have been granted in view of the improper remarks. "When a verdict should be set aside because of improper remarks of counsel, rather than because of the insufficiency of the evidence to support the verdict, the remedy is a new trial. . . . Our standard of review for such a claim is whether the court abused its discretion when it denied the motion." (Citation omitted.) *Palkimas* v. *Lavine*, supra, 71 Conn. App. 542. "In determining whether there has been an abuse of discretion, every reasonable presumption should be given to the correctness of the court's ruling." Id., 544.

[4] In reaching this conclusion, we do not make any specific finding as to whether counsel's improper argument constituted a violation of the Rules of Professional Conduct, as such a determination is not necessary to our resolution of the claim before us and such a finding would require due notice to counsel and an opportunity to be heard. See *State* v. *Perez*, 276 Conn 285, 296–97, 885 A.2d 178 (2005).

To determine whether the court abused its discretion in not granting the plaintiff's motion to set aside the verdict and for a new trial, we examine whether the improper remarks made by the defendant's counsel deprived the plaintiff of a fair trial. In other words, we look to see whether permitting the verdict to stand in light of the impropriety of counsel's argument would constitute a manifest injury to the plaintiff. The plaintiff has the burden of proving that she suffered manifest injury, that the remarks were unreasonable or that they were flagrantly prejudicial. See *Skrzypiec* v. *Noonan*, 228 Conn. 1, 15–16, 633 A.2d 716 (1993); *Yeske* v. *Avon Old Farms School, Inc.*, 1 Conn. App. 195, 204, 470 A.2d 705 (1984). If we determine that the remarks of the defendant's counsel deprived the plaintiff of a fair trial, then the court abused its discretion by denying the plaintiff's motion.

"Closing argument in civil cases, deemed improper upon appellate review, but not sufficiently improper to warrant the granting of a motion to set aside the verdict and to order a new trial, includes calling the opposing side's arguments a combination of sleaze, slime and innuendo, and characterizing the testimony of a defendant as weasel words . . . or arguing that the defendants provided testimony to save their filthy money . . . or asking the jurors to imagine that they had suffered the same injury when assessing damages, and discussing the defendant country club's lack of insurance and the impact on the jury's decision if one of the jurors' children had visited the country club and was injured . . . or arguing that defense counsel used tactics like criminal defense lawyers in sexual assault cases. . . .

"A verdict should be set aside and a new trial ordered, however, if counsel has misstated the law, despite a court's prior ruling . . . or if counsel comments without evidence to support a statement that implies that

if a verdict is rendered for a plaintiff, the financial burden on the defendant town will eliminate sports in that town. . . .

"If the trial court determines that the remarks of counsel did [not] jeopardize the right of a party to a fair trial by commenting on opposing counsel's appearance or implying that he would resort to trickery to win his case, there is no abuse of discretion if the court [does not grant] a motion to set aside the verdict. . . . This is so because the trial court is in a better position than an appellate court to evaluate the damage done by remarks made in closing argument. Because it is difficult for an appellate court to view the remarks from the same vantage as the trial court, to divine on which side of the impropriety line the remarks fall, we give great weight to the trial court's assessment of the situation. . . . A verdict should be set aside if there has been manifest injury to a litigant, and it is singularly the trial court's function to assess when such injury has been done since it is only that court which can appraise the atmosphere prevailing in the courtroom. . . .

"A trial court is invested with a large discretion with regard to arguments of counsel, and appellate courts should only interfere with a jury verdict if the discretion has been abused to the manifest injury of a party. . . . We recognize that advocacy must be tempered by the professional responsibility of the attorney and that advocacy must be restrained when necessary by the court's obligation to provide the parties a fair trial. Those factors limit the latitude allowed in closing argument and affect the discretion of the court in deciding motions for a new trial." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Palkimas* v. *Lavine*, supra, 71 Conn. App. 547–48.

Before turning to whether the improper remarks of the defendant's counsel deprived the plaintiff of a fair

trial, we note that the plaintiff claims in her brief that such a determination requires us to perform a six step analysis articulated by our Supreme Court in *State* v. *Williams*, 204 Conn. 523, 529 A.2d 653 (1987). The plaintiff, however, is incorrect, as the six step analysis described in *Williams* is applicable only in the context of evaluating whether prosecutorial impropriety deprived a criminal defendant of a fair trial. Instead, we look to our analysis in *Palkimas*, in which this court stated that, when assessing whether a lawyer's improper conduct during a civil trial warrants a new trial, we look to whether a manifest injury has occurred. *Palkimas* v. *Lavine*, supra, 71 Conn. App. 548. This court, in *Palkimas*, distinguished the review we accord in criminal cases from that in civil cases. Our reasoning there was that in a criminal case, a state's attorney has a special role, unlike that of an attorney in a civil case. Id., 545. We noted that a state's attorney is a high public officer and representative of the state, and has a duty of fairness that exceeds that of other advocates because he or she represents the public interest. Id., 546. Thus, we observed, remarks made by a state's attorney in closing argument are examined with special scrutiny. Id., 545. This is so because remarks made by a state's attorney during closing argument may deprive a defendant of a fair trial and violate his or her federal and state constitutional rights to due process of law. Id., 546. On the other hand, in a civil matter in which both counsel share equal footing before a jury, we look to determine whether a party has suffered a manifest injury due to the misconduct of opposing counsel. Id., 548.

In *Palkimas*, the plaintiff brought an action against the defendant for personal injuries allegedly sustained in a rear-end collision. Id., 538 n.2. After the jury returned a general verdict for the defendant, the plaintiff filed a motion to set aside the verdict and to order

a new trial, which the trial court denied. Id., 541–42. On appeal, the plaintiff claimed that the trial court abused its discretion in failing to set aside the verdict and to order a new trial because the defendant's counsel allegedly made improper remarks during closing argument. Id., 538. We concluded that, although the remarks of the defendant's counsel were improper, the plaintiff was not deprived of a fair trial because the improper remarks did not skew the results and invite the jury to ignore the facts. Id., 549–50.

Guided by our analysis and holding in *Palkimas*, we conclude that the improper remarks in the present case did not jeopardize the right of the plaintiff to a fair trial. The issues in this case were not complex and the evidence portion of the trial started and ended on the same day. On the basis of the evidence, the jury reasonably could have concluded that the plaintiff's injuries were exaggerated and that they did not all relate to the accident in question. Moreover, remarks made by the defendant's counsel on the issue of the plaintiff's credibility did not misstate the law or invite the jury to ignore facts or inflame the juror's passions and emotions. In short, although his remarks were improper for the reasons we have discussed, they were not so overly prejudicial as to deprive the plaintiff of a fair trial, as there was little risk that his remarks distracted the jury from focusing on the issues at hand and deciding the case solely on the basis of the evidence.

In sum, the remarks of the defendant's counsel, although improper, did not result in manifest injury to the plaintiff. Accordingly, we find no abuse of discretion in the court's decision to deny the plaintiff's motion to set aside the verdict and for a new trial.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* SEAN JACKSON (AC 41916)

Alvord, Bright and Beach, Js.

Syllabus

The defendant, who had been found to be in violation of probation, appealed to this court from the judgment of the trial court revoking his probation and sentencing him to six years of incarceration. While the defendant had been serving his probationary term, he was arrested and charged with possession of a controlled substance and possession of a controlled substance with intent to sell. The defendant was thereafter charged with violation of probation on the basis of this arrest, as well as two incidents in which he failed to report to the Office of Adult Probation. *Held*:

1. The defendant could not prevail on his claim that there was insufficient evidence to support a finding that he violated his probation because there was insufficient evidence to prove that he had constructive possession of the narcotics that formed the basis for his arrest, and the two instances in which he failed to report to the Office of Adult Probation were de minimis: the state presented sufficient evidence to buttress an inference that the defendant constructively possessed narcotics, specifically, evidence was presented that the police, while conducting surveillance of an apartment building on the basis of a confidential informant's tip that an individual named J was selling narcotics there, observed S, who had a history of drug related offenses, drive up to the building, and the defendant, the passenger in S's vehicle, went into the building and returned within five minutes, and the police, after conducting a motor vehicle stop, subsequently found a razor blade and narcotics in the front seat of S's vehicle, leading the court reasonably to have inferred that the defendant returned to the vehicle and placed the narcotics on the front seat with the intention that he and S would use or distribute them and, furthermore, sufficient evidence supported the finding of a violation of probation on the basis of two instances in which the defendant failed to report to the Office of Adult Probation.

2. The defendant's unpreserved claim that hearsay testimony was admitted at his probation revocation hearing in violation of his due process rights was not reviewable pursuant to *State* v. *Golding* (213 Conn. 233), and the claimed error was not so obvious and egregious that it required reversal under the plain error doctrine; the defendant did not request that the court conduct a balancing test pursuant to *State* v. *Shakir* (130 Conn. App. 458), when H, a police officer, testified that K, a detective, had received information from a confidential source, the state had no notice of the defendant's due process claim and, accordingly, did not present evidence regarding its reasons for not producing K at the hearing, and, therefore, the defendant failed to sustain his burden of providing

an adequate record to review his claim; moreover, the court did not abuse its discretion in admitting K's hearsay statements, as the court was not presented with any evidence that cast doubt on the reliability of K's statements to H, and defense counsel had the opportunity to question H on cross-examination regarding why K had deemed the information from the confidential informant reliable but did not do so; thus, the court was presented with testimony that contained minimal indicia of reliability.

3. The trial court did not abuse its discretion in imposing a sentence of six years of incarceration; the court concluded that the defendant's behavior was inimical to his own rehabilitation and the safety of the public and concluded that it did not believe that any further purpose could be served by continuing the defendant's probation, specifically expressing concern that, although the defendant's girlfriend testified that he was providing support for their four month old daughter and assistance to her as she recovered from a car accident, he was engaging in criminal activity while a suspended sentence of eight and one-half years remained outstanding.

Argued January 8—officially released June 30, 2020

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Hartford, where the case was transferred to the judicial district of New Britain; thereafter, the case was tried to the court, *Graham*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, with whom was *Edward Duarte*, former certified legal intern, for the appellant (defendant).

Laurie N. Feldman, special deputy assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Christian M. Watson*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BEACH, J. The defendant, Sean Jackson, appeals from the judgment of the trial court revoking his probation and imposing a sentence of six years of incarceration. On appeal, the defendant claims that (1) the evidence was insufficient to support a finding that he violated his probation, (2) the court erred in admitting

hearsay testimony at the probation revocation hearing, and (3) the court abused its discretion when it imposed a sentence of six years of incarceration. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our consideration of the defendant's claims on appeal. On June 21, 2006, the defendant pleaded guilty to one count of robbery in the first degree and one count of conspiracy to commit robbery in the first degree, and was sentenced to twenty years of incarceration, execution suspended after ten years, followed by five years of probation.[1] On January 23, 2013, the defendant was released from incarceration and began serving his probation.

On September 23, 2013, the defendant was arrested for assault in the third degree and disorderly conduct. On November 12, 2013, the court found the defendant in violation of probation on the basis of that arrest. The court revoked the defendant's probation and imposed a new sentence of ten years of incarceration, execution suspended after eighteen months, followed by fifty-four months of probation.[2] On January 16, 2015, the defendant was released from incarceration and began serving the new term of probation. The conditions of probation that applied to the defendant when he was released on January 16, 2015, included a requirement that he not violate any criminal law of the United States, the state of Connecticut or any other state or territory, and a requirement that he report to the Office of Adult Probation as directed by the probation officer. On April 26, 2017, the defendant was arrested and charged with possession of a controlled substance in violation of General

[1] The defendant's plea was part of a global plea bargain involving nine files, including the file underlying the present appeal. The court imposed nine concurrent sentences of twenty years of incarceration, execution suspended after ten years, with five years of probation.

[2] The court terminated the defendant's probation on all of his cases other than the present case.

Statutes § 21a-279 (a) (1) and possession of a controlled substance with intent to sell in violation of General Statutes (Rev. to 2017) § 21a-278 (b). On June 15, 2017, the defendant was charged with violation of probation on the basis of this arrest as well as two incidents in which he failed to report to the Office of Adult Probation.

The trial court held a hearing on the violation of probation charge on February 5, 2018. At the hearing, Joseph Mena, the defendant's probation officer, testified that the defendant had failed to report to the Office of Adult Probation on October 15, 2015, and July 7, 2016. These instances were recorded as "no call, no-show," meaning that the defendant neither notified his probation officer that he was not going to report nor followed up after the missed appointment. Mena further testified that the Office of Adult Probation did not initiate violation of probation proceedings solely on the basis of these failures to report.[3]

Joseph Halt, who was employed as a police officer with the city of New Britain in 2017, testified regarding the circumstances of the defendant's arrest on April 26, 2017. Halt testified that, on that date, he and Larry Smith, a detective, conducted surveillance of an apartment building located at 59 Daly Avenue in New Britain. The surveillance was undertaken because of information received from a confidential informant that an individual nicknamed J, later identified as Jeremy Lawrence, was selling crack cocaine from his apartment on the first floor of 59 Daly Avenue.[4] While conducting

[3] On cross-examination, Mena acknowledged that two failures to report in a two and one-half year period was "not bad."

[4] Halt testified that another police officer, Detective Kiely, received the information from the confidential informant. The defendant objected on the basis that this evidence constituted inadmissible hearsay. The trial court overruled the objection. As discussed in part II of this opinion, we conclude that the court properly admitted the evidence regarding information received from the confidential informant.

the surveillance, Halt observed a 2013 black Toyota Camry pull up to the building. A passenger got out of the vehicle and went into the building. The passenger exited the building within five minutes and returned to the vehicle. Halt testified that, on the basis of his training and experience, such behavior was indicative of possible street sales or narcotic sales.

Halt testified that after the passenger returned to the vehicle, the car began to drive away, and he and Smith followed it. After observing two motor vehicle violations, they stopped the vehicle. Once the vehicle had pulled over, Smith approached the driver's side and Halt approached the passenger side. As Halt approached the vehicle, he observed the driver, later identified as Sean Jackson, Sr., the defendant's father (Jackson), shifting in his seat. When Halt and Smith asked the occupants of the vehicle where they were coming from, the passenger, later identified as the defendant, explained that they had come from Hartford to visit J. Upon inquiry, the defendant did not explain why his visit with J was so brief. Jackson indicated that he had just dropped off his son and they were on their way back. Smith asked the defendant to exit the vehicle so that he and Jackson could be interviewed separately. After the defendant exited the vehicle, Halt observed Jackson reaching between the seat and the center console. Halt also observed that Jackson had a pocketknife on his right hip, which Jackson handed to Halt upon request.

After Jackson handed the pocketknife to Halt, Halt observed Jackson reaching for the center console again. Halt asked Jackson to exit the vehicle and, once he had done so, Halt searched that area of the vehicle and found an "untied bag with [an] off-white, rock-like substance." A field test of the substance revealed the presence of cocaine, later determined to weigh 1.9 grams. The area where the substance was found in the vehicle was "within an arm's reach" of the defendant. The

police also found a razor blade in a small compartment of the vehicle between the driver's seat and the door. Again, on the basis of his training and experience, Halt testified that 1.9 grams of crack cocaine would be split up by using a razor blade or some sort of sharp object.

Neither the defendant nor Jackson claimed ownership of the cocaine. They both were arrested for possession of narcotics and possession of narcotics with intent to sell. Halt testified that the defendant and Jackson were arrested because they both had constructive possession of the cocaine, which was "well within both of their reach." The defendant had $672 in various denominations in his possession at the time of his arrest. The money was divided and the defendant had $75 in one pocket and $595 in another pocket.[5] The money was not in a wallet. Halt testified that this would be indicative of a very quick sale and departure from the location. Jackson, who had numerous prior convictions for drug related offenses, was in possession of $4895 at the time of his arrest.

Ann Louise Lennon, a secretary with Connecticut Media House, a marketing company, next testified regarding the defendant's employment. According to Lennon, the defendant was employed by Connecticut Media House in April, 2017, and worked approximately twenty hours per week depending on the needs of the business. Lennon testified that the defendant earned minimum wage plus a commission.

At the conclusion of the hearing, the court found that the defendant had violated his probation as to both grounds. As to the first ground, the court found that the defendant had violated his probation by failing to report to the Office of Adult Probation on October 15, 2015, and July 7, 2016, without good cause. As to the

[5] Although Halt testified that the defendant had $672 in his possession at the time of his arrest, the record is unclear whether he had $670 or $672.

second ground, the court found that the defendant knowingly possessed crack cocaine and possessed it with intent to sell.[6] The court thereafter revoked the defendant's probation and sentenced him to six years of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court erred in finding that he violated his probation, as the evidence was insufficient to prove constructive possession of the narcotics that formed the basis for his April 26, 2017 arrest. He also argues that the two incidents in which he failed to report to the Office of Adult Probation were "nonviolations in the eyes of his probation officer." We will address these claims in turn.

[6] In its decision, the court stated: "[O]n April 26, 2017, in New Britain, the defendant, having driven from Hartford, entered 59 Daly Avenue for between two and five minutes, visited the residence of a reputed crack dealer and returned to a car driven by the defendant's father, who himself has a history of narcotics violations.

"The defendant, himself, is not drug dependent. The defendant, when stopped, had $672 in his pockets in his possession and that is separate from his wallet, a reliable indicia of a quick drug sell. The evidence indicates the defendant's legitimate employment at that time, the only established legitimate employment, would garner an income of approximately $220 a week.

"The police found 1.9 grams of crack cocaine within the car as well as a razor blade with cocaine residue. Now, the latter was on the father's side of the car, the father being the driver. Now, the former was adjacent to the console on the driver's side of the console but within reach of the defendant.

"Now more importantly, it is a reasonable inference now that the defendant in leaving the car, visiting his friend Jeremy for a very brief period of time, Jeremy being a reputed crack dealer, and returning to the car transported crack cocaine.

"In doing so, he knowingly possessed crack cocaine and possessed it with an attempt to deliver constituting sale within the meaning of [General Statutes (Rev. to 2017) § 21a-278 (b)]. The possession by itself, of course, is a violation of . . . [§] 21a-279.

"So there is a violation of the probation on both of those grounds using the standard of preponderance of the evidence, which is, of course, a lower standard than beyond a reasonable doubt."

We begin our analysis by setting forth the applicable standard of review. "[T]he purpose of a probation revocation hearing is to determine whether a defendant's conduct constituted an act sufficient to support a revocation of probation . . . rather than whether the defendant had, beyond a reasonable doubt, violated a criminal law. The proof of the conduct at the hearing need not be sufficient to sustain a violation of criminal law. . . . Thus, *a probation violation need only be proven by a preponderance of the evidence*. . . .

"A violation of probation hearing is comprised of an evidentiary phase and dispositional phase. . . . In the evidentiary phase, [a] factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made. . . . In the dispositional phase, [i]f a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Dunbar*, 188 Conn. App. 635, 640–41, 205 A.3d 747, cert. denied, 331 Conn. 926, 207 A.3d 27 (2019).

With respect to the evidentiary phase of a revocation proceeding, "[t]o support a finding of probation violation, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. . . . In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . This court may reverse the trial court's initial factual determination that a condition of probation has been violated only if we determine that such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling. . . . A fact is more probable than not when it is supported by a fair preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *Walcott*, 184 Conn. App. 863, 871, 196 A.3d 379 (2018).

We first consider whether the evidence was sufficient to support the finding of a violation of probation on the basis of the defendant's arrest for drug related offenses on April 26, 2017. "[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . Where . . . the contraband is not found on the defendant's person, the state must proceed on the alternat[ive] theory of constructive possession, that is, possession without direct physical contact. . . . Where the defendant is not in exclusive possession of the [place] where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control over them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . [T]he state had to prove that the defendant, and not some other person, possessed a substance that was of narcotic character with knowledge both of its narcotic character and the fact that he possessed it." (Internal quotation marks omitted.) *State* v. *Crewe*, 193 Conn. App. 564, 570–71, 219 A.3d 886, cert. denied, 334 Conn. 901, 219 A.3d 800 (2019). "To mitigate the possibility that innocent persons might be prosecuted for . . . possessory offenses . . . it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband." (Internal quotation marks omitted.) *State* v. *Davis*, 84 Conn. App. 505, 510, 854 A.2d 67, cert. denied, 271 Conn. 922, 859

A.2d 581 (2004). "While mere presence is not enough to support an inference of dominion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime." (Internal quotation marks omitted.) *State* v. *Williams*, 110 Conn. App. 778, 785–86, 956 A.2d 1176, cert. denied, 289 Conn. 957, 961 A.2d 424 (2008).

The defendant relies primarily on *State* v. *Fermaint*, 91 Conn. App. 650, 881 A.2d 539, cert. denied, 276 Conn. 922, 888 A.2d 90 (2005), an appeal from the judgment of violation of probation, in support of his claim that the evidence was insufficient to prove that he had constructive possession of the narcotics found in the vehicle. He argues that the evidence in that case, which was held not to be sufficient, had greater weight than that offered in the present case.[7] Specifically, the defendant argues that, in *Fermaint*, the confidential informant provided the identity of the suspected drug dealer

[7] "In *Fermaint*, the police received a tip from a confidential informant that the owner of a vehicle possessed crack cocaine and that she was accompanied by two males, one of whom the informant identified as 'Hector.' . . . After locating and stopping the vehicle, officers observed the occupants of the vehicle engaging in furtive movements, including the defendant's bending from the [backseat] toward the front seat passenger. . . . As one officer approached, the front seat passenger was observed putting something in her pants. . . . An officer observed several crumbs of a rock like substance, which later tested positive for cocaine, on the [backseat] next to the defendant. . . . The officer testified that it was possible that the defendant could have sat in the [backseat] without noticing the crumbs. . . . A green leafy substance, later found to be marijuana, was found in the front carpet area. . . . A plastic bag containing a large rock like substance, which tested positive for cocaine, and $120 were found on the person of the front passenger. . . . An address book and $2 were found on the person of the defendant, but no drugs. . . . This court reversed the trial court's judgment revoking the defendant's probation. . . . It held that the minimal nexus between the defendant and the drugs, along with the perhaps ambiguous movements observed by the officers, was insufficient to establish constructive possession of a narcotic substance." (Citations omitted.) *State* v. *Crewe*, supra, 193 Conn. App. 574–75.

and the vehicle in which she and others were driving; in the present case, by contrast, the confidential informant indicated only that someone named J was selling drugs in the apartment building but did not identify the defendant or his father. The defendant points out that in *Fermaint*, the police observed the defendant making furtive movements as they approached the vehicle, while in the present case, although Jackson made furtive movements, the police did not observe the defendant making any such movements. The defendant also contends that there was a physical barrier that partially blocked his access to the location of the drugs and that the paraphernalia and a majority of the currency were inaccessible to him. He notes that he did not make any incriminating statements to the officers and he did not own the vehicle in which the cocaine was found. He points out that no DNA or fingerprint analysis is available in this case. Finally, the defendant argues that the court's finding that he had a weekly income of $220 was clearly erroneous in that it conflicted with testimony regarding additional hours that he might have worked as well as commissions that he received.

In *State* v. *Crewe*, supra, 193 Conn. App. 574, an appeal from the judgment of conviction of possession of a narcotic substance, the defendant also relied primarily on *State* v. *Fermaint*, supra, 91 Conn. App. 650, to support his contention that the evidence presented at trial was insufficient to establish that he was in constructive possession of narcotics at the time of his arrest. In considering the defendant's argument, we noted that "[r]eview of a claim of insufficient evidence is necessarily fact specific and . . . the evaluation of the strength of inferences involves an exercise of judgment." *State* v. *Crewe*, supra, 575. We noted that, although some factors, viewed in a vacuum, may militate against a finding of constructive possession, the fact finder reasonably could have inferred, on the basis

of the totality of the circumstances, that the defendant knew of the presence of the narcotics and that he exercised dominion and controI over them. Id., 574. We also emphasize that, unlike appeals from criminal judgments of convictions for which the state is required to prove possession beyond a reasonable doubt, in a revocation of probation case, the state is required to prove a violation only by a preponderance of the evidence. *State* v. *Walcott*, supra, 184 Conn. App. 876.

With these principles in mind, we conclude that the state presented the court with sufficient evidence of incriminating circumstances to buttress an inference that the defendant constructively possessed the narcotics that formed the basis for his arrest on April 26, 2017. See *State* v. *Crewe*, supra, 193 Conn. App. 575. Specifically, the evidence established that the police received information that an individual named J was selling crack cocaine from his apartment building. The police conducted surveillance and observed Jackson, who had a history of drug related offenses, drive up to the building. The defendant, who was the passenger in Jackson's vehicle, went into the building and returned within five minutes. The defendant's behavior was consistent with "possible street sales or narcotic sales." The defendant indicated that they had come from Hartford to visit J. Upon inquiry, however, he did not explain why the visit was so short.

After Jackson handed his pocketknife to the police, he reached over to the center console, where the police found the open bag of narcotics. The defendant was "within arm's reach" of the narcotics. At the time of his arrest, the defendant had $672 in his possession. The money was not in a wallet; rather, it was divided into two pockets, which behavior is "indicative of a very quick sale and then leaving the location."[8] The

[8] The defendant contends that the court's calculation of his income as $220 per week is clearly erroneous and omits the fact that he may have worked additional hours and earned commissions. We conclude that the

police also found a razor blade in the vehicle. Halt testified that the amount of cocaine that was found in the vehicle would be split up using a razor blade or some sort of sharp object. On the basis of the foregoing, the court reasonably could have inferred that Jackson drove the defendant to the apartment building and, once they arrived, the defendant went inside to make the purchase. The court then reasonably could have inferred that once he was done, the defendant returned to the vehicle and placed the narcotics on the front seat with the intention that he and Jackson would use them or distribute them. Giving every reasonable presumption in favor of the trial court's ruling; see *State* v. *Walcott*, supra, 184 Conn. App. 871; we cannot conclude that the evidence was insufficient to prove that the defendant violated his probation by committing a crime on April 26, 2017.

We next consider whether the evidence was sufficient to support the court's conclusion that the defendant violated his probation on the basis of the defendant's failure to report to the Office of Adult Probation on two occasions. It is undisputed that the defendant failed to report to the Office of Adult Probation on October 15, 2015, and July 7, 2016. According to the defendant, these failures were de minimis and "would not generate a violation of probation." The defendant's argument overlooks the fact that "[a] critical element of probation is the supervisory role of the state. . . . That role cannot be diluted by a claim that one or more of the conditions were not substantial. All of the conditions at issue related to the state's interest in supervising the defendant, and were not, therefore, mere technical violations." (Internal quotation marks omitted.) *State* v.

court nonetheless reasonably could have inferred that the $672 that the defendant had in his possession upon arrest was a product of the sale of drugs rather than his employment. "[O]ur courts regularly have regarded a criminal defendant's quantum of cash as circumstantial evidence of his intent to sell drugs." *State* v. *Garcia*, 108 Conn. App. 533, 540, 949 A.2d 499, cert. denied, 289 Conn. 916, 957 A.2d 880 (2008).

Johnson, 75 Conn. App. 643, 656, 817 A.2d 708 (2003); id. (declining to hold that one violation of condition of probation was merely " 'minor transgression' "). We, therefore, conclude that the evidence was sufficient to support the finding of a violation of probation on the basis of the two instances in which the defendant failed to report to the Office of Adult Probation.

II

The defendant next claims that the court erred in admitting hearsay testimony during the probation revocation hearing. He contends that the testimony was uncorroborated, unreliable, not admissible under any hearsay exception and admitted in violation of his due process rights. The state counters that our review of the defendant's due process claim is precluded by *State* v. *Shakir*, 130 Conn. App. 458, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011), and its progeny, and that the hearsay evidence at issue was sufficiently reliable for admission. We agree with the state.

The following facts are necessary for the resolution of this claim. At the probation revocation hearing, Halt testified that the surveillance at 59 Daly Avenue was based on information that Detective Kiely, another member of his unit, had received from a confidential source. The defendant objected on the basis that this testimony was hearsay. The court indicated that hearsay can be admissible in a violation of probation hearing provided there are some indicia of reliability. Halt then testified that this information came from another police officer who had received it from a confidential source. When the court asked whether the informant was deemed reliable by the other police officer, Halt answered: "Correct or we wouldn't have used it." The court then overruled the defendant's objection and Halt testified that Kiely had received information from a confidential source that an individual nicknamed J was

selling crack cocaine from the first floor of 59 Daly Avenue.[9] Halt further testified that Kiely was able to confirm that J was Jeremy Lawrence who resided on the first floor of 59 Daly Avenue.

During cross-examination, Halt indicated that he did not investigate Lawrence's criminal history prior to or during the surveillance. The defendant then introduced into evidence, over the state's objection, a copy of Lawrence's criminal record, which contained no criminal history of narcotics violations. Halt acknowledged on cross-examination that confidential sources are not always the most reliable sources and they might give erroneous information based on personal bias.[10] The

[9] Halt testified as follows:

"[The Prosecutor]: And why is it that you came to start surveillance around 59 Daly Avenue in New Britain?

"[Halt]: Another member of our unit, Detective Kiely, had received information from a confidential source—

"[Defense Counsel]: I'm going to object, Your Honor. It's hearsay.

"[The Prosecutor]: Hearsay's admissible at a violation of probation hearing, Your Honor.

"The Court: Yeah, hearsay can be admissible, provided it's—there's some indicia of reliability. You got it from a confidential information source. Is that correct?

"[Halt]: This came from another police officer.

"The Court: Another police officer.

"[Halt]: Who had gotten it from a confidential source.

"The Court: Okay. Do you know whether that [confidential informant] was deemed reliable by the other police officer?

"[Halt]: Correct or we wouldn't have used it.

"The Court: All right. I will overrule the objection.

"[The Prosecutor]: And that was going to be my next question, Your Honor.

"The Court: All right. Go ahead.

"[The Prosecutor]: Thank you for asking. . . . So after you—what information did you obtain from Officer—or Detective Kiely?

"[Halt]: That the—there was [a] gentleman that went by the nickname J who was selling crack cocaine from the first floor of 59 Daly Avenue."

[10] Halt testified as follows:

"[Defense Counsel]: Now, Officer, let's face it, confidential sources are hardly the most reliable people in the world, isn't that correct?

"[Halt]: I would say it depends on what—what we're talking about.

"[Defense Counsel]: Good point. Very often they're desperate people. They've been arrested. They have a long criminal history. They're trying to curry favor with the police department in some respect. Correct?

"[Halt]: That's correct.

defendant contends that there was no evidence regarding how Kiely knew who Lawrence was, where Lawrence resided in the apartment building, or that Lawrence was a drug dealer of any kind. Neither Kiely nor the confidential informant testified at the hearing.[11]

A

We first consider the defendant's claim that Halt's testimony was admitted in violation of his due process rights. The defendant acknowledges that he did not raise a due process violation in his objection to the admission of the evidence. In the event that we should find the issue inadequately preserved, the defendant requests review of this claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015), or, alternatively, reversal under the plain error doctrine, codified at Practice Book § 60-5. We conclude that the defendant's claim was not preserved, that it is not reviewable pursuant to *Golding* and that the claimed error is not so obvious and egregious that it requires reversal under the plain error doctrine.

"Pursuant to *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless

"[Defense Counsel]: But they will lie. Sometimes confidential sources give you erroneous information based upon their personal bias. It has happened, hasn't it?

"[Halt]: Correct."

[11] In his initial appellate brief the defendant challenged the state's failure to present Kiely or the confidential informant as a live witness. In his reply brief, however, the defendant acknowledges that his hearsay claim is confined to the statements of Kiely.

error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . [U]nless the defendant has satisfied the first *Golding* prong, that is, unless the defendant has demonstrated that the record is adequate for appellate review, the appellate tribunal will not consider the merits of the defendant's claim." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Tucker*, 179 Conn. App. 270, 279, 178 A.3d 1103, cert. denied, 328 Conn. 917, 180 A.3d 963 (2018).

"Probation revocation proceedings fall within the protections guaranteed by the due process clause of the fourteenth amendment to the federal constitution . . . . Probation itself is a conditional liberty and a privilege that, once granted, is a constitutionally protected interest . . . . The revocation proceeding must comport with the basic requirements of due process because termination of that privilege results in a loss of liberty. . . . [T]he minimum due process requirements for revocation of [probation] include written notice of the claimed [probation] violation, disclosure to the [probationer] of the evidence against him, the opportunity to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses in most instances, a neutral hearing body, and a written statement as to the evidence for and reasons for [a probation] violation. . . . Despite that panoply of requirements, a probation revocation hearing does not require all of the procedural components associated with an adverse criminal proceeding." (Citation omitted; internal quotation marks omitted.) *State* v. *Dunbar*, supra, 188 Conn. App. 650.

"In *State* v. *Shakir*, [supra, 130 Conn. App. 467], we noted that the due process safeguards are codified in Federal Rule of Criminal Procedure 32.1 and include 'an opportunity to . . . question any adverse witness unless the court determines that the interest of justice

does not require the witness to appear . . . .' We further explained that the court must balance the defendant's interest in cross-examination against the state's good cause for denying the right to cross-examine. . . . Specifically, we cited to case law from the United States Court of Appeals for the Second Circuit and stated: 'In considering whether the court had good cause for not allowing confrontation or that the interest of justice [did] not require the witness to [appear] . . . the court should balance, on the one hand, the defendant's interest in confronting the declarant, against, on the other hand, the government's reasons for not producing the witness and the reliability of the proffered hearsay.' " (Citation omitted.) *State* v. *Polanco*, 165 Conn. App. 563, 570–71, 140 A.3d 230, cert. denied, 322 Conn. 906, 139 A.3d 708 (2016).

"This court has determined, however, that where the defendant does not request that the court conduct the *Shakir* balancing test, or make a good cause finding, the record is inadequate for review of a due process claim under the first prong of *Golding*." *State* v. *Tucker*, supra, 179 Conn. App. 281–82, citing *State* v. *Shakir*, supra, 130 Conn. App. 468; see also *State* v. *Randy G.*, 195 Conn. App. 467, 475, n.3, 225 A.3d 702, cert. denied, 335 Conn. 911, A.3d (2020); *State* v. *Dunbar*, supra, 188 Conn. App. 652; *State* v. *Esquilin*, 179 Conn. App. 461, 477–78, 179 A.3d 238 (2017); *State* v. *Polanco*, supra, 165 Conn. App. 576.

In the present case, the defendant failed to request that the court conduct a balancing test pursuant to *State* v. *Shakir*, supra, 130 Conn. App. 467, when Halt testified that Kiely had received information from a confidential source. The defendant, rather, simply stated: "I'm going to object, Your Honor. It's hearsay." The state had no notice of the defendant's due process claim and, accordingly, did not present evidence regarding its reasons for not producing Kiely at the hearing. The defendant, therefore, failed to sustain his burden of providing this

court with an adequate record to review his due process claim. "In this circumstance, the state was not responsible for this evidentiary lacunae. It would be patently unfair to address the defendant's due process claim on the basis of this record." *State* v. *Polanco*, supra, 165 Conn. App. 575. Accordingly, we decline to review the defendant's unpreserved due process claim on the basis of an inadequate record.[12]

The defendant similarly cannot prevail under the plain error doctrine. "[T]he plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . [T]he plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly." (Internal quotation

[12] The defendant contends that the *Shakir* line of cases is distinguishable and that the record in the present case is sufficient, clear and unambiguous as to whether a constitutional violation has occurred. He contends that the difficulties for the state in calling the witnesses in *Shakir* and its progeny were obvious while in the present case, there is no acceptable justification for the state not to call a local detective to testify on a statement that was vital to the state's case. We disagree and conclude that the defendant in this case has failed to sustain his burden of providing this court with an adequate record to review his due process claim.

The defendant also argues that the *Shakir* standard should be modified to allow for *Golding* review of unpreserved *Shakir* claims. We previously denied the defendant's motion for consideration of this matter en banc to consider whether to modify *Shakir*. "To the extent that the defendant's argument suggests that our [holding] in *Shakir* . . . should be overruled as conflicting with United States and Connecticut Supreme Court precedent, that is not within the province of a three judge panel of the Appellate Court. We note that this court's policy dictates that one panel should not, on its own, [overrule] the ruling of a previous panel. The [overruling] may be accomplished only if the appeal is heard en banc." (Internal quotation marks omitted.) *State* v. *Tucker*, supra, 179 Conn. App. 279 n.4.

marks omitted.) *State* v. *Tucker*, supra, 179 Conn. App. 282. On the basis of our review of the record, we conclude that the defendant has not demonstrated an error so obvious that it requires reversal under the plain error doctrine.

B

We next consider the defendant's claim that the court abused its discretion in admitting Kiely's hearsay statements because the statements were unreliable and uncorroborated. We conclude that the court did not abuse its discretion in admitting the hearsay statements.

"It is well settled that probation revocation proceedings are informal and that strict rules of evidence do not apply to them. . . . Hearsay evidence may be admitted in a probation revocation hearing if it is relevant, reliable and probative. . . . At the same time, [t]he process . . . is not so flexible as to be completely unrestrained; there must be some indication that the information presented to the court is responsible and has some minimal indicia of reliability." (Internal quotation marks omitted.) *State* v. *Megos*, 176 Conn. App. 133, 146, 170 A.3d 120 (2017).

"Regarding challenges to the trial court's evidentiary rulings, our standard of review is that these rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice. . . . In reviewing claims that the trial court abused its discretion, great weight is given to the trial court's decision and every reasonable presumption is given in favor of its correctness. . . . We will reverse the trial court's ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) Id., 147.

The defendant contends that no corroborating evidence was offered to support Kiely's statement to Halt and that it was unreliable. We disagree. At the hearing,

Halt testified, over objection, that Kiely had received information from a confidential source that Lawrence sold crack cocaine from the first floor of 59 Daly Avenue. When the court questioned Halt regarding whether the informant was deemed reliable, Halt responded: "Correct or we wouldn't have used it." The court was not presented with any evidence casting doubt on the reliability of Kiely's statement to Halt. During cross-examination, defense counsel had the opportunity to question Halt regarding why Kiely had deemed the information from the confidential informant reliable but did not do so. Defense counsel, rather, asked questions about the reliability of confidential informants in general. The court, therefore, was presented with testimony that contained "some minimal indicia of reliability." (Internal quotation marks omitted.) *State* v. *Megos*, supra, 176 Conn. App. 146. We conclude, therefore, that the court did not abuse its discretion in admitting the statement of Halt regarding the information that he had received from Kiely.

III

The defendant's final claim is that the court abused its discretion in imposing a sentence of six years of incarceration. In support of this claim, the defendant contends that he was doing well on probation, the evidence was insufficient to establish possession of narcotics, and the remaining violations were de minimis.[13] We disagree.

"If the trial court determines that the evidence has established a violation of a condition of probation, then

[13] In his reply brief, the defendant indicates that the principal reason for raising this claim is that, if this court concludes that the trial court erroneously found a violation of probation on the basis of the narcotics offenses, a remand would be necessary for resentencing based only on the defendant's failures to appear. As we conclude in part I of this opinion, however, the evidence was sufficient to support the court's conclusion that the defendant violated his probation on the basis of the narcotics offenses.

it proceeds to the second component of probation revocation, the determination of whether the defendant's probationary status should be revoked. On the basis of its consideration of the whole record, the trial court may continue or revoke the sentence of probation . . . [and] . . . require the defendant to serve the sentence imposed or impose any lesser sentence. . . . In making this second determination, the trial court is vested with broad discretion." (Internal quotation marks omitted.) *State* v. *Sherrod*, 157 Conn. App. 376, 381–82, 115 A.3d 1167, cert. denied, 318 Conn. 904, 122 A.3d 633 (2015). "In determining whether to revoke probation, the trial court shall consider the beneficial purposes of probation, namely rehabilitation of the offender and the protection of society. . . . The important interests in the probationer's liberty and rehabilitation must be balanced, however, against the need to protect the public." (Internal quotation marks omitted.) *State* v. *Megos*, supra, 176 Conn. App. 149.

The record reveals that the trial court balanced the defendant's interests in liberty and rehabilitation against the need to protect the public. During the sentencing phase of the hearing, the court heard the testimony of Jerrica Vega, the defendant's girlfriend, who testified that the defendant was providing support for their four month old daughter and assistance to her as she recovered from a car accident. Vega testified that the defendant was "a great person, a good father." Although acknowledging that the defendant had been helpful to Vega, the court concluded that the defendant's behavior was "inimical to his own rehabilitation as well as the safety of the public" and that it did not believe that any further purpose could be served by continuing the defendant's probation. Specifically, the court expressed concern that, at the same time that the defendant was helping Vega, he was engaging in criminal activity while a suspended sentence of eight and one-half years remained outstanding. According to

the court, this demonstrated a "lack of appreciation for the consequences of further unlawful activity." On the basis of this record, we conclude that the court did not abuse its discretion in revoking the defendant's probation and imposing a sentence of six years of incarceration.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

TANYA STUBBS *v.* ICARE MANAGEMENT, LLC, ET AL.
(AC 42551)

Keller, Bright and Beach, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for employment discrimination pursuant to the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.) following the termination of her employment. The plaintiff, who was employed by the defendants as a certified nursing assistant (CNA), alleged that she was approved for unpaid leave by the defendants in order to undergo knee surgery but, while she was recovering from that surgery, she was terminated for failing to report to work and for failing to report her absences on two dates that occurred approximately one week before her surgery. The plaintiff alleged that prior to these absences, she received a phone call from one of the defendants' employees, who told her not to report to work on those two dates, as the defendants were overbooked with CNAs. Since her

[14] To the extent that the defendant claims, however, that the sentence imposed by the trial court was excessive, this claim is not reviewable on appeal and should be made through the sentence review process pursuant to General Statutes § 51-195. See *State* v. *Wells*, 112 Conn. App. 147, 160 n.3, 962 A.2d 810 (2009) ("To the extent that the defendant also claims that the five year sentence imposed by the court was excessive, we deem such argument to be misplaced. An appeal following a revocation proceeding is not the proper forum in which to challenge the length of such sentence."), citing *State* v. *Fagan*, 280 Conn. 69, 107 n.24, 905 A.2d 1101 (2006), cert. denied, 549 U.S. 1269, 127 S. Ct. 1491, 167 L. Ed. 2d 236 (2007); see also *State* v. *Ricketts*, 140 Conn. App. 257, 264 n.5, 57 A.2d 893 ("to the extent that the defendant challenges the length of the sentence, we cannot review such claims because those claims should be made through the sentence review process under . . . § 51-595"), cert. denied, 308 Conn. 909, 61 A.3d 531 (2013).

surgery, the plaintiff has not sought work as a CNA, because she believed she has not yet recovered sufficiently to perform the essential functions required of that position. The defendants filed a motion for summary judgment and in support thereof, submitted various documents including the defendants' attendance policy, portions of the plaintiff's sworn deposition, disciplinary reports warning the plaintiff about her absenteeism and the certified letter sent to the plaintiff, which terminated her employment. The trial court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Held*:

1. The trial court erred in rendering summary judgment in favor of the defendants as to the plaintiff's discrimination claims, as there was a genuine issue of material fact as to whether the termination of the plaintiff's employment was pretextual and as to whether, at the time her employment was terminated, the plaintiff was qualified to perform the essential functions of her job, with a reasonable accommodation of a leave of absence: the record was devoid of any evidence regarding how the defendants treated employees similarly situated to the plaintiff who had sought leave to accommodate a disability, and a jury reasonably could conclude that the defendants told the plaintiff not to report to work on the dates at issue in order to create a pretext so that they would have a ground to terminate her employment independent of her disability and of her request for a leave of absence accommodation; the court's conclusion that the plaintiff failed to establish a prima facie case of discrimination based on the material fact that the plaintiff was not qualified to perform the essential functions of her job was incorrect, as it was based on evidence of the plaintiff's ability to perform after her employment was terminated, the determination of whether the defendant was qualified, with or without an accommodation, must be made at the time of termination.
2. The trial court erred in rendering summary judgment for the defendants on the plaintiff's reasonable accommodation claims, as there was at least a genuine issue of material fact as to whether the plaintiff could perform the essential functions of her job with an accommodation of a leave of absence to have and recover from surgery; the court incorrectly focused on the plaintiff's accommodations after the defendants terminated her employment, had the defendants terminated the plaintiff's employment at the end of the three month leave of absence, her inability to perform the essential functions of her job at that time would have been highly relevant, and likely to be dispositive of her claim, however, the defendants terminated her employment shortly after her leave of absence had begun and thus, it was expected, although not certain, that the plaintiff would have been able to return to work following the accommodation of a leave of absence.
3. This court declined to review the plaintiff's claims alleging retaliation, as those claims had been inadequately briefed; the brief was devoid of any discussion of the elements of retaliation, the law governing such, or the court's analysis of the plaintiff's claims.

Argued February 5—officially released June 30, 2020

Procedural History

Action to recover damages for, inter alia, alleged employment discrimination, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the trial court, *S. Richards*, *J.*, granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part; further proceedings.*

Zachary T. Gain, with whom, on the brief, was *James V. Sabatini*, for the appellant (plaintiff).

Rachel V. Kushnel, for the appellees (defendants).

Opinion

BRIGHT, J. The plaintiff, Tanya Stubbs, appeals from the summary judgment rendered by the trial court in favor of the defendants, ICare Management, LLC (ICare), and Meriden Care Center, LLC (Meriden), on the plaintiff's complaint, which alleged violations of the Connecticut Fair Employment Practices Act, General Statutes § 46a-51 et seq. In particular, the plaintiff alleged that the defendants terminated her due to her disability, failed to provide her with a reasonable accommodation for her disability, and retaliated against her for requesting a reasonable accommodation.[1] On appeal, the plaintiff claims that the court erred in determining that there were no genuine issues of material fact as to whether (1) the defendants' stated reason for their termination of the plaintiff's employment was pretextual and as to whether, at the time her employment was terminated, she was qualified, with or without a reasonable accommodation, to perform the essential functions of her job, and (2) the defendants failed to provide the plaintiff with a reasonable accommodation.

[1] In her complaint, the plaintiff also brought one count of "aiding and abetting" against ICare. She raises no claim of error on appeal in regard to the court rendering judgment in favor of ICare on that count.

Because there are genuine issues of material fact as to the plaintiff's claims of discrimination and failure to accommodate, we reverse the judgment of the trial court as to those claims. We affirm the trial court's judgment as to the plaintiff's claims of retaliation because she has failed to brief the claims and, therefore, has abandoned them.

The following facts, viewed in the light most favorable to the plaintiff, and procedural history are relevant to our analysis of the plaintiff's claims on appeal. Meriden is a skilled nursing facility that does business as Silver Springs Care Center; ICare manages Silver Springs Care Center. The plaintiff began working for the defendants in April, 2015, as a certified nursing assistant (CNA). Prior to being hired by the defendants, the plaintiff had worked as a licensed CNA since shortly after she graduated from high school in 1982. When she was hired by the defendants, the plaintiff was able to perform the essential functions of her job, which included pushing residents in wheelchairs, pushing medical carts, and direct patient care, including feeding and assisting with ambulation. In June, 2015, the defendants gave the plaintiff a positive performance review. The review did not identify any function of her job that the plaintiff could not perform. In fact, the evaluation stated that the plaintiff met the standards for all job requirements, except for attendance, as to which the evaluation stated that there was one issue, and that the plaintiff had taken actions to ensure that the issue did not arise again. The evaluation also described the plaintiff as an excellent employee.

The plaintiff does have a physical disability[2] and had a history of knee problems, which resulted in multiple surgeries on both of her knees, before she began working for the defendants. Nevertheless, she was experienc-

[2] It is not disputed that the plaintiff has a condition known as Turner Syndrome.

ing no difficulties with her knees when she was hired by the defendants. At some point while working for the defendants, the plaintiff began experiencing severe pain in both knees. Consequently, she requested that her work hours be reduced from twenty hours per week to twelve hours per week. The defendants agreed. By the end of 2015, the plaintiff informed the defendants that she needed to have surgery on her right knee. She requested leave under the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq., which request the defendants denied because the plaintiff had not worked for the defendants long enough to qualify for such leave. The defendants informed the plaintiff, however, that she could apply for an unpaid leave of absence, which she did. The defendants approved the plaintiff's unpaid leave of absence, to begin on February 10, 2016, so that the plaintiff could have and recover from her knee surgery. It was anticipated that the plaintiff would need approximately three months to recuperate.

While the plaintiff was recovering from surgery, she received a phone call from an employee of one of the defendants informing her that her employment was being terminated for failing to report to work and for failing to call to report her absence, which the defendants termed a "no call no show," on February 6 and 7, 2016.[3] Thereafter, the plaintiff received a letter from Gail Mari, an employee of Meriden, confirming the plaintiff's termination from employment. The letter stated

[3] The record is unclear as to the date of the plaintiff's surgery. The plaintiff testified at her deposition that she could not recall the exact date of her surgery, but it was "something like" February 10, 2016. She further testified that she was verbally informed of her termination by a phone call she received while still under the effects of anesthesia. Finally, a February 17, 2016 letter from one of Meriden's employees stated that it was confirming her telephone discussion with the plaintiff that day. Thus, it appears from the record that the plaintiff's surgery happened no earlier than February 10, 2016, when her leave of absence started, and no later than February 17, 2016.

that the plaintiff's employment was terminated "due to second occurrence of no call no show activity on [February 6 and 7, 2016]."[4] The defendants' "Daily eCentral Facility Call Out/Replacement Log," submitted by the plaintiff in opposition to the defendants' motion for summary judgment, includes an entry for the plaintiff, dated February 6, 2016, stating that the plaintiff was a "no call no show" on that date. The log does not contain an entry for the plaintiff for February 7, 2016. In addition, no party submitted an affidavit or any other evidence explaining the log, when it was completed, or by whom it was completed.

The plaintiff testified at her deposition that she was not a no call no show on February 6 and 7, 2016. She testified that she had received a phone call from one of the defendants' employees, whom she could not identify, telling her not to report to work on those dates because the defendants were overbooked with CNAs. She further testified that the defendants "constantly" overbooked employees and that she and other CNAs were called quite often and told not to report to work.

[4] Mari's letter does not identify the first no call no show occurrence. The evidence submitted in support of the defendants' motion for summary judgment includes three corrective action records relating to the plaintiff's attendance. Only one of the records, dated December 17, 2015, indicates that the plaintiff was a no call no show. That record reflects that the plaintiff received a one day suspension due to being a no call no show on December 3, 2015. The corrective action record prepared in connection with the plaintiff's termination also states that the plaintiff was a no call no show on December 3, 2015. The plaintiff disputes the accuracy of these records. She testified at her deposition that she had the day off on December 3, 2015, so she was not a no call no show on that date. She further testified that she was never suspended and noted that she did not sign the record where it calls for the employee's signature. On the line where the plaintiff would have signed, someone handwrote the words "via telephone." The plaintiff denied ever having such a phone call with an employee of one of the defendants about the December 3, 2015, alleged no call no show. Despite the plaintiff's deposition testimony, the defendants provided no affidavits from anyone who completed the record, who spoke to the plaintiff about the alleged no call no show, or who could confirm that the plaintiff, in fact, was suspended.

She also testified that she told the director of nursing, the assistant director, and some of the other CNAs that she had been told not to report to work on February 6 and 7, 2016. She identified the director of nursing as "Valerie something." According to the plaintiff, Valerie said that she would look into it. The defendants submitted no affidavit from Valerie or any other employee addressing the plaintiff's testimony that she was told not to report to work because Meriden was overbooked and that the plaintiff had reported the call to various employees of the defendants.

Although the plaintiff received clearance from her physician to return to work without restrictions on May 10, 2016, she has not sought work as a CNA. In fact, as of March 23, 2018, the date of her deposition, the plaintiff still believed that she had not recovered sufficiently to perform the essential functions of a CNA and she had no plans to return to that profession.

Following a January 31, 2017 release of jurisdiction notice from the Commission on Human Rights and Opportunities, the plaintiff, on March 25, 2017, commenced this action by service of process against the defendants. The plaintiff alleged the following causes of action against each defendant: disability discrimination (counts one and two), retaliation (counts three and four), failure to accommodate (counts five and six)—all in violation of General Statutes § 46a-60—and aiding and abetting against ICare.[5] The defendants responded with an answer and several special defenses.

On April 26, 2018, the defendants filed a motion for summary judgment on all counts of the plaintiff's complaint. In their motion, the defendants alleged that there were no disputed material facts, and that they were entitled to judgment as a matter of law because (1) the plaintiff could not establish a prima facie case to support any of her claims, and (2) her employment was

[5] See footnote 1 of this opinion.

terminated for a nondiscriminatory reason, namely, that she had failed to report to work on two scheduled days before her leave of absence without notifying them, in violation of their attendance policy. In support of their motion, the defendants submitted a memorandum of law, a portion of the plaintiff's sworn deposition, and various documents, including the defendants' attendance policy, disciplinary reports warning the plaintiff about her absenteeism and no call no shows, and Mari's February 17, 2016 certified letter that had been sent to the plaintiff by the defendants terminating her employment for "no call no show activity" on February 6 and 7, 2016.

The plaintiff objected to the defendants' motion, contending that there existed genuine issues of material fact. Attached to her memorandum of law in opposition to the defendants' motion for summary judgment was a portion of her deposition and various documents, including her request for leave, the defendants' "Daily eCentral Facility Call Out/Replacement Log," and the defendants' letter notifying her that her employment had been terminated "for cause."

Following a September 24, 2018 short calendar hearing, the court, on January 18, 2019, issued a memorandum of decision in which it granted the defendants' motion for summary judgment. After setting forth the applicable law governing the plaintiff's claims and the standard for summary judgment, the court concluded that the plaintiff had set forth sufficient, albeit scant, evidence showing that her employment was terminated "under circumstances giving rise to an inference of discrimination." Specifically, the court referred to the plaintiff's deposition wherein she testified that she had requested and been granted time off to have knee surgery, but, just a few days before she was scheduled to begin her leave of absence, the defendants told her that she did not have to report to work, specifically on the February 6 and 7, 2016, due to overstaffing, and thereafter wrote her up as a no call no show for those days,

using her nonattendance as a basis for the termination of her employment. The court also concluded, however, that the defendants had produced documents that demonstrated a legitimate nondiscriminatory reason for the termination of the plaintiff's employment, namely, that the plaintiff repeatedly had violated the defendants' absenteeism policy, and that the plaintiff had produced no evidence to indicate that the call she had received telling her not to report to work on February 6 and 7, 2016, was "motivated by illegal discriminatory bias." The court also focused on the fact that the plaintiff testified that she was treated the same as other employees while at work.

Additionally, the court concluded that the plaintiff could not establish a prima facie case of discrimination because she admitted in her deposition that she was not qualified for the position of CNA at the time she was terminated from her employment and that she has not been qualified since that time. As to the plaintiff's claim that the defendants failed to provide her with a reasonable accommodation, the court concluded that the plaintiff admitted that she had never requested an accommodation other than her medical leave, which the defendants granted. Insofar as the plaintiff argued that the defendants effectively denied her the accommodation of a leave of absence because they terminated the plaintiff's employment shortly after her leave commenced, the court concluded that the plaintiff readily admitted that she had not been able to perform the functions of her job since her surgery, with or without an accommodation. Finally, as to the plaintiff's claim of retaliation, the court concluded that because the defendants had advanced a nondiscriminatory reason for terminating the plaintiff's employment, namely, her repeated no call no shows, she could not establish a prima facie case of retaliation. Accordingly, the court rendered judgment in favor of the defendants. This appeal followed.

Initially, we set forth our standard of review. "The standard of review of a trial court's decision granting summary judgment is well established. 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. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The courts are in entire agreement that the moving party . . . has the burden of showing the absence of any genuine issue as to all the material facts . . . . 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 [nonmoving] party must present evidence that demonstrates the existence of some disputed factual issue. . . . Our review of the trial court's decision to grant the defendants' motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *Barbabosa* v. *Board of Education*, 189 Conn. App. 427, 436–37, 207 A.3d 122 (2019).

I

On appeal, the plaintiff claims that the court erred in rendering summary judgment on her disability discrimination claims because there are genuine issues of material fact as to whether the defendants' stated reason for its termination of the plaintiff's employment was pretextual and as to whether, at the time her employment was terminated, she was qualified, with or

without a reasonable accommodation, to perform the essential functions of her job. We agree with the plaintiff.

"Under the Connecticut Fair Employment Practices Act . . . employers may not discriminate against certain protected classes of individuals, including those who are physically disabled." *Desrosiers* v. *Diageo North America, Inc.*, 314 Conn. 773, 775, 105 A.3d 103 (2014). Section 46a-60 (b) (1) provides in relevant part: "It shall be a discriminatory practice . . . [f]or an employer . . . to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual's . . . physical disability . . . ."

"The term pretext is most often used in the context of evaluating claims of discrimination based on adverse employment action under the burden shifting analysis enumerated by the United States Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and adopted by this court in *Ford* v. *Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53–54, 578 A.2d 1054 (1990). Under this analysis, the employee must first make a prima facie case of discrimination. The employer may then rebut the prima facie case by stating a legitimate, nondiscriminatory justification for the employment decision in question. The employee then must demonstrate that the reason proffered by the employer is merely a pretext and that the decision actually was motivated by illegal discriminatory bias. *Craine* v. *Trinity College*, 259 Conn. 625, 637, 791 A.2d 518 (2002).

"In order to establish a prima facie case, the complainant must prove that: (1) he [was] in the protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) that the

adverse action occurred under circumstances giving rise to an inference of discrimination. . . . *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 400, 880 A.2d 151 (2005). We note, additionally, that [t]he [fact finder's] disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and . . . upon such rejection, [n]o additional proof of discrimination is required . . . . *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502, 511, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)." (Internal quotation marks omitted.) *Jackson* v. *Water Pollution Control Authority*, 278 Conn. 692, 705–706, 900 A.2d 498 (2006). "[T]o defeat summary judgment [however] . . . the plaintiff's admissible evidence must show circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination . . . ." (Internal quotation marks omitted.) *Taing* v. *Camrac, LLC*, 189 Conn. App. 23, 28, 206 A.3d 194 (2019).

A

We turn first to the court's conclusion that, although the plaintiff produced sufficient evidence to show that her employment "was terminated under circumstances giving rise to an inference of discrimination," she failed to present evidence sufficient to create a genuine issue of material fact that the defendants' stated reason for terminating the plaintiff was pretextual. "To prove pretext, the plaintiff may show by a preponderance of the evidence that [the defendant's] reason is not worthy of belief or that more likely than not it is not a true reason or the only true reason for [the defendant's] decision to [terminate the plaintiff's employment] . . . . Of course, to defeat summary judgment . . . the plaintiff

is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." (Citation omitted; internal quotation marks omitted.) *Taing* v. *Camrac, LLC*, supra, 189 Conn. App. 28–29. "A plaintiff may show pretext by demonstrating such weaknesses, implausibilities, inconsistencies, incoherences, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable [fact finder] could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." (Internal quotation marks omitted.) *Bombero* v. *Warner-Lambert Co.*, 142 F. Supp. 2d 196, 203 n.7 (D. Conn. 2000), aff'd 9 Fed. Appx. 38 (2d Cir. 2001).

The court correctly accepted, at the summary judgment stage, the plaintiff's sworn testimony that she was not a no call no show on February 6 and 7, 2016, but that she was told by the defendants not to report on those days. Nevertheless, the court found that there was no evidence that the plaintiff was treated differently than other employees, and, therefore, there was no evidence that the defendants' decision to terminate the plaintiff's employment was motivated by an illegal discriminatory bias.

The court's analysis misses the import of the plaintiff's claim. The plaintiff does not claim that she was discriminated against because of her disability while at work. Instead, her claim is that the defendants discriminated against her because she sought leave due to her disability. The record is devoid of any evidence, one way or the other, regarding how the defendants treated employees similarly situated to the plaintiff who sought leave to accommodate a disability. What the evidence, *viewed in the light most favorable to the plaintiff*, does reflect is that the plaintiff requested and was granted a leave of absence beginning on February 10, 2016, to

have surgery to correct knee pain that arose from her disability. The plaintiff submitted evidence that, four days before her leave was scheduled to begin, the defendants called her to tell her not to report to work on February 6 and 7, 2016, because they were overbooked with CNAs on those days. Days later, while the plaintiff was recovering from surgery, an employee of the defendants called the plaintiff and informed her that her employment was being terminated for a no call no show on February 6 and 7, despite the fact that the defendants had told her not to report to work. Furthermore, the daily log kept by the defendants does not show that the plaintiff was a no call no show on February 7. Finally, the plaintiff testified at her deposition that it was not true that she had a previous no call no show on December 3, 2015, or that she was suspended for that alleged incident.[6] On the basis of this evidence, if believed, a jury reasonably could conclude that the defendants told the plaintiff not to come to work on February 6 and 7, 2016, in order to create a pretext that she was a no call no show on those days so that they would have a ground to terminate her independent of her disability and her request for a leave of absence accommodation. Consequently, the court erred in concluding that there were no genuine issues of material fact regarding whether the defendants' stated reason for terminating the plaintiff's employment was pretextual.

B

We turn next to the court's conclusion that the plaintiff failed to establish a prima facie case of discrimination because she failed to establish a genuine issue of

[6] The court also noted that the defendants presented evidence that the plaintiff violated their absenteeism policy on at least three separate occasions. Any reliance on those occasions to support the defendants' motion for summary judgment is misplaced because the defendants' stated reason for terminating the plaintiff's employment was that her failure to come to work on February 6 and 7, 2016, was her second no call no show incident, with the first such incident allegedly having occurred on December 3, 2015. On the basis of the plaintiff's deposition testimony, there is a genuine issue

material fact as to whether she was qualified to perform the essential functions of her job, with the reasonable accommodation of a leave of absence, at the time the defendants terminated her employment.

To establish a prima facie case of employment discrimination pursuant to § 46a-60 (b) (1) on the basis of either a disability discrimination claim or a reasonable accommodation claim, a plaintiff must establish a common essential element, namely, that he or she is qualified for the position. See *Curry* v. *Allan S. Goodman, Inc.*, 286 Conn. 390, 415, 425–26, 944 A.2d 925 (2008).

"To be a qualified individual with a disability, a plaintiff must be able to perform the essential functions of his job, with or without a reasonable accommodation, *at the time of the adverse employment decision*." (Emphasis added.) *Tomick* v. *United Parcel Service, Inc.*, 135 Conn. App. 589, 611 n. 15, cert. denied, 305 Conn. 920, 47 A.3d 389 (2012).

In the present case, the court rested its conclusion that there was no genuine issue of material fact that the plaintiff was not qualified to perform the essential functions of her job on the plaintiff's deposition testimony. The plaintiff testified at her deposition, in March, 2018, that she was unable to perform the essential functions of a CNA following her surgery and that, two years after the surgery, she still was unable to perform those functions. On the basis of this testimony, the court concluded that "[t]he evidence shows that the plaintiff was unable to perform the essential functions of her job as a CNA at the time of the adverse employment action and remained unable to do so at least until the time of her deposition in March of 2018."

The problem with the court's analysis is that it is based on evidence of the plaintiff's inability to perform

of material fact as to whether she was a no call no show on any of those dates. Any other attendance issues, not being the stated reason for the defendants' termination of the plaintiff's employment, are irrelevant to the consideration of the defendants' motion.

the essential functions of her job *after her employment was terminated*. At the time the defendants terminated her employment, the plaintiff had just undergone knee surgery. The purpose of the plaintiff's leave of absence was to permit her to have the surgery and to recover from it so that she could return to work. Put another way, the expectation of the parties was that the plaintiff would be able to perform the essential functions of her job with the accommodation of a leave of absence related to her knee surgery. Thus, when the defendants terminated the plaintiff's employment, immediately after her surgery, it still was expected that she would remain qualified to perform the essential functions of her job, as she was before her surgery, if allowed the accommodation of time to recover. It was only after her employment was terminated, and she was unable to recover sufficiently, that it became clear that she would not be able to perform the essential functions of her job, even with the accommodation of the leave of absence.[7] Because, however, the determination of whether the plaintiff was qualified, with or without an accommodation, must be made at the time of termination, the fact that she was unqualified posttermination is irrelevant. The court's reliance on the plaintiff's posttermination condition for its conclusion that the plaintiff was unqualified to perform the essential functions of her job *at the time that she was terminated*, therefore, was improper, because all of the parties anticipated that she again would be qualified after her accommodation.[8] Consequently, there is a genuine issue of

[7] The plaintiff argues that there is a genuine issue of material fact as to whether she was qualified after the defendants terminated her employment because the plaintiff's treating physician cleared her to return to work as of May 10, 2016. Putting aside the relevance of her physician's opinion, given the plaintiff's repeated admissions that she can no longer perform the essential functions of a CNA, such evidence does not address directly whether the plaintiff was qualified in February, 2016, when the defendants terminated her employment.

[8] The court and the defendants relied on two cases that made references to a plaintiff's posttermination deposition testimony that they remained unable to perform the essential functions of their jobs at the time of their

material fact as to whether the plaintiff was qualified to perform the essential functions of her job, with the reasonable accommodation of a leave of absence, at the time the defendants terminated her employment.

II

We next consider the court's rejection of the plaintiff's claim that the defendants failed to provide her with a reasonable accommodation. The plaintiff claims that this was error, because, although the defendants granted her request for a leave of absence to have and recover from knee surgery, there is a genuine issue of material fact as to whether they then fired her for taking that accommodation.

"In order to establish a prima facie case for a reasonable accommodation claim, the plaintiff must produce

depositions: *Desmond* v. *Yale-New Haven Hospital, Inc.*, 738 F. Supp. 2d 331 (D. Conn. 2010), and *Daley* v. *Cablevision Systems Corp.*, United States District Court, Docket No. 12-CV-6316 (NSR) (S.D.N.Y. March 7, 2016), aff'd, 675 Fed. Appx. 97 (2d Cir. 2017). Such reliance is misplaced. Although the court in each case made reference to the plaintiff's condition at the time of his or her deposition, each court's decision was based on the plaintiff's ability to perform the essential functions of his or her job *at the time of his or her termination*. In *Desmond*, the plaintiff's employment was terminated only after the plaintiff received an extended leave of absence following surgery to address her disability and after a medical report indicated that, despite the leave of absence, she remained unable to perform the essential functions of her job. *Desmond* v. *Yale-New Haven Hospital, Inc.*, supra, 738 F. Supp. 2d. 341. Furthermore, she did not argue that the defendant failed to accommodate her with a leave of absence but, rather, that it should have provided either a second employee to do the physical parts of her job that she was unable to perform; id., 348–49; or it should have provided her with medical treatment to overcome her disability. Id., 350. The court concluded that neither proposed accommodation was reasonable as a matter of law. Id., 349–50, 352. Similarly, in *Daley*, the plaintiff's employment was terminated after he had received multiple leaves of absences to address his disability, but was still unable to perform the essential functions of his job after the leaves of absence ended. *Daley* v. *Cablevision Systems Corp.*, supra, United States District Court, Docket No. 12-CV-6316 (NSR). The plaintiff also refused to pursue less physically demanding positions that he could have performed with his disability. Id. In this case, the defendants do not argue that the plaintiff's request for a leave of absence as an accommodation was unreasonable. Furthermore, unlike in *Desmond* and *Daley*, the plaintiff's employment was terminated *during* the reasonable accommodation, not after it had expired.

enough evidence for a reasonable jury to find that (1) he is disabled within the meaning of the [statute], (2) he was able to perform the essential functions of the job with or without a reasonable accommodation, and (3) [the defendant], despite knowing of [the plaintiff's] disability, did not reasonably accommodate it." (Internal quotation marks omitted.) *Barbabosa* v. *Board of Education*, supra, 189 Conn. App. 437–38.

The court accurately set forth the parties' respective positions regarding the plaintiff's claim. "The defendant argues that there is no evidence in the record that the plaintiff requested a reasonable accommodation, other than time off for her surgery, which was granted . . . . The plaintiff, on the other hand, contends that the defendants effectively denied the leave of absence accommodation because the defendants terminated the plaintiff shortly after her leave commenced." The court did not address these respective arguments but, instead, rendered summary judgment because the plaintiff failed to produce evidence "that the leave of absence accommodation would have ever allowed her to perform the essential functions of the job." As it did with the plaintiff's discrimination claims, the court focused on the plaintiff's deposition testimony that "she was physically unable to work even after the alleged three month period requested for the leave of absence."

As was true of its analysis of the plaintiff's discrimination claim, the court incorrectly focused on the plaintiff's qualifications *after* the defendants terminated her employment. Had the defendants terminated the plaintiff's employment at the end of the three month leave of absence, her inability to perform the essential functions of her job at that time would be highly relevant, and, very likely, dispositive of her claim. However, the defendants terminated her employment shortly after her leave of absence had begun. At that point, it was expected, although admittedly not certain, that the plaintiff would be able to return to work following the

leave of absence accommodation. Thus, at the time of her termination from employment, there was at least a genuine issue of material fact as to whether the plaintiff could perform the essential functions of her job with the accommodation of a leave of absence to have and recover from surgery to her right knee. Consequently, the court erred in rendering summary judgment for the defendants on the plaintiff's reasonable accommodation claims.

III

Finally, the plaintiff claims that the court erred in rendering summary judgment for the defendants on her retaliation claims. We decline to review this claim because it has been inadequately briefed. The appellant's brief makes only passing references to "retaliation" in its statement of issues, introduction and in a heading in the argument section of the brief. The brief is devoid of any discussion of the elements of such claims, the law governing such claims, or the trial court's analysis of the plaintiff's claims. In fact, the section of the appellant's brief which, purportedly, was going to address the retaliation claims, addresses only the plaintiff's disability discrimination claims and asks only that the court's decision rendering summary judgment on the disability claims be reversed.

"We are not required to review issues that have been improperly presented to this court through an inadequate brief . . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs . . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Citation omitted; internal quotation marks omitted.) *State* v. *Michael T.*, 194 Conn. App.

598, 617, 222 A.3d 105 (2019). Accordingly, we decline to review this claim.

The judgment is reversed as to counts one and two, which allege discrimination on the basis of disability, and as to counts five and six, which allege a failure to accommodate, and the case is remanded for further proceedings on those counts; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JERMAINE HARRIS (AC 42888)

Lavine, Alvord and Harper, Js.

Syllabus

Convicted, following a jury trial, of the crimes of murder, robbery in the first degree, and carrying a pistol without a permit, the defendant appealed. *Held*:

1. The defendant could not prevail on his claim that the trial court improperly admitted uncharged misconduct evidence regarding two robberies and three shootings: the defendant failed to preserve his claim that the trial court improperly admitted evidence of uncharged misconduct, the defendant's objections lacked specificity with regard to the two robberies and the record did not reveal any objections to the admission of evidence regarding the shootings; moreover, the defendant was not entitled to reversal of his conviction under the plain error doctrine on his unpreserved claim that the trial court improperly admitted evidence of three uncharged shootings as it was clear from the record that the court balanced the probative value of the evidence against its prejudicial effect, and its determination that the evidence was more probative than prejudicial was legally correct; furthermore, even assuming, arguendo, that the trial court abused its discretion in admitting the evidence of the uncharged shootings, the defendant could not prove that the abuse of discretion was harmful in light of the trial court's ameliorative steps, which included limiting instructions to the jury regarding its use of uncharged misconduct evidence.
2. The defendant could not prevail on his claim that prosecutorial impropriety deprived him of his due process right to a fair trial; the prosecutor's comments about the defendant's gang affiliation and her misstatement about the location where the defendant confessed to an individual about the murder did not constitute prosecutorial impropriety and, although,

the prosecutor's use of the defendant's nickname beyond the purpose of clarifying the responses of the witnesses was arguably improper, the defendant was not deprived of a fair trial by the prosecutor's use of his nickname, given the strength of the state's case, the fact that the prosecutor's use of the nickname was infrequent, and the defendant's failure to object to its use during trial.

3. The defendant could not prevail on his claim that his right to due process was violated because the state withheld materially favorable evidence; evidence of the state's arrangement to provide a witness with lodging and a stipend for food was immaterial and there was not a reasonable probability that the jury would have reached a different verdict had it considered the undisclosed impeachment evidence because the impeachment value of the evidence was low and the state's case did not rest on the testimony of that witness but, rather, there was ample evidence to support the defendant's conviction, including video surveillance that captured the shooting and testimony that the defendant twice confessed to shooting the victim.

Argued February 10—officially released June 30, 2020

Procedural History

Information charging the defendant with the crimes of murder, felony murder, robbery in the first degree, and carrying a pistol without a permit, brought to the Superior Court in the judicial district of New Haven, where the defendant was tried to the jury before *Blue*, *J.*; verdict of guilty; thereafter, the court, *Blue*, *J.*, vacated the defendant's conviction of felony murder and sentenced the defendant on the remaining counts, and the defendant appealed. *Affirmed.*

Vishal K. Garg, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Stacey M. Miranda*, senior assistant state's attorney, and *Karen A. Roberg*, assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Jermaine Harris, appeals from the judgment of conviction, rendered after a jury trial, of murder, robbery in the first degree, and carrying

a pistol without a permit.[1] On appeal, the defendant claims that (1) the trial court improperly admitted uncharged misconduct evidence, (2) his right to due process was violated when the prosecutor appealed to the emotions of the jurors and misstated evidence, and (3) his right to due process was violated when the state withheld material evidence. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In 2011, the defendant was a member of the G-Shine chapter of the Bloods gang in New Haven. On the night of July 30, 2011, the defendant met Tevin Williams, a fellow gang member and, together, they met the victim, Darryl McIver, who was a member of a rival gang, the Grape Street Crips. Together, the defendant, Williams, and McIver travelled throughout "the Hill" section of New Haven and committed three armed robberies.

During the first two robberies, the defendant and McIver brandished their guns while Williams searched the victims' pockets and took whatever valuables were on their respective persons, including money and cell phones. The defendant was armed with a Hi-Point nine millimeter pistol. During the third robbery, McIver pistol whipped Telaso Telez after learning that he did not have any money. Following the third robbery, McIver mentioned that he recently had shot Jason Roman, a member of the Bloods gang who went by the nickname

[1] This appeal arises from the retrial of the defendant. The defendant's first jury trial resulted in a hung jury on all charges. A separate charge of criminal possession of a firearm was tried to the court. The court found the defendant guilty of that charge and sentenced him to five years incarceration. The defendant appealed from that conviction and this court affirmed the judgment of the trial court. *State* v. *Harris*, 183 Conn. App. 865, 867, 193 A.3d 1223, cert. denied, 330 Conn. 918, 193 A.3d 1213 (2018). After the mistrial, the state retried the defendant and, in the second trial, he was found guilty by the jury on all charges.

"Scar." Shortly after that admission, the defendant pulled Williams aside to inform Williams that he was going to shoot McIver.

Later that night, the defendant and Williams followed McIver as he led them through the surrounding neighborhoods. Eventually, all three of them climbed over a perimeter fence onto commercial property on Ella Grasso Boulevard. Once on the property, McIver continued to lead the defendant and Williams, at which point the defendant drew his gun and shot McIver in the back. After shooting McIver, the defendant placed his gun on the ground, next to McIver's body, and then searched McIver's body for his gun. While the defendant was searching for McIver's gun, Williams picked up the defendant's gun, as the defendant had instructed him to do, and fled the scene. As Williams left, he heard two more gun shots.[2] After shooting McIver again, the defendant searched for McIver's phone and left the scene.

The defendant and Williams reconnected at the home of the defendant's mother, which was located near the shooting of McIver. It was there that Williams returned the defendant's gun to him and that the defendant confessed to Williams that he had killed McIver in retaliation for McIver having shot Scar, their fellow gang member.

In early August, 2011, the defendant attended a meeting of two chapters of the Bloods at Jocelyn Square Park in New Haven. During that meeting, the defendant admitted to Luis Padilla, a fellow Blood, that he had killed McIver because McIver was "hard-headed." On August 15, 2011, the defendant was with Mickey Ferguson, a fellow Blood, at Ferguson's home, when he admitted to killing McIver.

[2] McIver died from five to six gunshot wounds, including shots to his back, chest, right forearm, and head.

The defendant was arrested on March 21, 2012, and charged with murder, conspiracy to commit murder, felony murder, robbery in the first degree, conspiracy to commit robbery in the first degree, carrying a pistol without a permit, and criminal possession of a firearm. See footnote 1 of this opinion. The defendant elected a trial by jury and was tried on all charges, except criminal possession of a firearm. The jury was unable to reach a unanimous verdict with respect to the charges before it, which resulted in a mistrial. The court, however, found him guilty of criminal possession of a firearm. The state retried the defendant for murder, felony murder, robbery in the first degree, and carrying a pistol without a permit.

Prior to the start of the second jury trial, the state filed a notice of intent to introduce evidence of uncharged misconduct. On June 16, 2017, the court conducted a pretrial hearing pursuant to that notice. During that hearing, the state informed the court that it intended to present evidence of three robberies and three shootings in which the defendant was involved but was not charged. The state argued that such evidence was relevant to show identity, means, and motive, and that it would corroborate other crucial prosecution evidence. At the end of the hearing, the court noted that the defendant did not object to the evidence pertaining to the second and third shootings. The court then stated that it would hear an offer of proof during trial with regard to evidence pertaining to the first shooting. The court overruled the defendant's objection to the evidence of the Telez robbery, concluding that such evidence was probative.

During the defendant's second jury trial, the prosecutor presented evidence of three separate shootings that occurred after McIver's death, that allegedly involved the defendant, but with which he had not been charged. More specifically, the prosecutor presented evidence that the shell casings found at the scene of the other

three shootings matched the shell casings found at the McIver murder scene. The evidence was admitted at trial without objections.[3]

Through the testimony of Williams, the prosecutor also presented evidence concerning the three robberies in which the defendant participated with Williams and McIver but with which he was not charged. Specifically, Williams testified that he, the defendant, and McIver committed three robberies, prior to the shooting of McIver, because they were bored.[4] As with the three shootings, the defendant did not object to the evidence admitted with regard to the first two robberies with which he was not charged.

At the conclusion of the evidence, the jury found the defendant guilty of murder, felony murder, robbery in the first degree, and carrying a pistol without a permit. Because the defendant was found guilty of murder, the court vacated his conviction of felony murder and imposed a total effective sentence of eighty years of incarceration.[5] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court improperly admitted various uncharged misconduct evidence, which deprived him of a fair trial. More specifically, he claims that the court improperly admitted evidence that he participated in two robberies that preceded McIver's

[3] Further discussion and analysis on the uncharged misconduct hearing is found in part I of this opinion.

[4] According to Williams, the first robbery occurred on the corner of Dewitt Street and Lamberton Street, the second robbery occurred on the corner of Lamberton Street and Wilson Street, and the third robbery occurred on Rosette Street.

[5] The defendant was sentenced to sixty years of incarceration for murder, twenty years of incarceration for robbery, to be served consecutively to the sentence for murder, and five years of incarceration for carrying a pistol without a permit, to be served concurrently with the sentences for murder and robbery.

death and evidence that he participated in three unrelated shootings that all succeeded McIver's death. We disagree.

We begin with the relevant legal principles that direct our analysis. "The admission of evidence of prior uncharged misconduct is a decision properly within the discretion of the trial court . . . . [Every] reasonable presumption should be given in favor of the trial court's ruling . . . . [T]he trial court's decision will be reversed only where abuse of discretion is manifest or where injustice appears to have been done." (Internal quotation marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 88, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018).

It is well established, however, "that [o]ur case law and rules of practice generally limit this court's review to issues that are distinctly raised at trial. . . . Only in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." (Internal quotation marks omitted.) *State* v. *Thompson*, 146 Conn. App. 249, 259, 76 A.3d 273, cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013). "To review claims articulated for the first time on appeal and not raised before the trial court would be nothing more than a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *State* v. *Rosado*, 134 Conn. App. 505, 516 n.3, 39 A.3d 1156, cert. denied, 305 Conn. 905, 44 A.3d 181 (2012).

The defendant contends that the uncharged misconduct evidence "created a serious risk that the jury would conclude that [he] had a propensity for violence." The state argues that the defendant waived appellate review of the admission of evidence concerning the two uncharged robberies because the defendant's pretrial objection to Williams' testimony was limited to the third robbery—the Telez robbery—and not all three robberies. In his reply brief, the defendant contends that he

objected to the entirety of Williams' testimony, which included all three robberies.[6] With respect to the evidence regarding the three shootings with which the defendant was not charged,[7] the state argues that the claim regarding evidence of the August 1, 2011 shooting is not properly before this court because the defendant did not secure a trial court ruling on a challenge to the admission of such uncharged misconduct evidence and, thus, he has waived appellate review. In his reply brief, the defendant seems to argue that if the August 1, 2011 shooting is not properly before this court, it is because the state failed to make an offer of proof concerning any evidence that related to the incident. The defendant further argues that even if we find that his claim is unpreserved we should, nonetheless, exercise our discretion to review it because the court's error requires reversal under the plain error doctrine.[8]

[6] In his brief, the defendant argues that he preserved his claim by filing a motion in limine to establish fair procedures for determining the admissibility of evidence concerning uncharged crimes or acts of misconduct. The state, however, correctly points out that the defendant filed his motion in limine in the first jury trial and not the second jury trial. Accordingly, the defendant's motion in limine was applicable to the first jury trial, not the subsequent retrial.

[7] At the scene of the McIver shooting, the police found nine millimeter shell casings. In order to establish that the defendant had access to the guns used to shoot McIver, the prosecutor presented evidence that the defendant had committed three other shootings in the weeks following McIver's death, and that shell casings from those subsequent shootings matched those found at the scene of the McIver shooting.

The facts involving the subsequent shootings are as follows. Luis Padilla, a fellow Blood, testified at trial that on August 1, 2011, the defendant shot at Padilla along with his associate, D'Andre Bell, while they were riding their bikes (August 1, 2011 shooting). The second subsequent shooting took place on August 15, 2011, on Arch Street. That shooting involved the defendant and Kenneth Sturdivant (August 15, 2011 shooting). The third subsequent shooting took place on September 16, 2011, on Hamilton Street in New Haven (September 16, 2011 shooting). During trial, Marcus Ratchford, the brother of the defendant's girlfriend, testified that, moments before the September 16, 2011 shooting, he gave the defendant a ride to Hamilton Street. According to Ratchford, after the defendant fired a gun and returned to Ratchford's car, Ratchford saw the defendant holding a gun that had the letters "XP" or "XD" on it—the same letters that were on McIver's gun.

[8] The defendant contends that the record is adequate for review. We disagree.

As noted, prior to the defendant's retrial, the court conducted a hearing on uncharged misconduct pursuant to the state's request to admit such evidence. During that hearing, with regard to the robberies, the parties made certain representations with respect to the testimony to be offered by Williams and Telez. Although it is evident that the state's offer of proof and the defendant's response conflated the anticipated testimony of the two witnesses with respect to the robberies, to the extent that the defendant objected to evidence of the robberies, we conclude that the objection was to Williams' testimony about the third robbery and not to all three robberies. In ruling, the court surmised that Williams was to testify that he, the defendant, and McIver "were robbing somebody on Rosette Street [fifteen] minutes before . . . the homicide." Shortly thereafter, defense counsel clarified the defendant's objection, stating that "its probative value does not outweigh the prejudicial, and that it would be prejudicial as to my client—with respect to Tevin Williams." At the end of the hearing, however, the court summarized its rulings: "As to . . . the July 31 robbery of [Telazo], the objections are overruled . . . ." The defendant never sought to clarify his objection further, nor did he seek any clarification from the court. Because the defendant's objections lacked specificity with regard to the two robberies that occurred before McIver was shot, we conclude that his claim that the court abused its discretion by admitting evidence concerning those robberies was not preserved. See *Daley* v. *McClintock*, 267 Conn. 399, 404, 838 A.2d 972 (2004) ("counsel must properly articulate the basis of the objection so as to apprise the trial court of the *precise* nature of the objection and its real purpose, in order to form an adequate basis for a reviewable ruling" (emphasis added)).

Furthermore, with respect to the admission of evidence of the posthomicide shootings with which the defendant was not charged, we conclude that the record

is devoid of any objections made by the defendant. During the uncharged misconduct hearing, the defendant suggested, with regard to the August 1, 2011 shooting, that the court hear testimony from Padilla as a brief offer of proof before any objections were to be made. The court agreed. The state made no offer of proof, however, and the defendant failed to object further. As to the August 15, 2011 shooting, the defendant agreed to the admission of evidence about that incident "so long as it's sanitized" pursuant to *State* v. *Collins*, 299 Conn. 567, 10 A.3d 1005, cert. denied, 565 U.S. 908, 132 S. Ct. 314, 181 L. Ed. 2d 193 (2011),[9] and so long as the court gave a limiting instruction. With regard to the September 16, 2011 shooting, defense counsel stated "I think that [*Collins*] . . . is on point on most of [this] so . . . what I will be asking for is [a] limiting instruction, and as much as possible, to keep it to the evidence on the gun." It is clear from the record that the defendant did not object to the admission of evidence pertaining to the uncharged shootings and, accordingly, his present challenge to that evidence is unpreserved.

Having determined that the defendant failed to preserve his claim that the court improperly admitted evi-

[9] During the uncharged misconduct hearing, the court appeared to explain what it meant to sanitize evidence: "[Y]ou could have a witness who testified that at this time and place, which is nearby, there was a shooting, and that certain cartridge casings found investigating that shooting matched up with the weapon that you say is the murder weapon here." From the transcript, it appears to this court that the sanitization instruction to the prosecutor was a limiting instruction, in that the court was aiming to mitigate any prejudice stemming from the uncharged misconduct by limiting what information the jury would hear. The court's instruction aligns with what our Supreme Court recognized in *Collins*, that a witness should be admonished "that any testimony about the [uncharged shooting] was to be limited only to the fact that there was a shooting, with no other details regarding the events of that day." *State* v. *Collins*, supra, 299 Conn. 589. The court in *Collins* further recognized that such actions by the trial court "are significant because the care with which the [trial] court weighed the evidence and devised measures for reducing its prejudicial effect militates against a finding of abuse of discretion." (Internal quotation marks omitted.) Id.

dence of uncharged misconduct, we turn to his request for plain error reversal.[10] First, we note that plain error is a rule of reversibility, not review. "The plain error doctrine is . . . reserved for truly extraordinary situations where the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment, for reasons of policy. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he [or she] demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citations omitted; internal quotation marks omitted.) *State* v. *Roger B.*, 297 Conn. 607, 618, 999 A.2d 752 (2010); see also Practice Book § 60-5. "Furthermore, even if the error is so apparent and review is afforded, the defendant cannot prevail on the basis of an error that lacks constitutional dimension unless he [or she] demonstrates that it likely affected the result of the trial." (Internal quotation marks omitted.) *State* v. *Dews*, 87 Conn. App. 63, 69, 864 A.2d 59, cert. denied, 274 Conn. 901, 876 A.2d 13 (2005).

The defendant argues that the trial court committed plain error when it "felt bound" by *Collins* to admit evidence concerning all of the uncharged shootings and, thus, failed to balance the probative value of the uncharged shootings against the prejudicial effect of allowing the jury to hear that evidence. We disagree.

[10] In his brief, the defendant argues that it was plain error to admit evidence concerning the shootings with which he was not charged. He does not make the same argument with regard to the robberies with which he was not charged. Accordingly, our plain error analysis will address only the uncharged shootings.

During the uncharged misconduct hearing, the court referenced *State* v. *Collins*, supra, 299 Conn. 567, several times. In *Collins*, our Supreme Court conducted an extensive review of the admissibility of uncharged misconduct evidence, including a factual scenario similar to the present case. In *Collins*, the trial court admitted evidence that the gun used in uncharged shootings was the same gun used in the underlying crime. Id., 586–93. Our Supreme Court undertook a four-pronged balancing test to determine whether the trial court in *Collins* correctly concluded that evidence of the uncharged shootings was more probative than prejudicial.[11] Although the trial court in the present case did not explicitly state that it was conducting the four-pronged balancing test from *Collins*, the questions it posed and the instructions it gave to the prosecutor demonstrate that it was applying the balancing test. Specifically, the court instructed the prosecutor to "[trim its] sails" in order to limit what information it elicited from witnesses; the court asked the prosecutor why it was necessary "to get into all the gang stuff" of the witnesses and stated that *Collin*s required caution with such an approach; the court stated that it would give a limiting instruction to the jury as to the testimony involving the uncharged misconduct; and the court instructed the prosecutor to admonish its witnesses about that to which they should not testify.

Moreover, the court, in agreement with defense counsel, stated that it would allow the prosecutor to ask

[11] Our Supreme Court has held that when "determining whether the prejudicial effect of otherwise relevant evidence outweighs its probative value, we consider whether: (1) . . . the facts offered may unduly arouse the [jurors'] emotions, hostility, or sympathy, (2) . . . the proof and answering evidence it provokes may create a side issue that will unduly distract the jury from the main issues, (3) . . . the evidence offered and the counterproof will consume an undue amount of time, and (4) . . . the defendant, having no reasonable ground to anticipate the evidence, is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 587.

leading questions on direct examination, in order to minimize prejudicial "blurt-outs." The court also gave several instructions to the jury about the uncharged shootings—instructions that were requested and approved by defense counsel.[12] Those instructions appropriately instructed the jury on the proper use of the uncharged misconduct evidence. The court also instructed the jury on the elements of the crimes charged.

We conclude that the court's statements, questions, and instructions to the prosecutor, taken together, persuade us that although it did not specifically state that it was conducting the aforementioned four-pronged balancing test, the court did balance the probative value of the evidence against its prejudicial effect in accordance with *Collins*. We further conclude that the court's determination that the evidence was more probative than prejudicial was legally correct.

As Connecticut jurisprudence provides,"[u]ncharged misconduct evidence has been held not unduly prejudicial when the evidentiary substantiation of the vicious conduct, with which the defendant was charged, far

[12] The trial court repeated the following instructions throughout the trial: "[Y]ou can consider the testimony of what supposedly happened in . . . what I'll call [a] subsequent incident for a limited purpose, and the limited purpose is to basically bolster . . . the [state's] case that it was the defendant and not someone else who committed the crimes charged in the information here, which of course is the homicide and robbery of July 31.

"The evidence that you've heard about and are going to hear about these other alleged acts of misconduct are limited to that limited purpose, and the bottom line is that you're expressly prohibited from using evidence like this which I anticipate is forthcoming for the evidence . . . to show any bad character of the defendant or propensity to commit a criminal act.

"If you find the evidence credible and if you find that it logically and reasonably supports the issues for which it's offered, namely that the defendant was the author of the crime charged in the information here, then you can use it for that purpose if you find it credible.

"But on the other hand, if you don't believe the evidence or even if you do, if you believe it doesn't logically and reasonably support the proposition that the defendant was the perpetrator of the . . . crimes alleged in the information, then obviously you should not use this for any purpose."

outweighed, in severity, the character of his prior misconduct." (Internal quotation marks omitted.) *State* v. *Collins*, supra, 299 Conn. 588. We find it significant that the three shootings with which the defendant was not charged in the present case, although dangerous and horrific, do not rise to the same severity as that of murder. We further find it significant, as previously noted, that the court instructed the prosecution to admonish its witnesses to limit their testimony. The court's devised measures for reducing the prejudicial effect of the evidence "militates against a finding of abuse of discretion." (Internal quotation marks omitted.) Id., 589. Furthermore, the court repeatedly gave a limiting instruction to the jury. See *State* v. *Mooney*, 218 Conn. 85, 131, 588 A.2d 145 (trial court's balancing was not "abuse of discretion . . . especially in light of the limiting instruction given to the jury on this issue"), cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 70 (1991); see also footnote 12 of this opinion. Lastly, as our Supreme Court found in *Collins*, we too find it instructive that other jurisdictions, "have rejected challenges, founded on undue prejudice, to the use of uncharged misconduct evidence in cases wherein the charged offenses were committed using the same gun that the defendant had utilized in [other] shootings." *State* v. *Collins*, supra, 590.

Additionally, although "evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused," there are several exceptions "set forth in § 4-5 (b) of the Connecticut Code of Evidence, which provides in relevant part that [e]vidence of other crimes, wrongs or acts of a person is admissible . . . to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony." (Internal quotation marks omitted.) Id., 582–83.

The state, in its original notice of intent to introduce evidence of the defendant's uncharged misconduct, argued that such evidence was "relevant to motive, intent, common scheme, [and] to corroborate crucial prosecution testimony." Specifically, with regard to the uncharged shootings, the state argued that the shell casings found at all the shooting scenes were linked by ballistics evidence and that such evidence related to the defendant's possession of the murder weapon, which was relevant and, thus, admissible, "for purposes of demonstrating both the identity of the shooter and . . . the means to commit these crimes." The state's argument coincides with our jurisprudence. See *State* v. *Sivri*, 46 Conn. App. 578, 584, 700 A.2d 96 ("[e]vidence indicating that an accused possessed an article with which the particular crime charged may have been accomplished is generally relevant to show that the accused had the means to commit the crime" (internal quotation marks omitted)), cert. denied, 243 Conn. 938, 702 A.2d 644 (1997). The state further argued that the various shooting incidents were indicative of motive because of the continuous gang-related tensions and violence. Again, this court has concluded that such evidence is admissible. See *State* v. *Watts*, 71 Conn. App. 27, 37, 800 A.2d 619 (2002) ("gang affiliation was particularly probative in showing . . . motive" (internal quotation marks omitted)).

Even assuming, arguendo, that the trial court abused its discretion in admitting the contested evidence, the defendant cannot satisfy his burden of proving that the court's abuse of discretion was harmful in light of its ameliorative steps. Accordingly, we conclude that the defendant is not entitled to a reversal of his conviction pursuant to the plain error doctrine. See *State* v. *Dews*, supra, 87 Conn. App. 71.

II

Next, the defendant claims that his right to due process was violated when the prosecutor committed vari-

ous acts of prosecutorial impropriety.[13] More specifically, the defendant contends that the prosecutor improperly appealed to the emotions of the jurors by referring to the defendant by his nickname, "Maniac" or "Main," and by commenting on and eliciting testimony about the defendant's gang involvement. Additionally, the defendant posits that, during closing argument, the prosecutor misstated the location where the defendant admitted to Ferguson that he had killed McIver. In response, the state argues that the prosecutor's remarks did not constitute prosecutorial impropriety, and, even if they did, the sum total of the improprieties did not deprive the defendant of a fair trial. We will address each alleged impropriety in turn.

The following legal principles guide our analysis. "To prove prosecutorial [impropriety], the defendant must demonstrate substantial prejudice. . . . In order to demonstrate this, the defendant must establish that the trial as a whole was fundamentally unfair and that the [impropriety] so infected the trial with unfairness as to make the conviction a denial of due process. . . . [I]t is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole. . . . Moreover, in analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1)

[13] The defendant raises this claim for the first time on appeal and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989). His claim, however, is reviewable pursuant to our Supreme Court's holding in *State* v. *Stevenson*, 269 Conn. 563, 572–75, 849 A.2d 626 (2004). In *Stevenson*, our Supreme Court concluded that, in cases of alleged prosecutorial impropriety, "it is unnecessary for the defendant to seek to prevail under the specific requirements of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and, similarly, it is unnecessary for a reviewing court to apply the four-prong *Golding* test. The reason for this is that the touchstone for appellate review of claims of prosecutorial [impropriety] is a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by this court in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)." (Footnote omitted.) *State* v. *Stevenson*, supra, 572–73.

whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. . . . [Additionally], prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . [T]he reviewing court must give due deference to the fact that [c]ounsel must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Citations omitted; internal quotation marks omitted.) *State* v. *Crocker*, 83 Conn. App. 615, 656–57, 852 A.2d 762, cert. denied, 271 Conn. 910, 859 A.2d 571 (2004).

"[F]ollowing a determination that prosecutorial [impropriety] has occurred . . . an appellate court must apply the . . . factors [set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)] to the entire trial." (Internal quotation marks omitted.) *State* v. *Blango*, 103 Conn. App. 100, 112, 927 A.2d 964, cert. denied, 284 Conn. 919, 933 A.2d 721 (2007). "Among [those factors] are [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case." (Internal quotation marks omitted.) *State* v. *Long*, 293 Conn. 31, 51, 975 A.2d 660 (2009). "In weighing the significance of an instance of prosecutorial impropriety, a reviewing court must consider the entire context of the trial, and [t]he question of whether the defendant has been prejudiced by prosecutorial [impropriety] . . . depends on whether there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the improprieties." (Internal quotation marks omitted.) Id., 37.

A

The defendant claims that the prosecutor committed impropriety, during trial and during closing argument, when the prosecutor referred to the defendant by his nickname. He further contends that the nickname, "Maniac" or "Main," was not relevant to any issue in the case and that the prosecutor used it to paint the defendant "as a dangerous, violent lunatic." The state argues that the use of the defendant's nickname was "brief, isolated, and used by the prosecutor merely as a way of referring to the defendant other than as the defendant or by his given name."

The jury trial from which this appeal arises spanned six days, including five days of evidence and one day of closing argument. During the five days of evidence, there were multiple instances in which the defendant's nickname was used in either questions posed by the prosecutor or answers provided by the witnesses. The jury first heard the defendant's nickname when the prosecutor asked Williams if the defendant had a nickname. Thereafter, the prosecutor referred to the defendant by his nickname several times, without it first being used by a witness in response to a question. Additionally, during closing and rebuttal argument, the prosecutor used the defendant's nickname a total of five times.

After a careful review of the trial transcripts, we estimate that of all the times in which the defendant's nickname was used, approximately one half of those instances arose when the state's witnesses had used the nickname on their own and without any prompting. Our review further reveals that there were several instances during trial and closing argument in which the state had used the defendant's nickname in order to clarify whom the witnesses were talking about, because several witnesses had used the defendant's nickname on their own. To the extent that the prosecutor used

the defendant's nickname during trial beyond the purpose of clarifying the responses of witnesses, in accordance with Connecticut jurisprudence, we conclude that such use may have been improper. See *State* v. *Santiago*, 269 Conn. 726, 755–56, 850 A.2d 199 (2004) (prosecutor's use and incorporation of nickname at least eighteen times during closing argument beyond mere reference to defendant was improper); *Camacho* v. *Commissioner of Correction*, 148 Conn. App. 488, 503, 84 A.3d 1246 ("reference to [the defendant's nickname] by the prosecutor at trial was inappropriate"), cert. denied, 311 Conn. 937, 88 A.3d 1227 (2014).

Because we conclude that, at times, the prosecutor's use of the defendant's nickname was arguably improper, we turn to an analysis of the *Williams* factors. See *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). From our review of the record, we conclude that the impropriety was not invited by defense conduct or argument; the prosecutor used the defendant's nickname, unprompted by the responses of the witnesses, approximately twelve times over the course of a six day trial; and no curative measures were adopted. The prosecutor, however, presented a strong case to the jury, including, among other things, (1) testimony that the defendant twice confessed to shooting the victim, (2) testimony from a witness who saw the defendant shoot McIver, (3) video surveillance that captured the shooting,[14] and (4) evidence that shell casings found at the crime scene matched casings found at other shootings in which the defendant was involved. Given the strength of the state's case and the prosecutor's overall infrequent use of the defendant's nickname, we cannot

[14] Surveillance video footage from the commercial property on Ella Grasso Boulevard was presented at trial. Williams identified himself, McIver, and the defendant in the video. Williams also identified the defendant shooting McIver, placing his gun next to McIver, grabbing McIver's gun and phone, then fleeing the scene.

conclude that the trial as a whole was fundamentally unfair or that the misconduct so infected the trial with unfairness as to make the conviction a denial of due process. See *State* v. *Crocker*, supra, 83 Conn. App. 656–58. It is important and significant that the defendant did not object to the use of his nickname when it occurred at trial. "A failure to object demonstrates that defense counsel presumably [did] not view the alleged impropriety as prejudicial enough to jeopardize seriously the defendant's right to a fair trial." (Internal quotation marks omitted.) *State* v. *Fauci*, 282 Conn. 23, 51, 917 A.2d 978 (2007). Furthermore, we cannot conclude that there is a reasonable likelihood that the jury's verdict would have been different absent the sum total of the alleged improprieties. See *State* v. *Long*, supra, 293 Conn. 37. Accordingly, the use of the defendant's nickname did not deprive him of a fair trial.

B

The defendant next claims that prosecutorial impropriety occurred when the prosecutor commented on the defendant's gang involvement for purposes irrelevant to the issues. More specifically, the defendant argues that the state improperly portrayed the defendant as a high ranking gang member who controlled the actions of those who reported to him, including Williams, and that the state had continuously referenced gang involvement throughout its closing and rebuttal arguments. He further argues that it was improper for the prosecutor to elicit testimony from Padilla about his gang affiliations as well as those of Bell and Sturdivant, the individuals involved in the uncharged misconduct shootings. See footnote 7 of this opinion. In response, the state argues that the prosecutor's references to the defendant's gang involvement and the evidence thereof were relevant to the defendant's motive for killing McIver.

We begin by addressing the defendant's claim with respect to the prosecutor's comments. In his brief, the

defendant directs this court to several comments made by the prosecutor during closing and rebuttal arguments. Specifically, the defendant contends that the prosecutor committed impropriety when she dedicated the first few minutes of her closing argument to detailing the "gang culture in New Haven and what it means for young men in . . . New Haven," and that "during a six week period . . . there was a lot of violence between these gangs." We are not persuaded.

In *State* v. *Taylor*, 239 Conn. 481, 503, 687 A.2d 489 (1996), cert. denied, 521 U.S. 1121, 117 S. Ct. 2515, 138 L. Ed. 2d 1017 (1997), the defendant argued that the prosecutor "made several prejudicial and inappropriate remarks regarding his affiliation with the Latin Kings during its closing argument . . . ." Specifically, "[i]n its closing argument, the state asked the jury to determine that [the defendant's] Latin King pride about being asked to leave the bar . . . caused him to return for retribution, that he intentionally and maliciously killed [the victim]." (Internal quotation marks omitted.) Id., 501. Our Supreme Court concluded that the prosecutor's remarks did not constitute impropriety. The court reasoned that the defendant admitted to being a member of the gang and the prosecutor's comments "were limited to establishing [the defendant's] motive for the killing." Id., 503. Our Supreme Court has concluded that references to evidence of gang affiliation are not improper so long as they are limited to a proper purpose, such as motive. See *State* v. *Wilson*, 308 Conn. 412, 430–31, 64 A.3d 91 (2013).

In the present case, although the defendant did not testify, there were several witnesses that self-identified as active members of a gang, as well as identified the defendant as their fellow or rival gang member. Furthermore, evidence presented during trial revealed that McIver's murder stemmed from an ongoing dispute between rival gangs that seemed to continue in the months after the murder. Although the prosecutor's

comments were broad with respect to gang life in New Haven, we conclude that they were relevant insofar as they were limited to motive.

With regard to the defendant's claim that that the prosecutor committed impropriety by eliciting testimony about his gang affiliation, we conclude that this is an evidentiary challenge masked as prosecutorial impropriety. Therefore, we address this part of the defendant's claim as evidentiary.

As previously noted, the defendant did not object to such evidence during the trial; however, he seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See footnote 13 of this opinion. To qualify for *Golding* review, the defendant must meet four conditions.[15] See *State* v. *Golding*, supra, 239–40. "In the absence of any one of these conditions, the defendant's claim will fail." Id., 240. In accordance with Connecticut jurisprudence, we conclude that the defendant's claim as to the evidence of his gang affiliation does not meet the third requirement for *Golding* review—that the alleged constitutional violation exists and deprived the defendant of a fair trial—and, as a result, this portion of his claim fails. See *State* v. *Taylor*, supra, 239 Conn. 502–503 (*Golding* review denied because admission of evidence of gang involvement not constitutional violation depriving defendant of fair trial); see also *State* v. *Torres*, 47 Conn. App. 149, 159, 702 A.2d 142 (1997), cert. denied, 243 Conn. 963, 707 A.2d 1267 (1998).

[15] The four conditions are: "(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40.

Accordingly, we conclude that the prosecutor's comments about the defendant's gang affiliation did not constitute prosecutorial impropriety. We further conclude that the defendant's challenge to the evidence pertaining to his gang affiliation is not properly before this court.

C

Finally, the defendant argues that the prosecutor improperly stated, during closing argument, that the defendant confessed to Ferguson at the Jocelyn Square Park meeting that he had killed McIver. The defendant argues that Ferguson was not present at the meeting and that by incorrectly placing him there, the prosecutor bolstered the testimony of other witnesses whose veracity about whether that meeting occurred was brought into question during trial. The state concedes that the prosecutor misstated the evidence with regard to *where* the defendant confessed to Ferguson; however, the state maintains that such a misstatement does not constitute prosecutorial impropriety because Ferguson testified that the defendant confessed to the murder. We agree with the state.

This court previously has recognized that "closing argument and closing rebuttal argument can require counsel to think on [their] feet and quickly recall and comment on evidence that was presented at trial, all while also reacting to arguments advanced by opposing counsel. Under such circumstances, it is appropriate that counsel be afforded some leeway for minor misstatements . . . in order to not impede counsel from zealously advocating for clients. . . . [I]n the heat of argument, counsel may be forgiven for hitting the nail slightly off center but not wholly inventing 'facts.' To conclude that [an] isolated [misstatement] constitute[s] a prosecutorial impropriety and that the defendant suffered harm from [it], we would need to minutely examine the prosecutor's word choice in a vacuum, ignoring

the broader context of the whole trial. This is not an appropriate approach to such considerations." (Citation omitted.) *State* v. *Danovan T.*, 176 Conn. App. 637, 651–52, 170 A.3d 722 (2017), cert. denied, 327 Conn. 992, 175 A.3d 1247 (2018). Additionally, "[t]here is a distinction between misstatement and misconduct." (Internal quotation marks omitted.) *State* v. *Chankar*, 173 Conn. App. 227, 255, 162 A.3d 756, cert. denied, 326 Conn. 914, 173 A.3d 390 (2017). Not every misstatement constitutes impropriety.

During trial, the jury heard from Ferguson himself that, while he and the defendant were at Ferguson's home, the defendant confessed to killing McIver. At the conclusion of trial, the jury also heard the prosecutor incorrectly state that the defendant's confession to Ferguson took place at a park. It is clear to this court that the prosecutor misspoke. "[T]he burden [however] [falls] on the defendant to demonstrate that the remarks were so prejudicial that he was deprived of a fair trial and the entire proceedings were tainted." (Internal quotation marks omitted.) Id., 253. This the defendant has not done. What is significant is that the admission was made, not where it was made. Therefore, we are not persuaded that, viewed in the larger context of the whole trial, this one isolated misstatement by the prosecutor constitutes impropriety.

In summary, in light of the strength of the state's overall case, notwithstanding the prosecutor's arguably improper use of the defendant's nickname, the defendant's due process right to a fair trial was not violated because we do not find that "there is a reasonable likelihood that the jury's verdict would have been different . . . ." *State* v. *Thompson*, 266 Conn. 440, 460, 832 A.2d 626 (2003).

III

The defendant's third claim is that his right to due process was violated because the state withheld materially favorable evidence. Specifically, he claims that the

state failed to disclose that it provided lodging and money for food and incidental expenses to a witness, Marcus Ratchford, who testified about the defendant's involvement in the September 16, 2011 shooting on Hamilton Street. He argues that such a benefit created a motive for Ratchford to testify favorably for the state and, if that information had been presented to the jury, there is a reasonable probability the defendant would not have been convicted. The state concedes that it failed to disclose its arrangement with Ratchford; however, it argues that the suppression of this evidence was immaterial. We agree with the state.

Whether the defendant was deprived of his due process rights pursuant to a *Brady* violation; see *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); is a question of law, over which we exercise plenary review. See *Walker* v. *Commissioner of Correction*, 103 Conn. App. 485, 491, 930 A.2d 65, cert. denied, 284 Conn. 940, 937 A.2d 698 (2007). "Our analysis of the defendant's claim begins with the pertinent standard, set forth in *Brady* and its progeny, by which we determine whether the state's failure to disclose evidence has violated a defendant's right to a fair trial. In *Brady*, the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added; internal quotation marks omitted.) *State* v. *Skakel*, 276 Conn. 633, 699–700, 888 A.2d 985, cert. denied, 549 U.S. 1030, 127 S. Ct. 578, 166 L. Ed. 2d 428 (2006). "In order to prove a *Brady* violation, the defendant must show: (1) that the prosecution suppressed evidence . . . (2) that the evidence was favorable to the defense; and (3) that the evidence was material." (Internal quotation marks omitted.) *Diaz* v. *Commissioner of Correction*, 174 Conn. App. 776,

795, 166 A.3d 815, cert. denied, 327 Conn. 957, 172 A.3d 204 (2017). "If the [defendant] fails to meet his burden as to one of the three prongs of the *Brady* test, then we must conclude that a *Brady* violation has not occurred." (Internal quotation marks omitted). *Peeler* v. *Commissioner of Correction*, 170 Conn. App. 654, 688, 155 A.3d 772, cert. denied, 325 Conn. 901, 157 A.3d 1146 (2017). It is important to note, however, that "[n]ot every failure by the state to disclose favorable evidence rises to the level of a *Brady* violation." *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 370, 71 A.3d 512 (2013).

Because the state concedes that the evidence at issue was favorable to the defendant and that it was suppressed by the state—the first and second *Brady* prongs—but maintains that the evidence was immaterial, we address only the third *Brady* prong. Under the third prong of *Brady*, "evidence will be deemed material only if there would be a reasonable probability of a different result if the evidence had been disclosed. [The] touchstone of materiality is a reasonable probability of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial." (Internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 370–71.

As it is relevant to this case and the third *Brady* prong, "[t]he United States Supreme Court also has recognized that [a] jury's estimate of the truthfulness and reliability of a . . . witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testi-

fying falsely that a defendant's life or liberty may depend. . . . [I]mpeachment evidence . . . broadly defined, is evidence having the potential to alter the jury's assessment of the credibility of a significant prosecution witness." (Citations omitted; internal quotation marks omitted.) *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 369–70. "[I]mpeachment evidence may be crucial to a defense, especially when the state's case hinges entirely upon the credibility of certain key witnesses. . . . Implicit in the standard of materiality is the notion that the significance of any particular bit of evidence can only be determined by comparison to the rest. . . . In this connection, it is important to the *Brady* calculus whether the effect of any impeachment evidence would have been cured by the rehabilitative effect of other testimony. . . . In determining whether impeachment evidence is material, the question is not whether the verdict might have been different without any of [the witness'] testimony, but whether the verdict might have been different if [the witness'] testimony [was] further impeached by disclosure of the [impeachment evidence]." (Citation omitted; internal quotation marks omitted.) *Elsey* v. *Commissioner of Correction*, 126 Conn. App. 144, 158–59, 10 A.3d 578, cert. denied, 300 Conn. 922, 14 A.3d 1007 (2011).

The following additional facts are relevant to our analysis. After the trial was completed, the defendant learned that the state had provided Ratchford with a hotel room and $40 a day for food and other expenses, prior to his testimony in the underlying trial. The defendant believed that such undisclosed action constituted a *Brady* violation and, as a result, filed a motion for rectification for a hearing in which to question Ratchford so that he could perfect the record for this appeal. During that hearing, Ratchford testified that he was living with his mother at the time he was contacted by

the state, the state arranged for him and his girlfriend to stay in a hotel and gave them money for food, he may not have been working at the time, he did not want to testify against the defendant but was subpoenaed by the state, and he stated multiple times that he did not feel that he owed the state any favorable testimony in exchange for its hotel and food benefits.

Although the evidence of Ratchford's arrangement with the state was impeachment evidence that was favorable to the defense, its relative impeachment value was low. The fact that Ratchford received a hotel room and food benefits from the state before testifying, when coupled with the fact that he had not previously come forward to testify, had some impeachment value insofar as it suggested that he had a motive for testifying. This impeachment value was greatly diminished, however, by the lack of evidence, other than temporal proximity, that Ratchford's benefit was in any way related to his decision to testify and the fact that the state had to subpoena him in order for him to testify.

Additionally, the prosecution's case did not hinge entirely on the testimony of Ratchford. Rather, as previously noted, there was ample evidence to support the defendant's conviction. See *Elsey* v. *Commissioner of Correction*, supra, 126 Conn. App. 160; see also part II of this opinion. Therefore, the state's failure to disclose its arrangement with Ratchford does not undermine our confidence in the jury's verdict, as there was not a reasonable probability that the jury would have reached a different verdict if it had considered this undisclosed impeachment evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* AUBURN W.*

(AC 42126)

Alvord, Elgo and Devlin, Js.

Syllabus

Convicted of the crimes of harassment in the second degree, stalking in the second degree and of having committed offenses while on release, the defendant appealed to this court, claiming that the trial court improperly determined that he forfeited his right to self-representation. The trial court had granted the defendant's motion to represent himself after it determined that he was competent to do so following a competency evaluation. After finding that the defendant was competent and able to assist in his defense, the court canvassed him as to his waiver of his right to counsel and informed him that a resumption of his prior disruptive courtroom conduct could result in a forfeiture of the right to represent himself. The defendant thereafter engaged in obstructionist behavior in further proceedings despite multiple warnings from the trial court. The court also noted that the defendant's extensive witness list included the names of two deities, and the prosecutor expressed concern about the defendant's competency to represent himself after stating that the discovery the defendant provided to him contained the defendant's original song lyrics and a short story and photographs of the defendant and his children. The court then ruled that the defendant had forfeited his right to self-representation. *Held* that the trial court reasonably concluded that the defendant would not be competent to discharge the essential functions necessary to conduct his defense without the assistance of counsel: the court did not abuse its discretion in finding that the defendant had a mental illness or mental incapacity that would interfere with his competency to conduct trial proceedings, which supported the court's conclusion that he forfeited his right to self-representation, as the psychiatrist who conducted the competency evaluation of the defendant diagnosed him with a personality disorder, the court determined after the competency hearing that the defendant exhibited signs of individual functioning problems that included disordered thinking and impaired expressive ability, and it was reasonable to infer that the defendant's habitual recalcitrant behavior was associated with the diagnosis of a personality disorder with borderline narcissistic and obsessive-compulsive traits, which reflected incompetence to represent himself and would have inhibited his ability to conduct proceedings

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018); we decline to identify any person protected or sought to be protected under a protective order or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

before a jury; moreover, the court reasonably could have concluded that the defendant's difficulty in grasping legal issues pertaining to the proceedings, his misunderstanding of the distinct roles of the court and the prosecutor, and his difficulty communicating appropriately with the court permitted the inference that he would not be competent to conduct trial proceedings without counsel's assistance; furthermore, the defendant's behavior could not be dismissed as malingering, as he characterized his behavior to the evaluation team as wilful and, despite warnings from the court that he could forfeit the right to self-representation if he did not behave appropriately, he did not sufficiently correct his obstreperous behavior, which permitted the inference that he would be unable to do so as a result of mental illness or incapacity.

Argued March 5—officially released June 30, 2020

Procedural History

Substitute information charging the defendant, in the first case, with two counts of the crime of harassment in the second degree, and two part substitute information in the second case, charging the defendant, in the first part, with two counts of the crime of harassment in the second degree, and, in the second part, with having committed an offense while on release, and two part substitute information in the third case, charging the defendant, in the first part, with two counts each of the crimes of harassment in the second degree and stalking in the second degree, and, in the second part, with having committed an offense while on release, brought to the Superior Court in the judicial district of Litchfield, geographical area number eighteen, where the court, *Dooley*, *J.*, granted the defendant's motion for self-representation; thereafter, the court, *Bentivegna*, *J.*, granted the state's motion to consolidate the cases for trial and entered an order that the defendant had forfeited his right to self-representation; subsequently, the first information and the first parts of the second and third informations were tried to the jury before *Bentivegna*, *J.*; verdicts of guilty; thereafter, the court, *Bentivegna*, *J.*, vacated the verdicts as to two counts of harassment in the second degree and one count of stalking in the second degree and dismissed the charges; subsequently, the second parts of the sec-

ond and third informations were tried to the jury; verdicts of guilty; judgments of guilty of four counts of harassment in the second degree, one count of stalking in the second degree and sentences enhanced for having committed offenses while on release, from which the defendant appealed to this court. *Affirmed*.

Daniel J. Krisch, assigned counsel, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, and *Gregory L. Borrelli*, assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Auburn W., appeals from the judgments of conviction, rendered following a jury trial, of three counts of harassment in the second degree in violation of General Statutes § 53a-183 (a) (2), one count of harassment in the second degree in violation of § 53a-183 (a) (3), and one count of stalking in the second degree in violation of General Statutes (Rev. to 2015) § 53a-181d (b) (1).[1] On appeal, the defendant claims that the trial court improperly held that he forfeited his right to self-representation on the basis of a

[1] The defendant was charged in three informations that were joined for trial. In each of the three informations the defendant was charged with two counts of harassment in the second degree, one count in violation of § 53a-183 (a) (2) and one count in violation of § 53a-183 (a) (3). In one of those informations, the defendant was further charged with two counts of stalking, one count in violation of General Statutes (Rev. to 2015) § 53a-181d (b) (1) and one count in violation of General Statutes (Rev. to 2015) § 53a-181d (b) (2).

The jury returned guilty verdicts against the defendant on all counts. Thereafter, the court granted the state's motion to vacate the convictions of two counts of harassment and one count of stalking because, according to the parties, those counts were charged as alternative forms of liability against the defendant. Subsequently, the defendant was found guilty by the jury on a part B information in two cases of having committed offenses while on release.

lack of competence. We disagree and, thus, affirm the judgments of the trial court.

The following facts and procedural history are relevant to this appeal and are set forth in detail, a reflection of the defendant's presumptive constitutional right to represent himself. See *Faretta* v. *California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The charges against the defendant stem from his unsolicited telephone calls, text messages, and e-mail communications to the three victims, C, F, and Attorney W. The defendant was charged as a result of his conduct related to C, F, and W in May, 2015, January, 2016, and September, 2016, respectively.

There were extensive pretrial proceedings in these joined cases, the most relevant of which began on November 28, 2017, when the court, *Dooley*, *J.*, held a hearing on the defendant's motion to replace his assigned defense counsel, Attorneys Christopher Y. Duby and Robert L. O'Brien. The defendant alleged misconduct against Duby and O'Brien, stated that he would be filing a police report, was seeking their prosecution, and would file a grievance against them. The defendant further claimed that Duby and O'Brien breached ethical duties to him, were providing inadequate assistance of counsel, and had conflicts of interest, including that they did not "want to expose what's gone on in this . . . courthouse . . . because they will lose business."

Judge Dooley denied the defendant's motion to replace his assigned defense counsel. The defendant, both before and after Judge Dooley's ruling, declared three times that he would represent himself. Judge Dooley warned the defendant that a decision to represent himself was "an incredibly bad idea" and stated that "refusing counsel is . . . not an option. If you'd like to make a motion that you be permitted to represent

yourself, I can undertake that motion . . . .'' Undeterred by Judge Dooley's warning, the defendant orally moved to represent himself. In response to the defendant's motion, Judge Dooley ordered a five minute recess so that the defendant could ''talk to [Duby and O'Brien] about the question of self-representation.''

When the court reconvened, O'Brien reported that he had advised the defendant of his constitutional right to an attorney and that, should he waive that right, he would be ''expected to follow all the rules and procedures of the court.'' According to O'Brien, the defendant told him ''that he didn't understand'' but, nonetheless, O'Brien ''believe[d] that [the defendant was] aware of what his obligations would be'' if he represented himself. O'Brien further stated that there was no further conversation between them because of ''the attitude'' O'Brien received from the defendant. The defendant told Judge Dooley that he did not understand why O'Brien was asking him if he understood his constitutional right to an attorney. Judge Dooley responded that she thought that it was prudent for him to speak with his defense counsel before deciding whether to represent himself without the assistance of counsel. Judge Dooley again ordered a recess so that the defendant would have that opportunity. Prior to the second ordered recess, however, the defendant again raised a concern about whether Duby and O'Brien could adequately represent him, to which Judge Dooley told the defendant that the issue had ''already been resolved by my ruling . . . .''

When the hearing resumed after the second recess, O'Brien reported to the court his impression that the defendant was ''aware of what's going on,'' and was ''aware of his obligations, the procedure into the court and . . . decorum.'' The defendant stated, ''[t]hat's exactly what I said I'm not aware of,'' and then attempted once again to revisit the topic of whether O'Brien should continue to represent him. At this time,

the prosecutor moved for a hearing, pursuant to General Statutes § 54-56d, to evaluate the defendant's competency under *Indiana* v. *Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008), and *State* v. *Connor*, 292 Conn. 483, 973 A.2d 627 (2009) (*Connor I*).

During a lengthy colloquy, Judge Dooley explained to the defendant what representing himself would entail and attempted to elicit a direct answer from him as to whether he was requesting to represent himself. The defendant provided equivocal answers to Judge Dooley's direct question, interrupted her and others numerous times, and raised immaterial issues. The defendant returned to his motion to substitute his assigned defense counsel, stated his intention to immediately appeal Judge Dooley's denial of that motion, and requested a change of venue because "[W] is well known by everyone in here." Judge Dooley warned the defendant multiple times to cease his interruptions or else she would remove him from the courtroom or "decide, based on the record developed here today, that you're not competent to represent yourself. . . . Because this is not a circus; this is not the Jerry Springer [television] show; this is not the big top. You're going to have jurors in here, and you will comport yourself with what we expect litigants and their lawyers and how they're to . . . behave. And what you're demonstrating to me is that you're not capable of that, and under those circumstances I would not let you represent yourself." Eventually, the defendant did unequivocally request to represent himself.

The state reiterated its request that the defendant's competency to represent himself be evaluated. After noting her "significant concern . . . as to [the defendant's] ability to comport himself as required in a courtroom . . . [and] his ability to appropriately stay focused on the issues associated with jury selection and . . . the cross-examination or direct examination

of witnesses," Judge Dooley ordered that the defendant's competency to represent himself be evaluated by the Department of Mental Health and Addiction Services (department). The defendant informed Judge Dooley what his "intent" was with respect to the evaluation: "I can make, I'm looney, I can go in there, make them think, sane. I can do whatever I wish." The defendant further stated, "I would like to apologize for my conduct; it has gone exactly as I hoped it would today."

Subsequently, Judge Dooley sua sponte raised the issue of the defendant's pretrial bond, indicating her intention to release the defendant from prison on a promise to appear that was accompanied by certain conditions. During the bond discussion, the defendant interjected frequently, informing Judge Dooley that he did "not want a reduction of bond." Judge Dooley warned the defendant five times to stop interrupting her and others before ordering him removed from the courtroom.

When the defendant eventually was permitted to return to the courtroom, he immediately stated his intention to file a grievance against the prosecutor and was told by Judge Dooley to stop interrupting. Soon thereafter, the defendant asked if he could withdraw his request to represent himself, to which Judge Dooley asked, "[d]o you realize that if you withdraw that request, then you can never reassert it?" The defendant then informed Judge Dooley that he did not know if he wanted to withdraw his request to represent himself. When Judge Dooley pressed for an unambiguous answer, the defendant instead sought to address prior comments made by the prosecutor. Judge Dooley redirected the discussion back to the issue of the defendant's pretrial bond without first getting a definitive answer from him as to the status of his request to represent himself.

Prior to and while Judge Dooley was issuing her ruling on his bond, the defendant interjected, "why are you trying to lower my bond? This doesn't make sense to me," "[w]atch this," "[h]ave you ever seen Star Trek, The Wrath of Khan?" and, "[h]ere it comes." When the prosecutor raised an issue concerning a protective order, the defendant again began interrupting the proceedings, including by stating that he would not recognize the protective order's restriction against contacting his three children. The defendant was warned three times by Judge Dooley to stop talking and then was ordered removed from the courtroom for the second time during that hearing. Judge Dooley stated, "I think what we've seen here today is gamesmanship, manipulation, deceit on many, many levels and . . . at this juncture, the court is going to get its evaluation . . . ." Judge Dooley then asked Duby and O'Brien to collect contact information from the defendant during the court's luncheon recess for his competency evaluation.

After the court reconvened, the defendant was permitted to return to the courtroom. The prosecutor stated to the court that, in the holding cell, the defendant "refus[ed] to leave and shout[ed] various statements, basically to the effect that he was going to violate the protective orders as soon as he exited the court." The bail commissioner reported that her attempts to speak with the defendant and have him sign a written promise to appear were unsuccessful because "he kept asking questions and redirecting our conversation." In light of the defendant's conduct, the state moved, and Judge Dooley ordered, that the defendant's bond be increased on each of his files. As Judge Dooley was explaining the predicate for her ruling, the defendant interjected, stating, "[t]hat's awesome. That is the best thing she could have said on the record. That is the best thing she could have said."

The defendant next appeared in court on January 30, 2018, when Judge Dooley conducted a competency hearing. The defendant interrupted the proceedings almost immediately to move to change venue, which Judge Dooley stated she would not entertain because "we don't have hybrid representation in the state of Connecticut . . . ." Psychiatrist Ish Bhalla testified as to the January 29, 2018 competency evaluation that he produced regarding the defendant. Before Bhalla could begin his testimony, however, the defendant interrupted the proceedings multiple times, causing Judge Dooley to take a recess in order to switch courtrooms to one equipped with an observation room, into which the defendant was placed when the proceedings reconvened.

Bhalla resumed testifying in the new courtroom. The testimony was punctuated by the defendant's audible shouting from inside the observation room. Judge Dooley ordered the defendant removed from the observation room because he was so disruptive to the proceedings inside the courtroom.

After the defendant was removed from the observation room, Bhalla testified that he was unable to form an opinion as to whether the defendant understood the nature of the proceedings against him but that, in his opinion, the defendant was not able to assist in his defense. Bhalla further testified that there was a substantial probability that the defendant could be restored to competency within eighteen months and that the least restrictive means of doing so would be by inpatient hospitalization. On redirect examination, Bhalla also testified that some of what he observed in the defendant, such as tangential thinking, the failure to redirect, and suspiciousness, "would transfer over to [the assessment of the defendant's ability to represent himself]." In response to questioning from Judge Dooley, Bhalla agreed with her that the disruptive behavior exhibited

by the defendant that day was "consistent with the symptomology that [he] saw presented during [his] evaluations."

After Bhalla's testimony, Judge Dooley found that the defendant was not presently competent to assist in his defense and that there was a "substantial probability that [he] may be restored to competency within the maximum period of placement, and . . . that the least restrictive setting in which to have that restoration of competency occur is . . . with the [department] at Whiting [Forensic Division of Connecticut Valley Hospital in Middletown]."

At the next hearing, on April 4, 2018, the March 28, 2018 competency evaluation produced by the department was entered into evidence as a court exhibit. The report concluded that the defendant was "fully competent and that he [understood] the nature of the charges against him and [is] able to assist in his defense." After neither party requested a hearing on the issues contained in the report, Judge Dooley asked the defendant if it was his "present desire to represent [himself] in [the] proceedings," to which the defendant responded in the affirmative. Judge Dooley then proceeded to canvass the defendant to determine whether he was competent to represent himself and whether he was knowingly, intelligently, and voluntarily waiving his right to the assistance of counsel. During the canvass, Judge Dooley told the defendant that she did not "have a question about [his] cognitive abilities," but she did share her "substantial concern[s]" regarding his conduct in past hearings that, if exhibited again, would "immediately come out to a forfeiture of that right." Judge Dooley ultimately concluded that the defendant knowingly, intelligently, and voluntarily waived his right to the assistance of counsel and was competent to represent himself. Thus, the defendant's request to represent himself was granted; Duby and O'Brien were appointed standby counsel.

The parties next appeared before the court, *Matasavage*, *J.*, in the morning of April 23, 2018, for a settlement discussion, which did not result in a plea deal. In the afternoon, the court, *Bentivegna*, *J.*, conducted a bond hearing. Judge Bentivegna denied a reduction in bond because of his "significant concerns, based on what [he] heard . . . as to whether or not [the defendant would] be willing to comply with the protective orders."

The parties again appeared before Judge Matasavage for a pretrial settlement discussion on July 10, 2018. Despite the purpose of the day's hearing, the defendant began by discussing a motion he had filed, in which he asserted that "the defense has not been afforded pretrial conferences with effective counsel . . . ." Judge Matasavage responded that the defendant's "pretrial conference is right now" but that he was prepared to delay the day's conference until 2 p.m. in order to give the defendant additional preparation time. Before Judge Matasavage could order a recess, the defendant stated that "pretrial conferences are not just a one time meeting" and that pretrial conferences "can take weeks and weeks." The defendant explained that he would "engage with . . . a good faith attitude; however, [he would] not . . . accept a form of cursory justice in which [he felt] rushed to . . . make a decision, especially when [he had] only been counsel for three months . . . ." The defendant then informed Judge Matasavage that the state had not provided him with exculpatory evidence—transcripts from his nine day divorce trial. The prosecutor disputed the defendant's contention, explaining that he had turned over his "complete file" to the defendant. The prosecutor further asserted, and Judge Matasavage agreed, that the prosecutor had no duty to search for exculpatory evidence and that the defendant could order the transcripts from his divorce trial if he believed they contained exculpatory evidence.

At multiple times throughout the hearing, the defendant took the settlement discussion off course. At one point, he stated that "[the prosecutor] does not have probable cause." Later, the defendant contested the basis for the protective orders that were part of the state's plea offer. Judge Matasavage stated that if the defendant did not want to plead guilty and have protective orders imposed against him, he could proceed to trial. The defendant responded, "I'm speaking to the record for posterity and to preserve an issue and for an offer of proof because I've been dealing with this court now for five years and this court—no offense, is highly corrupt. I am getting a change of venue, there is no way that this trial will be tried in Torrington at all, especially considering the fact that . . . everybody here works with . . . [W], everybody."

When Judge Matasavage asked the defendant "how would [he] like to resolve the case today," the defendant responded that "[he had not] been constitutionally arraigned" and that, "[r]ight now, there are no pleas on the record" because of ineffective assistance of counsel. The defendant further informed the court that "there are more pleas than guilty, not guilty, nolo contendere." During the hearing, Judge Matasavage cautioned the defendant five times that he was being obstructionist and once that his right to represent himself was not absolute. The hearing concluded without the defendant's accepting the state's offered plea deal and with Judge Matasavage telling the defendant that he had "been nothing but obstructive during this whole hearing."

On the following day, the parties appeared before Judge Bentivegna for a pretrial motion hearing. The first motion discussed was the defendant's motion to allow media access and coverage. Judge Bentivegna explained that the motion was not necessary because all criminal cases were presumed open to the public.

Nonetheless, the defendant explained that he had "encountered, basically, a kangaroo court within the last six years" so that he believed that it was "imperative that the media be here as a watchdog, not on me, but on this court." After Judge Bentivegna reiterated that the trial would be open to the public and the media, the defendant further stated that "there's a lot of connivance going on from the part of the state, trying to stop the member of the press, so named natural person, [the defendant], from reporting as a freelance journalist on what he has seen and witnessed with his own eyes." Judge Bentivegna warned the defendant that, "in the past, there's been an issue with you interrupting the judge," which he would not tolerate.

Next, the defendant's motion concerning his treatment by the courthouse marshals was discussed. The defendant "want[ed] to be heard," even though he also intended to "file a state civil action . . . [and] a federal civil action against the marshal service . . . ." Judge Bentivegna stated, "that's not relevant to this case," and moved on to other issues.

The next motion discussed was the defendant's motion to withdraw his not guilty pleas because they were entered by ineffective counsel. Judge Bentivegna stated, "this is [an] issue that raises concerns about whether or not you're competent to represent yourself because . . . the fundamental issue here is that you're asking for a trial because you think that you're innocent. In order to have a trial, you have to enter not guilty pleas to the charges." The defendant responded that he wanted to return to the point prior to arraignment when he would have the opportunity to meet with the prosecutor and explain why the charges should be dismissed before he ever had to enter a plea. Judge Bentivegna stated, "this is not a motion to dismiss," and reiterated his concerns with the defendant's competency to represent himself. The defendant had hoped to

enter an "obscure plea" that "basically stops everything short" but acceded to maintaining his not guilty pleas.

Subsequently, the defendant requested more pretrial conferences because the plea bargaining process "was riddled with bias and prejudice," and he had "the right to challenge the probable cause prior to trial." Judge Bentivegna explained that they were "past that" and that the state had the burden at trial to prove the charges beyond a reasonable doubt, which is a higher standard than probable cause. The defendant "remind[ed] the court that the reason [they were] past that is because of ineffective counsel who never challenged the probable cause of the state." Although the prosecutor informed the court that four of the five cases had arrest warrants that could not be subject to a motion to dismiss, the defendant continued arguing that there was insufficient probable cause in his cases.

The defendant also accused the victims of perjury and "ask[ed] [the] court to charge them with perjury to the full extent of the law." For the third time at this hearing, Judge Bentivegna stated his concerns about the defendant's competency because the defendant did not understand that the court did not have the authority to charge anyone with a crime. In response, the defendant clarified that he understood that the prosecutor is the individual who charges crimes.

The defendant requested a copy of the oath taken by judges, attorneys, and Winsted police officers. He further requested that, as a matter of "good faith," standby counsel and the prosecutor print and provide to him the research materials cited in their motions because he did "not have a law library available to [him]." Judge Bentivegna denied the motion, stating that neither standby counsel nor the prosecutor had an obligation to provide the defendant with research materials. The defendant raised the prosecutor's failure

to procure transcripts from the defendant's nine day divorce trial and provide them to him as a part of the prosecutor's duty to provide exculpatory evidence. Judge Bentivegna stated that the prosecutor had no obligation to get the transcripts. Before the court adjourned for the day, the defendant asserted that he intended to file a motion for a change of venue because of the "high prejudicial nature of this court against the defense" and "a myriad of due process violations" by the court and the prosecution.

On July 17, 2018, the parties again appeared before Judge Bentivegna for a hearing on pretrial motions. During the hearing, the state's motion for joinder was argued. The defendant disputed the merits of the charges against him and asserted that the prosecutor had misrepresented factual aspects of his cases, including his motive and intent. The defendant argued that the issues in each case were not related to one another, that the case involving C would take "possibly four to five days," then it would take eighteen days to try the cases involving C and F, and another twelve to fifteen trial days to try the case involving W. During his argument, the defendant was warned by Judge Bentivegna six times that he was "getting off track," sounded like he was testifying, was "getting far afield of what the arguments . . . are for this," and was "raising a lot of factual issues that may or may not be relevant at the trial." Judge Bentivegna further told the defendant that, although he thought that the defendant had "some understanding of the law," he was concerned that the defendant lacked the competency necessary to represent himself and that the court was nearing a decision that the right had been forfeited.

Judge Bentivegna next went through the defendant's witness list. The defendant's witness list was comprised of forty-eight names, including "Yahuah Elohim," "Yehosua Masiah," the prosecutor, Attorney General

George Jepsen, Winsted Mayor A. Candy Perez, Justice Andrew J. McDonald, and Chief State's Attorney Kevin T. Kane. Judge Bentivegna immediately stated his concerns about the defendant's competency to represent himself, given the fact that he requested to subpoena two deities. The defendant explained that, despite listing these two names on his witness list, he "wasn't asking to subpoena [them]. I trust in God, so he is going to be my witness at the case." Judge Bentivegna asked, "is [it] your position that God is going to be a witness here," to which the defendant questioned in response, "[a]re you putting my faith on trial with that question?" The defendant clarified that he figuratively listed the two deities and did not intend to have them testify.

Judge Bentivegna expressed concerns about the defendant's competency to represent himself on the basis of other witnesses he listed. With respect to witnesses who pertained to the defendant's prior divorce case, Judge Bentivegna stated, "I'm concerned that you don't have a fundamental understanding as to how the issues are different in a divorce case and a criminal case." When discussing the defendant's request to subpoena a social worker from the Department of Children and Families to support a justification defense, Judge Bentivegna stated that "she can't testify to your intent." Judge Bentivegna had similar concerns when the defendant sought to call a witness to testify to W's fear of the defendant, stating that someone else could not testify as to her thinking.

The defendant sought to call the psychologist who performed his March 28, 2018 competency evaluation to "testify that there is no intent" on his part because his alleged criminal conduct was a form of habit, routine or practice under § 4-6 of the Connecticut Code of Evidence, prompting Judge Bentivegna to again state his concerns with the defendant's competency to represent himself. Duby, acting as standby counsel, assisted the

defendant by articulating the logic behind calling this witness. After hearing Duby's clarification, Judge Bentivegna deferred ruling on that witness. Judge Bentivegna further noted his concerns with the defendant's competency on the basis of the defendant's having indicated that he planned to testify in one of three cases, despite "raising issues that seem to require that [he] would testify in all three cases . . . ." Judge Bentivegna stated, "I do not think that you understand how complicated this criminal trial is going to be."[2]

The parties appeared before Judge Bentivegna the following day. At the beginning of the hearing, the prosecutor expressed his concerns about the defendant's competency to represent himself after, inter alia, receiving the defendant's discovery materials, which included thirty-one pages of original song lyrics and an original short story, both written by the defendant, and thirty-nine photographs of the defendant and his three children. Accordingly, the prosecutor requested that Judge Bentivegna "revisit whether he remains competent to represent himself under Connecticut's heightened standard." The defendant argued in response that what he provided in discovery was relevant.

Judge Bentivegna issued a comprehensive oral ruling, concluding that the defendant forfeited his right to self-representation. Judge Bentivegna stated that the record from November 28, 2017, to April 4, 2018, revealed the following: The defendant was disruptive and obstructive during the November 28, 2017 and January 30, 2018

[2] Before the hearing concluded, Judge Bentivegna granted the defendant permission to sit in the courtroom for the remainder of that day and in the morning of the next day to listen to and view media on a laptop because he was not permitted to possess it in prison. The defendant asked whether the marshals overseeing him in the courtroom while he viewed the media could be called as witnesses against him at trial, prompting Judge Bentivegna to state that this was another instance that gave him concerns about the defendant's competency.

hearings before Judge Dooley, necessitating his removal from the courtroom on three occasions and once from the observation room; the January 29, 2018 competency evaluation concluded that the defendant was not competent but restorable, had self-reported post-traumatic stress disorder, but otherwise provided no records of his medical history, and that a longtime friend of the defendant reported that the defendant had anxiety and depression; Bhalla opined that "it would be very difficult for a person who presented with difficulty redirecting or tangential thought process to represent himself"; the March 28, 2018 competency evaluation concluded that the defendant was competent to represent himself but also diagnosed him with a personality disorder with borderline narcissistic and obsessive-compulsive traits; and, at the April 4, 2018 hearing, Judge Dooley found the defendant competent to represent himself and that he had improved his conduct since earlier hearings, and granted him the right to represent himself while also appointing standby counsel and warning the defendant that his right to self-representation could be forfeited.

Judge Bentivegna then summarized the record since April 4, 2018, which reflected the following: The defendant had filed approximately twenty-four motions and pleadings, "some of [which] rely on nonlegal references and arguments, some of [which] make nonsensical arguments and some of [which] are repetitive and redundant"; the defendant "was not able to grasp fully that pleading not guilty was a procedural necessity, in terms of having a trial"; the defendant sought preliminary hearings without "understanding that preliminary hearings are limited to the most serious crimes"; the defendant "did not understand that because most of his cases were based on arrest warrants, he was not entitled to a probable cause hearing"; the defendant requested that the court should charge witnesses that he suspected

would commit perjury, despite its inability to do so; and, the defendant exhibited confusion as to aspects of discovery, standby counsel, and criminal law and procedure.

Judge Bentivegna stated that, at the hearing held the previous day, some of the defendant's arguments on the motions for joinder and for severance "were totally off track," "[a]t times the defendant seemed to be testifying . . . [a]nd it sounded like he was planning to retry his divorce case in these criminal cases." Judge Bentivegna noted the defendant's witness list, particularly its inclusion of deities, that the defendant anticipated calling approximately thirty-three witnesses, and that he predicted that the trial would last several weeks. Judge Bentivegna stated that his "general impression is that the defendant does not clearly understand criminal procedure." Moreover, Judge Bentivegna raised additional concerns stemming from the defendant's thinking that the courtroom marshals could become witnesses against him in his cases and from the defendant's discovery disclosures to the prosecution.

With respect to the defendant's mental health, Judge Bentivegna noted that it varied and that he exhibited signs of "individual functioning problems," including "disorganized thinking, impaired expressive ability, the manner in which [he] had conducted himself, [his] grasp of issues pertinent to the proceedings, and [he] has also demonstrated tangential thought process, which was one of the concerns raised by . . . Bhalla." Although he noted that "the defendant has generally conducted himself appropriately" during the July 11 and 17, 2018 hearings, and that he "has demonstrated some understanding of criminal law and procedure and has shown that he is trying very hard to represent himself," Judge Bentivegna concluded that the defendant's "understanding and ability to represent himself is so limited that he is not able to represent himself adequately." In

light of the foregoing, Judge Bentivegna ruled that the defendant forfeited his right to self-representation.[3]

Subsequently, the defendant was found guilty of all counts; however, the court vacated two counts of harassment and one count of stalking. See footnote 1 of this opinion. The defendant was then was found guilty by the jury on the part B informations that alleged that he had committed crimes against F and W while on release in connection with the charges related to C. The defendant received a total effective sentence of twenty-four months incarceration, with the imposition of full, no contact protective orders in favor of C, F, and W. This appeal followed.

We begin our discussion with the established principles of law and our standard of review. The sixth amendment to the United States constitution provides in relevant part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." See also *Gideon* v. *Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (holding that sixth amendment right to counsel is made applicable to states through due process clause of fourteenth amendment). In *Faretta* v. *California*, supra, 422 U.S. 807, the Supreme Court held that "a defendant in a state criminal trial has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so." (Emphasis in original.) "The [c]ourt implied that right from: (1) a nearly universal conviction, made manifest in state law, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so . . . (2) [s]ixth [a]mendment language granting rights to the accused; (3) [s]ixth [a]mendment

[3] At his next court appearance, on July 24, 2018, the defendant filed a motion to reconsider the ruling denying him the right to represent himself, which the court denied.

structure indicating that the rights it sets forth, related to the fair administration of American justice, are persona[l] to the accused . . . (4) the absence of historical examples of *forced* representation . . . and (5) and respect for the individual . . . .'' (Citations omitted; emphasis in original; internal quotation marks omitted.) *Indiana* v. *Edwards*, supra, 554 U.S. 170. The right to self-representation, however, is not absolute, as articulated by the Supreme Court in *Faretta* and its progeny. See id., 171 (collecting cases).

In *Edwards*, the Supreme Court considered whether mental illness was a basis for limiting the scope of the self-representation right when a state court finds a criminal defendant competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. Id., 167, 171. More specifically, the court decided ''whether in these circumstances the [federal] constitution prohibits a [s]tate from insisting that the defendant proceed to trial with counsel, the [s]tate thereby denying the defendant the right to represent himself.'' Id., 167. The court held that the federal constitution ''permits [s]tates to insist upon representation by counsel for those competent enough to stand trial under *Dusky* [v. *United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960)] but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.'' *Indiana* v. *Edwards*, supra, 554 U.S. 178.

The court in *Edwards* provided three reasons to support its holding that the states could insist on representation by counsel for defendants who were not competent to conduct trial proceedings by themselves. First, the court determined that its precedent favored its holding. The court noted that its prior '' 'mental competency' '' cases, *Dusky* v. *United States*, supra, 362 U.S. 402, and *Drope* v. *Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975), produced a standard measuring

competency that assumed the presence of counsel. *Indiana* v. *Edwards*, supra, 544 U.S. 170–71; see *Dusky* v. *United States*, supra, 402 (prong one of test asks "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding"). Because *Edwards* involved a defendant who was seeking to forgo the assistance of counsel, the court believed that the *Dusky* standard inadequately measured competency under the circumstances. *Indiana* v. *Edwards*, supra, 174–75. Furthermore, the court observed that *Faretta*'s holding was supported in part by preexisting state case law set forth in cases, "all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right." Id., 175.

Second, the court stated that the complexity of mental illness, which "varies in degree," "can vary over time," and "interferes with an individual's functioning at different times in different ways," militates against a unitary competency standard. Id., 175–76. Third, the court believed that a higher competency standard for self-representation at trial would best " 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel"; id., 176; ensure a fair trial, and demonstrate fairness to observers. Id., 177.

Although the court held that the federal constitution permitted "[s]tates to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves"; id., 178; it declined to adopt a federal standard by which competency to represent oneself at trial would be assessed.[4] Id.

[4] The court declined Indiana's request that it adopt a standard "that would deny a criminal defendant the right to represent himself at trial where the defendant cannot communicate coherently with the court or a jury." (Internal quotation marks omitted.) *Indiana* v. *Edwards*, supra, 554 U.S. 178. The court also declined Indiana's request to overrule *Faretta*. Id.

Following the Supreme Court's decision in *Edwards*, our Supreme Court decided *Connor I*, supra, 292 Conn. 483, in which the defendant, despite a history of mental health issues, was found competent to represent himself and his request to do so was granted. Id., 502–503. In *Connor I*, the defendant had recently suffered a stroke that rendered him unable to walk. Id., 490. The defendant's competency to stand trial was evaluated three times but was hindered each time by the defendant's failure to cooperate with the evaluation teams. Id., 491, 492, 494, 495, 497–98. The first evaluation team concluded "that [the defendant] most likely would not be competent to stand trial." Id., 494. The court accepted this conclusion, found that the defendant was not competent to stand trial and ordered that he be committed to Connecticut Valley Hospital for the purpose of restoring his competency. Id. The second and third competency evaluation teams, however, concluded that the defendant was malingering and, thus, was competent to stand trial. Id., 495, 498, 520. Relatedly, two trial court judges observed that the defendant's in-court conduct was consistent with malingering. Id., 499–501.

After the defendant was found competent to stand trial following his third competency evaluation, he requested that he be allowed to represent himself at trial. Id., 501. The court cautioned the defendant against doing so but canvassed him, found him competent to represent himself, and granted the request. Id., 502–503. After a jury found him guilty of various charges; id., 504; the defendant appealed to our Supreme Court, claiming, inter alia, that the trial court deprived him of his right to the assistance of counsel, in violation of the federal and state constitutions, by improperly concluding that he was competent to waive his right to counsel at the trial of his criminal case. Id., 505–506.

Our Supreme Court in *Connor I* rejected the defendant's constitutional claims, concluding that "the trial

court reasonably found that the defendant was competent to stand trial and, therefore, that he also was competent, for constitutional purposes, to waive his right to counsel." Id., 519–20. The court "conclude[d], however, in the exercise of [its] supervisory authority over the administration of justice, that a defendant, although competent to stand trial, may not be competent to represent himself at that trial due to mental illness or mental incapacity." Id., 506. Therefore, "upon a finding that a mentally ill or mentally incapacitated defendant is competent to stand trial and to waive his right to counsel at that trial . . . trial court[s] must make another determination, that is, whether the defendant also is competent to conduct the trial proceedings without counsel." Id., 518–19. The court's decision to exercise its supervisory authority to require a distinct determination of a defendant's competency to conduct trial proceedings without the assistance of counsel was a reflection that "*Edwards* did not alter the principle that the federal constitution is not violated when a trial court permits a mentally ill defendant to represent himself at trial, even if he lacks the mental capacity to conduct the trial proceedings himself, if he is competent to stand trial and his waiver of counsel is voluntary, knowing and intelligent." Id., 517; see also id., 528 n.28 ("[b]ecause our conclusion is not constitutionally mandated, we adopt this rule in the exercise of our supervisory authority over the administration of justice"). In accordance with its holding, the court remanded the case "for a hearing on the issue of whether the defendant's mental illness or incapacity rendered him incompetent to represent himself at trial in the criminal case." Id., 506.

The court in *Connor I* did not "believe that it [was] prudent . . . to attempt to articulate a precise standard" to guide the trial court's analysis on remand but advised that "the trial court should consider all pertinent factors in determining whether the defendant has

sufficient mental capacity to discharge the essential functions necessary to conduct his own defense . . . .'' Id., 530 n.32; see also *Indiana* v. *Edwards*, supra, 554 U.S. 175–76 (stating that ''basic tasks needed to present [a] defense without the help of counsel'' are ''organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury''). Factors for consideration include ''the manner in which the defendant conducted the trial proceedings and whether he grasped the issues pertinent to those proceedings, along with his ability to communicate coherently with the court and the jury.'' *Connor I*, supra, 292 Conn. 530; id., 530 n.32. With respect to the particular defendant in *Connor I*, the trial court was instructed to consider ''any and all relevant information, including, but not limited to, the extent to which the defendant's competence to represent himself may have been affected by mental illness, by the stroke that he had suffered . . . any memory problems that he may have experienced as a result of that stroke,'' and ''the extent to which [he] may have been feigning mental problems.'' Id., 529. The court underscored that this analysis was not to focus on ''whether the defendant lacked the technical legal skill or knowledge to conduct the trial proceedings effectively without counsel'' because that ''has no bearing on whether he was competent to represent himself for purposes of *Edwards*.'' Id., 529–30.

We review a trial court's denial of a defendant's right to self-representation for an abuse of discretion. *State* v. *Braswell*, 318 Conn. 815, 830, 123 A.3d 835 (2015); *State* v. *Connor*, 170 Conn. App. 615, 621, 155 A.3d 289 (*Connor III*), cert. granted, 325 Conn. 920, 163 A.3d 619 (2017) (appeal withdrawn January 5, 2018);[5] see also

[5] In *State* v. *Connor*, 321 Conn. 350, 138 A.3d 265 (2016) (*Connor II*), our Supreme Court reversed the judgment of this court, which had reversed the judgment of the trial court and ordered a new trial, because this court raised, sua sponte, the procedural inadequacy of the remand hearing, an issue that had not been raised or argued by the parties. Our Supreme Court remanded

Indiana v. *Edwards*, supra, 554 U.S. 177 ("the trial judge . . . will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant"); *Connor I*, supra, 292 Conn. 529 (same). "In determining whether there has been an abuse of discretion, every reasonable presumption should be given in favor of the correctness of the court's ruling . . . . Reversal is required only where an abuse of discretion is manifest or where injustice appears to have been done. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . Our review of a trial court's exercise of the legal discretion vested in it is limited to the questions of whether the trial court correctly applied the law and could reasonably have reached the conclusion that it did." (Citations omitted; internal quotation marks omitted.) *Connor III*, supra, 621.

We now direct our attention to the present appeal. The defendant claims that the trial court "improperly denied [him] the right to represent himself based on his supposed incompetence" because "[t]he record demonstrates that [he] is sane and can organize his claims, file motions, and argue points of law." More specifically, the defendant argues that he "is (and was) *not* mentally

the case to this court to consider the defendant's claim that "the trial court abused its discretion when it erroneously concluded that the [defendant] was competent to represent himself at [his criminal] trial despite his mental illness or mental incapacity." (Internal quotation marks omitted.) Id., 360; see id., 375. On remand, the parties argued that the abuse of discretion standard applied, with which this court agreed before ultimately concluding that the trial court had not abused its discretion in determining that the defendant was competent to represent himself at his criminal trial. *Connor III*, supra, 170 Conn. App. 627. Subsequently, our Supreme Court granted certification to appeal from this court's judgment in *Connor III*. *State* v. *Connor*, 325 Conn. 920, 163 A.3d 619 (2017) (appeal withdrawn January 5, 2018).

ill" and that the record reveals his capability to perform the basic tasks necessary for self-representation. (Emphasis in original.) We disagree.

In the March 28, 2018 competency evaluation, in which the defendant was found competent to stand trial after time spent at Connecticut Valley Hospital for the purpose of restoration, he was diagnosed with a personality disorder with borderline, narcissistic and obsessive-compulsive traits. The report also stated that the defendant had indicated suffering from post-traumatic stress disorder and that a prior New Haven Office of Forensic Evaluations report referenced his hospitalization two years prior for anxiety and depression. Because the defendant provided little information about his medical history and refused to sign releases for that information, the report stated that it could not be determined whether the defendant possessed these disorders but did note that he displayed no symptoms of them during his period of restoration. The report further found that the defendant presented no delusional thought processes or psychiatric symptoms requiring medication. The report also stated that the defendant "admitted freely (and even boasted) that his behavior was [wilful], intentional, and part of a calculated maneuver toward some goal," but the evaluators did not opine whether they agreed that the defendant was malingering.

On the basis of the foregoing, we conclude that Judge Bentivegna reasonably found that the defendant had a "mental illness or mental incapacity." *Connor I*, supra, 292 Conn. 506. Although parts of the March 28, 2018 evaluation concluded that the defendant did not present diminished mentation, it did diagnose him with a personality disorder. Moreover, in the January 29, 2018 competency evaluation, the defendant was found to have exhibited "no insight, [and] a disorganized, tangential, and loosely associated thought process." Judge Bentivegna, who, as the trial judge, had the most advantageous position to observe the defendant, concluded

that, although the defendant's mental health varied, he exhibited signs of "individual functioning problems," including, "disorganized thinking, impaired expressive ability, the manner in which [he] had conducted himself, [his] grasp of issues pertinent to the proceedings, and [he] has also demonstrated tangential thought process, which was one of the concerns raised by . . . Bhalla." After a review of the January 29 and March 28, 2018 evaluations and the record from November 28, 2017 through July 18, 2018, we cannot conclude that Judge Bentivegna abused his discretion in reaching that determination. See *Indiana* v. *Edwards*, supra, 554 U.S. 175 (stating that mental illness "varies in degree," "can vary over time," and "interferes with an individual's functioning at different times in different ways"); *Connor I*, supra, 292 Conn. 529 (stating that trial court "is best able to make [a] fine-tuned mental capacity [decision], tailored to the individualized circumstances of a particular defendant" (internal quotation marks omitted)).[6]

We further conclude that Judge Bentivegna reasonably found that the defendant's mental illness or mental incapacity would interfere with his competency to conduct trial proceedings by himself and, thus, supported a conclusion that he forfeited his right to self-representation.

First, the manner in which the defendant conducted judicial proceedings raised concerns about his competency. While arguing points of law, the defendant frequently deviated from the issues then being discussed. For instance, on November 28, 2017, when

[6] The defendant argues that criminal defendants may not be denied the right to self-representation unless they possess a "severe mental illness." In *Connor I*, our Supreme Court held that trial courts must assess whether "*mentally ill or mentally incapacitated*" defendants who request to represent themselves are competent to do so. (Emphasis added.) *Connor I*, supra, 292 Conn. 487. The court in *Connor I* did not once preface mental illness or mental incapacity with the adjective "severe." Accordingly, we disagree with the defendant's argument.

Judge Dooley was attempting to determine whether the defendant was making a request to represent himself, the defendant resisted providing a direct answer, revisited her denial of his motion to substitute counsel, and stated his intention to file a motion to change venues.[7] During the July 10, 2018 settlement discussion before Judge Matasavage, the defendant claimed that the prosecutor was withholding exculpatory evidence from him, claimed that there was insufficient probable cause to bring the charges he faced, and contested the constitutionality of his arraignment.[8] Even during what was conceivably the defendant's display of his ability to represent himself, his argument against the state's motion for joinder, Judge Bentivegna told the defendant multiple times that he was "getting off track." These instances reasonably permitted an inference that, at times, the defendant presented disorganized and tangential thinking, which Bhalla testified to observing during the January 29, 2018 evaluation and in court on

[7] We appreciate that, at this time, the defendant was not representing himself but, rather, was advocating that he be permitted to do so. Because, during this discussion, the defendant was engaged in a colloquy with Judge Dooley concerning his request to represent himself, we consider how the trial court's assessment of his behavior during the discussion reflected on his ability to conduct future trial proceedings.

Before this court, the defendant argued that only conduct following April 4, 2018, when he was found competent to represent himself, may be considered when reviewing Judge Bentivegna's ruling. We disagree. Judge Bentivegna in part relied on the defendant's "disruptive and obstructive conduct" that occurred before November 4, 2018. We find no issue with Judge Bentivegna's approach in this situation. Although the defendant was found competent to stand trial in the March 28, 2018 evaluation and found competent to represent himself on April 4, 2018, he was previously found incompetent to stand trial in the January 29, 2018 evaluation and, thus, his conduct prior to and following that evaluation reflects a pattern of mental incompetency that Judge Bentivegna could compare to his observations of the defendant when determining whether he would be competent to conduct future trial proceedings without the assistance of counsel. See *Indiana* v. *Edwards*, supra, 554 U.S. 175 (mental illness "varies in degree . . . [and] over time").

[8] In his oral ruling, Judge Bentivegna did not reference the settlement discussions that occurred before Judge Matasavage. There was adequate support for Judge Bentivegna's ruling even without considering the defendant's conduct before Judge Matasavage. Because, however, those discussions further demonstrate the defendant's difficulty conducting proceedings, grasping issues, and communicating with the court, we discuss them in our analysis.

January 30, 2018, and which had the potential to reemerge. See *Indiana* v. *Edwards*, supra, 554 U.S. 175–76. Therefore, Judge Bentivegna reasonably concluded that the defendant's difficulty arguing points of law reflected an inability to conduct trial proceedings and, thus, an incompetence to represent himself in his upcoming criminal trial.

In addition, the defendant consistently interrupted proceedings before Judges Dooley, Matasavage, and Bentivegna, which further raised concerns regarding his ability to conduct trial proceedings. Our review of the record reveals that during each of the hearings between November 28, 2017, and July 17, 2018, the defendant was advised approximately sixty-six times to either stop interrupting and talking over others or that he was being obstructionist. The defendant accused the prosecutor of misconduct, of "being grossly inept at his job," and of malicious prosecution. The defendant also stated he had encountered a "kangaroo court," that the court was "highly corrupt," and that his settlement discussions were "riddled with bias and prejudice." Thus, it was reasonable for Judge Bentivegna to infer that the defendant's habitual recalcitrant behavior was associated with his diagnosis of a personality disorder with borderline, narcissistic and obsessive-compulsive traits, and would have inhibited his ability to conduct future trial proceedings, particularly before a jury.

Second, the defendant displayed difficulty grasping issues pertinent to the proceedings. In particular, when making motions and arguing points of law, the defendant evinced a misunderstanding of legal concepts, the distinct roles of the court and the prosecutor, and the relevance to the criminal case of issues and potential witnesses and exhibits.

The defendant did not understand that the prosecutor's obligation under *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), does not extend

to proactive acquisition of evidence that the defendant asserted was exculpatory. Further, the defendant did not understand that, in order to proceed to trial and prove his innocence, which he emphasized was critically important to him, he must plead not guilty. Despite repeated explanations to this effect from Judges Matasavage and Bentivegna, the defendant maintained a desire before both judges to change his guilty pleas to something "obscure . . . ." The defendant also pressed for a ruling that his trial be open to the public even after Judge Bentivegna informed him that such a ruling was not necessary because criminal trials are presumptively open to the public.

The defendant demonstrated a misunderstanding of the distinct roles of the court and the prosecutor. The defendant asked that the court charge the victims with perjury; only after Judge Bentivegna explained that that was not his role did the defendant express an understanding that charging decisions are made by the prosecutor. The defendant also believed that, notwithstanding the adversarial nature of our justice system, the prosecutor should, as a matter of "good faith," print and provide him with copies of research materials cited in the state's motions.

The defendant also raised irrelevant issues and requested that immaterial witnesses testify. Most prominently, he often sought to relitigate issues from his divorce trial, which were peripheral to the criminal charges against him. This not only presented concerns regarding the defendant's ability to grasp the relevant issues but, as a result, generated concerns about his ability to organize a defense. He further insisted that he "be heard" concerning alleged mistreatment by the courthouse marshals at a hearing before Judge Bentivegna, despite its immateriality to his criminal cases and his stated intention to assert those claims in a civil action. The defendant also provided a witness list naming forty-eight "people," including two deities, a

justice of our Supreme Court, the state's attorney general and chief state's attorney, and the Winsted mayor. He predicted that his criminal trial would take more than thirty days. Finally, the defendant claimed original song lyrics and a short story that he wrote, as well as photographs of him and his three children, were relevant discovery materials.

Judge Bentivegna reasonably concluded that the defendant's inability to grasp the foregoing issues had little to do with his ignorance of the law or a lack of technical expertise. The defendant maintained an insistence that the prosecutor must obtain transcripts from his divorce trial because they were exculpatory, that he change his guilty pleas, that his trial be open to the public, and that his divorce trial was relevant to his criminal charges, even after being told by the judges that his positions lacked legal foundation. Therefore, Judge Bentivegna reasonably could have concluded that the defendant's behavior was not a reflection of his ignorance of the law but of his personality disorder and occasionally diminished thought processes.

Third, at times, the defendant had difficulty communicating with the court. Although there were no concerns with the coherency of the defendant's communications, he displayed an inability to refrain from interrupting others, was disruptive, and frequently offered long, unfocused responses to questions and issues raised by the court. As stated previously, the defendant was told numerous times to stop interrupting or being disruptive between November 28, 2017, and July 17, 2018. The defendant was also removed from the courtroom three times and once from an observation room. Despite prior warnings to stop interrupting and being disruptive, as well as his removals from the courtroom and the observation room, the defendant did not comport his behavior in a fully appropriately manner before Judge Bentivegna, who also had to tell him to stop speaking a number of times. Although the defendant

did improve his behavior after being restored to competency and granted the right to represent himself, he did not do so sufficiently to eliminate all concerns.[9] Accordingly, Judge Bentivegna reasonably could have inferred that the defendant would not be competent to conduct future trial proceedings without the assistance of counsel as a result of his difficulty communicating with the court. Additionally, given that the defendant faced charges of harassment and stalking as a result of many unsolicited telephone calls, text messages, and e-mail communications sent to the victims, Judge Bentivegna had reason to be concerned that the defendant's difficulty communicating appropriately with the court could compromise the fairness of his trial before a jury.

Fourth, the defendant's conduct cannot be dismissed as malingering. The defendant characterized his behavior as wilful to the evaluation team that performed his March 28, 2018 competency evaluation, but the team itself never opined as to whether the defendant's conduct was, indeed, volitional. At the November 28, 2017 hearing, Judge Dooley indicated that it was her belief that the defendant was engaging in "gamesmanship, manipulation, [and] deceit," but there was also support for the conclusion that the defendant could not regulate his behavior. For instance, the defendant was

[9] In his ruling, Judge Bentivegna stated that the defendant "generally conducted himself appropriately" during the July 11 and 17, 2018 hearings. This statement is not inconsistent with a conclusion that the defendant was, at times, disruptive during those hearings in a manner that was reminiscent of his prior conduct. Judge Bentivegna further stated that, in his view, the "right to self-representation at trial will not affirm the dignity . . . of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given [the] defendant's uncertain mental state, *the spectacle that could well result from his self-representation at trial* is at least as likely to prove humiliating as ennobling." (Emphasis added.) In light of this statement, and Judge Bentivegna's review of the defendant's "disruptive and obstructive conduct" before Judge Dooley, it appears that Judge Bentivegna did consider the defendant's behavior in reaching his decision that the defendant would not be competent to represent himself at trial. We concluded previously in this opinion that it was not improper for Judge Bentivegna to consider the defendant's prior conduct

advised that his right to self-representation was not absolute and could be forfeited if he did not behave appropriately. Despite those warnings, the defendant, who earnestly sought to represent himself, did not sufficiently correct his obstreperous behavior, permitting the inference that he would be unable to do so as a result of mental illness or mental incapacity.

On the basis of the foregoing, Judge Bentivegna, as the trial judge well positioned to evaluate the circumstances of the defendant, reasonably concluded that the defendant would not be competent to discharge the essential functions necessary to conduct his own defense at his upcoming criminal trial without the assistance of counsel. See *Connor I*, supra, 292 Conn. 530 n.32.

The judgments are affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GEORGE MICHAEL LENIART
(AC 36358)

Prescott, Devlin and Sheldon, Js.

Syllabus

The defendant, who was convicted of capital felony and murder following the disappearance of the fifteen year old victim, appealed from the judgment of conviction, claiming, inter alia, that certain evidentiary rulings violated his constitutional rights to confrontation and to present a defense. At trial, the state presented testimony from A, who was serving a ten year sentence for an unrelated crime, that he and the defendant had sexually assaulted the victim, and, that when he met the defendant the following day, the defendant had confessed to killing the victim. In order to impeach A's credibility, the defendant sought to admit a videotape depicting a police officer interviewing A prior to the administration of a polygraph examination. The defendant claimed that

in making his ultimate decision that the defendant would be incompetent to conduct future trial proceedings without the assistance of counsel. See footnote 7 of this opinion.

the videotape was relevant because it showed that A had been promised favorable treatment in exchange for his cooperation. The trial court, however, excluded the videotape on the ground that it constituted inadmissible polygraph evidence under *State* v. *Porter* (241 Conn. 57). A thereafter testified, inter alia, that he hoped to receive some consideration from the state in exchange for his testimony. On the defendant's direct appeal, this court agreed with the defendant's evidentiary claim that the trial court had improperly excluded the videotape and found that its exclusion was harmful and, accordingly, reversed the trial court's judgment and remanded the case for a new trial. Both the state and the defendant, on the granting of certification, appealed to our Supreme Court, which affirmed this court's conclusion that the trial court improperly excluded the videotape but concluded that any error was harmless and, thus, reversed the judgment of this court and remanded the case for a determination of whether the exclusion of the videotape violated the defendant's constitutional rights. *Held* that the trial court's exclusion of the videotape did not violate the defendant's constitutional rights: although evidence tending to impeach A's trial testimony was central and critical to the defense and the videotape provided support for the defendant's claim that A's testimony was motivated by his own self-interest, the defendant was able to present ample evidence from which the jury could appropriately draw inferences relating to A's motives in testifying, his credibility and his bias, and the defendant was able to impeach A's testimony through other means, specifically through his cross-examination of A; moreover, defense counsel devoted a considerable portion of his closing argument to A's motives in testifying and his lack of credibility, including highlighting inconsistencies in A's testimony and his statement to the police and A's motives in testifying against the defendant.

(*One judge concurring separately*)

Argued February 6—officially released June 30, 2020

Procedural History

Substitute information charging the defendant with three counts of the crime of capital felony and one count of the crime of murder, brought to the Superior Court in the judicial district of New London and tried to the jury before *Jongbloed*, *J.*; thereafter, the court granted the state's motion to preclude certain evidence; verdict and judgment of guilty, from which the defendant appealed; subsequently, this court, *Sheldon* and *Prescott*, *Js.*, with *Flynn*, *J.*, concurring in part and dissenting in part, reversed the judgment of the trial court and remanded the case for a new trial, and the

state and the defendant, on the granting of certification, filed separate appeals with our Supreme Court, which reversed in part the judgment of this court and remanded the case to this court with direction to consider the defendant's remaining claims on appeal. *Affirmed.*

Lauren M. Weisfeld, chief of legal services, for the appellant (defendant).

Stephen M. Carney, senior assistant state's attorney, with whom, on the brief, was *Michael L. Regan*, state's attorney, for the appellee (state).

Opinion

DEVLIN, J. This case returns to this court on remand from our Supreme Court following its reversal of our judgment reversing the judgment of conviction of the defendant, George Michael Leniart, of murder in violation of General Statutes § 53a-54a (a), and three counts of capital felony in violation of General Statutes (Rev. to 1995) § 53a-54b (5), (7) and (9), as amended by Public Acts 1995, No. 95-16, § 4.[1] The sole remaining claim before us is whether the trial court's improper exclusion of certain evidence at trial violated the defendant's rights under the United States constitution. We conclude that the defendant's constitutional rights were not violated, and, accordingly, affirm the judgment of conviction.

"The following facts, which the jury reasonably could have found, and procedural history are relevant to the claims before us. On May 29, 1996, the victim,[2] who was then fifteen years old, snuck out of her parents' home to meet Patrick J. Allain, a teenage friend also

[1] For the sake of simplicity, we note that all references in this opinion to § 53a-54b are to General Statutes (Rev. to 1995) § 53a-54b, as amended by Public Acts 1995, No. 95-16, § 4.

[2] In accordance with our policy of protecting the interests of the victims of sexual abuse, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

known as P.J., so that they could smoke marijuana, drink alcohol, and have sex. The two teenagers were picked up by the defendant, who at the time was thirty-three years old. They then drove to a secluded, wooded location near the Mohegan-Pequot Bridge in the defendant's truck.

"While parked, the victim and Allain kissed, drank beer, and smoked marijuana. At some point, the defendant, who had told Allain that he was in a cult, called Allain aside and told him that he wanted 'to do' the victim and that he 'wanted a body for the altar.'

"Allain, who feared the defendant, returned to the truck and informed the victim that he and the defendant were going to rape her. Allain then removed her clothes and had sex with her in the truck while the defendant watched through the windshield. After Allain and the victim finished having sex, the defendant climbed into the truck and sexually assaulted the victim while Allain held her breast. After the assault, the victim pretended not to be upset so that the defendant would not harm her further.

"The defendant then drove the teenagers back to Allain's neighborhood. The defendant dropped off Allain near his home, and the victim remained in the truck. The victim never returned home that night and was never seen again, despite a protracted nationwide search by law enforcement. The search also did not recover her body.

"Allain subsequently implicated the defendant in the victim's death. As a result, in 2008, the state charged the defendant with murder in violation of § 53a-54a, capital felony in violation of § 53a-54b (5) for murder in the course of a kidnapping, capital felony in violation of § 53a-54b (7) for murder in the course of a sexual assault, and capital felony in violation of § 53a-54b (9) for murder of a person under the age of sixteen. The case was tried to a jury.

"The state's case against the defendant included the testimony of four witnesses, who each testified that, at different times, the defendant had admitted, directly or indirectly, to killing the victim. Allain, the state's key witness, was serving a ten year sentence for an unrelated sexual assault at the time of trial. He testified that, on the afternoon following the previously described events, the defendant had asked to meet with him on a path behind the Mohegan School in Montville. At that meeting, the defendant admitted that 'he had to do [the victim]—to get rid of her.' The defendant described to Allain how, after dropping Allain off the night before, he had pretended to run out of gas near the path.[3] He then ripped the license plates off his truck, dragged the frantic victim into the woods, and choked her. Later that evening, at a second meeting, the defendant further confessed to Allain that he had killed the victim and had 'erased' her by placing her remains in a lobster trap and dropping them into the mud at the bottom of the Thames River. The defendant was a lobster fisherman at the time." (Footnotes in original.) *State* v. *Leniart*, 333 Conn. 88, 93–95, 215 A.3d 1104 (2019).

"Prior to trial, the state filed a motion in limine seeking to exclude all testimony or evidence pertaining to the polygraph examination of any witnesses. Defense counsel opposed the motion, arguing that he intended to offer, among other things, a ninety minute videotape showing the standard pretest interview that the polygrapher, state police Trooper Tim Madden, had conducted with Allain prior to performing Allain's polygraph test in 2004. Defense counsel stated that he would seek to offer the videotape on the ground that it showed Madden giving Allain numerous assurances that Allain would receive favorable treatment if he cooperated with

[3] "Although Allain's testimony was unclear on this point, the jury reasonably could have concluded that the path on which Allain and the defendant spoke is the same path to which the defendant confessed having taken the victim." *State* v. *Leniart*, 333 Conn. 88, 95 n.3, 215 A.3d 1104 (2019).

the police, which, defense counsel argued, 'raises questions . . . about whether this young man is coming into this courtroom with the intention to do anything other than save himself.'

"The trial court ruled that the videotape was inadmissible. The court's oral ruling appeared to adopt the state's argument that a recording of a pretest interview or, indeed, any reference to the fact that a polygraph examination has been conducted, constitutes polygraph evidence and is, therefore, per se inadmissible. The court did, however, indicate that it would permit defense counsel to cross-examine Allain regarding 'any promises or benefits that were made to him during the course of that interview.' " Id., 124–25.

"The jury returned a verdict of guilty on all counts. The court merged the verdicts into a single conviction of capital felony and sentenced the defendant to a term of life imprisonment without the possibility of release. On appeal to [this court], the defendant raised various challenges to the trial court's evidentiary rulings and also claimed, relying in part on the common-law corpus delicti rule, that the evidence was insufficient to sustain his conviction. *State* v. *Leniart*, [166 Conn. App. 142, 146–49, 140 A.3d 1026 (2016)]. [This court] rejected the defendant's sufficiency claim but concluded that the trial court incorrectly had excluded the polygraph pretest interview videotape, as well as expert testimony relating to the credibility of jailhouse informants. [This court] then concluded that those evidentiary rulings substantially affected the verdict and, accordingly, remanded the case for a new trial.

"[Our Supreme Court] granted the state's petition for certification to appeal, limited to the questions of whether [this court] correctly concluded that the trial court had erroneously excluded the polygraph pretest interview videotape and expert testimony regarding jailhouse informant testimony and that those rulings

substantially affected the verdict. *State* v. *Leniart*, 323 Conn. 918, 150 A.3d 1149 (2016). [The Supreme Court] also granted the defendant's petition for certification to appeal, limited to the question of whether [this court] properly applied the corpus delicti rule in concluding that there was sufficient evidence to sustain his conviction of murder and capital felony. *State* v. *Leniart*, 323 Conn. 918, 918–19, 149 A.3d 499 (2016)." (Footnote omitted.) *State* v. *Leniart*, supra, 333 Conn. 96.

Our Supreme Court affirmed this court's rejection of the defendant's challenge to the sufficiency of the evidence. Id., 93. The Supreme Court also affirmed this court's conclusion that the trial court improperly excluded the polygraph pretest interview videotape. Id. The Supreme Court concluded, however, that "any error in the exclusion of the video was harmless"; id., 124; and, thus, reversed the judgment of this court,[4] and remanded this case for determination of the final issue of whether the exclusion of the videotape violated the defendant's constitutional rights. Id., 152 and n.35.

In assessing the evidentiary issue raised by the exclusion of the videotape and its subsequent determination that the exclusion was harmless, the Supreme Court set forth the following relevant description and analysis of its content, and of Allain's testimony at trial. "Madden's pretest interview of Allain lasted for approximately ninety minutes. For the first thirteen minutes or so, Madden and Allain discussed Allain's reasons for submitting to the polygraph. Specifically, a question arose as to whether Allain was taking the test voluntarily, because he believed that assisting the state was the right thing to do or, rather, because he was facing a potential five year sentence for having violated his probation through a failed drug test and had been led

[4] The Supreme Court also held that this court incorrectly concluded that the trial court had abused its discretion in precluding expert testimony regarding jailhouse informant testimony. See *State* v. *Leniart*, supra, 333 Conn. 93.

to believe that the state might not pursue a conviction if he cooperated in this matter. Allain initially indicated that he had consented to the polygraph primarily to avoid the conviction for violating his probation. Madden promptly explained, in no uncertain terms, that he could not perform the polygraph on those terms. Thus, before proceeding, Madden obtained from Allain a statement that he was participating freely.

"The remainder of the pretest interview consisted of Madden's asking Allain a series of background questions, reviewing the statements that Allain had given to the police and Allain's accounts of the events surrounding the victim's disappearance, and explaining the questions that Allain would be asked during the polygraph. During that time, Madden repeatedly emphasized how 'unbelievably important' it was for Allain to give completely truthful answers during the examination.

"Moreover, Madden consistently equated truthfulness with successfully passing the test, doing 'the right thing,' and being a reliable witness. He emphasized in this respect that the state would consider Allain to be a useful witness, and Allain would qualify for potentially favorable treatment, only if the polygraph results demonstrated that Allain was being completely truthful and forthcoming. Madden referred several times during the interview to the investigation of the 1997 gang rape and murder of Maryann Measles. He informed Allain that suspected participants in that crime who *truthfully* confessed their roles and then passed polygraph examinations were let off with 'a slap on the wrist,' whereas suspected participants who failed polygraph tests were aggressively prosecuted.

"At several points during the interview, Madden made comments indicating that the police were interested in obtaining Allain's cooperation. In particular, Madden explained that the police were interested in having Allain on their 'team' rather than on the defendant's

team, and in procuring Allain's assistance in 'getting' the defendant, whom Madden described as the 'bigger fish.' In each instance, however, he made clear that Allain could provide such assistance only by giving completely truthful testimony and passing the polygraph test. Madden indicated, for example, that, if Allain failed the polygraph, then he would be on the 'other team,' aligned with the defendant, rather than 'on our team.' In other words, Madden made clear that only truthful statements would help Allain.

"Throughout the interview, Madden made comments that gave the impression that he believed that Allain had not been completely forthcoming in his prior statements to the police and that Allain still had something to 'get off [his] chest.' In a few instances, Madden speculated that Allain felt intimidated or frightened by the defendant. In most instances, however, Madden appeared to believe that what Allain was withholding was the extent of his own involvement in the crime. Madden even suggested that this might be a cause of Allain's diagnosed clinical depression and speculated that Allain, by telling the complete truth, might find some relief. . . .

"After the trial court ruled the videotape inadmissible, the state called Allain to testify. The prosecutor began his direct examination by eliciting that Allain was then serving a ten year sentence for felony sexual assault involving a different victim, and that Allain was hoping for 'leniency' in connection with that sentence in exchange for his cooperation with the state and testimony against the defendant in the present matter. Allain acknowledged that 'it would be nice' to receive some consideration in exchange for his testimony.

"On cross-examination, defense counsel effectively developed all of the basic facts and themes that the defendant sought to establish through use of the pretest interview videotape. Defense counsel was able to demonstrate that Allain was generally unreliable as a wit-

ness. For example, defense counsel repeatedly returned to the theme that Allain had two powerful incentives to cooperate with the state in convicting the defendant, namely, to divert attention from himself as a suspect in the victim's murder and to obtain a reduction of the sentence that he was then serving for sexual assault. With respect to the former, Allain admitted to having raped the victim on the night she disappeared and to having concealed that information from the police until after the statute of limitations for rape had expired. He also understood, however, that the statute of limitations for a felony murder never runs.

"Allain also acknowledged that he had found and concealed the victim's shoe the day after she disappeared, and that this could make him an accessory to her murder. He also admitted to telling the police that he had previously indicated to the defendant that he was willing to kill the victim, and that he later told his father that he was involved in the victim's murder and that he needed help moving her body. . . . Allain admitted that he was concerned because, if the police believed that he had anything to do with the victim's death, he still could be charged with capital felony, and he believed that he would face a likely death sentence if convicted. At the same time, Allain, without expressly mentioning the pretest interview, testified that Madden had repeatedly told him that even someone who had been involved in rape and murder 'could walk away . . . with a slap on the hand' if they cooperated with the police. . . . Accordingly, the jury was aware that Allain was a potential suspect in the victim's murder, that he had implicated himself in the murder, and that he understood that he could be charged with the crime if the defendant were exonerated.

"The jury also heard testimony suggesting that there was an implicit agreement between Allain and the state that he would receive leniency on his sexual assault

sentence if he fully cooperated with the state in this matter and if his cooperation proved sufficiently helpful. Allain twice acknowledged that, at the time he was sentenced on that conviction, the state's attorney had indicated that the state would not oppose a motion for sentence modification at a later date if Allain met certain unstated requirements. Allain testified that he understood that to mean that he might be allowed to serve less time if he 'played ball' and cooperated in the defendant's case.

"At several points, Allain expressed hope that the state would believe that he had provided substantial assistance in the case against the defendant and that, if his cooperation was sufficiently valuable, he would be released from prison early. Indeed, Allain complained that he had been 'blackmailed' by the state and that an especially long sentence had been imposed for the sexual assault conviction specifically to ensure that he assisted the state in the defendant's case.

"Accordingly, the jury learned through cross-examination that Allain felt pressured to cooperate and that he hoped that the state would deem his help sufficiently valuable that he would obtain a sentence modification." (Citation omitted; emphasis in original; footnotes omitted.) Id., 128–32. The Supreme Court thus concluded that "all of the basic facts and themes that the defendant sought to show to the jury through the pretest interview videotape were effectively elicited during Allain's cross-examination . . . ." Id., 132. The defendant disagrees and contends that his constitutional rights to confrontation and to present a defense were violated by the exclusion of the videotape. We are not persuaded.

"It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. The sixth amendment provides in relevant part: In all criminal prosecutions, the accused

shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor . . . . A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . . Furthermore, the sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . .

"In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . It guarantees the right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . . Therefore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense. . . .

"The right of confrontation is the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by confrontation is the right to cross-examination . . . and an important function of cross-examination is the exposure of a witness' motivation in testifying. . . . Cross-examination to elicit facts tending to show motive, interest, bias and prejudice is a matter of right and may not be unduly restricted. . . .

"Impeachment of a witness for motive, bias and interest may also be accomplished by the introduction of extrinsic evidence. . . . The same rule that applies to the right to cross-examine applies with respect to extrinsic evidence to show motive, bias and interest; proof of the main facts is a matter of right, but the extent of the proof of details lies in the court's discretion. . . . The right of confrontation is preserved if defense counsel is permitted to expose to the jury the facts from

which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. . . .

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

"These sixth amendment rights, although substantial, do not suspend the rules of evidence . . . . A court is not required to admit all evidence presented by a defendant; nor is a court required to allow a defendant to engage in unrestricted cross-examination. . . . Instead, [a] defendant is . . . bound by the rules of evidence in presenting a defense. . . . Nevertheless, exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights . . . . Thus, [i]f the proffered evidence is not relevant [or constitutes inadmissible hearsay], the defendant's right[s] to confrontation [and to present a defense are] not affected, and the evidence was properly excluded." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 816–19, 135 A.3d 1 (2016).

"[W]hether a trial court's [exclusion of evidence offered by a criminal defendant] deprives [him] of his [constitutional] right to present a defense is a question that must be resolved on a case by case basis. . . . The primary consideration in determining whether a trial court's ruling violated a defendant's right to present a defense is the centrality of the excluded evidence to the claim or claims raised by the defendant at trial." (Internal quotation marks omitted.) *State* v. *Andrews*, 313 Conn. 266, 276, 96 A.3d 1199 (2014). Moreover, "[a] defendant may not successfully prevail on a claim of a violation of his right to present a defense if he has failed

to take steps to exercise the right or if he adequately has been permitted to present the defense by different means." *State* v. *Santana*, 313 Conn. 461, 470, 97 A.3d 963 (2014).

"If . . . we conclude that the trial court improperly excluded certain evidence, we will proceed to analyze [w]hether [the] limitations on impeachment, including cross-examination, [were] so severe as to violate [the defendant's rights under] the confrontation clause of the sixth amendment . . . . In evaluating the severity of the limitations, if any, improperly imposed on the defendant's right to confront, and thus impeach, a witness, [w]e consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial. . . . We consider de novo whether a constitutional violation occurred." (Citations omitted; internal quotation marks omitted.) *State* v. *Halili*, 175 Conn. App. 838, 852–53, 168 A.3d 565, cert. denied, 327 Conn. 961, 172 A.3d 1261 (2017).

In this case, the defendant sought to introduce the videotape of the pretest interview into evidence at trial on the ground that it showed Madden giving Allain numerous assurances that Allain would receive favorable treatment if he cooperated with the police, which, defense counsel argued, "raises questions . . . about whether this young man is coming into this courtroom with the intention to do anything other than save himself." On appeal, he claims that his right to confrontation was violated when the trial court excluded the videotape from evidence because, through the videotape, he "sought to elicit the psychological context of [Allain's] polygraph, and especially the pretest where . . . Madden can be seen frightening and inducing him to cooperate, to show motive and bias." The defendant

claims that the videotape demonstrated Allain's "vulnerable status . . . as well as [his] possible concern that he might be a suspect in the investigation." (Emphasis omitted; internal quotation marks omitted.) He argues that by excluding the videotape, "[t]he court prohibited relevant inquiry reasonably aimed at eliciting facts from which the jury might decide to disbelieve [Allain]." As to his claim that the exclusion of the videotape violated his right to present a defense, he claims that he was prevented from presenting his theory at trial that Allain was "the culprit" and that the exclusion of the videotape "violated his right to show that [Allain] was motivated by a desire to avoid being charged." The defendant also contends, more generally, that he was denied the right to "show whatever interest or motive [Allain] had." The defendant further argues that the cross-examination of Allain was no substitute for the videotape because the videotape showed "Madden's use of fear and promises" in questioning Allain, and that Madden "manipulated [Allain] by discouraging him from getting a lawyer, and by representing that the [polygraph] test would be 'medicinal.' "

In assessing the defendant's claim that his sixth amendment rights to confrontation and to present a defense have been violated, we first assess the centrality of the excluded evidence, the videotape, to the case, or, more specifically, to the defendant's claim that Allain's testimony was not credible because it was motivated by Allain's desire not to be implicated in the murder of the victim in this case and to serve a lesser sentence on the unrelated sexual assault for which he was incarcerated at the time of trial. It cannot reasonably be disputed that Allain's testimony was central to the state's case, and the jury's ability to assess and the defendant's ability to impeach the credibility of that testimony were critical. The more focused question, however, is whether the excluded videotape was central

and critical to the defendant's case because it highlighted Allain's motives to testify as he did at trial. Again, we do not believe that it reasonably can be disputed that evidence tending to impeach Allain's trial testimony was central and critical to the defense, and the videotape certainly provided support for the defendant's claim that Allain's testimony was motivated by his own self-interest.

Our constitutional inquiry, however, does not end here. We must next determine whether the defendant was able to present his theory of the case, or to present evidence to prove Allain's motives in testifying and to impeach his testimony, through other means, specifically through the cross-examination of Allain. "Both this court and our Supreme Court have stated that, when a defendant is afforded wide latitude in cross-examining a state's witness as to credibility, claims of sixth amendment violations for restrictions on cross-examination are indicia of the defendant [putting] a constitutional tag on a nonconstitutional claim."[5] (Internal quotation marks omitted.) *State* v. *Bermudez*, 195 Conn. App. 780, 807, A.3d , cert. granted, 335 Conn. 908, A.3d (2020); see id., 808 (defendant given ample opportunity to impeach credibility of witnesses); see also *State* v. *Jordan*, 329 Conn. 272, 287–88 n.14, 186 A.3d 1 (2018) (claim of improper exclusion of evidence of victim's convictions not constitutional in nature when jury heard testimony that, if credited,

[5] By contrast, a constitutional violation arises when a defendant is wholly prohibited from inquiring into an area pertaining to his or her defense at trial, particularly when a witness' credibility, motives or bias are at issue. See, e.g., *State* v. *Peeler*, 271 Conn. 338, 383–85, 857 A.2d 808 (2004) (trial court's failure to admit mental health records of state's witness precluded relevant line of inquiry into witness' ability to perceive events and was therefore of constitutional magnitude), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005); see also *State* v. *Slimskey*, 257 Conn. 842, 859, 779 A.2d 723 (2001) ("[h]aving determined that the evidence in issue was especially probative and having concluded that there was no other available means of inquiry into the victim's propensity to lie, we necessarily have concluded that the confrontation clause requires the disclosure").

would support theory of self-defense); *State* v. *Leconte*, 320 Conn. 500, 511, 131 A.3d 1132 (2016) (no constitutional violation where defendant was given ample opportunity to "expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness"); *State* v. *Romanko*, 313 Conn. 140, 151–52, 96 A.3d 518 (2014) (no constitutional violation where defendant was permitted to present his theory of case "by means other than the proposed demonstration"); *State* v. *Mark R.*, 300 Conn. 590, 612, 17 A.3d 1 (2011) ("over the course of a cross-examination of the victim that filled more than thirty transcript pages, the trial court did permit defense counsel to inquire into numerous elements of the defendant's fabrication theory"); *State* v. *Osimanti*, 299 Conn. 1, 10–13, 6 A.3d 790 (2010) (no violation of right to confrontation where defendant was permitted to present alternative evidence by way of cross-examination in support of his claim of self-defense and was able to refer to and emphasize that evidence in closing argument to jury); *State* v. *William C.*, 267 Conn. 686, 707–708, 841 A.2d 1144 (2004) (improper exclusion of records of Department of Children and Families indicating problems with victim's veracity in sexual assault case was, although harmful evidentiary error, not of constitutional magnitude, because defendant had opportunity to elicit issues concerning victim's veracity through extensive cross-examination); *State* v. *Sandoval*, 263 Conn. 524, 549, 821 A.2d 247 (2003) ("defense counsel aggressively cross-examined the victim in an attempt to convey to the jury that any participation by the defendant in the attempted abortion was consensual and that the victim falsely had accused the defendant of seeking to abort the pregnancy against her will"); *State* v. *Kelly*, 256 Conn. 23, 76, 770 A.2d 908 (2001) (no violation of constitutional right to present defense where subject matter of precluded testimony was presented through other witnesses); *State* v. *Shabazz*, 246 Conn. 746, 758 n.7, 719

A.2d 440 (1998) (no deprivation of constitutional right to present defense when "defendant was adequately permitted to present his claim of self-defense by way of his own testimony, by cross-examining the state's witnesses, and by the opportunity to present any other relevant and admissible evidence bearing on that question"), cert. denied, 525 U.S. 1179, 119 S. Ct. 1116, 143 L. Ed. 2d 111 (1999); *State v. Barletta*, 238 Conn. 313, 322–23, 680 A.2d 1284 (1996) (improper restriction on expert's testimony about likely effects of cocaine ingestion on eyewitness was not of constitutional magnitude because defendant permitted to cross-examine that eyewitness about her cocaine use, criminal record including narcotics convictions, and inducement from state to testify); *State* v. *Jones*, 205 Conn. 723, 730–32, 535 A.2d 808 (1988) (improper restriction on testimony of defendant's sister concerning reasons for defendant's flight, namely, his fear of victim's family, was not of constitutional magnitude because defendant had explained flight in his own testimony); *State* v. *Vitale*, 197 Conn. 396, 403, 497 A.2d 956 (1985) (wide latitude of cross-examination by defendant suggestive that claimed evidentiary errors were nonconstitutional in nature); *State* v. *Porfil*, 191 Conn. App. 494, 523–24, 215 A.3d 161 (2019) (no constitutional violation where defendant was able to adequately present his defenses of misidentification and lack of possession by other means and had additional, alternative avenues available to him to further bolster his defenses), cert. granted on other grounds, 333 Conn. 923, 218 A.3d 67 (2019); *State* v. *Durdek*, 184 Conn. App. 492, 511 n.10, 195 A.3d 388 (noting that "multiple avenues of impeachment" afforded to defendant in cross-examining "important state witness" supported conclusion that claimed errors were evidentiary, not constitutional, and defendant therefore had burden of establishing harm), cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018); *State* v. *Papineau*, 182 Conn. App. 756, 780–82, 190 A.3d 913

(no violation where defendant was permitted to present evidence by means other than narrow inquiry that was excluded by trial court), cert. denied, 330 Conn. 916, 193 A.3d 1212 (2018); *State* v. *Manousos*, 179 Conn. App. 310, 333, 178 A.3d 1087 (no constitutional violation where defendant was able to present his defense in full through other, unlimited testimony), cert. denied, 328 Conn. 919, 181 A.3d 93 (2018); *State* v. *Thomas*, 110 Conn. App. 708, 718, 955 A.2d 1222 ("[b]ecause the theory in question provided at most merely one more motivation to attack, its exclusion did not foreclose an entire defense theory and, therefore, did not rise to the level of a constitutional violation"), cert. denied, 289 Conn. 952, 961 A.2d 418 (2008).

In this case, we agree with the state that the defendant was able to elicit testimony regarding Allain's motives in testifying and to adequately impeach that testimony through cross-examination and, thus, was not prevented from presenting his defense to the jury. By way of the unbounded and rigorous cross-examination of Allain, the transcript of which spans approximately 140 pages, defense counsel effectively challenged Allain's credibility. During cross-examination, defense counsel focused on Allain's motivations in testifying—to avoid implication in the murder of the victim and to obtain a lesser sentence on the sexual assault charge for which he was then incarcerated. Allain openly acknowledged that he had strong incentives to testify in this case. He admitted, after several years of denying, that he had raped the victim in this case on the night in question, but he knew that the statute of limitations on that charge had expired and, thus, that he could not be charged with that rape. He understood, however, that he could still be charged with murder because there was no statute of limitations on that charge. Although Allain denied defense counsel's suggestion that he was motivated to inculpate the defendant in the hope of exculpating himself, stating that his testimony was truthful, he

admitted that, despite speaking to members of the major crime squad approximately twenty-five times, he had never been entirely truthful with the police throughout the course of the investigation. Allain testified at trial to several facts that he admittedly had never told any of the law enforcement officers with whom he had spoken over the course of the ten year investigation.[6] Allain even admitted during cross-examination that he was "making up things about what [he] thought was in [the defendant's] mind" pertaining to the victim, and that he had told the defendant that he would kill the victim himself.

During direct examination by the state, Allain acknowledged that he was then serving a ten year sentence for a felony sexual assault charge and that he was hoping for leniency in exchange for his testimony against the defendant in this case. Allain testified that he thought that the sentence that he received on that sexual assault charge was excessive, and that it was designed to compel him to testify in this case. On the basis of his perception of the sentence in that case as excessive, Allain testified that he felt as though he had been "blackmailed" to testify in this case so that he might receive a downward sentence modification later. As noted, Allain admitted that he hoped "that the state believes that [he] provided substantial assistance in [its] case against [the defendant] . . . ." He expressed his hope that the state believed that his "cooperation in this case was valuable enough" to obtain a sentence modification on his sexual assault charge.

[6] For example, Allain testified for the first time in court that the defendant told him that he was in a satanic cult, that he spoke to the defendant for about three minutes about the defendant's desire to kill the victim and that the defendant was giggling about it. He testified that, after he and the defendant raped the victim, he and the victim discussed the need to get "a good night's rest" in order "to prepare for school the next day" and that the victim casually told them that she had "always wanted to have sex with two guys."

In sum, the court allowed defense counsel to inquire repeatedly into Allain's motivations to testify—his desire to avoid his own implication in the murder of the victim in this case and his quest for a lesser sentence on the sexual assault charge for which he was incarcerated at the time of trial. Not only did the court not restrict defense counsel's inquiry, but that inquiry was effective and impactful. The jury was not only provided with an adequate opportunity to judge the credibility and bias of Allain, but a fair reading of the cross-examination leads to an inexorable conclusion that Allain's testimony was motivated by his own interests and his overall credibility had been damaged.

Moreover, defense counsel devoted a considerable portion of his closing argument to Allain's motives in testifying for the state and his lack of credibility. Defense counsel told the jury that it was "entitled to consider a witness' interest in the outcome of this case when rendering [its] verdict," and posited: "Who more than . . . Allain has an interest in—besides [the defendant]—in the [outcome] of this case?" Defense counsel underscored the incredibility of Allain's testimony by tracking each of Allain's statements to the police, all the way to his testimony at trial, and highlighting inconsistencies between his testimony on direct examination and cross examination.[7] As with cross-examination,

[7] Defense counsel argued to the jury: "There are more peaks and valleys in [Allain's] testimony than there is in the Rocky Mountains. . . . When [Allain] first went to the police in October of 1997, he told them all about being with that young woman that night. But he denied having any sexual contact with her, he denied having any real misconduct at all. He made it all sound out to be just like a night of partying. I may have misspoke—he may have said he had sex with her; that I may have gotten wrong. But he didn't make out any crimes.

"Then he spoke to the police on a second occasion. We've got these here—not all of these are exhibits—but I spent a lot of time cross-examining [Allain] and I want to tell you why. I listened very carefully and I'd ask you to do this as you deliberate.

"Go through what they said, each of them. Make the list. . . . What did they say on direct and what did they say on cross.

defense counsel effectively demonstrated to the jury the flaws in Allain's testimony in support of counsel's claim that Allain was not a credible witness. Defense counsel told the jury: "Allain has never told the same story twice" and that Allain was "a practiced liar" and "a stranger to the truth." Finally, defense counsel emphasized Allain's motives in testifying against the defendant when he argued to the jury that "the State of Connecticut has charged the wrong man; that the State of Connecticut cut a deal with the man who knew

"In October of 1997, [Allain's] with [the defendant]. They're with this young man; not much happens. We get then to another statement—and again, I don't mean to harp on this stuff and I'm not asking you to let [the defendant] go because the police can't keep track of dates—but maybe it was in November of 2001, maybe it's 2007; I don't really know. The date says one thing, the testimony's another.

"In 2004, [Allain] gives another statement. In this statement, he talks about some—a little bit more. This time [the defendant] has killed her now or [the defendant] says he was going to kill her. She jumps out of the van. But you know, [Allain] has some voluntary consensual sexual activity with her.

"In 2007, it's now this whole business about we're going to rape you. On the stand when I questioned him, he finally came around to rape but he pussyfooted around about that, too. I'd suggest to you that [Allain's] pussyfooting around because [Allain] knows where that body is and if [Allain] tells anybody, they'll seek to kill him. It's that simple.

"Nobody is going to pity poor [Allain] if he acknowledges his role in the rape and the murder of [the victim] and tells this jury—you, them, anybody in this room—something he's never told anybody but he wanted his father's help with. I need to move that body, it's up there near the Mohegan reservation—not near any water. It's up there near the Mohegan reservation.

"[The defendant] didn't dump it in the river. He didn't dump it in the Sound. He didn't chop her up. He didn't put her in the mud. He didn't put her in a well. It's up there near the reservation and dad help me and his father didn't and his dad ratted him out as it were and then [Allain] had to dance and he's dancing still."

Defense counsel further argued: "Then we get really not much more in the case. You know, [Allain's] out there, he's given a statement in [1997]. He gave one in maybe [2004], maybe [2007]. No warrant, no arrest. He's claiming the body's up there near the casino. He testifies in the trial then about a well. . . .

"If you need to hear from [Allain] again, listen to the entire testimony and what you will find out is that story he told on the stand, it doesn't agree with the story he told in 1997, it doesn't agree with the story he told in 2004, it doesn't agree with the story he told in 2007.

"Some of the things he told you in this room, you heard for the very first time—well, of course you did, but I mean, law enforcement heard for the very first time. [Allain] is a stranger to the truth and that desperate men do desperate things."

where the body is and is still afraid to tell it because they may kill him; that . . . Allain has everything to gain by the conviction of [the defendant] . . . .''

Because the defendant was permitted to present ample evidence from which the jury could appropriately draw inferences relating to Allain's motives and credibility, his rights to confrontation and to present a defense were preserved. Accordingly, the defendant's arguments that his constitutional rights were violated because the exclusion of the videotape ''prohibited relevant inquiry reasonably aimed at eliciting facts from which the jury might decide to disbelieve [Allain]'' and that he was prevented from demonstrating Allain's motives and biases are unavailing.

The judgment is affirmed.

In this opinion, *Sheldon*, *J.*, concurred.

PRESCOTT, J., concurring. Although our Supreme Court unanimously agreed with our earlier conclusion that the trial court improperly excluded the videotape of the polygraph pretest interview, a majority of the justices nonetheless concluded that the defendant had failed to demonstrate that the improper exclusion of the videotape was harmful to him. See *State* v. *Leniart*, 333 Conn. 88, 127–28, 138, 215 A.3d 1104 (2019). In reaching that conclusion, the majority stated that ''[o]ur impression of the videotape, and what the jury likely would have gleaned therefrom, differs from that of the Appellate Court.'' Id., 133.

As a judge on an intermediate appellate court, I am, of course, bound by the majority opinion of our Supreme Court in this matter. This obligation, in my view, includes the duty to analyze the question of whether the improper exclusion of the videotape violated the defendant's constitutional rights by applying the descriptions and characterizations of the contents of

the videotape that are set forth in Justice Mullins' majority opinion; see id., 133–36; regardless of my own impression or the impression of Justice D'Auria in his dissent. See id., 169–70. In light of those characterizations, I cannot conclude, under the precedent well described and aptly applied by Judge Devlin, that the improper exclusion of the videotape violated the defendant's constitutional rights to present a defense or to confront the witnesses against him.

Accordingly, I concur in the result.

WILLIAM SACKMAN III ET AL. *v.* KELLY A. QUINLAN, EXECUTRIX (ESTATE OF NANCY L. SACKMAN), ET AL.

(AC 42748)

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

Syllabus

The plaintiffs sought to recover damages from the defendant children of N and the defendant spouse of one of the children, claiming, inter alia, that the defendants were liable for conversion, unjust enrichment and tortious interference with contractual relations in connection with N's encumbrance of a condominium that the plaintiffs' deceased father, W, had quitclaimed to N before his death. W had executed a revised will that left his interest in the condominium to N, provided that, if she were to sell the condominium, she was to set aside the proceeds for the plaintiffs, less any funds that N might need for her comfort and support. The same day that W executed his revised will, N executed her will, which provided that, if W predeceased her, her interest in the condominium would pass to the plaintiffs upon her death. W and N then memorialized their intentions in a separate agreement that referenced the cross promises in their wills. The agreement provided that, if the property were sold during N's lifetime and after W's death, N would set aside the sale proceeds in a special account for the plaintiffs and that, if the property were not sold, it would be devised to the plaintiffs. The agreement also stated that it was a third-party beneficiary contract for the benefit of the plaintiffs and that nothing in the agreement would limit N's ability to use the funds set aside for her comfort and support, as provided for in W's revised will. N thereafter used the condominium as collateral to obtain a $100,000 line of credit and put the proceeds into an account to which her daughter, the defendant K, had access.

After N died, title to the condominium passed to the plaintiffs. K, who had been appointed executrix of N's estate, rejected a claim the plaintiffs filed against the estate in which they sought $76,000 of the line of credit that they believed N had not used for improvements to the condominium. In their complaint, the plaintiffs alleged that N had failed to abide by her promise to W to devise the condominium or the proceeds of its sale to the plaintiffs and sought to recover the outstanding balance of the line of credit. While the action was pending, the defendants' counsel, who had undergone surgery for brain cancer, filed an affidavit with the court and was permitted to withdraw from representation. When the defendants' new counsel thereafter filed a motion for summary judgment, the plaintiffs objected to the timing of the motion and to the contention that the defendants' original counsel was incapacitated, and the trial court ordered the defendants to file a motion for permission to file a motion for summary judgment. The court granted the motion for permission and thereafter granted the defendants' motion for summary judgment and rendered judgment for the defendants. The court determined that the written agreement between W and N was void for lack of consideration and that there was no genuine issue of material fact that N had complied with the provisions of the agreement. *Held*:

1. The trial court did not abuse its discretion when it granted the defendants' motion for permission to file a motion for summary judgment: the plaintiffs failed to present any persuasive arguments that the court abused its discretion, including their claim that the court failed to analyze the incompetency of the defendants' original counsel pursuant to statute (§ 45a-650), § 45a-650 having been inapplicable, as it provides analysis for the appointment of a conservator; moreover, the defendants represented to the court that their original counsel had demonstrated clear deficiencies in his representation, the defendants submitted to the court counsel's affidavit, which explained that he was impaired during the pendency of the case, as well as counsel's medical records and a chart of his treatment dates and corresponding trial court dates, and no trial date had been scheduled at the time the defendants filed their motion for permission to file a motion for summary judgment.
2. The trial court properly rendered summary judgment for the defendants, there having been no genuine issue of material fact as to the plaintiffs' claims of conversion, unjust enrichment and intentional interference with contractual relations: because N owned the condominium after it was quitclaimed to her, she had the right to borrow against it and, thus, K could not have converted funds that the plaintiffs did not own and could not have been unjustly enriched when N placed funds from the line of credit into an account that passed to K, and, because there was no merit to the plaintiffs' claim that the trial court improperly determined that the agreement between W and N was invalid, the defendants could not have interfered with the agreement; moreover, even if the agreement had been considered, it added only that N had promised not to change

her will, the plaintiffs did not argue that N changed her will, the property thereafter was devised to the plaintiffs in accordance with N's will and the agreement, and, as summary judgment for the defendants was proper, the plaintiffs' claim that the trial court failed to view the evidence in the light most favorable to them was unavailing.

Argued February 11—officially released June 30, 2020

Procedural History

Action to recover damages for, inter alia, conversion, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson*, *J.*, granted the defendants' motion for permission to file a motion for summary judgment; thereafter, the action was withdrawn as against the named defendant; subsequently, the court granted the defendants' motion for summary judgment and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed.*

Ellen C. Sackman, self-represented, with whom, on the brief, were *William Sackman III*, self-represented, and *Steven Sackman*, self-represented, the appellants (plaintiffs).

Cristina Salamone, with whom, on the brief, was *Steven C. Rickman*, for the appellees (defendants).

Opinion

PELLEGRINO, J. This appeal arises from a dispute between the self-represented plaintiffs,[1] the biological children of William Sackman, Jr. (William), from his marriage to Elaine Sackman (Elaine), and the defendants,[2] who are the children of William's second wife, Nancy L. Sackman (Nancy), and one of the children's spouse. The plaintiffs appeal from the judgment of the

[1] The plaintiffs are William Sackman III, Steven Sackman, and Ellen Sackman.

[2] The defendants are Kelly A. Quinlan (Kelly), Christopher M. Sattler, and Peter J. Quinlan (Peter). Kelly and Sattler are the biological children of Nancy Sackman; Peter is married to Kelly. Kelly was sued in her individual capacity and in her capacity as the executrix of Nancy Sackman's estate.

trial court, rendered in favor of the defendants on a motion for summary judgment. On appeal, the plaintiffs claim that the trial court improperly (1) allowed the defendants to file a motion for summary judgment, (2) granted the defendants' motion for summary judgment, and (3) failed to view the evidence in the light most favorable to the nonmoving party. We disagree and, therefore, affirm the judgment of the trial court.

The following undisputed facts are relevant to the resolution of this appeal. William and Elaine had three children issue of their marriage, the plaintiffs: William Sackman lll, Steven Sackman, and Ellen Sackman. After Elaine died in 1991, William married Nancy. Nancy had two children issue of a previous marriage, the defendants: Kelly A. Quinlan (Kelly) and Christopher M. Sattler. Kelly is married to Peter J. Quinlan, who is also a named defendant. William owned a home that he had acquired during his marriage to Elaine that was unencumbered when he sold it in 1999. With the proceeds from that sale, he purchased a condominium (condo) in Cheshire that is at the heart of this appeal.

William executed a will that provided that, if he were to predecease Nancy, she would have a life use of the condo, and the plaintiffs would have a remainder interest. In July, 2007, William executed a new will that provided that, in the event that he predeceased Nancy, his interest in the condo would pass to Nancy outright, provided that, if she sold the condo, she had to set aside the proceeds for the plaintiffs, less any funds that she may need for her comfort and support.[3] That same

[3] Article fourth of William's will states: "I give and devise to my wife, NANCY L. SACKMAN, if she survives me, all of my interest in and to the real property known as [the condo]. . . . I further request that my wife shall devise the same at her death to [the plaintiffs] and the then living issue of any deceased child of mine. In the event she shall sell such real property, I request that she set aside the net proceeds thereof in a separate account earmarked for eventual distribution to [the plaintiffs] pursuant to a last will and testament to be executed by her. . . . I further request that my wife, in the event that she shall sell such real property, shall set aside the net

day, Nancy executed a will providing that, if William predeceased her, her interest in the condo would pass to the plaintiffs upon her death.[4]

In a document dated August 13, 2007 (agreement), William and Nancy memorialized their intentions. The agreement referenced the cross promises contained in William's and Nancy's wills and explained that William had originally left the condo to Nancy "for the term of her natural life" but that, in agreement with Nancy, he was revising his will to leave the property to her outright, "primarily to provide her with a means to increase her income should it be necessary by means of a reverse mortgage." The agreement stated that William was willing to execute his will "provided that in the event such property is sold during the lifetime of Nancy and after the death of William, that she will set aside the net proceeds from the sale of such real property into a special account earmarked for distribution to [the plaintiffs] . . . . Further, in the event such property is not sold, it will be devised to [the plaintiffs]. . . ." The agreement added that Nancy agreed not to change her will "without the written consent of William while he is alive and in the event of his death without the written consent of [the plaintiffs] . . . ." Further, "the parties specifically agree that this [a]greement is a [third-party]

proceeds thereof in a separate account earmarked for eventual distribution to [the plaintiffs] pursuant to a Last Will and Testament to be executed by her. By such direction I do not mean that my wife should not be entitled to utilize such funds during her lifetime for her comfort and support, but rather that any proceeds remaining at her death should pass to [the plaintiffs] or if any be deceased, to their issue."

[4] Article fourth of Nancy's will provides: "If at the time of my death I have an interest in real property known as [the condo] . . . and be using as my residence, I give and devise the same to [the plaintiffs] . . . . I further direct that in the event that I have sold [the condo] . . . or such other residential property that I may own, and have not acquired another residence, then the net proceeds remaining from the sale of such real property that I have set aside in a special account earmarked for distribution to [the plaintiffs] be distributed to them . . . ."

beneficiary contract for the benefit of [the plaintiffs]" and that "[n]othing herein shall be construed to limit the ability of Nancy to utilize the funds so set aside for her comfort and support" in article fourth of William's will. On June 5, 2012, after William had become ill, Ellen Sackman, as attorney in fact for her father, quitclaimed William's interest in the condo to Nancy. Ellen claimed, in an affidavit to the trial court, that she had known that she "would have to open a formal estate for no other reason but to transfer the [condo] to Nancy. [She], therefore, made the decision to avoid probate by using the general [p]ower of [a]ttorney from [her] father to transfer the condominium to Nancy." William subsequently died on June 13, 2012.

Thereafter, Nancy obtained a $100,000 line of credit, using the condo as collateral, and put the proceeds into an account, to which Kelly had access. Prior to her death in March, 2016, Nancy withdrew money from the account to, among other things, make improvements to the condo and to purchase an automobile. After Nancy died, Kelly was appointed executrix of her estate by the Probate Court in Cheshire. The plaintiffs subsequently filed an application for an order regarding a certificate of devise of the condo, dated June 3, 2016. In their application for the order, the plaintiffs alleged that the condo was encumbered by the line of credit and, accordingly, sought a court order to sell the condo and pay off the line of credit. On that same day, the plaintiffs filed a claim against Nancy's estate seeking $76,000 of the line of credit that the plaintiffs believed Nancy had not used for improvements to the condo. Kelly, as executrix, rejected the claim. In accordance with Nancy's will, title to the condo passed to the plaintiffs, who sold it. The net proceeds from the sale of the condo were placed in a restricted account, and a portion of those proceeds eventually were distributed to the plaintiffs.[5]

[5] The property was sold on September 9, 2016, for $197,000. Subsequently, $101,229.88 of those sale proceeds were used to pay off the home equity

The plaintiffs commenced the present action on September 30, 2016, claiming that Nancy had failed to abide by her promise to William that she would devise the condo, or the proceeds from its sale, to the plaintiffs. The plaintiffs, thus, sought to recover the outstanding balance of the line of credit held in Nancy's account. The complaint contained six counts. Three counts were alleged against Kelly in her capacity as executrix of the estate: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; and (3) breach of fiduciary duty. The remaining counts were alleged against the defendants in their individual capacities: (1) conversion against Kelly; (2) unjust enrichment against Kelly; and (3) tortious interference with a contract against Christopher, Kelly, and Peter.

The parties filed a joint scheduling order on April 11, 2017, which provided that any dispositive motions were to be filed by May 8, 2017. Trial was scheduled for January 29, 2018. While the case was pending, the defendants' original counsel was diagnosed with, and underwent surgery for, terminal brain cancer. On December 29, 2017, original counsel filed a motion for a continuance, requesting that the case be continued to March 2, 2018, which the court granted on January 2, 2018, and marked off the trial date, which was to be set later by the court. Original counsel subsequently withdrew his appearance on January 3, 2018. The defendants then filed a motion for a continuance, dated February 28, 2018, to which the plaintiffs filed an objection on March 2, 2018. The plaintiffs also filed a new trial management report on March 1, 2018. New counsel filed an appearance on behalf of the defendants on March 8, 2018, and

line of credit. After the home equity line of credit was paid off, the Probate Court ordered the remaining funds, $81,799, put into a restricted account. The Probate Court approved the distribution of $8827.42 to Steven Sackman as reimbursement for work done on the condo and ordered $10,000 to be distributed to each of the plaintiffs. A total of $43,000 of the net proceeds of the sale remained in the restricted account to ensure that there were assets available to pay the expenses of Nancy's estate.

filed a motion for summary judgment on March 29, 2018. The plaintiffs objected to the timing of the motion for summary judgment and to the defendants' contention that the defendants' original counsel was incapacitated. Although at the time the motion for summary judgment was filed no trial date was set, a trial management order was in place. Accordingly, the court ordered the defendants to file a motion for permission to file a motion for summary judgment so that it could be apprised of all relevant information before deciding whether to exercise its discretion pursuant to Practice Book § 17-44 to grant the motion to file a motion for summary judgment.

In support of their motion for permission to file a motion for summary judgment, the defendants submitted, inter alia, an affidavit from their original counsel and his medical records detailing his condition and treatment to explain the reason why their motion for summary judgment had not been filed earlier. The trial court held a hearing on the motion for permission to file a late motion for summary judgment on June 4, 2018, and, after considering the arguments and affidavits filed by both parties, granted the defendants' motion for permission to file the motion for summary judgment. The trial court subsequently held a hearing on the motion for summary judgment on November 13, 2018. On March 1, 2019, the plaintiffs withdrew the counts of the complaint alleged against Kelly in her capacity as executrix.

In its March 13, 2019 memorandum of decision on the defendants' motion for summary judgment, the trial court found, as a matter of law, that William and Nancy's August 13, 2007 written agreement was void for lack of consideration. The court also concluded that there was no genuine issue of material fact that Nancy had complied with the provisions of her agreement with William in that, if she sold the condo, the net proceeds of the sale would go to the plaintiffs and that, if she did not sell the condo, her interest in the property would

pass to the plaintiffs. Accordingly, the court rendered judgment in favor of the defendants. This appeal followed.

I

On appeal, the plaintiffs first claim that the trial court abused its discretion by granting the defendants permission to file a motion for summary judgment in that the court (1) failed to "follow accepted guidelines for determining incompetency of prior counsel," (2) improperly considered original counsel's affidavit, and (3) "improperly relieved [the] defendants of [their] responsibility" to demonstrate original counsel's incapacity.

Practice Book § 17-44 provides in relevant part: "In any action . . . any party may move for a summary judgment . . . at any time if no scheduling order exists and the case has not been assigned for trial. If a scheduling order has been entered by the court, either party may move for summary judgment as to any claim or defense as a matter of right by the time specified in the scheduling order. If no scheduling order exists but the case has been assigned for trial, a party must move for permission of the judicial authority to file a motion for summary judgment. . . . The pendency of a motion for summary judgment shall delay trial only at the discretion of the trial judge." Accordingly, we review the trial court's decision for an abuse of discretion. See *Chadha* v. *Charlotte Hungerford Hospital*, 97 Conn. App. 527, 533, 906 A.2d 14 (2006). "When reviewing claims under an abuse of discretion standard, the unquestioned rule is that great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness . . . . In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it

did." (Citation omitted; internal quotation marks omitted.) *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 328–29, 838 A.2d 135 (2004).

The plaintiffs claim that the trial court failed to analyze the "incompetency" of the defendants' original counsel under General Statutes § 45a-650 (c) (1)[6] and therefore improperly granted the defendants' motion for summary judgment. This claim is meritless because § 45a-650 is not applicable. Instead, § 45a-650 provides

[6] General Statutes § 45a-650 provides in relevant part: "(a) At any hearing on a petition for involuntary representation, before the court receives any evidence regarding the condition of the respondent or of the respondent's affairs, the court shall require clear and convincing evidence that the court has jurisdiction, that the respondent has been given notice as required in section 45a-649, and that the respondent has been advised of the right to retain an attorney pursuant to section 45a-649a and is either represented by an attorney or has waived the right to be represented by an attorney. The respondent shall have the right to attend any hearing held under this section. . . .

"(c) (1) After making the findings required under subsection (a) of this section, the court shall receive evidence regarding the respondent's condition, the capacity of the respondent to care for himself or herself or to manage his or her affairs, and the ability of the respondent to meet his or her needs without the appointment of a conservator. Unless waived by the court pursuant to subdivision (2) of this subsection, medical evidence shall be introduced from one or more physicians licensed to practice medicine in this state who have examined the respondent not more than forty-five days prior to the hearing, except that for a person with intellectual disability, as defined in section 1-1g, psychological evidence may be introduced in lieu of such medical evidence from a psychologist licensed pursuant to chapter 383 who has examined the respondent not more than forty-five days prior to the hearing. The evidence shall contain specific information regarding the respondent's condition and the effect of the respondent's condition on the respondent's ability to care for himself or herself or to manage his or her affairs. The court may also consider such other evidence as may be available and relevant, including, but not limited to, a summary of the physical and social functioning level or ability of the respondent, and the availability of support services from the family, neighbors, community or any other appropriate source. Such evidence may include, if available, reports from the social work service of a general hospital, municipal social worker, director of social service, public health nurse, public health agency, psychologist, coordinating assessment and monitoring agencies, or such other persons as the court considers qualified to provide such evidence."

the analysis for the appointment of a conservator. The plaintiffs also claim that the trial court improperly considered original counsel's affidavit. The plaintiffs, however, provide no basis for their argument.[7] Finally, the plaintiffs argue that the trial court improperly relieved the defendants of their responsibility to "keep apprised of their case" and that the trial court "erred in allowing [the] defendants to retroactively assert that their counsel was incapable simply because they believe their counsel may have made a mistake." The plaintiffs, however, do not explain how the trial court acted improperly in utilizing its discretion to allow the defendants to file a motion for permission to file a motion for summary judgment. As such, the plaintiffs have not presented any persuasive arguments that would lead us to determine that the trial court abused its discretion in granting the defendants permission to file a motion for summary judgment.

In considering whether to allow the defendants to file their motion for summary judgment, the trial court heard representations from the defendants that original counsel did demonstrate some clear deficiencies in his representation, including that "he filed an answer in draft (red lined) format, conducted no discovery, and

[7] The plaintiffs argue in their principal brief to this court: "The fact that [original counsel] was ill is not in dispute, but if he at any time during his approximately thirteen month representation of the defendants believed his illness was interfering with his ability to represent them, he had the responsibility to withdraw as counsel. Instead he participated in the pretrial process and only retroactively swore in an affidavit that he had been impaired when he was requested to by the defendants' new counsel and the defendant Peter Quinlan, who was [original counsel's] longtime personal friend. By accepting and relying on [prior counsel's] affidavit in which he stated that he had been impaired, the court unfairly permitted the defendants to restart the case."

The plaintiffs provide no basis for their claims of impropriety on behalf of original counsel. Further, the plaintiffs do not explain why it was inappropriate for the court to have considered original counsel's affidavit. In addition to filing original counsel's affidavit, the defendants filed original counsel's medical records with the court, as well as an e-mail from original counsel explaining his treatment.

was subjected to numerous motions for default and judgment." The trial court was presented with evidence that the defendants' original counsel was diagnosed with terminal brain cancer and was undergoing treatment while the case was pending. The defendants submitted original counsel's medical records, a chart of his treatment dates and corresponding trial court dates, and an affidavit from original counsel explaining his condition. Original counsel's affidavit explained that he was impaired during the pendency of this case. He died within three months of submitting the affidavit. Further, no trial date was scheduled at the time the defendants filed their motion for permission to file a motion for summary judgment. On the basis of the record before us, we conclude that the court did not abuse its discretion by granting the defendants' motion for permission to file a motion for summary judgment.[8]

II

The plaintiffs also claim that the trial court improperly granted the defendants' motion for summary judgment because the defendants were not entitled to judgment. Specifically, the plaintiffs claim that the trial court (1) failed to consider "the limitation of 'for her comfort and support,' " (2) failed to consider "the legal definition of a sale and of the term 'proceeds,' "[9] and (3) improperly determined that the agreement was invalid. Further, the plaintiffs claim that the court failed to view

[8] The trial court did not file a memorandum of decision regarding its decision to allow the defendants to file their motion for summary judgment.

[9] The plaintiffs' claim on appeal that the trial court failed to consider whether Nancy, by taking out a line of credit on the condo, actually sold the property and that the funds from the loan were therefore proceeds of the sale. The trial court refused to consider this claim because the plaintiffs did not raise this argument until the hearing on the summary judgment motion. The plaintiffs did not raise this claim in their complaint or in their objection to the motion for summary judgment. Because this claim was not properly raised before and decided by the trial court, we do not consider it here. See *White* v. *Mazda Motor of America, Inc.*, 313 Conn. 610, 629–32, 99 A.3d 1079 (2014).

the evidence in the light most favorable to themselves as the nonmoving parties. We disagree.

"The standard of review of a trial court's decision to grant summary judgment is well established. [W]e must decide whether the trial court erred in determining that there was no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. . . . The test is whether a party would be entitled to a directed verdict on the same facts. . . . This court's review of the trial court's decision to grant summary judgment . . . is plenary." (Internal quotation marks omitted.) *TD Bank, N.A.* v. *Salce*, 175 Conn. App. 757, 765–66, 169 A.3d 317 (2017).

After the plaintiffs withdrew the three counts against Kelly in her capacity as executrix, the only counts remaining were conversion, unjust enrichment, and tortious interference with a contract as to all defendants.

The plaintiffs alleged that the funds from the line of credit belonged to them and that Kelly converted those funds by retaining ownership over them. "The tort of [c]onversion occurs when one, without authorization, assumes and exercises ownership over property belonging to another, to the exclusion of the owner's rights." (Internal quotation marks omitted.) *Deming* v. *Nationwide Mutual Ins. Co.*, 279 Conn. 745, 770, 905 A.2d 623 (2006). "To establish a prima facie case of conversion, the plaintiff must demonstrate that (1) the material at issue belonged to the plaintiff, (2) that the defendants deprived the plaintiff of that material for an indefinite period of time, (3) that the defendants' conduct was unauthorized and (4) that the defendants' conduct harmed the plaintiff." *Stewart* v. *King*, 121 Conn. App. 64, 74 n.4, 994 A.2d 308 (2010). The trial court found that there was no genuine issue of material fact that

Nancy owned the condo after Ellen quitclaimed it to her prior to William's death. As the owner of the condo, Nancy had the right to borrow against it as she wished. Kelly, therefore, could not have converted funds that the plaintiffs did not own.

The plaintiffs also alleged that Kelly was unjustly enriched. The plaintiffs argued that Nancy did not have the right to take the funds from the line of credit and retain them in an account that passed to Kelly.

"Unjust enrichment is a doctrine allowing damages for restitution, that is, the restoration to a party of money, services or goods of which he or she was deprived that benefited another." (Internal quotation marks omitted.) *Piccolo* v. *American Auto Sales, LLC*, 195 Conn. App. 486, 494, 225 A.3d 961 (2020). "[U]njust enrichment relates to a benefit of money or property . . . and applies when no remedy is available based on the contract. . . . The lack of a remedy under a contract is a precondition to recovery based on unjust enrichment . . . . It would be contrary to equity and fairness to allow a defendant to retain a benefit at the expense of the plaintiff." (Internal quotation marks omitted.) Id., 499.

The trial court determined that there was no genuine issue of material fact that, at the time Nancy borrowed money against the condo, she was the sole owner of the condo pursuant to the quitclaim deed Ellen signed as attorney in fact for William. The funds Nancy borrowed on the condo were hers to do with as she wished, and she could permit whomever she wished to have access to the funds. The funds from the home equity line of credit were never the plaintiffs'. The trial court accordingly rendered judgment on behalf of the defendants on this claim.

The plaintiffs alleged intentional interference with contractual relations against the defendants, specifically, that Nancy violated the terms of the agreement

by siphoning equity from the condo and passing it to Kelly. The plaintiffs alleged that the funds were in Nancy's account, to which Kelly had access at Nancy's death, and, as a result, the defendants retained the funds from the line of credit in violation of the agreement.

"A claim for intentional interference with contractual relations requires the plaintiff to establish: (1) the existence of a contractual or beneficial relationship; (2) the defendant's knowledge of that relationship; (3) the defendant's intent to interfere with the relationship; (4) that the interference was tortious; and (5) [that there was] a loss suffered by the plaintiff that was caused by the defendant's tortious conduct." (Internal quotation marks omitted.) *Starboard Fairfield Development, LLC* v. *Gremp*, 195 Conn. App. 21, 32, 223 A.3d 75 (2019).

The plaintiffs alleged that they were remainder beneficiaries of the agreement between Nancy and William. The plaintiffs further argued that Nancy's actions violated the agreement and that the proceeds of the line of credit were transferred improperly to Kelly upon Nancy's death. The trial court determined, as a matter of law, that the agreement between William and Nancy, in which Nancy promised not to alter her will without permission from William or the plaintiffs, was void and therefore unenforceable. Because there was no valid agreement between William and Nancy, the defendants could not have interfered with it. Prior to her death, Nancy owned the condo pursuant to the quitclaim deed and had the right to borrow against her interest in it. Despite the fact that the agreement was unenforceable, Nancy abided by her promise to William and, pursuant to her will, devised her interest in the condo to the plaintiffs at her death.

After thoroughly reviewing the record, including the pleadings and affidavits submitted in support of the

defendants' motion for summary judgment, we are persuaded that the trial court properly rendered summary judgment in favor of the defendants. The parties agree that there are no genuine issues of material fact. On appeal, the plaintiffs argue that Nancy's ability to borrow against the condo was restricted by the terms of the will limiting her access to funds "for her comfort and support." The trial court did not reach that conclusion when presented with the record. At the time of Nancy's death, she was the owner of the condo, which had been quitclaimed to her before William's death. Under the terms of her will, there was no prohibition against taking out a line of credit; she agreed only to devise the property to the plaintiffs, which she did. The plaintiffs, therefore, had no basis for their claim to the proceeds of the line of credit.

We see no merit to the plaintiffs' claim that the trial court improperly determined that the agreement was invalid. The trial court explained that, even if the agreement was considered, the agreement added only that Nancy promised not to change her will, and the plaintiffs do not argue that Nancy changed her will. In accordance with her will and the agreement, if considered, the property was devised to the plaintiffs. Further, because we agree with the trial court's determination that summary judgment in favor of the defendants was appropriate in this case, we reject the plaintiffs' claim that the trial court failed to view the evidence in the light most favorable to the plaintiffs. On the basis of the foregoing, we conclude that the trial court properly rendered summary judgment in favor of the defendants and, therefore, affirm the judgment of the trial court.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DONALD BROWN (AC 41745)

Prescott, Moll and Harper, Js.

Syllabus

Convicted, after a jury trial, of the crime of assault in the first degree in connection with an altercation during which the defendant shot R, the defendant appealed to this court. *Held* that the state produced sufficient evidence to disprove the defendant's theory of self-defense beyond a reasonable doubt; the jury was free to credit R's testimony that the defendant was acting in an aggressive manner and threatening him and that he did not advance toward the defendant, which contradicted the defendant's version of events, and the jury reasonably could have concluded that the defendant's fear of death or great bodily harm was unreasonable; moreover, even if the jury determined that the defendant reasonably believed that deadly physical force or great bodily harm was going to be inflicted on him, the jury reasonably could have concluded that the defendant did not subjectively believe that deadly force was necessary to repel R's alleged attack because, although the defendant presented evidence of R's reputation for violence, the jury was free to discredit the defendant's evidence; furthermore, even if the jury concluded that the defendant did subjectively believe that deadly force was necessary to repel the perceived attack, the jury reasonably could have concluded that this belief was unreasonable as there was evidence presented that the altercation between the defendant and R inside the defendant's motor vehicle prior to the shooting never escalated beyond a shoving match, and R testified that, on exiting the vehicle, he intended to return to the house and was not charging at the defendant.

Argued March 3—officially released June 30, 2020

Procedural History

Information charging the defendant with two counts of the crime of assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *D'Addabbo*, *J.*; verdict of guilty of one count of assault in the first degree; thereafter, the court, *D'Addabbo*, *J.*, denied the defendant's motions for judgment notwithstanding the verdict and for a new trial, and rendered judgment in accordance with the verdict, from which the defendant appealed to this court. *Affirmed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (defendant).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Gail Hardy*, state's attorney, and *Robin Krawczyk*, senior assistant state's attorney, for the appellee (state).

Opinion

HARPER, J. The defendant, Donald Brown, appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree in violation of General Statutes § 53a-59 (a) (5).[1] On appeal, the defendant claims that the evidence was insufficient to disprove beyond a reasonable doubt his asserted justification of self-defense and, accordingly, that he is entitled to a judgment of acquittal. We affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In 2005, the defendant purchased real property located at 131 Hebron Street in Hartford (property), and rented the property to his aunt, who died in 2014. Following her death, the defendant continued using the property as a rental property and, as such, rented the property to his cousin's daughter, Qeyonna Reid (Qeyonna), and her husband, the complaining witness, Lascelles Reid (Reid). The defendant had given Qeyonna and Reid permission to renovate the property, with the

[1] General Statutes § 53a-59 (a) provides in relevant part: "A person is guilty of assault in the first degree when . . . (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm."

Count two of the long form information also charged the defendant with assault in the first degree in violation of § 53a-59 (a) (3). The court instructed the jury that the state had charged the counts in the alternative, that it could not find the defendant guilty of both counts, and that it should proceed to count two only if it found the defendant not guilty on count one. Because the jury found the defendant guilty of count one, alleging intentional conduct, it did not return a verdict on the second count alleging reckless conduct.

understanding that they were to move into the property once the renovations were completed.

On April 24, 2015, the defendant drove his vehicle to the property. The defendant backed his vehicle into the driveway, exited the vehicle, entered the property, and proceeded to walk around the inside, observing the remodeling work that Reid had begun. The defendant was aware of the state of the renovations prior to his visit. The defendant had agreed to allow the couple only to paint the interior of the property and, consequently, felt Reid had rendered the property "unlivable" by gutting its interior. Accordingly, the defendant decided that he would express his discontent with Reid in private and, subsequently, invited Reid outside. The men entered the defendant's vehicle, which was in the driveway. Reid sat in the passenger seat, and the defendant sat in the driver's seat. The defendant began explaining to Reid that he was upset with the renovation work being done. While speaking to Reid, the defendant gestured with his hand in a pointing fashion close to Reid's face. Reid responded by swatting the defendant's finger away and blocking his subsequent attempts to gesture in such a way. As a result, a struggle ensued, with both men pushing and shoving each other inside the vehicle. During the encounter, the defendant was pinned against the A-frame of the car door as both men were "grabb[ing] each other's clothing." When the struggle ended, the defendant exited the vehicle and moved to the rear side of the vehicle. A few seconds later, Reid exited the passenger side of the vehicle and turned to find that the defendant—now also on the passenger side—was holding a gun pointed in his direction.[2] Reid asked the defendant, "what now, you're going to shoot me?" to which the defendant replied,

[2] The weapon the defendant used was a Sig Sauer P228 nine millimeter semiautomatic pistol. The defendant had a permit to carry the pistol, which was registered to him, at the time of the incident.

"I'll eff you up L.R. I'll kill you." The defendant then shot Reid one time in the abdomen. Reid fell to the ground and asked the defendant to call for help. The defendant approached a nearby stranger walking along the road and borrowed his cell phone to call 911.

After arriving at the property, the police secured the scene and observed, among other things, the defendant standing against the curb in the street. The defendant directed the responding officers to his firearm, which he had laid in the grass, and told them that he had shot Reid. The police then secured the firearm. The defendant told the police that he was unharmed, and they did not observe any injuries to him beyond a limp he had acquired from a prior work related injury.

The first responders also observed Reid lying on the ground and began treating him immediately before transporting him to Saint Francis Hospital and Medical Center for surgery. Reid suffered permanent injuries to his right leg.

Later, when the lead investigator, Detective Dennis DeMatteo, arrived at the scene, he spoke briefly with the responding officers and with the defendant, who had been placed in the back of a patrol cruiser. The defendant agreed to be transported to the Hartford police station to be interviewed. DeMatteo interviewed the defendant, who was not under arrest, for approximately two hours and forty-five minutes, during which time the defendant made, reviewed, and signed his formal statement describing the events that had occurred.

During his interview, the defendant told DeMatteo that once the struggle in the vehicle had ended, he exited the vehicle and began walking toward the front of the vehicle, at which time Reid also exited the vehicle. The defendant then began to retreat toward the rear of the vehicle. The defendant told DeMatteo that, during his retreat, he pulled out his gun out of fear "due to

his [work related] injuries and the size of . . . Reid." He then moved to the passenger side of the vehicle and shot him. The defendant did not report to the police that he had suffered any injuries during the altercation and declined medical treatment at that time. DeMatteo did not witness any injuries to the defendant during the interview. After concluding the interview, the defendant allowed the police to transport him back to the property and to take photographs of his vehicle, which, at that time, still had the key in its ignition.

DeMatteo interviewed Reid on April 27, and again on April 29, 2015. After evaluating both versions of events that he had received from Reid and the defendant, and after viewing the physical evidence at the scene, DeMatteo applied for an arrest warrant and, subsequently, arrested the defendant on May 14, 2015.

On May 14, 2015, the defendant was charged by long form information with one count of assault in the first degree pursuant to § 53a-59 (a) (5) and one count of assault in the first degree pursuant to § 53a-59 (a) (3). On November 8, 2017, after a trial, the jury returned a verdict of guilty on the charge of assault in the first degree pursuant to § 53a-59 (a) (5). Subsequently, the defendant filed posttrial motions for a judgment of acquittal notwithstanding the verdict and for a new trial. These motions were denied by the court, *D'Addabbo, J.*, on January 5 and 9, 2018, respectively. The defendant was thereafter sentenced to fourteen years of imprisonment, execution suspended after seven years, followed by five years of probation. This appeal followed. Additional facts will be set forth as necessary.

On appeal, the defendant claims that there was insufficient evidence at trial to satisfy the state's burden to disprove his claim of self-defense as a justification for his use of deadly force as set forth in General Statutes § 53a-19 (a). Among other things, § 53a-19 (a) looks to the reasonableness of the fear of the person claiming

self-defense and the necessity of the use of deadly force.[3] In response, the state argues that it disproved the defendant's claim of self-defense beyond a reasonable doubt.[4] We agree with the state that the evidence was sufficient to disprove the defendant's claim of self-defense beyond a reasonable doubt.

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

[3] General Statutes § 53a-19 (a) provides: "Except as provided in subsections (b) and (c) of this section, a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

[4] The state further argues, in the alternative, that it disproved the defendant's claim of self-defense beyond a reasonable doubt under § 53a-19 (b), which imposes a duty to retreat on the person claiming self-defense. See General Statutes § 53a-19 (b). Because we conclude that the state proffered sufficient evidence to disprove the defendant's claim of self-defense under § 53a-19 (a) beyond a reasonable doubt, we do not address the state's alternative ground for affirmance.

view of the evidence that supports the jury's verdict of guilty." (Citations omitted; internal quotation marks omitted.) *State* v. *Revels*, 313 Conn. 762, 778, 99 A.3d 1130 (2014), cert. denied, U.S. , 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015).

"The rules governing the respective burdens borne by the defendant and the state on the justification of self-defense are grounded in the fact that [u]nder our Penal Code, self-defense, as defined in . . . § 53a-19 (a) . . . is a defense, rather than an affirmative defense. See General Statutes § 53a-16. Whereas an affirmative defense requires the defendant to establish his claim by a preponderance of the evidence, a properly raised defense places the burden on the state to disprove the defendant's claim beyond a reasonable doubt. See General Statutes § 53a-12. Consequently, a defendant has no burden of persuasion for a claim of self-defense; 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." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Alicea*, 191 Conn. App. 421, 446–47, 215 A.3d 184, cert. granted on other grounds, 333 Conn. 937, 219 A.3d 373 (2019).

"Whether the defense of the justified use of force, properly raised at trial, has been disproved by the state is a question of fact for the jury, to be determined from all the evidence in the case and the reasonable inferences drawn from that evidence. . . . As long as the evidence presented at trial was sufficient to allow the jury reasonably to conclude that the state had met its burden of persuasion, the verdict will be sustained." (Internal quotation marks omitted.) *State* v. *Pranckus*, 75 Conn. App. 80, 85–86, 815 A.2d 678, cert. denied, 263 Conn. 905, 819 A.2d 840 (2003).

Our Supreme Court has interpreted § 53a-19 (a) to mean 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 in original.) *State* v. *Prioleau*, 235 Conn. 274, 285–86, 664 A.2d 743 (1995).

The defendant argues that his self-defense claim did not depend on credibility determinations by the jury because the facts at trial were undisputed. In response, the state argues that the jury was permitted to make credibility determinations in arriving at its verdict because material facts presented by both sides at trial were in dispute. We note at the outset that, contrary to the defendant's assertion, the trial evidence presented by both parties undeniably contains contradictions and disputes that the jury was entitled to evaluate and credit accordingly. "[T]he [jury] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [jury's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [jury] can . . . decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Marsala*, 44 Conn. App. 84, 96, 688 A.2d 336, cert. denied, 240 Conn. 912, 690 A.2d 400 (1997). Importantly, the evidence relevant to both the reasonableness of the defendant's fear and the necessity of deadly force consisted of contradictory testimony regarding a number of key facts. Specifically, the jury was free to evaluate disputed facts concerning the defendant's actions and demeanor inside the vehicle, as well as what ensued once the men exited the vehicle.

With respect to the events inside the vehicle, Reid testified that he engaged the defendant physically only

when the defendant began pointing his finger in close proximity to Reid's face. Reid further testified that the defendant was as equally involved in the physical altercation as he had been. The defendant testified that Reid was the initial aggressor and that Reid forcefully hit the defendant in the head and pushed him against the driver's side door frame. The defendant presented evidence, through the testimony of Detective Candace Hendrix, that the water bottle in the center console of the front seat was tilted toward the driver's side, as if it were pushed that way by Reid's directional force during the struggle.

With respect to the events that occurred once the men had exited the vehicle, the defendant testified that he had exited the vehicle and leaned against the driver's side while Reid was still in the vehicle. The defendant testified that when he saw Reid exit the vehicle and begin to move toward its rear, he moved to the front of the vehicle in an attempt to put the car between himself and Reid. The defendant also testified that, prior to discharging his weapon, Reid was chasing him and threatening to kill him. Reid, however, testified that he had exited the vehicle with the intent of going inside to retrieve his young nephew, whom he had been caring for that afternoon, when he turned around and was immediately faced with the defendant pointing a gun in his direction. Reid testified that the defendant told him, "I'll eff you up L.R. I'll kill you," and that the defendant immediately shot him. Reid also testified that, while he was lying on the ground after being shot, the defendant told him that if he moved he would "blow [his] head off." The defendant testified that, prior to shooting Reid, he only warned him to stay back but Reid continued to move toward him. The testimonies of Reid and the defendant were clearly in dispute and, as such, were subject to the credibility determinations of the jury.

In addition, at trial, the defendant was cross-examined about contradictions between his testimony on the stand and statements he made in his official police statement, as well as to DeMatteo during his police interview.[5] When questioned about these contradictions, the defendant testified that the discrepancies were the result of his being "numb" and "in shock" from the events when he was interviewed. Regarding his statement, he testified that he had "breezed through" giving and reviewing the statement and opined that he "[didn't] know if things were [clear] at that time" for him because he was in a daze. The state impeached the defendant's credibility with the testimony of DeMatteo, who testified that the defendant never appeared dazed, confused, or in shock during his interview. DeMatteo also detailed the thorough process of, and the defendant's compliance in, giving his statement. "It is fundamental that for the purpose of impeaching the credibility of his testimony, a witness may be cross-examined as to statements made out of court or in other proceedings which contradict those made upon direct examination. . . . This is based on the notion that talking one way on the stand, and another way previously, raises a doubt as to the truthfulness of both statements. . . . The purpose of impeachment is to undermine the credibility of a witness so that the trier will disbelieve him and disregard his testimony." (Citation omitted; internal

[5] The defendant's official police statement and the video recording of his police interview were not entered into evidence, but were testified to by DeMatteo on direct examination during the state's case-in-chief, and by the defendant on cross-examination during the defense's case-in-chief.

With regard to the interview, DeMatteo testified that the defendant said he did not feel any pain when Reid had him pressed against the door frame. On the witness stand, however, the defendant testified both that he had suffered injuries and that he had told the police about them that day. Additionally, in his statement, he said that, leading up to the encounter, he was upset with Reid because he was losing money on the property due to Reid's renovations. At trial, he testified that he was not upset with Reid for those reasons when he initiated the conversation with Reid.

quotation marks omitted.) *State* v. *Valentine*, 240 Conn. 395, 411, 692 A.2d 727 (1997).

In assessing the defendant's claim on appeal, we are mindful of our standard of review, which instructs us to consider only whether there is a reasonable view of the evidence that would support the jury's verdict and not whether there exists an alternative reasonable view that would support a not guilty verdict. See *State* v. *Leniart*, 166 Conn. App. 142, 170, 140 A.3d 1026 (2016), rev'd in part on other grounds, 333 Conn. 88, 215 A.3d 1104 (2019). Additionally, "[t]his court must defer to the jury's assessment of the credibility of the witnesses based on its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *Outlaw*, 108 Conn. App. 772, 779–80, 949 A.2d 544, cert. denied, 289 Conn. 915, 957 A.2d 880 (2008).

The defendant's claim is that he was justified in using deadly force because he was defending himself against an aggressor, Reid, whom he feared would seriously injure or kill him as a result of their altercation. At trial, however, the jury was provided with evidence that contradicted the defendant's claim of Reid's aggressiveness and called into question the reasonableness of the defendant's fear and the necessity of his use of deadly force. In particular, the jury was presented with conflicting testimony by Reid, who testified that the defendant was acting in an aggressive manner and threatening him, and that he did not advance toward the defendant outside the vehicle in the way the defendant claims he had. The jury, presented with two versions of the events, was free to credit Reid's description of the altercation. Accordingly, we conclude that the jury reasonably could have determined, on the basis of the evidence and its credibility assessments, that the defendant's fear of death or great bodily harm was unreasonable.

Even if we were to find that the jury determined that the defendant reasonably believed that deadly physical force or great bodily harm was going to be used or inflicted on him, we conclude that the jury had sufficient evidence reasonably to find that the defendant's use of deadly force was unnecessary under the circumstances. "We repeatedly have indicated that the test a jury must apply in analyzing the second requirement, i.e., that the defendant reasonably believed that deadly force, as opposed to some lesser degree of force, was necessary to repel the victim's alleged attack, is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable." (Internal quotation marks omitted.) *State* v. *Pranckus*, supra, 75 Conn. App. 90.

The subjective-objective inquiry "requires that the jury make two separate affirmative determinations in order for the defendant's claim of self-defense to succeed. First, the jury must determine whether, on the basis of all of the evidence presented, the defendant in fact had believed that he had needed to use deadly physical force, as opposed to some lesser degree of force, in order to repel the victim's alleged attack. . . .

"If the jury determines that the defendant had not believed that he had needed to employ deadly physical force to repel the victim's attack, the jury's inquiry ends, and the defendant's self-defense claim must fail. If, however, the jury determines that the defendant in fact had believed that the use of deadly force was necessary, the jury must make a further determination as to whether *that belief* was reasonable, from the perspective of a reasonable person in the defendant's circumstances." (Emphasis in original; internal quotation marks omitted.) *State* v. *Scarpiello*, 40 Conn. App. 189,

206–207, 670 A.2d 856, cert. denied, 236 Conn. 921, 674 A.2d 1327 (1996).

The defendant presented evidence of Reid's reputation for violence through the testimony of Reid's cousin, Natasha Baldwin, as well as through his own testimony. Baldwin testified that Reid "has a violent temper. That includes physical violence toward others, family members, friends." The defendant testified that he felt that deadly force was required to repel Reid's attack because of Reid's size and aggressiveness. The defendant described Reid's reputation in the community as being "[h]ot tempered, fight you on a drop of a dime, just a very unsavory person." Despite all of this, the jury was free to discredit the defendant's evidence and testimony on the basis of its credibility determinations in light of the other evidence admitted during trial. Particularly, Reid's testimony that he did not intend on continuing the fight outside the vehicle, and that he believed "[c]ooler heads prevail" could persuade a jury to disbelieve the defendant's claims about Reid's temper. On that basis, the jury reasonably could have concluded that the defendant did not subjectively believe that deadly force was necessary to repel Reid's alleged attack.

Even if the jury had concluded that the defendant did subjectively believe deadly force was necessary to repel the perceived attack by Reid, we conclude that the jury could reasonably have concluded that that subjective belief was objectively unreasonable. As previously noted, the evidence at trial revealed that the altercation between the defendant and Reid inside the vehicle never escalated beyond a shoving match. Further, Reid testified that he had no knowledge of the defendant's weapon, nor does the evidence reveal that Reid had any weapon of his own. Finally, Reid testified that, on exiting the car, he had intended to return to the house to retrieve his nephew and was not charging at the defendant. On the basis of this evidence, the jury

reasonably could conclude that even if the defendant subjectively believed deadly force was necessary to repel Reid's attack, that belief was an unreasonable one.

Accordingly, we conclude that the jury had before it sufficient evidence to determine that the state had disproved the defendant's asserted justification of self-defense beyond a reasonable doubt.

The judgment is affirmed.

In this opinion the other judges concurred.

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Audibert *v.* Halle. 472
Negligence; motion to set aside verdict and for new trial; reviewability of claim, raised for first time on appeal, that trial court improperly admitted evidence of subsequent motor vehicle accident plaintiff was involved in because evidence was not relevant; claim that trial court improperly failed to provide curative instruction to jury; whether trial court abused its discretion in denying motion to set aside verdict and for new trial; whether certain remarks by defendant's counsel during closing argument were improper and deprived plaintiff of fair trial.

Davis *v.* Commissioner of Correction. 345
Habeas corpus; whether petitioner's trial and appellate counsel rendered ineffective assistance for having failed to challenge statute (§ 53a-149) criminalizing bribery of witness as facially overbroad under novel constitutional argument that § 53a-149 could encompass legal activity such as settlement negotiations; whether counsel rendered ineffective assistance by failing to request at trial and to argue on direct appeal that trial court should have given jury instruction on true threats with respect to charge of breach of peace in second degree in violation of statute (§ 53a-181 (a) (3)); whether claim that trial court's failure to give jury instruction on true threats as to charge under § 53a-181 (a) (3) was inextricably linked to claim in habeas petition that appellate counsel rendered ineffective assistance for having failed to challenge § 53a-181 (a) as facially overbroad and unconstitutionally vague as applied; whether trial counsel and appellate counsel rendered ineffective assistance for having failed to challenge admission into evidence of petitioner's blood test results.

In re Corey C. 41
Termination of parental rights; whether Department of Children and Families made reasonable efforts to reunify respondent father with minor child; claim that department failed to offer father or child's mother any feedback with respect to their progress in therapeutic family time program; claim that department failed to offer parents adequate smoking cessation services; claim that trial court improperly found that father was unable or unwilling to benefit from department's reasonable efforts to reunify him with child; whether evidence was insufficient to support trial court's conclusion that father failed to achieve sufficient rehabilitation pursuant to statute (§ 17a-112 (j) (3) (B) (i)); whether trial court, in adjudicatory findings, improperly compared father's suitability as parent, and that of mother, to that of foster parent.

Moyher *v.* Moyher 334
Marital dissolution; claim that trial court improperly found that certain real property located in New Hampshire was marital asset; claim that trial court improperly awarded plaintiff 40 percent of value of property; reviewability of claim that trial court abused its discretion in not allowing defendant to present evidence regarding prenuptial agreement; whether trial court abused its discretion in ordering defendant to pay plaintiff her share of New Hampshire property within five months of dissolution judgment.

Pack 2000, Inc. *v.* Cushman 428
Leases; options to purchase real property; specific performance; whether trial court erred in ordering specific performance remedy that was contrary to terms of purchase options; claim that trial court erred in its determination of purchase prices based on present day appraisal values of properties; whether trial court erred in ordering plaintiff to make certain rent and use and occupancy payments and by refusing to credit any such payments against purchase prices; whether defendant was entitled to interest on purchase price of properties; whether trial court erred in failing to set purchase price for one property based on appraised value submitted by defendant.

Peck *v.* Statewide Grievance Committee 233
Attorney discipline; whether trial court properly granted motion to dismiss appeal, for lack of subject matter jurisdiction, that challenged defendant's imposition of discipline against plaintiff attorney; whether defendant was deprived of subject matter jurisdiction pursuant to Disciplinary Counsel *v.* Elder *(325 Conn. 378) to adjudicate grievance against plaintiff that was filed beyond six year limitation period in applicable rule of practice (§ 2-32 (a) (2) (E)).*

Prime Bank *v.* Vitano, Inc. 136
Statute of limitations; guarantee of promissory note; whether trial court properly found that plaintiff's cause of action to recover from defendant guarantor on borrower's note accrued when borrower defaulted on note payments and was barred by applicable statute of limitations (§ 52-576); claim that trial court erred in failing to conclude that there was acknowledgment of debt by defendant, thereby tolling statute of limitations.

Pursuit Partners, LLC *v.* Reed Smith, LLP 1
Breach of contract; motion for summary judgment; claim that trial court improperly concluded that defendant law firm was bound by confidentiality provision of settlement agreement only to extent of its client; claim that language of settlement agreement, coupled with defendant's signature on agreement, was ambiguous and created genuine issue of material fact regarding capacity in which defendant signed agreement; whether trial court properly concluded that finding in related action had collateral estoppel effect.

Rosario *v.* Rosario 83
Dissolution of marriage; motion for contempt; motion for continuance; claim that because trial court denied motions for contempt, there were no pending motions before court on which it could find plaintiff in contempt; claim that plaintiff did not receive motion for contempt by service of process.

S. A. *v.* D. G. 170
Application for civil protection order pursuant to statute (§ 46b-16a); claim that trial court abused its discretion by excluding evidence of certain audio and videotape recordings at hearing on application for protection order; claim that trial court improperly issued protection order despite fact that defendant was not arrested for violating any of statutory provisions set forth in statute (§ 54-1k) governing criminal protective orders; claim that trial court improperly issued protection order partly on basis of defendant having videotaped plaintiff performing her duties as public employee; reviewability of inadequately briefed constitutional claim; whether record was adequate for review of unpreserved claim.

Sackman *v.* Quinlan 614
Conversion; unjust enrichment; tortious interference with contract; whether trial court abused its discretion when it granted motion for permission to file motion for summary judgment; claim that trial court failed to analyze incompetency of counsel pursuant to statute (§ 45a-650); whether trial court properly rendered summary judgment for defendants; whether genuine issues of material fact existed as to claims of conversion, unjust enrichment and intentional interference with contractual relations; claim that trial court improperly determined that agreement between plaintiffs' deceased father and deceased father's second wife

was invalid; claim that trial court failed to view evidence in light most favorable to plaintiffs.

Scholz *v.* Epstein 197

Motion to dismiss; statutory theft; subject matter jurisdiction; absolute immunity; litigation privilege; whether trial court properly granted defendant's motion to dismiss and determined that defendant attorney was protected by absolute immunity from plaintiff's action for theft pursuant to statute (§ 52-564); claim that trial court improperly determined that defendant was absolutely immune from liability for statutory theft where some of defendant's alleged criminal conduct was perpetrated outside scope of judicial proceedings.

Sclafani Properties, LLC *v.* Sport-N-Life Distributing, LLC 292

Breach of lease; attorney trial referee; attorney's fees; claim that trial court erred when it failed to include in its judgment for plaintiff amount for unpaid real estate taxes because it improperly accepted attorney trial referee's finding that plaintiff provided no evidence of such unpaid taxes; claim that trial court abused its discretion in its award of attorney's fees.

State *v.* Auburn W. 558

Harassment in second degree; stalking in second degree; whether trial court improperly determined that defendant forfeited right to self-representation on basis of lack of competence; whether trial court abused its discretion in concluding that defendant had mental illness or mental incapacity.

State *v.* Brown 630

Assault in first degree; claim that state presented insufficient evidence to disprove defendant's theory of self-defense; credibility of witnesses.

State *v.* Dyous 253

Petition to extend psychiatric commitment of acquittee to jurisdiction of Psychiatric Security Review Board; claim that trial court's findings that, at time of state's petition, acquittee was mentally ill and dangerous to himself or others were clearly erroneous; claim that trial court improperly granted state's petition to extend acquittee's commitment.

State *v.* Harris 530

Murder; robbery in first degree; carrying pistol without permit; whether trial court improperly admitted uncharged misconduct evidence; unpreserved claims on appeal; plain error doctrine; whether alleged prosecutorial impropriety deprived defendant of his due process right to fair trial; claim that defendant was deprived of his right to due process because materially favorable evidence was withheld.

State *v.* Jackson 489

Violation of probation; claim that evidence was insufficient to support finding that defendant violated his probation; claim that there was insufficient evidence to prove defendant had constructive possession of narcotics that formed basis for his arrest; claim that two instances in which defendant failed to report to Office of Adult Probation were de minimis and insufficient to support finding of violation of probation; reviewability of claim that trial court erred in admitting hearsay testimony during probation revocation hearing; whether trial court abused its discretion in admitting hearsay statements; whether trial court abused its discretion in imposing sentence of six years of incarceration.

State *v.* Leniart 591

Murder; capital felony; whether trial court's improper exclusion of videotape evidence violated defendant's constitutional rights to confrontation and to present defense.

State *v.* Magaraci 305

Assault in first degree; claim that state presented insufficient evidence to disprove defendant's theory of self-defense; credibility of witnesses; whether jury reasonably could have concluded that defendant was initial aggressor and that he had ability to safely retreat; whether defendant waived claim that trial court improperly charged jury on self-defense.

State *v.* Marrero 90

Home invasion; burglary in first degree; assault in second degree; whether defendant was denied due process right to fair trial as result of prosecutorial improprieties; claim that prosecutor used excessive leading questions during direct examination of victim; reviewability of claim that prosecutor improperly refreshed witness' recollection by showing witness document that was different from document he purported to show witness; claim that prosecutor improperly commented during closing argument about victim's inconsistent statements as to cause of her injuries; whether trial court abused its discretion by admitting into evidence recordings of defendant's phone calls to incarcerated girlfriend; claim that trial

court improperly prevented defendant from exploring state's ability to authenticate his voice on recordings; claim that trial court abused its discretion by instructing jury on consciousness of guilt.

State Marshal Assn. of Connecticut, Inc. *v.* Johnson 392

Declaratory action; motion to dismiss; claim that trial court improperly determined that plaintiff lacked associational standing; whether plaintiff established that its members were classically or statutorily aggrieved by challenged conduct; whether trial court abused its discretion in denying plaintiff's motion for reargument and reconsideration.

State *v.* Robert H. 276

Risk of injury to child; corpus delicti or corroboration rule; claim that evidence was insufficient to support guilty verdict on second charge of risk of injury because common-law corpus delicti rule prevented defendant from being convicted solely on basis of his uncorroborated confession that more than one such incident occurred in absence of independent proof regarding second incident.

Stubbs *v.* ICare Management, LLC 511

Employment discrimination; claim that trial court erred in rendering summary judgment for defendants; whether trial court improperly concluded that plaintiff failed to establish prima facie case of discrimination as there was genuine issue of material fact as to whether termination of plaintiff's employment was pretextual and as to whether, at time plaintiff's employment was terminated, plaintiff was qualified to perform essential functions of job, following reasonable accommodation of leave of absence; whether trial court improperly rendered summary judgment on plaintiff's reasonable accommodation claims as there was genuine issue of material fact as to whether plaintiff could perform essential functions of job with accommodation of leave of absence to have and recover from surgery.

Wells Fargo Bank, N.A. *v.* Melahn. 151

Foreclosure; whether appeal from trial court's striking of special defenses was taken from final judgment; whether trial court relied on making, validity and enforcement test as expounded in U.S. Bank National Assn. *v.* Blowers *(332 Conn. 656); whether claim that plaintiff failed to send defendant timely notice of entry of judgment of foreclosure sufficiently related to enforcement of note or mortgage.*

NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 20-X: HIPAA Compliance Billing Code Quarterly Update

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after July 1, 2020, SPA 19-X will amend Attachment 4.19-B of the Medicaid State Plan to incorporate various Healthcare Common Procedure Coding System (HCPCS) updates (additions, deletions and description changes) from the most recent federal HCPCS quarterly update issued by CMS. These changes will be implemented as necessary to each of the applicable fee schedules, which will be determined as soon as possible after DSS has been able to analyze the relevant changes within this quarterly HCPCS update. Codes that are being added are being priced using a comparable methodology to other codes in the same or similar category. DSS is making these changes to ensure that these fee schedules remain compliant with the Health Insurance Portability and Accountability Act (HIPAA). Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download.''

Fiscal Impact

Overall based on the information that is available at this time, DSS does not anticipate that this SPA will significantly change annual aggregate expenditures in State Fiscal Year (SFY) 2021 and SFY 2022.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 20-X: HIPAA Compliance Billing Code Quarterly Update''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than July 15, 2020.