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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

NETSCOUT SYSTEMS, INC. *v.* GARTNER, INC. (SC 20079)

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

Syllabus

The plaintiff, which develops and sells information technology products, sought to recover damages for the defendant's alleged violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) and for defamation in connection with certain allegedly false statements that the defendant had published in a market research report. The defendant provides consulting services to vendors of information technology and publishes market research reports in which it rates vendors, including those that purchase its services. The defendant claims in its marketing materials that the opinions expressed in its reports are objective and impartial. The defendant published a report in which it rated vendors, including the plaintiff, in the network performance monitoring and diagnostics market, and, although the plaintiff previously had accepted the defendant's invitation to participate in the report's evaluation process, the plaintiff had declined to purchase any consulting services from the defendant. The report included a graphical ranking of vendors, which was presented in the form of a square divided into four quadrants, and vendors were plotted along the axes of the graph on the basis of the defendant's application of certain weighted criteria, including the subjective evaluations of the vendors' customers. On the basis of its placement in the upper left quadrant of the graph, the plaintiff was designated a "challenger," whereas vendors placed in the upper right quadrant received the more desirable designation of "leader." The report defined the term "challenger" in relevant part as a vendor that is currently struggling to deal with new technical demands and rising expectations, whereas a "leader" is defined in relevant part as having comprehensive portfolios and the ability to handle multiple application and technology types. The report also included three specific "cautions" about the plaintiff and its limitations in its market. The plaintiff alleged that the statements in the report were false and defamatory, and that the defendant had engaged in a pay to play scheme, pursuant to which it rated vendors in a biased manner, on the basis of the amount of consulting services each vendor purchased from the defendant. The defendant moved for summary judgment, claiming that, because the statements in the report constituted protected speech, the plaintiff's claims were barred by the first amendment to the United States constitution. Although the trial court concluded that the defendant's designation of the plaintiff as a challenger rather than as a leader constituted nonactionable opinion, it also determined that certain statements contained in the definition of the term "challenger" and in the cautions specific

to the defendant either were factual or implied, undisclosed facts. With respect to those statements, the court nevertheless concluded that the plaintiff's claims were barred by the first amendment because the defendant was a limited purpose public figure, the defendant's statements were on a matter of public concern, and the plaintiff failed to prove by clear and convincing evidence that the defendant had made the statements with actual malice. The court also found that there was no evidence that the defendant's placement of the various vendors in the quadrants on the graph was correlated to the amount of consulting services the vendors had purchased from the defendant. Accordingly, the trial court granted the defendant's motion for summary judgment on both the defamation count and the CUTPA count and rendered judgment thereon, from which the plaintiff appealed. *Held* that the trial court properly granted the defendant's motion for summary judgment, this court having concluded that all of the defendant's statements were nonactionable expressions of opinion, there was insufficient evidence to create a genuine issue of material fact regarding the truth of the defendant's claims of objectivity and impartiality, and the plaintiff failed to present sufficient evidence to support its pay to play claim: a reasonable person could construe the defendant's designation of the plaintiff as a challenger only to be an expression of opinion, as ratings of products and services are inherently subjective and the criteria used by the defendant in ranking the vendors, including the subjective evaluations of the vendors' own customers, and the weight assigned to those criteria could not be proven true or false; moreover, contrary to the conclusion of the trial court, this court concluded that, in light of the context in which they were made, the statements contained in the definition of the term "challenger" and in the cautions about the plaintiff were neither factual nor implied, defamatory statements of fact, as the parties were operating in a sophisticated market and their customers understood that the rating of products and services is based on inherently subjective evaluations, the report expressly stated that it consisted of the defendant's own opinions that should not be construed as statements of fact, and the language used in the definitions and cautions, which was highly technical and employed terms of art specific to the plaintiff's specific market, was abstract, unquantifiable, and comparative, such that the statements were insusceptible of being verified; furthermore, the fact that the defendant had claimed in its marketing materials that the opinions presented in its research reports are objective and impartial, in the absence of evidence establishing that those claims of objectivity were false, did not transform the nonactionable statements of opinion contained in the report into express or implied, defamatory factual statements, as such claims of objectivity, like puffery, are insusceptible of being proven true or false and are unlikely to induce reliance in a reasonable person viewing such statements.

Argued January 14, 2019—officially released January 21, 2020

Procedural History

Action to recover damages for, inter alia, violations of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Lee*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed. *Affirmed.*

Jason D. Frank, pro hac vice, with whom were *Emily E. Renshaw*, pro hac vice, and, on the brief, *James A. Budinetz*, *Michael T. Ryan*, *Elizabeth G. Hays*, pro hac vice, and *Michael D. Blanchard*, for the appellant (plaintiff).

Derek L. Shaffer, pro hac vice, with whom were *Andrew M. Zeitlin* and, on the brief, *Diane C. Polletta*, *John J. DiMarco*, *Robert L. Wyld*, *Patrick M. Fahey*, *Michael D. Bonanno*, pro hac vice, *Kathleen M. Sullivan*, pro hac vice, and *Robert L. Raskopf*, pro hac vice, for the appellee (defendant).

Michelle M. Seery and *Eugene Volokh*, pro hac vice, filed a brief for the Reporters Committee for Freedom of the Press as amicus curiae.

Jennifer M. DelMonico and *Proloy K. Das* filed a brief for the Connecticut Business and Industry Association as amicus curiae.

Opinion

ECKER, J. The plaintiff, NetScout Systems, Inc., is in the business of developing and selling information technology products that allow its customers to manage, monitor, diagnose and service their computer networks. The defendant, Gartner, Inc., publishes research reports in which it rates vendors, such as the plaintiff, that sell and service various forms of information technology. The defendant also sells consulting services

to some of the vendors that it rates. In 2014, the defendant issued a research report (2014 report), in which it ranked the plaintiff lower than some of its competitors and made critical comments about the plaintiff. Thereafter, the plaintiff brought this action alleging that the defendant had engaged in a "pay to play" scheme, in which it rewarded vendors that purchased consulting services from the defendant by giving them high ratings in its research reports. The plaintiff claimed that the alleged pay to play scheme constituted a false and deceptive business practice under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and that the 2014 report contained false and defamatory statements about the plaintiff. The defendant, in response, raised a defense premised on the theory that its rankings and commentary were protected speech under the first amendment to the United States constitution.[1]

The trial court agreed with the defendant. The court concluded that the defendant's 2014 report was constitutionally protected speech, and the plaintiff, as a limited purpose public figure, was required to present evidence that the defendant had acted with actual malice. The court found that the plaintiff had failed to do so and, accordingly, rendered summary judgment for the defendant with respect to both claims on that ground. The court also determined that the CUTPA claim failed because the plaintiff had not presented evidence to support the factual predicate for its pay to play allegation due to its own expert witness' inability to conclude that the defendant's ratings were correlated to the dollar volume of consulting services that the

[1] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ." This prohibition is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 489 n.1, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

vendors had purchased from the defendant. The plaintiff appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

We affirm the trial court's judgment on the alternative ground that all of the defendant's statements regarding the plaintiff were nonactionable expressions of opinion.

I

The record, viewed in the light most favorable to the plaintiff, reveals the following relevant facts and procedural history. The plaintiff, a Delaware corporation with its principal place of business in the town of Westford, Massachusetts, is a prominent provider of computer network performance monitoring products and services. Its customers include numerous businesses around the world, including commercial banks, airlines, financial service providers, and telecommunication service providers, as well as governmental agencies and five branches of the United States military. In 2014, the plaintiff had revenues of approximately $400 million.

The defendant, a Delaware corporation with its principal place of business in the city of Stamford, describes itself as " 'the world's leading information technology research and advisory company.' " Among the defendant's research publications are its "Magic Quadrant" research reports, which are marketed to buyers of various information technology products to assist them in selecting a vendor. The centerpiece of each report is a graphic rating of vendors called "the Magic Quadrant," presented in the form of a square divided into quadrants. The horizontal axis of the square depicts the vendors' "Completeness of Vision," and the vertical axis depicts their "Ability to Execute." As illustrated by the graphic, vendors with high ratings for both completeness of vision and ability to execute are placed in the upper

right quadrant and are designated as "Leaders"; those with a high rating for ability to execute and a low rating for completeness of vision are placed in the upper left quadrant and are designated as "Challengers"; those with a high rating for completeness of vision and a low rating for ability to execute are placed in the lower right quadrant and are designated as "Visionaries"; and those with low ratings for both completeness of vision and ability to execute are placed in the lower left quadrant and are designated as "Niche Players."

In addition to its research activities and associated publications, the defendant provides consulting services, which it calls "Strategic Advisory Services," to some vendors of information technology products.[2] The analysts who market and provide these consulting services also are part of the team that determines the placement of vendors on the Magic Quadrant graphic. An analyst's job performance is evaluated in part based on the amount of revenue he or she generates, including revenue from the sale of consulting services. The plaintiff's pay to play allegations rest substantially on the claim that the defendant's vendor ratings were influenced by the vendors' willingness to use and pay for the defendant's consulting services.

In early 2013, Julie Dempster, an account executive with the defendant assigned to the plaintiff's account, and Jonah Kowall, the defendant's research vice president for information technology operations management, exchanged a number of e-mails regarding the plaintiff. In an e-mail to Dempster dated January 4, 2013, Kowall wrote, "I don't understand why we don't speak to other people at [the plaintiff], nor do I understand why [the plaintiff does not] attend shows, or do any [strategic advisory services]. With [the plaintiff] in lots

[2] The precise nature of these consulting services is unclear from the record, but that has no bearing on our analysis or the disposition of this appeal.

of research and potentially a [Magic Quadrant report] in 2013 I'm not quite understanding the relationship at all. I normally go out of my way to make things happen, and that's not how it should be. [The plaintiff] ha[s] potentially the worst [analyst relations/public relations] and poor[est] marketing out of all the vendors I deal with." In a subsequent e-mail dated April 5, 2013, Kowall wrote that the plaintiff did not "work with us like [its] competitors do . . . and [it does not] engage us for [strategic advisory services], which I think could help [it] a lot more strategically." In an e-mail to Kowall dated July 8, 2013, Dempster wrote that "[t]he [strategic advisory services] day is so key for us to gain exposure and further licensing and engagements at [the plaintiff]!"

On July 29, 2013, the defendant publicly announced that it would be publishing a new Magic Quadrant report—that is, the 2014 report—for the network performance monitoring and diagnostics (NPMD) market. By e-mail dated September 2, 2013, the defendant invited the plaintiff to participate in the evaluation process for inclusion in the 2014 report. The defendant included in the e-mail a definition of the NPMD market, the criteria for inclusion in the report, the evaluation criteria, a research and process timeline, and a vendor survey. The plaintiff accepted the invitation and returned the completed survey to the defendant on October 1, 2013.

On December 2, 2013, Kowall sent an e-mail to his coworkers containing a draft of the Magic Quadrant graphic to be included in the 2014 report, in which the plaintiff was placed in the leaders quadrant. On December 3, 2013, Rebecca Noriega, a senior analyst and public relations manager with the plaintiff, sent an e-mail to Dempster indicating that the plaintiff was not going to participate in the "strategic advisory services day" that Dempster had suggested. The next day, Kowall circulated another e-mail containing a revised draft of

the Magic Quadrant graphic, in which the plaintiff was placed directly on the line between the leaders quadrant and the challengers quadrant. Kowall noted in the e-mail that he "still think[s] [that one of the other vendors placed in the challengers quadrant] and [the plaintiff] should technically be leaders here, or at least on the line (as [the plaintiff] is)" and observed that the plaintiff and the other vendor may be ranked "too low" in their ability to execute. On December 5, 2013, Kowall circulated yet another e-mail with a second revised draft of the Magic Quadrant graphic. Kowall indicated that he had "tweaked some of the weightings to give us better control." As a result, the plaintiff was placed higher on the vertical ability to execute axis but farther to the left on the horizontal completeness of vision axis, thereby situating the plaintiff deeper into the challengers quadrant. During the defendant's internal peer review of the draft 2014 report, several reviewers questioned why the plaintiff was placed in the challengers quadrant instead of in the leaders quadrant.

On January 9, 2014, the defendant provided the plaintiff with a draft of the 2014 report, in which the plaintiff was placed in the challengers quadrant of the Magic Quadrant graphic. The draft 2014 report also contained narrative evaluations of the plaintiff's "[s]trengths" and three "[c]autions" concerning the plaintiff. On January 14, 2014, Noriega and the plaintiff's vice president of marketing, Steven Shalita, participated in a conference call with Dempster and two other employees of the defendant, Vivek Bhalla and Colin Fletcher. Shalita indicated that the plaintiff was "struggling with the assessment and some of the language" the draft 2014 report contained. Bhalla and Fletcher attempted to explain the reasons for the plaintiff's placement and requested written feedback from the plaintiff. On January 17, 2014, Shalita sent an e-mail to Kowall, Fletcher, Bhalla and Michele Severance, another employee of the defen-

dant, attaching a response to the draft 2014 report and explaining in detail why the plaintiff believed that it had been ranked too low on its completeness of vision. In an e-mail to Shalita dated January 20, 2014, Kowall indicated that the defendant needed "specific changes to the text [of the draft 2014 report] BEFORE the call today"; (emphasis omitted); which would be the last opportunity to discuss the plaintiff's positioning in the Magic Quadrant graphic and the report's narrative providing certain cautions concerning the plaintiff. The plaintiff did not suggest any specific changes to the draft report, and the conference call never took place.

On January 22, 2014, the plaintiff's president and chief executive officer, Anil Singhal, sent a letter to the defendant's chief executive officer, Eugene A. Hall, in which he wrote that he did not find it "amusing that [the defendant] had the temerity to place [the plaintiff] in the '[c]hallengers' quadrant . . . ." Singhal also indicated that, if the defendant published the 2014 report, he would "vigorously contest [that] action through whatever means available." Over the next several days, Singhal had a number of telephone conversations with Nancy Erskine, the defendant's ombudsman, in which he reiterated that the plaintiff believed that the challengers ranking was unfair and discriminatory and that the plaintiff wanted to be designated as the leading vendor in the NPMD market or, in the alternative, removed entirely from the 2014 report. Singhal also indicated that, if the defendant refused to redesignate the plaintiff as a leader or to remove it from the report, the plaintiff would take legal action.

On March 6, 2014, the defendant published the final 2014 report. The plaintiff was placed in the challengers quadrant. The report defined "[c]hallengers" as "those with high market reach and large deployments. Once leaders in the network performance monitoring market, they are currently struggling to deal with new technical

demands and rising expectations. These established NPMD vendors bring a substantial installed base, but also architectures, feature sets and pricing structures that require modernization (often in progress) to better compete with those in the [l]eaders quadrant.'' The report also provided the following three ''[c]autions'' regarding the plaintiff: (1) ''[the plaintiff] has a limited ability to expand beyond its network management heritage, which would be the next logical step (for example, into [application performance monitoring] or [information technology] operations analytics)''; (2) ''[o]ffering only a hardware-based deployment model limits [the plaintiff's] ability to address growing software and [software as a service] solution demand''; and (3) ''[the plaintiff] is perceived as a conservative stalwart in the NPMD space, and lacks the reach and mind share that many smaller competitors have.'' In separate marketing publications directed at purchasers of the defendant's research products, the defendant represented that the opinions expressed in its reports were ''impartial,'' ''independent,'' ''objectiv[e],'' and ''unbiased.''

The 2014 report was made available to 40,000 subscribers to the defendant's research services, more than 4000 of whom viewed the report. Vendors purchased online reprints of the report that were viewed approximately 18,700 times, as well as 2000 paper reprints.

After the 2014 report was published, the plaintiff filed this lawsuit. The two count complaint alleged, in the first count, that the defendant had violated CUTPA by engaging in a pay to play scheme in which vendors purchase consulting services from the defendant in exchange for high ratings in the defendant's Magic Quadrant report. In the second count, the plaintiff alleged that the defendant had published false and defamatory statements about the plaintiff in the 2014 report.

The defendant moved for summary judgment, claiming that the first amendment barred both the defamation claim and the CUTPA claim. It contended that, because the 2014 report was on a matter of public concern and the plaintiff is a limited purpose public figure, the plaintiff was required to present evidence that the defendant had acted with actual malice, such that its statements about the plaintiff were "made with actual knowledge that [they were] false or with reckless disregard of whether [they were] false." (Internal quotation marks omitted.) *Gleason* v. *Smolinski*, 319 Conn. 394, 431, 125 A.3d 920 (2015). The plaintiff's failure to produce any evidence of actual malice, the defendant claimed, required the court to render summary judgment in its favor. The defendant also argued that the statements in the 2014 report were not factual assertions but statements of opinion protected by the first amendment. In addition, the defendant contended that the CUTPA claim was barred because (1) there was no evidence that the defendant's business model departed from standard business norms, (2) there was no evidence that the plaintiff's placement in the Magic Quadrant graphic was related to vendor payments to the defendant for consulting services, (3) professional malpractice is nonactionable under CUTPA, and (4) there was no evidence that the plaintiff suffered an ascertainable loss as a result of the 2014 report.

The trial court rendered summary judgment in the defendant's favor on both counts of the complaint. It concluded that the defendant's designation of the plaintiff as a challenger rather than a leader was nonactionable opinion. Although the court determined that certain statements in the defendant's definition of a challenger and in the three cautions regarding the plaintiff either were factual or implied undisclosed facts, it agreed with the defendant that the plaintiff was a limited purpose public figure and that the defendant's state-

ments were on a matter of public concern, which meant that the plaintiff, to overcome the defendant's first amendment protections, was required to present clear and convincing evidence that the defendant had made its statements with actual malice. After concluding that the plaintiff had not done so, the court held that both the defamation claim and the CUTPA claim were barred by the first amendment. In addition, with respect to the CUTPA claim, the court concluded that the plaintiff had presented no credible evidence that it was damaged by the defendant's statements or that the placement of vendors in the Magic Quadrant graphic was correlated to the amount of consulting services that the respective vendors had purchased from the defendant.

This appeal followed.[3] The plaintiff contends that the trial court erroneously concluded that the plaintiff was required to prove actual malice on the basis of its incorrect determination that the plaintiff was a limited purpose public figure and that the defendant's statements about the plaintiff in the 2014 report were on a matter of public concern. The plaintiff also contends that, even if the trial court correctly determined that the actual malice standard applies, the court incorrectly determined that the plaintiff had not presented evidence sufficient to create a genuine issue of material fact as to that issue. Finally, the plaintiff contends with respect to the CUTPA claim that the trial court incorrectly determined that the plaintiff had not presented evidence sufficient to create a genuine issue of material fact as to whether it had been damaged or whether the Magic

[3] We subsequently granted the application of the Reporters Committee for Freedom of the Press to file an amicus curiae brief in support of the defendant's contention that its statements about the plaintiff were nonactionable opinion and the application of the Connecticut Business and Industry Association to file an amicus curiae brief on the issue of whether this court should stop applying the so-called "cigarette rule" in CUTPA cases and, instead, apply the "substantial unjustified injury" test.

Quadrant vendor rankings were correlated to the purchase of consulting services.

The defendant disputes these claims of error. It also contends that the trial court's decision may be affirmed on the alternative grounds that (1) the defendant's statements about the plaintiff were in all respects statements of opinion, not fact, and (2) even if the statements were factual, the plaintiff presented no evidence that they were false. We agree with the defendant that its statements about the plaintiff were expressions of opinion and, therefore, cannot provide the basis for a defamation claim. With respect to the plaintiff's claims resting on the alleged falsity of the defendant's representations of independence and objectivity in rendering its opinions, we reject those claims as well on this record. Accordingly, we affirm the judgment of the trial court.[4]

II

The standard of review on summary judgment is well established. "Summary judgment shall be rendered forthwith if the pleadings, affidavits and 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. . . . The scope of our appellate review depends upon the proper characterization of the rulings made by the trial court. . . . When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record. . . .

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most

[4] Because we affirm the trial court's judgment on the basis of our conclusions that the defendant's statements regarding the plaintiff were expressions of nonactionable opinion and that the plaintiff failed to present evidence of a pay to play scheme, we need not address the other claims raised by the plaintiff on appeal.

favorable to the nonmoving party. . . . The party seeking summary judgment has the burden of showing the absence of any genuine issue [of] material facts which, under applicable principles of substantive law, entitle him to a judgment as a matter of law . . . and the party opposing such a motion must provide an evidentiary foundation to demonstrate the existence of a genuine issue of material fact." (Internal quotation marks omitted.) *Meyers* v. *Livingston, Adler, Pulda, Meiklejohn & Kelly, P.C.*, 311 Conn. 282, 289–90, 87 A.3d 534 (2014).

First amendment principles always must remain firmly in mind when a court considers whether legal liability may attach to harm allegedly attributable to a defendant's speech,[5] and both the parties and the trial court in the present case understandably have framed much of their respective analyses under the rubric of the first amendment. The operative principles of sub-

[5] See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 325, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) ("[t]his [c]ourt has struggled for nearly a decade [since *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)] to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the [f]irst [a]mendment"); *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 114–15, 448 A.2d 1317 (1982) (observing that common-law "privilege of 'fair comment' " was "elevated to constitutional status" in *New York Times Co.* v. *Sullivan*, supra, 376 U.S. 254). The distinction between fact and opinion at the center of the present case figures prominently in first amendment law, as well. See, e.g., *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) ("a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection"); see also 3 Restatement (Second), Torts § 566, comment (c), pp. 172–73 (1977) (entitled "Effect of the Constitution"). Under *Milkovich*, the characterization of the subject matter at issue as a matter of "public" or "private" concern may affect the first amendment analysis. See *Milkovich* v. *Lorain Journal Co.*, supra, 19 ("a statement on matters of *public concern* must be provable as false before there can be liability" under first amendment [emphasis added]). *Milkovich* appears to have left open the issue of whether a statement of opinion that involves a matter of private concern could be actionable under state law consistent with the first amendment. See id., 20. There is no need to address the issue here because the plaintiff's claims fail.

stantive law governing this appeal, however, primarily involve the common law of defamation. We make reference to constitutional doctrine when necessary, but, in our view, the issues presented here are largely resolved by the straightforward application of defamation law.

"At common law, [t]o establish a prima facie case of defamation, the plaintiff must demonstrate that: (1) the defendant published a defamatory statement; (2) the defamatory statement identified the plaintiff to a third person; (3) the defamatory statement was published to a third person; and (4) the plaintiff's reputation suffered injury as a result of the statement. . . .

"A defamatory statement is defined as a communication that tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him . . . ." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Gleason* v. *Smolinski*, supra, 319 Conn. 430–31. But it is not enough that the statement inflicts reputational harm. "To be actionable, the statement in question must convey an objective fact, as generally, a defendant cannot be held liable for expressing a mere opinion. See *Mr. Chow of New York* v. *Ste. Jour Azur S.A.*, 759 F.2d 219, [229–30] (2d Cir. 1985) (no liability where restaurant review conveyed author's opinion rather than literal fact); *Hotchner* v. *Castillo-Puche*, 551 F.2d 910, 913 [2d Cir.] ([a] writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be) [cert. denied sub nom. *Hotchner* v. *Doubleday & Co.*, 434 U.S. 834, 98 S. Ct. 120, 54 L. Ed. 2d 95 (1977)]." (Internal quotation marks omitted.) *Daley* v. *Aetna Life & Casualty Co.*, 249 Conn. 766, 795–96, 734 A.2d 112 (1999); see also *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 13, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990) (noting that, at early common law, defamatory opinion was actionable, but,

"due to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of fair comment was incorporated into the common law as an affirmative defense to an action for defamation" [internal quotation marks omitted]). "A statement can be defined as factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known. . . . In a libel action, such statements of fact usually concern a person's conduct or character. . . . An opinion, on the other hand, is a personal *comment* about another's conduct, qualifications or character that has some basis in fact." (Citations omitted; emphasis in original.) *Goodrich* v. *Waterbury Republican-American, Inc.*, 188 Conn. 107, 111, 448 A.2d 1317 (1982).

It should surprise no one that the distinction between actionable statements of fact and nonactionable statements of opinion is not always easily articulated or discerned. See id., 112 n.5 ("the difficulty in distinguishing fact from opinion has been recognized by a number of writers; see, e.g., [H.] Titus, 'Statement of Fact versus Statement of Opinion—A Spurious Dispute in Fair Comment,' 15 Vand. L. Rev. 1203 [1962]; [D.] Noel, 'Defamation of Public Officers and Candidates,' 49 [Colum.] L. Rev. 875, 878 [1949]; [N]ote, 'Fair Comment', 62 Harv. L. Rev. 1207 [1949]"); see also *Biro* v. *Condé Nast*, 883 F. Supp. 2d 441, 460 (S.D.N.Y. 2012) ("the seemingly simple proposition that expressions of opinion are protected belies an often complicated task of distinguishing between potentially actionable statements of fact and nonactionable expressions of opinion" [internal quotation marks omitted]). See generally J. Kirchmeier, Note, "The Illusion of the Fact-Opinion Distinction in Defamation Law," 39 Case W. Res. L. Rev. 867 (1988–1989). The difficulty arises primarily because the expression of an opinion may, under certain circumstances, reasonably be understood to imply the existence of an underly-

ing basis in an unstated fact or set of facts. See *Gleason* v. *Smolinski*, supra, 319 Conn. 435 (citing *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 117–19, for proposition that statements of opinion may be actionable statements of implied fact); 3 Restatement (Second), Torts § 566, p. 170 (1977) ("[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion"); see also *Milkovich* v. *Lorain Journal Co.*, supra, 497 U.S. 19 (under common law, privilege of fair comment "did not extend to a false statement of fact, whether it was expressly stated or implied from an expression of opinion" [internal quotation marks omitted]).

Context is a vital consideration in any effort to distinguish a nonactionable statement of opinion from an actionable statement of fact. As this court previously has recognized, "[t]his distinction between fact and opinion cannot be made in a vacuum . . . for although an opinion may appear to be in the form of a factual statement, it remains an opinion if it is clear from the *context* that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated. . . . Thus, while this distinction may be somewhat nebulous . . . [t]he important point is whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 111–12. A central feature of the analysis undertaken by virtually every court called on to distinguish opinion from fact involves a careful examination of the overall context in which the statement is made.

Courts will examine a variety of factors as part of this contextualized analysis, and, although no uniform test exists, the relevant case law focuses on a common set of considerations. One prevalent approach, first articulated by the United States Court of Appeals for the Ninth Circuit, uses a three part test to determine whether a reasonable fact finder could conclude that an expression of opinion implies an actionable assertion of fact: "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates that impression, and (3) whether the statement in question is susceptible of being proved true or false." *Partington* v. *Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); see also *Piccone* v. *Bartels*, 785 F.3d 766, 772 (1st Cir. 2015) (distinguishing statement of fact from expression of opinion requires "an examination of the totality of the circumstances in which the specific challenged statements were made, including the general tenor and context of the conversation and any cautionary terms used by the person publishing the statement"); *Mr. Chow of New York* v. *Ste. Jour Azur S.A.*, supra, 759 F.2d 226 (court considers [1] context in which statements were made and circumstances surrounding statements, [2] whether language was "precise" and "literal" or, instead, was "loose, figurative or hyperbolic," [3] whether statements were "objectively capable of being proved true or false," and [4] whether statements imply "undisclosed defamatory facts as the basis for the opinion"); *Ollman* v. *Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (in determining whether average person understands speech at issue to be factual or expression of opinion, court considers [1] "the common usage or meaning of the specific language of the challenged statement itself," [2] "the statement's verifiability—is the statement capable of being objectively characterized as

true or false," [3] "the full context of the statement—the entire article or column, for example," and [4] "the broader context or setting in which the statement appears"), cert. denied, 471 U.S. 1127, 105 S. Ct. 2662, 86 L. Ed. 2d 278 (1985); *Belly Basics, Inc.* v. *Mothers Work, Inc.*, 95 F. Supp. 2d 144, 145 (S.D.N.Y. 2000) ("New York law dictates a three factor test to distinguish statements of fact from statements of opinion: [1] whether the challenged statements have a precise and readily understood meaning; [2] whether the statements are susceptible of being proved false; and [3] whether the context signals to the reader that the statements are more likely to be expressions of opinion rather than fact" [internal quotation marks omitted]); *K Corp.* v. *Stewart*, 247 Neb. 290, 296, 526 N.W.2d 429 (1995) ("a court looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed, considering the specificity of the statement, its verifiability, the literary context, and the broader setting in which the statement appears"). Without stripping these formulations of their nuance, they can be summarized as requiring analysis of three basic, overlapping considerations: (1) whether the circumstances in which the statement is made should cause the audience to expect an evaluative or objective meaning; (2) whether the nature and tenor of the actual language used by the declarant suggests a statement of evaluative opinion or objective fact; and (3) whether the statement is subject to objective verification.

In light of the context in which the present case arises, we also find helpful the extensive case law from other jurisdictions involving speech that rates or reviews products, services or businesses. Some of these cases involve defamation or other claims against defendants in the business of rating the quality of sophisticated financial instruments of one kind or another; others are brought against defendants that rate or

review more garden variety consumer products and services such as restaurants, hotels, and the like. See footnotes 6 through 8 of this opinion. Within the broader analytic framework described in the preceding paragraph, courts in these "ratings" cases resolve the issue of whether a reasonable person could conclude that the rating or review implies a statement of objective fact by considering whether (1) the speaker has exercised discretion when weighing the underlying data,[6] (2) the defendant's rating system uses abstract terms, such as a number between one and ten or "fuzzy descriptive phrases like 'superb,' 'good,' and 'strong caution' "; *Browne* v. *Avvo*, *Inc.*, 525 F. Supp. 2d 1249, 1252 (W.D. Wn. 2007);[7] and (3) the publication containing

[6] See *Compuware Corp.* v. *Moody's Investors Services*, *Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (credit rating based on "subjective and discretionary weighing of complex factors" was nonactionable opinion); *Aviation Charter*, *Inc.* v. *Aviation Research Group/US*, 416 F.3d 864, 871 (8th Cir. 2005) ("subjective interpretation of multiple objective data points" constitutes opinion); *ZL Technologies*, *Inc.* v. *Gartner*, *Inc.*, 709 F. Supp. 2d 789, 798 (N.D. Cal. 2010) (when defendant weighed importance of certain facts differently based on relative value that it assigned to different criteria, rating was nonactionable opinion), aff'd, 433 Fed. Appx. 547 (9th Cir.), cert. denied, 565 U.S. 963, 132 S. Ct. 455, 181 L. Ed. 2d 295 (2011); *Browne* v. *Avvo*, *Inc.*, supra, 525 F. Supp. 2d 1252 (when underlying data were weighted based on defendant's subjective opinions regarding relative importance of various attributes, comparative rating of plaintiff attorney was nonactionable opinion); *Castle Rock Remodeling*, *LLC* v. *Better Business Bureau of Greater St. Louis*, *Inc.*, 354 S.W.3d 234, 242–43 (Mo. App. 2011) (when defendant's rating system weighted objective data, consumer rating was nonactionable opinion).

[7] See also *Aviation Charter*, *Inc.* v. *Aviation Research Group/US*, 416 F.3d 864, 867, 870–71 (8th Cir. 2005) (when defendant assigned ratings of "Does Not Qualify," "Silver," "Gold" and "Platinum," rating of plaintiff as "Does Not Qualify" was not sufficiently factual to be susceptible of being proved true or false); *Jefferson County School District No. R-1* v. *Moody's Investor's Services*, *Inc.*, 175 F.3d 848, 856 (10th Cir. 1999) (defendant's use of vague phrases such as "negative outlook" and "ongoing financial pressures" to describe plaintiff's financial condition constituted nonactionable opinion [internal quotation marks omitted]); *Castle Rock Remodeling*, *LLC* v. *Better Business Bureau of Greater St. Louis*, *Inc.*, 354 S.W.3d 234, 242–43 (Mo. App. 2011) (defendant's "C" rating of plaintiff was not "sufficiently factual to be susceptible of being proved true or false" [internal quotation marks omitted]); *K Corp.* v. *Stewart*, supra, 247 Neb. 296–97 (defendant's use of subjective terms such as "minimum standards," "unacceptable level of deterioration," "acceptable quality," and "first class condition" constituted expression of opinion).

the ratings defined the terms that it used. See *Smith* v. *Humane Society of the United States*, 519 S.W.3d 789, 800–801 (Mo. 2017) (defendant's use of term "puppy mill" to describe plaintiff's kennel was nonactionable when defendant did not define term).

Courts generally have held that "claims for defamation based upon ratings or grades fail because [ratings or grades] cannot be objectively verified as true or false and thus, are opinion . . . ."[8] *Castle Rock Remodeling, LLC* v. *Better Business Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234, 241 (Mo. App. 2011); see also id., n.3 (citing cases). "Liability for [defamation] may attach, however, when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the general reader. If an author represents that he has private, [firsthand] knowledge which substantiates the opinions he expresses, the expression of

[8] See, e.g., *Seaton* v. *TripAdvisor, LLC*, 728 F.3d 592, 600–601 (6th Cir. 2013) (defendant's placement of plaintiff's hotel on " 'Dirtiest Hotels' " list constituted nonactionable opinion); *ZL Technologies, Inc.* v. *Gartner Group, Inc.*, 433 Fed. Appx. 547, 548 (9th Cir.) (defendant's placement of plaintiff in Magic Quadrant graphic constituted nonactionable opinion), cert. denied, 565 U.S. 963, 132 S. Ct. 455, 181 L. Ed. 2d 295 (2011); *Compuware Corp.* v. *Moody's Investors Services, Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) (defendant's credit rating of plaintiff constituted nonactionable opinion); *Aviation Charter, Inc.* v. *Aviation Research Group/US*, 416 F.3d 864, 870–71 (8th Cir. 2005) (defendant's safety rating of plaintiff air charter services provider constituted nonactionable opinion); *Jefferson County School District No. R-1* v. *Moody's Investor's Services, Inc.*, 175 F.3d 848, 856 (10th Cir. 1999) (defendant's credit rating of plaintiff school district constituted nonactionable opinion); *Mr. Chow of New York* v. *Ste. Jour Azur S.A.*, supra, 759 F.2d 229 (with exception of statement that plaintiff restaurant served Peking duck in one dish instead of traditional three dishes, which was susceptible of being proved true or false, defendant's review of plaintiff's restaurant constituted nonactionable opinion); *Browne* v. *Avvo, Inc.*, supra, 525 F. Supp. 2d 1251 (defendant's comparative rating of attorneys constituted nonactionable opinion); *Smith* v. *Humane Society of the United States*, supra, 519 S.W.3d 800–801 (defendant's inclusion of plaintiff's kennel in report listing worst puppy mills in state constituted nonactionable opinion); *Castle Rock Remodeling, LLC* v. *Better Business Bureau of Greater St. Louis, Inc.*, 354 S.W.3d 234, 242–43 (Mo. App. 2011) (defendant's rating of plaintiff's business constituted nonactionable opinion).

opinion becomes as damaging as an assertion of fact." (Internal quotation marks omitted.) *Mr. Chow of New York* v. *Ste. Jour Azur S.A.*, supra, 759 F.2d 225; cf. *Biospherics, Inc.* v. *Forbes, Inc.*, 151 F.3d 180, 185 (4th Cir. 1998) (opinion based on fully disclosed facts is not actionable); *Partington* v. *Bugliosi*, supra, 56 F.3d 1156–57 (same). The case law in this area also makes it clear that an opinion that is based on the opinions of others does not imply defamatory facts and, therefore, is not actionable. See *Seaton* v. *TripAdvisor, LLC*, 728 F.3d 592, 599–601 (6th Cir. 2013) (when defendant's inclusion of plaintiff's hotel on " 'Dirtiest Hotels' " list was based on opinions of hotel customers, it did not imply false facts but constituted nonactionable opinion); *ZL Technologies, Inc.* v. *Gartner, Inc.*, 709 F. Supp. 2d 789, 798 (N.D. Cal. 2010) ("[t]he use of a rigorous mathematical model to generate a ranking . . . based upon [subjective evaluations by vendors and their customers] does not transform [the defendant's] opinion into a statement of fact that can be proved or disproved"), aff'd, 433 Fed. Appx. 547 (9th Cir.), cert. denied, 565 U.S. 963, 132 S. Ct. 455, 181 L. Ed. 2d 295 (2011).

"[T]he determination of whether a statement is opinion or rhetorical hyperbole as opposed to a factual representation is a question of law for the court." *Mr. Chow of New York* v. *Ste. Jour Azur S.A.*, supra, 759 F.2d 224; see also *Smith* v. *Humane Society of the United States*, supra, 519 S.W.3d 798 ("[w]hether an alleged statement is capable of being treated as an opinion or as an assertion of fact is a question of law" [internal quotation marks omitted]). "Where the court cannot reasonably characterize the allegedly libelous words as either fact or opinion because, for example, innuendo is present, this becomes an issue of fact for the jury, which would preclude a directed verdict. This is similar to the rule which requires the jury to decide

whether an ambiguous assertion is reasonably capable of a defamatory meaning."[9] *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 112 n.5.

With these principles in mind, we turn to the plaintiff's argument that the defendant's statements concerning the plaintiff in the 2014 report reasonably could be construed as defamatory statements of fact. The plaintiff's first claim of error is that the trial court incorrectly determined that the defendant's placement of the plaintiff in the challengers quadrant of the Magic Quadrant graphic was an expression of nonactionable opinion. We agree with the trial court that this speech was not factual and did not imply defamatory facts. Vendor ratings of this nature, in our view, typically are inherently subjective, and no reasonable person would consider a vendor's placement in the Magic Quadrant graphic to be anything other than the expression of the rater's opinion. This very issue was addressed in *ZL Technologies, Inc.* v. *Gartner, Inc.*, supra, 709 F. Supp. 2d 800, in which the United States District Court for the Northern District of California observed that the defendant determined the placement of vendors in a Magic Quadrant graphic by "looking to a number of factors, [and] applying differing weights based on its subjective assessment of a company's ability to execute and completeness of vision." The relative weight assigned to the criteria and the criteria themselves "are not facts

[9] See *Burns* v. *Telegram Publishing Co.*, 89 Conn. 549, 552, 94 A. 917 (1915) ("[i]t is only when the court can say that the publication is not reasonably capable of any defamatory sense, that the court can rule, as [a] matter of law, that the publication is not libelous, or withdraw the case from the jury, or order a verdict for the defendant" [internal quotation marks omitted]); 3 Restatement (Second), supra, § 614, p. 311 ("[t]he court determines . . . whether a communication is capable of bearing a [defamatory] meaning, and . . . [t]he jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient"); 3 Restatement (Second), supra, § 614, comment (d), p. 312 ("if, in the opinion of the court, the question [of whether a statement is capable of bearing a defamatory meaning] is one on which reasonable men might differ, it is for the jury to determine which of the two permissible views they will take").

that can be proved true or false but a reflection of a subjective valuation . . . .'' Id. The court in *ZL Technologies, Inc.*, also observed that the defendant made the placement determination in part by considering the subjective evaluations of the vendors' customers, which were merely opinions once removed. Id., 797, 800. Likewise, in the present case, the defendant assigned the plaintiff a place in the Magic Quadrant graphic on the basis of the defendant's subjective evaluation of a variety of factors that were, in turn, assigned relative importance or ''weigh[t]'' in accordance with the subjective preferences embedded in its evaluative process, and by considering the subjective evaluations of the vendors' customers. The trial court correctly determined that the placement of the plaintiff in the challengers section of the Magic Quadrant graphic was nonactionable opinion.

This brings us to our single area of disagreement with the trial court. Although the trial court found that the defendant's designation of the plaintiff as a challenger was nonactionable, it agreed with the plaintiff that the generic description of the term ''[c]hallengers,'' as used in the 2014 report, and the three particularized ''[c]autions'' explaining the plaintiff's placement as a challenger contained actionable statements of fact. With respect to the generic description of the challengers category, the trial court agreed with the plaintiff's contention that the defendant's rating impliedly conveyed a factual assertion that the plaintiff, having been designated by the defendant as a challenger rather than a leader, lacked ''comprehensive portfolios and the ability to handle multiple application and technology types'' and was ''currently struggling to deal with new technical demands and rising expectations.''[10] We disagree.

[10] The trial court did not expressly address the former statement, which was included in the defendant's definition of ''[l]eader'' in the 2014 report, but concluded that a reasonable juror could find that the latter statement was factual in nature, or at least that it implied undisclosed defamatory facts.

To begin with, we return to the starting point of our analysis, which requires consideration of the context in which the challenged statement is made. The 2014 report set forth views regarding the relative strengths and weaknesses of vendors operating within a particular commercial market. Whether expressed using colorful jargon, numerical or letter grades, stars, or the standard terminology of "good, better, best," such ratings appear virtually any place a potential customer might look—in magazines and newsletters, television advertisements, billboards, waiting rooms, websites, and every other conceivable physical or electronic surface. Reasonable viewers, and certainly those consumers operating in the sophisticated market involved here, understand that these ratings normally rest, at bottom, on inherently and irreducibly subjective evaluations of value, quality and performance. This assumption does not mean that the speaker is at liberty to make false statements of fact merely by labelling them "opinions,"[11] but it does lead us to believe that the audience ordinarily recognizes that the context bespeaks caution, in the sense that most ratings of goods and services reflect an expression of evaluative opinion rather than verifiable fact.

Indeed, consistent with the nature and context of its undertaking, the defendant expressly states in the 2014 report that "[t]his publication consists of the opinions of [the defendant's] research organization and should not be construed as statements of fact." Although this statement does not automatically immunize the speaker against claims of defamation; see footnote 11 of this opinion; we conclude that the abstract, unquantifiable,

[11] See *Milkovich* v. *Lorain Journal Co.*, supra, 497 U.S. 18 (observing that statement couched as opinion will be actionable if it implies assertion of objective fact); *Gleason* v. *Smolinski*, supra, 319 Conn. 435 n.34 ("the 'mere recitation of prefatory phrases such as "in my opinion" or "I think" will not render innocent an otherwise defamatory statement' ").

and comparative nature of the defendant's descriptions of the challenger and leader categories, using terms such as "comprehensive portfolios," "multiple application and technology types," and "struggling to deal with new technical demands and rising expectations," renders the statements irreducibly vague and insusceptible of being proved true or false. The statements, moreover, were not specific to the plaintiff but applied generally to *all* vendors placed in the referenced quadrants. A reasonable reader would understand that all aspects of the challengers description did not necessarily apply equally to all vendors.[12]

We reach a similar conclusion with respect to the statements contained in the 2014 report's cautions about the plaintiff, namely, that the plaintiff "has a limited ability to expand beyond its network management heritage, which would be the next logical step (for example, into [application performance monitoring] or [information technology] operations analytics)," that "[o]ffering only a hardware-based deployment model limits [the plaintiff's] ability to address growing software and [software as a service] solution demand," and that the plaintiff "is perceived as a conservative stalwart in the NPMD space, and lacks the reach and mind share that many smaller competitors have." The terms "limited" and "limits" used to describe the plaintiff's abilities are subjective, vague, unquantifiable, relative and unverifiable, and, although "reach" and "mind share" may be terms of art that have particular meanings in the

[12] The trial court also concluded that an assertion of fact is conveyed in the defendant's statement that challengers had "architectures, feature sets and pricing structures that require modernization (often in progress) to better compete with those in the [l]eaders quadrant." The plaintiff does not address or defend this particular finding on appeal. In any event, we would conclude that this statement is an expression of opinion for the same reasons the other statements in the challengers and leaders descriptions are expressions of opinion.

relevant marketing field,[13] these qualities are subjective and unverifiable. We also consider it significant that the 2014 report explained that, like the defendant's decision about where to place the plaintiff in the Magic Quadrant graphic, these additional statements were based in part on the subjective evaluations of the plaintiff's customers. Accordingly, we conclude that the trial court incorrectly determined that these statements were factual or implied defamatory statements of fact.

The plaintiff contends that, even if these statements were not actionable as defamatory statements of fact in and of themselves, the defendant's speech was still actionable because the defendant falsely claimed that its opinions were objective and impartial. Again, we disagree. Demonstrably false claims of objectivity, under certain circumstances, conceivably might supply sufficiently suggestive innuendo to transform otherwise nonactionable statements into defamatory speech, but this is not such a case. A false claim of objectivity, without more, cannot be defamatory of the plaintiff because the statement refers to the speaker rather than the vendor. We detect no obvious or even implied correspondence between the putative "objectivity" of the speaker and the perception of the speaker's statement as fact or opinion. "Objective" speakers may publish subjective opinions, whereas biased or self-interested speakers may publish statements of fact. In the defamation context, the speaker's claim to objectivity, whether true or not, does not turn that speaker's negative statement of opinion about the plaintiff into an actionable statement of fact. That the defendant claimed a measure of objectivity in its marketing materials did not convert its vaguely worded, comparative and evaluative state-

[13] See, e.g., T. Marabella, Note, "Elemental Copyright: The Complexity of Ideas and the Alchemy of Mind-Share," 90 B.U. L. Rev, 2149, 2161 (2010) ("[mind share] is a term used in the marketing and advertising world, defined as the likelihood that a consumer will think of a particular brand when a type of product is mentioned").

ments into express or implied defamatory factual statements. See *Seaton* v. *TripAdvisor, LLC*, supra, 728 F.3d 600 (defendant's claim that it was most trusted advisor and that it provided " 'the whole truth' " about rated hotels did not render defendant's opinion about plaintiff's hotel actionable); *ZL Technologies, Inc.* v. *Gartner, Inc.*, supra, 709 F. Supp. 2d 797–98 (defendant's statements that its analysis was "fact-based and knowledge-centric, built on objectivity, and founded on a methodology it says ensures the ultimate objectivity" were "insufficient to transform the tenor of the rankings in the [Magic Quadrant] [r]eport from opinion to fact" [internal quotation marks omitted]).[14]

[14] Section 566 of the Restatement (Second) of Torts makes the same point with respect to the closely related concept of the speaker's honesty or sincerity when expressing an opinion. See 3 Restatement (Second), supra, § 566, comment (c), p. 175 ("Should it be a significant issue whether the expression of opinion was the actual opinion of the defendant? Though an asserted factual statement that it is the actual opinion of the defendant may be held to be implied, its truth or falsity would apparently have no effect on the defamatory character of the communication."). But see *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 123 ("[a] comment is fair when [inter alia] it . . . is an *honest expression* of the writer's real opinion or belief" [emphasis in original; internal quotation marks omitted]). The court in *Goodrich* quoted the decision of the New York Court of Appeals in *Briarcliff Lodge Hotel, Inc.* v. *Citizen-Sentinel Publishers, Inc.*, 260 N.Y. 106, 118–19, 183 N.E.193 (1932), which cited no authority to support the statement. *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 123–24.

It has been held in cases involving claims of financial fraud that a false claim of objectivity may render a statement actionable. See, e.g., *In re International Business Machines Corporate Securities Litigation*, 163 F.3d 102, 109 (2d Cir. 1998) ("an opinion may still be actionable if the speaker does not genuinely and reasonably believe it or if it is without a basis in fact"); *Abu Dhabi Commercial Bank* v. *Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 176 (S.D.N.Y. 2009) (same); *State* v. *Moody's Corp.*, Superior Court, judicial district of Hartford, Docket No. X04-HHD-CV-10-6008836-S (May 10, 2012) (54 Conn. L. Rptr. 116, 121) (when defendant claimed that it had employed "specific policies and procedures . . . to protect its independence and objectivity," statement was actionable under theory of misrepresentation because it was susceptible to being proved false). In our view, there would seem to be a significant difference between the business of rating securities, which is predictive and widely perceived as employing standardized econometric methodologies requiring a high degree of mathematical and technical skill, and the business of rating products and services, which involves commentary on an existing state of affairs and is generally

The concept of "puffery," although typically applied outside the defamation context, usefully illuminates the basic point.[15] A claim of objectivity, like claims of integrity, credibility, high ethical norms and the like, is often considered nonactionable puffery because it is unlikely to induce reliance and is insusceptible to being proved true or false. See *Singh* v. *Cigna Corp.*, 918 F.3d 57, 63 (2d Cir. 2019) ("general statements about reputation, integrity, and compliance with ethical norms are inactionable puffery, meaning that they are too general to cause a reasonable investor to rely upon them" [internal quotation marks omitted]); *Intermountain Stroke Center, Inc.* v. *Intermountain Health Care, Inc.*, 638 Fed. Appx. 778, 788 (10th Cir. 2016) (advertising that speaks generically to caliber of defendant's product is "classic puffery" and incapable of being proved true or false); *Boca Raton Firefighters & Police Pension Fund* v. *Bahash*, 506 Fed. Appx. 32, 37 (2d Cir. 2012) ("[t]he statements alleged in the [plaintiff's] complaint regarding [the] integrity and credibility [of the company whose stock was being sold] and the objectivity of [the defendant security rating provider's] credit ratings are the

understood to be inherently subjective in nature. In light of this difference, as well as the differences between the elements of a fraud claim and a defamation claim; see F. Harper & M. McNeely, "A Syntheses of the Law of Misrepresentation," 22 Minn. L. Rev. 939, 947 (1938) ("[I]n misrepresentation, the defendant has misled the plaintiff himself, whereas in defamation he has misled a third person to the plaintiff's loss. Thus, in the case of misrepresentation, the plaintiff complains because he himself has been induced to enter into some commercial transaction by his reliance upon the misstatements which the defendant has made. In defamation, however, he complains because some third person has believed or is presumed to have believed the defendant's misstatements about him, and has been induced or is presumed to have been induced to act in reliance thereon to the plaintiff's loss." [Footnote omitted.]); it is far from clear to us that the same rule should apply in the context of a defamation claim brought in the ratings context by the subject of the purportedly defamatory opinion.

[15] "Puffery is an exaggeration or overstatement expressed in broad, vague, and commendatory language." *Castrol, Inc.* v. *Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993); see also *Newcal Industries, Inc.* v. *IKON Office Solution*, 513 F.3d 1038, 1053 (9th Cir. 2008) ("[u]ltimately, the difference between a statement of fact and mere puffery rests in the specificity or generality of the claim"), cert. denied, 557 U.S. 903, 129 S. Ct. 2788, 174 L. Ed. 2d 290 (2009).

type of mere puffery that we have previously held to be not actionable" because "no reasonable purchaser of [the stock] would view statements such as these as meaningfully altering the mix of available information about the company [whose stock was being sold]" [internal quotation marks omitted]); *ECA, Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (defendant's statements regarding its good reputation for integrity were "no more than 'puffery' "); *ECA, Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co.*, supra, 206 ("[the] [p]laintiffs conflate the importance of a . . . reputation for integrity with the materiality of [the defendant's own] statements regarding its reputation," and "[n]o investor would take [the defendant bank's statement that it set the standard for best practices] seriously . . . for the simple fact that almost every investment bank makes these statements").

Putting aside our conceptual problems with the plaintiff's theory of defamation premised on the allegedly false claims of objectivity, we also agree with the trial court that the plaintiff failed to present any credible evidence that the Magic Quadrant rankings in the 2014 report were based on the amount of consulting services that each vendor purchased from the plaintiff. Specifically, the court noted that the two vendors who spent the most on consulting services were ranked comparably to or lower than the plaintiff in the Magic Quadrant graphic—which the plaintiff's expert had disregarded when he found a correlation between expenditures and rankings. Although the plaintiff's expert attempted to salvage his pay to play correlation by reference to these two vendors' higher rankings in other Magic Quadrant reports, and the plaintiff claims on appeal that, at the very least, this broader historical point created a genuine issue of material fact, we remain unpersuaded. The unavoidable reality is that, with respect to the publica-

tion at issue, the plaintiff's own expert was unable to provide an opinion supporting the plaintiff's fundamental theory of wrongdoing without entirely disregarding the data pertaining to the two highest paying vendors in the rankings.[16] We agree with the trial court's conclusion that "[s]uch manipulation of evidence does not create a genuine issue of material fact or support a question for the jury" as to whether a correlation between expenditures and rankings existed.

The plaintiff also contends that, even if the trial court properly rejected its expert's conclusions correlating expenditures and rankings, there was other evidence that would allow a jury to infer that the defendant's claims of objectivity and impartiality were false. The plaintiff points in particular to evidence that the defendant had told the plaintiff that the defendant "need[ed] to fix things with [the plaintiff] considering the focus our research agenda has on [the plaintiff's] market in 2013" and that "market leaders need to be represented properly." Singhal, the plaintiff's president and chief executive officer, testified at his deposition that one of the defendant's analysts had told him that the plaintiff should spend more money on marketing, which Singhal interpreted as "code . . . for spending more money on [the defendant's] services." The evidence also established that the plaintiff was placed in the leaders quadrant in early drafts of the 2014 report, but, after Kowall

[16] The plaintiff contends that the trial court prematurely concluded that there was no correlation between expenditures and placement in the Magic Quadrant graphic because the trial court barred the plaintiff "from taking discovery related to [the defendant's] relationship with, payments from, and treatment of companies other than [the plaintiff] . . . ." The plaintiff, however, has neither challenged the correctness of the court's discovery ruling on appeal nor explained what additional information it would require to determine whether there was a correlation between expenditures and placement in the Magic Quadrant graphic. Indeed, the plaintiff acknowledges that it had information concerning the total amounts that other vendors had paid the defendant for consulting services and the placement of the two vendors who paid most in other Magic Quadrant reports for markets other than NPMD.

"tweaked" the underlying weightings, the plaintiff ended up in the challengers quadrant. The plaintiff additionally points to evidence that the defendant repeatedly referred to the plaintiff as a leader in various documents, thereby effectively admitting that the plaintiff should have been placed in the leaders quadrant.

We agree with the trial court's findings that this evidence was insufficient to create a genuine issue of material fact regarding the truth of the defendant's claims of objectivity and impartiality. With respect to the defendant's references to the plaintiff as a leader, the trial court correctly observed that all but one of these references were made solely in connection with the plaintiff's market share, which was consistent with its placement in the challengers quadrant. With respect to the earlier draft placing the plaintiff in the leaders quadrant, it is indisputable that the defendant's analysts engaged in a lengthy process of repositioning various vendors based on a variety of criteria. Although Kowall at one point wrote that he believed that the plaintiff "technically" should be placed in the leaders quadrant, or that it at least should be placed on the line between the leaders quadrant and the challengers quadrant, and other analysts questioned the plaintiff's ranking as a challenger, these exchanges took place at a time when the analysts were openly debating the position of vendors, including the plaintiff, in the graphic. The evidence showed that the positions of almost all of the vendors in the Magic Quadrant graphic worsened over time as the analysts "tweaked" the data, and the plaintiff's position relative to the other vendors remained relatively constant. There is no suggestion in any of these communications that the adjustments were made on the basis of the vendors' expenditure levels. We likewise conclude that the statement made by the defendant's analysts to the plaintiff that the defendant needed to "fix things" with the plaintiff and that the plaintiff should spend more on marketing reflect nothing more than a

recommendation for curative action and cannot reasonably support an actionable inference that the plaintiff's ranking was dependent on pay to play expenditures. The availability of the defendant's consulting services was no secret to anyone; the defendant publicly disclosed the fact that some of the vendors that it ranked in its Magic Quadrant reports purchased consulting services from it, enabling readers to consider the defendant's claims of objectivity and impartiality in their proper context.

The plaintiff contends that any ambiguity in the foregoing evidence must, at the summary judgment stage, be construed in its favor because a reasonable fact finder could resolve the ambiguity and conclude that the defendant's claims of objectivity and impartiality were false. The flaw in this argument is that it misapprehends the particular nature of the ambiguity at issue. The plaintiff is correct that, generally speaking, summary judgment will not be rendered if there is an ambiguity in the evidence such that a reasonable person might decide a disputed issue of material fact in favor of either the plaintiff or the defendant. See, e.g., *H.O.R.S.E. of Connecticut, Inc.* v. *Washington*, 258 Conn. 553, 565, 783 A.2d 993 (2001) (ambiguous meaning of critical deposition testimony precluded summary judgment). It also is true that, in defamation cases, a jury issue can arise when an expression of opinion contains an ambiguity that reasonably can be understood to convey by implication an actionable factual assertion.[17] See *Goodrich* v. *Waterbury Republican-American, Inc.*, supra, 188 Conn. 112 n.5 (referring to

[17] For example, this court found that an "ambiguous" statement appearing in a newspaper article that the plaintiff had charged the city of Bridgeport for 8000 gallons of gasoline, but, when measured, the volume had "shrunk [1000] gallons," was actionable because it was "susceptible of a libelous meaning [i.e., overcharging], and capable of being injurious to the plaintiff. It might have been understood by one reading it as implying that the plaintiff was guilty of some dishonest action in connection with the loss of the gasoline. So understood, the article was libelous. It being capable of such a meaning, it was proper for the plaintiff in his complaint, by way of innuendo,

"the rule which requires the jury to decide whether an ambiguous assertion is reasonably capable of a defamatory meaning"). But the ambiguity at work in the present case is of a different kind. When we say that certain statements in the 2014 report are properly characterized as vague and ambiguous, we mean that the statements could *not* be understood by a reasonable juror to imply a factual statement; their ambiguity does not invite the listener to infer a latent factual assertion but, rather, suggests an imprecise and irreducibly subjective meaning that cannot be understood to convey a statement of fact. Thus, the statements are expressions of opinion as a matter of law. See, e.g., *Mr. Chow of New York* v. *Ste. Jour Azur S.A.*, supra, 759 F.2d 224 (whether statement is factual or expression of opinion is question of law). This conclusion does not preclude summary judgment in the present context but, instead, compels it. Accordingly, we conclude that the trial court correctly determined as a matter of law that no reasonable juror could find by a preponderance of the evidence[18] that the defendant's claims of objectivity and impartiality were defamatory.[19] Any evidence presented by the plain-

to allege that it conveyed such a meaning to its readers." (Internal quotation marks omitted.) *Burns* v. *Telegram Publishing Co.*, 89 Conn. 549, 551–52, 94 A. 917 (1915).

[18] The defendant argues that the plaintiff is required to prove falsity by clear and convincing evidence because the plaintiff is a limited purpose public figure and that the 2014 report constituted speech on a matter of public concern. See *Gleason* v. *Smolinski*, supra, 319 Conn. 432. We need not address this issue because we have concluded that the plaintiff's claims fail even under the preponderance standard.

[19] This conclusion is reached in the context of a defamation claim, and the plaintiff is a vendor alleging harm arising from statements made as part of the defendant's rating and review of the plaintiff's information technology products and services. Different claims in a different context brought by a differently situated plaintiff may fare differently. Compare *Abu Dhabi Commercial Bank* v. *Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 176, 179 (S.D.N.Y. 2009) (when defendant rating agencies, which held themselves out as being unbiased and independent from companies that they rated, knew that "the ratings process was flawed . . . that the portfolio was not a safe, stable investment, and . . . that [they] could not issue an objective rating because of the effect it would have on their compensation, it may be plausibly inferred that [they] knew they were disseminating false and misleading ratings"); see also footnote 14 of this opinion.

tiff that might arguably support an inference that the defendant had a conflict of interest would not render its statements actionable in a defamation action. See *Abu Dhabi Commercial Bank* v. *Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 179 (S.D.N.Y. 2009) ("[t]he existence of conflicts of interest alone typically is not sufficient to establish that [the] defendants 'knowingly' made a false and misleading statement"). Indeed, as we have explained, a reasonable purchaser of the defendant's research reports would understand that comparative ratings of products and services cannot be strictly objective. See *Browne* v. *Avvo, Inc.*, supra, 525 F. Supp. 2d 1253 n.1 ("[c]omparisons and comparative ratings are often based as much on the biases of the reviewer as on the merits of the reviewed: they should, therefore, be relied upon with caution"); id., 1253 (stating, with respect to defendant's comparative ratings, that "that and $1.50 will get you a ride on Seattle's new South Lake Union Streetcar" [internal quotation marks omitted]); *Castle Rock Remodeling, LLC* v. *Better Business Bureau of Greater St. Louis, Inc.*, supra, 354 S.W.3d 241 (ratings and grades "cannot be objectively verified as true or false").

Our conclusion that the trial court properly rendered summary judgment for the defendant on the defamation claim is also dispositive of the plaintiff's claim that the trial court improperly rendered summary judgment for the defendant on the CUTPA claim. Because the defendant's statements about the plaintiff in the 2014 report were nonactionable expressions of opinion, and because the plaintiff failed to present sufficient evidence to support its pay to play claim, we are compelled to conclude that the plaintiff has failed to establish a viable claim within the purview of CUTPA.

In summary, we conclude that the trial court incorrectly determined that the 2014 report contained certain statements about the plaintiff that a reasonable juror could find to be defamatory and either to be factual or

to imply undisclosed defamatory facts. In our view, all of the statements that the defendant made about the plaintiff were expressions of nonactionable opinion. We further conclude that, at least in the absence of any credible evidence tending to establish that the defendant's claims of objectivity and impartiality were provably false and that it was engaged in a pay to play scheme, such speech cannot support either the plaintiff's defamation claim or its CUTPA claim. Accordingly, we affirm the trial court's judgment on the alternative ground that all of the challenged statements by the defendant were nonactionable expressions of opinion.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ANTHONY COLLYMORE (SC 19868)

Palmer, McDonald, D'Auria, Kahn, Ecker and Vertefeuille, Js.

Syllabus

Pursuant to *State* v. *Dickson* (322 Conn. 410), in cases in which the state seeks to present an in-court identification that has not been preceded by a successful identification during a nonsuggestive identification procedure, the state must request permission to do so, and the trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator or that the ability of the eyewitness to identify the defendant is not at issue.

Convicted of the crimes of felony murder, attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a firearm in connection with the shooting of the victim, the defendant appealed to the Appellate Court. The defendant and two friends, B and V, had driven to an apartment complex intending to commit a robbery. B waited in the car while the defendant and V, who were armed with guns, attempted to rob the victim. When the victim fled, the defendant and V fired gunshots, fatally wounding the victim, and then drove with B to the apartment of a friend, O. B, V and O gave statements to the police that incriminated the defendant. B also inculpated the defendant during his testimony at the defendant's

probable cause hearing, and V inculpated the defendant when he pleaded guilty to charges related to the shooting. At trial, the state granted B, V and O immunity from prosecution, pursuant to statute (§ 54-47a), in exchange for their testimony during the state's case-in-chief. B, V and O then repudiated their prior statements that incriminated the defendant and testified so as to exonerate him during the state's case-in-chief. The state introduced their prior inconsistent statements and questioned them regarding those statements. On cross-examination, defense counsel questioned B, V and O extensively about their prior, incriminating statements and their new, exculpatory testimony. When B, V and O were later called to testify in the defendant's case-in-chief, the prosecutor informed them that the state was not extending its grant of immunity to their testimony for the defense. The trial court informed B, V and O that the law was unclear as to whether the immunity they already had been granted extended to their testimony as defense witnesses and stated that they should be guided by the advice of their counsel. B, V and O then invoked their fifth amendment rights against self-incrimination. The defendant claimed, inter alia, that the trial court violated his rights to due process and to compulsory process when it improperly permitted the state to revoke the immunity that it had granted to B, V and O. He contended that the testimony of B, V and O would have addressed exculpatory, material and noncollateral matters, and would have rehabilitated his credibility and the credibility of B, V and O. The Appellate Court upheld the defendant's conviction and rejected his constitutional claim, reasoning that the state did not revoke the immunity it had granted to B, V and O when they were called to testify in the defendant's case-in-chief but, rather, refused to grant additional immunity for any transaction, matter or thing not testified to and immunized during the state's case. The Appellate Court also determined, inter alia, that the defendant was not constitutionally entitled to have additional immunity granted to B, V and O because he failed to establish that the additional testimony would have been essential to his defense or would not have been cumulative. The defendant thereafter filed a motion for reconsideration in light of *Dickson*, a case that was decided after his criminal trial but that applied retroactively to all cases then pending on appeal, claiming that the trial court had improperly permitted two witnesses, the victim's mother, R, and the victim's brother, G, to make first time in-court identifications of him as one of the persons who shot at the victim, in violation of the rule that such identifications must be prescreened by the trial court. The Appellate Court denied the motion. On the granting of certification, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that his rights to due process and to compulsory process were violated when the state declined to extend the immunity that it had granted under § 54-47a to B, V and O during the state's case-in-chief to their testimony during the defendant's

case-in-chief because, even if that immunity could not be revoked during the defendant's case-in-chief and the state's failure to extend such immunity violated § 54-47a, that violation was not constitutional in nature and, accordingly, did not violate his constitutional rights: to the extent that B, V and O could have invoked their fifth amendment rights even if immunity had been extended to their testimony during the defendant's case-in-chief, the defendant failed to establish that any improper revocation of immunity by the state violated his constitutional rights because the witnesses would not have answered questions for which they validly invoked those rights, and, thus, their testimony in response to those questions would not have been exculpatory; moreover, this court concluded, with respect to those matters for which B, V and O could not have validly invoked their fifth amendment rights if the previously granted immunity had extended to the defendant's case-in-chief, that, even if the state acted unfairly and committed misconduct by engaging in a discriminatory grant of immunity to gain a tactical advantage when it declined to extend immunity to the witnesses' testimony during the defendant's case-in-chief, the defendant failed to establish that the testimony he was prevented from offering during his case-in-chief was not cumulative, as the defendant failed to establish what new information B, V and O would have provided if the state had not declined to extend immunity beyond the state's case; furthermore, the state's purported revocation of immunity, coupled with the trial court's warnings to B, V and O that the law on whether immunity extended to their testimony as defense witnesses was unclear and that they should be guided by the advice of their counsel, did not drive them from the witness stand and, therefore, did not violate the defendant's constitutional rights, as neither the trial court nor the state threatened B, V or O that testifying for the defendant or in a manner unfavorable to the state would lead to perjury charges or to having a plea deal revoked, and the state's informing those witnesses of what it believed to be the scope of § 54-47a was not so coercive or intimidating as to substantially interfere with their decision whether to testify in the defendant's case-in-chief.

2. The defendant could not prevail on his claim that his right to due process was violated, pursuant to *Dickson*, when R and G purportedly gave first time in-court identification testimony about him, as that testimony, to the extent that it was improper, was harmless beyond a reasonable doubt: contrary to the state's assertion that the rule created in *Dickson* was inapplicable to the unsolicited and unanticipated identification testimony of R and G, all first time in-court identifications are subject to *Dickson*, regardless of whether the state intends or attempts to introduce such an identification, and, because the defendant's identity as a shooter was not at issue as to all of the charges except for criminal possession of a firearm, the testimony of R and G did not implicate the defendant's due process rights as to those charges; moreover, although the defendant's identity as a shooter was at issue with respect to the charge of

criminal possession of a firearm and, thus, the testimony of R and G implicated the defendant's due process rights with respect to that charge, the admission of that testimony was harmless beyond a reasonable doubt, as the statements of B, V and O to the police and the testimony of other witnesses indicated that the defendant possessed or used a gun during the shooting and that he possessed a gun after the shooting, defense counsel extensively cross-examined G as to his testimony and attacked his credibility, the state's overall reliance on the testimony of R and G was minimal, and, even without their testimony, there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt.

Argued November 7, 2018—officially released January 21, 2020

Procedural History

Substitute information charging the defendant with two counts of the crime of attempt to commit robbery in the first degree, and with one count each of the crimes of felony murder, conspiracy to commit robbery in the first degree and criminal possession of a firearm, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before *Cremins*, *J.*; verdict of guilty; thereafter, the court vacated the verdict as to one count of attempt to commit robbery in the first degree; subsequently, the court rendered judgment, from which the defendant appealed to the Appellate Court, *Gruendel*, *Lavine* and *Mullins*, *Js.*, which affirmed the trial court's judgment; thereafter, the Appellate Court denied the defendant's motion for reconsideration, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Susan M. Hankins, assigned counsel, for the appellant (defendant).

Robert J. Scheinblum, senior assistant state's attorney, with whom were *Cynthia S. Serafini*, senior assistant state's attorney, and, on the brief, *Maureen Platt*, state's attorney, for the appellee (state).

D'AURIA, J. The primary question in this appeal is whether the defendant, Anthony Collymore, was harmed when the state, after granting immunity to three witnesses under General Statutes § 54-47a for testimony given during the state's case-in-chief, revoked that immunity when the same witnesses later testified in the defense case-in-chief. The defendant appeals from the judgment of the Appellate Court affirming the judgment of conviction, rendered after a jury trial, of felony murder in violation of General Statutes § 53a-54c, attempt to commit robbery in the first degree in violation of General Statutes §§ 53a-49 (a) (2) and 53a-134 (a) (2), conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1).[1] He claims that his rights to due process and a fair trial under the fourteenth amendment to the United States constitution, and his rights to compulsory process and to present a defense under the sixth amendment to the United States constitution were violated when the trial court improperly permitted the state to revoke the immunity of the three witnesses, causing them to invoke their fifth amendment right against self-incrimination. Additionally, the defendant claims that the Appellate Court improperly denied his motion to reconsider in light of this court's holding in *State* v. *Dickson*, 322 Conn. 410, 141 A.3d 810 (2016), cert. denied, U.S. , 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017), on the ground that two witnesses made improper, first time in-court identifications. Because we conclude that the revocation of immunity did not violate the defendant's

[1] The defendant also was found guilty of a second count of attempted robbery in the first degree in violation of §§ 53a-49 (a) (2) and 53a-134 (a) (4), but the trial court vacated that finding at sentencing, pursuant to *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013).

constitutional rights and that any improprieties regarding the first time in-court identifications were harmless, we affirm the judgment of the Appellate Court.

The following facts, reasonably found by the jury and recited by the Appellate Court in *State* v. *Collymore*, 168 Conn. App. 847, 850–52, 148 A.3d 1059 (2016), and procedural history are relevant to our review of these claims: "On January 18, 2010, the defendant and two of his friends, Rayshaun Bugg and Vance Wilson (Vance), were driving around Waterbury in a white . . . four door, rental Hyundai that the defendant's aunt and uncle had lent to him, looking to rob someone. Eventually the three men drove into the Diamond Court apartment complex, which comprises eight apartment buildings. Halfway down the main road of the complex, the men saw an expensive looking, black Acura sport utility vehicle (SUV) and decided to rob its driver.

"They drove down a small road behind the apartments, where the defendant and Vance pulled out their guns and exited the Hyundai, saying that they were going to rob the driver of the SUV. The defendant had a .38 revolver, and Vance had a .357 revolver. Bugg drove to the end of the small road and waited. The defendant and Vance reached the SUV, saw two young children running toward its driver, and decided to call off the robbery. The SUV drove away.

"The defendant and Vance then saw seventeen year old John Frazier (victim) and decided to rob him. As they were trying to rob him, he slapped away one of their guns and ran toward his apartment, at the entrance to the complex. The defendant and Vance both fired shots at the victim.

"Bugg drove up, the defendant and Vance ran over to the Hyundai and got in, and they sped off to the apartment of Jabari Oliphant, a close friend who lived in Waterbury. There, the defendant and Vance explained

to Bugg and Oliphant what had just transpired at Diamond Court, namely, that they had intended to rob the man in the SUV but decided not to when they saw his young children; instead, they tried to rob the victim and shot him when he resisted. They then asked Oliphant if he had something to clean their guns.

"Police arrived at Diamond Court within minutes of the shooting and found the fatally wounded victim in front of his family's apartment. An autopsy revealed that a single .38 class bullet through the victim's heart had killed him.[2] The defendant was arrested and tried.

"At trial, the state's case included more than thirty witnesses, who testified over the course of fifteen days. A jury found the defendant guilty, and the court imposed a sentence of eighty-three years in prison." (Footnote in original.) Id. The defendant appealed to the Appellate Court, claiming, in relevant part, that the trial court had violated his constitutional rights to due process and compulsory process by failing to compel Bugg, Vance, and Oliphant to testify during the defense case-in-chief when they invoked their fifth amendment right against self-incrimination after the state improperly revoked the immunity that it had granted these witnesses during the state's case-in-chief. Id., 852.

The Appellate Court rejected the defendant's constitutional claim and affirmed the judgment of conviction, reasoning that, although the state could not revoke immunity it already had granted, his constitutional rights were not violated because the state did not revoke the existing immunity of these witnesses but, rather, refused to grant additional immunity for any transaction, matter, or thing not testified to and immunized during the state's case-in-chief. Id., 865, 867. The defen-

[2] "The state's ballistics expert noted that a .38 class bullet could be fired from a nine millimeter pistol, a .38 Special revolver, or a .357 Magnum revolver." *State* v. *Collymore*, supra, 168 Conn. App. 851 n.2.

dant, according to the Appellate Court, was not constitutionally entitled to have the three witnesses granted additional immunity because he had failed to establish that the additional testimony would have been essential to his defense or would not have been cumulative. Id., 870–71. Moreover, the Appellate Court determined that the trial court properly allowed the witnesses to invoke their fifth amendment privilege regarding questions not covered by the existing immunity because responsive answers had a tendency to incriminate the witnesses and, thus, their invocation of their fifth amendment right prevailed over the defendant's right to compulsory process. Id., 873–74, 874 n.14. The Appellate Court, however, also determined that the trial court abused its discretion by allowing the witnesses to invoke their fifth amendment privilege regarding questions covered by the existing immunity because their answers would not have incriminated them but that this error was harmless because the witnesses already had testified at length and been subject to cross-examination on those subject matters. Id., 874–75.

Subsequently, the defendant filed a timely motion for reconsideration and reargument en banc, in light of this court's holding in *State* v. *Dickson*, supra, 322 Conn. 410. The Appellate Court summarily denied the defendant's motion.

The defendant petitioned for certification to appeal, which we granted, limited to the following issues: (1) "[Did] the Appellate Court properly [hold] that a prosecutor's grant of immunity to a witness for his testimony during the state's case-in-chief does not extend to the same witness' testimony when later called by the defendant as a witness?" (2) "If the answer to the first question is no, was the error nonetheless harmless?" And (3) "[Did] in-court identification testimony made by the victim's mother and brother, contrary to their pretrial statements, [violate] the defendant's due process rights

pursuant to *State* v. *Dickson*, [supra, 322 Conn. 410]?" *State* v. *Collymore*, 324 Conn. 913, 153 A.3d 1288 (2017). Additional facts will be set forth as required.

I

The defendant first claims that his rights to present a defense and to due process were violated as a result of the state's revocation of the immunity it previously had granted to former prosecution witnesses under § 54-47a when they later were called as defense witnesses. Specifically, the defendant argues that the Appellate Court improperly characterized the prosecutor's actions as declining to grant additional immunity rather than as revoking existing immunity, which should have extended to his case-in-chief. This mischaracterization, the defendant contends, led the Appellate Court to improperly address his arguments in support of his constitutional claim, namely, that the state acted improperly by intentionally revoking immunity to deprive him of exculpatory testimony from those witnesses and that the state's actions, coupled with the trial court's warnings to the witnesses, improperly drove the witnesses from the witness stand.

Moreover, the defendant argues that he was harmed by the improper revocation of immunity, which caused the witnesses' subsequent, invalid invocations of their fifth amendment rights, because (1) the witnesses' testimony would have addressed exculpatory, material, and noncollateral subject matter, (2) the witnesses' testimony would have rehabilitated their credibility, and (3) the state's actions interfered with his right to control his defense strategy by forcing him to elicit testimony during the state's case-in-chief rather than during the defense case-in-chief.

The state responds that the Appellate Court properly characterized the prosecutor's actions as a refusal to grant additional immunity, not as a revocation of

existing immunity. The state argues that the defendant was not constitutionally entitled to have Vance, Bugg, and Oliphant granted additional immunity because he failed to establish either prosecutorial misconduct or that the additional testimony was material, exculpatory, or essential to his defense. Further, the state contends that, to the extent that the trial court improperly allowed the witnesses to invoke their fifth amendment right against self-incrimination, this error was harmless because their testimony would have been cumulative. Even if we assume, without deciding, that the state violated § 54-47a when it revoked the immunity it previously granted to Vance, Bugg, and Oliphant, we agree with the state that this action did not violate the defendant's constitutional rights.

A

The following additional facts and procedural history are relevant to this claim. Prior to trial, Bugg, Vance, and Oliphant each had given statements to the police that incriminated the defendant. Bugg had inculpated the defendant twice—in his statement to the police and during his testimony at the defendant's hearing in probable cause. Vance also inculpated the defendant twice—in his statement to the police and when he pleaded guilty to charges related to the incident at issue. Oliphant likewise incriminated the defendant in the statement he gave to the police.

When these witnesses were called as prosecution witnesses at trial, all three invoked their fifth amendment right against self-incrimination and refused to testify. The state granted immunity to these witnesses pursuant to § 54-47a in exchange for their testimony. Specifically, the state granted Bugg "use immunity for any drug activity he was engaged in on January 18,

2010."[3] The state did not specifically grant Bugg *immunity* from prosecution for any false statement made at the defendant's hearing in probable cause, which Bugg was concerned about, but it did concede that it would not prosecute him for any perjury that he may have committed at the hearing in probable cause.[4] The state granted Vance immunity from prosecution for making a false statement in his prior statements.[5] The state granted Oliphant immunity from prosecution for both filing a false statement and hindering prosecution on the basis of his statement to the police.[6]

Despite the witnesses' prior statements that incriminated the defendant, the witnesses repudiated those statements on direct examination in the state's case and testified so as to exonerate him. All three witnesses testified that they did not provide the police with the information contained in the statements and had signed the statements only because they had been coerced by the police. In light of this testimony, the state interrupted the testimony of each witness to call Lieutenant

[3] Although the state indicated it was granting Bugg only use immunity, because it granted him immunity pursuant to § 54-47a, it necessarily granted him both use immunity and transactional immunity. See *Furs* v. *Superior Court*, 298 Conn. 404, 410–11, 3 A.3d 912 (2010) (§ 54-47a [b] necessarily provides witness with both use and transactional immunity, and state cannot restrict its offer of immunity to only use or only transactional immunity).

[4] The state then requested that the court inform the jury that Bugg had been granted immunity and was compelled to testify. Over defense counsel's objections, the trial court informed the jury prior to the start of Bugg's testimony that he had been compelled to testify under § 54-47a, although the court did not specifically say that he had been granted immunity.

[5] The state argues that the defendant's claim, as it relates to Vance, fails because the record is inadequate to establish that the state ever granted him immunity. Although it is true that the state did not explicitly grant Vance immunity on the record prior to the start of his testimony, the state did later clarify on the record that it had granted Vance immunity from prosecution for the crime of making a false statement. In light of this clarification, the state's argument fails.

[6] The trial court informed Oliphant that "you have been given transactional immunity by the state." See footnote 3 of this opinion.

Michael Slavin of the Waterbury Police Department, who testified that he was present when the witnesses made and signed their statements and that the witnesses had not been coerced. Through Slavin, the state then had the statements of Bugg, Vance, and Oliphant read into the record and admitted into evidence for substantive purposes pursuant to *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986).

After the statements were admitted under *Whelan*, the state recalled the witnesses and continued with direct examination.[7] The state questioned the witnesses in detail about their prior statements to the police, reading the statements sentence by sentence and asking the witnesses if the information contained in each sentence was correct. Although the state had not yet offered into evidence Bugg's prior testimony from the probable cause hearing or Vance's prior testimony from his plea proceedings for substantive purposes under *Whelan*, it questioned Bugg and Vance about these other prior statements in a fashion similar to its questioning about their prior statements to the police. The witnesses each testified that, to the extent their prior statements and testimony were inconsistent with their trial testimony, the information contained in the prior statements and testimony was incorrect.

Subsequently, on cross-examination, defense counsel questioned the witnesses extensively about all of their prior statements that incriminated the defendant and,

[7] For some of the witnesses, there was a delay between the admission of the *Whelan* statements and the recommencement of direct examination. Bugg was not recalled by the state until approximately nine days later, after ten other witnesses had testified on behalf of the state. Vance was not recalled by the state until approximately eight days later (although due to weather, evidence was presented during only two of those eight days), after six other witnesses had testified on behalf of the state. Direct examination of Oliphant recommenced immediately after his prior statement to the police was read into the record.

especially, about their reasons for making these prior statements.[8] Although at this point in the trial, Bugg's prior testimony from the hearing in probable cause and Vance's prior testimony from his plea proceedings had not been admitted into evidence for substantive purposes under *Whelan*, because the state had questioned Bugg and Vance extensively about their prior testimony and gone through it with them line by line, defense counsel was able to extensively cross-examine them about their prior testimony. Defense counsel also questioned the witnesses about their new exculpatory testimony and the events that occurred on the night of the incident at issue.

At the end of the state's case, after the testimony of these witnesses concluded, the court permitted the state to read into the record Bugg's prior testimony at the hearing in probable cause and Vance's prior testimony at his plea proceedings for substantive purposes pursuant to *Whelan*.

The defense subsequently called these witnesses as defense witnesses in its case-in-chief. Prior to taking the witness stand, the witnesses were informed that the state was not extending its prior grant of immunity to their testimony in the defense case-in-chief and was

[8] Bugg testified that he signed his statement to the police and testified at the hearing in probable cause because he was promised a plea deal that limited his period of incarceration to five years. He also alleged that he had been slapped and hit by the officers prior to agreeing to sign the statement.

Vance testified that he signed his statement to the police only so that he would not receive the death penalty and testified at the plea proceedings consistently with the statement only so that he would receive a lesser sentence. Vance testified that not only did he not make a statement to the police but that the language in the statement was inconsistent with how he spoke.

Oliphant testified that he was bullied, beaten, and forced by the police into making a false statement against the defendant. According to Oliphant, he does not speak in the manner used in the statement and never would have used the phrases contained in the statement. He further testified that he was offered a plea deal if he perjured himself and testified in a manner that was consistent with his statement to the police.

not willing to grant any additional immunity for matters not covered by the prior grant of immunity. Specifically, the state clarified that it was "not giving [the witnesses] immunity for any testimony as a witness in the defense case." The state argued that the witnesses' testimony had concluded after the state's case ended and that, because they no longer were being called as prosecution witnesses, they did not "have immunity from the state for anything that [they]—that [they testify] to at this point on." The court, however, noted that it was unclear as to whether the immunity that the witnesses already had been granted by the state extended to their testimony as defense witnesses and that this was an issue the Appellate Court would have to decide.[9] The court then cautioned the witnesses that this was an unresolved issue, that they may or may not have immunity, and that they should be guided by the advice of their counsel. Subsequently, while testifying during the defense case-in-chief, the witnesses each invoked their fifth amendment rights and refused to answer some or all of the questions asked. We discuss each witness' prior statements and trial testimony in turn.

1

As explained, prior to trial, Bugg had inculpated the defendant twice—in a statement to the police and during his testimony at the defendant's probable cause hearing. In his statement to the police, Bugg informed the police that, on the date of the murder, he, the defendant, and Vance had been driving around looking for

[9] The defendant never requested that the trial court determine whether immunity under § 54-47a extended to testimony given during the defense case but, rather, agreed with the trial court that whether a witness is granted immunity is solely in the hands of the state and that the court could not require that immunity be granted. When the trial court inquired as to what defense counsel was seeking from the court, counsel responded that he did not believe that the court could do anything but nevertheless requested that the jury be advised that the prior immunity had been revoked. The court declined to give the jury this instruction.

women and ended up at Diamond Court. While in the parking lot area, the defendant saw an SUV driving toward them. The defendant and Vance discussed how the man in the SUV probably had money, pulled out their guns, and said they were going to rob him. Bugg saw Vance with a .357 and the defendant with a .38 revolver. The defendant then drove past the SUV and parked in a driveway. The defendant and Vance exited the vehicle and told Bugg to drive. Bugg remained in the vehicle for approximately five minutes and then heard five or six gunshots. He then drove the vehicle toward the SUV. The defendant ran to the vehicle, got into the backseat and said, "this nigga's hot." Vance then ran to the vehicle and also got into the backseat. Bugg drove away and asked if they "got" anything, to which Vance said no and that the boy they tried to rob "tried some wild shit." Bugg asked the defendant if he shot the boy. The defendant did not respond but appeared to be mad at Vance. Bugg drove them to Oliphant's house, where the defendant told Bugg that they did not rob the guy in the SUV but that "we got some young nigga walk[ing] by, holding his pockets, and he wouldn't give it up. [The defendant] said that, because the young nigga wouldn't give it up, [Vance] yapped that nigga. I know that yap means to shoot somebody. They said the guy in the [SUV] had a baby in it, so they felt bad [and] instead took the young nigga. [The defendant] said [Vance] ha[d] his gun to the boy's chest, and the boy tried to grab it and they started to tussle over the gun [and] that is why he shot him." Vance then asked for some ammonia to clean his gun. Vance kept telling everyone to keep their mouths shut. Bugg then left Oliphant's house and went to a strip club with his brother. He later told his cousin, Marquise Foote, about the incident.

After he gave his statement to the police, Bugg testified at the defendant's probable cause hearing. His testi-

mony was similar to, but not entirely consistent with, the content of his statement to the police. Specifically, Bugg testified that, although he saw Vance with a .357 pistol, he only saw something in the defendant's pocket that he assumed to be a gun.

At trial, on direct examination in the state's case-in-chief, Bugg's testimony differed significantly from his prior statements. He testified that, on the date of the incident, he, the defendant and Vance had been driving around, looking to purchase marijuana. They drove to the area near Diamond Square because Bugg knew of a narcotics dealer there. In the past, when Bugg wanted to purchase marijuana, he would call the dealer, and they would meet at Diamond Court. Although Bugg had not called the dealer prior to the current excursion, he saw the dealer's truck, a dark colored SUV, parked in the parking lot and informed the defendant and Vance that the dealer was in the truck. The defendant then parked down a side street. The defendant and Vance exited the vehicle. Bugg testified that he did not see either of them with a weapon. As Bugg was waiting in the vehicle, he testified, he thought he heard gunshots but was uncertain because music was playing in the vehicle. Bugg then drove toward the SUV and saw the defendant coming toward him, with Vance a couple of feet behind the defendant. The defendant and Vance got into the backseat of the vehicle, and Bugg drove to the defendant's house, where the three men smoked marijuana.[10]

[10] The state also questioned Bugg about phone conversations he had had with his sister and mother while he was incarcerated. Bugg testified that he did not recall the substance of the conversations but that he might have told his sister that Vance was willing to help him. He said that he did not recall telling his sister that, if he gave Vance "some kitty," everything would be fine. He did recall telling his mother or sister to tell Foote that they needed to talk so that Foote would tell the truth.

After Bugg's testimony in the state's case concluded, the state played audio recordings of these telephone conversations. In one recording, Bugg told his sister that, if he could "get that nigga' some kitty, and everything's gonna be good." He also informed his sister that "I'm trying to help the other nigga' out."

On direct examination during the defense case-in-chief, after the state informed Bugg that the prior grant of immunity did not extend to his testimony during the defense case, defense counsel questioned Bugg at length about recorded phone conversations he had had with his sister and mother while he was incarcerated. See footnote 10 of this opinion. Defense counsel asked Bugg to clarify what his statement to his sister about "kitty" meant. He explained that "kitty" meant money but that he had lied to his sister and only said that to calm her down. He testified that the conversation was about Vance's needing to tell the truth because Vance had lied in his statement. Defense counsel then asked Bugg about the nature of his relationship with Foote in January, 2010, to which Bugg responded that "[w]e wasn't cool" because "he stole from me." Defense counsel then inquired about what Foote had stolen from Bugg, in response to which Bugg invoked his fifth amendment right against self-incrimination. Bugg also invoked his fifth amendment right in response to the following questions by defense counsel: (1) where he had driven the vehicle after the defendant and Vance exited to purchase marijuana, (2) where precisely the vehicle he was driving was located at the time the shooting occurred, and (3) if he had told the truth about the vehicle's location during the probable cause hearing.[11]

2

Vance also inculpated the defendant twice prior to the defendant's trial—in the statement Vance gave to

[11] On cross-examination by the state, Bugg invoked his fifth amendment privilege as to four other questions: (1) whether he had testified inconsistently at the hearing in probable cause about whether the purpose of going to Diamond Court was to purchase marijuana, (2) whether he had testified inconsistently during the state's case-in-chief about remembering the telephone conversation with his sister about "kitty," (3) whether he had ever threatened Foote, and (4) whether he failed to inform the police that the reason he, the defendant and Vance had gone to Diamond Court was to purchase marijuana. The defendant, however, does not argue that he was harmed by Bugg's refusal to respond to these questions.

the police and when Vance pleaded guilty to charges related to the incident at issue. In his statement to the police, Vance stated that, on the day of the incident, he was with the defendant and Bugg when the defendant stated that he wanted to commit a robbery to get money to buy his son a birthday present. Vance agreed to help the defendant commit the robbery. He testified that the defendant drove them to an apartment complex where they saw a black SUV. The defendant parked behind one of the apartment buildings. Then, the defendant and Vance took out their guns and got ready to rob the driver of the SUV. Vance stated that he had a .357 revolver and that the defendant had a .38 revolver. The defendant and Vance exited the vehicle while Bugg remained in the vehicle. According to Vance, he and the defendant decided not to commit the robbery when they saw two children run toward the SUV. Vance and the defendant then saw the victim walking in the street and decided to rob him instead. Vance stated that he ran up behind the victim as the defendant put a gun to the victim's chest. The victim, however, slapped the gun away and ran toward the entrance of the apartment building. The defendant and Vance chased after him, and the defendant started shooting at the victim, firing two or three gunshots. Vance testified that, when he saw a woman and a man open the front door of the apartment the victim was running toward, he fired two or three gunshots at the door to scare them. Bugg then drove toward the defendant and Vance, who got into the backseat, and Bugg drove to Oliphant's house. The defendant commanded Vance to give him his gun so that the defendant could get rid of the guns, and Vance complied. Vance stated that he was not certain whether he or the defendant had shot the victim.

Subsequently, Vance again inculpated the defendant during his testimony in the proceedings in which Vance pleaded guilty to charges stemming from his participa-

tion in the incident at issue.[12] During the plea proceedings, Vance's prior statement to the police was read into the record, and Vance swore to its veracity. Additionally, in response to questions by the prosecutor, Vance's reiteration of the events of the incident at issue was mostly consistent with his statement to the police, with a few minor deviations.

Then, at the defendant's trial, on direct examination during the state's case, Vance testified that, approximately one month prior to the incident at issue, he had given the defendant ten blocks of heroin that the defendant was supposed to, but never did, pay for. On the day of the incident, the defendant called Vance, stating that, if Vance went with him to collect money from a man, he would give Vance the money. Vance agreed. Subsequently, the defendant, Vance, and Bugg drove to Diamond Court. Once at Diamond Court, the defendant saw the man who owed him money coming out of one of the apartment buildings with two children. Vance and the defendant exited the vehicle, and Bugg drove away. The man and the children quickly got into a vehicle and drove away. Vance argued with the defendant over the defendant's failure to ask the man for the money. Vance then punched the defendant, in response to which the defendant appeared to reach inside his clothing for a gun. Believing that the defendant had a gun, Vance grabbed the Taurus Magnum .357 gun at his hip and fired seven gunshots in the defendant's direction. The defendant ran toward where Bugg had parked their vehicle and was not struck by any of the bullets. Vance did not think he shot anyone. The defendant and Vance got into the backseat of the vehicle, and Bugg drove to the defendant's house. Vance testified that he expected his statement to the police to

[12] Although Vance had pleaded guilty pursuant to a plea deal at the time of the defendant's trial, he had not yet been sentenced because his sentence was contingent on whether he testified truthfully at the defendant's trial.

contain a recitation of these facts, including an admission that he might have killed the victim accidentally with a stray bullet when he shot at the defendant. Defense counsel then extensively cross-examined Vance about the events at issue and his prior statements.

During the defense case-in-chief, because Vance had stated that he would not respond to any questions, the trial court, outside the presence of the jury, ordered defense counsel to make an offer of proof. Vance refused to answer any questions. Specifically, he invoked his fifth amendment privilege against self-incrimination in response to the following questions: (1) what promises did the police officers make to him at the time he signed his statement to the police, (2) did he shoot the victim, (3) what did the detectives tell him about signing his statement, and (4) did he make a telephone call to Karen Atkins in June, 2012. Defense counsel did not ask Vance any further questions, despite the trial court's advising him to make a record of any questions he wanted to ask. Because Vance invoked his fifth amendment privilege in response to every question asked, the trial court ruled that Vance could not be called to testify merely to invoke his fifth amendment privilege against self-incrimination.

3

In his prior statement to the police, Oliphant stated that Vance and the defendant had come to his house on the night of the murder. Vance informed Oliphant that he had killed the victim and that the defendant had been with him when the murder occurred. Vance and the defendant told Oliphant that they had gone out looking to rob someone but that, when they tried to rob the victim, he fought back and ran away, after which Vance chased him and shot him in the back. Oliphant stated that he previously had seen Vance with a .357 gun and that Vance had told him he had used that gun

to shoot the victim. Oliphant also stated that he knew that the defendant had a .38 revolver.

At the defendant's trial, on direct examination in the state's case-in-chief, Oliphant testified that, on the night of the murder, the defendant, Vance, and Bugg came to his house. While Vance and Oliphant were alone in the bathroom, Vance told Oliphant that he had killed the victim and wanted to kill the defendant and Bugg to eliminate all witnesses. Soon after the conversation in the bathroom, Vance, Bugg, and the defendant left the house together. At a later date, Vance told Oliphant more details, including that he had shot at the victim approximately five times. Oliphant testified that, a couple of days after the murder, he also questioned the defendant about the murder but that the defendant did not want to talk. Oliphant testified that, subsequently, while he and Bugg were riding in a vehicle, Bugg told him that, on the night of the murder, they had been riding around, drinking and smoking marijuana when Vance got out of the vehicle and tried to rob the victim. The victim attempted to fight off Vance, who then shot the victim and got back into the vehicle. Oliphant further testified that he previously had seen Vance with a .357 gun but never had seen the defendant with a gun.

After the state's case-in-chief, Oliphant was called as a defense witness. Prior to the start of Oliphant's testimony, his counsel informed the trial court that Oliphant would not testify, "[b]ased on the representation that immunity will not be extended to [his] being called as a defense witness." The court then ordered that defense counsel make an offer of proof outside the presence of the jury.

On direct examination during the offer of proof, Oliphant answered two questions, stating (1) that he had been arrested for drug possession in 2011, and (2) that he did not know anyone named Jamel Waver but

that he previously had been arrested with a man named Jamel, whose surname he did not know. Oliphant, however, invoked his fifth amendment privilege against self-incrimination in response to two other questions: (1) whether he was beaten while in police custody, and (2) whether he previously testified during the state's case-in-chief that he felt guilty about Vance. Defense counsel did not ask any other questions, despite the trial court's warning that there needed to be a complete record.

On cross-examination, the state asked three questions regarding Oliphant's relationship with Jamel, including whether Oliphant possessed narcotics when they were arrested together in 2011, but Oliphant invoked his fifth amendment right in response to all three questions.[13] The state argued that, because Oliphant had invoked his fifth amendment right in response to all questions posed by the state on cross-examination, his testimony on direct examination would have to be stricken, and, thus, he could not be called to testify before the jury. The court agreed, citing *State* v. *Person*, 215 Conn. 653, 577 A.2d 1036 (1990).

B

We now turn to the defendant's claim. He contends that his rights to due process and compulsory process were violated when the state improperly revoked the immunity it had granted to Bugg, Vance, and Oliphant under § 54-47a. "[A] defendant has a right under the compulsory process and due process clauses to present [his] version of the facts as well as the prosecution's to the jury so [that] it may decide where the truth lies. . . . The compulsory process clause of the sixth amendment generally affords an accused the right to call witnesses whose testimony is material and favorable to his defense . . . ." (Citations omitted; internal

[13] The defendant does not argue that he was harmed by Oliphant's invocation of his fifth amendment right in response to questions by the state on cross-examination during the defense case-in-chief.

quotation marks omitted.) *State* v. *Holmes*, 257 Conn. 248, 253, 777 A.2d 627 (2001), cert. denied, 535 U.S. 939, 122 S. Ct. 1321, 152 L. Ed. 2d 229 (2002). "The issue of whether a defendant's rights to due process and compulsory process require that a defense witness be granted immunity is a question of law and, thus, is subject to de novo review." Id., 252; see also *State* v. *Kirby*, 280 Conn. 361, 403, 908 A.2d 506 (2006) (same). The defendant's claim is premised on an alleged violation of § 54-47a.[14] He argues that, once the state granted the three witnesses immunity under § 54-47a, the statute provided them with immunity during both the state's case-in-chief and the defense case-in-chief.[15] Even if we assume, without deciding, that, once the state granted these witnesses immunity under § 54-47a,[16] this immunity extended throughout the entire trial and could not

[14] Section 54-47a (a) permits a prosecutor to apply to the court for an order directing a witness, who has invoked his fifth amendment privilege against self-incrimination, to testify if the prosecutor determines that the testimony of the witness "in any criminal proceeding involving . . . felonious crimes of violence . . . or any other class A, B or C felony . . . [is necessary to obtain] sufficient information as to whether a crime has been committed or the identity of the person or persons who may have committed a crime . . . [and] is necessary to the public interest . . . ."

Section 54-47a (b), however, prohibits the witness from being "prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled to testify or produce evidence, and no testimony or evidence so compelled, and no evidence discovered as a result of or otherwise derived from testimony or evidence so compelled, may be used as evidence against him in any proceeding, except that no witness shall be immune from prosecution for perjury or contempt committed while giving such testimony or producing such evidence."

[15] Contrary to the state's argument, the defendant does not contend that the witnesses were entitled to additional immunity for subject matter not covered by the preexisting immunity. For this reason, we do not need to determine whether the defendant had a constitutional or statutory right to have these witnesses granted *additional* immunity.

[16] Even if we assume that immunity extends throughout the entire trial, this in no way means that the statute permits an immunized witness to testify falsely; the statute specifically prohibits the state from granting immunity for perjury a witness commits while giving testimony under a grant of immunity. See General Statutes § 54-47a (b); see also *State* v. *Giraud*, 258 Conn. 631, 634, 783 A.2d 1019 (2001) (immunity is not "a license to lie" [internal quotation marks omitted]). The defendant does not argue otherwise.

be revoked during the defense case-in-chief, and that the state's failure to extend the immunity violated § 54-47a,[17] we determine that this violation was not constitutional in nature.

The defendant argues that this alleged error is of constitutional magnitude and that, by mischaracterizing

[17] We note that, although the defendant argues before this court that the trial court failed to rule on the issue of whether the statute provided the witnesses with immunity throughout the entirety of the trial, the defendant never requested that the trial court decide this issue. Although the defendant argued at trial that the state's actions violated his rights to present a defense and to due process because the state was unfairly depriving him of witness testimony by scaring the witnesses from the witness stand, he did not argue that the state violated the statute. Defense counsel even admitted that whether immunity was granted was solely in the hands of the state and not within the power of the court. Defense counsel did not take issue with the state's argument that, under the statute, immunity extended only to the witnesses' testimony during the state's case. When the trial court inquired what defense counsel was seeking from the court on this issue, defense counsel responded that he did not think the court could do anything about whether the witnesses' immunity extended to the defense case-in-chief but requested that the jury be instructed that the state had revoked immunity, which the trial court denied. Although the trial court stated that it was unclear whether immunity extended to the defense case-in-chief, it did not fail to decide this issue because the defendant never sought a ruling on this issue.

Because the defendant did not raise a statutory claim at trial that the state improperly applied § 54-47a by revoking immunity, to the extent that the defendant's claim is not constitutional in nature, we do not review his statutory claim for harmless error, even if we assume that the state's actions violated § 54-47a. See *Crawford* v. *Commissioner of Correction*, 294 Conn. 165, 203, 982 A.2d 620 (2009) ("we will not review a claim unless it was distinctly raised at trial"); *Eubanks* v. *Commissioner of Correction*, 329 Conn. 584, 597, 188 A.3d 702 (2018) (same).

Despite the defendant's failure to raise this statutory claim at trial, to the extent that his constitutional claim relies on a violation of § 54-47a, we do not find it unpreserved. At trial, the defendant claimed that the state's actions regarding immunity violated his constitutional rights. The fact that the defendant now argues that the state's actions likewise violated § 54-47a does not make his constitutional claim unpreserved, nor does the state so argue. The defendant's argument on appeal—that the state's actions violated his constitutional rights to due process and to present a defense because the state employed tactical gamesmanship to scare the witnesses from the witness stand and, thus, unfairly deprived him of their testimony—is the same as his argument before the trial court, regardless of the reference to § 54-47a. See, e.g., *Crawford* v. *Commissioner of Correction*, supra, 294 Conn. 203 ("[w]e may . . . review legal arguments that differ from those raised before the trial court if they are subsumed within or intertwined with arguments related to the legal claim raised at trial").

the state's actions as declining to grant additional immunity rather than as revoking or failing to extend immunity, the Appellate Court did not properly address his constitutional claim. Specifically, the defendant argues that, by mischaracterizing the actions of the state, the Appellate Court never addressed (1) his allegation that the state acted with the intent to deprive him of the witnesses' testimony by revoking immunity in violation of § 54-47a, and (2) the impact that the revocation, coupled with the trial court's warnings, had on the witnesses and their decisions to invoke their fifth amendment rights against self-incrimination.

1

First, the defendant contends that the Appellate Court did not address his argument that due process and compulsory process under the federal constitution required that immunity be extended to the defense case-in-chief because the state intentionally prevented the witnesses from testifying in the defense case-in-chief. Even if we assume that the state's actions violated § 54-47a, this court has explained that only under "certain compelling circumstances" have some federal courts determined that "the rights to due process and compulsory process under the federal constitution require the granting of immunity to a defense witness." *State* v. *Holmes*, supra, 257 Conn. 254; accord *State* v. *Kirby*, supra, 280 Conn. 403–404. Specifically, "[t]he federal [c]ircuit [c]ourts . . . have developed two theories pursuant to which the due process and compulsory process clauses entitle defense witnesses to a grant of immunity. They are the effective defense theory, and the prosecutorial misconduct theory. . . . Because such circumstances [have not been present in prior cases before this court], however, we [have not had to] decide whether either theory is a correct application of the due process or compulsory process clause." (Internal quotation marks omitted.) *State* v. *Kirby*,

supra, 404; see *State* v. *Giraud*, 258 Conn. 631, 636–37, 783 A.2d 1019 (2001) (applying this framework when state granted prosecution witness immunity during hearing in probable cause but refused to extend immunity to defendant's case-in-chief when same witness was called as defense witness during trial).

The defendant in this case argues that only the prosecutorial misconduct theory applies.[18] "The prosecutorial misconduct theory of immunity is based on the notion that the due process clause [constrains] the prosecutor to a certain extent in [the] decision to grant or not to grant immunity. . . . Under this theory, however, the constraint imposed by the due process clause is operative only when the prosecution engages in certain types of misconduct, which include forcing the witness to invoke the fifth amendment or engaging in discriminatory grants of immunity to gain a tactical advantage, and the testimony must be material, exculpa-

[18] This framework has been used predominantly for evaluating whether the state's refusal to grant immunity to a defense witness, who never has been granted immunity, violated the defendant's constitutional rights. See *State* v. *Kirby*, supra, 280 Conn. 402–404. It also has been applied by this court to determine whether the state violated a defendant's constitutional rights when it granted a witness immunity at one stage of the proceedings (the hearing in probable cause) but declined to extend that immunity to the same witness when called as a defense witness during trial. *State* v. *Giraud*, supra, 258 Conn. 635–37. The parties do not dispute that this framework applies under the procedural posture and facts of this case; in fact, the defendant relies on it in support of his constitutional claim. Although we have been unable to identify any federal cases in which this framework has been applied when immunity has been revoked, rather than when the state has declined to grant immunity, this framework appears to be equally applicable to the constitutional analysis in the present case because it considers whether the state engaged in a discriminatory grant of immunity, which is how the defendant in the present case categorizes the state's actions—discriminatorily granting immunity for the state's case but revoking that immunity during the defendant's case to gain a tactical advantage.

Additionally, we note that, although the nomenclature of the prosecutorial misconduct theory is similar to a claim for prosecutorial impropriety, these are two separate and distinct claims, and the defendant in the present case does not raise a prosecutorial impropriety claim.

tory and not cumulative, and the defendant must have no other source to get the evidence." (Internal quotation marks omitted.) *State* v. *Kirby*, supra, 280 Conn. 404. As in *Kirby*, we need not decide whether the prosecutorial misconduct theory is valid, because, even if we did, the defendant has failed to establish that he has satisfied the requirements of this theory in this case.

We have described the requirements of this theory as "a very difficult burden for a defendant to meet." *State* v. *Giraud*, supra, 258 Conn. 637. Specifically, the defendant has the burden of establishing that (1) the prosecution engaged in misconduct, (2) the testimony was material, exculpatory, and not cumulative, and (3) there was no other source for securing the evidence. In the present case, the defendant did not request that the trial court make a finding regarding (a) whether the state engaged in misconduct, or (b) the state's intent in revoking immunity. From the record, it appears that the state's actions were based on its interpretation of the statute, not an intent to deprive the defendant of witness testimony. Nevertheless, there is at least the appearance of unfairness in the state's actions, especially in light of the fact that a defendant has the right to recall prosecution witnesses in his or her own case-in-chief to inquire into matters beyond the scope of the state's direct examination. See *State* v. *Caracoglia*, 134 Conn. App. 175, 192, 38 A.3d 226 (2012) ("[T]he scope of the state's direct examination inherently limits the scope of the defendant's cross-examination. It occasionally may be necessary for the defendant to go beyond the scope of direct examination to present information material to his defense. To do so he may need to recall a witness."). Specifically, to the extent that the defendant intended to ask these witnesses questions that involved subjects covered by the existing immunity but that went beyond the scope of the state's direct examination, it would appear unfair for the defen-

dant to be denied the opportunity to ask these questions because the state revoked immunity. We caution the state against engaging in what would appear to be an unfair and discriminatory grant of immunity. Even if we assume, however, that the state's actions were unfair and constituted misconduct by engaging in a discriminatory grant of immunity to gain a tactical advantage, the defendant has failed to establish that the testimony he was prevented from offering was not cumulative.

The defendant argues that the state's improper revocation of immunity, which caused the witnesses to improperly invoke their fifth amendment right against self-incrimination, deprived him of exculpatory, material, and noncumulative testimony. Specifically, he argues that the testimony of Bugg, Vance, and Oliphant during the defense case would have provided additional details about the defendant's and the witnesses' roles in the attempted robbery and murder, and would have rehabilitated the witnesses' and the defendant's credibility. We disagree.

a

The defendant's argument is premised on his subsidiary argument that, if immunity had not been revoked, the witnesses would not have been able to validly invoke their fifth amendment rights against self-incrimination. Thus, to determine whether the testimony at issue was exculpatory, material, and noncumulative, we first must determine whether the witnesses could have validly invoked their fifth amendment rights, even if immunity had not been revoked. We are guided by the following legal principles: "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. . . . In appraising a

fifth amendment claim by a witness, a judge must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." (Citations omitted; internal quotation marks omitted.) *Martin* v. *Flanagan*, 259 Conn. 487, 495–96, 789 A.2d 979 (2002).

When a witness' invocation of the fifth amendment privilege against self-incrimination conflicts with a defendant's right to present a defense, the defendant's right must "bow to accommodate other legitimate interests in the criminal trial process." (Internal quotation marks omitted.) *Rock* v. *Arkansas*, 483 U.S. 44, 55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). However, a witness' testimony is not privileged under the fifth amendment right against self-incrimination if the testimony is protected by a grant of immunity. See *State* v. *Roma*, 199 Conn. 110, 115, 505 A.2d 717 (1986); id., 115–16 (holding that witness validly invoked fifth amendment right when questioned about subject matter that was outside scope of immunity and outside scope of prior testimony). Additionally, once a witness voluntarily has testified about a subject, he may not later invoke the privilege against self-incrimination when questioned about additional details involving that subject matter. See id., 115 ("[w]here the witness . . . has already testified, on direct examination, to the incriminating matters sought to be explored on cross, he may be found to have waived his right not to disclose further the relevant details necessary to test the truth or accuracy of what he has already revealed").

With regard to the testimony of Bugg, Vance, and Oliphant, even if we assume that the state violated § 54-47a by revoking immunity and that immunity should

have extended to the defense case-in-chief, the three witnesses validly invoked their fifth amendment rights in response to some, though not all, of the questions posed on direct examination during the defendant's case. Bugg answered many of the questions asked by defense counsel on direct examination during the defense case-in-chief. After testifying that he did not have a good relationship with Foote at the time of the murder because Foote had stolen from him, Bugg invoked his fifth amendment right in response to a question about what Foote had stolen from him. Bugg also invoked his fifth amendment right in response to questions about precisely where the getaway vehicle he was driving was located at the time the shooting occurred.[19]

As to the question about what Foote stole from Bugg, Bugg and his counsel believed that whatever Foote stole could possibly subject Bugg to criminal charges. Even if we assume that what was stolen involved some form of contraband, Bugg's preexisting immunity, which covered only drug activity on the day of the murder,[20] would

[19] The defendant also argues that Bugg refused to respond to questions about a telephone conversation with his sister involving "kitty." Our review of the record, however, shows that Bugg did respond to defense counsel's inquiries about that subject during direct examination in the defense case. See also footnote 10 of this opinion. The defendant has not identified any questions that he was unable to ask or any new information that he was unable to obtain regarding this subject matter.

[20] The immunity that the state had granted to Bugg was limited to drug activity that he was engaged in on the day of the murder. See part I A of this opinion. Although the state indicated that it did not intend to prosecute Bugg for making a false statement at the hearing in probable cause, no immunity was officially granted. See id.; see also *State* v. *Williams*, 200 Conn. 310, 319, 511 A.2d 1000 (1986) ("the right to one's privilege against prosecution that could result from the testimony sought does not depend upon the likelihood of prosecution but upon the possibility of prosecution"); *Murphy* v. *Nykaza*, Superior Court, judicial district of Fairfield, Docket No. 320696 (May 17, 1995) (14 Conn. L. Rptr. 289, 290) ("a prosecuting attorney's indication in a particular case that he will not prosecute . . . [is] not sufficient to defeat a claim of privilege" [internal quotation marks omitted]).

not have extended to his response to this question, even if the immunity had not been revoked. Thus, Bugg validly invoked his fifth amendment privilege in response to this question, regardless of the revocation of immunity.

As to the questions regarding the location of the getaway vehicle, to the extent that the location of the vehicle might implicate Bugg in drug activity on the day of the murder—as Bugg was the getaway driver in what he claimed began as a narcotics deal—under the broad standard that applies, the grant of immunity covered these questions. See *Martin* v. *Flanagan*, supra, 259 Conn. 495 (invocation of fifth amendment right is valid if there *might* be danger of injurious disclosure). Therefore, if immunity had not been revoked, Bugg's invocation of his fifth amendment privilege in response to these questions would have been invalid.

Vance, who was granted immunity from prosecution only for making a false statement to the police and during his plea proceedings, invoked his fifth amendment right against self-incrimination during the defense case-in-chief as to the following questions: (1) did he shoot the victim, (2) what promises did the police officers make to him at the time he signed his statement, (3) what did the detectives tell him about signing the statement, and (4) did he make a telephone call to Atkins in June, 2012?

The grant of immunity would have covered Vance's response to the first question if his response established that he lied in his statement to the police or during the plea proceedings about shooting the victim. Thus, his invocation of his fifth amendment privilege in response to that question would have been invalid if immunity had not been revoked.

Additionally, the grant of immunity would have covered Vance's responses to the second and third ques-

tions if they had established that he was coerced into signing his statement to the police and that the information it contained was false, and, thus, that he had made a false statement. Therefore, his invocation of his fifth amendment privilege in response to those questions would have been invalid if immunity had not been revoked.

Vance's response to the fourth question would have been outside the scope of the immunity he was granted because it did not involve his prior statements, which did not mention Atkins, and, thus, the revocation of immunity had no effect on his invocation of his fifth amendment privilege as to this question. Additionally, Vance never testified about a telephone call to Atkins during the state's case and, thus, did not waive his fifth amendment right as to that question. Moreover, the record is void of information regarding Atkins, for example, who she is and the importance of this telephone call, and, thus, it is unclear how Vance's response to this question would have tended to incriminate him. Because it is the defendant's burden to establish harm; see, e.g., *State* v. *Bouknight*, 323 Conn. 620, 626–27, 149 A.3d 975 (2016); we cannot conclude that Vance would have invalidly invoked his fifth amendment right if immunity had not been revoked.

Oliphant, who was granted immunity from prosecution for filing a false statement and hindering prosecution on the basis of his statement to the police, invoked his fifth amendment right when he was examined[21] by the defendant in his case-in-chief in response to questions about (1) whether he had been beaten while in police custody and (2) whether he previously had testi-

[21] The defendant does not argue that he was harmed by Oliphant's invocation of his fifth amendment right in response to questions by the state during cross-examination in the defense case about a man named Jamel, with whom the defendant was arrested and who testified about hearing him being beaten by detectives while in police custody.

fied in the state's case that he felt guilty about Vance.[22] The grant of immunity would have covered Oliphant's response to the first question if it established that he was coerced into making and signing a false statement to the police and, thus, had made a false statement. Therefore, the invocation of his fifth amendment privilege in response to that question would have been invalid if immunity had not been revoked. Similarly, the grant of immunity would have covered Oliphant's response to the second question if it established that he felt guilty because he lied about what occurred on the night of the murder and, thus, had made a false statement in his statement to the police. Therefore, his invocation of his fifth amendment privilege in response to that question would have been invalid if immunity had not been revoked.

b

To the extent that these witnesses validly invoked their fifth amendment privilege, even if immunity had not been revoked, the defendant has failed to establish that the revocation of immunity violated his constitutional rights under the prosecutorial misconduct theory because the witnesses would not have answered these questions anyway, and, thus, their testimony would not have been exculpatory. To the extent the witnesses could have invalidly invoked their fifth amendment right if the immunity had not been revoked, however, we must determine whether the invalid invocations

[22] Our review of the record does not show that Oliphant testified that he felt guilty about Vance. Oliphant testified that, when Vance had been living in North Carolina, he called Oliphant and said he was staying in an abandoned house, and so Oliphant "felt bad" for him and invited Vance to stay with him in Connecticut. Oliphant, however, did testify on direct examination in the state's case-in-chief that he felt "a lot of guilt" about this case. On cross-examination, defense counsel inquired into this subject, in response to which Oliphant testified that he felt guilty for lying and incriminating the defendant, his best friend, by signing a false statement, which he signed only because the detectives beat and coerced him.

deprived the defendant of material, exculpatory, and noncumulative testimony. We determine that they did not because the defendant has failed to establish that the testimony would not have been cumulative.

To summarize, Bugg invalidly invoked his fifth amendment right in regard to questions about the location of the getaway vehicle that he operated at the time of the shooting. Vance invalidly invoked his fifth amendment right in regard to questions about whether he shot the victim, what promises the detectives made to him when he signed his statement to the police, and what the detectives told him about signing the statement. Oliphant invalidly invoked his fifth amendment right in regard to questions about whether he was beaten while in police custody and whether he previously testified in the state's case about feeling guilty about Vance. The defendant argues that the proposed inquiries addressed noncumulative, exculpatory, and material information about the events at issue and would have rehabilitated his credibility and that of the witnesses.[23] Specifically, he argues that where Bugg moved and parked the getaway vehicle would have helped establish both what Bugg witnessed and whether any of the other witnesses, such as, for example, the

[23] The defendant argues that the harm caused by the exclusion of this testimony was compounded by the state's reliance on the unavailable testimony in its summation to the jury. See *State* v. *Carter*, 228 Conn. 412, 428–29, 636 A.2d 821 (1994), cert. denied, 493 U.S. 1063, 110 S. Ct. 880, 107 L. Ed. 2d 963 (1990); id., 428 ("the harm to the defendant's claim of self-defense resulting from the exclusion of the victim's criminal record was compounded when the assistant state's attorney, in his rebuttal to the defendant's closing argument, commented" that there was no evidence that victim was bad person).

Although we agree that a defendant may be harmed by the improper exclusion of evidence if the prosecutor, in summation to the jury, relies on the significance of the missing evidence, this is not such a case. After having thoroughly reviewed the record, we determine that the state did not rely on the absence of the improperly excluded testimony during its summation.

victim's mother and brother,[24] were able to see the getaway vehicle. Additionally, the defendant argues that the location of the getaway vehicle would cast doubt on the credibility of Foote's testimony that Bugg had told him that he witnessed the shooting.[25]

Although we agree that this information would be material, we disagree that the defendant has established that it was not cumulative. During the state's case, both the defendant and the state questioned Bugg about the location of the getaway vehicle before, during, and after the shooting. Although Bugg's prior testimony, which mentioned the location and movements of the getaway vehicle, was not read into the record for substantive purposes until after Bugg testified in the state's case, the state questioned Bugg about his prior testimony, going through it sentence by sentence. Then, on cross-examination, defense counsel both had the opportunity to, and did, in fact question Bugg about his prior testimony, including the location of the getaway vehicle and his motives for providing the prior testimony. The defendant has failed to identify any testimony Bugg would have provided on this subject that he did not already provide in the state's case[26] and therefore has

[24] Both the victim's mother, Nelly Robinson, and brother, George C. Frazier, testified at the criminal trial that they saw a white getaway vehicle from the front door of their apartment, which conflicted with Bugg's testimony about parking the vehicle behind and between two of the apartment buildings. See part II A of this opinion.

[25] Foote testified at trial that Bugg informed him that he had witnessed the shooting. The defendant argues that, because Foote testified after Bugg, he should have been permitted to question Bugg about whether he witnessed the shooting. The defendant, however, never asked Bugg during direct examination in the defense case-in-chief whether he witnessed the shooting, and, thus, Bugg never invoked his fifth amendment privilege in response to this question. In the absence of such a record, we cannot say that the defendant was harmed.

[26] The defendant argues that the Appellate Court speculated that the witnesses' testimony during the defense case would have been cumulative but that there is no way to know or for him to have created a sufficient record because the state prevented him from obtaining answers to these questions. The case cited by the defendant, however, is distinguishable because it

provided us with no reason to believe that any further testimony by Bugg on this subject would not have been cumulative.

The defendant also argues that Vance would have provided material testimony because identifying who shot the victim and from where the gunshots originated were central issues at trial. Additionally, he argues that asking Vance about what the detectives said to him and promised him in regard to his statement to the police was crucial to rehabilitating his credibility by establishing that he had been coerced into signing the statement. Again, we agree that this information was material, but we also determine that the defendant has failed to establish that it was not cumulative. During the state's case, both parties questioned Vance at length about his role in the murder. In all of his different statements and varying testimony, Vance admitted that he fired his weapon on the night of the murder at the scene of the crime and may have (accidentally or otherwise) shot the victim. The defendant, who has the burden of establishing that he has satisfied all three prongs of the prosecutorial misconduct theory, has provided no record to establish that, had Vance once again been questioned

involved an error of constitutional magnitude, thereby requiring the state to prove that the error was harmless beyond a reasonable doubt, which it could not do in the absence of a sufficient record. See *State* v. *D'Ambrosio*, 212 Conn. 50, 61, 561 A.2d 422 (1989) ("[o]n the present record, we cannot conclude that the court's error, which implicates the defendant's constitutional right to impeach and discredit state witnesses, was harmless beyond a reasonable doubt"), overruled in part on other grounds by *State* v. *Bruno*, 236 Conn. 514, 523–24 n.11, 673 A.2d 1117 (1996).

In the present case, under the prosecutorial misconduct theory, the burden is on the defendant to provide a sufficient record and to establish that the testimony would not have been cumulative. The trial court advised defense counsel to ask any questions he had and to create an adequate record. In light of the fact that the witnesses invalidly invoked their fifth amendment rights in response to questions that they already had answered in the state's case, there is no reason in the record to suspect that any additional testimony would have been any different from their prior testimony.

about who shot the victim, his testimony would have provided any new information.

Similarly, both parties questioned Vance at length about his allegations of police coercion. Defense counsel spent significant time on cross-examination in the state's case attempting to rehabilitate Vance's credibility by establishing that the detectives coerced him into signing the statement that he gave to them. Although it is true that Vance's prior testimony at his plea proceedings was not read into the record for substantive purposes until after his testimony in the state's case concluded, Vance had been questioned by both parties about his prior testimony during the state's case, and, thus, defense counsel already had attempted to rehabilitate Vance's credibility in regard to his prior testimony. Moreover, the defendant has failed to identify any new and nonprivileged testimony that Vance would have provided on these subjects that he had not already provided in the state's case. As a result, the defendant has failed to establish that any further testimony by Vance on these subject matters would not have been cumulative.[27]

The defendant similarly argues that Oliphant's testimony would have been material and exculpatory because whether Oliphant was beaten while in police custody and whether he felt guilty about Vance were matters that pertained to Oliphant's credibility. The record establishes, however, that Oliphant testified about these subject matters in the state's case. See foot-

[27] Because we have determined that, even if the state improperly revoked immunity, and the witnesses subsequently invalidly invoked their fifth amendment rights, the defendant has failed to establish that this error was constitutional under the prosecutorial misconduct theory on the ground that he has failed to establish that the testimony would not have been cumulative, we need not address the state's alternative argument that any error in the revocation of immunity as to Vance was harmless because the statute of limitations for the crime of making a false statement had expired. See *State* v. *Giraud*, supra, 258 Conn. 638.

notes 7 and 22 of this opinion. Defense counsel spent considerable time on cross-examination attempting to rehabilitate Oliphant's credibility by establishing that he had signed the statement he made to the police after they had beaten and coerced him and that he felt guilty for having lied about the defendant's role in the murder. The defendant has not identified any new testimony that Oliphant would have provided on these subjects. Thus, the defendant has failed to establish that Oliphant's testimony would not have been cumulative.

The defendant further argues, generally, that, because other witnesses testified on behalf of the state after these witnesses and because Vance's prior testimony in his plea proceedings and Bugg's prior testimony at the hearing in probable cause were read into the record after their testimony had concluded, he should have had an opportunity to confront these witnesses about these subsequent pieces of evidence, which would not have been cumulative. The defendant argues that by not having this opportunity, he was restricted to remain within the parameters of the state's case and denied the right to compose his defense strategy as he thought best. He argues that he had compelling tactical reasons to wait to ask certain questions until the defense case, after all of the state's witnesses had testified.

We agree that, in general, a defendant is not limited to the scope of the state's case and may recall a state's witness as a defense witness to inquire into areas not previously discussed in the state's case.[28] See *State* v. *Caracoglia*, supra, 134 Conn. App. 192–93. However, with the exception of the question about what Foote stole from Bugg, to which Bugg had a valid claim of

[28] Both the trial court and the state correctly stated that the defendant had the right to recall the state's witnesses during the defense case-in-chief and question them on new topic areas not raised during the state's case.

privilege, the defendant has failed to provide a record of what other evidence he wanted to confront the witnesses about that he did not already ask about in the state's case. Although Bugg's prior testimony from the hearing in probable cause and Vance's prior testimony from his plea proceedings were admitted for substantive purposes after those witnesses testified in the state's case, both parties questioned Bugg and Vance extensively during the state's case about the substance of that testimony and their motives for providing that testimony. Despite inquiries by the trial court, the Appellate Court, and this court, the defendant has been unable to articulate either what questions he would have asked that would have led to new and not privileged information or a strategic reason for delaying asking certain questions. Thus, the defendant has failed to establish either that his defense strategy was improperly curtailed or that he was prevented from inquiring into subject areas outside the scope of the state's case that would have led to new and not cumulative testimony.

Accordingly, because the defendant has failed to provide this court with a record establishing what new information these witnesses would have provided if the state had not revoked their immunity, he has failed to establish that the state's violation of § 54-47a, assuming that a violation did occur, violated his constitutional rights to due process and compulsory process under the prosecutorial misconduct theory of immunity.

2

With regard to the defendant's second argument in support of his constitutional claim, the defendant contends that, by failing to categorize the state's actions as revoking immunity, the Appellate Court improperly failed to consider whether the revocation of immunity, coupled with the trial court's warnings to the witnesses,

substantially interfered with his right to present a defense by intimidating the witnesses and driving them from the witness stand. Although we agree with the defendant that the Appellate Court did not address the impact the revocation of immunity, coupled with the trial court's warnings,[29] had on the witnesses and their decisions to invoke their fifth amendment rights, we do not agree that the impact was such that the defendant's rights to due process and to present a defense were violated.

Neither the trial court nor the prosecutor may intimidate a witness and drive him from the witness stand. See, e.g., *Webb* v. *Texas*, 409 U.S. 95, 98, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972) ("judge's threatening remarks . . . effectively drove that witness off the stand, and thus deprived the petitioner of due process"); *United States* v. *Williams*, 205 F.3d 23, 29 (2d Cir.) ("judicial or prosecutorial intimidation that dissuades a potential defense witness from testifying for the defense can, under certain circumstances, violate the defendant's right to present a defense"), cert. denied, 531 U.S. 885, 121 S. Ct. 203, 148 L. Ed. 2d 142 (2000). Nevertheless, "[t]he function of the court in a criminal trial is to conduct a fair and impartial proceeding. . . . When the rights of those other than the parties are implicated, [t]he trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. . . .

[29] We note that the defendant did not object to the court's admonitions to the witnesses. However, because the record is adequate for review and the defendant's claim is of constitutional magnitude, we review it 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) (modifying third condition of *Golding*); see *State* v. *Fred C.*, 167 Conn. App. 600, 609, 142 A.3d 1258 (reviewing under *Golding* unpreserved claim that trial court's perjury admonition to witness violated defendant's due process rights), cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016); see also *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014) (defendant was not required to affirmatively request review under *Golding*).

Accordingly, it is within the court's discretion to warn a witness about the possibility of incriminating himself. . . . The court, however, abuses its discretion if it actively interferes in the defendant's presentation of his defense, and thereby pressures a witness into remaining silent. . . . The dispositive question in each case is whether the government actor's interference with a [witness'] decision to testify was substantial." (Citations omitted; internal quotation marks omitted.) *State* v. *Tilus*, 157 Conn. App. 453, 475–76, 117 A.3d 920 (2015), appeal dismissed, 323 Conn. 784, 151 A.3d 382 (2016).

The present case is distinguishable from the cases cited by the defendant in which warnings issued by courts or prosecutors have been held to be coercive. In those cases, the government actor gratuitously and threateningly warned the witness about committing perjury, threatened to revoke a plea agreement, or made the witnesses physically unavailable. See, e.g., *Webb* v. *Texas*, supra, 409 U.S. 97 ("The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of perjury. . . . [And] the judge implied that he expected [the witness] to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury . . . ."); *United States* v. *Vavages*, 151 F.3d 1185, 1190–91 (9th Cir. 1998) (prosecutor substantially interfered with witness' decision whether to testify when warnings about committing perjury were intimidating and intended to stifle witness' testimony where prosecutor made "an unambiguous statement of his belief that [witness] would be lying if she testified in support of [defendant's] alibi" and threatened to withdraw witness' plea agreement in unrelated case if she testified in support of defendant's alibi [emphasis omitted]); *United States* v. *Morrison*, 535 F.2d 223, 225–26, 227 (3d Cir. 1976) (during meeting in his office on day before witness testified, prosecutor repeatedly warned witness about committing perjury, "which culminated in a highly intimidating personal

interview"); *United States* v. *Bell*, 506 F.2d 207, 222 (D.C. Cir. 1974) ("[g]overnment conditioned its acceptance of [witnesses' guilty] pleas upon their commitment to refrain from testifying [in defendant's] behalf"); *United States* v. *Tsutagawa*, 500 F.2d 420, 422, 423 (9th Cir. 1974) ("the government placed witnesses, who may have been favorable to the appellees, outside the power of our courts to require attendance" when it precluded appellees from interviewing them by releasing them and sending them back to Mexico because they were illegal aliens who were not subjects of grand jury investigation); see also *State* v. *Tilus*, supra, 157 Conn. App. 476 (courts have found interference when government actor either stepped into role of witness' advocate or specifically threatened witness).

In the present case, neither the trial court nor the prosecutor threatened the witnesses. The witnesses were not bombarded with multiple warnings, were not warned that testifying in favor of the defendant would lead to perjury charges, were not threatened with having their plea deals revoked, and were not made physically unavailable. Although "the court may not threaten a witness into remaining silent or effectively [drive] that witness off the stand"; (internal quotation marks omitted) *State* v. *Fred C.*, 167 Conn. App. 600, 613, 142 A.3d 1258, cert. denied, 323 Conn. 921, 150 A.3d 1150 (2016); a court may advise a witness who has testified inconsistently of the consequences of committing perjury, as long as the court does not suggest which version of the witness' testimony is correct. Id., 613–14. Here, the court cautioned the witnesses that the law was unsettled as to whether they had immunity[30] and that

[30] The defendant further argues that his rights to due process and to present a defense were violated by the trial court's failure to decide whether § 54-47a required the state to extend immunity throughout the trial proceedings. The defendant, however, never requested that the trial court determine whether the statute provided the witnesses immunity throughout the entire trial and not merely during the state's case-in-chief. See footnote 17 of this opinion.

they should follow the advice of counsel as to whether they should testify. The court did not threaten the witnesses in any way. Although the state did inform the witnesses that it was revoking immunity and that none of their testimony during the defense case would be covered by any immunity, the record does not reflect that it did so in a threatening manner. Rather, it informed the court and witnesses of how it interpreted the immunity statute. The state never threatened the witnesses that, in light of this revocation of immunity, it would prosecute the witnesses if they testified or if they testified in a manner unfavorable to the state's case. The state's actions might have been a factor in the witnesses' decisions to invoke their fifth amendment rights, but "[a] defendant's constitutional rights are implicated only where the prosecutor or trial judge employs *coercive or intimidating* language or tactics that *substantially interfere* with a defense witness' decision whether to testify." (Emphasis added.) *United States* v. *Vavages*, supra, 151 F.3d 1189. The state's informing the witnesses of what it believed to be the scope of the immunity statute was not so coercive or intimidating as to substantially interfere with the witnesses' decisions.

Moreover, Bugg, Vance, and Oliphant all were represented by counsel and had an opportunity to speak with their counsel regarding their decisions to invoke their fifth amendment rights. See *United States* v. *Serrano*, 406 F.3d 1208, 1216 (10th Cir.) ("potential for unconstitutional coercion by a government actor significantly diminishes . . . if a defendant's witness elects not to testify after consulting an independent attorney" [emphasis omitted]), cert. denied, 546 U.S. 913, 126 S. Ct. 277, 163 L. Ed. 2d 247 (2005); *State* v. *Tilus*, supra, 157 Conn. App. 477 (same).

Thus, the revocation of immunity, coupled with the trial court's warnings to the witnesses, did not drive these witnesses from the witness stand and, thus, did

not violate the defendant's rights to due process and to present a defense. Accordingly, even if we assume that the state violated § 54-47a by revoking the immunity it previously granted to Bugg, Vance, and Oliphant, this error was not constitutional in nature. Thus, the defendant has failed to establish that, by revoking this immunity, the state violated his constitutional rights.

II

The defendant next claims that, pursuant to this court's recent decision in *State* v. *Dickson*, supra, 322 Conn. 410, his right to due process was violated by the first time in-court identification[31] testimony of the victim's mother, Nelly Robinson, and brother, George C. Frazier. As to Robinson, the defendant argues that, because she did not previously inform anyone that she had witnessed the shooting or that she could describe the shooters, her description of the shooters constituted a first time in-court identification subject to *Dickson*. As to George Frazier, the defendant argues that, because he did not previously identify the defendant in an out-of-court, nonsuggestive identification procedure, his in-court identification violated *Dickson*. The defendant further argues that both identifications were not harmless beyond a reasonable doubt.

The state responds that *Dickson* does not apply because identity was not at issue in the present case. Additionally, the state contends that, as to Robinson, *Dickson* does not apply because her description of the shooters did not constitute an identification. As to George Frazier, the state argues that *Dickson* does not apply because his in-court identification of the defendant was unsolicited and unanticipated, and *Dickson* applies only in cases in which "the state intends to present a first time in-court identification . . . ." Id.,

[31] For purposes of this opinion, "first time in-court identification" refers to in-court identifications in cases in which the witness has not successfully identified the defendant in a prior out-of-court identification procedure.

445. Finally, the state argues that, to the extent that *Dickson* applies, the admission of the testimony was harmless because of the state's strong case, which the defendant's own testimony largely corroborated.

We agree with the state that, even if we assume that Robinson and George Frazier made in-court identifications, identity was not at issue as to the charges of attempted robbery, conspiracy to commit robbery, and felony murder, and, thus, the admission of the first time in-court identifications did not implicate the defendant's right to due process. However, we disagree that identity was not at issue in relation to the charge of criminal possession of a firearm. Nevertheless, we determine that any error was harmless beyond a reasonable doubt.

A

The following additional facts are necessary to our review of this claim. At trial, Robinson, the victim's mother, testified that, at the time of the incident, she was in her apartment on the second floor ironing clothing when she heard the victim yell and looked out the window to see him running and ducking as two men shot at him. She described the two shooters: "One was taller than the other, and one was stockier and shorter than the other one." She testified that the "short, stocky one" fired two gunshots at the victim and that "the other one" then fired two gunshots.[32] Robinson further testified that she ran downstairs to the front door,

[32] On cross-examination, defense counsel, using a photograph of Diamond Court, asked Robinson to use a pointer to show where on the photograph the victim and the shooters were located when she looked out her window and saw the shooting. In describing the events, Robinson testified that the shooters chased after the victim but then stopped running and started shooting. In describing where the shooters stopped, she testified: "This guy right here—the short, fat one—went up, shot him twice, pushed back. The other tall, skinny one went up, shot him twice . . . ."

The defendant does not argue on appeal that Robinson's use of the phrase, "[t]his guy right here," meant that she was specifically pointing to and identifying the defendant. Although the record is unclear, it is equally possi-

where her two other children were standing, with the door open. The victim was outside the door reaching toward her. She grabbed him and laid him on the ground. She looked around and saw the two shooters get into a white car that sped away. She testified that she told all of this to the police at the scene of the crime but admitted that, in her written statement to them, there is no reference to her having witnessed the shooting or having seen the shooters.[33]

Following Robinson's testimony, George Frazier—her son and the victim's brother—testified that, at the time of the incident, he was inside his family's apartment and heard yelling. He went to look out the downstairs window and saw the victim running and yelling for their mother. George Frazier testified that he went to open the front door and heard approximately five gunshots. He testified that, when he opened the front door, he saw the victim on the floor outside their apartment. He further testified that he heard gunshots coming from the direction of mailboxes on the premises and saw two shooters and a white, four door vehicle parked with three men inside. He testified that he did not previously inform the police that he saw two shooters and never identified the defendant as one of the shooters but recalled that the defendant was one of the two shooters "[b]ecause the man that stands in front of me, I recognize his face." He specified that he "saw [the defendant] with a gun" but "never told anybody

ble that Robinson's statement referred to where on the photograph she was pointing, as in, "this guy, the guy standing right here where I am pointing." The record does not reflect that she identified the defendant, and neither party has argued that she did.

[33] Officer Michael Modeen, who responded to the scene of the crime, testified that Robinson did not inform him that she had witnessed the shooting or seen the shooters but, rather, that she heard several loud bangs and then opened the front door to find the victim fall to his back and see a white car speed away with two or three males inside. Modeen, however, did testify that Robinson was overcome with emotion and that she had difficulty conveying this information.

that until now." He testified that the defendant was with a "short, light-skinned" person.

George Frazier was subject to extensive cross-examination, during which he testified that he had suffered from a brain tumor a few months after the victim's murder and had difficulty recalling information. On cross-examination, he testified inconsistently about what he recalled, when and where he heard the gunshots, and what he had told the prosecutor. After his testimony concluded, the prosecutor went on the record, outside the presence of the jury, to state that George Frazier had testified falsely as to when he had met with her and that his testimony was unanticipated, specifically, his testimony about witnessing the shooting and his identification of the defendant as one of the shooters. Defense counsel said nothing on the matter.

B

"[W]hether [a party] was deprived of his due process rights is a question of law, to which we grant plenary review . . . ." (Internal quotation marks omitted.) *State* v. *Dickson*, supra, 322 Conn. 423. Whether the admission of eyewitness identification testimony violated due process is premised on whether the identification procedure was unnecessarily suggestive: "In the absence of unduly suggestive procedures conducted by state actors, the potential unreliability of eyewitness identification testimony ordinarily goes to the weight of the evidence, not its admissibility, and is a question for the jury. . . . Principles of due process require exclusion of unreliable identification evidence that is not the result of an unnecessarily suggestive procedure [o]nly when [the] evidence is so extremely unfair that its admission violates fundamental conceptions of justice . . . . A different standard applies when the defendant contends that an in-court identification followed an unduly suggestive pretrial identification procedure that was conducted by a state actor. In such cases, both

the initial identification and the in-court identification may be excluded if the improper procedure created a substantial likelihood of misidentification." (Citations omitted; internal quotation marks omitted.) Id., 419–20.

"In determining whether identification procedures violate a defendant's due process rights, the required inquiry is made on an ad hoc basis and is two-pronged: first, it must be determined whether the identification procedure was unnecessarily suggestive; and second, if it is found to have been so, it must be determined whether the identification was nevertheless reliable based on examination of the totality of the circumstances." (Internal quotation marks omitted.) Id., 420–21.

In *Dickson*, this court was faced with applying these principles to a first time in-court identification. We recognized the suggestive nature of first time in-court identifications: "[W]e are hard-pressed to imagine how there could be a more suggestive identification procedure than placing a witness on the stand in open court, confronting the witness with the person whom the state has accused of committing [a] crime, and then asking the witness if he can identify the person who committed the crime. . . . If this procedure is not suggestive, then no procedure is suggestive." (Emphasis omitted; footnote omitted.) Id., 423–24.

To avoid this kind of suggestive procedure, we announced the following procedural rule: "[I]n cases in which identity is an issue, in-court identifications that are not preceded by a successful identification in a nonsuggestive identification procedure implicate due process principles and, therefore, must be prescreened by the trial court." (Footnote omitted.) Id., 415. We then established the following prescreening procedure: "In cases in which there has been no pretrial identification . . . and the state intends to present a first time in-court identification, the state must first request permission

to do so from the trial court. . . . The trial court may grant such permission only if it determines that there is no factual dispute as to the identity of the perpetrator, or the ability of the particular eyewitness to identify the defendant is not at issue." (Citation omitted.) Id., 445–46. Permission is proper in these kinds of cases because, "when identity is not an issue," a defendant's due process rights are not implicated. Id., 433.

We held that this procedural rule applied retroactively to all cases pending on review. Id., 450–51. Because, however, it was too late to prescreen first time in-court identifications that already had occurred in pending cases, we provided a road map for how pending appeals should be handled: "[I]n pending appeals involving this issue, the suggestive in-court identification has already occurred. Accordingly, if the reviewing court concludes that the admission of the identification was harmful, the only remedy that can be provided is a remand to the trial court for the purpose of evaluating the reliability and the admissibility of the in-court identification under the totality of the circumstances. . . . If the trial court concludes that the identification was sufficiently reliable, the trial court may reinstate the conviction, and no new trial would be required." (Citations omitted; emphasis omitted.) Id., 452. "Of course, if the record is adequate for review of the reliability and admissibility of the in-court identification, the reviewing court may make this determination." Id., 452 n.35.

Since *Dickson*, this court has not been faced with the retroactive application of *Dickson* to a claim involving a first time in-court identification that already has occurred. The Appellate Court, however, has addressed this issue. Specifically, in *State* v. *Swilling*, 180 Conn. App. 624, 646, 184 A.3d 773, cert. denied, 328 Conn. 937, 184 A.3d 268 (2018), the defendant, who had a romantic history with the victim, was convicted of kidnapping, home invasion, and assault prior to this court's decision

in *Dickson*. Id., 627–28, 648. The victim, who did not make an out-of-court nonsuggestive identification, identified the defendant for the first time at trial as her assailant. Id., 647–48. On appeal to the Appellate Court, the defendant in *Swilling* claimed that, pursuant to *Dickson*, the victim's first time in-court identification violated his right to due process because the victim did not first make an out-of-court nonsuggestive identification and because the trial court did not prescreen the victim's in-court identification. Id., 648–49. The Appellate Court disagreed. Following this court's road map in *Dickson* for addressing this issue in pending cases, the Appellate Court determined that, because "there was no factual dispute with respect to whether the victim had the ability to identify the defendant"; id., 648; and, thus, identity was not at issue, there was no constitutional violation, and, therefore, the trial court's failure to prescreen the first time in-court identification was not harmful. Id., 649–50. Because the Appellate Court found the lack of prescreening harmless, it properly did not go on to determine whether the identification was reliable under the totality of the circumstances.

We agree with the Appellate Court's application of *Dickson* in *Swilling*. Because prescreening was not required in pending cases in which the first time in-court identification already occurred, a reviewing court must determine whether the admission was harmful, which necessarily includes determining whether identity was at issue. See *State* v. *Dickson*, supra, 322 Conn. 452. Thus, for cases pending at the time the decision in *Dickson* was released, if identity was not at issue, the admission of a first time in-court identification does not implicate due process concerns and, thus, was not harmful.[34]

[34] The state argues that, when identity is not at issue, *Dickson* does not apply. We have classified the impact of the rule in *Dickson* a bit differently, however, but with the same result in this case. We have held that the procedural rule in *Dickson* applies to all first time in-court identifications. Under *Dickson*, prospectively, all first time in-court identifications must be

In the present case, the state argues that, under *Dickson*, the admission of the first time in-court identifications did not violate the defendant's rights to due process for three reasons: (1) Robinson did not make a first time in-court identification, (2) *Dickson* applies only when "the state intends to present a first time in-court identification," and (3) identity was not at issue. We address each in turn.

1

As an initial matter, we must determine whether Robinson and George Frazier made first time in-court identifications. It is clear that George Frazier identified the defendant, for the first time at trial, as one of the shooters. He testified that he never previously informed anyone that he witnessed the shooting or that the defendant was one of the shooters. It is less clear whether Robinson's testimony constitutes a first time in-court identification.

Robinson never testified at trial that the defendant was one of the two shooters. Nor did she testify that one of the victim's assailants looked like the defendant. Robinson did not mention the defendant in any way. She did, however, testify that she saw two shooters—one was tall and thin, the other was short and stocky. Although the defendant argues that this description matches the physical characteristics of the defendant and Vance, Robinson never testified to such a correlation. As such, it is not clear from the record that Robinson explicitly identified the defendant as one of the shooters. Rather, she provided a description of the suspects.

prescreened, with the trial court having discretion to permit the admission of these identifications in cases in which identity is not at issue. Similarly, in cases pending at the time of this court's decision in *Dickson*, the lack of prescreening is harmful only if identity was at issue. Thus, *Dickson* makes clear that first time in-court identifications implicate due process only if identity is at issue.

This court in *Dickson* emphasized that the new rule we announced therein did not apply to observations of the perpetrator, such as height, weight, sex, race, and age, so long as the prosecutor does not question the witness about whether the defendant resembles the perpetrator. *State* v. *Dickson*, supra, 322 Conn. 436–37, 447; cf. *State* v. *Bethea*, 187 Conn. App. 263, 278, 202 A.3d 429, cert. denied, 332 Conn. 904, 208 A.3d 1239 (2019); *State* v. *Torres*, 175 Conn. App. 138, 150, 167 A.3d 365, cert. denied, 327 Conn. 958, 172 A.3d 204 (2017).

Nevertheless, we noted in *Dickson* that a defendant's due process rights may be implicated by the admission of a witness' testimony as to their observations about a perpetrator if the witness "was unable to provide any of these details before the court proceeding . . . ." *State* v. *Dickson*, supra, 322 Conn. 437 n.19. However, because we were not presented with that problem in that case, we did not address it. See id.

The description that Robinson gave of the perpetrators was minimal and generic—a short, stocky man and a tall, thin man. Robinson did not testify as to race, age, clothing or facial descriptions. This court has not previously addressed whether the level of detail in a witness' description of a perpetrator plays a factor in whether the description constitutes an identification or implicates a defendant's due process rights. We, however, need not decide this issue because, even if we assume that the rule in *Dickson* applies to Robinson's observations about the perpetrators, the defendant suffered no harm. See part II C of this opinion.

2

Next we address the state's argument that *Dickson* does not apply in the present case because *Dickson* applies only when "the state intends to present a first time in-court identification . . . ." *State* v. *Dickson*, supra, 322 Conn. 445. It is true that the procedure we

set forth in *Dickson* did not contemplate cases in which the first time in-court identification was a surprise to both the state and the defendant. Although we recognize that the prosecutor in the present case committed no misconduct because the identifications were unsolicited and unanticipated and because this court had yet to announce the new rule created in *Dickson*, the fact that these identifications were unsolicited and unanticipated does not affect whether they violate the defendant's right to due process. All first time in-court identifications are subject to the rule in *Dickson*; see footnote 34 of this opinion; regardless of the prosecutor's intent.

3

Finally, the state argues that *Dickson* does not apply, or that there was no due process violation; see id.; because identity was not at issue. Specifically, the state argues that, because the defendant testified that he was present at the scene of the crime and because he did not have to be the shooter to be convicted of felony murder, the shooter's identity was not at issue. The defendant responds that identity was at issue because the identity of the shooter and whether there was more than one shooter were actively disputed at trial. In light of the defendant's testimony that he was present at the scene of the crime, we agree with the state that identity was not at issue as to most of the charges, which did not require the defendant to be the shooter in order to be found guilty but disagree that identity was not at issue with regard to the charge of criminal possession of a firearm.

The defendant was charged with and found guilty of felony murder, two counts of attempt to commit robbery in the first degree, conspiracy to commit robbery in the first degree, and criminal possession of a firearm. See footnote 1 of this opinion. Although the state's

general theory of the case was that the defendant and Vance attempted to rob the victim and then fired their guns at the victim, the state argued in summation to the jury that the defendant could be found guilty of attempted robbery even if he did not have or use a gun. The prosecutor stated that "it doesn't have to be that they both had guns; it has to be that either [the defendant] or [Vance] must have been armed." Similarly, in regard to the charge of felony murder, the prosecutor argued that the state "does not have to prove who shot and killed [the victim], just that either [Vance's or the defendant's] actions caused [the victim's] death."

Likewise, when instructing the jury as to the charge of felony murder, the trial court explained that, to find the defendant guilty, it had to find that "the defendant, acting alone or with one or more persons . . . committed or attempted to commit a robbery" and that "the defendant or another participant in the attempted robbery caused the death of [the victim] . . . ." As to the charge of attempted robbery under §§ 53a-49 (a) (2) and 53a-134 (a) (2), the trial court instructed the jury that, to find the defendant guilty, it had to find that "the defendant or another participant in the crime [was] armed with a deadly weapon.'' As to the charge of attempted robbery under §§ 53a-49 (a) (2) and 53a-134 (a) (4), the trial court instructed the jury that, to find the defendant guilty, it had to find that "the defendant or another participant in the crime [displayed] or [threatened] the use of what he [represented] by word or conduct to be a pistol, revolver, rifle, shotgun, machine gun, or other firearm." As to the charge of conspiracy to commit robbery, the trial court did not mention possession of a firearm in its instruction. The only charge on which the court instructed the jury that it had to find that the defendant possessed a firearm before it could find him guilty was the charge of criminal possession of a firearm in violation of § 53a-217 (a) (1).

The trial court's instructions were consistent with the law of this state. See *State* v. *Davis*, 255 Conn. 782, 791, 772 A.2d 559 (2001) ("treating accessories and principals alike" for purposes of § 53a-134 so that defendant does not have to possess, use, or threaten use of deadly weapon to be found guilty of robbery, as long as another participant in robbery possessed, used, or threatened use of deadly weapon).

As the state's argument and jury instructions make clear, identity was not at issue as to the charges of felony murder, both counts of attempted robbery, and conspiracy to commit robbery. As to those charges, although the identity of the shooter was disputed, the defendant did not need to possess or use a firearm to be found guilty. It was sufficient for the state to establish that the defendant participated in the attempted robbery and the conspiracy to commit robbery while another participant—Vance—possessed, used, or threatened the use of a firearm. The defendant placed himself at the crime scene at the time the crime occurred. He admitted at trial that he was standing near Vance when Vance fired his gun at the victim. In light of the defendant's testimony, the issues that remained as to these four charges concerned whether the defendant participated in the attempted robbery and the conspiracy to commit robbery. The identity of the shooter was not at issue. Thus, as to these four charges, because identity was not at issue, the admission of the identification testimony of Robinson and George Frazier did not implicate the defendant's due process rights and, therefore, was not harmful.

Identity was at issue, however, in relation to the charge of criminal possession of a firearm. For the jury to find the defendant guilty of this charge, the state was required to prove that he possessed a firearm. See General Statutes § 53a-217 (a) (1). Although the trial court noted in its jury instructions that possession could

be actual or constructive, the state in closing argument argued to the jury only that the defendant actually possessed a firearm. Cf. *State* v. *King*, 321 Conn. 135, 149, 136 A.3d 1210 (2016) ("[p]rinciples of due process do not allow the state, on appeal, to rely on a theory of the case that was never presented at trial"). Although the state was not required to establish that the defendant either was the shooter or possessed a firearm in order for the jury to find him guilty of felony murder, attempted robbery, and conspiracy to commit robbery, the state was required to establish that he actually possessed a firearm in order for the jury to find him guilty of criminal possession of a firearm. Thus, the identity of the shooter was at issue for purposes of that charge—if the state established that the defendant was the shooter, then it likewise established that he possessed a firearm. Accordingly, the identification testimony of Robinson and George Frazier did implicate the defendant's due process rights in relation to the charge of criminal possession of a firearm.

C

Because we have determined that the admission of the identification testimony of Robinson and George Frazier implicated the defendant's due process rights in relation to the charge of criminal possession of a firearm, we must determine whether the testimony was harmless beyond a reasonable doubt. See *State* v. *Dickson*, supra, 322 Conn. 453. "A constitutional error is harmless when it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict without the impermissible [evidence] . . . . That determination must be made in light of the entire record [including the strength of the state's case without the evidence admitted in error]." (Citation omitted; internal quotation marks omitted.) Id. We conclude that any error was harmless beyond a reasonable doubt.

Whether an error is harmless in a particular case depends on several factors, including the importance of the witness' testimony to the state's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the witness' testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *State* v. *Shaw*, 312 Conn. 85, 102, 90 A.3d 936 (2014). "Most importantly, we must examine the impact of the evidence on the trier of fact and the result of the trial. . . . If the evidence may have had a tendency to influence the judgment of the jury, it cannot be considered harmless." (Internal quotation marks omitted.) Id.

The following additional facts, some of which we already have discussed, are relevant to our analysis. Joseph Rainone, a firearms examiner for the Waterbury Police Department, testified that, on the basis of bullet fragments found at the scene of the crime, it was inconclusive whether all of the bullets had been fired from the same gun, and it was possible that either one or more firearms had been used. However, he testified that all of the bullets fired were .38 class bullets, which could be fired from either a .38 revolver or a .357 revolver. Additionally, he testified that at least five, but as many as seven, gunshots were fired. Thus, it was possible that all of the bullets could have been fired from Vance's .357 revolver or from both Vance's .357 revolver and another firearm (either a .357 or a .38 revolver).

There was conflicting testimony at trial concerning whether the defendant possessed and/or used a firearm during the incident. As detailed in part I A of this opinion, in the prior statements of Bugg and Vance that were admitted for substantive purposes under *Whelan*, both stated that the defendant had a .38 revolver in his possession at the time of the incident, although they

later recanted on the witness stand and testified that he did not have a gun. Additionally, in his statement to the police, which also was admitted for substantive purposes under *Whelan*, Oliphant stated that he knew that the defendant possessed a .38 revolver because he previously had seen the defendant with it, although not necessarily during the incident at issue. Oliphant disputed this knowledge during his testimony at trial.

In addition to the testimony previously discussed, the state also presented the testimony of Foote. Foote testified that, after the shooting, Bugg told him that both the defendant and Vance had attempted to rob the victim and shot at him. The state also offered the testimony of Sade Stevens, who had been at Oliphant's apartment in his bedroom when the defendant, Bugg, and Vance arrived after the shooting. She testified that she heard the defendant say that they had tried to rob the victim and that she heard Vance say that he shot the victim. However, she testified that she did not hear the defendant confess to shooting the victim. The state then had Stevens' prior statement to the police read into the record for substantive purposes under *Whelan*. In her statement, Stevens stated that she had heard both the defendant and Vance admit to shooting the victim. Further, the state offered the testimony of Omar Wilson (Omar), the defendant's uncle. Omar testified that, in May, 2010, approximately four months after the incident at issue, he saw the defendant with a gun.

Although it is true that Bugg and Vance recanted their prior statements that were admitted under *Whelan*, the jury was entitled to credit and rely on the *Whelan* statements. See, e.g., *State* v. *Dupigney*, 78 Conn. App. 111, 120–22, 826 A.2d 241 (admission of evidence identifying defendant as shooter, even if improper, was nevertheless harmless beyond reasonable doubt because, inter alia, three other witnesses also identified defendant as shooter, including witness whose identification was

admitted under *Whelan* because he recanted on witness stand at trial), cert. denied, 266 Conn. 919, 837 A.2d 801 (2003). This is especially so in light of the fact that, despite the recantations by Bugg and Vance, the testimony and statements that Foote and Stevens gave to the police corroborated the prior statements of Bugg and Vance that the defendant was armed with a firearm during the incident. Thus, even without the identification testimony of Robinson and George Frazier, the jury heard testimony from four other witnesses that the defendant possessed a firearm at the time of the shooting and testimony from one witness, Omar, that the defendant possessed a firearm after the shooting. That testimony establishes beyond a reasonable doubt that the jury would have returned a guilty verdict, even without the impermissible identification testimony. See, e.g., *State* v. *Artis*, 314 Conn. 131, 159–60, 101 A.3d 915 (2014) (even if identification testimony was improper, it was harmless beyond reasonable doubt because of other identification testimony by witness who personally knew defendant); *State* v. *Dupigney*, supra, 120–22 (admission of evidence identifying defendant as shooter, even if improper, was nevertheless harmless beyond reasonable doubt because three other witnesses also identified defendant as shooter).

Moreover, defense counsel had the opportunity to, and did, extensively cross-examine George Frazier about his identification testimony. See *State* v. *Artis*, supra, 314 Conn. 160–61 (considering fact that defense counsel extensively cross-examined witness in determining whether improper identification testimony was harmless). Defense counsel heavily attacked George Frazier's credibility. George Frazier continuously contradicted himself, and his response to most questions was that he had no recollection, although he already had answered most of the questions on direct examination. He also testified that he had had surgery a

few months after the victim's murder to remove a brain tumor. Not only did defense counsel attack George Frazier's credibility, but the state similarly questioned him about his identification of the defendant, pointing out that he never previously had identified the defendant and never told the police or the prosecutor that he had witnessed the shooting. The state even went so far as to question George Frazier about whether he "actually saw [the defendant] with a gun, or are you just saying that because you wanted to help out your brother's memory?" The state's skepticism is clear in the record.

Furthermore, in arguing to the jury that the defendant possessed a firearm during the incident, the state primarily relied on the *Whelan* statements and the testimony of Bugg and Vance, with minimal reliance on the identification testimony of Robinson and George Frazier. With regard to the charge of attempted murder, the state argued in summation to the jury: "And in this particular count, count two, it has to be that they were armed with a deadly weapon. Well, again, it doesn't have to be that they both had guns; it has to be that either [the defendant] or [Vance] must have been armed. And the testimony is, however, though, that they both had guns. [Bugg] said they did in his statement. [Vance] said they did in his statement. [Bugg] said it at the testimony he gave at the probable cause hearing, and [Vance] said it when he plead[ed] guilty to the crimes." Although the state did refer to Robinson's testimony that she saw two shooters in relation to the felony murder charge in regard to the charge of criminal possession of a firearm, the state did not rely on Robinson's testimony, arguing only: "So, the next question is, did he possess a firearm on January 18, 2010. Bugg said he had one. [Vance] said he had one." In addition to relying on the *Whelan* statements of Bugg and Vance, the state also relied on Omar's testimony that he

saw the defendant with a gun a few months after the victim's murder, "which means the defendant had an instrumentality of the crime."

The state's overall reliance on the identification testimony at issue was minimal. The state referred to George Frazier only three times during closing argument—to argue the direction in which the gunshots were fired (but not who was shooting), to argue that the victim was heard calling out for his mother, and to argue that the jury should take into consideration the fact that he had had a brain tumor when considering his testimony. The state did not rely on or reference George Frazier's identification of the defendant in any way. The state, on four occasions, referenced Robinson's testimony that she saw two shooters and argued that the jury should take into consideration the fact that she was emotionally distraught when she spoke to the police when considering her testimony and statement to the police. These references, however, were overshadowed by the state's repeated references to testimony from other witnesses that the defendant possessed a firearm—specifically, nine references to the testimony of Bugg or Vance, two references to the testimony of Stevens, and three references to the testimony of Omar.

Accordingly, we conclude that, to the extent that the identification testimony of Robinson and George Frazier was improper, it was harmless beyond a reasonable doubt because it was cumulative of other identification testimony, it was subject to extensive cross-examination, it was minimally relied on by the state in closing argument, and, even without their testimony, there was sufficient evidence for the jury to find the defendant guilty beyond a reasonable doubt.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

ORDERS

CONNECTICUT REPORTS

VOL. 334

STATE OF CONNECTICUT *v.* KENYON JOSEPH

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 684 (AC 41379), is denied.

Peter G. Billings, assigned counsel, in support of the petition.

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

Decided January 8, 2020

CHRYSOSTOME KONDJOUA *v.* COMMISSIONER OF CORRECTION

The petitioner Chrysostome Kondjoua's petition for certification to appeal from the Appellate Court, 194 Conn. App. 793 (AC 41930), is denied.

Jennifer B. Smith, assigned counsel, in support of the petition.

Lisa A. Riggione, senior assistant state's attorney, in opposition.

Decided January 8, 2020

STATE OF CONNECTICUT *v.* LASHAWN R. CECIL

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 446 (AC 42097), is denied.

Christopher Y. Duby, assigned counsel, in support of the petition.

Nancy L. Walker, assistant state's attorney, in opposition.

Decided January 8, 2020

THE BANK OF NEW YORK MELLON *v.*
WILLIAM RUTTKAMP ET AL.

The defendant Shlomit Ruttkamp's petition for certification to appeal from the Appellate Court (AC 42865) is dismissed.

Shlomit Ruttkamp, self-represented, in support of the petition.

Benjamin T. Staskiewicz, in opposition.

Decided January 8, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 195

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE YOLANDA V. ET AL.*
(AC 42870)

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

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children. She claimed that the trial court improperly concluded that she failed to achieve the requisite degree of personal rehabilitation required by the applicable statute (§ 17a-112), and that termination of her parental rights was in the best interests of the children. *Held*:

1. The trial court properly determined that the respondent mother failed to attain the degree of rehabilitation sufficient to warrant the belief that, at some time in the foreseeable future, she would be capable of assuming a responsible position with respect to the care of her children: the evidence in the record belied the mother's assertion that she was compliant with the court-ordered specific steps for the eight and one-half months immediately preceding trial, as the record contained sufficient evidence for the trial court to conclude that the mother had not corrected several of the factors that led to the initial commitment of her minor children, including that she did not comply with certain, random toxicology screenings, she was arrested and convicted for certain drug related crimes, she did not comply with securing a legal income, she missed three supervised visits with her children, and the record substantiated the determination made by the trial court that the substance abuse, mental health, and parenting issues that led to the initial commitment of the mother's minor children continued to plague her because, although she completed some services, she failed to benefit from such services; moreover, in evaluating the mother's rehabilitation efforts, the trial court was mindful of the specialized needs of the minor children, and the court also properly considered the mother's history with the Department of Children and Families since 2002 and her history and unsuccessful attempts at reunification with her older children.
2. The trial court properly determined that termination of the respondent mother's parental rights was in the best interests of the minor children, who needed permanency, continuity, and stability in their lives; the evidence in the record supported that determination, as the trial court found that, despite the existence of a bond between the mother and the minor children, and despite the many services that had been provided

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

to the mother over the years, she remained unable to serve as a safe, nurturing, and responsible parent who was capable of assuming the care of three children who all had special needs and who had suffered trauma while in her care, and further, the mother's continued involvement in the drug trade imperiled the safety and stability of the minor children.

Argued October 17, 2019—officially released January 13, 2020**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, where the respondent father was defaulted for failure to appear; thereafter, the matters were tried to the court, *C. Taylor*, *J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Joshua Michtom, assistant public defender, for the appellant (respondent mother).

Rosemarie T. Weber, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Benjamin Zivyon*, assistant attorney general, for the appellee (petitioner).

Stein M. Helmrich, for the minor children.

Opinion

ELGO, J. The respondent mother appeals from the judgments of the trial court terminating her parental rights as to Yolanda V., Jennessy V., and Hailey V., her minor children.[1] She contends that the court improperly

** January 13, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The court also terminated the parental rights of the minor children's father, whom we refer to by that designation. At trial, the father was defaulted due to his failure to appear. Because he has not appealed from the judgments of the trial court, we refer in this opinion to the respondent mother as the respondent.

concluded that (1) she failed to achieve the requisite degree of personal rehabilitation required by General Statutes § 17a-112, and (2) termination of her parental rights was in the best interests of the children.[2] We affirm the judgments of the trial court.

The following facts, which the trial court found by clear and convincing evidence,[3] are relevant to this appeal. The respondent is a convicted felon and drug trafficker who has a history of substance abuse, domestic violence, and mental health issues. She has been diagnosed with depression, anxiety, post-traumatic stress disorder, mood disorder, and bipolar disorder.

As the court noted in its memorandum of decision, the Department of Children and Families (department) "has been involved with [the respondent and her family] since 2002, due to issues of domestic violence, substance abuse, mental health, parenting issues, physical neglect, and physical abuse." In 2002, the respondent's two older children, Malaysha R. and Damion B., were removed from her care following her arrest on drug related charges and subsequent incarceration. Their guardianship ultimately was transferred to a relative, and efforts to reunify them with the respondent were unsuccessful.

[2] We note that the attorney for the minor children filed a statement in which he took no position with respect to the first claim and adopted the position of the respondent with respect to the second claim. That statement was filed two days prior to oral argument before this court, in contravention of Practice Book § 67-13, which requires such statements to be filed within ten days of the filing of the appellee's brief. In this case, the appellee filed its brief on August 7, 2019. The attorney for the minor children nonetheless did not file his statement with this court until October 15, 2019. Moreover, counsel for the appellee represented to this court at oral argument held on October 17, 2019, that she did not receive the attorney's statement until that very day. We remind the attorneys for minor children of their obligation to comply with the rules of practice in this state.

[3] In this appeal, the respondent concedes that the court's factual findings are supported by evidence in the record before us and does not challenge those findings as clearly erroneous.

Yolanda was born in 2006, and was twelve years old at the time of trial. She has "significant special needs," having been diagnosed with autism spectrum disorder and attention deficit hyperactivity disorder (ADHD). Jennessy was eleven years old at the time of trial and suffers from ADHD, post-traumatic stress disorder, and multiple learning disorders. Hailey was ten years old at the time of trial and has been diagnosed with ADHD, multiple learning disorders, and pica.[4]

On January 25, 2010, Hailey sustained a cut to her forehead. The department received a report from emergency medical technicians who responded to a 911 call, who "did not feel that the coffee table, that [the respondent] reported the child had hit, had sharp enough edges to inflict such injury." Although a subsequent investigation concluded that there was insufficient evidence to substantiate the allegations of physical abuse, the case remained open and ongoing services continued.

On May 24, 2010, the department received a report from a teacher concerned by red sores on Yolanda's hands because Yolanda "had made statements accusing [the respondent of] hitting her." The department ultimately could not substantiate those allegations.

On February 16, 2011, the department received a report of emotional neglect stemming from a physical and verbal altercation between the respondent and the father, which later was substantiated. As the court recounted in its memorandum of decision: "The caller stated that police went to the home and learned that [the respondent] and [the father] had a physical and verbal altercation. According to the caller, this occurred

[4] "Pica is a symptom of a neurological or psychiatric disorder, which is usually only found in children and is manifested by the ingestion of nonnutritive substances, such as large quantities of dirt." *Caro* v. *Woodford*, 280 F.3d 1247, 1252 n.2 (9th Cir. 2002), cert. denied, 536 U.S. 951, 122 S. Ct. 2645, 153 L. Ed. 2d 823 (2002).

quite often. The caller stated that there were holes all over the walls and the caller was unsure if they were from both parties. There was spaghetti splattered over the wall. There were numerous items broken in the home from past fights which were never reported. [The father] had injuries. According to the caller, both parties were hitting each other. However, [the respondent] did not have any visible injuries. The children were present but not injured. The caller stated that the children were 'scared out of their minds.' The caller stated that neighbors heard the children screaming. The two older children told the caller that 'mommy and daddy fight all the time.' Both parents were arrested. [The respondent] was charged with assault in the third degree, disorderly conduct, and interfering. [The father] was charged with disorderly conduct and interfering. Both parties remained in police custody. The children remained at the home with a relative. The allegations were substantiated and the case was transferred to ongoing services. The children entered care at this time."[5]

The minor children thereafter were adjudicated neglected and committed to the custody of the petitioner, the Commissioner of Children and Families, on November 10, 2011. At that time, the court issued specific steps for both the respondent and the father. Following the implementation of services by the department, the court returned custody of the children to the respondent on September 18, 2012, approximately one and one-half years after the neglect petitions had been filed.

The department nevertheless continued to receive reports concerning the respondent and her family. As the court found: "On June 23, 2014, [the department]

[5] The record indicates that the department invoked a ninety-six hour hold on the minor children on March 25, 2011, and filed neglect petitions on their behalf days later.

received a report from [the Community Health Center], alleging reported physical neglect of the children by [the respondent]. . . . The caller, who had done an intake, expressed concerns regarding [the respondent's] substance abuse issues. [The respondent] tested positive for phencyclidine (PCP),[6] marijuana, and cocaine. The caller confronted [the respondent] with the results [and the respondent] did not deny using illicit substances . . . .

"[In-Home Child and Adolescent Psychiatric Services][7] had been working with the family since September, 2015. . . . The caller indicated that [that provider] had difficulty in reaching [the respondent] for six weeks and had difficulty in meeting with the family to provide necessary clinical services. The program was supposed to meet with Hailey three times per week, but [the respondent] had failed to make her available for at least three weeks. . . .

"On March 4, 2016, [the department] received a report from [the children's elementary school] alleging physical neglect of Yolanda, Jennessy, and Hailey by [the respondent]. The caller reported that the children had

[6] "[P]hencyclidine (PCP) is a street drug that induces psychotic behavior." *State* v. *Washington*, 155 Conn. App. 582, 588 n.3, 110 A.3d 493 (2015). It is "defined as a piperidine derivative $C_{17}H_{25}N$ used chiefly in the form of its hydrochloride [especially] as a veterinary anesthetic and sometimes illicitly as a psychedelic drug . . . ." (Internal quotation marks omitted.) *State* v. *Reddick*, 153 Conn. App. 69, 71 n.1, 100 A.3d 439, appeal dismissed, 314 Conn. 934, 102 A.3d 85, cert. denied, 315 Conn. 904, 104 A.3d 757 (2014).

[7] Intensive In-Home Child and Adolescent Psychiatric Services, known also as IICAPS, "provides home-based treatment to children, youth and families in their homes and communities. Services are provided by a clinical team which includes a [m]aster's-level clinician and a [b]achelor's-level mental health counselor. The clinical team is supported by a clinical supervisor and a child & adolescent psychiatrist. IICAPS Services are typically delivered for an average of [six] months. IICAPS staff also provide [twenty-four hour]/[seven day] emergency crisis response." (Internal quotation marks omitted.) *Matthew C.* v. *Commissioner of Children & Families*, 188 Conn. App. 687, 706–707 n.10, 205 A.3d 688 (2019).

chronic lice . . . . After [the department] investigated, the lice issue with the children was resolved and the case was submitted for closure with the children engaged in services at [the Village for Families and Children] and [Wheeler Center] Care Coordination.

"On May 10, 2016, [the department] received a report from [the Village for Families and Children] stating that the family appeared that evening for their medication management appointment. [The respondent] reported that her [former boyfriend] broke into the home and strangled Yolanda the night before. None of the children awoke [the respondent]. [The respondent] learned of this right before the appointment that night. Yolanda told [the respondent] that [the former boyfriend] 'choked' her. Jennessy told [the respondent that] she heard her sister screaming and saw the man choking her sister. Jennessy also reported she heard glass breaking. [The respondent's] car window was in fact broken. [The respondent] did not report this to police. The caller indicated that he/she encouraged [the respondent] to call the police. The children stated they did not go to [the respondent] because they were scared and [she was] sleeping. The allegations of physical neglect regarding Yolanda, Jennessy, and Hailey were substantiated against [the respondent] due to circumstances injurious to the children's well-being.

"[The department] concluded that [the respondent] was actively using PCP and marijuana while caring for her children. She presented with erratic thoughts and paranoia, which appeared to be a direct result of her PCP usage and unaddressed mental health. The children did not appear to be aware of [the respondent's] substance abuse, however, her usage and unaddressed mental health impacted her ability to parent and protect the children appropriately. The allegation of emotional neglect was substantiated on behalf of the children as the children reported being scared of burglaries to their

home. [The respondent's] erratic and paranoid behavior created an emotional impact on the children, as they became fearful to reside in their home and were noted to have difficulty sleeping. The case was transferred for ongoing services. [The respondent] continued to work with [Wheeler Center] to address her substance abuse and mental health, as well as the children's mental health services at [the Village for Families and Children]. . . . [Intensive Family Preservation] services were put in place to assist [the respondent] . . . in improving and strengthening family functioning." (Footnotes added.)

On October 19, 2017, the respondent attempted to commit suicide. She was transported by ambulance to the hospital with Yolanda at her side. Hospital officials contacted the department that day to report allegations of physical neglect of the minor children, which the department later substantiated.

The petitioner initiated a ninety-six hour hold on the minor children on October 20, 2017, and the trial court issued an order of temporary custody days later.[8] The department thereafter filed a neglect petition on behalf of the minor children, alleging, inter alia, that they were being denied proper care and attention and that they were being permitted to live under conditions injurious to their well-being. On January 25, 2018, the respondent appeared in court and entered a plea of nolo contendere to the injurious conditions allegation. As a result, the minor children were adjudicated neglected and committed to the custody of the petitioner. At that time, the court issued specific steps which the respondent signed.[9] The court also ordered the respondent to submit to a hair test. All three segments of that test later came back positive for PCP.

[8] It is undisputed that this was the second removal of the minor children in the span of six years. At that time, the minor children were placed in a relative foster home, where they since have remained.

[9] The specific steps issued on January 25, 2018, required, among other things, the respondent to (1) "[k]eep all appointments set by or with" the

On August 13, 2018, the petitioner filed petitions to terminate the respondent's parental rights predicated on her failure to achieve sufficient rehabilitation pursuant to § 17a-112 (j) (3) (B) (i).[10] In response, the respondent denied the substance of those allegations.

A two day trial on the termination petitions was held in January, 2019, at which the parties submitted documentary and testimonial evidence. On March 18, 2019, the court issued its memorandum of decision, in which the court granted the petitions to terminate the respondent's parental rights. In so doing, the court made extensive findings of fact and concluded that the petitioner had established that the adjudicatory ground for termination existed and that termination was in the best interests of the minor children. From those judgments, the respondent now appeals.

I

The respondent first claims that there was insufficient evidence for the trial court to find by clear and convincing evidence that she had failed to achieve the degree of personal rehabilitation required by § 17a-112. More specifically, the respondent argues that, although she "was not fully compliant with all specific steps, her

department, (2) "[s]ubmit to random drug testing", (3) "[n]ot use illegal drugs", (4) "[g]et and/or maintain . . . a legal income", (5) "[n]ot get involved with the criminal justice system", and (6) [l]earn to take care of the children's physical, educational, medical or emotional needs, including keeping [their] appointments with [their] . . . providers."

[10] General Statutes § 17a-112 (j) (3) (B) (i) provides in relevant part: "The Superior Court . . . may grant a petition [to terminate parental rights] . . . if it finds by clear and convincing evidence that . . . the child . . . has been found by the Superior Court . . . to have been neglected . . . in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

noncompliance occurred largely at the beginning of the case, and was followed by an eight month period of compliance immediately preceding" her January, 2019 trial.[11] We do not agree.

The legal principles that govern our review are well established. Pursuant to § 17a-112, "[t]he trial court is required . . . to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . Rehabilitate means to restore [a parent] to a useful and constructive place in society through social rehabilitation. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life. . . . In addition, [i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment, regardless of whether those factors were included in specific expectations ordered by the court or imposed by the department. . . .

[11] The respondent also complains that the trial judge utilized "identical language" in its memorandum of decision that also appears in other published decisions. The language in question is contained in but a few paragraphs of the court's comprehensive seventy-seven page memorandum of decision. Moreover, the respondent has not distinctly briefed any claim of error with respect thereto, stating that she "does not here argue that this duplicate language constitutes an abuse of discretion." Instead, she suggests that the court's use of that language is an indication that the court did not "adequately [weigh] the facts before it." On our thorough review of the court's memorandum of decision in light of the record before us, we conclude that her contention is without merit.

"When a child is taken into the commissioner's custody, a trial court must issue specific steps to a parent as to what should be done to facilitate reunification and prevent termination of parental rights." (Citations omitted; internal quotation marks omitted.) *In re Shane M.*, 318 Conn. 569, 585–86, 122 A.3d 1247 (2015). "Specific steps provide notice and guidance to a parent as to what should be done to facilitate reunification and prevent termination of rights. Their completion or noncompletion, however, does not guarantee any outcome. A parent may complete all of the specific steps and still be found to have failed to rehabilitate. . . . Conversely, a parent could fall somewhat short in completing the ordered steps, but still be found to have achieved sufficient progress so as to preclude a termination of his or her rights based on a failure to rehabilitate." (Citation omitted; internal quotation marks omitted.) *In re Elvin G.*, 310 Conn. 485, 507–508, 78 A.3d 797 (2013). "[I]n assessing rehabilitation, the critical issue is not whether the parent has improved her ability to manage her own life, but rather whether she has gained the ability to care for the particular needs of the child at issue." (Internal quotation marks omitted.) *In re Luciano B.*, 129 Conn. App. 449, 476, 21 A.3d 858 (2011).

Appellate review of the trial court's determination that a parent has failed to achieve the required degree of rehabilitation is a matter of evidential sufficiency. As our Supreme Court has explained, "[w]hile . . . clear error review is appropriate for the trial court's subordinate factual findings . . . the trial court's ultimate conclusion of whether a parent has failed to rehabilitate involves a different exercise by the trial court. A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate

standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Emphasis in original; footnote omitted; internal quotation marks omitted.) *In re Shane M.*, supra, 318 Conn. 587–88. "In other words, [i]f the [trial court] could reasonably have reached its conclusion, the [judgment] must stand, even if this court disagrees with it." (Internal quotation marks omitted.) *In re Jayce O.*, 323 Conn. 690, 716, 150 A.3d 640 (2016).

"An important corollary to these principles is that the mere existence in the record of evidence that would support a *different* conclusion, without more, is not sufficient to undermine the finding of the trial court. Our focus in conducting a review for evidentiary sufficiency is not on the question of whether there exists support for a different finding—the proper inquiry is whether there is *enough* evidence in the record to support the finding that the trial court made." (Emphasis in original.) Id.

We begin our analysis by noting what is not in dispute. The record before us contains ample evidence of the respondent's involvement with the department since 2002, when her eldest children were removed from her care. The evidence further demonstrates that the respondent has been provided numerous services over the years to address her substance abuse, mental health, domestic violence, and parenting issues. The respondent also does not contest the court's findings in its memorandum of decision that she failed to comply with the specific steps ordered by the court following the removal of her minor children in October, 2017, including (1) testing positive for marijuana and PCP on October 25, 2017, (2) testing positive for PCP on February

6, 2018, (3) failing to submit to drug testing between March 16 and June 18, 2018, (4) failing to consistently attend mental health appointments, and (5) failing to consistently attend medication management meetings. Those findings are supported by the evidence in the record before us.

The record also indicates that the minor children have been removed from the respondent's care and adjudicated neglected on two separate occasions in 2011 and 2017, respectively—the first precipitated by a domestic violence altercation that left the children " 'scared out of their minds' " and the second following the respondent's suicide attempt. As a result, the children spent approximately two and one-half years in foster care due to those removals.

The respondent also does not dispute that, under our rules of practice and decisional law, the critical date in assessing rehabilitation efforts is the date that the termination petition is filed. See Practice Book § 35a-7 (a) (trial court generally "is limited to evidence of events preceding the filing of the petition or the latest amendment" in adjudicatory phase of termination proceeding); see also *In re Cameron W.*, 194 Conn. App. 633, 645–46, A.3d (2019) ("in the adjudicatory phase, [the court] was limited to making its assessment on the basis of facts preceding the filing of the petition for termination of parental rights or the latest amendment thereto"). At the same time, our law recognizes that, in the rehabilitation context, "the court *may* rely on events occurring after the date of the filing of the petition to terminate parental rights when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time." (Emphasis in original; internal quotation marks omitted.) *In re Jennifer W.*, 75 Conn. App. 485, 495, 816 A.2d 697, cert. denied, 263 Conn. 917, 821 A.2d 770

(2003). This court has thus held that "the [trial] court [retains] discretion . . . to consider events and behavior that occurred after the filing of the [termination] petition to determine if the respondent had failed to achieve sufficient personal rehabilitation to allow her to assume a responsible position in her children's lives." Id. In the present case, the court exercised that discretion and expressly considered evidence of the respondent's conduct following the filing of the termination petitions in its memorandum of decision.

In light of the foregoing, the respondent argues in her principal appellate brief that she was "compliant" with the court-ordered specific steps "for the eight and one-half months immediately preceding the trial (June, 2018—January, 2019)."[12] The evidence in the record belies that assertion.

The specific steps required the respondent to "[s]ubmit to random drug testing; the time and method of the testing will be up to [the department] to decide." In its memorandum of decision, the court found that while the respondent complied with regularly scheduled testing, she did "not comply with the unscheduled random toxicology screenings." That finding is supported by the evidence at trial, which indicates that the respondent failed to submit to "random urine screenings" on

[12] The respondent further argues that the record reflects "substantial compliance" with the specific steps on her part in the months prior to trial. Apart from the factual inaccuracy of that statement, it reflects a misunderstanding of the applicable principles that govern the rehabilitation determination. "[A] finding of rehabilitation is not based on a mechanistic tabulation of whether a parent has undertaken specific steps ordered." *In re Destiny R.*, 134 Conn. App. 625, 627, 39 A.3d 727, cert. denied, 304 Conn. 932, 43 A.3d 660 (2012). Rather, the ultimate issue is whether the parent has gained the insight and ability to care for her children, given their ages and needs, within a reasonable time. See *In re Eden F.*, 250 Conn. 674, 706, 741 A.2d 873 (1999). For that reason, this court previously has rejected the claim that a respondent's "substantial compliance" with specific steps precludes the trial court from terminating her parental rights. *In re Coby C.*, 107 Conn. App. 395, 400–406, 945 A.2d 529 (2008).

October 15, November 5, November 7, November 13, November 16, and November 27, 2018.

The specific steps also required the respondent to "[n]ot get involved with the criminal justice system." The respondent concedes, and the record confirms, that she was arrested on August 9, 2018, for selling twenty-seven bags of fentanyl-laced heroin to an undercover police officer. The respondent did not report that arrest to the department. On November 28, 2018, the respondent was convicted of one count of possession of a controlled substance in violation of General Statutes § 21a-279 (a) (1), one count of interfering with an officer in violation of General Statutes § 53a-167a, and one count of criminal trespass in the first degree in violation of General Statutes § 53a-107.[13]

Furthermore, the specific steps obligated the respondent to secure "a legal income." The evidence in the record plainly indicates that the respondent did not comply therewith. The specific steps also required the respondent to "[k]eep all appointments set by or with" the department. The January 3, 2019 addendum to the social study that was admitted into evidence at trial states that the respondent had "missed three supervised visits with her children" since August 15, 2018.[14] In light of the foregoing, the respondent's claim of compliance with the specific steps in the eight and one-half months prior to trial is untenable.

In addition, we note that, contrary to the contention of the respondent, the court acknowledged her compliance with certain steps and her completion of certain

[13] A certified copy of the respondent's criminal conviction record was admitted into evidence at trial. That document indicates that the respondent received a suspended sentence with three years of probation for those offenses.

[14] In its memorandum of decision, the court found that the respondent "failed to visit her [minor] children on August 15, 2018, September 5, 2018, and September 26, 2018."

programs. As the court stated in its memorandum of decision, "[t]he credible evidence in this case clearly and convincingly shows that [the respondent] has undertaken some rehabilitative services. It has also been clearly and convincingly shown that she has completed some services." At the same time, the court also concluded that "it has . . . been clearly and convincingly shown that [the respondent], as shown by her conduct, has failed to benefit from such services."

In so doing, the court expressly relied on the precept that "[i]n determining whether a parent has achieved sufficient personal rehabilitation, a court may consider whether the parent has corrected the factors that led to the initial commitment . . . ." *In re Vincent D.*, 65 Conn. App. 658, 670, 783 A.2d 534 (2001). In its memorandum of decision, the court concluded that the substance abuse, mental health, and parenting issues that led to the initial commitment of the respondent's minor children continued to plague the respondent. The record substantiates that determination.

The evidence indicates that, although she completed substance abuse treatment that included an intensive outpatient program in late 2017, and the women in healing group in January, 2018, the respondent subsequently tested positive for PCP in February, 2018. Following that positive test, the evidence indicates that the respondent repeatedly refused to comply with random toxicology screenings. It also is undisputed that the respondent was arrested in 2018 for selling heroin and later convicted of possession of a controlled substance in violation of § 21a-279 (a) (1), months prior to trial on the termination petitions.

In addition, the evidence indicates that, in the months leading up to the filing of the petitions for termination of her parental rights, the respondent did not consistently attend mental health and medication management

appointments following the commitment of her minor children. During certain periods of time in which her therapist and department officials were concerned that the respondent was not taking her prescribed medications, they observed her "as being easily agitated, overwhelmed, impatient and . . . not making sense at times." The respondent also did not accurately inform her therapist of the circumstances surrounding her August 9, 2018 arrest[15] or the fact that she was involved in a domestic violence incident in November, 2018.[16]

Furthermore, despite completing a Therapeutic Family Time program, the evidence submitted at trial substantiates the court's finding that the respondent missed

[15] The respondent's mental health therapist, Jordan Wasik, testified at trial as follows:

"[The Petitioner's Counsel]: [W]hat did she tell you about her arrest in August of 2018?

"[Wasik]: She had said that she was in the wrong place at the wrong time and that [what] was reported was incorrect.

"[The Petitioner's Counsel]: Okay. So if you were to learn that [the respondent] was arrested for selling fentanyl-laced heroin to an undercover officer in August of 2018, would that be consistent with what she shared with you?

"[Wasik]: No.

"[The Petitioner's Counsel]: Okay. And if you also learned that she had—was found to have [twenty-seven] bags of fentanyl-laced heroin on her person, would that be consistent with what she shared with you?

"[Wasik]: No.

"[The Petitioner's Counsel]: Okay. Would those facts, if you knew them in August of 2018, be concerning to you in terms of [the respondent's] either substance abuse status or mental health status?

"[Wasik]: Yes."

[16] A printout of a November 23, 2018 Facebook post from the respondent was admitted into evidence at trial. In that post, the respondent recounted in graphic detail an incident that transpired on Thanksgiving night in which she was threatened with a weapon and was the victim of an attempted rape. Approximately one week after that message was posted, her social worker observed bruising on the respondent's lower jaw. That evidence supports the court's finding that the respondent was involved in a domestic violence incident that Thanksgiving.

At trial, Jordan Wasik, the respondent's therapist, testified that the respondent had not informed her of that incident. Wasik further testified that, if the respondent had shared that information, she would have been concerned about the respondent's understanding of healthy relationships.

three supervised visits with her children after the department filed the termination petitions on August 13, 2018.[17] The evidence also indicates that, when the respondent did attend supervised visits, she continued to have ''difficulty managing'' the minor children. Lourdes Burgos, an ongoing treatment worker with the department, testified that, when the minor children bickered with each other during supervised visits, the respondent "would seem agitated, overwhelm[ed], and would scream stop it . . . ." In this regard, we reiterate the undisputed fact that the minor children all have specialized needs including ADHD and, in Yolanda's case, autism spectrum disorder.

"[I]n assessing rehabilitation, the critical issue is not whether the parent has improved her ability to manage her own life, but rather whether she has gained the ability to care for the particular needs of the child at issue.'' (Internal quotation marks omitted.) *In re Luciano B.*, supra, 129 Conn. App. 476. In evaluating the respondent's rehabilitation efforts, the court understandably was mindful of those specialized needs of the minor children. The court also properly considered the respondent's history with the department since 2002. See id., 477 (rejecting claim that court "improperly considered [the respondent mother's] past history" in making rehabilitation assessment); *In re Jennifer W.*, supra, 75 Conn. App. 499 (explaining that trial court must make "an inquiry into the *full* history of the respondent's parenting abilities" [emphasis in original]). In addition, the court properly considered the respondent's history and unsuccessful attempts at reunification with her older children. See *In re Dylan C.*, 126 Conn. App. 71, 82, 10 A.3d 100 (2011) (court examined respondent mother's history with her other children "to gain perspective on the respondent's child caring and parenting abilities").

[17] See footnote 14 of this opinion.

Construing the record before us in the manner most favorable to sustaining the judgments of the trial court, as we are obligated to do; see *In re Shane M.*, supra, 318 Conn. 588; we conclude that it contains sufficient evidence for the court to conclude that the respondent had not corrected several of the factors that led to the initial commitment of her minor children. That evidence supports the court's determination that the respondent failed to attain that degree of rehabilitation sufficient to warrant the belief that at some time in the foreseeable future, she would be capable of assuming a responsible position with respect to the care of her children.

II

The respondent also challenges the court's finding that the termination of her parental rights was in the best interests of the minor children. She claims that the court's finding lacks an evidentiary basis and, thus, is clearly erroneous. We disagree.

Connecticut's appellate courts will not disturb a trial court's best interests finding unless it is clearly erroneous. See *In re Brayden E.-H.*, 309 Conn. 642, 657, 72 A.3d 1083 (2013). "A finding is clearly erroneous when either there is no evidence in the record to support it, or the reviewing court is left with the definite and firm conviction that a mistake has been made. . . . On appeal, our function is to determine whether the trial court's conclusion was factually supported and legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 488, 940 A.2d 733 (2008).

In the dispositional portion of its memorandum of decision, the court emphasized the family's history with the department, noting that the present litigation "marks the second removal [of the minor children] from [the respondent's] home . . . ." The court expressly considered the seven statutory factors prescribed by § 17a-112 (k) and made findings with respect thereto.[18] The court then considered the respondent's ability to provide stability and proper care for the minor children, who all have special needs. In this regard, the court found that "[t]he clear and convincing evidence also shows that [the respondent] has been placed on notice to address her issues in the past. . . . The evidence . . . clearly and convincingly shows that she is incapable of being a safe, nurturing, and responsible parent

[18] General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

for her daughters. [The respondent] is obviously unable to care for Yolanda, Jennessy, and Hailey appropriately and to provide them with the safety, care, permanence, and stability that the children need and deserve."

More specifically, the court found that the respondent had "numerous issues that are clearly antithetical to safe, responsible, and nurturing parenting, and are also antagonistic to [the minor children's] best interests." The court noted the respondent's history of substance abuse, which continued after the removal of the minor children from her home as reflected by her positive tests[19] and her refusal to submit to random drug testing.

In addition, the court was mindful of the respondent's criminal history, noting that she is "a convicted felon and drug trafficker" who previously had been incarcerated.[20] In light of that criminal history, the court found especially troubling the respondent's "continued involvement in serious criminal behavior" following the commitment of her minor children. As the court stated: "The petitioner put on evidence to clearly and convincingly show that [the respondent] did sell a quantity of narcotics, specifically heroin laced with fentanyl, to an undercover officer on August 9, 2018 . . . . Additionally, it was further shown that, when [the respondent] was arrested shortly thereafter, she was in possession of the buy money that she had received from the undercover officer . . . and twenty-seven bags of heroin laced with fentanyl, identical to the bags sold to the undercover officer. Trafficking in narcotics is an occupation fraught with danger and peril. These risks are things that [the respondent], a convicted drug trafficker

[19] The court found, and the record confirms, that the respondent tested positive for marijuana and PCP on October 25, 2017, and tested positive for PCP on February 6, 2018.

[20] The certified copy of the respondent's criminal conviction record that was admitted into evidence at trial indicates that the respondent's criminal history includes a 2002 conviction for the possession of a controlled substance with intent to sell in violation of General Statutes (Rev. to 2001) § 21a-277 (b).

prior to August 9, 2018, would be expected to be acquainted with. Unfortunately, these dangers and risks would have to be shared with any young and dependent children who shared [the respondent's] home and life." We agree with the trial court that the respondent's continued involvement in the drug trade bore directly on her ability to provide safety and stability to the minor children, irrespective of whether her criminal conviction resulted in incarceration.[21] We thus reject the respondent's assertion that the court "failed to articulate how [her] conviction . . . affected her parenting ability." Moreover, the evidence of the respondent's continued involvement in the drug trade substantiates the court's finding that the respondent's "individual judgment and conduct still remain questionable," despite being provided a litany of services by the department over the course of many years.

The court also credited evidence submitted at trial indicating that the respondent had shown little improvement in her parenting abilities. As the court found, the respondent's referrals to parenting programs "have failed to increase her abilities to manage her children's behaviors and their special needs. The reports from her supervised visitations and [the Therapeutic Family Time program] indicated that, despite services, [the respondent] had great difficulty in managing the children's behaviors during visits. The court is well aware and certainly sympathetic to the challenges that a caregiver faces in raising three children with significant special needs. Nevertheless, it was [the respondent's] responsibility to place herself in a position where she could care for these children safely, responsibly, and in a nurturing manner. Unfortunately, she has been

[21] It is undisputed that the respondent received a suspended sentence and three years of probation for her November 28, 2018 conviction of one count of possession of a controlled substance, one count of interfering with an officer, and one count of criminal trespass in the first degree, as reflected in the certified copy of the respondent's criminal conviction record that was admitted into evidence at trial.

unable to accomplish this." That finding also is bolstered by the undisputed fact, which the court emphasized in its memorandum of decision, that the respondent "has no legal income" and that she missed multiple supervised visits with the minor children in the months prior to trial. See footnote 14 of this opinion.

On appeal, the respondent emphasizes that the court, in its memorandum of decision, found that the minor children had a bond with her. That finding is substantiated by the evidence in the record. It nonetheless is not dispositive. As this court has explained, the appellate courts of this state "consistently have held that even when there is a finding of a bond between [a] parent and a child, it still may be in the child's best interest to terminate parental rights." *In re Rachel J.*, 97 Conn. App. 748, 761, 905 A.2d 1271, cert. denied, 280 Conn. 941, 912 A.2d 476 (2006); see also *In re Melody L.*, 290 Conn. 131, 164, 962 A.2d 81 (2009) (same), overruled in part on other grounds by *State v. Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

In the present case, the court found that, despite the existence of a bond and despite the many services that had been provided to her over the years, the respondent remained unable to serve as a "safe, nurturing, and responsible parent who is capable of assuming the care of Yolanda, Jennessy, and Hailey"—three children who all had special needs and who had suffered trauma while in her care.[22] The court further found that the respondent's continued involvement in the drug trade imperiled the safety and stability of the minor children. The court thus found that termination of the respondent's parental rights was in the best interests of the minor children, who needed permanency, continuity,

[22] Among the traumatic incidents documented in the record are the respondent's attempted suicide, the strangulation of Yolanda in their home by the respondent's former boyfriend, and the domestic violence incident that precipitated their first removal from the respondent's care and left the children " 'scared out of their minds.' "

and stability in their lives. Indulging every reasonable presumption in favor of the court's ruling as our standard of review requires; see *In re Davonta V.*, supra, 285 Conn. 488; we conclude that the evidence in the record supports that determination. That finding, therefore, is not clearly erroneous.

The judgments are affirmed.

In this opinion the other judges concurred.

THE BANK OF NEW YORK MELLON, TRUSTEE *v.* JOHN MAZZEO ET AL.
(AC 42180)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff bank, M Co., sought to foreclose a mortgage on certain real property owned by the defendants J and L. At trial, the court denied the motion for judgment filed by J and L, which was based on their claim that M Co. failed to make out a prima facie case because a condition precedent to foreclosure, namely, notice of default prior to acceleration, had not been proven. The trial court rendered a judgment of foreclosure by sale, from which J and L appealed to this court. *Held:*

1. J and L could not prevail on their claim that M Co. lacked standing, which was based on their claim that M Co. failed to establish that it was the holder of the note when it commenced the present action: M Co.'s production of the original note at trial, as well as the admission into evidence of the copy of the note through H, a litigation manager for B Co., the subservicer for the loan securing M Co.'s mortgage to J and L's property, raised a presumption that M Co. was the holder of the note, and it then became the burden of J and L to rebut that presumption in order to challenge M Co.'s right to enforce the note, which they failed to do; moreover, even though J and L claimed that the court improperly admitted into evidence the routing history of the loan, that evidence was not necessary to prove that M Co. was a holder of the note, as M Co. produced the note, which was endorsed in blank, and, thus, the challenge by J and L to the admission of the routing history, even if valid, did not rebut the presumption that M Co. owned the debt when this action commenced.

2. The trial court improperly concluded that M Co. proved its prima facie foreclosure case: even though J and L could not prevail on their claim that M Co. did not demonstrate that it was the owner of the debt, M Co. did not prove that all conditions precedent to foreclosure, as established by the note and mortgage, had been satisfied, specifically, M Co. did not demonstrate that it provided J and L with notice of default, as the plain language of the mortgage note required that notices of default be sent by first class mail, and the default notice admitted into evidence and H's accompanying testimony did not provide sufficient facts for a trier of fact reasonably to infer that the notice was mailed to J and L; moreover, A Co., the master servicer of the loan, generated the default notice, and H, as a representative of B Co., the subservicer for the loan, was not able to testify as to the practices A Co. employed to generate or mail default notices, and H's sole basis for claiming that notice was mailed was the existence of the notice and a screenshot from A Co.'s servicing platform that included a breach and expiration date consistent with the date on the default notice; furthermore, H provided no pertinent details regarding B Co.'s boarding process or methods of verification, and although H testified that the screenshot was part of the verification process for the mailing of the default notice, H lacked personal knowledge of the policies and procedures used to generate the screenshot; accordingly, the evidence was insufficient to support the court's determination that a default notice was sent to J and L via first class mail, and, thus, M Co. failed to prove a prima facie foreclosure case.

Argued October 15, 2019—officially released January 21, 2020

Procedural History

Action to foreclose a mortgage on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Fairfield and tried to the court, *Hon. Michael Hartmere*, judge trial referee; judgment of foreclosure by sale, from which the named defendant et al. appealed to this court. *Reversed; judgment directed.*

Janine M. Becker, with whom, on the brief, was *Patricia Moore*, for the appellants (named defendant et al.).

Benjamin Staskiewicz, for the appellee (plaintiff).

Opinion

KELLER, J. The defendants, John Mazzeo and Linda Mazzeo,[1] appeal from the judgment of foreclosure by sale rendered by the trial court in favor of the plaintiff, The Bank of New York Mellon, formerly known as The Bank of New York, as Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2005-56, Mortgage Pass-Through Certificates, Series 2005-56. The defendants claim that the plaintiff (1) lacked standing to bring the present action and (2) failed to prove its prima facie case.[2] We disagree with the defendants' first claim but agree with the defendants' second claim and, accordingly, reverse the judgment of the court.

Following a two day bench trial, the court issued a memorandum of decision setting forth the following findings of fact and procedural history: "On August 17, 2012, the plaintiff . . . filed this foreclosure complaint against the defendants . . . . On November 3, 2014, the defendants filed an answer and special defenses

[1] The complaint named as defendants, in addition to John Mazzeo and Linda Mazzeo, the state Department of Revenue Services and the United States Internal Revenue Service, each of which had asserted tax liens against the property. Those defendants, however, are not parties to the appeal, and references in this opinion to the defendants are to John Mazzeo and Linda Mazzeo, who are husband and wife.

[2] The defendants make four separate claims of error in their brief, which we have condensed to two claims. We have interpreted the second claim ("Did the court err in finding that the plaintiff established that it is the current owner and holder of the underlying note and that the plaintiff has been in possession of the note since prior to the commencement of the foreclosure action?"), as one challenging whether the plaintiff had standing to commence the underlying foreclosure action and whether the plaintiff established a prima facie case.

We also have combined the third claim ("Was it error for the court to allow the admission of exhibit 8, the 'routing history' of the note?"), with the claim related to standing.

Finally, we have combined the fourth claim ("Did the court err in finding that the plaintiff provided written notice of default to the defendants?"), with the claim related to whether the plaintiff established a prima facie case.

and setoffs.[3] . . . The matter was tried to the court on April 24 and April 25, 2018, subsequent to which the parties submitted posttrial briefs. Based on the submissions of the parties and the evidence presented at trial, the court makes the following findings.

"The defendant, John Mazzeo, executed an adjustable rate note[4] dated July 25, 2005, in the amount of $532,000, originally in favor of Countrywide Bank, a division of Treasury Bank, N.A. As of August 10, 2012, the date of the underlying [c]omplaint, the plaintiff was the owner and holder of the underlying note . . . . The court examined the original underlying documents during the trial. The note was secured by an open end mortgage deed concerning 36 Shady Lane, Monroe, Connecticut which was recorded on the Monroe land records. Bayview Loan Servicing, LLC (Bayview) is the current loan servicer for the plaintiff. Lauren Haberlan, a litigation manager for Bayview, testified extensively concerning Bayview's business records and how those records are made, maintained and verified for accuracy in the ordinary and usual course of business. She testified as to how historical loan servicing records for this loan were obtained, reviewed and audited for accuracy before they were incorporated by Bayview as their own business records.

[3] The defendants asserted the following special defenses and setoffs: "(1) The plaintiff's action is barred by its violations of the provisions of [the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601 et seq.] and the Dodd-Frank Wall Street Reform and Consumer Protection Act, [Pub. L. No. 111-203, 124 Stat. 1376-2223 (2010)].

"(2) The plaintiff's action is barred and/or the defendants are entitled to a setoff due to the charging of unnecessary fees and charges.

"(3) The plaintiff's action is barred in that its assignor and/or agents engaged in unfair lending practices.

"(4) The plaintiff's action is barred by unclean hands in that its predecessor disregarded underwriting standards and implemented fraud in the making of the loan and mortgage."

[4] The note was a negative amortization note, meaning that as the defendants paid off portions of the principal and interest every month, the outstanding balance due on the note increased instead of decreased.

"Haberlan testified that the note was signed by defendant John Mazzeo and that the note was endorsed in blank. The plaintiff received the original note on September 23, 2005, and sent the note to [the] plaintiff's counsel, on September 19, 2011. The mortgage deed, dated July 25, 2005, was signed by the defendants, John and Linda Mazzeo, and recorded in the Monroe land records. The mortgage deed secured property located at 36 Shady Lane, Monroe, Connecticut. An assignment of mortgage dated August 18, 2011, to the plaintiff also was recorded on the Monroe land records.

"There were a number of prior loan servicers for this loan prior to Bayview.[5] Bayview was given a limited power of attorney to act on behalf of the plaintiff.

"The defendants were issued written notices of default by one of the prior loan servicers, which were sent to the defendants at the property address. Written notices of default were sent to the defendants on January 27 and February 16, 2010. Under the terms of the mortgage deed, notice to one borrower is considered notice to all borrowers.

"The plaintiff presented a complete loan history, evidence and backup of the debt, and a demonstrative exhibit detailing the overall debt calculation. All loan charges, fees and calculations constituting the total debt were documented. The parties have stipulated that the fair market value of 36 Shady Lane, Monroe, [Connecticut] is $414,000. The testimony and exhibits presented at trial established a total debt of $892,770.14. The addition of a per diem interest charge of $82.56 from April 24, 2018, to August 27, 2018, will bring the total debt to $903,090.14. The court will allow appraisal fees (three appraisals) in the total amount of $1005 and a statutory title search fee of $225.

[5] Bank of America Home Loans (Bank of America) serviced the defendants' loan prior to Bayview, and remains the master servicer for the loan. Bayview is the subservicer.

"Thus, the plaintiff established a prima facie case for foreclosure. The plaintiff established that it is the owner and holder of the underlying note; that the note is endorsed in blank; that the plaintiff and or its agents have been in possession of the original note since prior to the commencement of this foreclosure action; that the plaintiff is the current mortgagee of record; that the plaintiff issued written notices of default to the defendants; that the defendants failed to cure the underlying default; that the plaintiff issued proper [Emergency Mortgage Assistance Program] notices to the defendants, and that the loan is in default and currently due for the January 1, 2010 mortgage payment. When the defendants failed to cure the default, the plaintiff accelerated the note and began these foreclosure proceedings." (Footnotes added.)

In its decision, the court found no merit in the defendants' special defenses and setoffs. The court rendered a judgment of foreclosure by sale with a sale date to be set by the court upon resolution of the attorney's fees.[6] This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendants first claim that the plaintiff lacked standing to bring the present action. In particular, the defendants claim that the plaintiff failed to establish that it was the holder of the note at the time it commenced the present action. The plaintiff argues that it had proved its status as holder and, thus, had standing to bring the present action, by virtue of its possession of the note and blank endorsement. We disagree with the defendants and conclude that the plaintiff had standing to bring this action.

[6] A judgment ordering a foreclosure by sale is a final judgment for purposes of appeal even if the court has not set a date for the sale. *Willow Funding Co., L.P.* v. *Grencom Associates*, 63 Conn. App. 832, 837–38, 779 A.2d 174 (2001).

The following additional facts are relevant to the disposition of this claim. At trial, the plaintiff's counsel produced the original note for review by opposing counsel and the court.[7] After the court stated that it had reviewed the original note, the plaintiff's counsel offered for admission into evidence exhibit 7, a copy of the original note, through its witness Lauren Haberlan,[8] a litigation manager for Bayview, the subservicer for the loan securing the plaintiff's mortgage to the defendants' property. After the court admitted into evidence the copy of the note, Haberlan testified that the signature page of the note contained two endorsements, one of which was an endorsement in blank. Haberlan further testified that the plaintiff was the holder of the note at the commencement of the action, which was August 14, 2012. The plaintiff's counsel also offered for admission into evidence exhibit 8, a document that detailed the routing history for the loan in question. Once the court admitted into evidence exhibit 8, Haberlan testified, consistent with the information set forth in the routing history, that "on [September 23, 2005], the [loan's] collateral documents were with [the plaintiff]."

"The issue of standing implicates the trial court's subject matter jurisdiction and therefore presents a

[7] At trial, the plaintiff's counsel stated: "I have the original note, original mortgage and certified assignment of mortgage. I have shown such to opposing counsel and I've agreed with her that I'm going to be submitting copies as . . . exhibits in this matter but I wanted to give Your Honor the opportunity to review the original documents themselves." The court replied, "I've reviewed the documents. They appear to be in order."

[8] Following a voir dire of Haberlan, the defendants' counsel objected to the admission of exhibit 7, the copy of the note. The objections of the defendants' counsel were not based on any specific evidentiary grounds. Rather, the defendants' counsel stated that "I have no objection to the introduction of the original note subject again to the plaintiff being able to tie up that they're the person entitled to enforce the note." Counsel also stated, "I'm going to object at this point because we do not know who the owner of the note is."

threshold issue for our determination. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . [When] a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . . We have long held that because [a] determination regarding a trial court's subject matter jurisdiction is a question of law, our review is plenary. . . . In addition, because standing implicates the court's subject matter jurisdiction, the issue of standing is not subject to waiver and may be raised at any time.[9] . . . [T]he plaintiff ultimately bears the burden of establishing standing." (Citations omitted; footnote added; internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 397–98, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014).

"Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property. . . . Whether a party is entitled to enforce a promissory note is determined by the provisions of the Uniform Commercial Code, as codified in General Statutes § 42a-1-101 et seq. . . . Under [the Uniform Commercial Code], only a holder of an instrument or someone who has the rights of a holder is entitled to enforce the instrument. . . . When a note is endorsed in blank, any person[10] in possession of the note is a holder and is entitled to enforce

[9] The defendants did not raise the issue of standing at trial.

[10] Pursuant to General Statutes § 42a-1-201 (b) (27), a "[p]erson" is defined as "an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation or any other legal or commercial entity."

the instrument. General Statutes §§ 42a-1-201 (b) (21) (A), 42a-3-205 (b) and 42a-3-301." (Emphasis omitted; footnote added; internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bliss*, 159 Conn. App. 483, 488–89, 124 A.3d 890, cert. denied, 320 Conn. 903, 127 A.3d 186 (2015), cert. denied, U.S. , 136 S. Ct. 2466, 195 L. Ed. 2d 801 (2016).

"The plaintiff's possession of a note endorsed in blank is prima facie evidence that it is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action. . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt . . . . The defendant [must] set up and prove the facts which limit or change the plaintiff's rights. . . . The possession by the bearer of a note [e]ndorsed in blank imports prima facie [evidence] that he acquired the note in good faith for value and in the course of business, before maturity and without notice of any circumstances impeaching its validity. The production of the note establishes his case prima facie against the makers and he may rest there. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights." (Citation omitted; internal quotation marks omitted.) Id., 489.

In *JPMorgan Chase Bank, National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 145–46, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016), this court elaborated that "[i]f the foreclosing party produces a note demonstrating that it is a valid holder of the note, the court is to presume that the foreclosing party is the rightful owner of the debt. . . . The defending party may rebut the presumption that the holder is the rightful owner of the debt, but bears the

burden to prove that the holder of the note is not the owner of the debt. . . . This may be done, for example, by demonstrating that ownership of the debt had passed to another party. . . . The defending party does not carry its burden by merely identifying some documentary lacuna in the chain of title that *might* give rise to the possibility that a party other than the foreclosing party owns the debt. . . . To rebut the presumption that the holder of a note endorsed specifically or to bearer is the rightful owner of the debt, the defending party must prove that another party is the owner of the note and debt. . . . Without such proof, the foreclosing party may rest its standing to foreclose the mortgage on its status as the holder of the note." (Citations omitted; emphasis in original.)

Here, the plaintiff's production of the note at trial, as well as the introduction into evidence of the copy of the note through Haberlan, raised the presumption that the plaintiff was the valid holder of the note. See *U.S. Bank, N.A.* v. *Ugrin*, 150 Conn. App. 393, 403–404, 91 A.3d 924 (2014) (plaintiff's production of original note at trial was prima facie evidence that plaintiff was holder of note and had standing); *Deutsche Bank National Trust Co.* v. *Bliss*, supra, 159 Conn. App. 494–95 (plaintiff's production of copy of note, together with witness testimony, was prima facie evidence that plaintiff was holder of note and had standing); *Equity One, Inc.* v. *Shivers*, 310 Conn. 119, 131, 74 A.3d 1225 (2013) (plaintiff's production of copy of note endorsed in blank, certified copy of mortgage, and assignment of note and mortgage to plaintiff was prima facie evidence that plaintiff was holder of note and had standing).

Once the plaintiff produced the note, endorsed in blank at trial, it became the defendants' burden to rebut that presumption and to challenge the plaintiff's right to enforce the note. The defendants do not directly challenge the plaintiff's production of the note as a

means of proving standing but, rather, claim that without the admission into evidence of the routing history in exhibit 8, the plaintiff was not able to prove that it was the holder of the note on the date the action was commenced. The defendants purport that "[t]he [r]outing [h]istory was the only documentary evidence which suggest[ed] that [the plaintiff] was the holder of the [n]ote at the time the action was commenced."[11] The defendants challenge the admission of the routing history on the basis that, over the objection of the defendants' counsel, the court improperly admitted it pursuant to the business records exception to the hearsay rule. We disagree with the defendants' assertion that the admission into evidence of the routing history was necessary to prove that the plaintiff was the holder of the note. In making this argument, the defendants neglect to acknowledge that the plaintiff's production of the note endorsed in blank raised a presumption that it was the holder of the note, and the defendants then bore the burden of rebutting that presumption. The contents of the routing history merely supported the plaintiff's position that it was the holder of the note at the time the action was commenced. Thus, the defendants' challenge to the admissibility of the routing history, even if valid, does not rebut the presumption that arose by virtue of the evidence that the plaintiff had possession of the note endorsed in blank at the time of trial.

[11] Moreover, there was a representation made to the trial court pursuant to *Equity One, Inc.* v. *Shivers*, supra, 310 Conn. 132–33, that the office of the plaintiff's counsel was in possession of the original note endorsed in blank for the benefit of its client prior to the commencement of this action. "In the absence of any fact based challenge to counsel's representation, such reliance was proper . . . because the plaintiff's counsel is an officer of the court . . . ." Id., 133. There was also testimony from Josephine Lewis, an employee of the office of the plaintiff's counsel, that the original note was received by the law firm on September 23, 2011, which was approximately one year before the case was brought.

Therefore, we need not reach the defendants' contention regarding the admission of the routing history because, even if the defendants are correct in their assertion that the routing history should not have been admitted into evidence, that argument would in no way aid them in rebutting the presumption raised by the plaintiff's production of the note. Specifically, the absence of the routing history would not aid the defendants in demonstrating that a party other than the plaintiff was the holder of the note at the time the action was commenced. The plaintiff contends, and we agree, that the defendants' present argument is wholly focused on the admission of the routing history and overlooks other critical evidence, namely, the production of the original note endorsed in blank and the admission into evidence of the copy of the original note and the endorsement. Throughout the two day trial, the defendants did not offer any evidence to rebut the presumption that the plaintiff, as the holder of the note, owned the underlying debt at the commencement of the action in August, 2012. See *HSBC Bank USA, N.A.* v. *Navin*, 129 Conn. App. 707, 712, 22 A.3d 647 (plaintiff was deemed to have standing because defendants offered no evidence challenging plaintiff's assertion that it possessed the note at the commencement of the action), cert. denied, 302 Conn. 948, 31 A.3d 384 (2011); *Chase Home Finance, LLC* v. *Fequiere*, 119 Conn. App. 570, 578, 989 A.2d 606 (plaintiff's presentation of note endorsed in blank established plaintiff's standing in foreclosure action when defendant "failed to present even a scintilla of evidence demonstrating that the plaintiff was not in possession of the promissory note" at the commencement of the action), cert. denied, 295 Conn. 922, 991 A.2d 564 (2010). Therefore, the plaintiff had standing to bring this foreclosure action because the plaintiff presented unrebutted evidence that gave rise to a presumption that it was the owner of the debt at the time the action was commenced.

II

Next, the defendants claim that the plaintiff failed to prove its prima facie case. Specifically, the defendants claim that the plaintiff failed to prove that (1) it was the owner and holder of the note and mortgage and (2) any conditions precedent to foreclosure, as established by the note and mortgage, had been satisfied. With respect to the second contention, in particular, the defendants claim that the plaintiff did not provide the defendants with notice of default, as required by the note and mortgage. We disagree with the defendants' first claim but agree with their second claim, and, accordingly, reverse.

"In order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and the mortgage, have been satisfied." (Internal quotation marks omitted.) *Wells Fargo Bank, N.A.* v. *Strong*, supra, 149 Conn. App. 392.

"In order to establish a prima facie case, the proponent must submit evidence which, if credited, is sufficient to establish the fact or facts which it is adduced to prove." (Emphasis omitted; internal quotation marks omitted.) *New England Savings Bank* v. *Bedford Realty Corp.*, 246 Conn. 594, 608, 717 A.2d 713 (1998). "[W]hether the plaintiff has established a prima facie case is a question of law, over which our review is plenary." (Internal quotation marks omitted.) *John H. Kolb & Sons, Inc.* v. *G & L Excavating, Inc.*, 76 Conn. App. 599, 605, 821 A.2d 774, cert. denied, 264 Conn. 919, 828 A.2d 617 (2003). In conducting a plenary review "we must decide whether [the court's] conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Stepney Pond Estates, Ltd.*

v. *Monroe*, 260 Conn. 406, 417, 797 A.2d 494 (2002). "We conduct that plenary review, however, in light of the trial court's findings of fact, which we will not overturn unless they are clearly erroneous." (Internal quotation marks omitted.) *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).

"A finding of fact is clearly erroneous when [either] there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) Id. Therefore, "[u]nder the clearly erroneous standard of review, a finding of fact must stand if, on the basis of the evidence before the court and the reasonable inferences to be drawn from that evidence, a trier of fact reasonably could have found as it did." (Internal quotation marks omitted.) *McBurney* v. *Paquin*, 302 Conn. 359, 368, 28 A.3d 272 (2011).

A

First, we address whether the plaintiff proved that it was the owner of the note.

"Being the holder of a note satisfies the plaintiff's burden of demonstrating that it is the owner of the note because under our law, the note holder is presumed to be the owner of the debt, and unless the presumption is rebutted, may foreclose the mortgage . . . . The possession by the bearer of a note [e]ndorsed in blank imports prima facie [evidence] that he acquired the note in good faith for value and in the course of business, before maturity and without notice of any circumstances impeaching its validity. The production of the note [endorsed in blank] establishes [the possessor's] case prima facie against the makers and he may rest there. . . . It [is] for the defendant to set up and prove the facts which limit or change the plaintiff's rights."

(Citation omitted; internal quotation marks omitted.) *American Home Mortgage Servicing, Inc.* v. *Reilly*, 157 Conn. App. 127, 133, 117 A.3d 500, cert. denied, 317 Conn. 915, 117 A.3d 854 (2015).

On the basis of our resolution of the claim discussed in part I of this opinion, we reject the defendants' claim that the plaintiff did not demonstrate that it was the owner of the debt because the defendants failed to present evidence to rebut the presumption that, as the holder of the note, the plaintiff owned the debt.

As we observe in part I of this opinion, the plaintiff established, through the production of the note, that it was the holder of the note. Therefore, following the reasoning of this court in *American Home Mortgage Servicing, Inc.* v. *Reilly*, supra, 157 Conn. App. 127, the plaintiff, as the note holder, also is presumed to be the owner of the debt. Further, as explained in part I of this opinion, the defendants in no way rebutted that presumption. Accordingly, we reject the defendants' assertion that the plaintiff failed to present evidence to support its prima facie case with regard to ownership of the note and mortgage.

B

We next address the defendants' claim that the plaintiff failed to establish a prima facie case because it failed to prove that a condition precedent to foreclosure had been satisfied. The condition precedent at issue in the present action involves sections 7 and 8 of the mortgage note, which require that, upon default, the plaintiff provide the defendants with notice of default prior to acceleration.[12] In its complaint, the plaintiff alleged that it provided the defendants with written

[12] Section 7 (C) of the note, titled "Notice of Default," provides: "If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal that has not been paid and all the interest that I owe on that amount. The date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means."

notice of default in accordance with the note and mortgage. In their answer, the defendants neither admitted nor denied that the plaintiff provided them with such notice and left the plaintiff to its proof.

The following additional facts are relevant to this portion of the defendants' claim. At trial, the plaintiff offered for admission into evidence exhibit 17, which is a default notice addressed to one of the defendants, John Mazzeo, at 36 Shady Lane, Monroe, Connecticut. The default notice was dated February 16, 2010. The last page of exhibit 17 also contained a screenshot from Bank of America's mortgaging servicing platform (screennbshot). The screenshot included information regarding the loan in question, including a breach date of February 16, 2010, and an expiration date. The plaintiff offered exhibit 17 into evidence through Haberlan. Exhibit 17 was admitted over the objection of the defendants' counsel that the exhibit did not qualify under the business records exception to the rule against the admission of hearsay evidence because Haberlan could not testify that the document was made at or about the time of the date that appeared on the notice. The court overruled the objection, stating that the exhibit had been established to be a business record of Bayview, Haberlan's employer.[13]

Further, Section 8 of the note, titled "GIVING OF NOTICES," provides: "Unless applicable law requires a different method, any notice that must be given to me under this Note will be given by delivering it or by mailing it by first class mail to me . . . . Unless the Note Holder requires a different method, any notice that must be given to the Note Holder under this Note will be given by delivering it or by mailing it by first class mail . . . ."

[13] Although the default notice and accompanying mortgage servicing platform screenshot were generated by Bank of America, the plaintiff's counsel established that Haberlan's employer, Bayview, had access to these documents, as well as others, through the boarding process that occurs between a master servicer (in this case, Bank of America) and a subservicer (in this case, Bayview). The following exchange occurred between the plaintiff's counsel and Haberlan:

"Q. And when you had a circumstance when a loan is transferred from one servicer to another, does the transferring servicer have a duty to transfer a copy of a document such as this to the new servicer on or about the time of the transfer per industry custom and standard?"

"A. Yes."

Following the admission into evidence of exhibit 17, Haberlan testified that the default notice in question was mailed first class mail to John Mazzeo at the subject property of 36 Shady Lane, Monroe, Connecticut. On cross-examination, however, she testified that she did not have direct knowledge of whether the notice was properly stamped and placed in a mailbox or handed over to the postal service, but, rather, that she based her assertion that the notice was mailed on the existence of the notice itself and the accompanying screenshot. She further testified, "I have no reason to believe they were not mailed out. . . . [T]hat's industry standard for any time anyone doesn't pay on anything." Haberlan also testified that she had no firsthand personal knowledge of Bank of America's process for generating notice of default letters. The following exchange then occurred between the defendants' counsel and Haberlan:

"Q. You have no personal knowledge as you sit here today of whether or not Bank of America Home Loans ever mailed [the default notice]?

"A. Other than the review of our business records.

"Q. But what in your business record would have revealed whether or not that letter ever in fact got mailed by Bank of America Home Loans?

"A. The fact that they exist. They don't create them not to mail them out."

Haberlan described the boarding process as follows: "Boarding is where . . . we merge and adopt the previous loan servicer's information into our system of records, which then creates one singular record. We have two main areas that are involved, which is loan setup and operations. Loan setup would handle mapping, which is where we take raw data from the previous servicer and input it into a standardized format and operations handles testing and data validation. Testing is where the loan is checked for accuracy and completeness, checks and balances along with reconciliations occur as does due diligence and if anytime during that process we find any errors or discrepancies with the loan, we place it aside for further review, reach back out to the previous servicer and if the issue cannot be rectified the loan will not be boarded. Data validation is where the final phase of testing occurs so that we can ensure the loan is validated as such and accurate. Once that is completed the loan is then boarded onto the system, given a specific Bayview Loan number and distributed amongst the different departments to be worked and then we also send out a welcome letter at that point."

On redirect examination, Haberlan further testified that Bayview conducts a verification process of the documents it loads into its system during the boarding process.[14] She noted that the screenshot was the way by which Bayview verified that the default notice was in fact mailed by the prior servicer, Bank of America.

Following the plaintiff's case in chief, the defendants' counsel moved for a judgment in favor of the defendants, arguing that the plaintiff failed to make out a prima facie case because a condition precedent to foreclosure, namely, notice of default prior to acceleration, had not been proven. The defendants' counsel based her argument on the fact that there was "testimony that [the default notice] was created and generated, but [the plaintiff is] missing a link regarding [Bank of America's] procedures in generating the letter to putting it in the postbox, which is the requirement under the law." The plaintiff's counsel responded that the breach date on the screenshot was proof of mailing of the default notice because "the way that you breach a loan is you issue a letter of default." The court subsequently ruled on the defendants' motion: "I'll deny the motion for judgment based on all of the evidence introduced. The plaintiff has produced sufficient evidence to make out

[14] The following exchange occurred between the plaintiff's counsel and Haberlan:

"Q. During the boarding process Bayview's employees would look at prior loan notes, prior loan histories and items like that to verify that the actions alleged to be taken by that prior servicer were actually done, would they not?

"A. Yes."

The following additional exchange occurred between the plaintiff's counsel and Haberlan:

"Q. Please tell me your understanding about the boarding process and the verification process used in particular for default letters and other correspondence sent on a loan?

"A. So they're going to verify that the address is correct, that the borrower [is] correct, that the amounts are correct, the dates and even sometimes the language in the breach letters. If there are system notes those will be verified as well stating sometimes there [are] logs that say this was mailed out on this particular day. In this particular instance on this loan we have that screenshot that's attached to the back of the letter that says it was on this date with this expiration date with this amount due with this loan number. So that would be part of the verification process."

a prima facie case including the notices to the defendants of default. And again, that's based upon the testimony which we've heard."

This court has recognized that "[t]he right of a mortgagee to initiate a foreclosure action against a defaulting debtor depends on the mortgagee's compliance with the notice provisions contained in the mortgage." *Mortgage Electronic Registration Systems, Inc.* v. *Goduto*, 110 Conn. App. 367, 368, 955 A.2d 544, cert. denied, 289 Conn. 956, 961 A.2d 420 (2008); see also *Fidelity Bank* v. *Krenisky*, 72 Conn. App. 700, 707, 807 A.2d 968, cert. denied, 262 Conn. 915, 811 A.2d 1291 (2002); *Citicorp Mortgage, Inc.* v. *Porto*, 41 Conn. App. 598, 602, 677 A.2d 10 (1996). "The intent of such notice of default provisions is to inform mortgagors of their rights so that they may act to protect them." (Internal quotation marks omitted.) *Aurora Loan Services, LLC* v. *Condron*, 181 Conn. App. 248, 263, 186 A.3d 708 (2018).

Here, the plain language of the mortgage note requires that notice of default be sent to the borrowers[15] prior to acceleration. See footnote 12 of this opinion. As stated previously in footnote 12 of this opinion, section 8 of the note at issue requires that notices of default be sent by first class mail. This court has previously held that "[f]irst class mail enjoys a presumption of actual delivery," meaning that when the notice is placed in the mail, delivery is presumed and the sender need not confirm actual receipt. Id., 268. Similarly, the "mailbox rule," a general principle of contract law, provides that "a properly stamped and addressed letter that is placed into a mailbox or handed over to the United States Postal Service raises a rebuttable presumption that it will be received." *Echavarria* v. *National Grange Mutual Ins. Co.*, 275 Conn. 408, 418, 880 A.2d 882 (2005).

[15] Section 15 of the mortgage deed in question, titled "Notices," provides in relevant part: "Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise."

Therefore, in the present case, the issue is whether the court properly found that the plaintiff proved, through exhibit 17 and Haberlan's testimony, that the default notice was actually placed in the mail.

According to our Supreme Court: "That a letter was duly deposited in a mail box may be proved either by direct or circumstantial evidence. It may be proved by the testimony of the person who deposited it or by proof of facts from which it may be reasonably inferred that it was duly deposited. . . . Any other rule would ignore the realities of today's business practice." (Citation omitted.) *Kerin* v. *Udolf*, 165 Conn. 264, 268, 334 A.2d 434 (1973). In interpreting this language, however, courts have concluded that the direct or circumstantial evidence to be provided in the form of testimony are sufficient when given by a witness with personal knowledge of the mailing procedures in question. In *Kerin*, our Supreme Court held that, in an action on a promissory note, the defendant proved, through circumstantial evidence, that he had mailed an installment check prior to the default period. Id., 265, 268. Specifically, "the defendant and [his employee] both testified that it was customary for [the defendant] to give [his employee] letters to be mailed so that [the employee] could stamp them and deposit them in the mail box. It was further testified that this customary procedure was followed [at the time the letter was allegedly mailed]." Id., 266, 268. Similarly, in *State* v. *Morelli*, 25 Conn. App. 605, 610–11, 595 A.2d 932 (1991), this court relied on circumstantial evidence in the form of witness testimony to hold that a police station had mailed to the defendant the results of a series of breath tests. In particular, a police officer employed by the Wilton Police Department that administered the tests and mailed the results testified that it was the department's "course of habit" to mail test results to the subject of the test. (Internal quotation marks omitted.) Id., 610; see also *State* v. *Dedominicis*, Superior Court, judicial district of New

Britain, Docket No. MV-01-0316680 (October 21, 2002) (33 Conn. L. Rptr. 298) (circumstantial evidence from witness who testified that he supervised established practice in lab of mailing test results led court to infer that state met its burden of proving that results were mailed.)

In the present case, exhibit 17 and Haberlan's accompanying testimony did not provide sufficient facts for a trier of fact to reasonably infer that the default notice was mailed to the defendants. Haberlan, as a representative of Bayview, was not able to testify as to the particular practices used by Bank of America to generate default notices, or to mail default notices. Although she testified that she was "familiar with industry standards," she admitted that she was not familiar with the default notice practices used by Bank of America. Unlike the testifying witnesses in *Kerin* and *Morelli*, Haberlan was not able to testify that it was "customary" or the "course of habit" for Bank of America to mail default notices following the generation of such notices because she had no personal knowledge of Bank of America's specific procedures or policies. Her sole basis for claiming that the default notice was mailed to the defendants was the mere existence of the notice and accompanying screenshot, and the fact that they had been boarded into Bayview's system when Bayview became the loan subservicer. Haberlan testified that Bayview's boarding process verifies the loan documents and the alleged actions to which they refer, however, she provided the court with no pertinent details regarding the boarding process or its methods of verification. See footnote 13. She testified that the verification process sometimes consists of "system notes" and mailing "logs," however, she referred the court to no such items in this instance. Rather, she testified, in a rather circular fashion, that, in this case, the screenshot was part of the verification process for the mailing of the default notice because the screenshot contained an expiration

date and breach date consistent with the date on the default notice. Haberlan, however, admitted that she lacked personal knowledge of the policies and procedures used to generate the screenshot. Therefore, her reliance on the screenshot to prove Bayview's verification process is insufficient evidence of Bank of America having mailed the default notice to the defendants.

In applying the clearly erroneous standard of review, we find that the evidence was insufficient to support the court's determination that Bank of America had mailed the default notice to the defendants. Accordingly, because it was a condition precedent of the note that the plaintiff provide the defendants with notice of default via first class mail, the plaintiff failed to prove a prima facie foreclosure case.

The judgment is reversed and the case is remanded with direction to render judgment for the defendants.

In this opinion the other judges concurred.

RICHARD ROMEO ET AL. *v.* FERNNE BAZOW (AC 42200)

Alvord, Prescott and Sullivan, Js.

Syllabus

The plaintiffs appealed to this court from the judgment of the trial court dismissing for lack of subject matter jurisdiction their third-party petition for visitation as to the minor children of the defendant. On their petition, the plaintiffs checked the boxes stating that they have a relationship with the children that is parent-like and that denial of visitation will cause real and significant harm to the children, and they referenced an attached affidavit. In the attached affidavit, the plaintiffs averred that they are the children's maternal grandparents, and they detailed their involvement with the children. They also averred that the defendant was preventing them from having any relationship with the children because she was angry with the plaintiffs and that, in doing so, the children were being harmed by deracinating them from their extended family and family roots. The defendant moved to dismiss the petition for lack of subject matter jurisdiction on the ground that the plaintiffs failed to plead the necessary factual allegations to satisfy the second jurisdictional prerequisite set forth in *Roth* v. *Weston* (259 Conn. 202),

specifically, that the denial of visitation will cause real and significant harm to the children. Thereafter, the plaintiffs filed an expert witness disclosure, in which they indicated that a clinical and forensic psychologist would testify as to the real and significant harm that would result from the sudden exclusion of the plaintiffs from the children's lives. Following a hearing, the trial court granted the defendant's motion to dismiss and rendered judgment thereon, determining, inter alia, that the plaintiffs' petition failed to satisfy the second jurisdictional element set forth in *Roth*. *Held*:

1. The trial court properly limited its consideration to the allegations contained in the plaintiffs' petition and the attached affidavit in ruling on the defendant's motion to dismiss; contrary to the plaintiffs' claim that that court improperly failed to consider their expert witness disclosure, our case law instructs that it would have been inappropriate for the court to look beyond the petition and accompanying affidavit to the expert disclosure, as the court was required to scrutinize the petition to determine whether it contained specific, good faith allegations of harm, and the expert disclosure, which was not attached to the petition and was not filed until months after the parties' briefing on the motion to dismiss was complete, constituted an attempt to supplement the petition with additional allegations in an effort to satisfy the second jurisdictional element set forth in *Roth*.

2. The trial court properly dismissed the plaintiffs' petition for lack of subject matter jurisdiction, the plaintiffs having failed to plead the requisite level of harm under the second jurisdictional element set forth in *Roth*; the only allegations as to harm in the plaintiffs' petition and accompanying affidavit were general allegations that neither rose to the level of neglect, abuse or abandonment contemplated by *Roth*, nor specified the type of harm that the children would suffer if the plaintiffs were denied visitation with them.

Argued October 10, 2019—officially released January 21, 2020

Procedural History

Petition for visitation with the defendant's minor children, brought to the Superior Court in the judicial district of Hartford, where the court, *Margaret M. Murphy*, *J.*, granted the defendant's motion to dismiss and rendered judgment thereon, from which the plaintiffs appealed to this court. *Affirmed*.

John F. Morris, for the appellants (plaintiffs).

Steven R. Dembo, with who were *Caitlin E. Kozloski* and, on the brief, *P. Jo Anne Burgh*, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiffs, Richard Romeo and Nancy Romeo, appeal from the judgment of the trial court dismissing their third-party petition for visitation brought pursuant to General Statutes § 46b-59 and Practice Book § 25-4 as to the minor children of the defendant, Fernne Bazow. On appeal, the plaintiffs claim that the court improperly dismissed their petition on the basis that it failed to satisfy the jurisdictional pleading requirements set forth in *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002). We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. On January 8, 2018, the plaintiffs filed a third-party petition for visitation seeking visitation with the defendant's two minor children.[1] The plaintiffs checked the box on the petition stating that they "have a relationship with the child(ren) that is parent-like." In the space below, the plaintiffs wrote: "See attached Affidavit." The plaintiffs also checked the box stating that "[d]enial of visitation will cause real and significant harm to the child(ren)" and again referenced the attached affidavit.[2]

[1] Nancy Romeo is the defendant's mother, and Richard Romeo is the defendant's stepfather.

[2] The petition was signed by Richard Romeo only and was not sworn to before a clerk, notary public, or commissioner of the Superior Court. The attached affidavit, executed the same day as the petition, was signed by both Richard Romeo and Nancy Romeo and sworn to before a commissioner of the Superior Court. At oral argument before this court, the defendant argued that this deficiency alone would require dismissal of the petition, citing *Firstenberg* v. *Madigan*, 188 Conn. App. 724, 731 n.6, 205 A.3d 716 (2019). In that case, this court noted that the appellant's failure to verify the petition, as required by § 46b-59 (b), alone would require dismissal of the petition. Id. In the present case, the trial court did not address this discrepancy in its memorandum of decision, and the defendant did not analyze the issue in her appellate brief as an alternative ground to affirm the judgment. Moreover, because we conclude that the court properly dismissed the petition on the basis that it failed to satisfy the second element of the *Roth* standard, we need not resolve whether an absent or inconsistent verification provides an additional and independent basis for dismissal of the petition.

In the attached affidavit, the plaintiffs averred that they are the maternal grandparents of the children and that they "have had a long-standing involvement with [their] grandchildren that has been so active, involved, and regular as to be the same as a parent-child relationship." They averred that they had lived with the children for the children's entire lives and had taught them hygiene, safety, respect, and morality, among other basic necessities of life. They averred that Richard Romeo had been the only consistent male role model the children have had. They averred that the defendant was upset with them because they had recently advocated for the defendant's daughter to have a relationship with her estranged father and that the defendant had retaliated against the plaintiffs by moving out of their home and restricting their access to the children.

The plaintiffs' affidavit contained twenty-three paragraphs detailing their involvement with the children, including providing childcare, both during their infancy "on a daily and often over-night basis," and during their preteen years to enable the defendant to maintain employment. They averred that they provided clothing, shoes and shelter for the children, taught them life skills, took them on vacations, did homework with them, and facilitated their involvement in sports activities. As to Nancy Romeo, they averred that she "became the custodian" for the children when she retired in 2013, at which time she became responsible for "getting them up in the morning, getting them breakfast, making sure homework was done, and taking them to and picking them up from school, after school activities, supper and putting them to bed." The plaintiffs averred that the defendant's daughter has asthma, and that "many times [they] were the ones doing asthma treatment with her, bringing her to the doctor, and on occasion to the hospital." The plaintiffs averred that they strongly feel that "it is in [the] children's best interests to maintain a consistent and ongoing relationship" with them.

The plaintiffs further averred: "We are gravely concerned that [the defendant] is preventing us from seeing [the] children because she is angry with us over our support of [her daughter's] paternal relationship. [Her daughter] is now [fourteen], and needs to know who her father is, and have a relationship with him. Since mid-2017, [the defendant] has been removing the children from any relationship with us and extended family members. It is so hurtful that [the defendant] would try to prevent the children from having relationships with their family members. Our extended family and friends saw the children on a nearly weekly basis since they were very little, and now [the defendant] is restricting all such access. There can be no greater harm to a child than the neglecting to promote and foster a child's roots in family [and] friends which directly affect the child's emotional growth and moral compass. The harm to the children, by deracinating their family roots is real and significant because it undermines a substantial part of who they are."

The plaintiffs sought visitation with the children "one weekend per month from Friday after school until Sunday night at dinnertime, one mid-week overnight every other week, summer vacation time, and regular telephone or FaceTime access."

On January 31, 2018, the defendant filed a motion to dismiss the petition on the basis that the plaintiffs lacked standing and, therefore, that the court lacked subject matter jurisdiction. In her memorandum of law in support of her motion to dismiss, the defendant argued that the plaintiffs had failed to plead the factual allegations necessary to provide the court with jurisdiction. Specifically, she argued that the petition failed to satisfy the second element of the two part test for standing established by our Supreme Court in *Roth* v. *Weston*, supra, 259 Conn. 235, in that the petition lacked specific, good faith allegations that denial of the visitation will cause real and significant harm to the children.

She argued that the only allegation of harm contained in the petition did not specifically identify the type of harm and spoke "to some hypothetical child or children and not even the defendant's children . . . ." She further argued that there were no allegations that "would be of such magnitude such as to allow the state to assume custody under [General Statutes §§] 46b-120 and 46b-129."

On February 16, 2018, the plaintiffs filed an objection to the motion to dismiss, in which they argued that the defendant's claims were not the proper subject of a motion to dismiss. They maintained that "[t]he defendant's claim that the allegations in the affidavit do not rise to the level of 'parent-like relationship' and/or that the denial will not cause 'real and significant harm' are appropriately subjects of a hearing on the merits of the petition, where the claims of both parties can be weighted, considered and decided." The defendant filed a reply to the plaintiffs' objection on March 8, 2018.

On June 6, 2018, the plaintiffs filed an expert witness disclosure, in which they indicated that Sidney Horowitz, a clinical and forensic psychologist, was expected to testify as to "the real and significant harm caused to the minor children by the defendant's sudden exclusion of the plaintiffs from the children's lives after years of substantial and regular involvement."[3] The disclosure was refiled on September 7, 2018. On September 25, 2018, the defendant filed a motion in limine seeking to preclude the plaintiffs from presenting expert testimony during the hearing on the defendant's motion to dismiss.

[3] The plaintiffs' disclosure indicated that Horowitz was expected to opine, inter alia, that "the [plaintiffs] have had a reciprocal parent-like relationship with the minor children that has resulted in a psychological bonding between them . . . [t]hat sudden rupture of the relationship by unilateral action of the defendant, without cause, is reasonably likely to cause traumatogenic consequences for the children . . . [and] [t]hat there is a reasonable psychological probability that the defendant's intentional rupture of the relationship, and traumatogenic harms can substantially [a]ffect the children's emotional and psychological development resulting in real and substantial harm."

The defendant argued therein that the proper inquiry for the court was whether the petition, as pleaded, was sufficient to afford the court jurisdiction and that the plaintiffs should not be permitted to supplement their allegations through expert testimony.

The parties appeared before the court, *Margaret M. Murphy, J.*, on September 26, 2018. The defendant's counsel represented that the parties had met that morning with Judge Olear, who had denied the plaintiffs' request for a continuance based on the filing of the motion in limine. According to the defendant's counsel, Judge Olear had stated that the matter was going forward because "there was no ability to have third parties."[4] The defendant's counsel accordingly restricted his argument before Judge Murphy to the motion to dismiss, and the plaintiffs' counsel did not thereafter reference the expert disclosure. At the conclusion of argument, the court stated that it needed to decide the subject matter jurisdiction issue before proceeding and that it would issue a decision shortly.

On October 5, 2018, the court issued a memorandum of decision in which it granted the defendant's motion to dismiss the petition on the basis that the plaintiffs lacked standing because their petition failed to include the jurisdictional elements required by *Roth*. As to the first element, the court found that, although "the petition asserts daily interactions and contact, cohabitation alone does not establish the requisite parent-like relationship." With respect to the allegations of activities that the plaintiffs facilitated with the children, the court found that such interactions did not suffice to meet the jurisdictional threshold.[5] As to the second element, the

[4] The court file does not indicate that a ruling was issued on the motion in limine.

[5] The court also found that the defendant's termination of regular contact between the plaintiffs and the children in mid-2017 "precludes a finding of a present parent-like relationship . . . ." On appeal, the plaintiffs argue that the court applied the wrong standard of law, in that it deviated from the *Roth* standard "by introducing a requirement of a 'present' parent-like stan-

court found that the petition contained no specific allegations of real and significant harm to the children from the lack of visitation. Specifically, the court found that the plaintiffs' allegations evidenced a disagreement with certain parenting decisions made by the defendant but that the plaintiffs did not allege that the defendant is unfit or that the children are neglected. The court stated: "The grandchildren may miss regular contact with their grandparents, although this fact is not alleged. But even if, for argument's sake, the grandchildren miss their grandparents or the defendant has made parenting mistakes, this type of harm alone does not rise to the level of neglect or uncared for as contemplated by *Roth* or as defined in . . . § 46b-59." Accordingly, the court granted the defendant's motion to dismiss the petition. This appeal followed.

On appeal, the plaintiffs claim that the court erred in dismissing the petition and in failing to consider the plaintiffs' expert witness disclosure. We disagree.

We first set forth our standard of review. "The standard of review of a motion to dismiss is . . . well established. In ruling upon whether a complaint survives a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . Because a challenge to the jurisdiction of the court presents a question of law, our review of the court's legal conclusion is plenary. . . . Subject matter jurisdiction involves the authority of the court to adjudicate

dard that is not found in the statute or the case law." We need not address this argument, as we conclude that the court properly dismissed the petition on the basis that it failed to satisfy the second element of the *Roth* standard. See *Fennelly* v. *Norton*, 103 Conn. App. 125, 142, 931 A.2d 269 (petition must contain "specific, good faith allegations of *both* relationship and harm" [emphasis added]), cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . ." (Internal quotation marks omitted.) *Fuller* v. *Baldino*, 176 Conn. App. 451, 456–57, 168 A.3d 665 (2017).

We next set forth applicable legal principles. In *Roth* v. *Weston*, supra, 259 Conn. 228, our Supreme Court recognized that the "constitutionally protected interest of parents to raise their children without interference undeniably warrants deference and, absent a powerful countervailing interest, protection of the greatest possible magnitude." To safeguard parents' rights against unwarranted intrusions into their authority, the court set forth "two requirements that must be satisfied in order for a court: (1) to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent; and (2) to grant such a petition." Id., 234.

"First, the petition must contain specific, good faith allegations that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship. The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child. As we have stated, that degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by §§ 46b-120 and 46b-129, namely, that the child is 'neglected, uncared-for or dependent.' The degree of specificity of the allegations must be sufficient to justify requiring the fit parent to subject his or her parental judgment to unwanted litigation. Only if these specific, good faith allegations are made will a court have jurisdiction over the petition." Id., 234–35.

"Second, once these high jurisdictional hurdles have been overcome, the petitioner must prove these allegations by clear and convincing evidence. Only if that enhanced burden of persuasion has been met may the court enter an order of visitation." Id., 235.

Following *Roth*, this court has described the procedure to be followed by the trial court when faced with a motion to dismiss a petition for visitation on the basis that it fails to allege the jurisdictional elements set forth in *Roth*. Specifically, "the trial court is required . . . to scrutinize the [petition] and to determine whether it contains specific, good faith allegations of both relationship and harm. . . . If the [petition] does not contain such allegations, the court lacks subject matter jurisdiction and the [petition] must be dismissed." (Citations omitted; footnote omitted.) *Fennelly* v. *Norton*, 103 Conn. App. 125, 142, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007); see *Fuller* v. *Baldino*, supra, 176 Conn. App. 460–61 (court properly dismissed third-party petition for lack of subject matter jurisdiction where petition failed to allege second jurisdictional element set forth in *Roth*); *Warner* v. *Bicknell*, 126 Conn. App. 588, 593, 12 A.3d 1042 (2011) ("[o]ur case law is clear that, absent the allegations identified by the *Roth* court, the court must dismiss a third party's [petition] for visitation"); see also *Firstenberg* v. *Madigan*, 188 Conn. App. 724, 736, 205 A.3d 716 (2019) (court lacked subject matter jurisdiction over petition that lacked necessary allegations).

In the present case, the plaintiffs argue that the court improperly declined to consider their expert disclosure when ruling on the defendant's motion to dismiss their petition. They maintain that the disclosure was part of the record available to the court when considering whether the *Roth* standards were satisfied and that the disclosure specifically "address[ed] the harm issue in addition to their affidavit." As noted previously, it is not clear from our scrutiny of the record that the plaintiffs requested that Judge Murphy consider the expert disclosure because, prior to oral argument before Judge Murphy, Judge Olear had stated, as represented by the defendant's counsel, that no "third parties" could present testimony. Even if the plaintiffs had made such a

request, we conclude that the court properly limited its consideration to the allegations contained in the plaintiffs' petition, including the attached affidavit.[6]

When the issue raised in a motion to dismiss is the plaintiff's failure to comply with the *Roth* requirements in a third-party petition for visitation, *Roth* instructs that the court simply should "examine the allegations of the petition and compare them to the jurisdictional requirements set forth herein." *Roth* v. *Weston*, supra, 259 Conn. 235. In *Fennelly* v. *Norton*, supra, 103 Conn. App. 134–36, 138, this court considered whether the trial court, after a motion to dismiss had been filed, properly conducted an evidentiary hearing, at which the plaintiffs concededly attempted to establish the threshold requirements of *Roth*. On appeal, this court concluded that, "[b]ecause the defendant's motion to dismiss for lack of jurisdiction was predicated on the insufficiency of the [petition] for visitation, it was inappropriate for the court to look beyond that pleading and permit the plaintiffs to augment the [petition] with additional allegations at the evidentiary hearing." Id., 139.

The defendant in the present case filed a motion to dismiss the petition and a memorandum of law in support, in which she argued that the petition was deficient because the allegations failed to satisfy the *Roth* requirements. In ruling on the motion to dismiss, the court was required to scrutinize the petition to determine whether it contained specific, good faith allegations of both relationship and harm. The court properly conducted this analysis. The plaintiffs' expert disclosure, which was not attached to the petition and was

[6] The defendant passingly argues in her appellate brief that the court should not have considered the allegations contained in the plaintiffs' affidavit, which was attached to and referenced in the plaintiffs' petition. We need not address this issue because the facts alleged in the affidavit, even if considered, are insufficient to satisfy *Roth*.

not filed until months after the parties' briefing on the motion to dismiss was complete, constituted an attempt to supplement the plaintiffs' petition with additional allegations in an effort to satisfy the second jurisdictional element set forth in *Roth*. Thus, it was not improper for the court to limit its consideration to the allegations of the petition and accompanying affidavit. Indeed, our case law instructs that it would have been inappropriate for the court to look beyond that pleading to the expert disclosure.[7]

Having concluded that the court properly limited its consideration to the allegations of the petition and the attached affidavit, we turn to the plaintiffs' claim that the court improperly determined that the petition failed to satisfy the *Roth* requirements. We conclude that the court properly determined that the plaintiffs failed to plead the requisite level of harm under the second element of the *Roth* requirements.[8]

As stated previously, the second element of the *Roth* test requires that the petition "contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child. . . . [T]hat degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by §§ 46b-120 and 46b-129, namely, that

[7] We further note that, in light of the requirement in § 46b-59 (b) that third-party petitions for visitation be verified, it would be particularly inappropriate for the court to consider representations contained in an expert disclosure, which our rules of practice do not require to be verified. See Practice Book § 13-4. Indeed, the purpose of our rule of practice requiring expert disclosure merely is "to assist the defendant in the preparation of his case, and to eliminate unfair surprise by furnishing the defendant with the essential elements of a plaintiff's claim." *Wexler* v. *DeMaio*, 280 Conn. 168, 188, 905 A.2d 1196 (2006).

[8] Accordingly, we need not address the plaintiffs' argument that the court improperly determined that they failed to allege the first *Roth* requirement. See footnote 5 of this opinion.

the child is 'neglected, uncared-for or dependent.' "[9] *Roth* v. *Weston*, supra, 259 Conn. 235; see also *Firstenberg* v. *Madigan*, supra, 188 Conn. App. 735 ("[t]he statute is clear and unambiguous that a petition for visitation must make specific, good faith allegations that the minor child will suffer real and significant harm akin to neglect if visitation were denied").

In *Roth*, our Supreme Court stated: "[I]t is unquestionable that in the face of allegations that parents are unfit, the state may intrude upon a family's integrity. . . . Therefore, it is clear that a requirement of an allegation such as abuse, neglect or abandonment would provide proper safeguards to prevent families from defending against unwarranted intrusions and would be tailored narrowly to protect the interest at stake." (Citations omitted.) *Roth* v. *Weston*, supra, 259 Conn. 224. The court described as the "more difficult issue . . . whether the child's own complementary interest in preserving relationships that serve his or her welfare and protection can also constitute a compelling interest that warrants intruding upon the fundamental rights of parents to rear their children." Id., 225. The court stated: "We can envision circumstances in which a nonparent and a child have developed such substantial emotional ties that the denial of visitation could cause serious and immediate harm to that child. For instance, when a

[9] General Statutes § 46b-59 (a) (2) defines real and significant harm to mean "that the minor child is neglected, as defined in section 46b-120, or uncared for, as defined in said section."

General Statutes § 46b-120 (4) provides in relevant part that "[a] child may be found 'neglected' who, for reasons other than being impoverished, (A) has been abandoned, (B) is being denied proper care and attention, physically, educationally, emotionally or morally, or (C) is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child . . . ."

General Statutes § 46b-120 (6) provides in relevant part that "[a] child may be found 'uncared for' (A) who is homeless, (B) whose home cannot provide the specialized care that the physical, emotional or mental condition of the child requires, or (C) who has been identified as a victim of trafficking, as defined in section 46a-170. . . ."

person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship. Thus, proof of a close and substantial relationship and proof of real and significant harm should visitation be denied are, in effect, two sides of the same coin. Without having established substantial, emotional ties to the child, a petitioning party could never prove that serious harm would result to the child should visitation be denied. This is as opposed to the situation in which visitation with a third party would be in the best interests of the child or would be very beneficial. The level of harm that would result from denial of visitation in such a situation is not of the magnitude that constitutionally could justify overruling a fit parent's visitation decision. Indeed, the only level of emotional harm that could justify court intervention is one that is akin to the level of harm that would allow the state to assume custody under . . . §§ 46b-120 and 46b-129—namely, that the child is 'neglected, uncared-for or dependent' as those terms have been defined." Id., 225–26.

Recently, in *Fuller* v. *Baldino*, supra, 176 Conn. App. 459, this court concluded that allegations that the plaintiff has a "very strong bond" with the child and that the child "suffers" and "is very emotional" when unable to see him did not rise to the level of neglect, abuse or abandonment. This court further concluded that the allegations failed to specify what harm the child will suffer if he is denied visitation and that the petition, instead, asked the court "to infer neglect, lack of care, or abandonment from his allegation that the child will 'suffer' as a consequence of the termination of their relationship." Id., 460. Accordingly, the allegations were insufficient under *Roth* to establish subject matter jurisdiction. Id. The court in *Fuller* relied on *Clements* v.

Jones, 71 Conn. App. 688, 695, 803 A.2d 378 (2002), in which this court considered the plaintiff's allegations that she "often received the child in an ill state, apparently due to the child's asthma, and needed to nurse him back to health, that the plaintiff spent much time nursing the child back to health, that separation would be unjust and inhumane to the child, and that visitation would be in the best interest of the child." With respect to the allegations regarding the child's health, without more, this court could not conclude that they "constitute an allegation that rises to the level of abuse, neglect, or abandonment contemplated by *Roth*." Id., 695–96. This court further concluded that "[t]he other assertions also do not allege the requisite level of harm necessary to satisfy the harm test set out in *Roth*." Id., 696; see also *Firstenberg* v. *Madigan*, supra, 188 Conn. App. 735 (court lacked jurisdiction over third-party petition for visitation, where petition "made several unsubstantiated allegations" about defendant and his attorney, none of which addressed type of real and substantial harm contemplated by §§ 46b-59 and 46b-120, or referenced type of harm child would experience if visitation were denied).

In the present case, the only allegations as to harm in the plaintiffs' petition and accompanying affidavit are the following: "There can be no greater harm to a child than the neglecting to promote and foster a child's roots in family [and] friends which directly affect the child's emotional growth and moral compass. The harm to the children, by deracinating their family roots is real and significant because it undermines a substantial part of who they are." These general allegations neither rise to the level of neglect, abuse or abandonment, nor specify the type of harm the children will suffer if the plaintiffs are denied visitation. Accordingly, we agree with the trial court that the plaintiffs' petition failed to allege the second jurisdictional element set forth in

Roth, and the court properly dismissed the petition for lack of subject matter jurisdiction.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

CRAIG B. HUNTER ET AL. *v.* SATYAM S. SHRESTHA
(AC 41751)

Alvord, Moll and Beach, Js.

Syllabus

The plaintiffs appealed to this court from the judgment of the trial court dismissing for lack of subject matter jurisdiction their third-party petition for visitation as to the minor child of the defendant. In dismissing the petition, the trial court determined that the plaintiffs failed to set forth the specific, good faith allegations required to satisfy the jurisdictional pleading requirements set forth in *Roth* v. *Weston* (259 Conn. 202), specifically, that the plaintiffs have a parent-like relationship with the child and that the denial of visitation will cause real and significant harm to the child. *Held* that the trial court properly dismissed the plaintiffs' petition for lack of subject matter jurisdiction, the plaintiffs having

[10] In their appellate brief, the plaintiffs rely on *DiGiovanna* v. *St. George*, 300 Conn. 59, 12 A.3d 900 (2011), for a number of general legal propositions. In that case, the issue on appeal was whether a trial court may deny a nonparent's petition for visitation when the applicant has proven by clear and convincing evidence that he has a parent-like relationship with the child and that the child would suffer harm akin to abuse and neglect if the relationship is not permitted to continue, if the trial court concludes that visitation nonetheless is not in the best interest of the child. Id., 61. In resolving that question, the court noted that it was "treat[ing] as uncontested the trial court's findings that the plaintiff alleged and proved the *Roth* factors by clear and convincing evidence." Id., 70. Thus, *DiGiovanna* primarily addressed the implementation of visitation *following* the third party's pleading and proving the requisite *Roth* elements of the parent-like relationship and substantial harm akin to abuse or neglect if visitation were denied. Accordingly, it does not assist this court in its analysis as to whether the jurisdiction elements were alleged in the present case.

We recognize, however, as the plaintiffs emphasize, that our Supreme Court in *DiGiovanna* noted that "because the requisite harm for obtaining visitation over a fit parent's objection is akin to, but falls short of, the neglected, uncared-for or dependent standard for intervention by the [Department of Children and Families], parents unsuccessfully may oppose visitation without necessarily being unfit or in need of such intervention." Id., 73. Because the plaintiffs' allegations fall considerably short of the requisite harm akin to neglect, we fail to see how this principle is of any assistance to the plaintiffs.

failed to plead the requisite level of harm under the second element of *Roth*; although the plaintiffs alleged that the denial of visitation would cut the child off from the maternal side of her family, have the effect of the child feeling that the plaintiffs abandoned her, compound the child's early childhood trauma and harm her, the plaintiffs did not allege with sufficient specificity how the child would be harmed, and, without more, those allegations did not rise to the level of abuse, neglect or abandonment contemplated by *Roth*.

Argued October 8, 2019—officially released January 21, 2020

Procedural History

Petition for visitation with the defendant's minor child, brought to the Superior Court in the judicial district of Hartford, where the court, *Prestley*, *J.*, denied the defendant's motion to dismiss; thereafter, the court granted the defendant's motion for reconsideration and rendered judgment dismissing the petition, from which the plaintiffs appealed to this court. *Affirmed*.

Barbara J. Ruhe, for the appellants (plaintiffs).

Tanya T. Dorman, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiffs, Craig B. Hunter and Sarah Megan Berthold, appeal from the judgment of the trial court dismissing their third-party petition for visitation pursuant to General Statutes § 46b-59[1] and Practice Book § 25-4[2] as to the minor child of the defendant,

[1] General Statutes § 46b-59 provides in relevant part: "(b) Any person may submit a verified petition to the Superior Court for the right of visitation with any minor child. Such petition shall include specific and good-faith allegations that (1) a parent-like relationship exists between the person and the minor child, and (2) denial of visitation would cause real and significant harm. . . ."

[2] Practice Book § 25-4 provides: "Every application or verified petition in an action for visitation of a minor child, other than actions for dissolution of marriage or civil union, legal separation or annulment, shall state the name and date of birth of such minor child or children, the names of the parents and legal guardian of such minor child or children, and the facts necessary to give the court jurisdiction. An application brought under this section shall comply with Section 25-5. Any application or verified petition brought under this Section shall be commenced by an order to show cause. Upon presentation of the application or verified petition and an affidavit

Satyam S. Shrestha. Because we conclude that the plaintiffs' petition failed to satisfy the jurisdictional pleading requirements set forth in *Roth* v. *Weston*, 259 Conn. 202, 789 A.2d 431 (2002), we affirm the judgment of the trial court.

The following facts and procedural history are necessary to our resolution of the plaintiffs' appeal. On January 26, 2017, the then self-represented plaintiffs[3] filed a third-party petition seeking visitation with the defendant's child.[4] The plaintiffs checked the box on the petition stating that they "have a relationship with the child(ren) that is parent-like."[5] The plaintiffs alleged that they had been the child's "primary caregivers for three years prior to July 15, 2016," and that for the first one and one-half years of that time, the child lived with the plaintiffs seven days per week, and for the remainder of that time, the child lived with the plaintiffs five days per week. The plaintiffs checked the box stating that "[d]enial of visitation will cause real and significant harm to the child(ren)." The plaintiffs alleged that "[i]t would cut [the child] off from all ties with her maternal side of the family. [The child's] mother abandoned her when she was [one year old] and we have been consistent and parent-like caregivers in her life ever since. Denying visitation will have the effect of

concerning children, the judicial authority shall cause an order to be issued requiring the adverse party or parties to appear on a day certain and show cause, if any there be, why the relief requested in the application or verified petition should not be granted. The application or verified petition, order and affidavit shall be served on the adverse party not less than twelve days before the date of the hearing, which shall not be held more than thirty days from the filing of the application or verified petition."

[3] Counsel for the plaintiffs filed an appearance on May 4, 2017.

[4] The plaintiffs alleged in their petition that they are the grandparents of the child. In the defendant's memorandum of law in support of his motion to dismiss the petition, he represented that Hunter is the child's maternal grandfather, and Berthold is the child's maternal stepgrandmother.

[5] As with other family matters, the Judicial Branch provides a form, JD-FM-221, which a nonparent may choose to use to seek visitation with a child.

[the child] feeling that we have abandoned her and compound her early childhood trauma [and] harm her." The plaintiffs also added, "see attached [s]upplements."

In the attached supplement, the plaintiffs alleged that prior to the child's birth, they "provided extensive financial and emotional support" to the child's parents. The plaintiffs alleged that they were present from the time of the child's birth and infancy and "provided her with parent-like care." The plaintiffs alleged that they "have had a continuous parent-like relationship with [the child] on both coasts of the United States throughout her life" and that "[s]he began to live with [them] several days a week before she first attended school." The plaintiffs alleged that they had "continuously supported and assisted" the defendant in the child's education and spiritual growth. Lastly, the plaintiffs alleged that the defendant recently had deprived the child and the plaintiffs of the relationship and companionship they had previously enjoyed, and that they had been deprived of contact with the child, which had seriously disrupted the parent-like relationship with the child that the defendant had previously encouraged. The plaintiffs sought, inter alia, weekly visitation with the child, including overnight visitation every other weekend and weekday visitation twice a week on alternate weeks, and permission to communicate with the child on a daily basis.

Before the trial court, the defendant challenged the court's subject matter jurisdiction over the petition. Ultimately, the trial court found that the plaintiffs had failed to set forth the specific, good faith allegations required by *Roth* v. *Weston*, supra, 259 Conn. 234–35, namely, that "the petitioner has a relationship with the child that is similar in nature to a parent-child relationship" and that "denial of the visitation will cause real and significant harm to the child." Accordingly, the trial court dismissed the petition for lack of subject matter jurisdiction. This appeal followed.

The dispositive issue on appeal is whether the trial court lacked subject matter jurisdiction over the plaintiffs' petition.[6] We conclude that the plaintiffs failed to plead the requisite level of harm under the second element of *Roth*, and, therefore, the court correctly dismissed the petition for lack of subject matter jurisdiction.[7]

We first set forth relevant principles of law and our standard of review. It is well established that "[a] court lacks discretion to consider the merits of a case [or claim] over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.) *Warner* v. *Bicknell*, 126 Conn. App. 588, 596, 12 A.3d 1042 (2011); see id., 594 ("[O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented. . . . The court must fully resolve it before proceeding further with the case." [Internal quotation marks omitted.]). "Because a challenge to the jurisdiction of the court presents a question of law, our review of the court's legal conclusion is

[6] On appeal to this court, the plaintiffs claimed that a number of procedural irregularities improperly led to the dismissal of their petition for visitation. The plaintiffs' briefing did not address the merits of the court's determination regarding its subject matter jurisdiction. Accordingly, we provided the parties with an opportunity to file supplemental briefing on the question of "whether the plaintiffs' petition satisfies the threshold requirements for the trial court to acquire subject matter jurisdiction pursuant to . . . § 46b-59?" The parties filed their supplemental briefs on November 15, 2019. Because we conclude that the trial court lacked subject matter jurisdiction over the petition, we do not address the procedural irregularities raised by the plaintiffs.

[7] Accordingly, we need not address whether the court properly determined that the plaintiffs failed to allege the first *Roth* element.

plenary." (Internal quotation marks omitted.) *Fuller* v. *Baldino*, 176 Conn. App. 451, 457, 168 A.3d 665 (2017).

In *Roth* v. *Weston*, supra, 259 Conn. 228, our Supreme Court recognized that the "constitutionally protected interest of parents to raise their children without interference undeniably warrants deference and, absent a powerful countervailing interest, protection of the greatest possible magnitude." To safeguard parents' rights against unwarranted intrusions into their authority, the court set forth "two requirements that must be satisfied in order for a court: (1) to have jurisdiction over a petition for visitation contrary to the wishes of a fit parent; and (2) to grant such a petition." Id., 234.

"First, the petition must contain specific, good faith allegations that the petitioner has a relationship with the child that is similar in nature to a parent-child relationship. The petition must also contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child. As we have stated, that degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by [General Statutes] §§ 46b-120 and 46b-129, namely, that the child is 'neglected, uncared-for or dependent.' The degree of specificity of the allegations must be sufficient to justify requiring the fit parent to subject his or her parental judgment to unwanted litigation. Only if these specific, good faith allegations are made will a court have jurisdiction over the petition." Id., 234–35.

"Second, once these high jurisdictional hurdles have been overcome, the petitioner must prove these allegations by clear and convincing evidence. Only if that enhanced burden of persuasion has been met may the court enter an order of visitation." Id., 235.

When faced with a motion to dismiss a petition for visitation on the basis that it fails to allege the jurisdictional elements set forth in *Roth*, "the trial court is required . . . to scrutinize the [petition] and to determine whether it contains specific, good faith allegations of both relationship and harm. . . . If the [petition] does not contain such allegations, the court lacks subject matter jurisdiction and the [petition] must be dismissed." (Citations omitted; footnote omitted.) *Fennelly* v. *Norton*, 103 Conn. App. 125, 142, 931 A.2d 269, cert. denied, 284 Conn. 918, 931 A.2d 936 (2007).

As stated previously, the second element of *Roth* requires that the petition "contain specific, good faith allegations that denial of the visitation will cause real and significant harm to the child. . . . [T]hat degree of harm requires more than a determination that visitation would be in the child's best interest. It must be a degree of harm analogous to the kind of harm contemplated by §§ 46b-120 and 46b-129, namely, that the child is 'neglected, uncared-for or dependent.' "[8] *Roth* v. *Weston*, supra, 259 Conn. 235; see also *Firstenberg* v. *Madigan*, 188 Conn. App. 724, 735, 205 A.3d 716 (2019) ("[t]he statute is clear and unambiguous that a petition for visitation must make specific, good faith allegations that the minor child will suffer real and significant harm

[8] General Statutes § 46b-59 (a) (2) defines real and significant harm to mean "that the minor child is neglected, as defined in section 46b-120, or uncared for, as defined in said section."

General Statutes § 46b-120 (4) provides in relevant part that "[a] child may be found 'neglected' who, for reasons other than being impoverished, (A) has been abandoned, (B) is being denied proper care and attention, physically, educationally, emotionally or morally, or (C) is being permitted to live under conditions, circumstances or associations injurious to the well-being of the child . . . ."

General Statutes § 46b-120 (6) provides in relevant part that "[a] child may be found 'uncared for' (A) who is homeless, (B) whose home cannot provide the specialized care that the physical, emotional or mental condition of the child requires, or (C) who has been identified as a victim of trafficking, as defined in section 46a-170. . . ."

akin to neglect if visitation were denied"). In *Roth*, our Supreme Court stated: "[I]t is unquestionable that in the face of allegations that parents are unfit, the state may intrude upon a family's integrity. . . . Therefore, it is clear that a requirement of an allegation such as abuse, neglect or abandonment would provide proper safeguards to prevent families from defending against unwarranted intrusions and would be tailored narrowly to protect the interest at stake." (Citations omitted.) *Roth* v. *Weston*, supra, 224. The court described as the "more difficult issue . . . whether the child's own complementary interest in preserving relationships that serve his or her welfare and protection can also constitute a compelling interest that warrants intruding upon the fundamental rights of parents to rear their children." Id., 225. The court stated: "We can envision circumstances in which a nonparent and a child have developed such substantial emotional ties that the denial of visitation could cause serious and immediate harm to that child. For instance, when a person has acted in a parental-type capacity for an extended period of time, becoming an integral part of the child's regular routine, that child could suffer serious harm should contact with that person be denied or so limited as to seriously disrupt that relationship. Thus, proof of a close and substantial relationship and proof of real and significant harm should visitation be denied are, in effect, two sides of the same coin. Without having established substantial, emotional ties to the child, a petitioning party could never prove that serious harm would result to the child should visitation be denied. This is as opposed to the situation in which visitation with a third party would be in the best interests of the child or would be very beneficial. The level of harm that would result from denial of visitation in such a situation is not of the magnitude that constitutionally could justify overruling a fit parent's visitation decision. Indeed, the only level of emotional harm that could justify court

intervention is one that is akin to the level of harm that would allow the state to assume custody under . . . §§ 46b-120 and 46b-129—namely, that the child is 'neglected, uncared-for or dependent' as those terms have been defined." Id., 225–26.

In the present case, the plaintiffs allege that denial of visitation "would cut [the child] off from all ties with her maternal side of the family. [The child's] mother abandoned her when she was [one year old] and we have been consistent and parent-like caregivers in her life ever since. Denying visitation will have the effect of [the child] feeling that we have abandoned her and compound her early childhood trauma [and] harm her."

We first address the allegation that denial of visitation would cut the child off from her maternal side of the family. Although it may not be in the child's best interest not to share a relationship with extended family, this allegation is not commensurate with the level of harm contemplated in *Roth*. Second, the plaintiffs allege that denying visitation will have the effect of the child feeling that they have abandoned her, citing the early abandonment by the child's mother. Again, while the absence of a parent and maternal family members could be detrimental to the child, it does not rise to the level of harm set forth in § 46b-120. See, e.g., *Fuller* v. *Baldino*, supra, 176 Conn. App. 459 (allegations that plaintiff has "very strong bond" with child and that child "suffers" and is "very emotional" when unable to see him do not rise to level of neglect, abuse or abandonment [internal quotation marks omitted]); *Clements* v. *Jones*, 71 Conn. App. 688, 695–96, 803 A.2d 378 (2002) (holding insufficient allegations "that the plaintiff often received the child in an ill state, apparently due to the child's asthma, and needed to nurse him back to health, that the plaintiff spent much time nursing the child back to health, that separation would be unjust and inhumane to the child, and that visitation would be in the best interest of the

child''). Finally, the plaintiffs' allegation that denying visitation will ''compound [the child's] early childhood trauma [and] harm her'' ignores the requirement that facts must be pleaded with sufficient specificity to warrant the court's intrusion. The plaintiffs do not allege how the child will be harmed and, without more, these allegations do not rise to the level of abuse, neglect, or abandonment contemplated by *Roth*. Accordingly, the trial court properly determined that the plaintiffs' petition failed to allege the second jurisdictional element set forth in *Roth* and properly dismissed the petition for lack of subject matter jurisdiction.

The judgment is affirmed.

In this opinion the other judges concurred.

TONI RACZKOWSKI *v.* DAVID J. MCFARLANE ET AL. (AC 42024)

Keller, Prescott and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendants, G and M, for negligence in connection with personal injuries she allegedly sustained when she was bitten by a dog owned by M on property that M leased from G pursuant to a written lease agreement. The lease permitted the tenant to keep a pet on the property in exchange for increased rent but required that the pet pose no threat to anyone entering the property and provided that that was to be determined by the landlord. The plaintiff alleged, inter alia, that G was negligent because she knew or should have known the vicious propensities of M's dog and by allowing the dog to stay on the property, G failed to use reasonable care to keep the property in a reasonably safe condition. In addition, the plaintiff alleged that the lease imposed on G a duty of care that extended to third persons who were not parties to the lease. Following a hearing, the trial court granted G's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. She claimed that the trial court improperly rendered summary judgment in favor of G because it erroneously concluded that G did not owe her a duty of care on the basis of the lease between G and M. *Held*:

1. The trial court properly rendered summary judgment in G's favor, there having been no genuine issue of material fact that the plain language of the lease did not require G to investigate the behavioral propensities of M's dog and that the lease did not create a duty on the part of G to third persons who might encounter the dog on the property; the relevant language of the lease clearly did not impose a duty on G to perform an extraneous investigation of the dog's behavioral propensities but, rather, simply provided G with discretion to approve or deny the ability of the tenant to own or keep pets on the property and was included for the exclusive benefit of G in her capacity as the landlord, and the obligations under the lease were limited to its signatories and did not extend to third persons, as the language of the lease clearly demonstrated that G and M did not intend to create an obligation to any third persons.
2. The plaintiff could not prevail on her claim that the language of the lease related to G's discretion to approve a tenant having a pet on the property created a genuine issue of material fact as to whether G retained control over the property and, therefore, whether the lease imposed on G a duty of care to keep in a reasonably safe condition those portions of the property over which she reserved control: G submitted a copy of the lease and various affidavits demonstrating that the entire property was leased to M and thereby established that she did not have control or possession over the property where the plaintiff was injured and, therefore, did not owe a duty of care to the plaintiff, and the plaintiff failed to provide any evidence to show that there was a genuine issue of material fact as to whether G had possession or control over the property; moreover, the plaintiff's reliance on *Giacalone* v. *Housing Authority* (306 Conn. 399) was misplaced, as that case was distinguishable because, in the present, case there was no common area of the property for G to keep reasonably safe due to M's exclusive possession under the lease, and, therefore, G had no right to enter the property and to physically remove M's dog, and the issue of whether the landlord knew or should have known of the dog's vicious tendencies was not before this court.

Argued October 15, 2019—officially released January 21, 2020

Procedural History

Action to recover damages for the defendants' alleged negligence, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Shapiro*, *J.*, granted the motion for summary judgment filed by the defendant Evelyn Garrow and rendered judgment thereon; thereafter, the court, *Hon. Robert B. Shapiro*, judge trial referee, denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed.*

Keith Yagaloff, for the appellant (plaintiff).

Joseph M. Busher, Jr., for the appellee (defendant Evelyn Garrow).

Opinion

HARPER, J. The plaintiff, Toni Raczkowski, brought the underlying negligence action against the defendant landlord, Evelyn Garrow.[1] The plaintiff sought compensation for damages she allegedly sustained when she was bitten by a dog owned by the defendant's tenant, David J. McFarlane, on the leased property. The plaintiff appeals from the summary judgment rendered by the trial court in favor of the defendant. The plaintiff claims that the court improperly granted the defendant's motion for summary judgment because it erroneously concluded that the defendant did not owe her a duty of care on the basis of the lease agreement between the defendant and McFarlane.[2] We disagree and, accordingly, affirm the judgment of the trial court.

[1] The plaintiff named Garrow and her tenant, David J. McFarlane, as defendants in this action. McFarlane has not appeared in this action either before the trial court or this court and, thus, has not participated in this appeal. In this opinion, we refer to Garrow as the defendant.

[2] In her statement of issues, the plaintiff set forth the following three issues: "1. Did the court err in failing to apply the appropriate legal standard for a motion for summary judgment?

"2. Did the court err in determining that the defendant . . . did not owe a contractual duty of care to the plaintiff arising out of the lease with . . . McFarlane?

"3. Did the court err in finding that the lease language did not support the existence of a duty for [the defendant] to perform a reasonable inquiry into the dog's dangerous tendencies?"

The plaintiff's brief does not comply with Practice Book § 67-4 (b) in that the statement of issues is not accompanied by "appropriate references to the page or pages of the brief where [each] issue is discussed" in the brief. Nor does the brief comply with § 67-4 (e) in that the plaintiff's argument is not "divided under appropriate headings into as many parts as there are points to be presented" with "a separate, brief statement of the standard of review the appellant believes should be applied" to each part.

Despite these deficiencies with respect to the brief, we have reviewed the arguments raised therein and conclude that it essentially raises a single issue with two subparts, namely, whether the court improperly failed to

The record, viewed in the light most favorable to the plaintiff as the nonmoving party, reveals the following relevant facts and procedural history. On April 16, 2016, the plaintiff was walking her dog along the sidewalk in front of 295 Hilliard Street in Manchester (property). As she was walking her dog near the property, a dog named Diesel, owned by McFarlane, ran out and bit her. This occurred, in part, on the property. The plaintiff's injuries included multiple puncture wounds and tears to her forearm and wrist. At the time of the incident, the defendant was the owner and landlord of the property, and was renting the property to McFarlane pursuant to a written lease agreement.

On April 11, 2017, the plaintiff commenced the present action. In her amended complaint, the plaintiff alleged that the defendant was negligent in that she knew or should have known that McFarlane's dog was dangerous and that allowing the dog to stay on the property constituted a failure to use reasonable care to keep the property in a reasonably safe condition. Furthermore, the plaintiff alleged that the lease between the defendant and McFarlane, which left the approval of any dogs living on the property to the discretion of the defendant, imposed on the defendant a duty of care to third persons who are not parties to the lease.

On January 19, 2018, the defendant filed a motion for summary judgment in which the defendant asserted

conclude that a genuine issue of material fact existed with respect to whether the language of the lease gave rise to a duty of care owed by the defendant to third parties, including the plaintiff, because the lease (1) required the defendant to investigate on behalf of third parties whether dogs on the subject property had dangerous propensities and (2) reflected that the defendant retained control over the portion of the leased property where the plaintiff sustained her injuries and, thus, the defendant owed third parties who were on this portion of the property a duty of care with respect to dangerous dogs.

We note that, during oral argument before this court, the plaintiff acknowledged that she was not pursuing a claim that the court improperly failed to determine that a duty of care arose apart from the language of the lease.

that the plaintiff had failed to demonstrate that there was a genuine issue of material fact as to whether the defendant had actual or constructive knowledge of the dog's vicious propensities or whether the defendant owed the plaintiff a duty of care on the basis of the lease agreement between the defendant and McFarlane. The plaintiff filed an objection to the motion for summary judgment on April 9, 2018. In support of her objection, the plaintiff asserted that there was a genuine issue of material fact as to whether the lease imposed a duty on the defendant that extended to the plaintiff, a nonparty to the lease. The plaintiff relied on an affidavit from a neighbor that suggested that McFarlane's dog had vicious propensities.[3]

On April 16, 2018, the court, *Shapiro*, *J.*, held a hearing on the defendant's motion for summary judgment. The court granted the motion for summary judgment on June 11, 2018, and issued a memorandum of decision setting forth its reasoning. In its memorandum of decision, the court concluded that the defendant was entitled to summary judgment because there was no genuine issue of material fact as to whether the defendant knew or should have known of the dog's allegedly vicious propensities or whether the lease agreement imposed on the defendant a duty of care that extended to nonparties to the lease. The court further concluded that a plain reading of the language in the lease revealed that the lease did not impose a duty on the defendant that required her to make a reasonable inquiry into the behavior of McFarlane's dog.

[3] During the hearing on the motion for summary judgment, the defendant objected to the affidavit from McFarlane's neighbor on the ground that it contained hearsay. The affidavit indicated that the neighbor knew of the dog's vicious tendencies prior to the incident in which the plaintiff was bitten. The court, however, having found that it was undisputed that the defendant did not have knowledge of the dog's allegedly vicious tendencies prior to the attack, did not address the argument relating to the consideration of the neighbor's affidavit.

On June 29, 2018, the plaintiff filed a "motion to reargue/reconsider" with the court. In her motion, the plaintiff reiterated many of the same arguments that she raised in her objection to the motion for summary judgment. Additionally, she characterized the court's analysis in its memorandum of decision as concluding that the language in the lease between the defendant and McFarlane was "vague." On August 9, 2018, the court issued a ruling on the plaintiff's "motion to reargue/reconsider" in which it disputed the plaintiff's characterization. The court concluded that it "did not find . . . the language of the lease agreement . . . ambiguous. Rather, the court found that the plain language of the lease [did] not support the plaintiff's interpretation that [the defendant] had a blanket duty to anyone entering the property to ensure that any dog residing on the property did not pose a threat. . . . [The lease] plainly and unambiguously did not create a duty owed by [the defendant] to unnamed third [persons], such as [the plaintiff] who happened to come onto [the defendant's] property." This appeal followed. Additional facts will be set forth as necessary.

On appeal, the plaintiff advances one claim, but makes two arguments in support of that claim. First, she argues that the court erred in rendering summary judgment in favor of the defendant because there was a genuine issue of material fact as to whether the lease created a duty requiring the defendant to investigate the behavioral propensities of a tenant's dog on the property on behalf of third persons not parties to the lease. According to the plaintiff, this duty of care owed to her would have required the defendant to take some type of action to protect third persons not parties to the lease from dangerous dogs being kept on the property. Second, she argues that the language of the lease stating that the defendant had discretion to approve her tenant's pets created a genuine issue of material fact as to whether the defendant retained control over the

property and, therefore, whether the lease imposed a duty of care to keep in a reasonably safe condition those portions of the property over which she reserved control. We disagree with the plaintiff's arguments.

We begin our analysis with the standard of review applicable to a trial court's decision to grant a motion for summary judgment. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A party moving for summary judgment is held to a strict standard. . . . To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent. . . . When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue. . . . Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue. . . . It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly presented to the court under Practice Book § [17-45]. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary." (Internal quotation marks omitted.) *Anderson* v. *Dike*, 187 Conn. App. 405, 409–10, 202 A.3d 448, cert. denied, 331 Conn. 910, 203 A.3d 1245 (2019).

The plaintiff argues that the language of the lease imposed a duty of care on the defendant to investigate the behavioral propensities of McFarlane's dog and that the lease recognized that the defendant owed a duty of care to nonparties to the lease who might encounter the dog on the property.

Here, because the lease is a contract and the plaintiff's claim presents a question of contract interpretation, the lease is subject to the same rules of construction as other contracts. See *Bristol* v. *Ocean State Job Lot Stores of Connecticut, Inc.*, 284 Conn. 1, 7, 931 A.2d 837 (2007). "Where the language of the contract is clear and unambiguous, the contract is to be given effect according to its terms. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . [E]xtrinsic evidence may be considered in determining contractual intent only if a contract is ambiguous. . . . When the intention conveyed by the terms of an agreement is clear and unambiguous, there is no room for construction. . . . The circumstances surrounding the making of the contract, the purposes which the parties sought to accomplish and their motives cannot prove an intent contrary to the plain meaning of the language used. . . . In sum, decisional law holds that if the language of the contract is clear and unambiguous, our courts must look only to the four corners of the contract to discern the parties' intent." (Citations omitted; internal quotation marks omitted.) *Konover* v. *Kolakowski*, 186 Conn. App. 706, 719–20, 200 A.3d 1177 (2018), cert. denied, 330 Conn. 970, 200 A.3d 1151 (2019). Thus, when a contract is unambiguous within its four corners, as it is here, the interpretation of it is a question of law for this court. See *Connecticut National Bank* v. *Rehab Associates*, 300 Conn. 314, 319, 12 A.3d 995 (2011).

Additionally, "when the claim [of a duty of care arising out of a contract] is brought [by an individual] who

is not a party to the contract, the duty must arise from something other than mere failure to perform properly under the contract. . . . The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised." (Citation omitted; internal quotation marks omitted.) *Atelier Constantin Popescu, LLC* v. *JC Corp.*, 134 Conn. App. 731, 757, 49 A.3d 1003 (2012). In the present case, however, unless the signatories of the lease intended, at the time of signing, that the plaintiff be a third-party beneficiary, then the harm that could have resulted if a duty of care was not exercised was not foreseeable. "The proper test to determine whether a lease creates a third party beneficiary relationship is whether the parties to the lease intended to create a direct obligation from one party to the lease to the third party. . . . In determining the meaning and effect of the controverted language in the lease, the inquiry must focus on the intention expressed in the lease and not on what intention existed in the minds of the parties." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 231, 654 A.2d 342 (1995). "Although . . . it is not in all instances necessary that there be express language in the contract creating a direct obligation to the claimed third party beneficiary . . . the only way a contract could create a direct obligation between a promisor and a third party beneficiary would have to be . . . because the parties to the contract so intended. . . . [B]oth contracting parties must intend to confer enforceable rights in a third party . . . in order to give the third party standing to bring suit. This requirement rests, in part at least, on the policy of certainty in enforcing contracts, which entitles each party to a contract to know the scope of his or her obligations thereunder." (Citations omitted; internal quotation marks omitted.) *Hilario's Truck Center, LLC* v. *Rinaldi*, 183 Conn. App. 597, 605, 193 A.3d 683, cert. denied, 330 Conn. 925, 194 A.3d 776 (2018).

In the present case, the relevant language of the lease is as follows: "The tenant may keep a pet but this will increase the monthly payment by $50.00 per month. The tenant must keep the pet healthy and well groomed. The pet must pose no threat to anyone coming on the property. This is to be determined by the landlord." Because we conclude that the language of the contract is clear and unambiguous, we look only to the plain meaning of the language used therein.[4]

It is clear from the language of the lease that the lease did not impose a duty on the defendant to perform an extraneous investigation of the dog's behavioral propensities.[5] The language of the lease simply provides the defendant the discretion to approve or deny the ability of her tenants to own or keep pets on the property. This language was included for the exclusive benefit of the defendant in her capacity as the landlord. The relevant clause states that "[t]his is to be determined by the landlord." A reasonable interpretation of this language would be that the defendant was reserving the right to make a determination regarding whether a dog could be kept by a lessee. Furthermore, we disagree with the plaintiff's argument that the lease created a duty on the part of the defendant to third persons who might encounter the dog on the property. Here, the

[4] We note that during oral argument before this court, when specifically asked whether the language of the lease was ambiguous or unambiguous, the plaintiff repeatedly conceded that the language was unambiguous. Because the language is unambiguous, a proper analysis of the language at issue is not dependent on extrinsic evidence of the parties' intent. See *Parisi* v. *Parisi*, 315 Conn. 370, 383, 107 A.3d 920 (2015) ("[w]hen only one interpretation of the contract is possible, the court need not look outside the four corners of the contract"[internal quotation marks omitted]).

[5] We find persuasive the defendant's argument that it is unreasonable to interpret the language of the lease stating that "the pet must pose no threat to anyone coming on the property" as requiring the defendant to pay for a canine DNA analysis, to review an inspection by a veterinarian, or for her to complete a canine lineage check. Nor do we conclude that the language of the lease requires the defendant to interview previous owners or even review similar tests provided and paid for by the tenant.

lease's obligations are limited to its signatories and do not extend to third persons. After consideration of the parties' intent expressed by the language in the lease, we conclude that the language of the lease clearly demonstrates that the defendant and McFarlane did not intend to create an obligation to any third persons.

On the basis of the foregoing, we conclude that there is no genuine issue of material fact that the plain language of the lease did not require the defendant to investigate the behavioral propensities of the dog and that the lease did not create a duty on the part of the defendant to third persons who might encounter the dog on the property.[6]

The plaintiff next argues that a genuine issue of material fact exists as to whether the defendant reserved control over the property, which created a duty to use reasonable care to keep in a reasonably safe condition those portions of the property over which she reserved control. Specifically, the plaintiff, relying on the language we have previously interpreted in this opinion, contends that the language of the lease proves that the defendant retained possession and control over the leased property. For the reasons that follow, we interpret the plain and unambiguous language of the lease on which the plaintiff relies to give the tenant complete control and possession of the property and, therefore, disagree with the plaintiff's argument.

[6] The defendant cites authority outside of this jurisdiction in support of her position that a lease provision regarding pets does not create a duty to third persons who are not parties to the lease. We find this authority instructive. See *Boots* v. *Winters*, 145 Idaho 389, 396, 179 P.3d 352 (App. 2008) (concluding that landlord did not assume duty to protect third persons not parties to lease from tenant's dogs, when securing a specific pet deposit under lease); *Hyun Na Seo* v. *Yozgadlian*, 320 N.J. Super. 68, 72–73, 726 A.2d 927 (App. Div. 1999) (concluding that lease provision prohibiting tenants from keeping pets does not make landlord responsible for injuries to third persons not parties to lease caused by dog kept in violation of that provision); *Gilbert* v. *Miller*, 356 S.C. 25, 30–31, 586 S.E.2d 861 (App. 2003) (stating that language of lease that made control of pet sole responsibility of tenant, and required pet to meet landlord approval, did not create duty on part of landlord to prevent injuries to third persons not parties to lease).

"In a negligence action, the plaintiff must meet all of the essential elements of the tort in order to prevail. These elements are: duty; breach of that duty; causation; and actual injury. . . . [T]he existence of a duty of care is a prerequisite to a finding of negligence . . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." (Citation omitted; internal quotation marks omitted.) *Charles* v. *Mitchell*, 158 Conn. App. 98, 108, 118 A.3d 149 (2015).

"The general rule regarding premises liability in the landlord-tenant context is that landlords owe a duty of reasonable care as to those parts of the property over which they have retained control . . . . [L]andlords [however] generally [do] not have a duty to keep in repair any portion of the premises leased to and in the exclusive possession and control of the tenant. . . . Retention of control is essentially a matter of intention to be determined in the light of all the significant circumstances. . . . The word control has no legal or technical meaning distinct from that given in its popular acceptation . . . and refers to the power or authority to manage, superintend, direct or oversee. . . . *Unless it is definitely expressed in the lease,* the circumstances of the particular case determine whether the lessor has reserved control of the premises or whether they were under the exclusive dominion of the tenant . . . ." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Fiorelli* v. *Gorsky*, 120 Conn. App. 298, 308, 991 A.2d 1105, cert. denied, 298 Conn. 933, 10 A.3d 517 (2010). Thus, "summary judgment is appropriate when there is no genuine issue of material fact. A material fact is one that will make a difference in the case. . . . Therefore, to answer the question presented, we must determine whether a genuine issue of

material fact exists as to whether the incident occurred at a location over which the defendant exercised control." (Citation omitted.) *Charles* v. *Mitchell*, supra, 158 Conn. App. 110. Previously in this opinion, we set forth the well settled principles that govern our interpretation of contracts.

The defendant asserts that the lease language that vests discretion in her to approve pets does not serve as a reservation of control over the property. To support this claim, she submitted a copy of the lease and various affidavits to establish that she did not have control or possession over the property where the plaintiff was injured and, therefore, did not owe a duty of care to the plaintiff. The affidavits submitted by the defendant demonstrate that the tenant, McFarlane, was responsible for the exterior maintenance of the property, including but not limited to, the front and back lawn and the driveway. Further, the entirety of the property was leased to McFarlane. We have held that when parts of a premises or a property are leased to and in the exclusive possession and control of the tenant, the landlord does not owe a duty of reasonable care because in that instance, the landlord does not have possession or control of the property. *Fiorelli* v. *Gorsky*, supra, 120 Conn. App. 308.

The plaintiff relies on *Giacalone* v. *Housing Authority*, 306 Conn. 399, 51 A.3d 352 (2012), for the proposition that it is the duty of the landlord to maintain the areas of the premises over which they reserve control. *Giacalone*, however, is distinguishable from the present case. *Giacalone* involved two tenants who shared a common landlord—one of which was bitten by the other's dog in a common area of the property. Id., 402. Thereafter, the injured tenant brought a common-law premises liability action against the landlord, claiming that the landlord was negligent because the landlord, with knowledge that the dog had vicious propensities,

failed to remove the dog from the property. Id. Our Supreme Court concluded that a landlord "must take reasonable steps to alleviate the dangerous condition created by the presence of a dog with known vicious tendencies *in the common areas of the property*." (Emphasis added.) Id., 408. The plaintiff's reliance on *Giacalone* is misplaced.

In the present case, because the entirety of the property was leased to McFarlane and he maintained exclusive possession and control over it, there was no common area for the defendant to keep reasonably safe. Furthermore, because there was no common area of the property due to McFarlane's exclusive possession, the defendant had no right to enter the property and to physically remove McFarlane's dog. See *Central Coat, Apron & Linen Service, Inc.* v. *Indemnity Ins. Co.*, 136 Conn. 234, 237, 70 A.2d 126 (1949) (concluding that "[w]here entire premises are rented, in the absence of any agreement, the tenant . . . has the right of exclusive possession and control, and the landlord has no right to enter upon them"). Lastly, as we have discussed in the preceding paragraphs of this opinion, the issue of whether the landlord knew or should have known of the dog's vicious tendencies is not before this court. Thus, *Giacalone* is distinguishable from the present case.

After the defendant satisfied her burden as the moving party and established that there was no genuine issue of material fact with respect to whether she retained control over any portion of the leased property, the plaintiff was required to demonstrate the existence of a disputed fact. "The party opposing summary judgment must present a factual predicate for [her] argument to raise a genuine issue of fact. . . . [B]are assertions by the nonmovant are not enough to withstand summary judgment." (Citation omitted; internal quotation marks omitted.) *Colon* v. *AutoZone Northeast, Inc.*, 148 Conn. App. 435, 440, 84 A.3d 1234 (2014). Here, the

plaintiff neglected to provide any evidence to show that there was a genuine issue of material fact as to whether the defendant had possession or control over the property. The plaintiff merely referred to sections of the lease under which the defendant has discretion to approve or deny whether her tenant keeps a pet on the property. Thus, because the plaintiff failed to demonstrate a genuine issue of material fact, the court properly rendered summary judgment in favor of the defendant.

The judgment is affirmed.

In this opinion the other judges concurred.

CHIEF DISCIPLINARY COUNSEL *v.* HAROLD H. BURBANK II
(AC 41805)

Prescott, Bright and Sheldon, Js.

Syllabus

The respondent attorney appealed to this court from the judgment of the trial court suspending him from the practice of law for one year. The respondent, who was admitted to practice law in both Maine and Connecticut, had been involved in civil litigation in Maine involving waterfront property that he owned in joint tenancy with several members of his family. After the trial court rendered judgment in that action, the respondent appealed as a self-represented party to the Maine Supreme Judicial Court, which affirmed the judgment of the Maine Superior Court and concluded that the respondent had engaged in misconduct while prosecuting the appeal. Accordingly, sanctions were imposed against the respondent in the form of an award of attorney's fees and costs. Subsequently, Maine's Board of Overseers of the Bar suspended the respondent from practicing law in Maine for one year on the ground that he had violated Maine's Rules of Professional Conduct. Thereafter, in the present case, the petitioner, the Chief Disciplinary Counsel, filed an application seeking commensurate disciplinary action against the respondent pursuant to the applicable rule of practice (§ 2-39). Subsequently, the trial court found that commensurate discipline was appropriate with respect to the respondent's Connecticut law license and ordered the respondent suspended from the practice of law in Connecticut for one year. On appeal, the respondent claimed, inter alia, that because he was a self-represented party at the time he engaged in the alleged misconduct that led to his suspension in Maine, the disciplinary

action against his law license in Maine, and by extension, in Connecticut, violated his right as a citizen to petition the government for a redress of grievances as protected by the first amendment to the federal constitution and violated his rights to due process and equal protection under the fourteenth amendment to the federal constitution. *Held:*

1. The trial court did not err in determining that the respondent failed to demonstrate by clear and convincing evidence that the reciprocal suspension of his law license was a violation of his federal constitutional rights to petition the government without the fear of reprisal; the respondent failed to cite to any legal authority in which a court has ruled that the enforcement of attorney disciplinary rules on an attorney engaging in self-representation before a court implicates that attorney's right to petition as protected by the first amendment, nor did he cite to any authority for the proposition that an attorney acting as a self-represented litigant should be held to a different standard of professional conduct than that applied to an attorney acting on behalf of a client, and the respondent's attempt to differentiate for disciplinary and constitutional purposes between an attorney's actions taken on behalf of a client and actions taken in representing himself in his role as a citizen was unavailing, as this court has recognized that an attorney, as an officer of the court, must always conduct himself or herself in accordance with the Rules of Professional Conduct, the respondent had the same professional obligation to the court when representing himself as when representing a client, and the fact that he appeared in a self-represented capacity did not lesson his duty to comply with those rules.
2. The respondent could not prevail on his claim that the trial court's finding that he failed to demonstrate by clear and convincing evidence a cognizable defense to the Maine disciplinary proceedings was clearly erroneous; although the failure to receive due process in a disciplinary proceeding in another jurisdiction would be a proper defense to the imposition of reciprocal discipline in Connecticut, there was nothing in the record to demonstrate that the respondent raised a colorable claim that he was denied due process in the Maine disciplinary proceedings, nor did he make any credible claim that he lacked sufficient notice or an opportunity to be heard, the respondent's arguments and reasoning, both in his pleadings before the trial court and to this court on appeal, were circuitous, repetitious, and lacked a cogent discussion that was logically and legally tethered to the issue under consideration, which made it difficult to evaluate whether his claim was properly raised and preserved for appellate review, and even if the claim were deemed to be preserved, much of the veritable laundry list of constitutional arguments and alleged violations of rights, including fleeting references to the ninth amendment, the supremacy clause, the commerce clause, and the full faith and credit clause of the United States constitution, consisted of no more than generalized statements of legal propositions, devoid of any cogent analysis or application of the facts to any of the asserted constitutional doctrines relative to the subject matter at hand, namely, the reciprocal enforcement of rules governing attorney professional misconduct.

Argued October 17, 2019—officially released January 21, 2020

Procedural History

Presentment by the petitioner for alleged professional misconduct by the respondent, brought to the Superior Court in the judicial district of Hartford and tried to the court, *Sheridan*, *J.*; judgment suspending the respondent from the practice of law for twelve months, from which the respondent appealed to this court. *Affirmed.*

Harold H. Burbank II, self-represented, the appellant (respondent).

Brian B. Staines, chief disciplinary counsel, for the appellee (petitioner).

Opinion

PRESCOTT, J. The present appeal arises out of a reciprocal disciplinary proceeding commenced pursuant to Practice Book § 2-39 by the petitioner, the Chief Disciplinary Counsel, against the respondent, Harold H. Burbank II, who had been suspended from the practice of law in Maine for one year due to his actions as a self-represented appellant before the Supreme Judicial Court of Maine. The respondent appeals from the judgment of the trial court, which found that commensurate discipline was appropriate with respect to the respondent's Connecticut law license and ordered the respondent suspended from the practice of law in Connecticut for one year.[1]

The respondent, relying principally on the fact that he was not acting on behalf of a client but as a self-represented party at the time he engaged in the misconduct that led to his suspension in Maine, claims

[1] The United States Court of Appeals for the First Circuit and the United States District Court for the District of Connecticut each subsequently imposed a one year reciprocal suspension of the respondent's right to practice before them on the basis of the same Maine disciplinary action. See *In re Burbank*, United States Court of Appeals, Docket No. 19-8010 (1st Cir. Oct. 28, 2019); *In re Burbank*, United States District Court, Docket No. 3:18-GP-00006 (MPS) (D. Conn. Nov. 8, 2018).

on appeal that the disciplinary action against his law license in Maine and, by extension, in Connecticut, (1) violated his right as a citizen to petition the government for a redress of grievances as protected by the first amendment of the United States constitution, and (2) violated his rights to due process and equal protection of law under the fourteenth amendment to the United States constitution.[2] We disagree and, accordingly, affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history.[3] The respondent is an attorney admitted to the practice of law in Connecticut and Maine. The genesis of the underlying grievance proceeding was civil litigation before the Superior Court in Maine concerning waterfront property in Northport, Maine, that the respondent owned in joint tenancy with his father, two siblings, and ten other members of his family (Burbank property).[4] Several neighboring property owners (neighbors) commenced the litigation

[2] The respondent also claims that the disciplinary proceedings violated various rights afforded to him under the Connecticut constitution. The respondent, however, has failed to analyze adequately his state constitutional claims because, in his appellate brief, he has not "functionally address[ed] in detail the subject matter of most of the factors" set forth in *State* v. *Geisler*, 222 Conn. 672, 610 A.2d 1225 (1992), which our Supreme Court has made clear is necessary for any independent state constitutional analysis. See *State* v. *Santiago*, 305 Conn. 101, 250–51, 49 A.3d 566 (2012), superceded in part on other grounds by *State* v. *Santiago*, 318 Conn. 1, 122 A.3d 1 (2015). Because the respondent has not briefed adequately his state constitutional claims, we deem them abandoned. See *Wasko* v. *Farley*, 108 Conn. App. 156, 164, 947 A.2d 978, 985, cert. denied, 289 Conn. 922, 958 A.2d 155 (2008).

[3] The trial court effectively adopted the factual findings set forth in the opinions of the Maine Supreme Judicial Court and the retired justice who oversaw the Maine disciplinary proceeding, stating that it "[would] not revisit the factual findings made by the various courts in Maine that have fully reviewed, analyzed, and vetted the evidence." See *Lincoln* v. *Burbank*, 147 A.3d 1165, 1169 (2016), cert. denied, U.S. , 137 S. Ct. 1338, 197 L. Ed. 2d 520 (2017); *Board of Overseers of the Bar* v. *Burbank*, BAR-17-12 (January 29, 2018) (Clifford, J.). Accordingly, we rely on those opinions in setting forth the facts and procedural history underlying the present appeal.

[4] The crux of the litigation was aptly described by the United States Court of Appeals for the First Circuit in its own reciprocal disciplinary action

against the owners of the Burbank property seeking, inter alia, a prescriptive easement over the Burbank property, a declaratory judgment, and damages for conversion and trespass. At trial, the respondent represented himself, his father, and his siblings (Burbank defendants). The remaining co-owners of the Burbank property (co-owners) sought to settle the dispute with the neighbors and later filed a cross claim against the Burbank defendants seeking a partition by sale of the Burbank property. The trial court, after a bench trial, rendered judgment in favor of the neighbors on their claims for a prescriptive easement, a declaratory judgment, and conversion, and also found for the ten co-owners on their cross claim and ordered a partition by sale. The court found against the neighbors on their trespass count.

The respondent was the only party who appealed from the trial court's decision. Although the appeal was filed initially by another attorney, she later withdrew her appearance, and the respondent continued prosecuting the appeal as a self-represented party. The Maine Supreme Judicial Court issued an opinion in which it affirmed the judgment of the Maine Superior Court and, more importantly for the issues now before this court, concluded that the respondent had engaged in misconduct while prosecuting the appeal. The court determined that this misconduct warranted the imposition of sanctions against the respondent in the form of an award of attorney's fees and costs.

The Maine Supreme Judicial Court summarized its decision as follows: "The trial court issued a thorough,

against the respondent. See *In re Burbank*, supra, United States Court of Appeals, Docket No. 19-8010. "The neighbors had been using for decades, without issue or objection, beach access stairs adjacent to [the Burbank property] to descend an embankment—they would then cross a small portion of [the Burbank property] in order to get to the beach. [The respondent] took it upon himself to report the stairs as a zoning violation and, ultimately, he removed the stairs (contrary to an advisement from the town and against the wishes of his fellow co-owners), giving rise to this lawsuit." Id.

carefully considered judgment, supported by extensive findings and conclusions and accurate legal analysis. Because the court did not err when it granted a prescriptive easement or ordered partition by sale of the property, and because the remainder of [the respondent's] arguments are either improperly raised, meritless, or both, we affirm the judgment and, on separate motions of the [n]eighbors and the [c]o-owners, we order sanctions against [the respondent] pursuant to [Me. R. App. P. 13 (f)]."[5] *Lincoln* v. *Burbank*, 147 A.3d 1165, 1169 (Me. 2016), cert. denied, U.S. , 137 S. Ct. 1338, 197 L. Ed. 2d 520 (2017).

In discussing its decision to sanction the respondent, an action that the court indicated it reserved for only "egregious cases"; (internal quotation marks omitted) id., 1176; the Maine Supreme Judicial Court made the following findings regarding what the court viewed as the respondent's "repeated misconduct in prosecuting [the] appeal." Id., 1179. "[The respondent] initiated the handling of this appeal with the same cavalier attitude that he demonstrated in his handling of the steps at issue in this case. He did not communicate with the appellees in order to reach some agreement on the contents of the [a]ppendix; he attempted to include in the [a]ppendix documents that were not part of the record below; he failed to respond to a direct order requiring him to explain how he, as the appellant, could purport to represent some of the appellees; he filed a brief 'bound' with twine; and as noted above, he failed to comply with [Maine's rules of appellate procedure by] filing a second reply brief without permission.

"[The respondent's] brief on appeal demonstrated this same contumacious attitude, a fact he apparently

[5] Subsection (f) of Rule 13 of the Maine Rules of Appellate Procedure provides: "If, after a separately filed motion or a notice from the court and a reasonable opportunity to respond, the Law Court determines that an appeal, motion for reconsideration, argument, or other proceeding before it is frivolous, contumacious, or instituted primarily for the purpose of delay,

recognized, as, in his request for oral argument, Burbank asserted that some of his filings before us 'were not properly edited before being submitted to the court,' and argued for a chance to 'correct and clarify these errors, so the court may be certain that [the a]ppellant certainly did not intend them or to offend the dignity and authority of the court.'

''[The respondent]'s request for oral argument included statements that further highlight the impropriety of his actions in this appeal. Beyond conceding the impropriety of some statements in his several appellate briefs . . . he proposed to represent the views of the other Burbank [d]efendants [who had] declined to have [the respondent] represent them on appeal and are not participating in this appeal. [The respondent], as a member of the Maine bar, must understand that he cannot represent on appeal persons who have declined to appeal and declined to have him represent them on appeal[6]. . . .

"In his request for oral argument, [the respondent] also proposed to testify or otherwise present facts to clarify [trial testimony that] the trial court found, in part, to be contradictory and not credible. There can be no question that presenting new facts or other evidence by brief or oral argument is not proper appellate advocacy. . . . [The respondent's] several briefs include a number of statements about facts that do not appear in the trial court record and thus are improperly offered for consideration on appeal. . . . [The respondent] also filed a "Supplement of Legal Authorities" that includes evidentiary materials and fact statements

it may award to the opposing parties or their counsel treble costs and reasonable expenses, including attorney fees, caused by such action."

[6] The respondent did not withdraw as counsel for the remaining Burbank defendants until the Supreme Judicial Court had ordered the respondent to show cause as to why he should not be sanctioned for attempting to represent three appellees while simultaneously representing himself as the appellant.

not in the trial court record, including an advocacy document that [the respondent] had filed with a private mediator that, as a document apparently used in settlement efforts, could not have been used at trial pursuant to [Maine's Rules of Evidence §] 408 (b), and, consequently, was improperly filed with the appeal documents.

"Beyond his purported representation of people who do not wish to be represented by him, his failure to comply with the logistical rules, his attempt to present new evidence at an appellate proceeding, and his contentious and unprofessional tone, [the respondent] makes several arguments in support of his appeal that are frivolous and devoid of legal authority to support them.

"Asserting propositions of law not supported by statute or precedent, absent a good faith effort to evolve the law, is an indication of frivolousness that can subject a party to sanctions. . . .

* * *

"Throughout the various stages of this appeal, in his briefs, his Supplement of Legal Authorities, his request for oral argument, and his responses to opposing parties' motions, [the respondent] has consistently disregarded standards of law and practice that govern appellate review. He has asserted legal arguments that are frivolous and baseless, and, contrary to governing precedent, he has sought to have us consider and decide the appeal on new facts and new evidence that were not part of the trial court record on appeal. [The respondent]'s efforts have been disrespectful to the proper role of the trial court, unfair to and expensive for the other parties, and contrary to Maine appellate law. [The respondent]'s frivolous and baseless actions are egregious conduct that has confused the issues on appeal, delayed final resolution of this matter, and significantly driven up the costs to other parties. Although

the actions taken by [the respondent] would be concerning if he were a litigant unschooled in law, we note that [the respondent] is not only an attorney, but an attorney who is licensed to practice in Maine. He is, therefore, presumed to be familiar with our case law, our statutes, and our [r]ules; his actions demonstrate either a complete lack of understanding or an intentional flouting of those guides.

* * *

"As with other rules, the rules regarding sanctions and determinations that an appeal is frivolous are applied equally to represented and unrepresented parties. . . . Although he purports to speak for or represent the interests of parties who are not participating in this appeal, and although he is an attorney, we consider [the respondent] to be unrepresented for purpose of our consideration of sanctions. However, attorneys who represent themselves on appeal are assumed to be aware of court rules and their ethical obligations in prosecuting their own appeals." (Citations omitted; footnote added.) *Lincoln* v. *Burbank*, supra, 147 A.3d 1176-79. The Maine Supreme Judicial Court concluded on the basis of what it described as "repeated misconduct in prosecuting this appeal" that the respondent should be sanctioned, and it ordered the respondent to pay each of the plaintiff neighbors and nonBurbank defendant co-owners of the property $5,000 toward their attorney fees incurred to defend the appeal as well as treble costs. Id.

On the basis of this conduct and following a review of those findings by a Maine grievance commission panel, Maine's Board of Overseers of the Bar (board) filed an information in accordance with Rule 13 of Maine's Disciplinary Rules of Procedure in which it alleged that the respondent had violated multiple provisions of Maine's Rules of Professional Conduct.

In accordance with Maine procedural rules, on October 18, 2017, Justice Robert Clifford, an active retired justice of the Maine Supreme Judicial Court, conducted a de novo testimonial hearing. Justice Clifford, on January 25, 2018, filed a memorandum of decision suspending the respondent from practicing law in Maine for a period of twelve months. See *Board of Overseers of the Bar* v. *Burbank*, BAR-17-12 (January 29, 2018) (Clifford, J.). Justice Clifford found on the basis of the Maine Supreme Judicial Court's factual findings and conclusions in *Lincoln* v. *Burbank*, supra, 147 A.3d 1165, and on the additional evidence presented at the testimonial hearing, that the board had proven that the respondent had violated Rules 1.1, 1.3, 3.1, 3.4 and 8.4 of Maine's Rules of Professional Conduct, which, like Connecticut's rules, adopt with modifications the American Bar Association's Model Rules of Professional Conduct.[7] See 1 & 2 G. Hazard, W. Hodes & P. Jarvis, The Law of Lawyering, (4th Ed., 2019), § 1.15 & Appendix B.

[7] The text and numbering of the relevant Maine and Connecticut rules of professional conduct are virtually identical. The following are Connecticut's rules, which govern with respect to the reciprocal disciplinary ruling under review.

Rule 1.1, titled "Competence," provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Rule 1.3, titled "Diligence," provides: "A lawyer shall act with reasonable diligence and promptness in representing a client."

Rule 3.1, titled "Meritorious Claims & Contentions," provides in relevant part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . ."

Rule 3.4, titled "Fairness to Opposing Party & Counsel," provides in relevant part: "A lawyer shall not . . . (3) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists . . . ."

Rule 8.4, titled "Misconduct," provides in relevant part: "It is professional misconduct for a lawyer to: (1) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another. . . ."

In his opinion, Justice Clifford also observed that the respondent's actions continued "to be problematic" during the disciplinary proceedings. *Board of Overseers of the Bar* v. *Burbank*, supra, BAR-17-12. Specifically, the court found the following: "In his answer to the within information in this case, [the respondent] has admitted to making errors in applying and interpreting the applicable rules of court, but has asserted that some rules were not published, and thus he could not interpret or apply them; some rules were ambiguous; and his failure to file timely responses was due to his suffering a stroke. [The respondent] has failed to pay the $10,000 in sanctions imposed on him by the [Maine Supreme Judicial Court], nor has he fully paid the $20,000 judgment against him imposed by the [Maine Superior Court] in the underlying litigation, and has since filed a Chapter 7 bankruptcy action in the Bankruptcy Court in Connecticut. [The respondent] also did not properly offer all the exhibits at this bar discipline hearing that he made reference to in his post hearing submission. In short, he does not appear to have a good grasp of the procedural rules of litigation."[8]

In determining the appropriate sanction to impose for the respondent's violations of the identified rules of professional conduct, Justice Clifford considered

[8] It is unclear from Justice Clifford's decision what rule of professional conduct, if any, the court deemed implicated by an attorney's having filed for bankruptcy or his resulting inability to satisfy a civil judgment or monetary sanction. The respondent, however, has not raised any specific claim on appeal regarding these findings or suggested that they provide support for any of the constitutional claims that he raises. Furthermore, even if we were to conclude that these particular findings were irrelevant or improper factual predicates on which to base a finding of attorney misconduct, any such error likely was rendered harmless in light of the extensive other findings supporting the violations asserted. See *Henry* v. *Statewide Grievance Committee*, 111 Conn. App. 12, 27–28, 957 A.2d 547 (2008) (holding any impropriety in relying on allegedly irrelevant factual findings in finding violations of rules of professional conduct necessarily harmless if other evidence existed sufficient to support court's ultimate findings).

both aggravating and mitigating factors. Specifically, the court stated: "There are *many* aggravating factors in this case. The misconduct at issue is very serious. [The respondent's] conduct in the underlying litigation, and especially in the appeal in *Lincoln* [v. *Burbank*, supra, 147 A.3d 1165], has caused substantial injury to the parties involved in the litigation as well as a waste of judicial resources. Although this court does not find that all of [the respondent's] misconduct was deliberate, as a practicing attorney, he certainly should have known that his conduct was far afield from the standards expected of a reasonably competent attorney, and that his actions constituted misconduct.

"There are *some* mitigating factors that the court feels compelled to consider. [The respondent] has no prior disciplinary record in Maine, he was under great stress due to his father's poor health, and he himself has suffered from a stroke and is not in good health. There is also evidence that [the respondent] provided competent legal representation in Maine in the past, namely, in the effort by Ralph Nader to be placed on the Maine ballot as a presidential candidate in the early 2000s.

"The main purpose of imposing a sanction in these disciplinary proceedings is the protection of the public. The sanction to be imposed must be significant because of the serious misconduct that is involved here, and must require that [the respondent] file a petition for reinstatement in order for him to be reinstated as an attorney in good standing." (Emphasis in original.) Id. Having considered both the aggravating and mitigating factors, Justice Clifford imposed a twelve month suspension from the practice of law in Maine, effective as of the date of the decision, with the attendant obligation that the respondent must petition for reinstatement in accordance with Maine's Disciplinary Rules of Procedure.

On February 6, 2018, having learned of the respondent's suspension in Maine, Connecticut's Chief Disciplinary Counsel filed an application in the Connecticut Superior Court pursuant to Practice Book § 2-39[9] seeking commensurate disciplinary action against the respondent's Connecticut law license. The application alleged that the respondent was admitted to the Connecticut bar on June 10, 1994, and that, on January 24, 2018, he had been suspended from the practice of law in Maine for a period of twelve months. A copy of the Maine order was attached to the application.

The respondent filed an answer in response to the application in accordance with Practice Book § 2-39, which he later amended. He also filed a number of exhibits with the court. In his amended answer, the respondent admitted to his twelve month suspension in Maine but argued that reciprocal action by Con-

[9] Practice Book § 2-39 provides: "(a) Upon being informed that a lawyer admitted to the Connecticut bar has resigned, been disbarred, suspended or otherwise disciplined, or placed on inactive disability status in another jurisdiction, and that said discipline or inactive disability status has not been stayed, the disciplinary counsel shall obtain a certified copy of the order and file it with the Superior Court for the judicial district wherein the lawyer maintains an office for the practice of law in this state, except that, if the lawyer has no such office, the disciplinary counsel shall file the certified copy of the order from the other jurisdiction with the Superior Court for the judicial district of Hartford. No entry fee shall be required for proceedings hereunder.

"(b) Upon receipt of a certified copy of the order, the court shall forthwith cause to be served upon the lawyer a copy of the order from the other jurisdiction and an order directing the lawyer to file within thirty days of service, with proof of service upon the disciplinary counsel, an answer admitting or denying the action in the other jurisdiction *and setting forth, if any, reasons why commensurate action in this state would be unwarranted.* Such certified copy will constitute prima facie evidence that the order of the other jurisdiction entered and that the findings contained therein are true.

"(c) Upon the expiration of the thirty day period the court shall assign the matter for a hearing. After hearing, *the court shall take commensurate action unless it is found that any defense set forth in the answer has been established by clear and convincing evidence.*

"(d) Notwithstanding the above, a reciprocal discipline action need not be filed if the conduct giving rise to discipline in another jurisdiction has already been the subject of a formal review by the court or Statewide Grievance Committee." (Emphasis added.)

necticut was unwarranted. The respondent principally argued that he should never have been subject to disciplinary proceedings in Maine because he had appeared before the Maine Supreme Judicial Court in *Lincoln* as a self-represented Connecticut citizen, not as a licensed attorney, and that any application of the rules of professional responsibility to his conduct while prosecuting the appeal as a self-represented party necessarily implicated and violated his rights under the first and fourteenth amendments to the United States constitution to petition the government without threat of punishment, reprisal or prior restraint. According to the respondent, any reciprocal disciplinary proceeding in Connecticut stemming from the allegedly unconstitutional Maine disciplinary action similarly would be unconstitutional.

The matter was assigned for a hearing before the court, *Sheridan*, *J.* At the hearing, the court afforded the respondent ample opportunity to present witnesses as well as additional evidence pertaining both to the underlying litigation in Maine and to the resulting disciplinary proceedings. On June 4, 2018, the court issued a decision concluding that the respondent's arguments largely were without merit or inconsequential, and that he most certainly fell short of establishing by clear and convincing evidence any of the defenses advanced in his answer. The court found that commensurate discipline was appropriate under the circumstances and ordered the respondent suspended from the practice of law in Connecticut for a period of twelve months, retroactive to January 24, 2018. The court further ordered that, to be reinstated to the bar at the conclusion of his suspension, the respondent was required to apply for reinstatement in accordance with Practice Book § 2-53. This appeal followed.[10]

[10] Although, as of the date of oral argument before this court, the respondent's suspension from the practice of law in Connecticut had expired by its terms on January 24, 2019, the respondent's license remains suspended according to the Judicial Branch's website. Even if the suspension order under consideration no longer were in effect, however, that fact alone would

We begin with governing principles of law, including our standard of review. "Attorney disciplinary proceedings are for the purpose of preserving the courts of justice from the official ministration of persons unfit to [practice] in them. . . . An attorney as an officer of the court in the administration of justice, is *continually* accountable to it for the manner in which he exercises the privilege which has been accorded him. His admission is upon the implied condition that his continued enjoyment of the right conferred is dependent upon his remaining a fit and safe person to exercise it, so that when he, *by misconduct in any capacity*, discloses that he has become or is an unfit or unsafe person to be entrusted with the responsibilities and obligations of an attorney, his right to continue in the enjoyment of his professional privilege may and ought to be declared forfeited. . . . Therefore, [i]f a court disciplines an attorney, it does so not to mete out punishment to an offender, but [so] that the administration of justice may be safeguarded and the courts and the public protected from the misconduct or unfitness of those who are licensed to perform the important functions of the legal profession." (Citations omitted; emphasis added; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Spirer*, 247 Conn. 762, 771–72, 725 A.2d 948 (1999).

Practice Book § 2-39 sets forth the procedures by which Connecticut courts may impose commensurate reciprocal discipline on an attorney admitted to the Connecticut bar who has been disciplined for professional misconduct in another jurisdiction. See footnote

not render the present appeal moot because an expired suspension continues to have adverse collateral consequences on an attorney's reputation and professional standing. See *Statewide Grievance Committee* v. *Whitney*, 227 Conn. 829, 837–38 n.13, 633 A.2d 296 (1993) (holding that because prior misconduct of attorney may be considered in subsequent disciplinary proceeding, expiration of suspension during pendency of appeal from suspension order did not render appeal moot due to potentially prejudicial collateral consequences).

9 of this opinion; *In re Weissman*, 203 Conn. 380, 383, 524 A.2d 1141 (1987). Section 2-39 compels disciplinary counsel, upon learning of an attorney's discipline occurring in another jurisdiction, to file a copy of the disciplinary order with the Superior Court, which then serves an order to show cause directing the attorney to file an answer "admitting or denying the action in the other jurisdiction and setting forth, if any, reasons why commensurate action in [Connecticut] would be unwarranted." Practice Book § 2-39 (b). The certified copy of the other jurisdiction's disciplinary order constitutes prima facie evidence that the order entered "and that the findings contained therein are true." Practice Book § 2-39 (b). After conducting a hearing, the court "shall take commensurate action unless it is found that any defense set forth in the answer has been established by clear and convincing evidence." Practice Book § 2-39 (c).

"[C]lear and convincing proof denotes a degree of belief that lies between the belief that is required to find the truth or existence of the [fact in issue] in an ordinary civil action and the belief that is required to find guilt in a criminal prosecution. . . . [The burden] is sustained if evidence induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. . . . Our Supreme Court has stated that the clear and convincing standard is a demanding standard that should operate as a weighty caution upon the minds of all judges, and it forbids relief whenever the evidence is loose, equivocal or contradictory." (Citations omitted; internal quotation marks omitted.) *Shelton* v. *Statewide Grievance Committee*, 85 Conn. App. 440, 443–44, 857 A.2d 432 (2004), aff'd, 277 Conn. 99, 890 A.2d 104 (2006).

Because whether a respondent has established a defense to a disciplinary order by clear and convincing evidence presents a question of fact for the trier, it follows that our review of a court's finding that a respondent has failed to meet that high burden of persuasion is limited to whether that finding is clearly erroneous.[11] See, e.g., *Melillo* v. *New Haven*, 249 Conn. 138, 150, 732 A.2d 133 (1999) (reviewing under clearly erroneous standard court's finding that appellant failed to meet burden of proof); *Jazlowiecki* v. *Cyr*, 4 Conn. App. 76, 77, 492 A.2d 516 (1985) (same); *Ruggiero* v. *East Hartford*, 2 Conn. App. 89, 96, 477 A.2d 668 (1984) (same).[12] Under this highly deferential standard, "[w]e do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. Rather, we focus on the conclusion of the trial court, as well as the method by which it arrived at that conclusion, to determine whether it is legally correct and factually supported. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence in the record to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Depart. of Transportation* v. *Cheriha, LLC*, 155 Conn. App. 181, 191–92, 112 A.3d 825 (2015).

Next, before turning to our discussion of the claims raised by the respondent on appeal, it is helpful to acknowledge what claims the respondent has chosen

[11] "The concept of a burden of persuasion ordinarily applies to questions of fact, and ordinarily is expressed in one of three ways: (1) a preponderance of the evidence; (2) clear and convincing evidence; or (3) proof beyond a reasonable doubt." *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 580, 735 A.2d 231, 240 (1999).

[12] The respondent argues that he is entitled to de novo review because "whether the court held the parties to the proper standard of proof is a question of law." The respondent is not arguing on appeal, however, that the court made a legal error by choosing and applying an incorrect burden of persuasion in evaluating his defenses. Rather, acknowledging that he bears the burden of proving a defense by clear and convincing evidence, he challenges the court's factual finding that he failed to meet that standard.

not to raise and, thus, what is not properly before us. The respondent has not claimed that the misconduct in which he was found to have engaged by the Maine Supreme Judicial Court either did not occur or, in some manner, was insufficient to support his violations of the particular rules of professional conduct he was found to have violated by Justice Clifford. He has not claimed that the same misconduct or actions, if taken in Connecticut, would not have constituted violations of Connecticut's corresponding rules of professional conduct and, thus, that reciprocal discipline would be inappropriate. Finally, the respondent does not claim that the trial court, having concluded that reciprocal discipline was warranted in this jurisdiction, abused its discretion by imposing a one year suspension rather than some lesser sanction.[13] The respondent argues only that the court should not have imposed *any* reciprocal discipline because, by doing so, it allegedly violated a myriad of constitutional rights.

Finally, to the extent that the respondent seeks to attack collaterally the underlying Maine disciplinary judgment, we, of course, have no appellate jurisdiction to alter the Maine judgment. See General Statutes § 51-197a (limiting appellate jurisdiction of this court to appeals from final judgments of our Superior Court unless otherwise provided by statute). Here, our review is limited as to whether the trial court properly rendered its judgment in accordance with the dictates of Practice

[13] "[C]ommensurate action under [Practice Book § 2-39] (c) does not mean identical action. The trial court ha[s] inherent judicial power, derived from judicial responsibility for the administration of justice, to exercise sound discretion to determine what sanction to impose in light of the entire record before it." (Internal quotation marks omitted.) *In re Weissman*, supra, 203 Conn. 384. Accordingly, appellate review of the terms of any sanction imposed is limited to whether the court abused its discretion. In the present case, the respondent argues only that the court was precluded from imposing *any* discipline with respect to his Connecticut license. The respondent does not claim that the court abused its discretion by imposing a yearlong suspension rather than some lesser sanction.

Book § 2-39 (c). Although the respondent was free to seek appellate review of the Maine disciplinary judgment by filing an appeal with the Maine Supreme Judicial Court; see *Board of Overseers of the Bar* v. *Condon*, 940 A.2d 1065 (Me. February 5, 2008); it does not appear from the record presented to us that the respondent availed himself of such review, arguably waiving any appellate review he may have had with respect to the Maine disciplinary judgment. See *Sousa* v. *Sousa*, 322 Conn. 757, 771–72, 143 A.3d 578 (2016) ("collateral attack on a judgment is a procedurally impermissible substitute for an appeal").

I

The respondent first claims that the court improperly determined that he had failed to prove by clear and convincing evidence that the reciprocal suspension of his law license, which was based on his actions while prosecuting an appeal as a self-represented party, effectively violated his first and fourteenth amendment rights to petition the government without the fear of reprisal. As part of this claim, the respondent also suggests that his statements and arguments made while prosecuting the appeal before the Maine Supreme Judicial Court were protected political speech that could not have formed a proper basis for disciplinary proceedings. In other words, the respondent has raised arguments implicating both the petition and the free speech clause of the first amendment.[14] The petitioner responds that

[14] The first amendment to the United States Constitution provides in relevant part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I. "These two guarantees are known, respectively, as the Speech Clause and the Petition Clause." *Mirabella* v. *Villard*, 853 F.3d 641, 653 (3d Cir. 2017). "[T]he core value of the Free Speech Clause of the First Amendment" is "[t]he public interest in having free and unhindered debate on matters of public importance." *Pickering* v. *Board of Education*, 391 U.S. 563, 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives . . . ." *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 388, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011).

we should decline to review this claim entirely because the respondent has not adequately briefed it. The petitioner notes that the respondent has provided no direct authority that his presentation of legal issues that the Maine Supreme Judicial Court found to be "meritless," "frivolous," and "devoid of legal authority to support them," was protected speech exempt from the application of disciplinary rules, or that his status as a self-represented party should have precluded any finding that he violated the Rules of Professional Conduct. On the basis of the briefing and record provided, we conclude that the respondent's arguments are unpersuasive and, for the reasons that follow, the court's finding that the respondent failed to meet his burden of demonstrating a defense to the Maine disciplinary proceeding by clear and convincing proof was not clearly erroneous.

At their core, the respondent's constitutional arguments, to the extent that they are discernable, primarily focus on the fact that he was representing himself before the Maine Supreme Judicial Court in the *Lincoln* matter and that, because he allegedly was not acting in his capacity as an attorney but, rather, in his capacity as a private citizen, he simply was not accountable to the rules of professional conduct or related disciplinary procedures. According to the respondent, under these circumstances, holding him accountable to standards applicable to attorneys unfairly infringed on first amendment rights held by ordinary citizens.

There is no dispute that a person's ability to have access to courts to litigate civil disputes is among the rights protected under the first amendment's petition clause. See *Borough of Duryea* v. *Guarnieri*, 564 U.S. 379, 387, 131 S. Ct. 2488, 2494, 180 L. Ed. 2d 408 (2011) ("the [p]etition [c]lause [of the first amendment] protects the right of individuals to appeal to courts and

other forums established by the government for resolution of legal disputes"]. In raising his first amendment arguments before the trial court, however, the respondent failed to cite to any case, from any jurisdiction, in which a court has ruled that the enforcement of attorney disciplinary rules on an attorney engaging in self-representation before the court implicates that attorney's right to petition as protected by the first amendment. The respondent has not remedied this deficiency in his appellate brief.[15] Additionally, the respondent cites no authority for the proposition that an attorney acting as a self-represented litigant should be held to a different standard of professional conduct than that applied to an attorney acting on behalf of a client.

Contrary to the assertions of the respondent, this court previously has stated that the "Rules of Professional Conduct bind attorneys to uphold the law and to act in accordance with high standards *in both their personal and professional lives.*" (Emphasis added.) *Statewide Grievance Committee* v. *Egbarin*, 61 Conn. App. 445, 450, 767 A.2d 732, cert. denied, 255 Conn. 949, 769 A.2d 64 (2001). In support of that statement, we relied on language found in the preamble to our Rules of Professional Conduct, which provides in relevant part that "[a] lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and *a public citizen having special responsibility for the quality of justice.*" (Emphasis added.)

In *In the Matter of Presnick*, 19 Conn. App. 340, 345–46, 563 A.2d 299, cert. denied, 213 Conn 801, 567 A.2d 833 (1989), an en banc panel of this court considered whether we had the authority to suspend an attorney from filing papers and appearing before this court

[15] Although the respondent quotes extensively from the dissenting opinion in *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984), he fails to elaborate how the dissent's discussion of the special nature of the protections and freedoms afforded to speech under the first amendment are applicable to the facts of the present case.

for disobeying an order in a case in which the attorney was representing himself. We concluded that we had the authority to discipline an attorney despite the fact that the underlying behavior of the attorney resulting in the sanction occurred while the attorney was appearing as a self-represented party. Id., 341–42. In so holding, we indicated that "[a]lthough misconduct of an attorney may be unconnected with representation of another as a member of the bar, punishment may be imposed for that misconduct because it is an indication of a general unfitness to practice law. . . . Whether an attorney represents himself or not, his basic obligation to the court as an attorney remains the same. He is an officer of the court no matter who is the client. Disciplinary proceedings not only concern the rights of the lawyer and the client, but also the rights of the public and the rights of the judiciary to ensure that lawyers uphold their unique position as officers and commissioners of the court." Id., 344-45.

Our statements in *Egbarin* and *In the Matter of Presnick* recognize that an attorney always must conduct himself or herself in accordance with professional standards and belie the respondent's arguments that seek to differentiate for disciplinary and constitutional purposes between an attorney's actions taken on behalf of a client and actions taken in representing himself in his role as a citizen. Our Supreme Court similarly has stated that an attorney, as an officer of the court, "is *continually* accountable to [the court] for the manner in which he exercises the privilege which has been accorded him" and attorney disciplinary proceedings are appropriate with respect to "misconduct *in any capacity*," which necessarily encompasses actions taken by attorneys who are engaged in self-representation. (Emphasis added.) *Statewide Grievance Committee* v. *Spirer*, supra, 247 Conn. 771–72. Said another way, it is the

unique position attorneys enjoy that makes it important that they, *at all times*, conduct themselves in accordance with the Rules of Professional Conduct; see *Statewide Grievance Committee* v. *Rozbicki*, 211 Conn. 232, 237–38, 558 A.2d 986 (1989); and the mere fact that an attorney may be appearing before a tribunal in a self-represented capacity does not lessen his duty to comply with such rules. If, through his actions, an attorney demonstrates that he cannot be "entrusted with the responsibilities and obligations of an attorney, his right to continue in the enjoyment of his professional privilege may and ought to be declared forfeited." *Statewide Grievance Committee* v. *Spirer*, supra, 772.

Our conclusion that the respondent had the same professional obligation to the court when representing himself as when representing a client undermines the central construct in his first amendment challenge to the imposition of reciprocal discipline on him in this case. He advances no factual or legal basis for reaching any other conclusion. To avoid reciprocal discipline, it is the respondent who has the burden to demonstrate the validity of some defense; it is not the duty of the court or bar counsel to negate every posited defense. His arguments on appeal unquestionably fall short of convincing us that the trial court's finding that he failed to prove by clear and convincing evidence a defense premised on a violation of first amendment rights was clearly erroneous.

II

The respondent also claims that, under the circumstances of this case, the Maine court's disciplinary proceedings violated his rights to due process and equal protection as protected by the fourteenth amendment to the constitution of the United States, and that this violation should have barred the imposition of reciprocal discipline by the Connecticut trial court. The petitioner argues that the respondent failed to raise this

claim in the trial court and, even if raised, that he failed to provide the trial court with a complete record adequate to review the claim. Similar to the respondent's prior claim, he has failed to demonstrate with respect to this claim that the trial court's finding that he failed to prove *any* defense raised in his answer by clear and convincing evidence was clearly erroneous.

"Because a license to practice law is a vested property interest, an attorney subject to discipline is entitled to due process of law. . . . In attorney grievance proceedings, due process mandates that [b]efore discipline may be imposed, an attorney is entitled to notice of the charges, a fair hearing and an appeal to court for a determination of whether he or she has been deprived of these rights in some substantial manner." (Citation omitted; internal quotation marks omitted.) *Statewide Grievance Committee* v. *Egbarin*, supra, 61 Conn. App. 456. Accordingly, if proven by clear and convincing evidence, the failure to receive due process in a disciplinary proceeding in another jurisdiction certainly would be a proper defense to the imposition of reciprocal discipline in Connecticut.

Here, however, nothing in the record before us suggests that the respondent raised even a colorable claim that he was denied due process in the Maine disciplinary proceedings. The respondent makes no credible claim that he lacked sufficient notice or an opportunity to be heard. The respondent's arguments and reasoning, both in his pleadings before the trial court and to this court on appeal, are circuitous, repetitious, and lack a cogent discussion that is logically and legally tethered to the issue under consideration. This makes it all the more difficult to evaluate whether his claim properly was raised and preserved for appellate review. For example, a significant portion of his answer to the application for reciprocal discipline focused on the Maine Supreme Judicial Court's resolution of the merits of the *Lincoln*

matter rather than discussing the court's findings of misconduct by the respondent that formed the basis of the court's sanction orders and the subsequent disciplinary proceedings. Further, as the petitioner argues, the respondent failed to provide the trial court with a complete record of the appellate proceedings before the Maine Judicial Court.[16]

Even if we deem his claim preserved, however, much of the veritable laundry list of constitutional arguments and alleged violations of rights, including fleeting references to the ninth amendment, the supremacy clause, the commerce clause, and the full faith and credit clause of the United States constitution, consists of no more than generalized statements of legal propositions, devoid of any cogent analysis or application of the facts to any of the asserted constitutional doctrines relative to the subject matter at hand: the reciprocal enforcement of rules governing attorney professional conduct. Having thoroughly reviewed the record and the briefs, we are unpersuaded that the court's finding that the respondent failed to demonstrate by clear and convincing evidence a cognizable defense to the Maine disciplinary proceedings was clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

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[16] For example, he did not provide the court with copies of any transcripts of the proceedings before the Maine Supreme Judicial Court or with copies of the relevant appellate pleadings and briefs that the Maine Supreme Court identified as having "consistently disregarded standards of law and practice that govern appellate review." *Lincoln* v. *Burbank*, supra, 147 A.3d 1179.

STATE OF CONNECTICUT *v.* SEMMION WATSON (AC 41563)

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

Syllabus

Convicted, following a trial before a three judge panel, of the crime of murder and, following a trial to the court, of the crime of sale of narcotics, the defendant appealed to this court. The defendant's conviction stemmed from an incident in which he sold crack cocaine to the victim, who later refused to leave the defendant's home. Thereafter, the defendant engaged in a physical altercation with the victim and stabbed him fifty-one times, resulting in the victim's death. On appeal, the defendant claimed, inter alia, that the state failed to disprove his defenses of self-defense and defense of premises beyond a reasonable doubt. *Held*:

1. The panel properly concluded that the state presented sufficient evidence to meet its burden of disproving the defendant's claims of self-defense and defense of premises beyond a reasonable doubt: the defendant's claim that he experienced a blackout following his physical altercation with the victim was inconsistent with his statement to the police, which included multiple details of events that he alleged happened after he claimed to have blacked out, his statement to the police included other irregularities regarding what occurred following the stabbing, the nature and extent of both the victim's and the defendant's wounds did not support the defendant's self-defense narrative, and the defendant's actions following the stabbing, in which he acknowledged that the victim lay on the floor bleeding significantly but failed to seek medical assistance, changed his clothes upon leaving his apartment and purposefully avoided his apartment and the police for thirty-six hours following the stabbing, belied an actual belief on the defendant's part that he was acting in self-defense; furthermore, the panel was not obligated to accept as credible the defendant's evidence or version of events, and the evidence supported the panel's findings that the defendant did not believe that the victim was using or about to use deadly physical force or that deadly physical force was necessary to prevent the victim from committing a crime of violence.

2. The defendant could not prevail on his claim that the trial court improperly precluded the testimony of his expert witness: the expert's proffered opinion that an individual in a stressful situation may overreact constituted knowledge that was common to the average person and, thus, did not require expert testimony, and the defendant's claim that the court improperly subjected the expert's proffered opinions on certain physiological effects and blackouts caused by stressful situations to the standard set forth in *State* v. *Porter* (241 Conn. 57) for the admissibility of scientific evidence was unavailing, as the proffered expert's testimony was premised on scientific studies and, thus, needed to be evaluated

pursuant to the threshold admissibility standard set forth in *Porter*; accordingly, the trial court did not abuse its discretion in subjecting the two proffered opinions to a *Porter* analysis.

Argued September 18, 2019—officially released January 21, 2020

Procedural History

Substitute information charging the defendant with the crimes of murder, sale of narcotics and tampering with physical evidence, brought to the Superior Court in the judicial district of New Haven, where the murder charge was tried to a three judge panel, *Alander*, *O'Keefe* and *Cradle*, *Js.*, and the remaining two charges were tried to the court, *Alander*, *J.*; subsequently, the court, *Alander*, *J.*, granted the defendant's motion for a judgment of acquittal with respect to the tampering with physical evidence charge and the court, *Alander*, *O'Keefe* and *Cradle*, *Js.*, denied the defendant's motion with respect to the murder charge; judgment of guilty, from which the defendant appealed. *Affirmed.*

Peter G. Billings, for the appellant (defendant).

Margaret Gaffney Radionovas, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Seth R. Garbasky*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Semmion Watson, appeals from the judgment of conviction of murder in violation of General Statutes § 53a-54a (a) and sale of narcotics in violation of General Statutes § 21a-278 (b), rendered after a trial to the court. On appeal, the defendant claims that (1) the state failed to disprove his self and premises defenses beyond a reasonable doubt and (2) the court improperly precluded the testimony of a defense witness. We disagree and, accordingly, affirm the judgment of conviction.

The trial court set forth the following facts in its memorandum of decision that are relevant to our decision. On October 5, 2013, the victim, Anthony Stevenson, entered the defendant's New Haven apartment to

purchase crack cocaine. After ingesting the drug in the apartment, the victim refused the defendant's request that he depart. After the defendant grabbed the victim in an effort to force him to leave the apartment, the two struggled over a knife with a blade of approximately six inches. Once he gained possession of the knife, the defendant repeatedly stabbed the victim. The victim sustained fifty-one stab wounds, including thirty-one in the back. Fourteen stab wounds penetrated the victim's chest and abdominal cavities, causing injuries to his lungs, liver, spleen and kidney. The defendant exited the apartment as the victim lay on the floor profusely bleeding and uttering that he "was dying." At no point did the defendant summon medical assistance for the victim; instead, he "purposefully did not return to his apartment or disclose his whereabouts to the police" until his arrest approximately thirty-six hours later. The victim died as a result of the stab wounds.

In a three count information dated August 30, 2016, the state charged the defendant with murder, sale of narcotics and tampering with physical evidence in violation of General Statutes § 53a-155 (a) (1). The defendant elected a court trial before a three judge panel, *Alander*, *O'Keefe* and *Cradle*, *Js.* (panel), on the murder charge, and a court trial before Judge Alander, the presiding judge of the panel, on the remaining two charges.[1] At the conclusion of the state's case, the defendant filed

[1] General Statutes § 54-82 provides in relevant part: "(a) In any criminal case, prosecution or proceeding, the accused may, if the accused so elects when called upon to plead, be tried by the court instead of by the jury; and, in such case, the court shall have jurisdiction to hear and try such case and render judgment and sentence thereon.

"(b) If the accused is charged with a crime punishable by death, life imprisonment without the possibility of release or life imprisonment and elects to be tried by the court, the court shall be composed of three judges to be designated by the Chief Court Administrator, or the Chief Court Administrator's designee, who shall name one such judge to preside over the trial. Such judges, or a majority of them, shall have power to decide all questions of law and fact arising upon the trial and render judgment accordingly. . . ."

a motion for a judgment of acquittal as to the murder and tampering with physical evidence charges. The panel denied the defendant's motion for a judgment of acquittal as to the murder charge, and Judge Alander granted the defendant's motion with respect to the tampering with physical evidence charge.

On September 29, 2016, the panel found the defendant guilty of murder. Specifically, the panel unanimously concluded that the defendant had stabbed the victim on the evening of October 5, 2013, causing his death. The panel found that "[t]he sheer number of stab wounds—fifty-one—is powerful evidence that the defendant intended to cause the death of the [victim]. Also telling is the depth of those wounds—as much as six inches—and the force needed to inflict them. Finally, the defendant's failure to render or seek medical assistance to the obviously dying [victim] reflects an intent to cause his death."

The panel further concluded that the state had disproved, beyond a reasonable doubt, the defendant's claims of defense of self; see General Statutes § 53a-19; and defense of premises. See General Statutes § 53a-20. Specifically, it found that "the defendant did not actually believe that [the victim] was using or about to use deadly physical force, or inflicting or about to inflict great bodily harm and that the defendant did not actually believe deadly physical force was necessary to prevent an attempt by [the victim] to commit a crime of violence. We simply do not believe the defendant's assertions that [the victim] first came at him with a knife and that he used deadly physical force to defend himself and his premises."

Judge Alander found the defendant guilty of sale of narcotics. On December 1, 2016, the panel sentenced the defendant to forty-five years of incarceration on the murder count and Judge Alander imposed a ten year concurrent sentence on the sale of narcotics count, for a total effective sentence of forty-five years of incarcera-

tion. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the state failed to disprove his self and premises defenses beyond a reasonable doubt. Specifically, he argues that the panel erred in concluding that the state had met its burden of disproving these justification defenses, as its decision was unsupported by the evidence and drew unreasonable inferences. We are not persuaded.

We begin with our standard of review and the relevant legal principles. "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 [fact finder] 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 [fact finder] if there is sufficient evidence to support the [fact finder's] verdict . . . . We ask . . . whether there is a reasonable view of the evidence that supports the [fact finder's] verdict of guilty. . . .

"The rules governing the respective burdens borne by the defendant and the state on the justification of self-defense [and defense of premises] 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 [or defense of premises]; 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 [or defense of premises] to the [fact finder]. . . . Once the defendant has done so, it becomes the state's burden to disprove the defense beyond a reasonable doubt." (Citation omitted; 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); *State* v. *Nicholson*, 155 Conn. App. 499, 505–506, 109 A.3d 1010, cert. denied, 316 Conn. 913, 111 A.3d 884 (2015); see also *State* v. *Grasso*, 189 Conn. App. 186, 198–201, 207 A.3d 33, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019).[2]

Next, we set forth the substantive principles with respect to the defendant's claims of self-defense and defense of premises. Regarding the claim of self-defense, "[u]nder § 53a-19 (a), 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. . . . We repeatedly have indicated that the test a [fact finder] 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

[2] Our review of a claim of insufficient evidence is the same whether the trier of fact is a judge, a jury, or a panel of judges. *State* v. *D'Antuono*, 186 Conn. 414, 421, 441 A.2d 846 (1982); see also *State* v. *Bennett*, 307 Conn. 758, 763, 59 A.3d 221 (2013).

alleged attack, is a subjective-objective one. The [fact finder] 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. *Revels*, 313 Conn. 762, 779, 99 A.3d 1130 (2014), cert. denied, 574 U.S. 1177, 135 S. Ct. 1451, 191 L. Ed. 2d 404 (2015); see also *State* v. *Terry*, 161 Conn. App. 797, 805–807, 128 A.3d 958 (2015), cert. denied, 320 Conn. 916, 131 A.3d 751 (2016).[3]

Regarding the claim of defense of premises, § 53a-20 provides in relevant part: "A person in possession or control of premises, or a person who is licensed or privileged to be in or upon such premises, is justified in using reasonable physical force upon another person when and to the extent that he reasonably believes such to be necessary to prevent or terminate the commission or attempted commission of a criminal trespass by such other person in or upon such premises; *but he may use deadly physical force* under such circumstances only (1) in defense of a person as prescribed in section 53a-19, or (2) *when he reasonably believes such to be necessary to prevent an attempt by the trespasser* to commit arson *or any crime of violence* . . . ." (Emphasis added.) See also *State* v. *Terwilliger*, 294 Conn. 399, 409, 984 A.2d 721 (2009); *State* v. *Nicholson*, supra, 155 Conn. App. 506–507.

We begin our analysis by setting forth the defendant's theory of self-defense and defense of premises. See, e.g., *State* v. *Revels*, supra, 313 Conn. 779; *State* v. *Grasso*, supra, 189 Conn. App. 198. The defendant did

[3] The panel found, and the defendant does not dispute, that the defendant used deadly physical force, as evidenced by the use of a knife with a six inch blade and the nature and number of wounds sustained by the victim. See, e.g., General Statutes § 53a-3 (5) (defining "deadly physical force" as "physical force which can be reasonably expected to cause death or serious physical injury").

not testify at trial. Instead, defense counsel used the video recording and transcript of the defendant's October 7, 2013 interview with the police, both of which were admitted into evidence, to establish the justification defenses. In that interview, the defendant admitted that he had sold $60 of crack cocaine to the victim, and allowed him to ingest the drug in his apartment. The victim asked for more crack cocaine, and the defendant responded by demanding additional payment. The victim failed to tender any further payment. The defendant then instructed the victim to leave, but the victim refused, stating: "I ain't going nowhere." The defendant attempted to grab the victim, at which point the victim brandished a silver pocketknife. The victim then stabbed the defendant in the knee twice and cut his finger. The defendant attempted to leave, but the victim blocked the only means of egress. At this point, the defendant claimed to have "blacked out."

Upon further questioning, the defendant provided additional details, despite his blackout claim. Specifically, the defendant stated that after he had been stabbed in the knee, the two combatants separated and he told the victim: "Yo, you got to go." The victim responded: "You're not going nowhere." The two men then resumed their physical struggle, and the defendant caused the victim to drop the knife. The knife fell onto a dresser, and the defendant picked it up. The defendant then reasserted his claim of a blackout. He could not recall stabbing the victim, only that he got out the door. The defendant did remember that the victim's head was near the bedroom and his feet near the kitchen. The victim stated that he was dying. The defendant responded that he was leaving and that the whole altercation could have been avoided. Contradicting his previous statement, the defendant indicated that he knew he had stabbed the victim, who bled "a lot."

Despite his two prior blackout claims, the defendant further explained that he left the apartment and obtained a change of clothes from an unidentified female. Approximately thirty-six hours later, while sitting in a park and speaking to his former wife on the phone, the defendant "flagged down" a police officer and stated that he was "the guy you're looking for." Near the end of the interview, the defendant expressed surprise when told that the victim had sustained approximately fifty stab wounds.

Next, we consider the evidence before the panel, viewed in a light most consistent with the panel's verdict. The panel "conclude[d] that the state [had] proved beyond a reasonable doubt that the defendant did not actually believe that [the victim] was using or about to use deadly physical force, or inflicting or about to inflict great bodily harm and that the defendant did not actually believe deadly physical force was necessary to prevent an attempt by [the victim] to commit a crime of violence. We simply do not believe the defendant's assertions that [the victim] first came at him with a knife and that he used deadly physical force to defend himself and his premises." In support of this conclusion, the panel pointed to the defendant's inconsistent statements regarding the events that he could and could not recall as a result of his purported blackout. The panel found the defendant's claim of a blackout to be "selective and self-serving" because it allowed him "to avoid explaining the nature of the struggle, if any, with [the victim] once the defendant attains possession of the knife [and, most] tellingly, it frees him from having to explain why it was necessary to stab [the victim] fifty-one times, including thirty-one times in the back."

The panel highlighted other irregularities with the defendant's statement to the police. For example, the defendant had stated that he dropped the knife on the sidewalk in front of his apartment building, but no

weapon was located by the police. The defendant also provided vague and incomplete statements regarding (1) where he went after the stabbing and during the approximately thirty-six hour time period between the stabbing and his arrest and (2) the details of what happened to the clothes he wore during the stabbing and how he obtained a change of clothes.

The panel further noted that "[t]he nature and extent of the wounds, both the [victim's] and the defendant's, do not support the defendant's self-defense narrative." Specifically, it iterated that the victim had suffered fifty-one stab wounds, with thirty-one being in the back. This evidence, coupled with the minimal blood stains on the victim's shoes, support the finding that victim was lying on the floor while the defendant stabbed him from above. The panel also found that the lack of extensive defensive wounds on the defendant did not support the "claim of a long struggle necessitating fifty-one thrusts of a knife."[4] Furthermore, the panel, on the basis of photographs of the defendant's injuries and the testimony of the emergency medical technician and nurse who treated the defendant following his arrest, determined that neither the injury to the defendant's finger nor his knee could be characterized as a stab wound.

The panel also relied on evidence of the defendant's actions after he stabbed the victim. "Finally, the defendant's actions subsequent to the stabbing belie an actual belief on his part that he acted in self-defense. First, the defendant knew prior to leaving his apartment that [the victim] lay on the floor bleeding significantly. He also heard [the victim] proclaim that he was dying. At no point, then or later, did the defendant summon

[4] See, e.g., *State* v. *Riggsbee*, 112 Conn. App. 787, 795, 963 A.2d 1122 (2009) (evidence that victim suffered numerous wounds while defendant "had no marks on his person" supported finding that state had disproved self-defense beyond reasonable doubt).

medical assistance for [the victim]. Second, the defendant changed his clothes upon leaving his apartment, did not retain them and professes not to know where they might be. Third, the defendant purposefully did not return to his apartment or disclose his whereabouts to the police for the thirty-six hours prior to his arrest. Each of these acts reveals a consciousness on the defendant's part that he had committed a criminal act and is inconsistent with his claim that he was merely acting to protect himself and his premises."[5]

We emphasize that although the state had the burden of persuading the panel, beyond a reasonable doubt, that the defendant had not acted in self-defense or in defense of his premises, the panel was not obligated to accept, as credible, the defendant's evidence or version of events. *State* v. *Grasso*, supra, 189 Conn. App. 211. As the sole arbiter of the credibility of the witnesses and the weight to be given to specific testimony, the panel was free to disbelieve any or all of the defendant's statement to the police. See *State* v. *Ames*, 171 Conn. App. 486, 501, 157 A.3d 660, cert. denied, 327 Conn. 908, 170 A.3d 679 (2017); see also *State* v. *Pauling*, 102 Conn. App. 556, 572, 925 A.2d 1200 ("[trier of fact] was free to disbelieve the defendant's version of the events that resulted in the injuries to [the victim]"), cert. denied, 284 Conn. 924, 933 A.2d 727 (2007).

We iterate that a person is justified in using 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 and (2) deadly physical force is necessary to repel the attack. *State* v. *Pranckus*, 75 Conn. App. 80, 88, 815 A.2d 678, cert.

[5] See, e.g., *State* v. *Delgado*, 13 Conn. App. 139, 143, 535 A.2d 371 (1987) (evidence of flight introduced into evidence to show that defendant had believed what he had done was not act of self-defense and such evidence, while not absolute proof of guilt, was sufficient to allow trier of fact to infer consciousness of guilt).

denied, 263 Conn. 905, 819 A.2d 840 (2003). Additionally, the use of deadly physical force is permitted in a defense of premises situation when the defendant actually believes it is necessary to prevent arson or an attempted crime of violence. See General Statutes § 53a-20. In the present case, the panel reasonably concluded that the state had presented sufficient evidence to meet its burden of persuasion, and, therefore, the determination of guilt must be sustained. *State* v. *Ames*, supra, 171 Conn. App. 504; see also *State* v. *Lisboa*, 148 Conn. App. 769, 779, 85 A.3d 1244 (2014) (reviewing finding of three judge panel by construing evidence in light most favorable to sustaining verdict and asking whether there is reasonable view of evidence supporting panel's verdict of guilty). Specifically, the panel's findings that the defendant did not actually believe that (1) the victim was using or about to use deadly physical force, or inflict or about to inflict great bodily harm, or (2) deadly physical force was necessary to prevent the victim from committing a crime of violence, are supported by the evidence. Contrary to the defendant's appellate argument, the panel was not bound to accept as true his statements made during the recorded interview with the police. Accordingly, the defendant's sufficiency claim fails.

II

The defendant next claims that the court improperly precluded the testimony of a defense expert witness. Specifically, he argues that the court, *Alander*, *J.*,[6] abused its discretion in granting the state's motion in limine to preclude the expert testimony of Reginald Allard, and that this ruling violated his sixth amendment right to present a defense. We conclude that the court properly granted the state's motion, and, thus, the

[6] The parties agreed that Judge Alander alone should determine whether to preclude Allard from testifying at trial.

defendant's constitutional right to present a defense was not violated.

The following additional facts are necessary for the resolution of this claim. In March, 2016, defense counsel notified the state of his intention to offer the expert testimony of Allard "concerning the effect of adrenaline on sensory processing, decision-making, short-term memory, 'fight-or-flight' reactions and related issues as they regard a claim of self-defense." On August 23, 2016, the state filed a motion in limine to preclude this testimony. The state argued that Allard, who had worked as a police officer and police trainer, had no peculiar knowledge or experience related to the issues at trial, that any such knowledge or experience he possessed was "common to the world" and that any testimony from Allard would not assist the trier of fact. The state further contended that "any testimony from . . . Allard on scientific issues is inadmissible under *State* v. *Porter*, 241 Conn. 57[, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998)], because no factors support the reliability of . . . Allard's methods and those methods are irrelevant to the facts involved in the trial." On September 19, 2016, the defendant filed a memorandum in support of Allard testifying.

The court held a *Porter* hearing on September 19, 2016. Allard testified that he was the sole member and chief operating officer of 13th Juror, LLC, an expert witness and police training consulting business. Prior to that, Allard had been a New Britain police officer and a training officer at the Connecticut Police Academy in the areas of force, restraint and control, shooting decisions, psychology and abnormal behavior. He explained that when an individual is faced with a threat, the adrenal gland, which is located on top of the kidney, secretes a "chemical cocktail" consisting of adrenaline and noradrenaline, which cause feelings of fear and

rage, respectively. These chemicals cause a number of physiological effects, including a distorted perception of events. Allard specifically noted that, in the context of a violent attack, an individual with no training in compensating for these physiological effects would be more likely to overreact in an effort to end the threat. He was not able, however, to identify any specific studies to support this opinion.

During cross-examination by the prosecutor, Allard could not identify specifically where in his collection of medical treatises, psychological journals and psychiatric articles the term "chemical cocktail" was used. He acknowledged that he did not have a degree in any of the medical sciences such as biology, chemistry or physiology. Allard then indicated that blackouts may occur in stressful situations,[7] but he was unable to point to any specific scientific studies to support this opinion, or to identify the frequency of their occurrence. He testified that whether a particular individual actually suffered a blackout cannot be verified independently and is based solely on the self-reporting of that individual.

After Allard had completed his testimony, the court heard argument from the parties. The court asked defense counsel to identify precisely Allard's opinions that he sought to have admitted into evidence at the trial. Defense counsel stated that Allard would testify that (1) a person may overreact to a situation due to stress, (2) the chemical cocktail causes certain physiological effects and (3) a person in a stressful situation may experience a blackout. At the conclusion of the hearing, the court issued an oral decision. It began with

[7] Specifically, Allard testified that blackouts can occur following a traumatic event and are "a physiological response to the peak stress that the individual encounters . . . ." He further indicated that this opinion was based on his research, including psychological and experimental studies, but he was unable to identify these studies specifically.

a summary of the parties' arguments. "The defendant's position is that it's not scientific. The testimony, it's not—I guess that it's just based on [Allard's] experience as opposed to any scientific basis. The state's position is twofold. To the extent it's nonscientific, it's within a lay person's or a juror's experience, and they don't need an expert to opine on those matters, and the second is, that to the extent it is otherwise, it's scientific evidence in which there's not been the appropriate support."

The court proceeded to address each of Allard's opinions in turn. As to Allard's opinion that individuals may overact in a stressful situation, the court concluded that "[a] lay person knows that under stress people can—can overreact to situations. I think that's within the realm of the person's everyday experience. . . . So I don't think that is in need of an expert opinion."

As to the physiological effects resulting from the chemical cocktail, the court stated: "I mean, that's clearly scientific. I mean that's physiological. That's medicine. I don't know how one can claim that that's not scientific. And he—he outlined a number of . . . physiological effects, visual narrowing, auditory exclusions, increased heartrate, decreased breathing, loss of fine motor skills, flash of white light. But he also indicated that it's totally based on the self-reporting of police officers. [There are] . . . no published studies on this. [Allard's] not published on it. He's not aware of anyone else publishing on it. There's no known error rate. The self-reporting hasn't been analyzed or scrutinized to any degree. It's just accepted as wisdom because police officers said it occurred. So that's a problem."

With respect to the third opinion, that blackouts may occur in response to a stressful situation, the court

again pointed to Allard's inability to identify any scientific study to support his position. "Now he testified he knows of studies but couldn't identify any. He didn't know the methodology used. He said it wasn't based on any scientific studies, and he couldn't identify any identifiable frequency that they occur. And again, this is physiological. It's—it's medicine." The court further noted that Allard did not testify that his opinions were generally accepted in the relevant scientific community. After considering the other factors set forth in *State* v. *Porter*, supra, 241 Conn. 57, the court precluded Allard from testifying.

We now turn to the relevant legal principles and our standard of review.[8] "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . The trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opinions. . . . The court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law. . . . Generally, expert testimony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues." (Citations omitted; internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 634, 881 A.2d 1005 (2005); see also *State* v. *Brett B.*, 186 Conn. App. 563, 600–601, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019); see generally E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 7.3.2, pp. 439–40.

[8] In *State* v. *Griffin*, 273 Conn. 266, 280–81, 869 A.2d 640 (2005), our Supreme Court specifically stated that the same standard of determining the admissibility of scientific evidence applies to cases tried before a court as those tried before a jury.

"Beyond these general requirements regarding the admissibility of expert testimony, [t]here is a further hurdle to the admissibility of expert testimony when that testimony is based on . . . scientific [evidence]. In those situations, the scientific evidence that forms the basis for the expert's opinion must undergo a validity assessment to ensure reliability. . . . In *Porter*, this court . . . held that scientific evidence should be subjected to a flexible test, with differing factors that are applied on a case-by-case basis, to determine the reliability of the scientific evidence. . . . Following . . . *Porter* . . . scientific evidence, and expert testimony based thereon, usually is to be evaluated under a threshold admissibility standard assessing the reliability of the methodology underlying the evidence and whether the evidence at issue is, in fact, derived from and based upon that methodology . . . which has been referred to as the fit requirement." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Maher* v. *Quest Diagnostics, Inc.*, 269 Conn. 154, 168, 847 A.2d 978 (2004).

We also note that the defendant has raised both an evidentiary and a constitutional claim. "[T]he federal constitution require[s] that criminal defendants be afforded a meaningful opportunity to present a complete defense. . . . The sixth amendment . . . [guarantees] the right to offer the testimony of witnesses, and to compel their attendance, if necessary, [and] is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . When defense evidence is excluded, such exclusion may give rise to a claim of denial of the right to present a defense. . . . *A defendant is, however, bound by the rules of evidence in presenting a defense.* . . . Although exclusionary rules of evidence cannot be applied mechanistically to

deprive a defendant of his rights, *the constitution does not require that a defendant be permitted to present every piece of evidence he wishes*." (Emphasis added; internal quotation marks omitted.) *State* v. *Sampson*, 174 Conn. App. 624, 635, 166 A.3d 1, cert. denied, 327 Conn. 920, 171 A.3d 57 (2017); see also *State* v. *Rogers*, 183 Conn. App. 669, 679–80, 193 A.3d 612 (2018). Guided by these principles, we address each of Allard's proffered opinions in turn.

A

The defendant first argues that the court improperly precluded Allard from testifying that an individual in a stressful situation may overreact on the ground that this opinion constituted knowledge common to the average person, and therefore expert testimony was unnecessary. The state counters that the court did not abuse its discretion in concluding that this opinion did not require expert testimony. We agree with the court's conclusion.

During the *Porter* hearing, Allard testified that an individual trained in the physiological effects of the chemical cocktail caused by a stressful situation acts more appropriately than an untrained person. He explained that untrained individuals "are more likely to overreact . . . because they . . . are not comfortable with the fear, and as a consequence they are just trying to stop the fear anyway they can." Following a question from the court, Allard conceded that he could not identify a study to support the position that an untrained individual generally overreacts to a violent confrontation.

In concluding that expert testimony was not needed to present this opinion to the fact finder, the court stated: "Everybody knows that. I think that's what is governed by the [Appellate Court's] decision in [*State* v. *Campbell*, 149 Conn. App. 405, 88 A.3d 1258, cert.

denied, 312 Conn. 907, 93 A.3d 157 (2014)]. A lay person knows that under stress people can—can overreact to situations. I think that's within the realm of the person's everyday experience. . . . So I don't think that is in need to an expert opinion."

In *State* v. *Campbell*, supra, 149 Conn. App. 408, the victim struck the defendant's brother in the head after a verbal disagreement. The victim then challenged the defendant to a fight, who responded by shooting the victim with a pistol. Id., 408–409. On appeal, the defendant claimed, inter alia, that the court improperly had precluded his expert witness, a psychiatrist, about the "fight or flight" response to the perception of danger. Id., 427–28. The state agreed with the trial court that "human reactions to stressful circumstances that give rise to a fight or flight response are matters that fall within the common experience of the average juror." Id., 430. In affirming the decision of the trial court, we stated: "The proffered testimony . . . was an attempt to provide expertise on inferences which lay persons were equally capable of drawing from the evidence. It is only when an expert witness has a special skill or knowledge, beyond the ken of the average juror, on the particular subject at issue that his testimony can be helpful and, accordingly, should be admitted." (Internal quotation marks omitted.) Id.

In the present case, we emphasize that "[i]t is well settled that [t]he true test of the admissibility of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; *but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue*." (Emphasis added; internal quotation marks omitted.) *State* v. *Leniart*, 333 Conn.

88, 142, 215 A.3d 1104 (2019). Furthermore, the need for an expert is determined on a case-by-case basis and is dependent on whether the issues are sufficiently complex to warrant the use of expert testimony as an aid to the court. *State* v. *Buhl*, 321 Conn. 688, 700, 138 A.3d 868 (2016). We agree with the court's conclusion that the fact that a person may overreact in a stressful situation is not beyond the ken of the average fact finder. Accordingly, the court did not abuse its discretion in excluding this portion of Allard's testimony.

B

The defendant next argues that the court abused its discretion in preventing Allard from testifying that the chemical cocktail causes certain physiological effects and that a person in a stressful situation may experience a blackout. Specifically, he contends that the court improperly subjected these two opinions to the *Porter* test.[9] The state counters that the court correctly determined that these two opinions needed to satisfy the *Porter* standard before they could be admitted into evidence. We agree with the state.

We begin with the relevant legal principles. "In [*State* v. *Porter*, supra, 241 Conn. 57], [our Supreme Court] followed the United States Supreme Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and held that testimony based on scientific evidence should be subjected to a flexible test to determine the reliability of methods used to reach a particular conclusion. . . . A *Porter* analysis involves a two part inquiry that assesses the reliability and relevance of the witness' methods. . . . First, the party offering the expert testimony must show the expert's methods for reaching his conclusion are reliable. . . . Second, the proposed

[9] In this appeal, the defendant does not argue that the court erred in its *Porter* analysis, only that it was not subject to the *Porter* threshold test for scientific evidence.

scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract. . . . Put another way, the proponent of scientific evidence must establish that the specific scientific testimony at issue is, in fact, derived from and based [on] . . . [scientifically reliable] methodology." (Internal quotation marks omitted.) *State* v. *Edwards*, 325 Conn. 97, 124, 156 A.3d 506 (2017); see also *State* v. *Montanez*, 185 Conn. App. 589, 618–19, 197 A.3d 959 (2018), cert. denied, 332 Conn. 907, 209 A.3d 643 (2019); *State* v. *Campbell*, supra, 149 Conn. App. 426–27 (trial court acts as gatekeeper to ensure fact finder hears only relevant evidence grounded in scientific fact and not conjecture and speculation).[10]

This court has recognized that "[a]lthough [our Supreme Court] in *Porter* explicitly adopted the *Daubert* test to determine the admissibility of scientific evidence . . . [it] did not explicitly overrule Connecticut precedent regarding the evidence to which such a test should apply. Prior to *Porter*, [our Supreme Court] had recognized that the *Frye* [v. *United States*, 293 F. 1013 (D.C. Cir. 1923)] test for admissibility should not apply to all expert testimony, but only to that which involves innovative scientific techniques . . . . In *Porter* [our Supreme Court] recognized that *Daubert*'s vagueness as to how and when to apply the factors of the test was necessary. . . . In order to maintain flexibility in

[10] In *State* v. *Maner*, Superior Court, judicial district of Waterbury, Docket No. CR-08-0375803 (July 19, 2011), the court identified the four situations when expert testimony of innovative scientific techniques is not subject to a *Porter* analysis. "The first occurs when established techniques [are] applied to the solution of novel problems. . . . The second situation is when the scientific principles have become so well established that an explicit *Daubert* analysis is not necessary for admission of evidence thereunder. . . . The third situation is when the evidence simply requires jurors to employ their own powers of observation and comparison. . . . The fourth situation is when the testimony in not truly scientific." (Citations omitted; internal quotation marks omitted.) Id.

applying the test, [it] did not define what constitutes scientific evidence." (Internal quotation marks omitted.) *State* v. *Furbush*, 131 Conn. App. 733, 754, 27 A.3d 497 (2011); see also *State* v. *Griffin*, 273 Conn. 266, 276, 869 A.2d 640 (2005).

In his argument at the *Porter* hearing, defense counsel stated that Allard was not offering a scientific opinion. The court disagreed and, referencing the *Porter* standard, indicated that its function was to ensure (1) that the proffered scientific evidence was predicated on reliable scientific methods and procedures and (2) that the evidence was relevant to the facts of the case. It then summarized Allard's opinions regarding the physiological effects of the chemical cocktail[11] and the blackouts that may occur during a traumatic event.[12] Applying the *Porter* standard to these facts, the court determined that the proffered testimony of Allard was inadmissible.[13]

[11] As we noted previously, the court stated: "I mean, that's clearly scientific. I mean that's physiological. That's medicine. I don't know how one can claim that that's not scientific. And he—he outlines a number of . . . physiological effects, visual narrowing, auditory exclusions, increased heartrate, decreased breathing, loss of fine motor skills, flash of white light. But he also indicated that it's totally based on the self-reporting of police officers. There's—there's no published studies on this. He's not published on it. He's not aware of anyone else publishing on it. There's no known error rate. The self-reporting hasn't been analyzed or scrutinized to any degree. It's just accepted as wisdom because police officers said it occurred."

[12] Specifically, the court stated: "Now he testified he knows of studies but couldn't identify any. He didn't know the methodology used. He said it wasn't based on any scientific studies, and he couldn't identify any identifiable frequency that they occur. And again, this is physiological. It's—it's medicine. . . . He also indicated that his opinions weren't generally accepted in the relevant scientific community. He didn't say they weren't. He just didn't say they were."

[13] The court noted that the defendant bore the burden of establishing the reliability of Allard's opinions. It also pointed to the fact that the defendant had failed to demonstrate that Allard's opinions were accepted in the general scientific community, that the evidence had not been subjected to testing or a peer review, that Allard did not possess an undergraduate or graduate degree relevant to the scientific opinions he sought to give and that his opinions were based on the subjective reporting of the people he trained in police procedure, rather than objectively verifiable criteria. Further, the court pointed to Allard's inability to identify specifically the scientific studies that would support his opinions.

On appeal, the defendant argues that the court should not have conducted a *Porter* analysis on Allard's opinions. Specifically, he contends that Allard's "testimony . . . was based on his education, experience and observations made in the field of use of force situations [and he did not] seek to diagnose the defendant, nor did [Allard's opinions] rely on the results of any scientific tool or protocol." Simply stated, the defendant contends that Allard's proffered opinions regarding the physiological effects of the chemical cocktail and the possibility of a blackout following his encounter with the victim did not constitute scientific evidence. See, e.g., *State* v. *Vumback*, 68 Conn. App. 313, 329, 791 A.2d 569 (2002), aff'd, 263 Conn. 215, 819 A.2d 250 (2003). In support, he relies on *State* v. *Reid*, 254 Conn. 540, 757 A.2d 482 (2000), *State* v. *Borrelli*, 227 Conn. 153, 629 A.2d 1105 (1993), and *State* v. *Hasan*, 205 Conn. 485, 534 A.2d 877 (1987).

In *State* v. *Griffin*, supra, 273 Conn. 266, our Supreme Court recited the analytic framework for determining whether a *Porter* analysis is necessary and summarized its decision in *Reid* and *Hasan*. "[O]ur initial inquiry is whether the [evidence] at issue . . . is the type of evidence contemplated by *Porter*. . . . *State* v. *Reid*, supra, 254 Conn. 549, and *State* v. *Hasan*, supra, 205 Conn. 490, are useful starting points in our analysis. In *Reid*, we concluded that microscopic hair analysis is not the type of evidence that is subject to a threshold determination of reliability under *Porter*. . . . We explained that, [a]lthough [the expert witness'] training [was] based in science, he testified about a subject that simply required the jurors to use their own powers of observation and comparison. . . . The challenged evidence in *Reid* included an enlarged photograph displaying a microscopic image of the defendant's hair strand, side-by-side with a hair strand recovered from the victim's clothing, and expert testimony explaining

the similarities and particular features of the hair strands. . . . Because [t]he jurors were free to make their own determinations as to the weight they would accord the expert's testimony in the light of the photograph and their own powers of observation and comparison . . . we concluded that the admissibility of the challenged evidence was not contingent upon satisfying the *Porter* test. . . .

"Similarly, in *State* v. *Hasan*, supra, 205 Conn. 490, [w]e concluded that [a] podiatrist's testimony [concerning the probability that a pair of sneakers would fit the defendant's feet] was not scientific evidence subject to the *Frye* test because the podiatrist merely compared the footwear to the defendant's feet. . . . Accordingly, [we determined that] the jury [was] in a position to weigh the probative value of the testimony without abandoning common sense and sacrificing independent judgment to the expert's assertions based on his special skill or knowledge. . . . [T]he podiatrist's testimony concerned a method, the understanding of which [was] accessible to the jury . . . and the value of the expertise lay in its assistance to the jury in viewing and evaluating the evidence. . . . As we recently noted, *Hasan* and *Reid* stand for the proposition that evidence, even evidence with its roots in scientific principles, which is within the comprehension of the average juror and *which allows the jury to make its own conclusions based on its independent powers of observation and physical comparison, and without heavy reliance upon the testimony of an expert witness, need not be considered scientific in nature for the purposes of evidentiary admissibility.*" (Citations omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *State* v. *Griffin*, supra, 276–78.

In the present case, Allard's two proffered opinions regarding the physiological effects of the chemical cocktail and that a person in a stressful situation may

blackout are inapposite to the facts of *Reid* and *Hasan*, where the jurors were asked to use their independent powers of observation and physical comparison. Here, the fact finder would need to rely on the testimony of Allard with respect to the physiological effects of the chemical cocktail and a possible blackout. Further, the fact finder would not be in a position to reach a conclusion with respect to these topics based on its independent powers of observation and physical comparison. Thus, we conclude that the defendant's reliance on *Reid* and *Hasan* is misplaced.

Additionally, we are not persuaded by the defendant's argument based on *State* v. *Borrelli*, supra, 227 Conn. 153. In that case, the defendant argued, inter alia, that expert testimony regarding battered woman's syndrome[14] did not meet the test of admissibility of scientific evidence as stated in the then controlling case of *Frye* v. *United States*, supra, 293 F. 1013. *State* v. *Borrelli*, supra, 162–63. In rejecting that argument, our Supreme Court relied on the principle that the *Frye* test did not apply to all types of expert testimony, even if scientific concepts are involved. Id., 163.

The expert witness in *Frye* testified about his observations, based on his educational background and experience, regarding a large group of battered women. Id., 165. "He did not offer any opinion as to whether [the victim] was a battered woman or whether she exhibited the typical behavioral characteristics of a battered woman. [The expert] did not apply any scientific instrument or test to specific evidence in the case, nor did he use battered woman's syndrome as a diagnostic tool. Finally, he did not apply any scientific test to a

[14] The expert witness defined the syndrome "as referring to the behavioral and psychological consequences that many victims, but by no means all victims, experience as a consequence of living in domestic violence situations." (Internal quotation marks omitted.) *State* v. *Borrelli*, supra, 227 Conn. 168.

hypothetical question posed by the state." Id., 164–65. Instead, his testimony was focused on characteristics commonly found in relationships that involve domestic violence and the behaviors exhibited by an individual experiencing battered women's syndrome, which include remaining in a relationship with the abuser, delaying or failing to report the abuse, minimizing or denying the harm suffered and reporting the dangerous situation to the police or a health care provider and then recanting it at a later date. Id., 168–69.

The present case is distinguishable from *Borrelli*. The expert in *Borrelli* testified about the typical behaviors of victims of domestic abuse who experienced battered women's syndrome. See also *State* v. *Vumback*, supra, 68 Conn. App. 330–32 (expert testimony regarding behaviors of children subjected to sexual abuse may act under certain circumstances not scientific evidence subject to *Porter*). Here, Allard testified about the chemistry regarding the secretion of adrenaline and noradrenaline by the adrenal gland and the resulting physiological effects of this chemical cocktail. Relying on a scientific study, he identified some of these effects as "the numbing of the—of the brain, the auditory exclusion, the visual narrowing, the fine motor skills that are lost as a consequence of blood going from the brain." Allard also relied on a psychological study to support his opinion that the chemical cocktail distorted perception and long-term memory. During cross-examination, Allard specifically acknowledged that all of the physiological reactions he had mentioned were based on the chemistry of the body. He also explained that a blackout that may occur during a traumatic encounter constituted a physiological reaction to peak stress. Allard based this opinion on his research, including experimental and psychological studies.

In contrast to the testimony in *Borrelli* regarding the possible behaviors of victims of domestic violence who suffered from battered women's syndrome, Allard

testified about the specific chemical and physiological effects of adrenaline and noradreline on the body when an individual experiences a stressful event. Allard also discussed the potential physiological reaction of a blackout as result of a traumatic or stressful situation. His testimony was premised on scientific studies. This specific scientific testimony, distinguishable from the testimony regarding possible behaviors in *Borrelli*, needed to be evaluated pursuant to the threshold admissibility standard set forth in *Porter*. See, e.g., *State* v. *West*, 274 Conn. 605, 630, 877 A.2d 787, cert. denied, 546 U.S. 1049, 126 S. Ct. 775, 163 L. Ed. 2d 601 (2005). Simply stated, we are not persuaded that these two proffered opinions fit within the holding of *Borrelli*. Accordingly, we conclude that the court did not abuse its discretion in subjecting these two proffered opinions to a *Porter* analysis.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RANDY G.*
(AC 41488)

Lavine, Elgo and Moll, Js.

Syllabus

The defendant, who had been on probation in connection with his conviction of the crime of criminal violation of a protective order, appealed to this court from the judgment of the trial court revoking his probation and sentencing him to forty-four months of incarceration. During his probation period, the victim, who was the defendant's former girlfriend, gave a statement to the police in which she stated that the defendant had come to her home, looked in her window and then left the premises on a bicycle. Thereafter, the defendant was arrested and charged with violating the condition of his probation that required him to comply

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2012); we decline to identify any party 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 party's identity may be ascertained.

with a protective order in effect, which prohibited him from contacting the victim and required him to stay 100 yards away from her. *Held*:

1. The defendant could not prevail on his claim that the trial court abused its discretion by admitting into evidence a police report concerning his prior arrest relating to the underlying conviction, which was based on his claim that the report was unreliable hearsay because it included details of a home invasion and an assault charge that the state had nolled; that court properly admitted the police report into evidence as reliable hearsay, as it is well settled that probation proceedings are informal and that strict rules of evidence do not apply to such proceedings, in which a broad evidentiary standard is applied, and because a probation hearing is merely a reconvention of the original sentencing hearing, the court could consider types of information properly considered at that hearing, including evidence of crimes for which the defendant was charged but not prosecuted.

2. Contrary to the defendant's claim, the trial court did not abuse its discretion in refusing to admit into evidence a police report that was related to the victim's criminal complaint against a previous boyfriend: although the defendant claimed that the police report would have shown the victim's pattern of making false claims against former boyfriends and, therefore, would have impeached her credibility, defense counsel admitted on the record that there was no indication that the victim's prior complaint was false, and the police report failed to show any bias or prejudice on the victim's part against the defendant; moreover, the defendant's claim was inherently problematic because he was, in effect, asking this court to conclude that a victim's trustworthiness is directly related to the number of criminal complaints that he or she has filed, and because the defendant's evidentiary claim failed, his constitutional claim that the exclusion of the police report violated his due process right to confront witnesses against him also failed.

Argued September 20, 2019—officially released January 21, 2020

Procedural History

Information charging the defendant with violation of probation, brought to the Superior Court in the judicial district of Hartford, geographical area number twelve, and tried to the court, *Oliver*, *J.*; judgment revoking the defendant's probation, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Adam B. Scott*, supervisory assistant state's attorney, for the appellee (state).

Opinion

LAVINE, J. The defendant, Randy G., appeals from the judgment of the trial court finding him in violation of his probation pursuant to General Statutes § 53a-32. On appeal, the defendant claims that the court abused its discretion by (1) admitting into evidence a police report from the underlying case in which he was convicted and (2) refusing to admit evidence of the victim's criminal complaint against a previous boyfriend. We affirm the judgment of the trial court.

The record reveals the following facts and procedural history that inform our analysis of the defendant's claims on appeal. Prior to the events at issue in the present appeal, the defendant and the victim lived together and had a child together. Sometime thereafter, the court issued a protective order against the defendant to protect the victim. On January 5, 2017, while the protective order was in effect, the defendant went to the victim's apartment, physically assaulted her, and fled on their child's bicycle. The defendant was charged with criminal violation of a protective order, failure to comply with fingerprint requirements, larceny in the sixth degree, and assault in the third degree. The defendant pleaded guilty to criminal violation of a protective order on February 8, 2017 (underlying conviction), and the state nolled the remaining charges. On April 27, 2017, the defendant was sentenced to four years of incarceration, execution suspended after 120 days, and three years of probation.

The defendant was released from the custody of the Commissioner of Correction on May 4, 2017, and signed his conditions of probation on May 15, 2017. Those

conditions required the defendant to comply with the protective order in effect, which prohibited him from contacting the victim and required him to stay 100 yards away from her. On May 23, 2017, the victim contacted the defendant's probation supervisor, Thomas Buikus II, and informed him that the defendant had come to her home, harassed her, and vandalized her property. On the same date, she gave a statement to Officer Juan Rivera III of the East Hartford Police Department, relating that she heard a banging noise outside of her apartment and, after investigating, saw the defendant looking in her window. She further stated that the defendant had come to her apartment on a bicycle, and, after about ten minutes, he left the premises on the bicycle.

An arrest warrant was issued for the defendant on August 3, 2017, for his violation of probation by failing to adhere to the no contact condition. The state thereafter charged the defendant with violation of probation, and, following a hearing, the court found that the defendant had violated the conditions of his probation, revoked his probation, and sentenced him to forty-four months of incarceration. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that the court abused its discretion by admitting into evidence during the violation of probation hearing a police report concerning his prior arrest relating to the underlying conviction because it contained inadmissible hearsay. More specifically, the defendant claims that the report was improperly admitted under the business record exception to the hearsay rule and as reliable hearsay, and because it contained double hearsay.

During the probation violation hearing, Rivera testified as a witness for the state. The following examination transpired:

"[Defense Counsel]: And are you aware of the . . . victim [having] a history of calling the East Hartford Police Department with similar complaints?

"[Rivera]: I was not—

"[The Prosecutor]: Objection, Your Honor, relevance. . . .

"[Defense Counsel]: I would claim it only as to her credibility, Your Honor.

"[The Prosecutor]: She's not testified, Your Honor.

"The Court: It's overruled. You can answer, if you know, officer.

"[Rivera]: The only—I knew from looking up her history that she was involved with a case within a few months prior. That was pretty much all I knew.

"[Defense Counsel]: With another defendant?

"[Rivera]: No, I believe it was with [the defendant]."

The state then conducted redirect examination of Rivera.

"[The Prosecutor]: Officer Rivera, you indicated on cross-examination that you checked the incidents for [the defendant] previously that [the victim] was involved with. Do you—and you indicated that there was an arrest by Officer Sanzo with regard to [the defendant]?

"[Rivera]: Yeah. At the same apartment, Officer Sanzo had an arrest with him.

"[The Prosecutor]: Can you identify that document for the court?

"[Rivera]: Yeah, this is . . . the case report for Officer Sanzo at 126 Silver Lane.

"[The Prosecutor]: And was that document taken in the ordinary course of business?

"[Rivera]: Correct.

"[The Prosecutor]: And it's prepared by the East Hartford Police Department in the ordinary course of business?

"[Rivera]: Yes.

"[The Prosecutor]: And is it kept by them in that same regard?

"[Rivera]: Yes.

"[The Prosecutor]: And was it made at or around the time of the incident that it purports to document?

"[Rivera]: Yes.

"[The Prosecutor]: I'd offer state's exhibit 4 as a full exhibit at this time, Your Honor. . . .

"[Defense Counsel]: Your Honor, I'm going to object to this document as hearsay because Officer Sanzo isn't here to testify about it. And this officer didn't . . . create the report. . . .

"[The Prosecutor]: It is hearsay, Your Honor. I've indicated a[n] . . . exception to the hearsay rule, a business record. I would also indicate that its relevance is made clear through the defendant's cross-examination of this witness, Your Honor. And I would also indicate that it goes to, being that this is a two tiered hearing, one that indicates the defendant's ability to conform to the conditions of probation . . . . If Your Honor indeed finds him in violation of probation, that this document would go to that issue. . . .

"[Defense Counsel]: . . . Your Honor . . . in my direct examination, we didn't really touch on any of the bases of the underlying conviction. And it doesn't appear that this witness has personal knowledge of the

prior arrest as to indicate what would be required for a disability as a business record. I understand the court may be able to look at it as part, but it's just simply in terms of liability.

"The Court: Well, the business record exception does not require that the authenticator be the author, and this is a violation of probation hearing, reliable hearsay is allowed. I'll offer it both for adjudication and disposition.

"[Defense Counsel]: All right, thank you, Your Honor."

We first note that "the Connecticut Code of Evidence does not apply to proceedings involving probation. Section 1-1 (d) (4) of the Connecticut Code of Evidence specifically provides: The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to, the following . . . [p]roceedings involving probation." (Internal quotation marks omitted.) *State* v. *Megos*, 176 Conn. App. 133, 146, 170 A.3d 120 (2017). "It is well settled that probation 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.) Id.; see also *State* v. *Giovanni P.*, 155 Conn. App. 322, 327, 110 A.3d 442 ("[h]earsay evidence may be admitted in a probation revocation hearing if it is relevant, reliable and probative"[internal quotation marks omitted]), cert. denied, 316 Conn. 909, 111 A.3d 883 (2015).

On appeal, the defendant claims that the trial court abused its discretion by admitting the police report[1] under the business record exception to the hearsay rule and, further, because the court "sua sponte broadened the bases for admission to include reliable hearsay" although the police report did not meet the standards for reliable hearsay. The defendant argues that the police report was unreliable because "[i]t details a very violent attack and home invasion," even though the defendant was convicted only on the charge of criminal violation of a protective order, and not on the assault charge, which was nolled.[2] The defendant further claims that the police report was improperly admitted because it contained double hearsay, insofar as the report documented statements made by the victim and her then boyfriend. In response, the state argues that the police report was indeed reliable because the report was prepared by a police officer in the course of his duties shortly after the incident in question and was corroborated at least in part by another officer who testified at the hearing, the victim testified that the defendant previously had violated protective orders that had been put in place against him, and the defendant testified at the hearing that he was arrested and convicted twice in 2013 and once in 2017 for violating protective orders in place to protect the victim.

We disagree with the defendant's characterization of the court's ruling. We construe the court's ruling to indicate that the police report was ultimately admitted as reliable hearsay. We consider the trial court's admission of the police report as reliable hearsay particularly mindful of the following principles. "The evidentiary standard for probation violation proceedings is broad.

[1] That report described the incident leading to the defendant's arrest for criminal violation of a protective order and assault.

[2] Although the defendant's argument pertains to the fact that the assault charge against him was nolled, we note that the charges of larceny and failure to comply with fingerprint requirements against him were also nolled.

. . . [T]he court may . . . consider the types of information properly considered at an original sentencing hearing because a revocation hearing is merely a reconvention of the original sentencing hearing. . . . The court may, therefore, consider hearsay information, evidence of crimes for which the defendant was indicted but neither tried nor convicted, evidence of crimes for which the defendant was acquitted, and evidence of indictments or informations that were dismissed." (Internal quotation marks omitted.) *State* v. *Megos*, supra, 176 Conn. App. 147. After reviewing the record, we conclude that the court did not abuse its discretion in admitting as reliable hearsay the police report from the underlying case in which the defendant was convicted. Because the report was properly admitted as reliable hearsay, we need not address the defendant's claims related to the business record exception.[3]

II

The defendant's second claim is that the court abused its discretion by failing to admit evidence of the victim's

[3] The defendant also claims on appeal that his due process right to confront and cross-examine adverse witnesses, pursuant to *Morrissey* v. *Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972), was violated because he was not able to confront the author of the police report, as well as the victim and her then boyfriend who gave statements to the police. See *State* v. *Shakir*, 130 Conn. App. 458, 466–468, 22 A.3d 1285, cert. denied, 302 Conn. 931, 28 A.3d 345 (2011). The defendant did not preserve this constitutional claim because he failed to raise an objection that provided opposing counsel and the court with fair notice of that claim. See id., 462 (claim unpreserved where defendant objected solely on basis of unreliable hearsay); *State* v. *Crespo*, 190 Conn. App. 639, 647, 211 A.3d 1027 (2019) (claim unpreserved where defendant never argued that court was required to conduct balancing test to determine whether due process right was violated). Because the defendant failed to preserve the claim, it is not reviewable by this court. It is also on this basis that the record is inadequate to afford the defendant review pursuant to *State* v. *Golding*, 213 Conn. 233, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See *State* v. *Crespo*, supra, 648. To the extent that the defendant separately makes a purely evidentiary claim on double hearsay grounds, this claim was not preserved because the defendant did not make an objection based on double hearsay before the trial court.

criminal complaint against a previous boyfriend and, therefore, violated the defendant's due process right to confront witnesses against him. We disagree.

The following additional facts and procedural history are relevant to our disposition of this claim. At the violation of probation hearing, defense counsel proffered a police report from 2014, which was prompted by the victim's complaint against a previous boyfriend, John Henry (Henry police report). Defense counsel sought to use the Henry police report to impeach the victim's credibility with regard to bias, interest, or prejudice against the defendant. Defense counsel argued that the Henry police report showed the victim's "prejudice against old boyfriends, and calling the police on [them]." Counsel further argued that the report was similar to the present incident because there was little proof to support the victim's allegation insofar as when the responding officer arrived, "no one was there." The prosecutor objected on the basis of relevance, because the prior incident involved a different time, location, and individual. The court sustained the prosecutor's objection because there was no indication that the victim's prior complaint was false and, therefore, the court concluded, the evidence was not relevant.[4]

"Ordinarily, [o]ur standard of review regarding challenges to a trial court's evidentiary rulings 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

[4] When questioned on the falsity of the victim's complaint made against Henry in 2014, defense counsel admitted: "I don't have any indication it was construed to be false, Your Honor. Simply they didn't find him at the apartment and there was further investigation to follow."

ruling only if it could not reasonably conclude as it did." (Internal quotation marks omitted.) *State* v. *Young*, 63 Conn. App. 794, 798, 778 A.2d 1015, cert. denied, 258 Conn. 903, 782 A.2d 140 (2001).

"[R]evocation of [probation] is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to [probation] revocations. . . . A probation revocation hearing must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. . . . A probationer is entitled to be heard and show, if possible, that a violation did not occur. The inquiry is a narrow one and the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial. . . .

"The process, however, 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. . . . Both the probationer . . . and the [s]tate have interests in the *accurate* finding of fact and the informed use of discretion—the probationer . . . to insure that his liberty is not unjustifiably taken away and the [s]tate to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community. . . . [T]he state, as well as the probationer, has an interest in a *reliable* determination of whether probation has been violated." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 799–800.

On appeal, the defendant claims that the court improperly excluded the Henry police report because it would have shown a pattern of the victim making false or exaggerated claims against former boyfriends

and, therefore, would have impeached the victim's credibility. Defense counsel admitted on the record that there was no indication of falsity in the victim's criminal complaint about Henry in the report. The defendant also argues, somewhat contrarily, that the evidence was not offered as to the victim's veracity, but as to bias, and, therefore, the evidence did not need to be false to be relevant. The defendant, however, failed to present any evidence of bias on the part of the victim against the defendant.[5] On the basis of the foregoing, it is apparent that the Henry police report failed entirely to show bias or prejudice on the part of the victim against the defendant. The defendant's claim is also inherently problematic because he is, in effect, asking this court to conclude that a victim's trustworthiness is directly related to the number of criminal complaints that he or she has filed. We conclude that the court did not abuse its discretion in excluding the Henry police report. Because the defendant's evidentiary claim fails, his constitutional claim also fails. See *State* v. *Durdek*, 184 Conn. App. 492, 511 n.10, 195 A.3d 388, cert. denied, 330 Conn. 934, 194 A.3d 1197 (2018).

The judgment is affirmed.

In this opinion the other judges concurred.

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[5] In support of his argument, the defendant cites to *State* v. *Cortes*, 276 Conn. 241, 256, 885 A.2d 153 (2005), for the proposition that the end of an emotionally charged sexual relationship "generates greater bias and motive to fabricate accusations than an argument between friends or acquaintances." The defendant, however, failed to present evidence that the end of his relationship with the victim was emotionally charged and, further, failed to present evidence that the victim's relationship with Henry was sexual in nature and ended emotionally.

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Contracts; breach of parties' marital separation agreement; mootness; claim that trial court erred by concluding that action was barred by applicable statute of limitations (§ 52-576 [a]) and determining that it lacked continuing jurisdiction to enforce parties' separation agreement; whether claim that plaintiff's breach of contract action was not barred by statute of limitations was moot where plaintiff failed to challenge independent ground for court's adverse ruling.

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Writ of error; claim that this court lacked subject matter jurisdiction; claim that writ of error should be dismissed because it was not taken from final judgment; claim that sanctions and attorney's fees issued against plaintiff in error did not terminate distinct and separate proceeding because relevant orders were issued during discovery phase of underlying personal injury case, requested cell phone records were necessary to resolve defendant in error's case, and those records were inextricably intertwined with defendant in error's case; claim that interlocutory order requiring witness to submit to discovery is not final judgment and, therefore, is not immediately appealable; claim that imposition of sanctions and attorney's fees against plaintiff in error did not terminate distinct and separate proceeding because trial court did not find plaintiff in error to be in contempt; whether trial court erred as matter of law by ordering plaintiff in error to produce cell phone records that neither he nor his client, who was defendant in underlying action, owned or possessed, and by issuing sanctions against plaintiff in error and awarding attorney's fees to counsel for defendant in error.

La Morte *v.* Darien (Memorandum Decision) 901

Licari *v.* Commissioner of Correction (Memorandum Decision) 902

Michael D. *v.* Commissioner of Correction. 6
Habeas corpus; claim that petitioner's trial counsel provided ineffective assistance in failing to challenge admission of pornographic magazine into evidence; whether habeas court properly determined that trial counsel's conduct in attempting to preclude magazine did not constitute deficient performance; claim that trial counsel provided ineffective assistance by failing to request instruction that jury must unanimously agree on factual basis for each guilty verdict; whether habeas court properly determined that petitioner failed to establish prejudice resulting from trial counsel's failure to request specific unanimity instruction.

Raczkowski *v.* McFarlane 402
Negligence; summary judgment; claim that trial court improperly rendered summary judgment in favor of defendant landlord; whether lease agreement between defendant landlord and tenant, whose dog bit plaintiff on leased property, imposed

duty of care on landlord; whether there was genuine issue of material fact as to whether plain language of lease required defendant landlord to investigate behavioral propensities of tenant's dog and whether lease created duty on part of landlord to third persons who might encounter dog on subject property; whether obligations under lease were limited to its signatories and did not extend to third persons; claim that relevant language of lease created genuine issue of material fact as to whether defendant landlord retained control over property and, therefore, whether lease imposed duty of care on landlord to keep in reasonably safe condition those portions of property over which she reserved control; whether plaintiff's reliance on Giacalone *v.* Housing Authority *(306 Conn. 399) was misplaced.*

Romeo *v.* Bazow 378

Third-party petition for visitation; motion to dismiss; subject matter jurisdiction; whether trial court properly dismissed for lack of subject matter jurisdiction plaintiffs' petition for visitation rights as to defendant's minor children; claim that that trial court improperly failed to consider plaintiffs' expert witness disclosure in ruling on motion to dismiss; whether trial court properly limited its consideration to allegations contained in petition and attached affidavit; whether petition satisfied jurisdictional pleading requirements set forth in Roth *v.* Weston *(259 Conn. 202); whether plaintiffs failed to plead requisite level of harm under second jurisdictional element of* Roth*; whether allegations in petition rose to level of abuse, neglect or abandonment contemplated by* Roth *or specified type of harm that children would suffer if plaintiffs were denied visitation.*

Rossell *v.* Rossell (Memorandum Decision) 902

Starboard Fairfield Development, LLC *v.* Gremp 21

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

State *v.* Bradley 36

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

State *v.* Brown 244
Breach of peace in second degree; criminal violation of protective order; assault in third degree; claim that trial court improperly granted motion for joinder of cases; claim that trial court improperly allowed jury to consider prejudicial evidence of two different crimes; claim that trial court improperly allowed state to use prejudicial language during voir dire questioning; whether joinder resulted in substantial prejudice to defendant; whether two incidents leading to charges against defendant were discrete and easily distinguishable; whether assaults were so brutal or shocking as to interfere with jury's ability to consider each offense fairly and objectively; unpreserved claim that defendant's federal right to fair trial was violated when trial court allowed state to use prejudicial language during state's voir dire questioning of potential jurors; whether trial court improperly allowed facts of case to be introduced in effort to remedy use of prejudicial language; whether introduction of phrases by state, such as "domestic violence," "family violence," and "dispute between roommates" during voir dire was improper; whether trial court abused its discretion in denying defendant's request for continuance at start of trial to accommodate presence of witness.

State *v.* Colon (Memorandum Decision) 902

State *v.* Francis 113
Murder; claim that trial court improperly denied motion for judgment of acquittal; whether there was sufficient evidence for jury to have found defendant guilty of murder beyond reasonable doubt; claim that there was insufficient evidence to establish that defendant caused death of victim or that he had specific intent to cause victim's death; consciousness of guilt evidence; request for this court to change its long-standing standard of review with respect to sufficiency of evidence claims to more rigorous standard that would require this court to determine if there was reasonable view of evidence that would support hypothesis of innocence; whether, as intermediate appellate court, this court could overrule Supreme Court authority.

State *v.* Jarmon 262
Home invasion; burglary in first degree; robbery in first degree; stealing firearm; claim that state presented insufficient evidence to prove beyond reasonable doubt operability of each stolen firearm; whether cumulative effect of evidence supported jury's ultimate conclusion that state demonstrated operability beyond reasonable doubt; claim that trial court erroneously admitted into evidence defendant's letter written while incarcerated, which was intercepted by correction officer and forwarded to law enforcement; whether defendant's claim that trial court erred in determining that correction officer followed department regulation was ever distinctly raised at trial; whether defendant proved that he had objectively reasonable expectation of privacy such that fourth amendment rights were violated; whether department regulation at issue was void for vagueness as applied to defendant; claim that defendant's conviction of home invasion and burglary violated constitutional protection against double jeopardy; whether defendant showed that two charges arose out of same act or transaction; whether evidence allowed defendant's crimes to be separated into parts, each of which constituted completed offense.

State *v.* Mekoshvili 154
Murder; self-defense; claim that testimony regarding statements made by victim was irrelevant as to whether defendant killed victim or whether he acted with criminal intent; whether testimony demonstrated that defendant had financial motive in killing victim; claim that victim's statements to wife were self-serving and backward looking, and did not satisfy state of mind exception to hearsay rule; whether trial court improperly allowed, pursuant to habit exception of hearsay rule, testimony regarding victim's customary habit of leaving portion of taxi fee in glove compartment of taxi; whether testimony was relevant to issue of motive for defendant to kill victim; claim that state failed to provide adequate foundation for admission of testimony regarding habit evidence; whether trial court properly instructed jury with general unanimity charge and did not err in failing to grant defendant's request for specific unanimity charge as to claim of self-defense.

State *v.* Mitchell 199
Motion to correct illegal sentence; claim that sentence was imposed in illegal manner in violation of Santobello *v.* New York *because defendant was sentenced after nine month period of* Garvin *agreement had ended; claim that sentence was imposed in illegal manner because defendant was not given adequate notice*

of sentencing hearing; claim that defendant was denied opportunity to make statement or to present evidence at sentencing hearing; claim that imposition of sentence violated applicable rule of practice (§ 43-29); whether trial court properly determined that defendant confused notice for violation hearing with notice for sentencing hearing.

State *v.* Mukhtaar 1
Murder; whether trial court improperly dismissed motion for second sentence review hearing and determined that it lacked subject matter jurisdiction to consider motion; whether defendant had right to second sentence review hearing.

State *v.* Randy G. 467
Violation of probation; claim that trial court abused its discretion by admitting into evidence police report concerning defendant's prior arrest related to underlying conviction; whether trial court properly admitted police report as reliable hearsay; claim that trial court abused its discretion in refusing to admit into evidence police report that was related to victim's criminal complaint against her previous boyfriend; whether report would have impeached victim's credibility; whether police report failed to show any bias or prejudice on victim's part against defendant; claim that exclusion of police report violated defendant's due process right to confront witnesses against him.

State *v.* Tanner (Memorandum Decision) 901

State *v.* Watson 441
Murder; sale of narcotics; claim that state presented insufficient evidence to disprove defenses of self-defense and defense of premises beyond reasonable doubt; whether trial court was required to find defendant's claims credible; claim that trial court improperly precluded testimony of expert witness; whether proffered expert testimony involved knowledge that was common to average person; whether trial court improperly subjected expert testimony to test for admissibility set forth in State v. Porter (241 Conn. 57); whether expert testimony was premised on scientific studies.

Streifel *v.* Bulkley 294
Negligence; duty of care; summary judgment; claim that trial court improperly rendered summary judgment in favor of defendant; whether plaintiff waived any claim that trial court improperly failed to treat motion for summary judgment, which effectively challenged legal sufficiency of complaint, as motion to strike; claim that trial court improperly granted motion for summary judgment because question of whether defendant owed plaintiff duty of care involved question of fact reserved for jury; whether determination of whether duty of care existed under circumstances of this case was question of law; whether trial court was permitted to decide that no duty existed solely on public policy grounds; claim that applying test articulated in Murillo *v.* Seymour Ambulance Assn., Inc. *(264 Conn. 474) to determine whether recognizing duty of care is inconsistent with public policy conflicts with state's abolition of doctrine of assumption of risk as complete bar to recovery; whether plaintiff's reliance on* Sepega *v.* DeLaura *(326 Conn. 788) to support claim was misplaced; claim that trial court incorrectly determined that imposing duty of care on defendant while plaintiff was furnishing medical care to him was inconsistent with public policy; whether this court should recognize, as matter of law, that patient owes duty of care to avoid negligent conduct that causes harm to medical care provider while patient is receiving medical care from that provider; whether application of relevant public policy considerations articulated in test in* Murillo *weighed against recognizing duty of care.*

U.S. Bank, National Assn. *v.* Bennett 96
Foreclosure; special defenses; counterclaims; whether trial court properly rendered summary judgment as to vexatious litigation counterclaim; whether vexatious litigation counterclaim was premature; whether trial court properly rendered summary judgment as to abuse of process counterclaim; claim that genuine issues of material fact existed regarding trial court's previous dismissal of foreclosure action for failure to establish proper chain of custody; whether trial court properly determined that no genuine issues of material fact existed that plaintiff's primary purpose in filing present action was to prosecute foreclosure and that plaintiff was owner of note and mortgage; whether abuse of power counterclaim was premature; claim that trial court improperly relied on plaintiff's uncontested evidence of debt without holding evidentiary hearing.

Zillo *v.* Commissioner of Correction 71

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

NOTICES

Superior Court Operations

Small Claims/Motor Vehicle Magistrate Appointments

The Judicial Branch is now accepting applications for Small Claims/ Motor Vehicle Magistrate appointments pursuant to C.G.S. § 51-193*l*. Attorneys interested in being considered for appointment for the term beginning July 1, 2020 should complete and email an application and supporting materials to magistrate matters at Magistrate.Matters@jud.ct.gov. Fillable PDF versions of the forms are available at www.jud.ct.gov. Applications will be considered on a rolling basis.

DIVISION OF CRIMINAL JUSTICE
(Affirmative Action/Equal Opportunity Employer)

STATE'S ATTORNEY
JUDICIAL DISTRICT OF FAIRFIELD

Applications are being accepted for the full-time position of State's Attorney for the Judicial District of Fairfield (PCN 4866). The successful applicant shall hold office from the date of appointment through June 30, 2025, and thereafter be subject to appointment to an eight (8) year term. The annual salary is $163,292.17. For a description of this position please visit our website at:
https://portal.ct.gov/DCJ/Employment/Job-Descriptions/States-Attorney.

At the time of appointment, the successful candidate must be an attorney-at-law and shall have been admitted to the practice of law for at least three years; residency in the State of Connecticut is a prerequisite to appointment. Division of Criminal Justice application forms must be completed by all applicants. These forms may be downloaded from the Division website at:
https://portal.ct.gov/-/media/DCJ/EmploymentApplicationFillablepdf.pdf?la=en.

Two (2) complete sets of application forms along with resumes must be sent via U.S. Mail to: The Honorable Andrew J. McDonald, Chairman, Criminal Justice Commission, c/o Human Resources - Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Attn: SA-Fairfield JD (PCN 4866) and must be postmarked no later than **January 28th, 2020**. In addition, an electronic copy (pdf) of application materials should be sent to **DCJ.HR@ct.gov**. Applications received by facsimile will not be accepted. The Division of Criminal Justice is an Affirmative Action/Equal Opportunity Employer.