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JOHN MOSBY ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NORWALK ET AL.

The named plaintiff's petition for certification to appeal from the Appellate Court, 191 Conn. App. 280 (AC 42007), is denied.

John Mosby, self-represented, in support of the petition.

John M. Walsh, *Jr.*, and *M. Jeffry Spahr*, deputy corporation counsel, in opposition.

Decided September 15, 2020

DEVONTE DALEY *v.* ZACHARY KASHMANIAN ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 193 Conn. App. 171 (AC 41393), is granted, limited to the following issue:

"Did the Appellate Court correctly determine that General Statutes § 52-557n confers governmental immunity from liability for damages arising from personal injuries caused by a police officer's negligent operation of a motor vehicle when the negligent conduct occurs in the course of the officer's on duty surveillance activities?"

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

Martin McQuillan, in support of the petition.

Nathalie Feola-Guerrier and *William J. Melley III*, in opposition.

Decided September 15, 2020

DEVONTE DALEY *v.* ZACHARY KASHMANIAN ET AL.

The named defendant's cross petition for certification to appeal from the Appellate Court, 193 Conn. App. 171 (AC 41393), is denied.

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

William J. Melley III, in support of the petition.

Martin McQuillan, in opposition.

Decided September 15, 2020

STATE OF CONNECTICUT *v.* BENJAMIN CHASE CARPENTER

The defendant's petition for certification to appeal from the Appellate Court, 194 Conn. App. 364 (AC 41888), is denied.

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

Emily Graner Sexton, assigned counsel, in support of the petition.

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

Decided September 15, 2020

THE CARABETTA ORGANIZATION, LTD., ET AL. *v.* CITY OF MERIDEN ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 196 Conn. App. 147 (AC 41688), is denied.

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

Dominic J. Aprile, in support of the petition.

Daniel J. Krisch, *Carl R. Ficks*, *Katherine E. Rule*, *Thomas R. Gerade* and *John R. Fornaciari*, pro hac vice, in opposition.

Decided September 15, 2020

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

The named defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 279 (AC 42221), is denied.

Matthew J. Kwong, self-represented, in support of the petition.

David L. Gussak, in opposition.

Decided September 15, 2020

U.S. BANK, NATIONAL ASSOCIATION, TRUSTEE *v.* MARGIT MADISON ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 267 (AC 42228), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the defendant did not have standing in a foreclosure action to raise a defense that she had failed to identify as an asset of the bankruptcy estate in the schedule of assets filed in her chapter 7 bankruptcy case adjudicated while the foreclosure case was pending?"

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

Earle Giovanniello, in support of the petition.

Matthew B. Johnson, in opposition.

Decided September 15, 2020

AMERICAN TAX FUNDING, LLC *v.* FIRST EAGLE CORPORATION ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 196 Conn. App. 298 (AC 42610), is denied.

David L. Gussak, in support of the petition.

Gregory W. Piecuch, in opposition.

Decided September 15, 2020

STATE OF CONNECTICUT *v.* DONALD BROWN

The defendant's petition for certification to appeal from the Appellate Court, 198 Conn. App. 630 (AC 41745), is denied.

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

Robert L. O'Brien, assigned counsel, in support of the petition.

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

Decided September 15, 2020

STEPHEN W. SCHOLZ *v.* JUDA J. EPSTEIN

The plaintiff's petition for certification to appeal from the Appellate Court, 198 Conn. App. 197 (AC 42419), is granted, limited to the following issue:

"Under the circumstances of this case, did the Appellate Court correctly conclude that the defendant attorney enjoyed absolute immunity from the plaintiff's claim of statutory theft, arising from the defendant's conduct during prior judicial proceedings?"

Jonathan J. Klein, in support of the petition.

Daniel J. Krisch, *Joshua M. Auxier* and *Stephen P. Fogerty*, in opposition.

Decided September 15, 2020

IN RE AISJAHA N.

The petition by the respondent mother for certification to appeal from the Appellate Court, 199 Conn. App. 485 (AC 43680), is denied.

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

Benjamin M. Wattenmaker, assigned counsel, in support of the petition.

Stephen G. Vitelli, assistant attorney general, in opposition.

Decided September 15, 2020

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ROBERT MANERE *v.* PETER COLLINS ET AL.
(AC 42182)

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

Syllabus

The plaintiff, a minority member of the defendant B Co., a Connecticut limited liability company, sought to recover damages from B Co. and the defendant C for, inter alia, breach of contract, and sought the dissolution of B Co. on the ground of oppressive conduct. The plaintiff and C formed B Co. for the purposes of purchasing and operating a cafe. C received a 60 percent interest in B Co. and the plaintiff received a 40 percent interest in B Co. A hurricane caused the cafe to be closed for a period of time, and, despite an oral agreement between C and the plaintiff that neither would take any guaranteed payments from B Co. for fifty-two weeks, the plaintiff continued to take cash from B Co. during this period. C subsequently reconstructed the cafe's financial history, which revealed that the plaintiff had misappropriated approximately $190,000 of B Co.'s funds. C amended the operating agreement of B Co., and terminated the plaintiff as a manager of B Co., terminated the plaintiff's son as an employee, stopped payment on certain checks issued to the plaintiff and changed the locks on the cafe to prevent the plaintiff from accessing the building. The plaintiff commenced the present action asserting various claims, including breach of fiduciary duty and oppression by C, and seeking the dissolution of B Co. pursuant to statute (§ 34-267 (a) (5)), and B Co. filed a counterclaim alleging breach of fiduciary duty. After a bench trial, the court rendered judgment in favor of the defendants as to all counts of the plaintiff's complaint, and in favor of B Co. on the count of its counterclaim alleging breach

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

of fiduciary duty. From the judgment rendered thereon, the plaintiff appealed to this court. *Held*:

1. The trial court properly concluded that B Co.'s counterclaim stated a claim on which relief could be granted: B Co. pleaded facts which sufficiently alleged a claim of breach of fiduciary duty, specifically, that the plaintiff owed a fiduciary duty to B Co., that the plaintiff breached that duty by acting in a manner that would personally benefit himself in the form of using B Co.'s funds for his own interests at the expense of the interests of B Co., and that B Co.'s damages were a result of the plaintiff's conduct; the plaintiff's emphasis on B Co.'s use of the term "misappropriation" was misplaced, as B Co.'s allegation that the plaintiff misappropriated funds was simply a recitation of facts describing conduct in support of its claim for breach of fiduficary duty, rather than an attempt to state a cause of action for "misappropriation."
2. The trial court improperly applied a six year statute of limitations to B Co.'s counterclaim: notwithstanding B Co.'s claim that it had set forth an action for an accounting, to which a six year statute of limitations would apply pursuant to statute (§ 52-576), B Co.'s counterclaim did not allege that it either made a demand of the plaintiff to furnish an accounting or that the plaintiff refused its demand, instead merely requesting in its prayer for relief an accounting of all B Co.'s funds that the plaintiff misappropriated; moreover, all of B Co.'s financial information was available to it by the time it filed its counterclaim, as evidenced by its calculation of the specific amount of money that the plaintiff had misappropriated; thus, although B. Co's counterclaim alleged that the plaintiff breached a fiduciary duty, it did not properly allege that the plaintiff's breach of that duty necessitated an accounting, and the plaintiff's breach of his fiduciary duty to B Co. did not prevent B Co. from ascertaining the amount of money that the plaintiff misappropriated; B Co.'s counterclaim, rather, set forth a claim for breach of fiduciary duty, which is governed by a three year statute of limitations under the applicable statute (§ 52-577), and, because the question of whether the plaintiff's tortious conduct fell within that three year period implicated issues of fact, the trial court's judgment was reversed and the case was remanded for further proceedings.
3. The trial court improperly rejected the plaintiff's application to dissolve B Co. on the ground of oppression pursuant § 34-267 (a) (5) because that court applied an incorrect legal standard in evaluating the plaintiff's claim: this court concluded that a new trial was warranted on the plaintiff's claim of oppression as to all of the complained of conduct, except for the plaintiff's termination of employment, as it was clear from the record that the court did not assess the plaintiff's claim of oppression by focusing on his reasonable expectations as a minority member of B Co.

Argued December 5, 2019—officially released September 29, 2020

Procedural History

Action seeking damages for, inter alia, breach of contract, and the dissolution of the defendant BAHR, LLC, brought to the Superior Court in the judicial district of Fairfield, where the defendant BAHR, LLC, filed a counterclaim; thereafter, the matter was tried to the court, *Hon. George N. Thim*, judge trial referee; judgment in favor of the defendants on all counts of the plaintiff's complaint and in favor of the defendant BAHR, LLC, on the second count of its counterclaim, and the plaintiff appealed to this court. *Affirmed in part*; *reversed in part*; *further proceedings*.

Alan R. Spirer, for the appellant (plaintiff).

Alexander H. Schwartz, with whom was *Roy S. Ward*, for the appellees (defendants).

Opinion

ELGO, J. The plaintiff, Robert Manere, appeals from the judgment of the trial court, rendered after a bench trial, in favor of the defendants, Peter Collins and BAHR, LLC (BAHR). On appeal, the plaintiff claims that the court improperly (1) concluded that BAHR's counterclaim stated a claim upon which relief could be granted, (2) applied a six year statute of limitations to BAHR's counterclaim, and (3) rejected his application to dissolve BAHR on the ground of oppression pursuant to General Statutes § 34-267 (a) (5), Connecticut's limited liability company dissolution statute.[1] We agree with

[1] The plaintiff also appears to assert two other claims, specifically, that the trial court improperly found that Collins did not breach (1) the operating agreement or (2) a fiduciary duty. To the extent that the plaintiff asserts these claims—either independent from, or as a basis for, his claim of oppression—we conclude that these claims are inadequately briefed and, thus, decline to review them. It is well established that the appellate courts of this state "are not obligated to consider issues that are not adequately briefed. . . . Whe[n] an issue is merely mentioned, but not briefed beyond a bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice." (Citations omitted; internal quotation marks omitted.) *Connecticut*

the plaintiff's second and third claims and, accordingly, reverse in part the judgment of the trial court.

The following facts, as found by the trial court or otherwise undisputed, and procedural history are relevant to this appeal. In 2009, the plaintiff and Collins, both graduates of the same high school, reconnected during their thirtieth high school reunion. Between the time after graduation and the reunion, both had pursued professions in the food service and bar industry. The plaintiff had experience in the restaurant business and Collins was the owner and manager of a successful bar in New York City. Still working in the Fairfield county area, the plaintiff became aware that a popular bar and restaurant establishment, Seagrape Cafe (cafe), was potentially for sale. Both the plaintiff and Collins were familiar with the cafe and its popularity among college students.

In 2011, the plaintiff and Collins formed BAHR, a Connecticut limited liability company, for the purposes of purchasing and operating the cafe. After forming BAHR, the plaintiff and Collins executed an operating

Coalition Against Millstone v. *Connecticut Siting Council*, 286 Conn. 57, 87, 942 A.2d 345 (2008). "[F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed . . . . The parties may not merely cite a legal principle without analyzing the relationship between the facts of the case and the law cited." (Internal quotation marks omitted.) *Nowacki* v. *Nowacki*, 129 Conn. App. 157, 163–64, 20 A.3d 702 (2011) (per curiam).

The plaintiff's briefing of the aforementioned claims is deficient in many respects. Primarily, the plaintiff provides virtually no analysis of his claims. His principal brief contains only two sentences referencing his claim that Collins' refusal to provide BAHR's financial information was a breach of the operating agreement and General Statutes § 34-255i. Instead, the relevant section in the plaintiff's principal brief appears to primarily focus on Collins acting in an oppressive manner under § 34-267. See part III of this opinion. Although the plaintiff appears to provide a more pointed discussion of these claims in his reply brief, "we consider an argument inadequately briefed when it is delineated only in the reply brief." *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 378 n.6, 3 A.3d 892 (2010).

agreement drafted by an attorney who previously had represented the plaintiff in unrelated business matters. The plaintiff and Collins were the sole members of BAHR, and the operating agreement designated both as its managers. Each provided capital contributions and "priority member loans"[2] to BAHR. Specifically, Collins provided a $600 capital contribution and a $149,400 priority member loan,[3] and the plaintiff provided a $400 capital contribution and a $19,600 priority member loan.[4] Due to the disparity in their respective loans, Collins received a 60 percent interest and the plaintiff received a 40 percent interest in BAHR. Thereafter, the plaintiff signed a lease on behalf of BAHR for the property on which the cafe is located and further provided a personal guarantee of BAHR's performance under the lease.

In the fall of 2011, the cafe opened under BAHR's ownership. Because Collins was living in New York City, where he operated a different establishment, the plaintiff and Collins agreed that the plaintiff would be primarily responsible for operating the cafe and acting as its on-site manager. Prior to its opening, Collins and the plaintiff agreed that, as compensation for acting as the

[2] The operating agreement defines "[p]riority [m]ember [l]oans" as additional loans made by members of BAHR "for the acquisition of assets, build-out, construction, working capital and other purposes." (Internal quotation marks omitted.) In addition, priority member loans do not increase any member's share of allocations, distributions, or interest, but do constitute a priority debt obligation of BAHR at an annual 7 percent interest rate. Importantly, § 11 of the operating agreement provides that "while any principal balance remains outstanding and unpaid on any [p]riority [m]ember [l]oan, any decisions which are to be made by the [m]embers, rather than the [m]anager, shall be made by a 60 [percent] majority vote or consent of the [m]embers."

[3] Of the $149,000 that Collins loaned to BAHR, Collins acquired approximately $100,000 of that amount through a loan from his bank, UBS, which was secured by his retirement account.

[4] Affixed to the operating agreement was a schedule A detailing each members' capital contribution, the priority loan amounts, and their respective percentage interest in BAHR. That document was initialed and dated by both Collins and the plaintiff.

cafe's manager, the plaintiff would be paid a weekly salary of $600. The plaintiff's responsibilities included hiring and paying staff, obtaining stock items such as food and liquor, and accounting for revenue and expenses. Shortly after the cafe opened, the plaintiff and Collins agreed to raise the plaintiff's weekly salary to $1000 per week.[5] Unbeknownst to Collins, the plaintiff was also using BAHR funds to pay for personal expenses such as health insurance, car payments, and gas.

In October, 2012, Hurricane Sandy devastated the Fairfield county area and severely damaged the cafe premises. In addition to the cafe, a small house located on the same property, which was leased by BAHR and used as an office for BAHR affairs, sustained damage. Due to the severe impact on both the cafe and the community in which it was located, the cafe was closed for a period of time in an effort to rebuild the premises. Pursuant to their recovery plan, both the plaintiff and Collins agreed that neither would take any guaranteed payments from BAHR for a period of fifty-two weeks. Despite this oral agreement, the plaintiff continued to take cash from the business during the recovery period. For instance, the plaintiff continued to take a salary in cash and unilaterally increased that salary to $1500 per week in June, 2013. He also continued to use BAHR funds to pay for his health insurance, car payments, and gas. The plaintiff recorded these cash payments in a handwritten ledger. In October, 2013, after the fifty-two week period had ended, the plaintiff ceased taking his $1500 salary in cash and resumed issuing himself checks in that amount. He also continued to use BAHR funds to pay for personal expenses.

In 2015, Collins and his family moved to Connecticut and began to spend more time at the cafe. Due to his

[5] The plaintiff was the only person who had the ability to issue checks on behalf of BAHR and was in control of issuing himself checks for his weekly salary.

more active role in the cafe, Collins began to receive a weekly salary of $1000. The plaintiff thereafter reduced his weekly salary from $1500 to $1000. Later that same year, the plaintiff, Collins, and two associates of Collins opened a restaurant called the Georgetown Saloon. BAHR was not involved in this new venture. Instead, a separate limited liability company was formed for the purposes of owning and operating the Georgetown Saloon. Like his role at the cafe, the plaintiff was tasked with operating the Georgetown Saloon and acting as its on-site manager. Unlike the cafe, however, the Georgetown Saloon proved unsuccessful and closed in July, 2016. Although he did not blame the plaintiff for the Georgetown Saloon's failure, Collins became concerned with the plaintiff's style of management based on the manner in which the plaintiff conducted himself as its manager. As a result, Collins began to increasingly question the plaintiff about cafe affairs, including its finances and daily receipts.

Dissatisfied with the information he was receiving from the plaintiff, Collins began to ask cafe employees to text or e-mail him daily revenue numbers. When Collins asked the plaintiff to provide him with BAHR's business records—all of which had been relocated from the on-site office to the plaintiff's home after Hurricane Sandy—he received partial information which was often either incomplete or unresponsive. The piecemeal information provided by the plaintiff led Collins to perform his own inquiry into BAHR's records. With his wife, Collins obtained records of cash receipts and payments, bank records, tax returns, and other information in an attempt to reconstruct BAHR's financial history. Complicating this process was the fact that Collins initially did not have access to the payroll system and, due to the plaintiff's disorganized storage or outright destruction of BAHR's financial records, had only part of BAHR's financial records available to him. The trial court found that

Collins' reconstruction of the cafe's financial history revealed that the plaintiff had misappropriated approximately $190,000 of BAHR funds. In March, 2017, Collins unilaterally amended the operating agreement.[6] In the amended operating agreement, the plaintiff was terminated as a manager of BAHR. In addition, the plaintiff was removed as the liquor permittee for the cafe. The plaintiff's son, who was employed as a bartender at the cafe, was also terminated as an employee. Collins thereafter stopped payment on nine $1000 checks issued to the plaintiff and changed the locks on the cafe to prevent the plaintiff from accessing the building.[7]

After taking over management of the cafe, Collins brought the building into compliance with fire safety standards. He further ensured that the cafe's staff were put on a payroll system for the purpose of placing the cafe in compliance with state and federal wage and hour laws. As a result, the cafe's revenue increased by 25 percent.

Since 2017, BAHR has not made any distributions to Collins or the plaintiff. Additionally, the plaintiff has not been provided with any information concerning BAHR's finances pursuant to the operating agreement, other than the information he received through the discovery process of the underlying litigation. Although Collins continued to receive a weekly salary of $1000 as of the time of the trial, no other payments have been made by BAHR to either Collins or the plaintiff.

In response to the measures taken by Collins, the plaintiff instituted the underlying action against Collins and BAHR, asserting a series of claims against both

[6] On appeal, the plaintiff does not challenge the court's finding that Collins is a 60 percent stakeholder in BAHR and, therefore, had authority to unilaterally amend the operating agreement.

[7] The trial court found that, in addition to taking these actions, Collins' attorney had filed an interim report with the Secretary of the State, which unintentionally omitted the plaintiff as a member of BAHR.

defendants including, inter alia, breach of contract by both defendants, breach of fiduciary duty by Collins, and oppression by Collins. The plaintiff also sought an accounting of BAHR's finances. The plaintiff further requested the dissolution of BAHR pursuant to § 34-267 (a) (5) on the ground of oppression.[8] In response, BAHR filed an answer and brought a counterclaim against the plaintiff.[9] The plaintiff, as the counterclaim defendant, asserted four special defenses.[10] After a two day bench trial, the court, *Hon. George R. Thim*, judge trial referee, rendered judgment in favor of the defendants on all counts of the plaintiff's complaint. The court further rendered judgment in favor of BAHR on its counterclaim and awarded it $190,463.03 in damages. This appeal followed.

I

The plaintiff first challenges the propriety of the court's judgment in favor of BAHR on its counterclaim. According to the plaintiff, the counterclaim alleged a claim of misappropriation, a cause of action that is not recognized under Connecticut law. The plaintiff therefore argues that, based on its responsive pleading, BAHR did not state a claim upon which relief could be granted.[11] We disagree.

[8] The plaintiff also alleged claims of unpaid wages and theft under General Statutes §§ 31-72 and 52-564 against BAHR for Collins' cancellation of the nine $1000 checks that the plaintiff issued to himself as his weekly salary. During trial, however, the plaintiff withdrew those claims.

[9] BAHR's counterclaim consisted of two counts. The first count asserted a claim of larceny in violation of General Statutes § 53a-119, as to which the court found in favor of the plaintiff. That claim is not a subject of this appeal. For purposes of clarity, we refer to the second count of BAHR's counterclaim—the nature of which is disputed on appeal; see part II of this opinion—as the counterclaim.

[10] The plaintiff's special defenses stated that (1) any benefits that were paid to him were authorized by Collins and BAHR, (2) BAHR was estopped from asserting such counterclaims, (3) BAHR's second counterclaim was time barred, and (4) BAHR's counterclaims failed to state a claim upon which relief could be granted.

[11] We note that, in challenging the legal sufficiency of BAHR's counterclaim, the plaintiff only raised his challenge by asserting it as a special

"[I]t is well settled that the [t]he failure to include a necessary allegation in a complaint precludes a recovery by the plaintiff under the complaint . . . . As a result, [i]t is incumbent on a plaintiff to allege some recognizable cause of action in his complaint. . . . Yet [w]e previously have recognized [that] . . . if the complaint puts the defendant on notice of the relevant claims, then a plaintiff's failure specifically to allege a particular fact or issue is not fatal to his claims unless it results in prejudice to the defendant." (Internal quotation marks omitted.) *Sharp Electronics Corp.* v. *Solaire*

defense in his responsive pleading. The plaintiff did not file a motion to strike the counterclaim for failure to state a claim upon which relief could be granted, and he did not raise this issue at any point during the underlying proceedings.

As this court has previously acknowledged, "there is a split of authority among our trial court judges with respect to whether failure to state a claim upon which relief can be granted constitutes a valid special defense." *Sharp Electronics Corp.* v. *Solaire Development, LLC*, 156 Conn. App. 17, 33 n.11, 111 A.3d 533 (2015). We are doubtful that such a practice conforms with our rules that govern an attack on a pleading for a failure to state a claim. See Practice Book §§ 10-7 and 10-39 (a); see also *Rogan* v. *Rungee*, 165 Conn. App. 209, 215–16 n.3, 140 A.3d 979 (2016) (plaintiff's filing of answer with special defense to counterclaim and failure to file motion to strike resulted in waiver of right to challenge legal sufficiency of counterclaim). A special defense serves a unique purpose—"to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action." *Grant* v. *Bassman*, 221 Conn. 465, 472–73, 604 A.2d 814 (1992); see also Practice Book § 10-50. By pleading that "[BAHR's] counterclaims fail to state claims upon which relief can be granted," the plaintiff has attempted to assert a legal sufficiency claim by way of a special defense.

We will not resolve this particular issue based on the record before us. First and foremost, none of the parties distinctly raised the issue before the trial court during the underlying proceedings, nor did the court address the issue or the plaintiff's special defense in its memorandum of decision. Moreover, BAHR has not raised the issue on appeal. Although this court has the authority to raise an issue sua sponte, "the burden ordinarily is on the parties to frame the issues, and the presumption is that issues not raised by the parties are deemed waived." *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 164, 84 A.3d 840 (2014). Thus, we leave for another day the issue of whether a party may properly assert, by way of a special defense, that a count fails to state a claim upon which relief may be granted.

Development, *LLC*, 156 Conn. App. 17, 34, 111 A.3d 533 (2015). "[T]he general rule is that [a] counterclaim should be pleaded in exactly the same way the claim would be pleaded in the complaint in an independent action." (Internal quotation marks omitted.) *98 Lords Highway*, *LLC* v. *One Hundred Lords Highway*, *LLC*, 138 Conn. App. 776, 796, 54 A.3d 232 (2012).

"The interpretation of pleadings is always a question of law for the court . . . . Our review of the trial court's interpretation of the pleadings therefore is plenary." (Internal quotation marks omitted.) *Grenier* v. *Commissioner of Transportation*, 306 Conn. 523, 536, 51 A.3d 367 (2012). "In exercising that review, [w]e take the facts to be those alleged in the complaint . . . and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Moreover, we are mindful that pleadings must be construed broadly and realistically, rather than narrowly and technically." (Citation omitted; internal quotation marks omitted.) *Sharp Electronics Corp.* v. *Solaire Development*, *LLC*, supra, 156 Conn. App. 34. "[I]n determining the nature of a pleading filed by a party, we are not bound by the label affixed to that pleading by the party." *BNY Western Trust* v. *Roman*, 295 Conn. 194, 210, 990 A.2d 853 (2010).

Upon our review, we are convinced that BAHR, in its counterclaim, properly alleged a claim of breach of fiduciary duty. Contrary to the plaintiff's argument, it is clear from the operative pleadings that BAHR pleaded facts which sufficiently set forth that cause of action.

"The elements which must be proved to support a conclusion of breach of fiduciary duty are: [1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the

plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages; [and] [4] [t]hat the damages were proximately caused by the fiduciary's breach of his or her fiduciary duty." (Internal quotation marks omitted.) *Chioffi* v. *Martin*, 181 Conn. App. 111, 138, 186 A.3d 15 (2018).

Consistent with these elements, BAHR alleged, in relevant part, the following facts in its counterclaim: (1) the plaintiff held 40 percent of BAHR's membership interests; (2) until March, 2017, the plaintiff was entrusted with BAHR's day-to-day operations and control; (3) in March, 2017, Collins learned that the plaintiff had been misappropriating BAHR's assets and income by using such assets and income for his own personal benefit; (4) the plaintiff did not have, nor did he seek, permission to use BAHR's assets and income for his own personal benefit; (5) "as a member and manager of BAHR, [the] plaintiff owed the company the duty to act in good faith towards the company with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner [he] reasonably believed was in BAHR's best interest, not his own personal interests"; (6) "[the] [p]laintiff breached the duties he owed to BAHR by misappropriating and stealing its funds"; and (7) "[o]n account of [the] plaintiff's conduct, BAHR is damaged."

On the basis of our reading of BAHR's pleading, BAHR alleged (1) that the plaintiff owed a fiduciary duty to BAHR, namely, a duty to act in good faith toward the company and the company's best interests as opposed to his own, (2) the plaintiff breached that duty by acting in a manner that would personally benefit himself in the form of using BAHR funds for his own interests at the expense of the interests of BAHR, (3) BAHR sustained damages, and (4) BAHR's damages were a

result of the plaintiff's conduct. Viewing those allegations in the light most favorable to sustaining its legal sufficiency; see *Sharp Electronics Corp.* v. *Solaire Development, LLC*, supra, 156 Conn. App. 34; we conclude that BAHR's counterclaim sounds in breach of fiduciary duty.

We recognize that a party "must allege breach of fiduciary duty with specificity before liability can attach on such grounds." *Pergament* v. *Green*, 32 Conn. App. 644, 651, 630 A.2d 615, cert. denied, 228 Conn. 903, 634 A.2d 296 (1993). There is no dispute that BAHR's counterclaim does not explicitly allege the phrase "breach of fiduciary duty." Notwithstanding the absence of that phrase in BAHR's pleadings, "[t]here can . . . be no serious claim of surprise or prejudice by the [defendants] for the lack of these terms." *Morton* v. *Syriac*, 196 Conn. App. 183, 192, 229 A.3d 1129, cert. denied, 335 Conn 915, 229 A.3d 1045 (2020). Indeed, nearly all of the duties alleged in BAHR's counterclaim are fiduciary in nature. See *Murphy* v. *Wakelee*, 247 Conn. 396, 401–402, 721 A.2d 1181 (1998) ("[i]t is a thoroughly [well settled] equitable rule that any one acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest" (internal quotation marks omitted)); *Hall* v. *Schoenwetter*, 239 Conn. 553, 562, 686 A.2d 980 (1996) (plaintiff, as executrix of estate, "undertook a fiduciary duty obligating her to act in the best interests of the estate"); *Pacelli Brothers Transportation, Inc.* v. *Pacelli*, 189 Conn. 401, 407, 456 A.2d 325 (1983) (director of corporation, as fiduciary to both corporation and shareholders, "is bound to use the utmost good faith and fair dealing in all his relationships with the corporation" (internal quotation marks omitted)); *Mallory* v. *Mallory Wheeler Co.*, 61 Conn. 131, 139, 23 A. 708 (1891) (directors of company have fiduciary relationship with company and, consistent with that relationship, "have no right under

any circumstances to use their official positions for their own benefit or the benefit of any one except the corporation itself"). Furthermore, we note that, as a member and manager of BAHR, the plaintiff held a fiduciary relationship with BAHR and was bound by that duty as delineated by statute. See General Statutes (Rev. to 2017) §§ 34-141 and 34-255h.[12] Because of the plaintiff's status, he owed a fiduciary duty to BAHR, "regardless of whether that duty had been specifically so labeled in the complaint." *Murphy* v. *Wakelee*, supra, 399 n.2; see Practice Book § 10-4 ("[i]t is unnecessary to allege any promise or duty which the law implies from the facts pleaded").

In addition, we reject the plaintiff's argument that BAHR's allegations were an attempt to state a cause of action for "misappropriation" based on its use of that term in its pleadings to describe the plaintiff's conduct. As the plaintiff correctly notes, our law does not recognize misappropriation as a stand-alone tort claim. But see General Statutes §§ 35-51 (b) and 35-53 (defining "[m]isappropriation" as cause of action specifically concerning misappropriation of trade secrets and providing for monetary damages under Uniform Trade Secrets Act, General Statutes § 35-50 et seq.). We believe, however, that the plaintiff's emphasis on BAHR's use of the term "misappropriation" is misplaced. BAHR's allegation—that the plaintiff "misappropriated" funds—is simply a recitation of facts describing conduct in support of its claim of breach of fiduciary duty. Indeed, this court has also used the term "misappropriation" to summarize factual allegations that a defendant breached his fiduciary duty by using company funds to

[12] As discussed in footnote 18 of this opinion, General Statutes (Rev. to 2017) § 34-141 was repealed pursuant to Public Acts 2016, No. 16-97, § 110, and replaced by the Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq. General Statutes (Rev. to 2017) § 34-141, however, was in effect at the time the plaintiff allegedly breached his fiduciary duties to BAHR.

personally benefit himself. See *Papallo* v. *Lefebvre*, 172 Conn. App. 746, 755, 161 A.3d 603 (2017) (in describing claim of breach of fiduciary duty, noting that plaintiff alleged in operative complaint "that the defendant misappropriated LLC revenues and engaged in fraudulent conduct by inaccurately reporting those revenues and expenses"). In characterizing the plaintiff's conduct as a misappropriation of company assets, BAHR sufficiently described "the acts or omissions it believed would support a determination of liability under [its counterclaim]." *Commerce Park Associates, LLC* v. *Robbins*, 193 Conn. App. 697, 734, 220 A.3d 86 (2019), cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 447 (2020), and cert. denied sub nom. *Robbins Eye Center, P.C.* v. *Commerce Park Associates, LLC*, 334 Conn. 912, 221 A.3d 448 (2020).

On the basis of the foregoing, we find no merit in the plaintiff's argument that BAHR's counterclaim is legally insufficient for a failure to state a claim upon which relief can be granted. To the contrary, BAHR sufficiently alleged facts that state a claim for breach of fiduciary duty. Accordingly, we reject the plaintiff's claim.

II

The plaintiff next claims that the court improperly applied a six year statute of limitations to BAHR's counterclaim pursuant to General Statutes § 52-576.[13] The plaintiff argues that, because the counterclaim sounds in tort, the court was bound to apply the three year statute of limitations of General Statutes § 52-577.[14] In

[13] General Statutes § 52-576 provides in relevant part: "(a) No action for an account . . . shall be brought but within six years after the right of action accrues, except as provided in subsection (b) of this section. . . ."

[14] General Statutes § 52-577 provides: "No action founded upon a tort shall be brought but within three years from the date of the act or omission complained of."

response, BAHR asserts that its counterclaim sets forth an action for an accounting and reasons that, because an accounting is an equitable claim, the court properly applied a six year statute of limitations. We agree with the plaintiff.

A

Before addressing the plaintiff's claim, we note that the parties dispute whether BAHR's counterclaim sounds in tort or an accounting. Because each of these causes of action is governed by a different statute of limitations, resolving the plaintiff's claim necessarily involves an interpretation of the pleadings, our review of which is plenary. See *Grenier* v. *Commissioner of Transportation*, supra, 306 Conn. 536. We conclude that, although BAHR has sufficiently alleged and proven a claim of breach of fiduciary duty, BAHR's counterclaim does not set forth a cause of action for an accounting.

"An accounting is defined as an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due. . . . Courts of equity have original jurisdiction to state and settle accounts, or to compel an accounting, where a fiduciary relationship exists between the parties and the defendant has a duty to render an account. . . . In an equitable proceeding, the trial court may examine all relevant factors to ensure that complete justice is done. . . . The determination of what equity requires in a particular case, the balancing of equities, is [therefore] a matter for discretion of the trial court." (Citations omitted; internal quotation marks omitted.) *Papallo* v. *Lefebvre*, supra, 172 Conn. App. 762–63. "An accounting is not available in an action where the amount due is readily ascertainable. Equity will ordinarily take jurisdiction to settle the account if the facts create a reasonable doubt

whether adequate relief may be obtained at law." (Internal quotation marks omitted.) *Mankert* v. *Elmatco Products, Inc.*, 84 Conn. App. 456, 460, 854 A.2d 766, cert. denied, 271 Conn. 925, 859 A.2d 580 (2004).

"The general rule is that a prior demand by the plaintiff for an accounting and a refusal by the defendant to account is a prerequisite to the commencement of an action for an accounting." (Internal quotation marks omitted.) *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, 302 Conn. 408, 452 n.30, 28 A.3d 302 (2011), cert. denied, 567 U.S. 924, 132 S. Ct. 2773, 183 L. Ed. 2d 653 (2012). "To support an action of accounting, *one* of several conditions must exist. There must be a fiduciary relationship, *or* the existence of a mutual and/or complicated accounts, *or* a need of discovery, *or* some other special ground of equitable jurisdiction such as fraud." (Emphasis in original; internal quotation marks omitted.) *Mankert* v. *Elmatco Products, Inc.*, supra, 84 Conn. App. 460.

As this court explained in *Zuch* v. *Connecticut Bank & Trust Co.*, 5 Conn. App. 457, 461–62, 500 A.2d 565 (1985), "[w]hile there are cases which hold otherwise, the vast weight of authority in this jurisdiction requires the allegation of a demand and refusal before a party may successfully invoke the remedy of an accounting. Such a conclusion is in accord . . . with the traditional understanding of an accounting as a remedy . . . . Furthermore, the requirement of such an allegation, as a practical matter, may prevent useless litigation." (Citations omitted.)

We believe that the legal principles espoused by this court in *Zuch* are dispositive. Absent from BAHR's counterclaim are any allegations that it either made a demand of the plaintiff to furnish an accounting or that the plaintiff refused its demand. Instead, BAHR merely requested, in its prayer for relief, "[a]n accounting of all

BAHR funds [the] plaintiff misappropriated." Although BAHR may have requested an accounting in its prayer for relief, doing so does not convert that request into an actionable claim for an accounting in the absence of the necessary allegations. See *Discover Bank* v. *Hill*, 150 Conn. App. 164, 172–73 n.8, 93 A.3d 159 ("[t]he prayer for relief does not constitute a cause of action"), cert. denied, 312 Conn. 924, 94 A.3d 1203 (2014).

In addition, it is clear from the record that all of BAHR's financial information was available to it by the time it filed its counterclaim, as evidenced by its calculation of the specific amount of money that the plaintiff had misappropriated. As conceded by Collins at trial, he was able to reconstruct BAHR's finances both through the documents provided by the plaintiff and the records obtained by banking institutions.[15] BAHR received further accounting information from the plaintiff through discovery. A claim for an accounting was, therefore, not available to BAHR because it could ascertain the amount of money that it was due from the plaintiff. See *Papallo* v. *Lefebvre*, supra, 172 Conn. App. 763 ("[a]n accounting is not available in an action where the amount due is readily ascertainable" (internal quotation marks omitted)).

Upon our plenary review of the pleadings, we reject BAHR's argument that its counterclaim sets forth an action for an accounting. BAHR properly alleged, and sufficiently proved, that the plaintiff breached a fiduciary duty. BAHR did not, however, properly allege that the plaintiff's breach of that duty necessitated an

[15] We further observe that BAHR did not appear to consider its counterclaim as setting forth a cause of action for an accounting. Specifically, in its posttrial brief, BAHR made no argument that an accounting was needed as a result of the plaintiff's breach of his fiduciary duty. Rather, BAHR explicitly stated that its counterclaim "alleges a claim for a breach of the foregoing fiduciary duty" and limited its analysis to arguing that such a breach occurred.

accounting. BAHR's failure to allege any facts that it both demanded an accounting from the plaintiff and that the plaintiff refused its demand is fatal. Furthermore, the record reflects that the plaintiff's breach of his fiduciary duty did not prevent BAHR from ascertaining the amount of money that the plaintiff misappropriated. As discussed at length in part I of this opinion, however, we conclude that BAHR's counterclaim properly states a claim for breach of fiduciary duty.[16]

B

Having determined that BAHR's counterclaim sets forth a claim for breach of fiduciary duty, we now turn to the plaintiff's claim that the court improperly applied a six year statute of limitations. We agree.

[16] In reaching this conclusion, we acknowledge that the remedy of an accounting may take the form of either equitable or legal relief. See *Zuch* v. *Connecticut Bank & Trust Co.*, supra, 5 Conn. App. 460–61. Indeed, "[t]he right to accounting is not absolute, but should be accorded only on equitable principles." (Internal quotation marks omitted.) *Papallo* v. *Lefebvre*, supra, 172 Conn. App. 764. The balancing of the equities generally is entrusted to the discretion of the trial court. See *Mankert* v. *Elmatco Products*, *Inc.*, supra, 84 Conn. App. 459.

The record, however, provides little indication that the court employed any equitable balancing or considered BAHR's counterclaim as sounding in a claim for an accounting. The court's memorandum of decision is largely silent with respect to BAHR's request for an accounting, and the court makes only a single reference to that request when summarizing BAHR's request for relief. Absent from the decision is any order for an accounting or any indication that it was exercising a discretionary, equitable function. See *Episcopal Church in the Diocese of Connecticut* v. *Gauss*, supra, 302 Conn. 457–58 (court acted within its discretion when it explicitly invoked its equitable authority to order accounting to protect its original judgment). Even if we were to assume otherwise, the deficiencies in BAHR's pleadings, and the fact that its damages were readily ascertainable, leave no room for discretion. See *Zuch* v. *Connecticut Bank & Trust Co.*, supra, 5 Conn. App. 461–62 (because plaintiff failed to allege demand and refusal in its claim for accounting, court improperly found that complaint sufficiently stated claim for accounting); see also *Papallo* v. *Lefebvre*, supra, 172 Conn. App. 764 (in holding that court was within discretion to deny request for accounting of bartering agreement, noting that accounting would nevertheless be inappropriate because plaintiffs "had records pertaining to the defendant's use of [the bartering agreement], and therefore any loss was ascertainable").

We begin by setting forth the applicable standard of review. "The determination of which, if any, statute of limitations applies to a given action is a question of law over which our review is plenary." *Government Employees Ins. Co.* v. *Barros*, 184 Conn. App. 395, 398, 195 A.3d 431 (2018).

In its memorandum of decision, the court rejected the plaintiff's special defense that BAHR's counterclaim was barred by the three year statute of limitations provided under § 52-577. The court instead concluded that, because it found that the plaintiff did not commit larceny under the first count of the counterclaim; see footnote 9 of this opinion; "the [three year] [statute of] limitations for an action based on a tort, [§ 52-577], is inapplicable. Rather, a six year limitation, [under § 52-576], applies."

Our courts have consistently held that because breach of fiduciary duty is an action that sounds in tort, such claims are governed by a three year statute of limitations pursuant to § 52-577. See *Flannery* v. *Singer Asset Finance Co., LLC*, 312 Conn. 286, 290 n.4, 94 A.3d 553 (2014); *Pasco Common Condominium Assn., Inc.* v. *Benson*, 192 Conn. App. 479, 514–15, 218 A.3d 83 (2019); *Ahern* v. *Kappalumakkel*, 97 Conn. App. 189, 192 n.3, 903 A.2d 266 (2006). As previously discussed, BAHR's counterclaim unambiguously states a claim for breach of fiduciary duty. Contrary to the trial court's determination, § 52-576 does not apply because BAHR's counterclaim does not set forth a cause of action for an accounting. See part II A of this opinion. Therefore, BAHR's counterclaim was governed by § 52-577, not § 52-576. Accordingly, we conclude that the court improperly applied a six year statute of limitations to BAHR's counterclaim for breach of fiduciary duty. Because the question of whether the plaintiff's tortious conduct fell within the three year limitation period implicates issues of fact, the trial court's judgment must be reversed and remanded for further proceedings to resolve those factual issues.

III

The plaintiff next claims that the court improperly rejected his application for a dissolution of BAHR pursuant to § 34-267 (a) (5) on the ground of oppressive conduct by Collins.[17] In response, the defendants assert that none of the actions taken by Collins amounted to oppression.[18] We conclude that the court applied an incorrect legal standard in evaluating the plaintiff's claim under § 34-267 (a) (5). We further conclude that a remand for a new trial on that claim is warranted in the present case.

[17] The relevant allegations of oppression include that Collins (1) stopped payment on nine $1000 checks, (2) filed an interim report with the Connecticut Secretary of the State that failed to list the plaintiff as a member of BAHR, (3) terminated the plaintiff's son from employment by the cafe, (4) refused to provide the plaintiff with distributions, and (5) refused to provide the plaintiff with BAHR's financial documents

[18] The defendants further argue—in a footnote in their brief—that the plaintiff's reliance on the Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq., is improper and inapplicable due to its savings clause. See General Statutes § 34-283b ("[s]ections 34-243 to 34-283d, inclusive, do not affect an action commenced, proceeding brought or right accrued before July 1, 2017"). Upon our review of the record, however, Collins never brought this issue to the trial court's attention at any point during the underlying proceedings.

To the contrary, BAHR itself relied on the CULLCA throughout its posttrial brief. Moreover, in a reply to the plaintiff's objection to BAHR's motion for leave to file an amended counterclaim, BAHR argued that "[t]he [CULLCA] was effective July 1, 2017, and [General Statutes] § 34-255h (i) (1) applies retroactively to the plaintiff's conduct." In that pleading, BAHR further alleged that the "[p]laintiff is well aware of the applicability of that act" and was granted permission to amend his complaint accordingly. In seeking permission to amend the complaint, the plaintiff expressly stated that the amendment was necessary in order "to reference applicable provisions of [the] [CULLCA], [§] 34-243 et seq., effective July 1, 2017 . . . ." The defendants did not object to the amendment. Given the defendants' failure to object to the amended complaint and their reliance on CULLCA before the trial court, it is unsettling that the defendants now claim on appeal, for the first time, that CULLCA is inapplicable. In light of the foregoing, we consider the defendants' alternative argument regarding the applicability of CULLCA unpreserved, and therefore decline to address it on appeal. See *Travelers Casualty & Surety Co. of America* v. *Netherlands Ins. Co.*, 312 Conn. 714, 761–62, 95 A.3d 1031 (2014).

We begin by setting forth the legal principles governing our review of this claim. On appeal, the plaintiff challenges the legal standard employed by the trial court. As such, "the trial court's determination of the proper legal standard in any given case is a question of law subject to our plenary review." *Fish* v. *Fish*, 285 Conn. 24, 37, 939 A.2d 1040 (2008).

A

Section 34-267 (a) provides that a limited liability company is to be dissolved, and its "activities and affairs must be wound up" in five different circumstances. Relevant to this claim, subdivision (5), provides the following circumstance: "On application by a member, the entry by the Superior Court for the judicial district where the principal office of the limited liability company is located, of an order dissolving the company on the grounds that the managers or those members in control of the company: (A) Have acted, are acting or will act in a manner that is illegal or fraudulent; or (B) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant . . . ." General Statutes § 34-267 (a) (5). Neither this court nor our Supreme Court has had the opportunity to define oppression as that term has been utilized in § 34-267 since its inception.

Thus, at the outset, we note that the plaintiff's claim necessarily involves interpreting and constructing a statute. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When

a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter . . . .'' (Internal quotation marks omitted.) *Gilmore* v. *Pawn King, Inc.*, 313 Conn. 535, 542–43, 98 A.3d 808 (2014).

1

Turning to the statute at issue in the present case, we note that the Connecticut Uniform Limited Liability Company Act (CULLCA), General Statutes § 34-243 et seq., does not define ''oppression.'' The term ''oppression,'' likewise, does not appear in any section of title 34 of the General Statutes, other than § 34-267 (a) (5). Furthermore, the predecessor to the current revision of § 34-267 did not delineate oppression as a basis for seeking judicial dissolution but, instead, empowered the Superior Court to order a dissolution of a limited liability company at its discretion, ''whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.'' General Statutes (Rev. to 2017) § 34-207.[19]

Because the text of the CULLCA is not plain, we now turn to other materials in an effort to ascertain the legislature's intent. See *State* v. *Pond*, 315 Conn. 451, 466–67, 108 A.3d 1083 (2015). Our research yields no definition of oppression in other related statutes. See General Statutes §§ 33-896 and 33-1187 (providing for judicial dissolution of corporation based on Superior

[19] The Connecticut Limited Liability Company Act (CLLCA), General Statutes (Rev. to 2017) § 34-100 et seq., has since been repealed and replaced by the CULLCA. See Public Acts 2016, No. 16-97, § 110; see also *Saunders* v. *Briner*, 334 Conn. 135, 139 n.1, 221 A.3d 1 (2019). For purposes of convenience, all references to the CLLCA in this opinion are to the 2017 revision of the General Statutes.

Court finding that majority shareholder engaged in oppressive conduct). A review of the legislative history of the CULLCA has also afforded little guidance. "Because the statute and its predecessors did not define the term ['oppression'], and the legislative history of the statute is unilluminating, that task was left to the courts." *State* v. *Cyr*, 291 Conn. 49, 56, 967 A.2d 32 (2009); see also General Statutes § 34-243j ("[u]nless displaced by particular provisions of sections 34-243 to 34-283d, inclusive, the principles of law and equity supplement sections 34-243 to 34-283d, inclusive").

2

To begin our examination of extratextual sources, we believe it prudent to provide a review of the history of the oppression doctrine. It is important to emphasize that, in the context of corporation law, "oppression" is a strictly technical term. Black's Law Dictionary (11th Ed. 2019), p. 1319, defines "oppression" in this context as the "[u]nfair treatment of minority shareholders ([especially] in a close corporation) by the directors or those in control of the corporation." The history of the oppression doctrine reflects this specialized definition. As the modern corporate world began to take form during the nineteenth century, courts recognized that a pure majority rule for evaluating majority shareholder behavior "would lead to unfair results for minority shareholders" and, as a result, "used the trust metaphor to impose on directors a fiduciary duty to serve *all* of the shareholders of the corporation, not just a select group." (Emphasis in original.) D. Smith, "The Shareholder Primacy Norm," 23 J. Corp. L. 277, 310 (1998).

By the late nineteenth and early twentieth centuries, courts developed the oppression doctrine to reach conduct that the doctrines of ultra vires, fraud, and illegality did not address. See id., 310–22 (discussing history and development of oppression doctrine). Indeed,

courts remained reluctant to label majority shareholder conduct as fraudulent or to extend established legal doctrines to encompass such conduct, finding these "traditional grounds for imposing liability . . . too restrictive." Id., 314, 319. Consequentially, courts "continued to redress the concerns of minority shareholders, increasingly under the rubric of minority oppression." Id., 314. Well into the twentieth century, oppression was cited as a ground for dissolution in the Illinois and Pennsylvania corporations acts in 1933, the Model Business Corporation Act of 1946, and the English Companies Act of 1948. See R. Thompson, "The Shareholder's Cause of Action for Oppression," 48 Bus. Law. 699, 709 (1993). Although the doctrine of oppression was founded at common law; see D. Smith, supra, 23 J. Corp. 320–21; it eventually developed into "the principal vehicle used by legislatures, courts, and litigants to address the particular needs of close corporations." R. Thompson, supra, 708.

3

As we have previously discussed, the legislative history does little to inform us of the legislature's intended definition of oppression under the act. A summary of the CULLCA notes that "the bill requires considering the need to promote uniformity with other states regarding LLC law when applying and construing its provisions . . . ." Office of Legislative Research, Bill Analysis, Substitute House Bill No. 5259, An Act Concerning Adoption of the Connecticut Uniform Limited Liability Company Act (April 28, 2016); see General Statutes § 34-283 ("[i]n applying and construing the provisions of the [CULLCA], consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it"). In doing so, the legislature adopted, in full, the language of the related section of the Revised Uniform Limited Liability Company Act (RULLCA). See Rev. Unif. Limited Liability Company Act of 2006 (2013) § 701, 6C U.L.A. 133 (2016);

see also General Statutes § 34-267. The only difference between the related section of the RULLCA, § 701, and § 34-267 is the legislature's retention of a cause for dissolution as provided in § 34-267's predecessor statute, General Statutes (Rev. to 2017) § 34-207. See Rev.Unif. Limited Liability Company Act of 2006 (2013) § 701, supra, 6C U.L.A. 133; General Statutes (Rev. to 2017) § 34-207. Because the legislature substantially adopted the major provisions of the RULLCA, we may look to the commentaries of that uniform act for further guidance in ascertaining the legislature's intent. See *Connecticut National Bank* v. *Giacomi*, 233 Conn. 304, 320, 659 A.2d 1166 (1995) (where legislative history does not reveal legislature's intent in adoption of uniform act, "we may be assisted in ascertaining that intent by looking to commentaries" of uniform act).

As stated therein, the commentary explains that the RULLCA "does not define 'oppressively,' but 'oppression' 'is a concept [well grounded] in the law of close corporations.[20] . . . In many jurisdictions the concept

[20] It is well established that a limited liability company (LLC) is a "distinct business entity that adopts and combines features of both partnership and corporate forms." (Internal quotation marks omitted.) *418 Meadow Street Associates, LLC* v. *Clean Air Partners, LLC*, 304 Conn. 820, 834 n.13, 43 A.3d 607 (2012). Our Supreme Court has recognized "the closely held nature of many [limited liability companies]" (Internal quotation marks omitted.) *Saunders* v. *Briner*, 334 Conn. 135, 162 n.28, 221 A.3d 1 (2019). Scholars that have examined the oppression doctrine have analogized minority members of a limited liability company (LLC) to minority shareholders of close corporations. See generally F. O'Neal & R. Thompson, Oppression of Minority Shareholders and LLC Members (Rev. 2d Ed. 2011) § 6:2, pp. 6-2 through 6-4 (analyzing similarities between minority shareholders of close corporation and minority member of LLC in context of oppression); see also D. Moll, "Minority Oppression & The Limited Liability Company: Learning (Or Not) From Close Corporation History," 40 Wake Forest L. Rev. 883, 925–57 (2005) (in arguing that oppression claims should be available to minority members of LLC, noting that such members share many characteristics of minority shareholders of close corporation).

Additionally, we note that courts of other states have applied corporate principles governing oppression claims to minority members of LLCs. See, e.g., *Pointer* v. *Castellani*, 455 Mass. 537, 549–51, 918 N.E.2d 805 (2009) (holding LLC is close corporation and applying corporate principles of

equates to or at least includes the frustration of the plaintiff's reasonable expectations." (Citations omitted; footnote added.) See Rev. Unif. Limited Liability Company Act of 2006 (2013) § 701, comment, supra, 6C U.L.A. 135. Consistent with the RULLCA commentary's definition, in *R.D. Clark & Sons, Inc.* v. *Clark*, 194 Conn. App. 690, 706–707, 222 A.3d 515 (2019), this court recently defined "oppression," as used in General Statutes § 33-896 of the Connecticut Business Corporation Act, as the following: "Oppression in the context of a dissolution suit suggests a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members, or a visible departure from the standards of fair dealing and a violation of fair play as to which every shareholder who entrusts his money to a company is entitled. . . . [O]ppressive conduct in the corporate dissolution context . . . arise[s] when the controlling directors' conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the firm." (Internal quotation marks omitted.)

We note, however, that the broad definition of oppression, as stated in *Clark*, presents a conundrum that other

oppression doctrine to minority member's oppression claim); see also F. O'Neal & R. Thompson, Oppression of Minority Shareholders and LLC Members (Rev. 2d Ed. 2020) § 6:3 ("Elsewhere, courts in many jurisdictions refer explicitly to close corporation precedent in addressing LLC issues. Given the overlap of close corporations and LLCs, courts regularly apply close corporation rules to its newer legal cousins . . . .") Furthermore, the commentary to the RULLCA explicitly looks to close corporation law in defining the contours of oppression under the act, despite acknowledging that doing so "requires some caution." Rev. Unif. Limited Liability Company Act of 2006 (2013) § 701, comment, 6C U.L.A., supra, 135.

Given that a minority shareholder of a close corporation and a minority member of an LLC share many traits which make them vulnerable to oppression, and mindful of the commentary's guidance, we believe that the governing principles of close corporation law are instructive for our interpretation of the term "oppression" as it appears in the CULLCA. For purposes of convenience, we use the terms "LLC" and "close corporation" interchangeably.

jurisdictions have encountered. Both courts and scholars have underlined two competing standards that have been employed for analyzing whether conduct rises to the level of oppression: the "fair dealings" standard and the "reasonable expectations" standard. See, e.g., *Ritchie* v. *Rupe*, 443 S.W.3d 856, 865 (Tex. 2014); *Scott* v. *Trans-System, Inc.*, 148 Wn. 2d 701, 710–11, 64 P.3d 1 (2003) (en banc); cf. *Baur* v. *Baur Farms, Inc.*, 832 N.W.2d 663, 670–71 (Iowa 2013); F. O'Neal & R. Thompson, Oppression of Minority Shareholders and LLC Members (Rev. 2d Ed. 2011) § 7:11, pp. 7-113 through 7-117; see generally D. Moll, "Shareholder Oppression In Close Corporations: The Unanswered Question of Perspective," 53 Vand. L. Rev. 749 (2000) (discussing competing standards used for oppression doctrine).

Under the "fair dealings" standard, oppression occurs when the conduct complained of is "burdensome, harsh and wrongful" and evinces either "a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members" or is "a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely." (Internal quotation marks omitted.) *Ritchie* v. *Rupe*, supra, 443 S.W.3d 865. This test has been described as a focus "on preserving the majority's discretion to make decisions in furtherance of a legitimate business purpose—a standard that is typically satisfied when majority actions benefit the corporation." D. Moll, supra, 53 Vand. L. Rev. 762. Some courts employing the "fair dealings" standard have, however, cautioned that even though a majority shareholder's conduct was in furtherance of a legitimate business purpose, such conduct may be oppressive unless the minority shareholder "cannot demonstrate [that] a less harmful alternative" was available. *Daniels* v. *Thomas, Dean & Hoskins, Inc.*, 246 Mont. 125, 137–38, 804 P.2d 359 (1990).

In contrast, the "reasonable expectations" standard analyzes the conduct at issue from the perspective of the minority shareholder. As one Connecticut Superior Court decision aptly stated, oppression under this test "should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture." (Internal quotation marks omitted.) *Booth* v. *Waltz*, Superior Court, judicial district of Hartford, Docket No. CV-10-6011749-S (December 14, 2012); see id. (defining oppression as that term appears in Connecticut Business Corporation Act, General Statutes § 33-600 et seq.). "This approach takes into account the fact that shareholders in close corporations may have expectations that differ substantially from those of shareholders in public corporations" and further "recognizes the fact sensitive nature of judicial inquiry into this area and the need to examine the understanding of the parties concerning their role in corporate affairs." (Internal quotation marks omitted.) *Hendrick* v. *Hendrick*, 755 A.2d 784, 791 (R.I. 2000).

No court has had the occasion to directly address the issue of which test applies to claims of oppression pursuant to the RULLCA. We are convinced that, under the CULLCA, the "reasonable expectations" test is the proper standard to be applied for analyzing claims of oppression under § 34-267 (a) (5). Our conclusion primarily rests on the commentary provided in § 701 of the RULLCA. As previously noted, the commentary emphasizes that "[i]n many jurisdictions the concept [of oppression] equates to or at least includes the frustration of the plaintiff's reasonable expectations." Rev. Unif. Limited Liability Company Act of 2006 (2013) § 701, comment, 6C U.L.A. 135. In addition, the commentary provides guidance for assessing whether conduct is oppressive. Specifically, that commentary states that

"a court considering a claim of oppression by an LLC member should consider, with regard to each reasonable expectation invoked by the plaintiff, whether the expectation: (i) contradicts any term of the operating agreement or any reasonable implication of any term of that agreement; (ii) was central to the plaintiff's decision to become a member of the limited liability company or for a substantial time has been centrally important in the member's continuing membership; (iii) was known to other members, who expressly or impliedly acquiesced in it; (iv) is consistent with the reasonable expectations of all the members, including expectations pertaining to the plaintiff's conduct; and (v) is otherwise reasonable under the circumstances." Id., § 701, comment. We view this guidance as a tacit adoption of the "reasonable expectations" standard for oppression claims under the RULLCA. We see no cause or reason to suggest that the legislature intended for a different standard to apply under § 34-267 (a) (5).[21]

We further note that the majority of courts in other jurisdictions have embraced the "reasonable expectations" standard, or some iteration thereof, for claims of oppression in the close corporation context. See, e.g., *Baur* v. *Baur Farms, Inc.*, supra, 832 N.W.2d 673; *Bontempo* v. *Lare*, 444 Md. 344, 365–66, 119 A.3d 791 (2015); *Gunderson* v. *Alliance of Computer Professionals, Inc.*, 628 N.W.2d 173, 186 (Minn. App. 2001), appeal dismissed, (Minn. August 17, 2001); *Brenner* v. *Berkowitz*, 134 N.J. 488, 506–507, 634 A.2d 1019 (1993); *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 73, 473 N.E.2d 1173, 484 N.Y.S.2d 799 (1984); *Meiselman* v. *Meiselman*, 309 N.C. 279, 290, 307 S.E.2d 551 (1983); see also *Ritchie*

[21] Additionally, we note that at least one appellate court in this country has also applied the "reasonable expectations" standard for analyzing claims of oppression under its state's version of the RULLCA. See *Morse* v. *Rosendhal*, Court of Appeals of Iowa, Docket No. 15-0912, 885 N.W.2d 220, 2016 WL 3273725, *5–6 (Iowa App. June 15, 2016) (unpublished opinion).

v. *Rupe*, supra, 443 S.W.3d 901 (Guzman, J., dissenting) (collecting cases); F. O'Neal & R. Thompson, Oppression of Minority Shareholders and LLC Members (2d Rev. 2011) § 7:12, pp. 7-113 through 7-117 (collecting cases and noting that Michigan appellate court's rejection of "reasonable expectations" standard was "out of step with interpretations in the rest of the country in this area over the last three decades").

The reasons that have been cited for this widespread acceptance of the "reasonable expectations" standard largely concern the unique nature of a closely held entity. See F. O'Neal & R. Thompson, Oppression of Minority Shareholders and LLC Members (Rev. 2d Ed. 2011), § 7:12, pp. 7-113 through 7-118. "Unlike their counterparts in large corporations, minority shareholders in [close] corporations often expect to participate in management and operations." *Topper* v. *Park Sheraton Pharmacy, Inc.*, 107 Misc. 2d 25, 33, 433 N.Y.S.2d 359 (1980). For instance, "[i]t is widely understood that, in addition to supplying capital to a contemplated or ongoing enterprise and expecting a fair and equitable return, parties comprising the ownership of a close corporation may expect to be actively involved in its management and operation . . . . The small ownership cluster seeks to 'contribute their capital, skills, experience and labor' toward the corporate enterprise . . . ." (Citations omitted.) *Matter of Kemp & Beatley, Inc.*, supra, 64 N.Y.2d 71.

Like minority shareholders of a close corporation; see footnote 20 of this opinion; these unique features of an LLC therefore place a minority member in a special position, unlike his or her counterparts in a publicly traded company. As the Supreme Court of New Jersey explained in interpreting a statute with similar language, minority members of an LLC face a "unique vulnerability" for a number of reasons: "First, because the majority has a controlling interest, it has the power

to dictate to the minority the manner in which the corporation is run. . . . Second, shareholders in close corporations frequently consist of family members or friends and once the personal relationship is destroyed, the company deteriorates. . . . Third, unlike shareholders in larger corporations, minority shareholders in a close corporation cannot readily sell their shares when they become dissatisfied with the management of the corporation. . . . Indeed, the discord in the corporation makes the minority stock even more difficult to sell." (Citations omitted; internal quotation marks omitted.) *Brenner* v. *Berkowitz*, supra, 134 N.J. 505. Thus, "[f]ocusing on the harm to the minority shareholder reflects a departure from the traditional focus, which was solely on the wrongdoing by those in control, and reflects the current trend of recognizing the special nature of close corporations." Id., 509.

Given that special nature and the unique position that a minority member holds, to focus on whether a majority member's conduct served a "legitimate business purpose" would, in our view, frustrate the protections that the oppression doctrine was intended to afford. See F. O'Neal & R. Thompson, Oppression of Minority Shareholders and LLC Members (Rev. 2d Ed. 2011) § 7:12, pp. 7-116 through 7-118. Thus, even when a majority member's conduct serves a legitimate business purpose that directly benefits the LLC, that conduct may be in direct contravention to a minority member's reasons for committing to the venture or the expectations that developed over time. Those reasons may have consisted of employment, a share of company earnings, or meaningful participation in its operations. See *Matter of Kemp & Beatley, Inc.*, supra, N.Y.2d 72–73; see also *Gunderson* v. *Alliance of Computer Professionals, Inc.*, supra, 628 N.W.2d 189. The majority member's reasons for excluding a minority member from any of those expectations may benefit the LLC and could very well

have not been achieved by less harmful means. In such circumstances, however, the minority member is left with "neither the power to dissolve the business unit at will, as does a partner in a partnership, nor does he have the 'way out' which is open to a shareholder in a publicly held corporation, the opportunity to sell his shares on the open market. . . . Thus, the illiquidity of a minority shareholder's interest in a close corporation renders him vulnerable to exploitation by the majority shareholders." (Citation omitted.) *Meiselman* v. *Meiselman*, supra, 309 N.C. 291. In effect, the majority member is placed "in an enhanced power position to use the minority's investment without paying for it. . . . As a consequence, a [member] challenging the majority in a close corporation finds himself on the horns of a dilemma, he can neither profitably leave nor safely stay with the corporation. In reality, the only prospective buyer turns out to be the majority [member]." (Citation omitted; internal quotation marks omitted.) *Brenner* v. *Berkowitz*, supra, 134 N.J. 505.

Our conclusion is further buttressed by the fact that courts employing the "reasonable expectations" standard have looked to factors that closely track the guidance provided by the commentary of § 701 of the ULLCA. For instance, in assessing a minority member's reasonable expectations, courts have noted the relevance of the operating agreements of LLCs (or other written and oral agreements); see *Gunderson* v. *Alliance of Computer Professionals, Inc.*, supra, 628 N.W.2d 185; whether the expectations were "substantial"; see *Meiselman* v. *Meiselman*, supra, 309 N.C. 298–99; whether those expectations were both known to and consented by the other members; see id.; whether the expectations were consistent with the reasonable expectations of all the members, including expectations pertaining to the plaintiff's conduct; see *Gimpel* v. *Bolstein*, 125 Misc. 2d 45, 52, 477 N.Y.S.2d 1014 (1984); and whether the expectations

were otherwise reasonable under the circumstances. See *Harris* v. *Testar, Inc.*, 243 N.C. App. 33, 39, 777 S.E.2d 776 (2015).

In light of the foregoing, we are persuaded that a proper analysis of an oppression claim requires the court to assess that claim under the "reasonable expectations" standard. Accordingly, we conclude that oppression, under the CULLCA, properly is analyzed under that standard. Thus, a majority member's conduct is oppressive if that conduct substantially defeats the minority member's expectations which, objectively viewed, were both reasonable under the circumstances and were central to his or her decision to join the venture or developed over time.

3

Having concluded that "oppression" under § 34-267 (a) (5) should be assessed by the "reasonable expectations" standard, we believe it prudent to expand on the contours of that doctrine. As one court noted, "the key is *reasonable*." (Emphasis in original; internal quotation marks omitted.) *Meiselman* v. *Meiselman*, supra, 309 N.C. 298. In our view, the RULLCA commentary sets forth a general list of factors that courts should consider when determining the reasonableness of a minority member's expectation. As previously stated, these factors include "whether the expectation: (i) contradicts any term of the operating agreement or any reasonable implication of any term of that agreement; (ii) was central to the plaintiff's decision to become a member of the limited liability company or for a substantial time has been centrally important in the member's continuing membership; (iii) was known to other members, who expressly or impliedly acquiesced in it; (iv) is consistent with the reasonable expectations of all the members, including expectations pertaining to the plaintiff's

conduct; and (v) is otherwise reasonable under the circumstances." Rev. Unif. Limited Liability Company Act of 2006 (2013) § 701, comment, 6C U.L.A., supra, p. 135.

There are a number of reasonable expectations that may drive a minority member to join an LLC by committing capital or expertise. "It is widely understood that, in addition to supplying capital to a contemplated or ongoing enterprise and expecting a fair and equal return, parties comprising the ownership of a close corporation may expect to be actively involved in its management and operation . . . ." (Citation omitted.) *Matter of Kemp & Beatley, Inc.*, supra, 64 N.Y.2d 71. "In fact, because of the unique characteristics of close corporations, employment is often a vital component of a [close corporation] [member's] return on investment and a principal source of income." *Gunderson* v. *Alliance of Computer Professionals, Inc.*, supra, 628 N.W.2d 189; see *Brenner* v. *Berkowitz*, supra, 134 N.J. 509.

Other reasonable expectations have included "possible entitlement to dividends, voting at shareholders' meetings, and access to corporate records." *Gimpel* v. *Bolstein*, supra, 125 Misc. 2d 53; see also *State ex rel. Costelo* v. *Middlesex Banking Co.*, 87 Conn. 483, 484–85, 88 A. 861 (1913) ("[t]he right of inspection of the books and records of a corporation at reasonable times and for proper purposes is a common-law privilege incident to the ownership of shares in a corporation"); cf. General Statutes § 34-255i and General Statutes (Rev. to 2017) § 34-144 (CULLCA and its predecessor, CLLCA, providing statutory right to member of LLC to inspect company records). Because employment by an LLC is typically the main source of income to members in an LLC—and due to the inherently reasonable expectation that a minority member is to receive a return on his or her investment—a change in distribution policy could, for instance, constitute oppression depending on the

factual circumstances. See *Matter of Kemp & Beatley, Inc.*, supra, 64 N.Y.2d 74–75 ("[i]t was not unreasonable for the fact finder to have determined that this change in [distribution] policy amounted to nothing less than an attempt to exclude petitioners from gaining any return on their investment through the mere recharacterization of distributions of corporate income").

Notwithstanding these examples, the ULLCA factors also indicate—as do other courts—that the reasonableness of a member's expectation at the inception of an LLC may prove unreasonable over time and under particular circumstances.[22] See *Meiselman* v. *Meiselman*, supra, 309 N.C. 298 (noting that reasonable expecta tions can be altered over time based on conduct of shareholders). For example, a minority member may reasonably expect to be employed by the LLC when entering into the venture with other members. That expectation, however, becomes patently unreasonable when, in light of the minority member's own misconduct, he or she is terminated from that employment with the LLC. "Accordingly, an expectation of continuing employment is not reasonable and oppression liability does not arise when the shareholder-employee's own misconduct or incompetence causes the termination of employment." *Gunderson* v. *Alliance of Computer Professionals, Inc.*, supra, 628 N.W.2d 192; see *Gimpel* v. *Bolstein*, supra, 125 Misc. 2d 52–53. This also extends to a member's expectation that a relative will be employed. See *Brenner* v. *Berkowitz*, supra, 134 N.J. 517–18 ("[W]hen the employment of the shareholder's relative

[22] Furthermore, we agree with the New York Court of Appeals that "[i]t would be contrary to the remedial purpose [of involuntary dissolution] to permit its use by minority shareholders as merely a coercive tool . . . ." (Citations omitted.) *Matter of Kemp & Beatley, Inc.*, supra, 64 N.Y.2d 74. Thus, a plaintiff is not entitled to seek dissolution under § 34-267 (a) (5) when his or her own acts—resulting in the alleged oppressive conduct—were "made in bad faith and undertaken with a view toward forcing an involuntary dissolution . . . ." (Citations omitted.) Id.

is at issue, the shareholder will find it even more difficult to establish that those in control of a corporation acted oppressively. A heightened burden exists particularly in the case of a relative who was not employed at the beginning of the corporate relationship.") Moreover, if a minority member does not actively pursue those reasonable expectations, a court could find that the expectation has been forfeited. See *Brickman* v. *Brickman Estate at the Point, Inc.*, 253 App. Div. 2d 812, 813, 677 N.Y.S.2d 600 (minority shareholders were not oppressed by majority shareholders' failure to provide them with corporate records where minority shareholders failed to seek responsibilities in management or express interest in taking part in shareholders' meetings), leave to appeal denied, 92 N.Y.2d 817, 707 N.E.2d 443, 684 N.Y.S.2d 488 (1998).

In providing these examples, we must emphasize that whether a minority member's expectation is both reasonable and was defeated "will depend on the circumstances in the individual case." *Matter of Kemp & Beatley, Inc.*, supra, 64 N.Y.2d 73. Consequentially, making that determination requires the court to engage in a fact intensive inquiry. See *Gunderson* v. *Alliance of Computer Professionals, Inc.*, supra, 628 N.W.2d 186 (noting that "whether a shareholder's reasonable expectations have been frustrated is essentially a fact issue").

4

In addition to a finding of oppression, a court must determine, pursuant to § 34-267 (a) (5) (B), whether the oppressive conduct "was, is, or will be directly harmful to the applicant . . . ." Notwithstanding this additional requirement, the CULLCA, its legislative history, and the ULLCA fail to define the harm that was, is, or will be suffered by the affected member. Generally, oppression consists of harm in the form of the defeat of a member's reasonable expectation. See, e.g., *Ritchie*

v. *Rupe*, supra, 443 S.W.3d 866–67 ("[g]enerally, these [oppression] statutes indicate that 'oppressive' actions involve an abuse of power *that harms the rights* or interests of another person or persons" (emphasis added)).

Nevertheless, "[i]t is a basic tenet of statutory construction that the legislature [does] not intend to enact meaningless provisions. . . . Because [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or world shall be superfluous, void or insignificant." (Internal quotation marks omitted.) *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010). In recognition of that basic principle, we conclude that the language of § 34-267 (a) (5) (B) requires a causal connection between the oppressive conduct and the harm sustained by the plaintiff-member. This requirement reflects the precept that, not only must a plaintiff establish that the conduct in question rose to the level of oppression, but he or she "must also demonstrate a nexus between that misconduct and the minority shareholder or her interest in the corporation. The remedies that a court will apply will logically depend on the harm to the minority shareholder or her interest in the corporation. . . . Therefore, in determining the nexus between the misconduct and the harm to the shareholder, the court must consider those acts that affect or jeopardize a shareholder's stock interest as well as those acts that may be specifically targeted to the shareholder." (Citation omitted.) *Brenner* v. *Berkowitz*, supra, 134 N.J. 508.

Moreover, the use of the disjunctive "or" in § 34-267 (a) (5) (B) indicates that the legislature intended for a court to consider harm that is retrospective, active, or prospective. See *State* v. *Pascucci*, 164 Conn. 69, 72, 316 A.2d 750 (1972) ("use of the disjunctive 'or' between the two parts of the statute indicates a clear legislative

intent of separability" (internal quotation marks omitted)). Thus, under § 34-267 (a) (5) (B), the harm at issue is not limited to a particular instance. So long as a member was harmed, is being harmed, or will be harmed by the oppressive conduct, such will suffice to satisfy the statute. We believe that allowing a court to form a remedy for oppressive behavior based on harm that has been or will be sustained by a plaintiff is in accord with the remedial nature that the statute was intended to provide. As the Supreme Court of New Jersey explained, "[a] requirement that the [oppressive] conduct must be [ongoing] frustrates [the legislative purpose] because it allows the majority to abuse the minority so long as the abuse ceases prior to the date a decision is rendered . . . . Requiring that the conduct be continuing would, therefore, work a grave injustice on the minority shareholder by depriving her of a remedy when her reasonable expectations for the corporation are thwarted." (Citation omitted; internal quotation marks omitted.) *Brenner* v. *Berkowitz*, supra, 134 N.J. 507.

B

Turning to the facts of the present case, we conclude that the court applied an incorrect legal standard for assessing a claim alleging "oppression" pursuant to § 34-267 (a) (5). For that reason, its determination that Collins' conduct was not oppressive cannot stand.

In its memorandum of decision, the court made a number of factual findings to support its judgment in favor of Collins and BAHR with respect to the plaintiff's claim under § 34-267 (a) (5). First, the court found that Collins had authority to amend the operating agreement based on its finding that, pursuant to the original operating agreement, he maintained a 60 percent interest in BAHR based on the outstanding priority loans still owed to him by BAHR. The court further found

that Collins, as the majority member in BAHR, properly used his authority to remove the plaintiff as a manager of BAHR. Pursuant to § 11 of the amended operating agreement, Collins had complete control of BAHR because he was its sole manager.[23] The court concluded that Collins' conduct in this respect "was not oppressive, harsh, or wrongful in light of [the plaintiff's] unfair dealing."

The court further found that Collins' failure to provide the plaintiff with financial documents, as required by the operating agreement, was not harmful to the plaintiff. In so finding, the court emphasized that the purpose of its requirement in the operating agreement was to enable BAHR's members to prepare their income tax statements. The court therefore concluded that the plaintiff was not harmed in this instance because all of BAHR's financial information was provided during the discovery process.

The court also rejected the plaintiff's oppression argument concerning Collins' termination of the plaintiff's son as an employee of the cafe and concerning the filing of a report with the Secretary of the State which omitted the plaintiff as a member of BAHR. The court reasoned that the plaintiff's son was terminated as an at-will employee because Collins believed that the plaintiff's son had provided incorrect information about the cafe's revenue. It further noted that the failure to file an accurate report with the Secretary of the State did "not appear to have been done with any intent to harm [the plaintiff]. This omission can be easily remedied. No harm has been shown."

[23] As we previously noted, the plaintiff does not challenge the court's conclusion that Collins had authority to unilaterally amend the operative agreement by virtue of his status as a 60 percent stakeholder in BAHR. See footnote 6 of this opinion.

Thus, the court concluded that the plaintiff failed to show that BAHR "should be dissolved under the provisions of [§ 34-267 (a) (5)]. He has not shown [Collins'] conduct was illegal, oppressive, or in violation of [the plaintiff's] rights as a shareholder of BAHR. He has not shown that Collins has acted or is acting in a manner that is directly harmful to [the plaintiff]. Rather, the managerial actions taken by Collins were reasonable in light of [the plaintiff's] having used BAHR funds to pay personal expenses and his having withdrawn weekly 'salary' payments contrary to his agreement with Collins."

To begin, the court's memorandum of decision reflects that it did not employ the correct legal standard for determining whether the defendants' conduct was oppressive.[24] This, of course, is understandable because no appellate court in this state has interpreted either the oppression doctrine or the term "oppression" as it appears in § 34-267 (a) (5). "Ordinarily, the trial court's failure to apply the correct legal standard . . . results in a remand to the trial court for application of the correct standard."[25] *Western Dermatology Consultants*,

[24] In fact, during trial, the court expressly disallowed any testimony about the plaintiff's expectations upon forming BAHR with Collins and sustained an objection by the defendants on the basis that such testimony was irrelevant.

[25] We further believe that the court's finding that the plaintiff failed to show that he was harmed does not appear to take into account the particular harms that arise from oppressive conduct *relative to the plaintiff's status as a minority member*. For instance, the court concluded that the plaintiff was not harmed by the defendants' failure to provide him with BAHR's financial documents because they were produced during the discovery process. This conclusion indicates that the court not only failed to consider the unique harms suffered by the plaintiff as a minority member, but it additionally ignored the fact that the plaintiff alleged these harms as a ground for oppressive conduct. See *Brenner* v. *Berkowitz*, supra, 134 N.J. 507. It was not until litigation proceedings began that the plaintiff received the company documents he believed he was entitled to. It would contravene the purposes of § 34-267 (a) (5) if the only way that a minority member could exercise his or her rights would be to rely on the discovery process in the course of legal proceedings. Because the court did not appear to apply the correct legal standard for determining harm, we cannot affirm the court's judgment on that basis.

P.C. v. *VitalWorks*, *Inc.*, 322 Conn. 541, 563, 153 A.3d 574 (2016). This is so "unless we conclude that, based on the evidence, a new trial would be pointless." *McDermott* v. *State*, 316 Conn. 601, 611, 113 A.3d 419 (2015).

In light of the evidence and the factual findings made by the court, we conclude that a new trial is warranted on the plaintiff's claim of oppression for all of the complained of conduct except for his termination of employment. It is clear from the record that the court did not assess the plaintiff's claim of oppression by focusing on his reasonable expectations as a minority member. Instead, the court improperly concentrated its analysis on Collins' conduct as a majority member in response to the plaintiff's misconduct as a manager of BAHR.

Notwithstanding the court's use of an incorrect legal standard, we believe that a new trial on the particular issue of the plaintiff's termination from employment is unwarranted. See *McDermott* v. *State*, supra, 316 Conn. 611. That is so because the reasonable expectations standard applied to the evidence adduced at trial would not change the court's factual findings or conclusion; specifically, the plaintiff's misappropriation of BAHR's funds would render any expectation of continuing employment by BAHR or the cafe unreasonable. See *Gunderson* v. *Alliance of Computer Professionals*, *Inc.*, supra, 628 N.W.2d 192. Upon our review of the record, the evidence strongly supports the court's conclusion that Collins' assumption of control over the management of the cafe "was not oppressive . . . in light of [the plaintiff's] unfair dealing." In addition, the record supports the court's conclusion that Collins had authority to do so pursuant to his majority stake in BAHR. The plaintiff may very well have reasonably expected to be employed by the cafe as its manager at the inception of BAHR, to remain as a manager of BAHR, and to have unobstructed access to both the cafe's premises and its bank accounts. Although those expectations

may have, at one point, been reasonable, "it must be recognized that 'reasonable expectations' do not run only one way. To the extent that [the plaintiff] may have entertained 'reasonable expectations' of profit . . . the other shareholders also entertained 'reasonable expectations' of fidelity and honesty from him. All such expectations were shattered when [the plaintiff] stole from the corporation. His own acts broke all bargains. . . . Since then, the only expectations he could reasonably entertain were those of a discovered thief: ostracism and prosecution." (Citation omitted.) *Gimpel* v. *Bolstein*, supra, 125 Misc. 2d 52.

To this end, we further note that, although it was the plaintiff's own misconduct which prompted the complained of acts he has alleged as oppressive, that misconduct does not obviate the need for the court to consider whether he continued to have reasonable expectations as a minority member. See *Gimpel* v. *Bolstein*, supra, 125 Misc. 2d 53 (although minority shareholder embezzled company funds, "it does not necessarily follow that the majority shareholders may treat him as shabbily as they please"). While the plaintiff cannot establish oppression based on his termination of employment—or based on his being prevented from unfettered access to the cafe or BAHR's bank accounts—we emphasize that the plaintiff cannot be marginalized to the extent that he would be precluded from realizing what reasonable expectation he still maintains as a minority member.[26] See id., 55 ("While

[26] Given the atypical expectations of a minority member in an LLC, it is implausible that such a member would have committed capital to a venture in the knowledge that he or she could be entirely precluded from realizing any return on his or her investment. As one scholar on this issue has commented, a minority shareholder simply does not bargain for such a potentiality: "[I]t seems likely that minority shareholders would have refused to invest in the venture if the majority shareholder had insisted upon the retention of his freeze-out discretion. In other words, to appease the minority shareholders and to induce them to commit capital to the business, the majority shareholder would likely have had to promise that his freeze-out discretion would not be utilized." D. Moll, supra, 53 Vand. L. Rev. 799–800.

[the minority shareholder's] past misdeeds provided sufficient justification for the majority's acts to date, there is a limit to what he can be forced to bear . . . . The other shareholders need not allow him to return to employment with the corporation, but they must by some means allow him to share in the profits." (Citation omitted.)).

Should the court find that the other acts taken by Collins were oppressive, the plaintiff's prior malfeasance should not bar his pursuit of an appropriate remedy under § 34-267 (a) (5).[27] This is so because, so long as

[27] We emphasize that dissolution is not the sole remedy for oppression of a minority member. In fact, § 34-267 (b) expressly permits a court to "order a remedy other than dissolution" for a proceeding brought under § 34-267 (a) (5). In providing for these alternatives, this provision of the CULLCA suggests that the drafters acknowledged the extreme and drastic nature of dissolution as a remedy. Cf. *Bator* v. *United Sausage Co.*, 138 Conn. 18, 22, 81 A.2d 442 (1951) (holding that dissension among corporation members "is not a ground for dissolution unless it goes so far as to render it impossible to carry on the corporate affairs"); see also *Bontempo* v. *Lare*, supra, 444 Md. 368 ("dissolution is an extreme remedy and should be avoided if less drastic equitable remedies are available); *Brenner* v. *Berkowitz*, supra, 134 N.J. 511 (dissolution is "an extreme remedy to be imposed with caution after a careful balancing of the interests at stake"); *Scott* v. *Trans-System, Inc.*, supra, 148 Wn. 2d 718 (concluding that facts of case "do not rise to the level of egregiousness required to justify dissolution given the admonishments from courts in this state and around the country that dissolution is a drastic remedy that should be used with extreme caution").

In *Bontempo* v. *Lare*, supra, 444 Md. 368–69, the Court of Appeals of Maryland adopted a nonexhaustive list of alternative remedies to dissolution for oppressive conduct that a court has at its disposal:

"(a) The entry of an order requiring dissolution of the corporation at a specified future date, to become effective only in the event that the stockholders fail to resolve their differences prior to that date;

"(b) The appointment of a receiver, not for the purposes of dissolution, but to continue the operation of the corporation for the benefit of all the stockholders, both majority and minority, until differences are resolved or 'oppressive' conduct ceases;

"(c) The appointment of a 'special fiscal agent' to report to the court relating to the continued operation of the corporation, as a protection to its minority stockholders, and the retention of jurisdiction of the case by the court for that purpose;

"(d) The retention of jurisdiction of the case by the court for the protection of the minority stockholders without appointment of a receiver or 'special fiscal agent';

the plaintiff retains an investment in BAHR, his reasonable expectations include being entitled to certain minimum rights as a minority member. See *Gimpel* v. *Bolstein*, supra, 125 Misc. 2d 53 (although termination from employment for embezzling corporate funds was not oppression, minority shareholder was entitled to participate as "stranger" which includes "possible entitlement to dividends, voting at shareholders' meetings, and access to corporate records"). An infringement of these rights and a bar to any remedy leaves the plaintiff with a worthless asset. See *Brenner* v. *Berkowitz*, supra, 134 N.J. 505; *Meiselman* v. *Meiselman*, supra, 309 N.C. 291. We therefore conclude that a remand to the trial court for a new trial is warranted due to the court's failure to apply the correct legal standard as to the plaintiff's oppression claim under § 34-267 (a) (5).

"(e) The ordering of an accounting by the majority in control of the corporation for funds alleged to have been misappropriated;

"(f) The issuance of an injunction to prohibit continuing acts of 'oppressive' conduct and which may include the reduction of salaries or bonus payments found to be unjustified or excessive;

"(g) The ordering of affirmative relief by the required declaration of a dividend or a reduction and distribution of capital;

"(h) The ordering of affirmative relief by the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders at a price to be determined according to a specified formula or at a price determined by the court to be a fair and reasonable price;

"(i) The ordering of affirmative relief by the entry of an order permitting minority stockholders to purchase additional stock under conditions specified by the court;

"(j) An award of damages to minority stockholders as compensation for any injury suffered by them as the result of 'oppressive' conduct by the majority in control of the corporation."

See also *Brenner* v. *Berkowitz*, supra, 134 N.J. 514–15 (providing similar list of nonexclusive equitable remedies, short of dissolution, for oppressed minority shareholder).

We further note that, in fashioning a less drastic remedy, "a court should take into account not only the reasonable expectations of the oppressed minority [member], but also the expectations and interests of others associated with the company." *Bontempo* v. *Lare*, supra, 444 Md. 370. To do so necessarily requires a balancing of factors to make an equitable determination, and, therefore, is left to the sound discretion of the trial court. See

The judgment is reversed with respect to the plaintiff's claim for a dissolution of BAHR on the ground of oppression pursuant to § 34-267 (a) (5) (B), and with respect to BAHR's counterclaim for breach of fiduciary duty to the extent that the court improperly applied a six year, instead of a three year, statute of limitations, and the case is remanded for a new trial consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* JUAN J. RIVERA
(AC 42388)

DiPentima, C. J., and Alvord and Keller, Js.*

Syllabus

Convicted of the crime of breach of the peace in the second degree, the defendant appealed to this court. The defendant was involved in an altercation with an instructor at a tractor trailer training school, where he was enrolled. The altercation began in the school's student breakroom and then continued outside to a parking lot area in front of a garage on the premises. The defendant claimed that the evidence was insufficient to support a finding that the conduct giving rise to the conviction had occurred in a public place, a necessary element of the applicable statute (§ 53a-181 (a) (1)). *Held*:

1. The state could not prevail on its argument that the defendant's claim on appeal was unreviewable in that the defendant, through counsel, explicitly waived his right to have the state prove beyond a reasonable doubt that the altercation occurred in a public place under § 53a-181 (a) (1) by conceding during closing argument that the altercation occurred in a public place, as defense counsel's remarks, whether viewed either in isolation or alongside the state's closing arguments and the court's jury instructions, did not demonstrate that the defendant intentionally relinquished or abandoned his right to have the state prove the public place element beyond a reasonable doubt.

T & M Building Co. v. *Hastings*, 194 Conn. App. 532, 551, 221 A.3d 557 (2019), cert. denied, 334 Conn. 926, 224 A.3d 162 (2020).

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

2. The evidence was not sufficient to support the defendant's conviction of breach of the peace in the second degree, as the cumulative force of the state's evidence, when viewed in the light most favorable to sustaining the verdict, was insufficient to establish beyond a reasonable doubt that the area in which the altercation occurred was a public place; the plain and ordinary meaning of "public" confirmed that the legislature intended for § 53a-181 (a) (1) to apply only to conduct that occurs on property that is held out for use by all members of the public, not just select groups, and, based on the text of the statute, its relationship to other statutes, and the plain meaning of the word "public," the meaning of the term "public place" in § 53a-181 (a) was plain and unambiguous, and the state produced no evidence showing that the area in which the altercation occurred was used or held out for use by the public, and the jury was left to speculate about the characteristics of the location.

Argued June 17—officially released September 29, 2020

Procedural History

Substitute information charging the defendant with three counts each of the crimes of breach of the peace in the second degree and threatening in the second degree, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the court, *Seeley, J.*; thereafter, the court granted the defendant's motion for judgment of acquittal as to two counts of breach of the peace in the second degree; verdict and judgment of guilty of one count of breach of the peace in the second degree, from which the defendant appealed to this court. *Reversed*; *judgment directed.*

John L. Cordani, Jr., assigned counsel, for the appellant (defendant).

Denise B. Smoker, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Alison Kubas*, special deputy assistant state's attorney, for the appellee (state).

Opinion

KELLER, J. The defendant, Juan J. Rivera, appeals from the judgment of conviction, rendered following a jury trial, of breach of the peace in the second degree

in violation of General Statutes § 53a-181 (a) (1). The defendant claims that (1) the evidence was insufficient to support a finding that the conduct giving rise to the conviction had occurred in a public place and (2) the conviction violated the constitutional prohibition against double jeopardy. With respect to the first claim, we reverse the judgment of the trial court. Because we conclude that the evidence was insufficient to support the jury's verdict of guilty, and we have reversed the judgment of conviction and ordered that the trial court render a judgment of acquittal, we need not reach the second claim.

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. The defendant was enrolled as a student at the New England Tractor Trailer Training School (school) in Somers, where he was training to get his commercial driver's license. On the morning of July 7, 2016, Walter Tarbox, an instructor at the school, entered the school's student breakroom to check in the approximately twenty-five students who were present. The defendant and several other students were seated at a table that Tarbox wanted to use to check students in for the day. When Tarbox asked to use the table, some students moved, but others, including the defendant, remained seated. The defendant stood up and began yelling at Tarbox. The defendant kept "getting into [Tarbox'] face" and was close enough to Tarbox that his nose touched Tarbox' nose. Whenever Tarbox took a step back, the defendant "kept coming forward" toward Tarbox "in a rage." The defendant called Tarbox "the 'N' word" and said that Tarbox needed to "get beat up." He then stated that he wanted to punch Tarbox in the mouth and that he and "his boys" would "come after" Tarbox and Tarbox' family.

The altercation in the breakroom lasted roughly fifteen minutes until the defendant told Tarbox that he

wanted to "go outside and fight [Tarbox]." Tarbox reasoned that going outside and away from the other students might diffuse the situation and allow him to locate a lead instructor. The two men walked outside to a parking lot area in front of a garage on the premises. While outside, the defendant continued yelling at Tarbox, calling him "the 'N' word," and saying that he would "bring his boys" and "take care of" him and his family. At times, the defendant pulled his fist back, "squar[ed] up" with Tarbox, and told Tarbox to fight him.

While outside, Tarbox used his cell phone to call Kevin Lusty, a lead instructor at the school, to inform him about the situation. Tarbox asked Lusty to meet him in front of the garage. After speaking with Tarbox about what happened, Lusty asked the defendant to join him in his supervisor's office to have a private conversation. The two sat down and began speaking about the situation, but Lusty stopped the conversation when, in his words, the defendant "started to disrespect [Tarbox]." The defendant then stood up and slammed his hands on the desk in the office. Immediately after, he said "fuck you" to Lusty and told him not to go outside if, in the defendant's words, he knew what was good for him.

The defendant went back outside and Lusty, concerned for Tarbox, followed him. The defendant, still angry, started coming toward Lusty, but went off to the side of Lusty and then began walking in front of Lusty. The defendant went toward the front of the garage again while yelling about his displeasure with the school. Lusty persuaded the defendant to go into the front of the building and then asked him to leave the premises. The defendant initially refused to leave, but left once Lusty threatened to call the police.

After the incident, Tarbox went home for the day and returned to the school two days later, where he gave a signed, sworn statement to Officer Scott Mazza

of the Somers Police Department. After receiving this statement, Mazza and another officer called the defendant. When Mazza asked the defendant about the incident, the defendant raised his voice and became, in Mazza's words, "agitated" and "angry." Mazza then asked the defendant to provide a statement to the police concerning the incident, but the defendant refused and hung up.

Pursuant to an arrest warrant, the police arrested the defendant on March 10, 2017. By substitute information, the state charged the defendant with one count of breach of the peace in the second degree in violation of § 53a-181 (a) (1), one count of breach of the peace in the second degree in violation of § 53a-181 (a) (3), one count of breach of the peace in the second degree in violation of § 53a-181 (a) (5), and three counts of threatening in the second degree in violation of General Statutes (Rev. to 2015) § 53a-62 (a). The defendant pleaded not guilty to all six counts.

A jury trial began on August 24, 2018. The state called Tarbox, Lusty, and Mazza to testify about the incident. The defendant did not call any witnesses and the court did not admit any exhibits from either party into evidence.

At the close of the state's case-in-chief, the defendant moved for a judgment of acquittal on all counts,[1] which the court granted as to the second count, breach of the peace in violation of § 53a-181 (a) (3), and the third count, breach of the peace in violation of § 53a-181 (a) (5). On August 28, 2018, the jury returned a guilty verdict on count one, breach of the peace in violation of § 53a-181 (a) (1), and found the defendant not guilty of

[1] Although defense counsel, in connection with the motion for judgment of acquittal, argued that the evidence was insufficient to support a conviction for breach of the peace in violation of § 53a-181 (a) (1), he did not advance the argument raised in claim one of this appeal, namely, that the state did not prove beyond a reasonable doubt that the incident occurred in a public place.

the remaining three counts. The defendant was sentenced to a period of six months incarceration, execution suspended, followed by one year of conditional discharge. This appeal followed.

The defendant claims that the evidence does not support the conviction of breach of the peace in the second degree because it does not support a finding that the conduct giving rise to the conviction, the altercation with Tarbox, had occurred in a public place.[2] We agree.

I

Before turning to the merits of this claim, we must first address the state's argument that it is unreviewable by this court. The state argues that the defendant, through counsel, explicitly waived his right to have the state prove every element of § 53a-181 (a) (1) beyond a reasonable doubt by conceding during closing argument that the altercation occurred in a public place. We disagree with the state's contention.

"[W]aiver is an intentional relinquishment or abandonment of a known right or privilege. . . . It involves

[2] At trial, the state's theory of the case on this count focused on the defendant's altercation with Tarbox, not with Lusty. The state's closing argument solely addressed the defendant's conduct toward Tarbox and only cited Lusty's testimony to corroborate Tarbox' account of the events. Similarly, the jury instructions on this count directed the jury's attention only to the defendant's conduct toward Tarbox.

"We assume that the fact finder is free to consider all of the evidence adduced at trial in evaluating the defendant's culpability, and presumably does so, regardless of whether the evidence is relied on by the attorneys. . . . When the state advances a specific theory of the case at trial, however, sufficiency of the evidence principles cannot be applied in a vacuum. Rather, they must be considered in conjunction with an equally important doctrine, namely, that the state cannot change the theory of the case on appeal." (Citation omitted; internal quotation marks omitted.) *State* v. *Carter*, 317 Conn. 845, 853–54, 120 A.3d 1229 (2015). Before this court, the defendant and the state focus their analysis on the defendant's conduct toward Tarbox. Thus, consistent with the state's theory of the case at trial as well as the arguments advanced on appeal, we likewise focus our analysis on whether the evidence was sufficient to prove beyond a reasonable doubt that the altercation with Tarbox occurred in a public place.

the idea of assent, and assent is an act of understanding. . . . The rule is applicable that no one shall be permitted to deny that he intended the natural consequences of his acts and conduct. . . . In order to waive a claim of law it is not necessary . . . that a party be certain of the correctness of the claim and its legal efficacy. It is enough if he knows of the existence of the claim and of its reasonably possible efficacy." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 469, 10 A.3d 942 (2011).

"It is well settled that a criminal defendant may waive rights guaranteed to him under the constitution. . . . The mechanism by which a right may be waived, however, varies according to the right at stake. . . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel. . . . When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal." (Internal quotation marks omitted.) *State* v. *Foster*, 293 Conn. 327, 337, 977 A.2d 199 (2009).

"[A]lthough there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. . . . As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney. . . . Thus, decisions by counsel are generally given effect as to what arguments to pursue . . . what evidentiary objections to raise . . . and what agreements to conclude regarding the admission of evidence . . . . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." (Internal quotation marks omitted.) *State* v. *Kitchens*,

supra, 299 Conn. 467–68, quoting *New York* v. *Hill*, 528 U.S. 110, 114–15,120 S. Ct. 659, 145 L. Ed. 2d 560 (2000).

"Courts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." (Internal quotation marks omitted.) *State* v. *Shockley*, 188 Conn. 697, 707, 453 A.2d 441 (1982), quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). "[A] waiver of a fundamental constitutional right is not to be presumed from a silent record." *State* v. *Shockley*, supra, 707, citing *Boykin* v. *Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). For a waiver to be effective, "it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." (Internal quotation marks omitted.) *Brookhart* v. *Janis*, 384 U.S. 1, 4, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966).

Although it is a fundamental aspect of due process that the state must prove beyond a reasonable doubt each element of an offense, a defendant may concede that the state has sustained its burden of proof with respect to one or more elements. *State* v. *Cooper*, 38 Conn. App. 661, 669–70, 664 A.2d 773, cert. denied, 235 Conn. 908, 665 A.2d 903 (1995), cert. denied, 517 U.S. 1214, 116 S. Ct. 1837, 134 L. Ed. 2d 940 (1996). Connecticut courts have never required an express waiver of the right to require the state to prove each element of a crime. Id., 670.

Having examined the applicable principles of law, we turn to the facts that the state argues implicate waiver in the present case. While speaking to the jury during closing argument about the three elements the state must prove under § 53a-181 (a) (1), defense counsel stated in relevant part: "So, the judge is going to instruct you on a number of things. He's going to instruct you on the law about what—oh, one more thing on the

breach of [the] peace. You also have to find that the inconvenience, annoyance and alarm that was caused by—all that going on with [the defendant] went on and actually caused alarm. *It has to be taking place in a public place, so I'll give you that. It was a public place. It was the New England Training School, New England Tractor Training School, and there* [*were*] *twenty-five people there.*

"You also have to find that it caused inconvenience, annoyance and alarm to the other twenty-five students. There is not testimony that that happened at all.

"All we heard was that they were there, but we didn't hear any testimony that any of them were alarmed, that any of them were upset. Nobody came in here to testify that they were. All we heard was Mr. Tarbox say, oh, they were there, that he was concerned about them, but there [were] no students who came and said that they were concerned, that they were upset." (Emphasis added.)

Defense counsel then stated: "And remember you've got to find each and every element be proven beyond a reasonable doubt—not just one, not just half of one—each and every element of the crime must be proven beyond a reasonable doubt in order to find somebody guilty."

Following the completion of defense counsel's closing argument, the state conducted its rebuttal closing argument. The state first argued: "Now, you just heard a lot from the defense attorney, and I'll start off with first the breach of [the] peace claim. The state does not have to make a showing there was an actual inconvenience, annoyance or alarm in the public, but rather just that the incident took place in a public location.

"In this case there was testimony that the incident with [Tarbox] and the defendant occurred at the New

England Tractor Trailer School, where at least twenty-five other students were present, and I would argue that that is a public place." After the state finished delivering its rebuttal argument, the jury exited the courtroom and the court had a short discussion with the attorneys that did not involve the public place element. After a brief recess, the court called the jury back into the courtroom to receive jury instructions.[3]

The court instructed the jury in relevant part that, if "the state fails to meet its burden of proof as to one or more essential elements of that offense, the presumption of innocence alone will require that [the defendant] be found not guilty of that offense." The court also stated that "[a]ny argument or statement by a lawyer is not evidence."

When the court instructed the jury on the essential elements of § 53a-181 (a) (1), it stated that, "[i]f you were to find the defendant guilty of this offense the state must prove the following three [elements] beyond a reasonable doubt: (1) With intent to cause inconvenience, annoyance or alarm or recklessly creating a risk thereof; (2) [t]he defendant engaged in violent, tumultuous or threatening behavior; and (3) [t]hat the conduct occurred in a public place."

When instructing the jury regarding the third element, the court stated: "The third element the state must prove beyond a reasonable doubt is that the conduct occurred in a public place. Public place means any area that is used or held out for use by the public whether

[3] During oral argument before this court, the state contended that the trial court instructed the jury about the public place element because the court gave its jury instructions immediately after the state finished its rebuttal. Therefore, the state argued, there was no opportunity for the trial court to reconfigure the jury instructions to account for the alleged waiver. The discussion between the trial court and the attorneys that took place after the state's rebuttal argument, along with the brief recess thereafter, undermines this contention.

owned or operated by public or private interests." The court concluded its instructions on this count by reminding the jury that the state was required to prove beyond a reasonable doubt all three elements, including that the offense occurred in a public place.

On appeal, the state argues that defense counsel's statement that the conduct "[had] to be taking place in a public place, so I'll give you that. It was a public place," was tantamount to a waiver by the defendant of his right to require the state to prove beyond a reasonable doubt the public place element of § 53a-181 (a) (1). In support of this argument, the state directs our attention to the defendant's failure to challenge the sufficiency of the evidence of the public place element in his motion for a judgment of acquittal, despite having raised such claims with respect to the other two elements of § 53a-181 (a) (1). The state asserts that by waiving the right to require the state to prove this element, the defendant's claim is unreviewable by this court.[4]

[4] The state also argues that the defendant does not satisfy the third prong of *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). "Under *Golding*, a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. . . . The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new trial." (Citation omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Kitchens*, supra, 299 Conn. 466–67.

"A defendant in a criminal prosecution may waive one or more of his or her fundamental rights. . . . [I]n the usual *Golding* situation, the defendant raises a claim on appeal [that], while not preserved at trial, at least was not waived at trial. . . . [A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation clearly exists and clearly deprived the defendant of a fair trial . . . ." (Citation omitted; internal quotation marks omitted.) Id., 467.

The defendant argues that defense counsel's remarks did not constitute a waiver of his constitutional right to be convicted only upon sufficient evidence. First, he asserts that he personally would have had to waive this right in order for the waiver to be valid. Second, he argues that defense counsel's statement did not constitute a waiver and, instead, could be viewed as "an *assumption* for the sake of an argument relating to the 'inconvenience' prong of the statute." (Emphasis in original.) Third, he contends that the court's jury instructions reflect that neither the state nor the court understood defense counsel's remarks to constitute a waiver and that, ultimately, the jury was instructed that the state bore the burden of proving each element of the offense beyond a reasonable doubt.

We conclude that this statement did not constitute an express waiver. First, the remarks made by defense counsel are ambiguous and reasonably may be construed to pertain to a different element of § 53a-181 (a) (1). At the time defense counsel made these remarks, she was discussing how the state must prove beyond a reasonable doubt that the defendant acted with the "intent to cause inconvenience, annoyance or alarm, or that he recklessly created a risk thereof . . . ." General Statutes § 53a-181 (a). As the defendant argues in his reply brief, defense counsel might have been assuming for the sake of argument that, even if the state had proved that the altercation occurred in a public place, it would still need to prove this other element. By noting that there were other students in the breakroom, defense counsel was focused on the effects of the defendant's actions on those around him to articulate why the state had not proven this element.

Because we find that the defendant did not waive his claim at trial, it is not necessary for us to determine whether the defendant met this prong of *Golding*.

Further, defense counsel repeatedly stated that there were twenty-five people present, which demonstrates that her statement that "[i]t was a public place" arguably pertained only to the portion of the alleged altercation that had occurred in the breakroom. Thus, even if we were to assume that defense counsel had intended to waive the defendant's right to challenge the sufficiency of the evidence as to the public place element, her remarks suggest that she had a misunderstanding of the meaning of "public place" within the statute, which only concerns a place's use and not merely the number of persons to which it is accessible. See General Statutes § 53a-181 (a) ("[f]or purposes of this section, 'public place' means any area that is used or held out for use by the public whether owned or operated by public or private interests"). The number of people present when an altercation occurs has no bearing on whether a place falls within this definition.

Second, even if the statement was unambiguous, neither the state nor the trial court recognized defense counsel's statement as a waiver. During the state's rebuttal closing argument, the prosecutor argued that the state had proved the public place element beyond a reasonable doubt. She made no mention of the supposed waiver that occurred just moments before. The court, in its instructions, articulated multiple times that the state was required to prove the public place element beyond a reasonable doubt. The court instructed the jury that one of the essential elements of the offense was that it occurred in a public place and provided the jury with the statutory definition of "public place," which removed any confusion that defense counsel's statement might have created. Additionally, the court reminded the jury that any statement by an attorney was not evidence. Neither the state nor the defendant objected to the court's instructions on this ground.

The state claims that defense counsel's statement was an explicit waiver, yet it relies on inapplicable cases in which our courts have found that defendants have made implicit waivers by failing to reject jury instructions that they later challenged on appeal. The state primarily discusses *State* v. *Cooper*, supra, 38 Conn. App. 669, a case in which a defendant, through counsel, implicitly waived his right to have the state prove beyond a reasonable doubt an element of a crime of which he was found guilty. In *Cooper*, the defendant was convicted under General Statutes § 14-227a (a) of operating a motor vehicle on Interstate 84 (I-84) while under the influence of alcohol. Id., 662–63. This statute required the state to prove beyond a reasonable doubt that the defendant had operated a vehicle on a public highway. Id., 666. To satisfy its burden, the state introduced evidence that the state Department of Transportation maintains I-84 and called a police sergeant to testify, without objection, that I-84 is a public highway. Id., 667–68. During closing arguments, the prosecutor stated, without objection, that there was uncontroverted evidence that the incident occurred on a public highway and told the jury that the judge would instruct them that it was public. Id., 668. The trial court then instructed the jury "that the highway in question is a public highway. So you need not deal with that element and you need not make that finding." (Internal quotation marks omitted.) Id., 664. On appeal, the defendant claimed that the trial court improperly instructed the jury as to this element. Id.

Cooper is factually distinguishable from the present case. Here, as we will discuss in greater detail later in this opinion, the state produced no evidence that the altercation had occurred in a public place. On the contrary, there are several pieces of testimony that suggest that the area in question was not open to the public.

Next, the prosecutor did not assert in her rebuttal closing argument that the defendant had conceded this element. Instead, she argued that the state had proven this element beyond a reasonable doubt. Finally, the defendant does not challenge the jury instructions, as they included detailed instructions concerning the element that the state now argues the defendant conceded at trial.

Defense counsel's remarks, whether viewed either in isolation or alongside the state's closing arguments and the court's jury instructions, do not demonstrate that the defendant intentionally relinquished or abandoned his right to have the state prove the public place element of § 53a-181 (a) (1) beyond a reasonable doubt. Accordingly, we are not persuaded that a waiver occurred.

II

We next address the defendant's claim that the evidence did not support a finding that the altercation with Tarbox occurred in a public place for purposes of § 53a-181 (a) (1).[5] We agree.

We begin by setting forth the standard of review for claims of evidentiary insufficiency in a criminal appeal. "The standard of review we apply to a claim of insufficient evidence is well established. In reviewing the sufficiency of the evidence to support a criminal conviction

[5] The record reflects that the defendant did not preserve this sufficiency claim for appellate review. The claim is nonetheless reviewable on appeal. See *State* v. *Lewis*, 303 Conn. 760, 767 n.4, 36 A.3d 670 (2012) ("To the extent that the defendant's sufficiency claims were unpreserved, we observe that 'any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989)]. There being no practical significance, therefore, for engaging in a *Golding* analysis of an insufficiency of the evidence claim, we will review the defendant's challenge to his conviction . . . as we do any properly preserved claim.' *State* v. *Adams*, 225 Conn. 270, 276 n.3, 623 A.2d 42 (1993).").

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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"In evaluating evidence, the [finder] of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The [finder of fact] may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . .

"On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Dojnia*, 190 Conn. App. 353, 371–72, 210 A.3d 586, cert. granted on other grounds, 333 Conn. 914, 215 A.3d 1211 (2019).

Section 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance

or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . .''

To prove a breach of the peace in violation of § 53a-181 (a) (1), the state must prove beyond a reasonable doubt that ''(1) the defendant engaged in fighting or in violent, tumultuous or threatening behavior, (2) that this conduct occurred in a public place and (3) that the defendant acted with the intent to cause inconvenience, annoyance or alarm, or that he recklessly created a risk thereof.'' (Internal quotation marks omitted.) *State* v. *Colon*, 117 Conn. App. 150, 158, 978 A.2d 99 (2009). Section 53a-181 (a) defines ''public place'' as ''any area that is used or held out for use by the public whether owned or operated by public or private interests.''

We next turn to the evidence that is related to the disputed essential element. At trial, Tarbox testified that after he and the defendant left the breakroom, their altercation continued outside of a garage at the school. During cross-examination, the following exchange occurred between defense counsel and Tarbox:

''Q. You were outside your garage. Correct?

''A. Correct.

''Q. Well, were you backed up against the wall?

''A. We [were] in the corner of the building. The building is a—it's a corner and there's a door. The door is right there.

''Q. Well, you walked out with him and you were trapped?

''A. No. I started walking out into the parking lot.

''Q. Okay. So you started walking into the parking lot.

''A. And—

"Q. Okay.

"A. Because it's all open, the building, and then you come out the door and it's open but they park trucks to the left."

Tarbox also testified that he asked Lusty to come to the front of the garage through the student breakroom door, which was "by the garage." Lusty corroborated this testimony when he described the altercation by testifying in relevant part, "I went out into the front of the garage where [Tarbox] was standing and there was a student who was irate at the time and [Tarbox] was trying to get my attention."

During the state's direct examination, the following exchange occurred between the prosecutor and Tarbox:

"A. We have a special—we have a separate parking place for our vehicles because we work there versus students.

"Q. So when you say our vehicles, you mean the employees?

"A. The employees.

"Q. And you stated that the students walk through that parking lot?

"A. They walk by our vehicles all the time."

Additionally, Lusty testified during his direct examination that, after his conversation with the defendant in his supervisor's office, the defendant "started going toward the front of the garage, again . . . ." Lusty then stated, "I got [the defendant] into the front of the building and I asked him to leave the facility."

The defendant argues that the state introduced insufficient evidence to prove beyond a reasonable doubt that the defendant was in a "public place" during the altercation with Tarbox. He notes that the definition of

"public place" in § 53a-181 (a) is concerned with how the property on which an incident takes place is used, and not with factors such as visibility to the public and the number of people present. He contends that the state introduced "no evidence" to prove that the breakroom or the area outside the garage were used or held out for use by the public. In fact, he argues, "safety concerns would be raised by allowing the public access to a tractor trailer garage area."

To bolster his argument, the defendant points to other statutes within our Penal Code, which we will discuss, that have broader definitions of "public place." He argues that these statutes demonstrate that, among other things, our legislature did not intend for § 53a-181 (a) (1) to extend to all commercial settings. Instead, according to the defendant, it applies only to places "where any member of the public may freely enter without specific invitation, such as a public park, a road, a grocery store, a museum, or a shopping mall." He notes that General Statutes § 53a-182 (a) (1), Connecticut's disorderly conduct statute, covers the same conduct as § 53a-181 (a) (1), but also applies when the conduct occurs in nonpublic places. He adds that the plain and ordinary meaning of the word "public" confirms that a "public place" is one that must be held out for use by "all" in the "entire community."

The state argues that a jury could have reasonably found that the area in front of the school's garage met the definition of "public place" in § 53a-181 (a). Through its brief and its statements made at oral argument, the state concedes that the breakroom does not meet this definition. The state, however, points to Tarbox' testimony that the outdoor area where the altercation took place was "all open, the building and then you come out the door and it's open but they park trucks to the left." At oral argument before this court, the state conceded that this testimony was the only evidence proving

that the area outside of the garage was a "public place." In its brief, the state emphasizes that there is no evidence that the property was "fenced in or that access was otherwise restricted in any way."

Because there is no Connecticut case law interpreting "public place" under § 53a-181 (a), the state relies on *State* v. *Cutro*, 37 Conn. App. 534, 657 A.2d 239 (1995), a case in which the defendant was convicted of public indecency in violation of General Statutes § 53a-186 (a) (2) for an incident that occurred in a mall parking lot. Id., 535–36. The state cites to cases from other states to strengthen its position that "parking lots on private property, open to the public, are public places," and that a key factor for courts to consider is a parking lot's "accessibility to the public."

In order to rule on the defendant's claim, we must interpret the term "public" that is defined in § 53a-181 (a). We begin by setting forth the guiding principles of statutory interpretation. General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." "The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *State* v. *Brown*, 310 Conn. 693, 702, 80 A.3d 878 (2013).

"[W]hen the statute being construed is a criminal statute, it must be construed strictly against the state and in favor of the accused. . . . [C]riminal statutes [thus] are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant. . . . Rather,

penal statutes are to be construed strictly and not extended by implication to create liability which no language of the act purports to create." (Citations omitted; internal quotation marks omitted.) *State* v. *LaFleur*, 307 Conn. 115, 126–27, 51 A.3d 1048 (2012).

The legislature expressly intended § 53a-181 (a) (1) to apply only to conduct that occurs on property "used or held out for use by the public . . . ." Despite the fact that the legislature defined "public place" as that term is used in § 53a-181 (a) (1), it did not define the word "public." "In the absence of a definition of terms in the statute itself, [w]e may presume . . . that the legislature intended [a word] to have its ordinary meaning in the English language, as gleaned from the context of its use. . . . Under such circumstances, it is appropriate to look to the common understanding of the term as expressed in a dictionary." (Internal quotation marks omitted.) *Efstathiadis* v. *Holde*r, 317 Conn. 482, 488, 119 A.3d 522 (2015), quoting *State* v. *LaFleur*, supra, 307 Conn. 128. Thus, looking at the plain and ordinary meaning of the word "public" sheds light on the definition of "public place" as it applies to § 53a-181 (a). When used as an adjective, Black's Law Dictionary defines "public" as: "1. Of, relating to, or involving an entire community, state, or country. 2. Open or available for all to use, share, or enjoy. 3. (Of a company) having shares that are available on an open market." Black's Law Dictionary (11th Ed. 2019), p. 1483. As the defendant notes in his brief, the plain and ordinary meaning of "public" confirms that the legislature intended for § 53a-181 (a) (1) to apply only to conduct that occurs on property that is held out for use by all members of the public, not just select groups.

Section 1-2z next directs us to look at the relationship of § 53a-181 (a) (1) to other statutes. The relationship between § 53a-181 (a) (1) and other statutes further reveals the legislature's intended meaning of the word

"public." The term "public place" appears in four other sections of the penal code. General Statutes § 53a-180aa (a), which defines breach of the peace in the first degree, uses the same definition as that used in § 53a-181 (a). Section 53a-182 (a) (6), which defines disorderly conduct, uses the term "public place," but does not define it. The two remaining statutes, which we will discuss, illustrate why the legislature's use of "public place" in § 53a-181 (a) (1) is narrower in scope than the state argues.

First, § 53a-186 (a), Connecticut's public indecency statute, defines "public place" as "any place where the conduct may reasonably be expected to be viewed by others." This statute criminalizes the performance of certain lewd acts in a public place, which presumably is why the definition focuses on the visibility of the place where the acts take place, rather than the place's use. If the legislature intended § 53a-181 (a) (1) to extend to conduct that occurs within view of members of the public, it could have included similar language in the statute's definition. Instead, we may presume from the definition applicable to § 53a-181 (a) (1) that the legislature was not concerned with this characteristic for the purpose of breach of the peace.

Second, General Statutes § 53a-189c criminalizes the unlawful dissemination of an intimate image. Subsection (b) of § 53a-189c provides that the provisions of subsection (a) do not apply to, inter alia, "[a]ny image . . . of such other person if such image resulted from voluntary exposure or engagement in sexual intercourse by such other person, in a public place, as defined in section 53a-181, *or in a commercial setting* . . . ." (Emphasis added.) "We presume that the legislature did not intend to enact meaningless provisions. . . . [S]tatutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant . . . ." (Internal quotation marks omitted.) *State* v. *LaFleur*, supra, 307 Conn. 126. The addition of the phrase "or in a commercial setting" reflects

that the legislature recognized that there are commercial settings that are not used or held out for use by the public. We may presume that, if the legislature intended for § 53a-181 (a) to apply to conduct in all commercial settings, it would have included this clause or similar language in the statute's definition.

The legislature enacted § 53a-182 (a) (1) to cover altercations that occur in commercial settings that are not used or held out for use by the public. This subsection, which criminalizes disorderly conduct, mirrors the language of § 53a-181 (a) (1), but does not contain the term "public place." See *State* v. *Taveras*, 183 Conn. App. 354, 376 n.17, 193 A.3d 561 (2018) ("[w]e note that elements of breach of the peace in the second degree are identical to the elements of disorderly conduct, except that breach of the peace in the second degree requires that the proscribed conduct occur in a public place"). In *State* v. *Indrisano*, 228 Conn. 795, 799–800, 640 A.2d 986 (1994), for example, the defendant was convicted of disorderly conduct under § 53a-182 (a) (1) for an altercation that took place in the common area of an office space that the victim shared with another tenant. The existence of the disorderly conduct statute further illustrates that § 53a-181 (a) (1) does not cover commercial settings that are not open to the public.

On the basis of the text of § 53a-181 (a), its relationship to other statutes, and the plain meaning of the word "public," we are persuaded that the meaning of the term "public place" is plain and unambiguous and does not yield absurd or unworkable results. It is therefore not necessary for us to look to extratextual evidence of its meaning.

The cases that the state cites in support of its interpretation of the statute are unpersuasive. *Cutro*, the main case on which the state relies, is inapplicable to the case before us, as it involves a different statute with its own definition of "public place." *State* v. *Cutro*,

supra, 37 Conn. App. 535. As we discussed previously, the defendant in *Cutro* was convicted of public indecency in violation of § 53a-186 (a) (2), which defines "public place" as "any place where the conduct may reasonably be expected to be viewed by others." Id., 535 n.1. This court, in *Cutro*, reasoned that the jury had sufficient evidence from which it could conclude that the defendant's automobile, which was parked in a mall parking lot, met this definition. Id., 543–44. It does not follow, however, that every parking lot is a public place. The state must still prove that the lot is used or held out for use by the public. If anything, *Cutro* weakens the state's argument by highlighting the contrast between this definition and the definition contained within § 53a-181 (a).

We are not persuaded by the out-of-state cases that the state cites, as the cases apply different breach of the peace statutes and do not shed light on the meaning of § 53a-181 (a). The state does not indicate if these statutes define "public place," nor does it attempt to articulate how the statutes are analogous to § 53a-181 (a). Thus, these cases do not add to what we can glean from the definition of "public place" in § 53a-181 (a), this definition's relationship to other definitions of "public place" within the Penal Code, and the plain meaning of the word "public."

We turn now to the defendant's claim that the state did not produce sufficient evidence to prove the "public place" element in § 53-181 (a) (1) beyond a reasonable doubt. When construing the evidence in the light most favorable to sustaining the verdict, we are unable to conclude that a jury could have reasonably found that the area outside of the garage was a public place.

The state produced no evidence showing that this area was used or held out for use by the public. The prosecutor did not ask its witnesses for details about this area, such as whether prospective students or other

members of the public used it to park. The state did not proffer into evidence maps or photographs to demonstrate that entry to the area was unrestricted. Instead, the jury was left to speculate about the characteristics of the location.

The only evidence that the state can point to is Tarbox' testimony that the area in front of the garage was "all open." This testimony is ambiguous because it is unclear what Tarbox was referencing when he used the phrase "all open." It is unreasonable to infer from this vague language that Tarbox meant that the area was accessible by members of the public generally, rather than just to students and staff of the school. He made this comment after clarifying that he was in the corner of the building, but not trapped near the wall. He proceeded to say that he walked into the parking lot. Thus, he could have been explaining that he and the defendant were outside of the building, as opposed to the doorway through which they came and the garage outside of which they stood. It is also unclear if Tarbox was describing the character of the parking lot itself, as opposed to its openness to the public. The parking lot could have been large and physically open to accommodate the trucks parked to the left, but contained signs, fencing, or a gate to restrict public access.

When viewing Tarbox' "all open" comment alongside other testimony, it is even more probable that a jury could have inferred that the area outside of the garage was not open to the public. First, Tarbox testified that employees had their own parking lot, which meant that there were multiple parking lots on the school's premises. Further, the existence of a parking lot that was "all open," except for trucks parked on the left, could imply that the roughly twenty-five students who were at the school at the time were not allowed to park there. One possible explanation is that this parking lot was only for tractor trailers. Second, Tarbox' testimony

about these trucks indicates that vehicles, presumably tractor trailers, drove through that particular parking lot, and possibly in and out of the garage. Thus, it is reasonable to infer that there would be a large area that was "all open" for drivers to maneuver these trucks. When combined with Tarbox' testimony that the incident occurred in front of the garage, and Lusty's testimony corroborating this statement, one could reasonably infer that the school had an interest in keeping members of the public away from this area. Third, Lusty's testimony that he led the defendant to the front of the building before asking him to leave suggests that the garage area did not have a means of egress. Without more evidence, a jury could not reasonably draw the inference that the school held out this area for use by the public.

The cumulative force of the state's evidence, even when viewed in the light most favorable to sustaining the verdict, was insufficient to establish beyond a reasonable doubt that the area in which the altercation occurred was a public place as required by § 53a-181 (a) (1). For the foregoing reasons, we conclude that there is no reasonable view of the evidence that supports the jury's verdict of guilty.

"[A] defendant convicted on the basis of insufficient evidence is entitled to a judgment of acquittal." *State* v. *Soto*, 175 Conn. App. 739, 746, 168 A.3d 605, cert. denied, 327 Conn. 970, 173 A.3d 953 (2017). Therefore, we must reverse the judgment of conviction.

The judgment is reversed and the case is remanded with direction to render a judgment of acquittal.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* RICARDO K. WILLIAMS (AC 43226)

DiPentima, C. J., and Lavine and Bright, Js.*

Syllabus

Convicted, after a jury trial, of sexual assault in the first degree, sexual assault in the fourth degree and risk of injury to a child, the defendant appealed to this court. He claimed that he was entitled to a new trial on the basis of alleged prosecutorial improprieties during the state's closing argument and the state's examination of its witnesses, which resulted in a denial of his due process right to a fair trial, and that the evidence was insufficient to support the mandatory minimum sentence imposed by the court pursuant to statute (§ 53a-70 (b) (2)). *Held*:

1. The defendant could not prevail on his claim that he was deprived of his right to a fair trial as a result of alleged prosecutorial improprieties: the prosecutor's references to the complainant as the "victim" did not constitute prosecutorial impropriety as the prosecutor's use of the word "victim" was relatively infrequent, the court repeatedly instructed the jurors that the arguments of counsel were not evidence, the prosecutor reminded the jury at the beginning of her rebuttal that closing arguments were "arguments," and, when defense counsel objected to the prosecutor's use of the word "victim" during closing argument, the trial court sustained the objection and immediately instructed the jury to disregard it, whereby the prosecutor promptly apologized in front of the jury; moreover, the prosecutor's statements expressing her opinion on the credibility of the victim during closing argument were proper argument because they reflected reasonable inferences that the jury could have drawn from the evidence produced at trial, and, as it was the defendant's theory of defense that the evidence showed that that the victim made up the allegations against the defendant, the prosecutor was allowed to address that argument in her closing argument; furthermore, the prosecutor did not improperly elicit comments on the credibility of the victim from the state's witnesses, as the witnesses' inappropriate answers to otherwise proper questions did not constitute prosecutorial impropriety.
2. The defendant's unpreserved claim that there was insufficient evidence for the jury to find beyond a reasonable doubt that the victim was under ten years of age at the time of the first sexual assault to support the mandatory minimum sentence imposed by the court pursuant to § 53a-70 was unavailing, as the victim testified that she was nine years old at the time of the first sexual assault, and this testimony, in conjunction

* The listing of judges reflects their seniority status on this court as of the date the appeal was submitted on briefs.

with her testimony concerning the dates of the other incidents, provided a sufficient evidentiary basis for the jury to answer the interrogatory in the affirmative; moreover, even though the jury was presented with conflicting evidence as to the victim's age at the time of the first sexual assault, the jury was free to believe the victim's testimony that she was nine years old at the time, and, therefore, this court concluded that the evidence was sufficient to support the jury's finding.

Submitted on briefs April 6—officially released September 29, 2020

Procedural History

Substitute information charging the defendant with two counts of the crime of sexual assault in the first degree and one count each of the crimes of sexual assault in the fourth degree and risk of injury to a child, brought to the Superior Court in the judicial district of New Haven, geographical area number twenty-three, and tried to the jury before *Vitale, J.*; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed.*

Alice Osedach, assistant public defender, for the appellant (defendant).

Samantha L. Oden, deputy assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Mary A. Sanangelo*, senior assistant state's attorney, and *Maxine Wilensky*, senior assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Ricardo K. Williams, appeals from the judgment of conviction, rendered after a jury trial, of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2), one count of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2013) § 53a-73a (a) (1) (A) and one count of risk of injury to a child in violation of General Statutes § 53-21 (a) (1). On appeal, the defendant claims that (1) he was deprived of the right to a fair trial as a result of prosecutorial

impropriety and (2) the evidence was insufficient to support the mandatory minimum sentence imposed by the court under § 53a-70 (b) (2). We are not persuaded and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. In 2012, the victim[1] lived on the second floor of a multifamily apartment with her mother and her siblings. The defendant was in a relationship with the victim's mother at the time and often would spend the night at the apartment.

In the autumn of 2012, when the victim was nine years old, she was sleeping on the couch in the living room of the apartment. She awoke to the defendant hovering over her. The defendant picked her up, carried her into her bedroom, laid her on her back on the bed and, after putting on a condom, sexually assaulted her by vaginal intercourse, causing her to bleed and to experience pain.

A second incident occurred sometime that winter, after the victim and her family had moved to a new apartment. On that night, the victim and her younger brother had fallen asleep on the floor of their playroom. She awoke to the defendant tapping her and telling her to come into the adjoining living room. The defendant laid her on the floor, removed her underwear and sexually assaulted her, also by vaginal intercourse.

A third incident occurred on December 14, 2013. That morning, the victim was lying on the bed in her sibling's bedroom. The defendant, who had been making breakfast, entered the room, got onto the bed with the victim and kissed the victim's mouth and neck, as well as her chest, breasts, stomach, vagina and inner thighs above

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

the clothes. The assault ended when the victim's mother called for the defendant. On June 18, 2015, the victim met with Brian Schweinsburg, a clinical psychologist specializing in neuropsychology, in New Haven. Her mother had arranged the appointment due to her concerns about the victim's increased levels of depression and recent suicide attempts. Schweinsburg conducted an assessment interview with the victim, who revealed that the defendant had "raped" her on multiple occasions. Following the interview, Schweinsburg arranged for an ambulance to transport the victim to the hospital for further psychiatric evaluation. Schweinsburg also made oral and written reports to the Department of Children and Families (department) regarding the victim's disclosure of the sexual assaults.

The victim was discharged from the hospital the following morning and returned to her mother's apartment. That day, a department investigator made an unannounced visit to the home, but was denied access by the victim's mother. On July 8, 2015, the victim was brought to Yale New Haven Hospital for a forensic interview regarding her disclosures of sexual assault by the defendant. Following the interview, Lisa Pavlovic, a physician at the Yale Child Abuse Clinic, conducted a medical examination of the victim. The examination revealed that the victim had suffered a penetrating injury to her vagina.

Thereafter, on July 29, 2015, Kristine Cuddy, a detective with the New Haven Police Department, interviewed the defendant concerning the victim's allegations. In October, 2015, the defendant was arrested and, in a 2017 long form information, was charged in counts one and two with sexual assault in the first degree, in count three with sexual assault in the fourth degree and in count four with risk of injury to a child. The case proceeded to a trial by jury on that information. On January 11, 2018, the jury found the defendant guilty

of all counts. The jury, in response to a written interrogatory, specifically found that the victim was under ten years of age at the time of the sexual assault alleged in the first count of the long form information.

Following the verdict, the defendant filed a motion for new trial nunc pro tunc, claiming prosecutorial impropriety. The court denied the motion and thereafter sentenced the defendant on count one to ten years of incarceration in accordance with the statutory minimum under § 53a-70 (b) (2),[2] followed by five years of special parole, on count two to ten years of incarceration, five years mandatory, followed by five years of special parole, on count three to two years and one day of incarceration followed by two years of special parole, all to be served consecutively, and on count four to ten years of incarceration to be served concurrently to all of the other counts, for a total effective term of twenty-two years and one day of incarceration, fifteen years of which are mandatory, followed by twelve years of special parole. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that he was deprived of the right to a fair trial as a result of prosecutorial impropriety. Specifically, he argues that the prosecutor's impropriety during direct examination and closing arguments deprived him of his due process right to a fair trial. The defendant contends that the prosecutor acted improperly in three ways: (1) by referring to the complainant as the "victim," (2) by expressing her opinion

[2] General Statutes § 53a-70 (b) (2) provides in relevant part: "Any person found guilty under said subdivision (1) or (2) shall be sentenced to a term of imprisonment of which ten years of the sentence imposed may not be suspended or reduced by the court if the victim is under ten years of age or of which five years of the sentence imposed may not be suspended or reduced by the court if the victim is under sixteen years of age."

concerning the credibility of the victim in closing argument and (3) by eliciting comments on the credibility of the victim from the state's witnesses. In the alternative, he argues that this court should exercise its supervisory powers to reverse his conviction because of "the flagrant prosecutorial improprieties in this case." We disagree with the first argument and decline the invitation to consider the alternative argument.

The record reveals that the defendant did not specifically object to all of the alleged instances of impropriety that he now claims. This failure does not preclude our review. It is well settled that "a defendant who fails to preserve claims of prosecutorial [impropriety] need not seek to prevail under the specific requirements of *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)], and, similarly, it is unnecessary for a reviewing court to apply the four-pronged *Golding* test. . . . The reason for this is that the defendant in a claim of prosecutorial [impropriety] must establish that the prosecutorial [impropriety] was so serious as to amount to a denial of due process . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Warholic*, 278 Conn. 354, 360, 897 A.2d 569, 578 (2006); accord *State* v. *Payne*, 303 Conn. 538, 560, 34 A.3d 370, 386 (2012).

Accordingly, we undertake our review of these claims with a two step analysis. It is well established that "[i]n analyzing claims of prosecutorial [impropriety], we engage in a two step analytical process. The two steps are separate and distinct: (1) whether [impropriety] occurred in the first instance; and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial. . . . [W]hen a defendant raises on appeal a claim that improper remarks by the prosecutor deprived the defendant of his constitutional right to a fair trial, the burden is on the defendant to show . . .

that the remarks were improper . . . .'' (Citation omitted; internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 761–62, 51 A.3d 988 (2012).

''If we conclude that prosecutorial impropriety occurred, we then decide whether the defendant was deprived of his due process right to a fair trial by considering [the factors set forth in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987)] [1] the extent to which the [impropriety] was invited by defense conduct or argument . . . [2] the severity of the [impropriety] . . . [3] the frequency of the [impropriety] . . . [4] the centrality of the [impropriety] to the critical issues in the case . . . [5] the strength of the curative measures adopted . . . and [6] the strength of the state's case. . . . As is evident upon review of these factors, it is not the prosecutor's conduct alone that guides our inquiry, but, rather, the fairness of the trial as a whole.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Albert D.*, 196 Conn. App. 155, 162–63, 229 A.3d 1176, cert. denied, 335 Conn. 913, 229 A.3d 118 (2020). With those principles in mind we address each of the defendant's claims of impropriety in turn.

A

The defendant first claims that the prosecutor acted improperly by referring to the complainant as the ''victim'' during closing argument.[3] Specifically, the defendant directs us to the following four statements. First,

[3] As part of this claim, the defendant also argues that the prosecutor acted improperly by referring to the complainant as the ''victim'' during the voir dire of two venirepersons. The state correctly notes that neither of these venirepersons actually served on the jury. We agree with the state that because neither of the venirepersons served on the jury, these alleged instances of impropriety cannot have unduly influenced the jury's decision making or otherwise denied the defendant his due process right to a fair trial. See *State* v. *Thompson*, 146 Conn. App. 249, 268–69, 76 A.3d 273 (noting that prosecutor referring to complainant as ''victim'' risks improper communication *to jury*), cert. denied, 310 Conn. 956, 81 A.3d 1182 (2013). We therefore conclude that this argument is without merit.

the prosecutor stated: "There is a stipulation in this case about the ages and the dates of birth, so you don't have to say oh, how old was the defendant or how old was the victim you have their dates of birth." Second, the following exchange occurred:

"[The Prosecutor]: The victim testified a week ago, a little over a week ago—

"[Defense Counsel]: Objection as to the use of the term victim, Your Honor.

"The Court: Sustain the objection. Jury disregard it.

"[The Prosecutor]: I'm sorry, I apologize. The complainant. We are not calling her a victim; I apologize."

Third, the prosecutor stated: "It sounds like [the defendant] was a good authority figure in the house, maybe a little stability to a crazy mother, but maybe that made her a perfect victim." Finally, the prosecutor commented that "[h]e just pulls up his pants and leaves and leaves her there. She was the perfect victim." The state argues that these statements, given their infrequency and context, do not amount to impropriety. We agree with the state.

In cases where the use of the term "victim" is at issue, "[o]ur Supreme Court has stated that a *court's* repeated use of the word victim with reference to the complaining witness is inappropriate when the issue at trial is whether a crime has been committed. . . . A different set of circumstances exists when the person making reference to the complaining witness is the prosecutor." (Emphasis added.) *State* v. *Rodriguez*, 107 Conn. App. 685, 701, 946 A.2d 294, cert. denied, 288 Conn. 904, 953 A.2d 650 (2008).

"This is so, our courts have held, for two basic reasons. First, although a prosecutor's reference to the complainant as the 'victim,' in a trial where her alleged victimization is at issue, risks communicating to the

jury that the prosecutor personally believes that she in fact is a victim, and thus the defendant is guilty of victimizing her, the isolated or infrequent use of that term in a trial otherwise devoid of appeals to passion or statements of personal belief by the prosecutor will probably be understood by jurors to be consistent with the prosecutor's many proper references to the complainant as the complainant or the alleged victim, particularly where the prosecutor openly acknowledges and willingly accepts the state's burden of proving the defendant guilty beyond a reasonable doubt solely on the basis of the evidence admitted at trial. Second, when a prosecutor uses that term in argument, where his or her role is generally expected and understood to be that of an advocate, such isolated or infrequent references to the complainant as the 'victim' are likely to be understood by jurors as parts of a proper argument that the evidence has established the complainant's victimization, and thus the defendant's guilt, beyond a reasonable doubt. In either of those circumstances, the prosecutor's use of the term 'victim' in reference to the complainant is not considered improper because such usage does not illicitly ask the jury to find the defendant guilty on the basis of the prosecutor's personal belief in the complainant's victimization or the defendant's guilt." *State* v. *Thompson*, 146 Conn. App. 249, 268–69, 76 A.3d 273, cert denied, 310 Conn. 956, 81 A.3d 1182 (2013).

A brief review of the relevant case law will facilitate our analysis of this argument. In *State* v. *Warholic*, supra, 278 Conn. 370, our Supreme Court held that reference to the complainant as the "victim" twice during closing argument did not amount to impropriety because "the jury was likely to understand that the state's identification of the complainant as the victim reflected the state's contention that, based on the state's evidence, the complainant was the victim of the alleged crimes." The court did, however, caution the state

against "making excessive use of the term 'victim' to describe a complainant when the commission of a crime is at issue . . . ." Id., 370 n.7.

In *State* v. *Rodriguez*, supra, 107 Conn. App. 703, in holding that the prosecutor's "sporadic" references to the complainant as the "victim" did not amount to impropriety, this court stated that "[j]urors understand the respective roles of the prosecutor and defense counsel. It should not be assumed that jurors will be unduly influenced by the prosecutor's use of the word victim." In that case, because this court found that an evidentiary basis existed for the jury to conclude that the complainant was indeed the victim of the offense, the prosecutor's use of the word victim was unlikely to confuse the jury and constituted a proper rhetorical argument. Id.

Likewise, in *State* v. *Kurrus*, 137 Conn. App. 604, 621, 49 A.3d 260, cert. denied, 307 Conn. 923, 55 A.3d 556 (2012), this court did not find impropriety when the prosecutor used the word "victim" three times at the end of his closing argument, told the jury at the beginning of closing argument that his statements were argument, and the court instructed the jurors in its instructions that closing arguments were not testimony, but merely statements to help them interpret the evidence. This court stated that given these factors it "[would] not assume that the jurors were unduly influenced by the prosecutor's isolated use of the word victims." Id.

Cases in which our courts have determined that references to the complainant as the "victim" constituted impropriety concerned more obvious and frequent uses of the term as compared to the cases discussed. See, e.g., *State* v. *Albino*, 130 Conn. App. 745, 24 A.3d 602 (2011) (distinguishing *Warholic* and *Rodriguez* and holding that prosecutor's reference to the complainant as "the victim" approximately twenty-seven times was

improper), aff'd, 312 Conn. 763, 97 A.3d 478 (2014); *State* v. *Thompson*, supra, 146 Conn. App. 271 (finding that prosecutor's use of word "victim" seven times in reference to complainant, each of which was subject to timely defense objection all of which were sustained by the court without opposition by the state, was improper).

Here, the defendant identifies four instances when the prosecutor used the word "victim." The defendant attempts to distinguish *Kurrus* by noting that here, unlike in *Kurrus*, the prosecutor did not begin her closing argument by expressly telling the jury that her arguments are solely arguments and not evidence. This contention is unpersuasive. The court repeatedly instructed the jurors that the arguments of counsel are not evidence[4] and the prosecutor reminded the jury at the beginning of her rebuttal that closing arguments are "arguments." Moreover, when defense counsel objected to the prosecutor's use of the word "victim" during closing argument, the trial court sustained the objection and immediately instructed the jury to disregard it, whereby the prosecutor promptly apologized in front of the jury. See *State* v. *Ubaldi*, 190 Conn. 559, 563, 462 A.2d 1001 ("[w]e have often held that a prompt cautionary instruction to the jury regarding improper prosecutorial remarks obviates any possible harm to

[4] Indeed, before the court began to deliver its final instruction to the jury it expressly addressed this issue: "Before I begin, there is one thing I need to address with respect to the arguments of counsel. To the extent the state in any part of its argument referred to [the complainant] as the 'victim,' I instruct you that the use of that term was improper and you are to disregard it. It is your responsibility alone to determine whether the state has proven any of these allegations beyond a reasonable doubt." Although the court told the jury that the prosecutor's use of the word "victim" was improper, that is not the same as concluding that the prosecutor engaged in prosecutorial impropriety. As noted previously in this opinion, isolated instances of the use of improper language is typically insufficient to support a conclusion that there was prosecutorial impropriety.

the defendant"), cert. denied, 464 U.S. 916, 104 S. Ct. 280, 78 L. Ed. 2d 259 (1983).

Given these circumstances and the prosecutor's relatively infrequent use of the word victim we find this case to be similar to *Kurrus* and conclude that the prosecutor's references to the complainant as the "victim" did not constitute prosecutorial impropriety.[5]

B

The defendant next argues that the prosecutor acted improperly by expressing her opinion on the credibility of the victim during closing argument. The state responds that the prosecutor's comments were proper argument because they reflected reasonable inferences that the jury could have drawn from the evidence produced at trial. We agree with the state.

We begin by detailing the challenged statements and the context in which they arose. During closing argument, the prosecutor first stated: "It is the state's position—is that [the victim] was credible and she was being consistent." In the second challenged statement the prosecutor stated: "It is your job to assess the credibility of [the victim]. She was here. You also have her video. If you need to, watch her video and compare it with what she told you live and see how consistent she is and how credible she is." The third statement was:

[5] Further, with respect to the prosecutor's comments that the complainant was the "perfect victim," we note that in *State* v. *Ceballos*, 266 Conn. 364, 832 A.2d 14 (2003), our Supreme Court concluded that the prosecutor's comments about the claimant being the "perfect victim" because of her childhood and living conditions constituted a proper argument concerning the defendant's opportunity to commit the alleged offenses and were not improper appeals to the jurors' emotions. Id., 394–95. Here, the prosecutor referred to the complainant as the "perfect victim" in an analogous manner, to argue that the circumstances surrounding the alleged offenses—i.e., the defendant's position of authority as her mother's boyfriend, and an unstable home environment—made the complainant vulnerable. These two comments by themselves constituted proper argument.

"Watch [the video]. She wasn't coached. They asked what happened, show us. That's not a false accusation. A false accusation does not have graphic detail and sensory impressions."

The fourth challenged statement concerned the motives of the victim: "What motivation would she have to talk about [the defendant] after [the defendant and the victim's mother] had already broken up? Yes, maybe a motivation to get out of mom's house certainly. There's no motivation to fabricate a story against [the defendant]; he was long gone."

The defendant also challenges statements made during the state's rebuttal argument to the jury. In the first statement, the prosecutor stated: "And again, the state is going to ask you again to look at the credible, consistent evidence of [the victim] when she was here, [the victim] on her video. Watch that video again. You decide." In the second challenged statement in rebuttal, the prosecutor indicated that "[the victim] said [the defendant was the person who had sexually assaulted her], there's medical evidence, she was consistent, she was credible." In the last challenged statement, the prosecutor asked: "How could she make a false accusation and have a torn hymen?"

It is well settled that "[a] prosecutor may not express his [or her] own opinion, directly or indirectly, as to the credibility of the witnesses. . . . Such expressions of personal opinion are a form of unsworn and unchecked testimony, and are particularly difficult for the jury to ignore because of the prosecutor's special position. . . . Put another way, the prosecutor's opinion carries with it the imprimatur of the [state] and may induce the jury to trust the [state's] judgment rather than its own view of the evidence. . . . Moreover, because the jury is aware that the prosecutor has prepared and presented the case and consequently, may have access to matters

not in evidence . . . it is likely to infer that such matters precipitated the personal opinions. . . . However, [i]t is not improper for the prosecutor to comment upon the evidence presented at trial and to argue the inferences that the jurors might draw therefrom. . . . We must give the jury the credit of being able to differentiate between argument on the evidence and attempts to persuade them to draw inferences in the state's favor, on one hand, and improper unsworn testimony, with the suggestion of secret knowledge, on the other hand. The [prosecutor] should not be put in the rhetorical straitjacket of always using the passive voice, or continually emphasizing that he [or she] is simply saying I submit to you that this is what the evidence shows, or the like." (Internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 40–41, 100 A.3d 779 (2014).

"A prosecutor's mere use of the words honest, credible, or truthful does not, per se, establish prosecutorial impropriety. . . . The distinguishing characteristic of impropriety in this circumstance is whether the prosecutor asks the jury to believe the testimony of the state's witnesses because the state thinks it is true, on the one hand, or whether the prosecutor asks the jury to believe it because logic reasonably thus dictates." (Citation omitted; internal quotation marks omitted.) *State* v. *Fasanelli*, 163 Conn. App. 170, 186, 133 A.3d 921 (2016).

Further, "[i]t is well established that a prosecutor may argue about the credibility of witnesses, as long as her assertions are based on evidence presented at trial and reasonable inferences that jurors might draw therefrom." (Internal quotation marks omitted.) *State* v. *Ciullo*, supra, 314 Conn. 45. "Moreover, we have held that [i]t is permissible for a prosecutor to explain that a witness either has or does not have a motive to lie." (Internal quotation marks omitted.) *State* v. *Reddick*, 174 Conn. App. 536, 562, 166 A.3d 754, cert. denied, 327

Conn. 921, 171 A.3d 58 (2017), cert. denied, U.S. , 138 S. Ct. 1027, 200 L. Ed. 2d 285 (2018).

With those principles in mind, we conclude that in this case the prosecutor's comments were not improper. The prosecutor's statements in both closing arguments concerning the credibility of the victim "when placed in the context in which they were made, are reasonable inferences the jury could have drawn from the evidence adduced at trial." *State* v. *Ciullo*, supra, 314 Conn. 42. The prosecutor properly argued that the jury should assess the evidence and testimony adduced at trial and that such review would lead to the conclusion that the victim was credible. Simply because the prosecutor used the word "credible" in her argument does not establish prosecutorial impropriety. See *State* v. *Fasanelli*, supra, 163 Conn. App. 186. Thus, the context shows that these statements were not improper.

Likewise, we find that the challenged statement that the victim had no motive to lie was proper. "This court previously has concluded that the state may argue that its witnesses testified credibly, if such an argument is based on reasonable inferences drawn from the evidence. . . . Specifically, the state may argue that a witness has no motive to lie." (Citation omitted.) *State* v. *Warholic*, supra, 278 Conn. 365. At trial, there was evidence offered concerning the time frame of the defendant's relationship with the victim's mother and the victim's abusive home environment. The prosecutor's statement asked the jury to recall this evidence and use it in their assessments of the victim's credibility. Moreover, it was the defendant's theory of defense that the evidence showed that the victim "made up" the allegations against the defendant, and the prosecutor was allowed to address this argument in her closing. We therefore conclude that the prosecutor's statements were proper argument.

C

Last, the defendant argues that the prosecutor acted improperly by eliciting comments on the credibility of the victim from the state's witnesses. Specifically, the defendant points to the testimony of Schweinsburg and Cuddy and argues that improper statements given during their respective direct examinations were the result of improper questioning by the prosecutor. The state argues that, regardless of whether the witness' testimony was improper, it was not given in response to improper questions from the prosecutor and, therefore, cannot be attributed to prosecutorial impropriety. We agree with the state.

During the prosecutor's direct examination of Schweinsburg, the witness testified as follows:

"[The Prosecutor]: Doctor, what did [the victim] look like to you as she was describing being sexually assaulted allegedly by [the defendant]?

"[The Witness]: She appeared to me to be a—telling a credible story.

"[Defense Counsel]: Objection.

"The Court: Sustain . . . . That last statement is stricken; disregard it. Doctor, please listen to the question that's asked.

"[The Prosecutor]: Doctor, I'm not asking for your assessment at this point.

"[The Witness]: Hm-hmm.

"[The Prosecutor]: We're just asking what did she look like.

"[The Witness]: Okay."

Schweinsburg proceeded to testify as to his physical observations of the victim. Thereafter, outside the presence of the jury, the court cautioned Schweinsburg and

asked him to "direct [his] answers to the specific question that's asked."

The defendant further directs us to the prosecutor's direct examination of Cuddy:

"[The Prosecutor]: [I]n cases you personally have handled, and you indicated you've handled at least 200 . . . do those result in arrests every time?

"[The Witness]: No.

"[The Prosecutor]: And why not?

"[The Witness]: Because most of these crimes occur—there's no witnesses, there's no evidence, the statements get recanted. They're very hard cases to put together. You need to be able to prove that the timeline matches, the person matches, the child's story is legit. Any corroboration of anything, if the person was—you know—in the place where the child said the place was and other things happened, everything happened but the sexual event, it's pretty likely that the child is telling you the truth. So that's just part of the investigation.

"The Court: Just a second. That last statement is ordered stricken from the record. Jury disregard it.

"[The Witness]: Sorry, Your Honor."

Later in the direct examination, the prosecutor asked Cuddy "what was the end result of your investigation," whereby Cuddy responded that she "had probable cause." That comment was stricken by the court and the jury was instructed to disregard it. The prosecutor then asked Cuddy if she had arrested the defendant in October, 2015, and she responded in the affirmative.

In its final instructions to the jury, the court specifically addressed the testimony: "To the extent that Dr. Schweinsburg, Detective Cuddy, or any other witnesses, if any, may have commented either directly or indirectly in the course of testimony in court on the

credibility of [the victim] or her accusations that are the subject of this trial, such testimony is stricken and you are not—and you are to disregard it. You are not to consider any such testimony when evaluating the evidence in this case, and any such comments . . . are to play absolutely no role in your deliberations . . . .''

''It is well established that a witness may not be asked to comment on the veracity of another witness' testimony. . . . Such questions are prohibited because determinations of credibility are for the jury, and not for witnesses. . . . Consequently, questions that ask a [witness] to comment on another witness' veracity invade the province of the jury. . . . [Q]uestions of this sort also create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied. . . . A witness' testimony, however, can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. . . .

''Moreover, [w]e repeatedly have stated that an expert may not testify regarding the credibility of a particular victim. The reason is that such testimony may be viewed as a direct assertion that validate[s] the truthfulness of [the victim's] testimony.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Ritrovato*, 280 Conn. 36, 64–65, 905 A.2d 1079 (2006); see also *State* v. *Taft*, supra, 306 Conn. 764; *State* v. *Singh*, 259 Conn. 693, 706–710, 793 A.2d 226 (2002).

The defense argues that this case is similar to *Ritrovato*. We disagree. In *Ritrovato*, the prosecutor asked the witness on redirect examination whether she found the victim's account of the incident to be ''credible.'' *State* v. *Ritrovato*, supra, 280 Conn. 60 n.19. Here, the prosecutor did not ask either witness to comment on the credibility of the victim. The prosecutor made clear to Schweinsburg that she was attempting to elicit testi-

mony concerning his observations of the victim's *physical* appearance, not his opinions of the victim's credibility.[6] Likewise, the first question to Cuddy at issue properly inquired as to her process in investigating similar allegations and elicited, in part, proper testimony. The second question to Cuddy at issue similarly was not improper but a permissive inquiry into the investigation of the defendant. Witnesses' inappropriate answers to otherwise proper questions do not constitute prosecutorial impropriety. We therefore conclude that the prosecutor did not improperly elicit comments on the credibility of the victim from the state's witnesses.

Because we conclude that no prosecutorial impropriety occurred, we need not consider whether the defendant was deprived of his due process right to a fair trial. See *State* v. *Reddick*, supra, 174 Conn. App. 563.

II

The defendant's second claim is that the evidence was insufficient to support the mandatory minimum sentence imposed by the court under § 53a-70 (b) (2). Specifically, the defendant argues that the state failed to produce sufficient evidence regarding the age of the victim at the time of the sexual assault as alleged in count one. We disagree.

The following procedural history is relevant to the resolution of this claim. The jury was instructed on four counts against the defendant pursuant to the 2017 long form information. With respect to the first count, which alleged sexual assault in the first degree in violation of § 53a-70 (a) (2), the jury was provided with an instruction that if it found that the state had proven all the elements of the offense beyond a reasonable doubt, it was to further make a separate and specific finding, by

[6] Indeed, defense counsel did not object to Schweinsburg's eventual testimony regarding his observations of the victim's mannerisms.

means of a written interrogatory, as to whether the state had "proven beyond a reasonable doubt, that the complainant was less than ten years of age at the time of the offense alleged." The purpose of this written interrogatory was to determine the defendant's statutory minimum sentence pursuant to § 53a-70 (b) (2).[7] See *State* v. *Kirk R.*, 271 Conn. 499, 512, 857 A.2d 908 (2004) (determining that factual question of whether victim was under ten years of age at time of violation of § 53a-70 (a) is to be determined by jury). The jury answered the written interrogatory in the affirmative and the defendant subsequently was sentenced to ten years of incarceration in accordance with the statutory minimum on this count.

The defendant argues that there was insufficient evidence for the jury to find beyond a reasonable doubt that the victim was under ten years of age at the time of the first sexual assault. Specifically, he contends that the victim's testimony was inconsistent with other evidence adduced at trial such that the jury could not have found that the victim was under ten years of age at the time of the first sexual assault. The defendant does not dispute that there was sufficient evidence to prove that the victim was under sixteen years of age at the time of the offense and asks us to remand this case to the trial court to resentence the defendant to a five year mandatory sentence on this count. See General Statutes § 53a-70 (b) (2). The state argues that, on the basis of the testimony of the victim at trial, the jury reasonably could have inferred that the victim was under ten years old at the time of the first offense. We agree with the state.

Although this claim was not preserved at trial, it is reviewable. "Unpreserved sufficiency claims are reviewable on appeal because such claims implicate a defendant's federal constitutional right not to be convicted

[7] See footnote 2 of this opinion.

of a crime upon insufficient proof. . . . Our Supreme Court has stated that *Jackson* v. *Virginia*, [443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)], compels the conclusion that any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right, and would therefore necessarily meet the four prongs of [*State* v. *Golding*, supra, 213 Conn. 239–40]. . . . Thus . . . there is no practical reason for engaging in a *Golding* analysis of a claim based on the sufficiency of the evidence. . . . We will review the defendant's challenge to the sufficiency of the evidence as we do any properly preserved claim." (Citation omitted; internal quotation marks omitted.) *State* v. *Cyrta*, 107 Conn. App. 656, 659–60, 946 A.2d 288, cert. denied, 288 Conn. 912, 954 A.2d 185 (2008).

The standard of review for sufficiency of the evidence claims is well established. "In reviewing the sufficiency of the evidence to support a criminal conviction 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 [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . We note that the [finder of fact] must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the [finder of fact] to conclude that a basic fact or an inferred fact is true, the [finder of fact] is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt. . . .

"When there is conflicting evidence . . . it is the exclusive province of the . . . trier of fact, to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude . . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Citation omitted; internal quotation marks omitted.) *State* v. *Daniel G.*, 147 Conn. App. 523, 530–31, 84 A.3d 9, cert. denied, 311 Conn. 931, 87 A.3d 579 (2014).

The state relied primarily on the testimony of the victim at trial to prove that she was under the age of ten at the time of the first sexual assault. The victim testified that she was nine years old at the time of the first incident. She further testified that the third incident occurred on December 14, 2013, her eleventh birthday, that the second incident had occurred one year prior in the winter and that the first incident occurred in autumn.

The defendant argues that the victim was not "adamant" about her timeline of events and points to inconsistencies in the victim's testimony as well as to inconsistencies between the victim's timeline of events and other testimony and evidence adduced at trial. In support of his argument, the defendant cites the victim's statements made at trial that she "can't really remember the time [of the incidents]" and her statement in the July 8, 2015 forensic interview that she was ten at the time of the first incident. He also directs us to the tes-

timony of Schweinsburg who testified that the victim told him in the June 18, 2015 interview that the incidents occurred between December, 2013 and February, 2014, a period in which the victim was more than ten years old.

"It is well settled . . . that [e]vidence is not insufficient . . . because it is conflicting or inconsistent. . . . Rather, the [finder of fact] [weighs] the conflicting evidence and . . . can decide what—all, none, or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.) *State* v. *Montana*, 179 Conn. App. 261, 266, 178 A.3d 1119, cert. denied, 328 Conn. 911, 178 A.3d 1042 (2018).

Here, the victim testified that she was nine years old at the time of the first sexual assault.[8] This, in conjunction with her testimony concerning the dates of the other incidents, provided a sufficient evidentiary basis for the jury to answer the interrogatory in the affirmative. That conflicting evidence was proffered does not undermine our decision. "As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . [W]e must defer to the [finder] of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor, and attitude. . . . Credibility determinations are the exclusive province of the . . . fact finder, which we refuse to disturb." Id., 265–66. Furthermore,

[8] The victim testified as follows:

"Q. Let me ask you—let's go slow. The first time, you were living at . . . .

"A. Yes.

"Q. Okay. And do you remember this first time, how old were you, when this first thing happened to you?"

"A. Nine.

"Q. Okay. Do you remember a specific date, or anything about when the date the first time happened was?

"A. No

"Q. Okay. But you know you were about nine years old?

"A. Yes."

"[e]ven if uncorroborated, the victim's testimony, if believed, may be sufficient to support a guilty verdict." *State* v. *Antonio W.*, 109 Conn. App. 43, 53, 950 A.2d 580, cert. denied, 289 Conn. 923, 958 A.2d 153 (2008). The jury was presented with conflicting evidence as to the victim's age at the time of the first sexual assault and was free to believe the victim's testimony that she was nine years old at the time. See *State* v. *Montana*, supra, 179 Conn. App. 266. Because we conclude that the evidence was sufficient to support the jury's finding, we reject the defendant's claim.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LUIS CASTRO
(AC 43386)

Keller, Prescott and Devlin, Js.

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. He claimed that the trial court violated his right under the confrontation clause of the sixth amendment when it admitted into evidence a certain ballistics report, whose author did not testify at trial, after defense counsel expressly waived the defendant's confrontation right. The state had elicited testimony from R, a police forensics supervisor, about the findings of the report, which R neither authored nor peer-reviewed. Defense counsel indicated to the court that, to expedite matters, he had no objection to the admission of the report or to R's testifying about its contents. The defendant further claimed that this court should hold that the right to confrontation can only be personally waived by the defendant because article first, § 8, of the Connecticut constitution provides greater protection than the federal constitution. *Held*:

1. The defendant could not prevail on his unpreserved claim that counsel's waiver of his confrontation right was invalid because the trial court failed to make a finding that counsel's decision was a legitimate trial tactic or part of a prudent trial strategy: despite the defendant's claim that his counsel's rationale for the waiver, which was to expedite matters, could not be considered a legitimate trial tactic or part of a prudent trial strategy, counsel's indication to the court that he had no objection

to the admission of the ballistics report or to R's testifying as to its contents constituted a valid, express waiver of the defendant's sixth amendment confrontation clause claim, and this court declined to apply a rule requiring the trial court to explore defense counsel's rationale for the waiver and to make a finding that it was either a legitimate trial tactic or part of a prudent trial strategy before accepting the waiver, our Supreme Court having repeatedly and expressly rejected the proposition that a trial court is required to assess defense counsel's professional judgment before accepting his or her waiver of a constitutional claim; moreover, in circumstances in which defense counsel's waiver of a constitutional claim constitutes a violation of the defendant's right to the effective assistance of counsel, the defendant may seek recourse through habeas corpus proceedings.

2. The defendant's claim that the right to confrontation can only be personally waived by the defendant was unavailing, as his assertion that article first, § 8, of the state constitution provides greater protection than the federal constitution was contrary to established precedent.

Submitted on briefs April 6—officially released September 29, 2020

Procedural History

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

Emily Graner Sexton, assigned counsel, and *Matthew C. Eagan*, assigned counsel, filed a brief for the appellant (defendant).

Maureen Platt, state's attorney, *Don E. Therkildsen, Jr.*, senior assistant state's attorney, and *Laurie N. Feldman*, special deputy assistant state's attorney, filed a brief for the appellee (state).

Opinion

PRESCOTT, J. The defendant, Luis Castro, appeals from the judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a). On appeal, the defendant claims that the trial court violated his right under the confrontation clause

of the sixth amendment to the United States constitution.[1] Specifically, the defendant argues that the trial court improperly admitted into evidence a ballistics report that was authored by an individual whom the defendant did not have an opportunity to confront because he did not testify at trial, after defense counsel expressly waived, without any legitimate or prudent strategical reasons, the defendant's confrontation right with respect to the author of the ballistics report.[2] The defendant further argues that article first, § 8, of the Connecticut constitution[3] provides greater protection than the federal constitution, and, thus, a waiver of the right to confrontation must be personally made by the defendant in order to comport with our state constitution. We disagree with the defendant and, accordingly, affirm the judgment of the trial court.

The jury reasonably could have found the following facts. On April 9, 2016, at about 2 a.m., a group of people, including the defendant, Jacquise Henry, and Michael Roman, arrived at Bobby D's Café, a bar on Whitewood Road in Waterbury. Shortly thereafter, the group confronted the victim, Harry Mendoza, who was by a pool table. Henry punched the victim in the face,

[1] The sixth amendment to the United States constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const., amend. VI. "[T]he sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment." (Internal quotation marks omitted.) *State* v. *Holley*, 327 Conn. 576, 593, 175 A.3d 514 (2018).

[2] The defendant also argues that the state cannot prove that the admission of the ballistics report was harmless beyond a reasonable doubt because it tied the state's case together and bolstered the credibility of otherwise unreliable eyewitnesses. Because we conclude that the defendant's claim fails under the third prong of *State* v. *Golding*, 213 Conn. 233, 240, 567 A.2d 823 (1989), as a result of defense counsel's express waiver, we do not reach the issue of whether the admission of the report constituted harmless error.

[3] The constitution of Connecticut, article first, § 8, as amended by articles seventeen and twenty-nine of the amendments, provides in relevant part: "In all criminal prosecutions, the accused shall have a right . . . to be confronted by the witnesses against him . . . ."

and a physical altercation involving many of the bar patrons ensued. The bartender told everyone to leave. The defendant, Henry, and the victim walked out to the parking lot near the rear of the building. The defendant took a revolver from his waistband and shot the victim twice. The victim was transported to Waterbury Hospital where he died from his gunshot wounds.

Later that day, Henry turned himself in to the police and gave a statement identifying the defendant as the shooter. The police obtained a warrant for the defendant's arrest but were unable to find him. On April 18, 2016, the defendant turned himself in to the United States Marshals Service in Puerto Rico. No weapon was ever recovered. The defendant was charged with the victim's murder.[4]

The defendant elected a jury trial, which began on May 14, 2018. On the third day of trial, the state called as a witness Joseph Rainone, supervisor of the forensics division of the Waterbury Police Department, and had him explain the findings of a ballistics report, which was admitted into evidence for substantive purposes but that he neither authored nor peer-reviewed.[5] Specifically, Rainone testified, inter alia, that, after assessing a bullet recovered from the victim's body, a state's firearms examiner concluded that it was discharged from a .38 or .357 caliber firearm, which could have been a revolver or a semiautomatic pistol. While testifying, Rainone stated that, on the basis of the report, the bullet

[4] In addition to the murder charge, the state initially charged the defendant with reckless endangerment in the first degree in violation of General Statutes § 53a-63, unlawful discharge of a firearm in violation of General Statutes § 53-203, and carrying a pistol without a permit in violation of General Statutes § 29-35. The state later chose not to pursue those additional charges and filed a substitute information limited to the murder charge.

[5] According to Rainone's testimony, the procedure of the state forensic science laboratory is that, after the examiner completes his or her report, it is peer-reviewed by another individual for accuracy. Both the examiner and the individual who conducted the peer-review sign the report.

would have come from a revolver.[6] Defense counsel did not object to either the admission of the ballistics report or to Rainone's testimony. At the conclusion of the testimony, the court requested a sidebar conference with counsel. Subsequently, outside the presence of the jury, the court summarized the conference on the record. The following colloquy ensued:

"The Court: So, first I want to put on the record that—a sidebar conversation I had with counsel at the conclusion of Joseph Rainone's testimony. Mr. Rainone obviously testified as to the contents of the state lab firearms report, exhibit 39. The defense had no objection to the admission of that report. And then Mr. Rainone testified as to the contents of the report. I just wanted to verify that the defense had no objection to Mr. Rainone testifying as to the contents of the report. He obviously was not the author of that report. And under *Crawford* v. *Washington* [541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)], the defendant has a right to have the author of that report testify. And, [defense counsel], you indicated that you had no objection to Mr. Rainone testifying with respect to the report. Anybody want to be heard?

"[Defense Counsel]: Judge, just to complete the record—

"The Court: Yes.

"[Defense Counsel]: —that is correct. I spoke with the state's attorney. Obviously that report, it speaks for itself, it's not terribly complicated. The issue would be the individual that authored that report, I believe, is no longer in the state. So, to expedite matters, [the state] had indicated to me Mr. Rainone's credentials and what he would testify to. I saw no problem with it, whatsoever.

[6] Specifically, the prosecutor stated: "But this bullet would have come from a revolver," and Rainone responded, "[c]orrect, from what he's saying—yeah—well—yes, correct, from what he's saying."

"The Court: Okay.

"[Defense Counsel]: So, I had no objection.

"The Court: Okay.

"[Defense Counsel]: I knew it was going to happen, and it's—

"The Court: Okay, fine.

"[Defense Counsel]: —absolutely no objection."

The jury found the defendant guilty of murder in violation of § 53a-54a (a), and he was subsequently sentenced to forty-seven years of incarceration. This appeal followed.

I

The defendant first claims that the trial court violated his sixth amendment right to confrontation by admitting the ballistics report into evidence because, even though defense counsel expressly waived the defendant's right to confront the author of the report, the waiver was invalid.[7] Specifically, the defendant argues that, pursuant to *State* v. *Rivera*, 129 Conn. App. 619, 632, 22 A.3d

[7] In *Bullcoming* v. *New Mexico*, 564 U.S. 647, 652, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), the United States Supreme Court held that the confrontation clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial statement by an analyst, certifying the results of a test he performed, through the in-court testimony of another scientist who did not sign the certification or perform or observe the test reported in the certification. The accused has the right "to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." Id. Moreover, as our Supreme Court stated in *State* v. *Walker*, 332 Conn. 678, 212 A.3d 1244 (2019), "where the testifying expert explicitly refers to, relies on, or vouches for the accuracy of the other expert's findings, the testifying expert has introduced out-of-court statements that, if offered for their truth and are testimonial in nature, are subject to the confrontation clause. . . . [E]xpert witnesses cannot be used as conduits for the admission into evidence of the testimonial statements of others." (Citations omitted.) Id., 694–95.

636, cert. denied, 302 Conn. 922, 28 A.3d 342 (2011), counsel's waiver of a defendant's sixth amendment right to confrontation is invalid unless (1) the defendant does not dissent from his attorney's decision, and (2) the attorney's decision is a legitimate trial tactic or part of a prudent trial strategy. The defendant acknowledges that he did not dissent, on the record, from his counsel's decision, but he contends that the trial court failed to make a finding that the decision was a legitimate trial tactic or part of a prudent trial strategy. Additionally, the defendant asserts that defense counsel's given rationale for the waiver, namely, " 'to expedite matters,' " cannot be considered a legitimate trial tactic or part of a prudent trial strategy, and, to the extent that the trial court accepted this rationale, it committed reversible error. For these reasons, the defendant contends that he was deprived of his confrontation right under the sixth amendment. We disagree.

The defendant concedes that he did not preserve this claim at trial and seeks review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 239–40. "The first two *Golding* requirements involve whether the claim is reviewable, and the second two involve whether there was constitutional error requiring a new

trial." (Internal quotation marks omitted.) *State* v. *Fabricatore*, 281 Conn. 469, 477, 915 A.2d 872 (2007).

With respect to the first two prongs, we note that the record, which contains the full transcript of the trial proceedings, is adequate for our review; see id.; and the claim is of constitutional magnitude because it implicates the defendant's sixth amendment right to confrontation. Accordingly, the defendant's claim is reviewable under *Golding*. Therefore, we next address the merits of the defendant's claim under the third prong of *Golding*.

"[A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . . To reach a contrary conclusion would result in an ambush of the trial court by permitting the defendant to raise a claim on appeal that his or her counsel expressly had abandoned in the trial court." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Holness*, 289 Conn. 535, 543, 958 A.2d 754 (2008).

"It is well settled that a criminal defendant may waive rights guaranteed to him under the constitution. . . . The mechanism by which a right may be waived, however, varies according to the right at stake. . . . For certain fundamental rights, the defendant must personally make an informed waiver. . . . For other rights, however, waiver may be effected by action of counsel." (Citations omitted; internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, 291 Conn. 62, 71, 967 A.2d 41 (2009). "As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent . . . . Thus, decisions by counsel are generally given effect as to what arguments to pursue . . . what evidentiary objections

to raise . . . and what agreements to conclude regarding the admission of evidence . . . . Absent a demonstration of ineffectiveness, counsel's word on such matters is the last." (Internal quotation marks omitted.) *State* v. *Kitchens*, 299 Conn. 447, 468, 10 A.3d 942 (2011), quoting *New York* v. *Hill*, 528 U.S. 110, 115, 120 S. Ct. 659, 145 L. Ed. 2d 560 (2000). "The fundamental rights that a defendant personally must decide to waive are therefore distinguishable from tactical trial rights that are not personal to the defendant and that counsel may choose to waive as part of trial strategy."[8] *State* v. *Gore*, 288 Conn. 770, 778–79, 955 A.2d 1 (2008).

"[T]he definition of a valid waiver of a constitutional right . . . [is] the intentional relinquishment or abandonment of a known right." (Internal quotation marks omitted.) Id., 776. "When a party consents to or expresses satisfaction with an issue at trial, claims arising from that issue are deemed waived and may not be reviewed on appeal. See, e.g., *State* v. *Holness*, [supra, 289 Conn 544–45] (holding that defendant waived [claim under *Crawford* v. *Washington*, supra, 541 U.S. 36, that trial court improperly admitted recording of conversation in violation of confrontation clause of federal constitution] when *counsel agreed* to limiting instruction regarding hearsay statements introduced by state on cross-examination) . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) *Mozell* v. *Commissioner of Correction*, supra, 291 Conn. 71–72.

In the present case, the defendant does not dispute that defense counsel knowingly and intentionally abandoned the defendant's sixth amendment right to confront the author of the ballistics report. Rather, he maintains that, when counsel expressly waives a defendant's

[8] "The fundamental rights that a defendant personally must waive typically are identified as the rights to plead guilty, waive a jury, testify in his or her own behalf, and take an appeal." *State* v. *Gore*, 288 Conn. 770, 779 n.9, 955 A.2d 1 (2008).

right to confrontation, the trial court has a duty to "[explore] defense counsel's rationale for the waiver" and make a finding that it is either a legitimate trial tactic or part of a prudent trial strategy before accepting it. In support of that assertion, the defendant relies on the standard under federal case law that this court applied in *Rivera*, namely, that counsel may waive a defendant's sixth amendment right to confrontation, if (1) the defendant does not dissent from his attorney's decision, and (2) "it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." (Internal quotation marks omitted.) *State* v. *Rivera*, supra, 129 Conn. App. 631.

In response, the state argues that the trial court has no duty to elicit or examine the soundness of counsel's decision to waive a confrontation clause claim. Moreover, the state asserts that a claim that counsel's waiver was not part of a legitimate trial tactic or part of a prudent trial strategy is, in essence, a claim of ineffective assistance of counsel, which can be properly addressed only in a habeas corpus proceeding. We agree with the state.[9]

[9] To the extent that the state claims that a habeas proceeding is the *only* forum to address a claim of ineffective assistance of counsel, we do not agree. There are some instances in which an ineffective assistance of counsel claim may be pursued on direct appeal. In *State* v. *Crespo*, 246 Conn. 665, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999), our Supreme Court explained that, "[a]lmost without exception, we have required that a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim. . . . On the rare occasions that we have addressed an ineffective assistance of counsel claim on direct appeal, we have limited our review to allegations that the defendant's sixth amendment rights had been jeopardized by the actions of the *trial court*, rather than by those of counsel. . . . We have addressed such claims, moreover, only where the record of the trial court's allegedly improper action was adequate for review or the issue presented was a question of law, not one of fact requiring further evidentiary development." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 687–88.

Additionally, in *State* v. *Polynice*, 164 Conn. App. 390, 133 A.3d 952, cert. denied, 321 Conn. 914, 136 A.3d 1274 (2016), this court acknowledged that

Our Supreme Court has repeatedly and expressly rejected the proposition that a trial court is required to assess defense counsel's professional judgment before accepting his or her waiver of a constitutional claim. Specifically, in *Holness*, the defendant argued, inter alia, that defense counsel's waiver of his sixth amendment *Crawford* claim was invalid because the state did not demonstrate that counsel's waiver was knowing and intelligent. The court disagreed, reasoning that, "[a]lthough a defendant will not be deemed to have waived certain constitutional rights unless the state can demonstrate that the defendant's waiver was knowing and intelligent . . . that requirement is inapplicable when, as in the present case, counsel has waived a potential constitutional claim in the exercise of his or her professional judgment. . . . In our adversary system, the trial court was entitled to presume that defense counsel was familiar with *Crawford* and had acted competently in determining that the limiting instruction was adequate to safeguard the defendant's sixth amendment rights. To conclude otherwise would require the trial court to canvass defense counsel with respect to counsel's understanding of the relevant constitutional principles before accepting counsel's agreement on how to proceed. For good reason, there is nothing in our criminal law that supports such a requirement." (Citations omitted; footnote omitted.) *State* v. *Holness*, supra, 289 Conn. 544.

The court employed the same rationale in *Kitchens* to justify the implied waiver rule for jury instruction claims. See *State* v. *Kitchens*, supra, 299 Conn. 482–83; id., 486–91 ("In adopting the standard set forth in this opinion, we also rely on . . . the widely recognized

"[a] claim of ineffective assistance of counsel is generally made pursuant to a petition for a writ of habeas corpus rather than in a direct appeal. . . . Section 39-27 of the Practice Book, however, provides an exception to that general rule when ineffective assistance of counsel results in a guilty plea." (Internal quotation marks omitted.) Id., 397.

presumption that counsel is competent . . . . As we explained in *Holness*, when . . . counsel has waived a potential . . . claim . . . in the exercise of his or her professional judgment . . . [it may be] presume[d] that defense counsel was familiar with [the law] and . . . acted competently in determining that the [court's] limiting instruction was adequate to safeguard the defendant's [constitutional] rights. To conclude otherwise would require the trial court to canvass defense counsel with respect to counsel's understanding of the relevant constitutional principles before accepting counsel's agreement on how to proceed. . . . [T]here is nothing in our criminal law that supports such a requirement." (Citations omitted; footnote omitted; internal quotation marks omitted.)). In *State* v. *Bellamy*, 323 Conn. 400, 414–19, 147 A.3d 655 (2016), the court used the rationale again when rejecting the defendant's invitation to overrule *Kitchens*. See id., 419 (stating that "a comprehensive canvass of this nature not only would be difficult if not impossible to conduct, but would not promote this court's interest in judicial economy, given the time required to determine whether counsel was aware of every conceivable constitutional principle under which an instructional flaw might be identified").

Moreover, "in circumstances in which defense counsel's waiver of a constitutional claim cannot be justified, that is, when the waiver constitutes a violation of the defendant's right to the effective assistance of counsel, the defendant may seek recourse through habeas corpus proceedings." *State* v. *Holness*, supra, 289 Conn. 544 n.8. "[A] claim of ineffective assistance of counsel is more properly pursued on a petition for new trial or on a petition for a writ of habeas corpus rather than on direct appeal . . . [because] [t]he trial transcript seldom discloses all of the considerations of strategy that may have induced counsel to follow a particular course of action." (Internal quotation marks omitted.) *State* v. *Taft*, 306 Conn. 749, 768, 51 A.3d 988 (2012).

"[A] habeas proceeding provides a superior forum for the review of a claim of ineffective assistance because it provides the opportunity for an evidentiary hearing in which the attorney whose conduct is challenged may testify . . . ." *State* v. *Kitchens*, supra, 299 Conn. 496–97; see also *State* v. *Bellamy*, supra, 323 Conn. 431 (reiterating that habeas proceeding is " 'superior forum' " for reviewing claim of ineffective assistance of counsel because it allows for development of record "sufficient to determine whether counsel waived [a] claim for constitutionally acceptable strategic reasons").

Defense counsel's indication that he had "absolutely no objection" to the admission of the ballistics report, or to Rainone testifying to the contents of that report, constituted a valid, express waiver of the defendant's sixth amendment confrontation clause claim. Thus, in light of the authority already set forth in our discussion of this claim, the defendant's claim fails under the third prong of *State* v. *Golding*, supra, 213 Conn. 240. The defendant may seek recourse through habeas corpus, which is the superior forum for determining whether counsel waived a constitutional claim for acceptable strategic reasons.[10] See *State* v. *Kitchens*, supra, 299 Conn. 496–97; see also *State* v. *Bellamy*, supra, 323 Conn. 431.

Furthermore, we decline the defendant's invitation to apply the rule articulated under federal law in *State* v. *Rivera*, supra, 129 Conn. App. 619, for two reasons. First, that case is factually distinct from the present case, in that it involved an instance of implied waiver, not express waiver. Indeed, in that case, defense counsel consented to the admission of a recording without being aware that it contained a hearsay statement to

[10] We note that, in the present case, defense counsel may not have fully articulated all of his reasons for the waiver, and the trial court risks interfering with the defendant's right to counsel and the attorney-client relationship if the court asks counsel, during trial, for a full explanation of his strategy.

which she had objected, and the court excluded, when it was offered into evidence through witness testimony. See id., 623–24. As such, the court's conclusion that defense counsel had waived the defendant's sixth amendment claim by consenting to the admission of the recording as a full exhibit arose from an inference that defense counsel knowingly and voluntarily had relinquished the right. Id., 636; see also *State* v. *Bellamy*, supra, 323 Conn. 443 ("implied waiver . . . arises from an inference that the defendant knowingly and voluntarily relinquished the right in question . . . and . . . competent counsel is presumed, when determining whether a defendant's waiver of a constitutional right or statutory privilege has been knowing and intelligent" (citation omitted; internal quotation marks omitted)).[11] By contrast, in the present case, there is no question that defense counsel knowingly and voluntarily waived the defendant's right to confrontation.

Second, the federal standard applied in *Rivera* has not been adopted by our Supreme Court, and may have been superseded by more recent developments in Connecticut's law of waiver, including our apparent divergence from federal waiver law. Specifically, in *Bellamy*, the defendant argued that the court should overrule *Kitchens* and instead follow federal waiver law as it pertains to unpreserved jury instruction claims. See *State* v. *Bellamy*, supra, 323 Conn. 414, 433. The court

[11] In drawing that inference, the court noted that the fact that defense counsel used the recording containing the hearsay statement to the defendant's benefit—referring to it during cross-examination of a state's witness and in closing argument—indicates that she was following a sound or prudent trial strategy when she consented to its admission. See *State* v. *Rivera*, supra, 129 Conn. App. 634–35. Under Connecticut's implied waiver jurisprudence, it is appropriate for a court to consider "the particular facts and circumstances surrounding [the] case, including the . . . conduct of the [person waiving the right] . . . ." (Internal quotation marks omitted.) *State* v. *Kitchens*, supra, 299 Conn. 484; id. ("[i]t . . . is well established that any such inference [of waiver] must be based on a course of conduct").

rejected this argument on the ground that, inter alia, "federal waiver law is inconsistent with our jurisprudence, thus making a comparison of federal and Connecticut law extremely difficult, if not impossible." Id., 435. The court explained that, under federal law, "[a] finding of waiver requires evidence that the defendant knowingly and voluntarily approved of the disputed [jury] instruction after an on-the-record discussion . . . *or very clear evidence that the failure to object was due to tactical considerations*. . . .[12] *In contrast*, Connecticut waiver law is construed more broadly . . . and plain error review more strictly. . . . Unpreserved claims that have not been waived are not automatically reviewed under the plain error doctrine because the plain error doctrine in Connecticut, unlike under federal law, is one of reversibility rather than reviewability." (Citations omitted; emphasis added; footnote added.) Id., 437–38. Accordingly, in light of the fundamental differences between federal case law and our state's jurisprudence in the law of waiver, we decline to apply the federal standard articulated in *Rivera*, here, to an instance in which defense counsel's waiver was express as opposed to implied.

II

The defendant's second argument is that article first, § 8, of the Connecticut constitution provides greater

[12] For the latter proposition, the court in *Bellamy* cited *United States* v. *Cooper*, 243 F.3d 411, 416 (7th Cir.), cert. denied, 534 U.S. 825, 122 S. Ct. 64, 151 L. Ed. 2d 31 (2001), which is one of the cases this court cited in *Rivera* to support its conclusion that the federal waiver standard should be applied. See *State* v. *Rivera*, supra, 129 Conn. App. 632–35. *Cooper* involved a claim by the defendant that his sixth amendment right to confrontation was violated by the government's repeated references to the substance of an anonymous tip. See *United States* v. *Cooper*, supra, 415. In resolving the claim, the court adopted the standard used by the majority of federal Circuit Courts of Appeals at that time, namely, "a defendant's attorney can waive his client's [s]ixth [a]mendment confrontation right so long as the defendant does not dissent from his attorney's decision, and so long as it can be said that the attorney's decision was a legitimate trial tactic or part of a prudent trial strategy." (Internal quotation marks omitted.) Id., 418.

protection than the federal constitution and, thus, that this court should hold that the right to confrontation can only be personally waived by the defendant. We reject this argument, as it is contrary to established precedent. Indeed, in *State* v. *Lockhart*, 298 Conn. 537, 4 A.3d 1176 (2010), our Supreme Court determined that "with respect to the right to confrontation within article first, § 8, of our state constitution, its language is nearly identical to the confrontation clause in the sixth amendment to the United States constitution. The provisions have a shared genesis in the common law. . . . Moreover, we have acknowledged that the principles of interpretation for applying these clauses are identical. . . . Therefore, we are not convinced that we should . . . construe the confrontation clause of our state constitution to provide greater protections than its federal counterpart." (Citations omitted.) Id., 555.

Similarly, in *State* v. *Jones*, 140 Conn. App. 455, 59 A.3d 320 (2013), aff'd, 314 Conn. 410, 102 A.3d 694 (2014), this court concluded that "there exists no legal basis that suggests that our state constitution provides the defendant any broader protection [than the federal constitution] to confront a witness against him." Id., 466. "In the brief time since our Supreme Court conducted [its analysis under *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992)] of the confrontation clause in *Lockhart*, no decision from our state courts or from our sister states' appellate courts has called into question the soundness of its logic. Further, there are no compelling economic or sociological concerns that have arisen since the analysis was authored that would support a change in the interpretation of our confrontation clause." *State* v. *Jones*, supra, 475–76.

The judgment is affirmed.

In this opinion the other judges concurred.

PATRICK RIDER *v.* BRIAN RIDER, EXECUTOR (ESTATE OF LEIGH RIDER), ET AL.
(AC 42570)

DiPentima, C. J., and Lavine and Elgo, Js.*

Syllabus

The plaintiff appealed to this court from the judgment of the trial court dismissing for lack of subject matter jurisdiction an action he brought against the defendants in which he sought to claim ownership of a campground unit that had been sold to A Co. by B, the conservator and executor of the estate of R. The plaintiff alleged that, in 2009, after R and R's wife had agreed to transfer the unit to him, he learned that the deed that was to transfer ownership to him had not been recorded and that A Co. and C Co. had potential ownership claims to the unit. In 2014, the plaintiff filed a voluntary bankruptcy petition but did not list the unit as property of his estate. In 2017, the plaintiff recorded a lis pendens and commenced an action to quiet title to the unit. In June, 2017, R petitioned the Probate Court for a voluntary conservatorship of his estate and person. The Probate Court granted R's petition and appointed B as conservator of R's estate and person. B, as conservator, executed a deed that conveyed the unit to A Co., which was approved by the Probate Court. The plaintiff alleged that the defendants H and P had witnessed the deed and were aware of his 2017 action. The Probate Court ended the voluntary conservatorship the next day, and the deed for the unit was recorded in the land records that same day. The plaintiff did not file an appeal to challenge any of the Probate Court's actions. Thereafter, in October, 2017, R agreed to quitclaim title to the unit to the plaintiff in exchange for his withdrawal of the 2017 action. A Co. then informed the plaintiff that it owned the unit. The trial court granted the motions to dismiss that were filed by B, C Co., H and P, concluding that it lacked subject matter jurisdiction because the plaintiff lacked standing as a result of his failure to disclose in the bankruptcy proceeding his interest in the unit. The court determined that, as a result of that failure, the plaintiff's claim to the unit belonged to the bankruptcy trustee, who was not a party to the plaintiff's action against the defendants. On appeal, the plaintiff claimed that the trial court improperly concluded that he lacked standing and that, because the Probate Court lacked statutory (§ 45a-646) authority to appoint B as conservator, all subsequent proceedings in the Probate Court were void ab initio. *Held*:

1. This court would not consider the plaintiff's collateral challenge to the subject matter jurisdiction of the Probate Court: the plaintiff's claim,

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

which he raised, for the first time, on appeal to this court, that the Probate Court lacked authority under § 45a-646 to appoint B as conservator, was based on certain letters that related to B's appointment as conservator, which the Probate Court did not address in its decrees and for which there is no evidence that the Probate Court received; moreover, the plaintiff did not set forth any reason why he should be permitted to raise his collateral attack on the Probate Court's actions when he failed to appeal from the proceedings in that court and failed to raise his claim in the trial court, and the facts and circumstances of the present case did not constitute the exceptional case in which the lack of jurisdiction was so manifest as to warrant review.

2. The plaintiff could not prevail on his claim that the trial court improperly concluded that he lacked standing, as all of the claims he alleged in his complaint belonged to the bankruptcy estate; the plaintiff lacked standing to pursue his claims in those counts of his complaint that he asserted arose after the resolution of the bankruptcy proceedings and pertained to the October, 2017 quitclaim deed, as all of the alleged conduct purportedly occurred in September, 2017, when R's voluntary conservatorship terminated and the unit was transferred to A Co., and, thus, the only basis for the plaintiff to have standing to raise those claims was his interest in the unit that originated in 2009, which undisputedly belonged to the bankruptcy estate.

Argued February 19—officially released September 29, 2020

Procedural History

Action to quiet title to a certain campground unit, and for other relief, brought to the Superior Court in the judicial district of New London, where the court, *Hon. Emmet L. Cosgrove*, judge trial referee, granted the motions to dismiss filed by the named defendant et al. and rendered judgment thereon, from which the plaintiff appealed to this court. *Affirmed.*

Matthew S. Carlone, for the appellant (plaintiff).

Charles D. Houlihan, Jr., for the appellees (named defendant et al.).

Kerry R. Callahan, with whom was *Jeffrey E. Renaud*, for the appellee (defendant Franklin G. Pilicy).

Franklin G. Pilicy, for the appellee (defendant Lake Williams Campground Association, Inc.).

Opinion

DiPENTIMA, C. J. This appeal stems from a family dispute among a father and his two sons. In an effort to revive his claims to ownership of a campground parcel, the plaintiff, Patrick Rider, has created an appellate argument reminiscent of Frankenstein's monster,[1] as he has stitched together aspects of four separate matters: a probate proceeding, a bankruptcy action, a separate 2017 civil action (2017 action) and the underlying action in an effort to reverse the judgment of the trial court. The plaintiff appeals from the judgment of the trial court granting the motions to dismiss filed by the defendants, Brian Rider, individually and in his capacities as the executor and conservator of the estate of Leigh H. Rider, Jr. (Leigh Rider), Lake Williams Campground, Inc., Lake Williams Campground Association, Inc. (Association), Charles D. Houlihan, Jr., and Franklin G. Pilicy. The plaintiff and Brian Rider are the sons of Leigh Rider. On appeal, the plaintiff presents, for the first time, a collateral challenge to the appointment by the Probate Court of North Central Connecticut (Probate Court) of Brian Rider as conservator for Leigh Rider and the subsequent conveyance of a campground property from the conserved Leigh Rider to the Association. The plaintiff further contends that the trial court improperly dismissed his complaint on the ground that he lacked standing. We affirm the judgment of the trial court.

[1] See M. Shelley, Frankenstein (1818); see generally *Daniel* v. *Duetch Bank National Trust Co.*, United States District Court, Docket No. 07-cv -01400-MSK-MEH (D. Colo. February 27, 2008) (assertions and language in complaint culled from various form books and pleadings in other cases described as "Frankenstein's Monster"); *BlueStone Natural Resources II, LLC* v. *Randle*, 601 S.W.3d 848, 853 (Tex. App. 2019) (party described contract, "with its parts cobbled together from the parts bin of oil and gas lease provisions" as " 'Frankenstein's Monster' "), review granted, Texas Supreme Court, Docket No. 19-0459 (May 29, 2020); *Hudson* v. *Hapner*, 170 Wn. 2d 22, 36, 239 P.3d 579 (2010) (Sanders, J., dissenting) ("[i]t is difficult to address the majority's reasoning because, much like Frankenstein's monster, the majority opinion is a sewn-together collection of partial arguments, each pilfered from a different cadaver and none lending any real support to its conclusion").

As we recently have stated, "[w]hen a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those necessarily implied from the allegations, construing them in a manner most favorable to the pleader. . . . The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone." (Internal quotation marks omitted.) *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 394, A.3d (2020).

The plaintiff commenced the underlying action on April 17, 2018, by service of an eight count complaint. The plaintiff brought this action against Brian Rider individually and in his capacity as the executor of the estate of Leigh Rider, who died on December 2, 2017. He also sued Brian Rider in his capacity as the conservator of Leigh Rider, a position that Brian Rider held from July 27 to September 28, 2017. Additionally, the plaintiff named the Lake Williams Campground, Inc., and the Association as defendants. The plaintiff described the Lake Williams Campground, Inc., as a "Connecticut common interest cooperative community consisting of subdivided parcels of real property created pursuant to the [d]eclaration of Lake Williams Campground," and these parcels, as subdivided, are known as "Units." The declaration created the Association. Finally, the plaintiff named in his complaint two attorneys, Houlihan and Pilicy, who represented certain defendants at relevant times in these proceedings.

The plaintiff alleged that, in 2009, Leigh Rider and his wife, Sandra Rider,[2] owned a parcel of property known

[2] The court noted in its memorandum of decision that Sandra Rider died sometime after 2009 and was never a party to these proceedings.

as "Unit #1." At that time, Leigh Rider and Sandra Rider wanted the plaintiff to join the Association's board of directors and take over control of its financial affairs. As a prerequisite, the plaintiff needed to become an owner of a Unit in the campground. Thus, "Leigh and Sandra Rider represented to the plaintiff that they would transfer title to Unit #1 to the plaintiff in exchange for the plaintiff agreeing to become a member of the board of directors for at least two (2) years." The plaintiff agreed to this plan, and Leigh Rider represented that title to Unit #1 had been conveyed to the plaintiff, who accepted a position on the board of directors. The plaintiff subsequently learned that the quitclaim deed that was to transfer ownership of Unit #1 to him had not been recorded, and that the Association and Lake Williams Campground, Inc., had potential ownership claims to that parcel. The plaintiff alleged a cause of action to quiet title to Unit #1, pursuant to General Statutes § 47-31, in count one of his complaint. In the second count of his complaint, the plaintiff alleged that he previously had commenced the 2017 action,[3] seeking, inter alia, to quiet title and, or, to obtain an equitable lien on Unit #1.

Counts three and four set forth claims of fraud against Brian Rider, as conservator for Leigh Rider, and Houlihan, who was counsel for Brian Rider as conservator, while counts five and six alleged that Pilicy and the Association were "accessories" to fraud. Regarding these counts, the plaintiff alleged that as part of the 2017 action, he had recorded a lis pendens in the Lebanon land records. Approximately four months later, Leigh Rider filed a petition in the Probate Court voluntarily seeking the appointment of a conservator.[4] The Probate Court granted his petition and appointed Brian Rider as conservator.

[3] See *Rider* v. *Rider*, Superior Court, judicial district of New London, Docket No. CV-17-6029789-S (withdrawn by plaintiff on October 23, 2017).

[4] See *In re Leigh H. Rider, Jr.*, Court of Probate, North Central Connecticut (17-0344) (June 28, 2017).

Leigh Rider subsequently filed a request for release from the voluntary conservatorship, but before that request could be acted on, Brian Rider, as conservator, entered into a contract to sell certain properties owned by Leigh Rider to the Association; Unit #1 was not part of this transaction. One day before the termination of the voluntary conservatorship, the Probate Court approved the sale of Leigh Rider's properties. Later that day, Brian Rider, as conservator, executed a deed conveying Unit #1 from Leigh Rider to the Association. The deed was recorded on the land records the next day. According to the plaintiff's complaint, Houlihan and Pilicy witnessed the deed and were aware of the 2017 action and the lis pendens encumbering Unit #1.

On October 14, 2017, the plaintiff and Leigh Rider reached a settlement whereby Leigh Rider agreed to transfer title of Unit #1 to the plaintiff in exchange for the withdrawal of the 2017 action. Approximately six weeks later, the plaintiff received a letter from the Association stating that it owned Unit #1. In response, the plaintiff notified the relevant parties that Unit #1 should not have been included in the sale of Leigh Rider's properties and that they should take all necessary steps to remedy the situation.

Count seven of the plaintiff's complaint incorporated most of the plaintiff's prior allegations as stated in counts one through six and set forth a claim of breach of fiduciary duty as to Brian Rider, as conservator. Finally, in count eight of the complaint, the plaintiff sought a declaratory judgment that the deed transferring Unit #1 to the Association in the absence of approval from the Probate Court was void. In his prayer for relief, the plaintiff requested an order establishing his ownership of Unit #1, an equitable lien as to Unit #1, a declaratory judgment declaring that the transfer of Unit #1 to the Association was void, money damages, attorney's fees and costs.

On June 6, 2018, Brian Rider, individually and in his capacities as executor and conservator, and Lake Williams Campground, Inc., filed a motion to dismiss the plaintiff's complaint. Specifically, these defendants argued, inter alia, that the plaintiff had filed a voluntary bankruptcy petition in August, 2014,[5] and, as a result, his interest in Unit #1 became the property of the bankruptcy estate. These defendants, therefore, claimed that the plaintiff lacked standing. Houlihan filed a similar motion on the same day. One week later, Pilicy raised the same standing argument in his motion to dismiss. On July 25, 2018, the plaintiff acknowledged that the three motions to dismiss were "substantively identical" and filed a single objection in response. The court heard argument from the parties on August 6, 2018.[6]

On October 12, 2018, the court, *Hon. Emmet L. Cosgrove*, judge trial referee, issued a memorandum of decision granting the motions to dismiss filed by the defendants.[7] At the outset of its analysis, the court stated: "The defendants' main argument is that the court lacks subject matter jurisdiction because the plaintiff lacks standing because he failed to disclose his interest in Unit #1 when he voluntarily declared bankruptcy in 2014. Accordingly, his interest in Unit #1 remains with

[5] See *In re Rider*, United States Bankruptcy Court, Case No. 14-21583 (D. Conn. August 7, 2014).

[6] This court has not been provided with a transcript of the August 6, 2018 hearing.

[7] It appears that the Association neither filed its own motion to dismiss nor joined any of the three motions to dismiss filed by the other defendants. Nevertheless, the court's conclusion that the plaintiff lacked standing, which implicated subject matter jurisdiction and the subsequent dismissal of the complaint, applies to all the defendants. See, e.g., *In re Michelle G.*, 52 Conn. App. 187, 190, 727 A.2d 226 (1999) (questions of standing and subject matter jurisdiction may be raised at any time during proceedings and by any party or by court sua sponte).

We also note that the court properly concluded that the other arguments raised by the defendants, res judicata and lack of privity to a contract, "are inappropriate in a motion to dismiss . . . [r]ather, those claims are properly raised through a motion for summary judgment." (Citation omitted.)

his bankruptcy trustee, who possess[es] the sole right to exercise that interest but is not a party to this action." The court concluded that the plaintiff had been aware of his potential interest in Unit #1 in 2009, prior to his filing of the bankruptcy petition, but had failed to include it in either the initial 2014 bankruptcy petition or in any subsequent amendments.[8] As a result of this failure, his claims relating to Unit #1 belonged solely to the bankruptcy trustee.[9]

On November 30, 2018, the plaintiff moved for reargument and reconsideration of the decision to dismiss his complaint for lack of subject matter jurisdiction. He argued, inter alia, that counts three through eight of the complaint did not pertain to his 2009 agreement with Leigh Rider; those counts, he claimed, arose from the October 14, 2017 quitclaim deed transferring Unit #1 to him, which was part of the agreement to withdraw the 2017 action. On January 4, 2019, the court denied the plaintiff's motion, concluding that the plaintiff failed to plead facts that would establish his standing to assert the claims in his complaint. The plaintiff then filed a second motion for reargument and reconsideration, which the court denied on January 28, 2019. This appeal followed. Additional facts will be set forth as necessary.

Before addressing the specific appellate claims raised by the petitioner, we set forth the relevant legal principles. "The standard of review of a motion to dismiss is

[8] The court took judicial notice of the plaintiff's bankruptcy petition.

[9] The court also determined that the plaintiff's May 23, 2018 opening of the bankruptcy case did not afford him any relief. Specifically, the court stated: "[O]nce a debtor fails to disclose an asset in his or her bankruptcy petition, the debtor may not claim such asset after discharge of the debt, regardless if the debtor opens the petition. Here, according to the docket report from the Bankruptcy Court, the court issued an order discharging the plaintiff's debt on November 19, 2014, and closed the case on December 10, 2014. Thus, the plaintiff's opening of the case does not change the fact that he lacks standing to pursue his claimed interest in Unit # 1."

. . . 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 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.) *Romeo* v. *Bazow*, 195 Conn. App. 378, 385–86, 225 A.3d 710 (2020).

Questions of standing implicate the court's subject matter jurisdiction. *Jenzack Partners, LLC* v. *Stoneridge Associates, LLC*, 334 Conn. 374, 382, 222 A.3d 950 (2020). "Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy. . . . When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue . . . ." (Internal quotation marks omitted.) *Starboard Resources, Inc.* v. *Henry*, 196 Conn. App. 80, 88, 228 A.3d 1042, cert. denied, 335 Conn. 919, 231 A.3d 1170 (2020). If a party lacks standing, then the court is without subject matter jurisdiction. *Saunders* v. *Briner*, 334 Conn. 135, 156, 221 A.3d 1 (2019). Guided by these principles, we now turn to the specific claims raised by the plaintiff in this appeal.

I

The plaintiff first claims that the 2017 conveyance of Unit #1 to the Association, which occurred through Brian Rider's actions as conservator, was invalid because the conservatorship was void ab initio. The plaintiff contends, therefore, that Brian Rider lacked the legal authority to transfer, sell or convey any of the property owned by Leigh Rider, including Unit #1. Essentially, the plaintiff seeks, for the first time, to collaterally challenge the Probate Court proceedings in this appeal. We decline to consider this collateral attack on the actions of the Probate Court.

The following additional facts from the Probate Court proceedings are necessary for our discussion. On June 28, 2017, Leigh Rider petitioned the Probate Court to appoint a voluntary conservator of both his estate and his person pursuant to General Statutes § 45a-646.[10] See footnote 4 of this opinion. The Probate Court scheduled a hearing on the petition on July 27, 2017. Following that hearing, the Probate Court issued a decree appointing Brian Rider as conservator of the person and the estate of Leigh Rider. On August 29, 2017, Thomas Becker,

[10] General Statutes § 45a-646 provides in relevant part: "Any person may petition the Probate Court . . . for the appointment of a conservator of the person or a conservator of the estate, or both. . . . Upon receipt of the petition, the court shall set a time and place for hearing and shall give such notice as it may direct to the petitioner, the petitioner's spouse, if any . . . and to other interested parties, if any. After seeing the respondent in person and hearing his or her reasons for the petition and after explaining to the respondent that granting the petition will subject the respondent or respondent's property, as the case may be, to the authority of the conservator, the court may grant voluntary representation and thereupon shall appoint a conservator of the person or estate or both, and shall not make a finding that the petitioner is incapable. The conservator of the person or estate or both, shall have all the powers and duties of a conservator of the person or estate of an incapable person appointed pursuant to section 45a-650. . . ."

See generally *Heinemann* v. *Heinemann*, Superior Court, judicial district of Middlesex, Docket No. CV-16-6015584-S (September 14, 2017).

the attorney for Leigh Rider, notified the Probate Court in writing of Leigh Rider's request to revoke the voluntary conservatorship.[11] On August 31, 2017, the Probate Court sent notice of Leigh Rider's request to be released from the voluntary conservatorship and that pursuant to General Statutes § 45a-647,[12] such release would occur on September 28, 2017.

On September 11, 2017, Houlihan, as attorney for Brian Rider as conservator, filed a motion with the Probate Court to approve the sale of property owned by Leigh Rider to the Association. Attached to that motion was the real estate contract identifying Leigh Rider as the seller and the Association as the buyer. That contract contained the following clause with respect to Unit #1: "Unit [#1] . . . is subject to pending litigation between Patrick Rider and Leigh Rider. If the litigation is resolved in favor of Leigh Rider, Leigh Rider shall convey Unit [#1] to the Association." After a September 27, 2017 hearing, the Probate Court issued a decree, approving the sale pursuant to the terms of the contract. Finally, the Probate Court ended the voluntary conservatorship effective September 28, 2017. The plaintiff did not file an appeal to challenge any of the actions of the Probate Court. See, e.g., General Statutes § 45a-186; cf. *In re Probate Appeal of Buckingham*, 197 Conn.

[11] Specifically, Becker's letter to the Probate Court stated: "I am the attorney for Leigh Rider in the matter of his voluntary conservatorship. Please let this letter stand as Mr. Leigh Rider's request to revoke his voluntary conservatorship. The matter is currently being set down for a hearing on a real estate contract with the Lake Williams Campground association. There is a second contract on the same piece of property from a corporation owned by Mr. Rider's other son Patrick Rider. Please put all of these matters together in a single hearing if possible. Also I cannot be available for a Monday or a Wednesday. Thank you."

[12] General Statutes § 45a-647 provides: "Any person who is under voluntary representation as provided by section 45a-646 shall be released from voluntary representation upon giving thirty days' written notice to the Court of Probate."

See generally *Day* v. *Seblatnigg*, 186 Conn. App. 482, 505, 199 A.3d 1103 (2018), cert. granted, 331 Conn. 913, 204 A.3d 702 (2019).

App. 373, 376, 231 A.3d 1261 (2020); *In re Probate Appeal of Knott*, 190 Conn. App. 56, 61–62, 209 A.3d 690 (2019).

For the first time, on appeal, the plaintiff argues that the Probate Court lacked statutory authority to appoint Brian Rider as conservator, and therefore all the subsequent proceedings in that court were void ab initio. Underlying this claim are two letters relating to the appointment of Brian Rider as conservator for Leigh Rider. The first letter, dated July 22, 2017, and addressed to the "Enfield Court of Probate," purported to be a letter from Leigh Rider revoking his application for a voluntary conservatorship and requesting the cancellation of the July 27, 2017 hearing regarding the appointment of a voluntary conservator. That letter bears a stamp indicating only that it had been "received" on July 26, 2017.

The second letter, undated, appears to have been sent via telefax, and was addressed to the "North Central Connecticut Probate Court" from Brian Rider. It was stamped as "received" on July 24, 2017. This document alleged that Leigh Rider's cancellation letter resulted from misinformation and manipulations by the plaintiff. The second letter requested that the Probate Court proceed with the hearing to determine Leigh Rider's true intent regarding the appointment of a voluntary conservatorship. It bears emphasizing that the Probate Court did not address either of these letters in its decrees, and there is no evidence in the record before this court that either letter had been received by the Probate Court.

Despite this evidentiary lacuna, the plaintiff claims nonetheless that this court should rely on the contents of the first letter and conclude that the Probate Court lacked subject matter jurisdiction so that the appointment of Brian Rider as the conservator for Leigh Rider, and all the proceedings that followed in the Probate Court, must be determined to be void. We are not persuaded.

As a court of limited jurisdiction, the Probate Court "is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation." (Internal quotation marks omitted.) *Geremia* v. *Geremia*, 159 Conn. App. 751, 766–67, 125 A.3d 549 (2015); see also *Heussner* v. *Hayes*, 289 Conn. 795, 802–803, 961 A.2d 365 (2008). The plaintiff contends that the first letter, purportedly from Leigh Rider, withdrew the petition for a voluntary conservatorship, and therefore the Probate Court lacked the statutory authority to appoint Brian Rider as conservator for Leigh Rider pursuant to § 45a-646. Alternatively, the plaintiff claims that the first letter operated as notice pursuant to § 45a-647 and commenced the thirty day time period to end the voluntary conservatorship, resulting in the end of the conservatorship before the Probate Court's approval of the sale of Leigh Rider's real estate.

The plaintiff relies on his claim that the Probate Court lacked subject matter jurisdiction to overcome the myriad roadblocks to appellate review, including his failure to appeal directly from the Probate Court proceedings, his failure to raise this claim in the trial court and his reliance on documents not presented to the trial court. To be sure, it is often stated that "[a] claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings . . . including on appeal . . . ." (Internal quotation marks omitted.) *Starboard Resources, Inc.* v. *Henry*, supra, 196 Conn. App. 88; *Kelly* v. *Kurtz*, 193 Conn. App. 507, 539, 219 A.3d 948 (2019); see also *Taylor* v. *Wallace*, 184 Conn. App. 43, 48, 194 A.3d 343 (2018) (issue of subject matter jurisdiction may be raised at any time, even at appellate level); *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 500 n.10, 167 A.3d 1112 (claim that implicates court's subject matter jurisdiction may be raised at any time, including for first time on appeal), cert. denied, 327 Conn. 973, 174 A.3d 192 (2017).

Our jurisprudence, however, has recognized limits to raising a collateral attack setting forth a claim of lack of subject matter jurisdiction. See, e.g., *Upjohn Co.* v. *Zoning Board of Appeals*, 224 Conn. 96, 103–104, 616 A.2d 793 (1992). "Although challenges to subject matter jurisdiction may be raised at any time, it is well settled that [f]inal judgments are . . . presumptively valid . . . and collateral attacks on their validity are disfavored. . . . The reason for the rule against collateral attack is well stated in these words: The law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . Public policy requires that a term be put to litigation and that judgments, as solemn records upon which valuable rights rest, should not lightly be disturbed or overthrown. . . . [T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings. Unless it is *entirely invalid* and that fact is disclosed by an inspection of the record itself the judgment is invulnerable to indirect assaults upon it. . . .

"[I]t is now well settled that, [u]nless a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid, he or she must resort to direct proceedings to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal. . . . [A]t least where the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if he did have such an opportunity, whether there

are strong policy reasons for giving him a second opportunity to do so." (Citations omitted; emphasis altered; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771–72, 143 A.3d 578 (2016); see also *Investment Associates* v. *Summit Associates, Inc.*, 309 Conn. 840, 855, 74 A.3d 1192 (2013) (litigation about subject matter jurisdiction should take into account principle of finality of judgments, particularly when parties had full opportunity originally to contest jurisdiction); *Urban Redevelopment Commission* v. *Katsetos*, 86 Conn. App. 236, 244, 860 A.2d 1233 (2004) (collateral attack on judgment is procedurally impermissible substitute for appeal and litigant generally must resort to direct appeal to correct perceived wrongs), cert. denied, 272 Conn. 919, 866 A.2d 1289 (2005). Our Supreme Court further explained that such a collateral attack is permissible only in rare instances when the lack of jurisdiction is entirely obvious so as to "amount to a fundamental mistake that is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority . . . [or] the exceptional case in which the court that rendered judgment lacked even an arguable basis for jurisdiction." (Citations omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 773.

In the present case, the Probate Court's purported lack of subject matter jurisdiction resulting from the lack of statutory authority is not entirely obvious. Indeed, the plaintiff acknowledges in his appellate brief that the legal effect of the purported revocation letter "appears to be a novel issue as undersigned counsel was unable to find any case law, or other authority, that might provide guidance." Additionally, assuming that the Probate Court received the two letters from Leigh Rider and Brian Rider, it never addressed or discussed those documents in a decree or indicated whether it found them to be authentic or credible. Further, the plaintiff has not set forth any reason why he should be permitted to raise his collateral attack when

he failed to appeal directly from the proceedings in the Probate Court. Finally, we are not persuaded that these facts and circumstances constitute the exceptional case in which the lack of jurisdiction was so manifest as to warrant review at this point in the proceedings. Accordingly, we decline the plaintiff's invitation to consider his untimely collateral challenge to the subject matter jurisdiction of the Probate Court.

II

The plaintiff next claims that the trial court improperly concluded that he lacked standing. Specifically, he argues that the court erred by determining that all of the claims alleged in his complaint were the property of his bankruptcy estate, and that, therefore, he lacked standing and the court lacked subject matter jurisdiction. We are not persuaded.

The plaintiff does not challenge the law cited by the trial court regarding the transfer of assets and causes of action relative to a bankruptcy estate. Specifically, the court stated: "Commencement of a bankruptcy proceeding creates an estate that comprises all legal or equitable interests of the debtor in property as of the commencement of the case. . . . The debtor must file a formal statement with the Bankruptcy Court, including a schedule of his or her assets and liabilities. . . . The assets, which become the property of the bankruptcy estate, include all causes of action belonging to the debtor that accrued prior to the filing of the bankruptcy petition. . . . A cause of action becomes a part of the bankruptcy estate even if the debtor fails to schedule the claim in his petition. . . . [P]roperty that is not formally scheduled is not abandoned and therefore remains part of the estate. . . . Courts have held that because an unscheduled claim remains the property of the bankruptcy estate, the debtor lacks standing to pursue the claims after emerging from bankruptcy, and the claims must be dismissed. . . . *Assn.*

Resources, Inc. v. *Wall*, 298 Conn. 145, 164–65, 2 A.3d 873 (2010).

"[*I*]*t is a basic tenet of bankruptcy law . . . that all assets of the debtor, including all* [*prepetition*] *causes of action belonging to the debtor, are assets of the bankruptcy estate* that must be scheduled for the benefit of the creditors . . . . *Beck & Beck, LLC* v. *Costello*, 178 Conn. App. 112, 117, 174 A.3d 227 (2017), cert. denied, 327 Conn. 1000, 176 A.3d 555 (2018). [W]here a debtor fails to list a claim as an asset on a bankruptcy petition, the debtor is without legal capacity to pursue the claim on his or her own behalf [postdischarge]. . . . This is so regardless of whether the failure to schedule causes of action is innocent. . . . Id., 118." (Emphasis added; internal quotation marks omitted.)

The plaintiff does not contest the dismissal of counts one and two of his complaint due to the lack of standing. Instead, he argues that counts three through eight of this operative complaint do not arise from a prebankruptcy cause of action related to Unit #1.[13] He maintains that the causes of action alleged in counts three through eight arose when Leigh Rider executed the quitclaim deed in favor of the plaintiff on October 14, 2017, three years after the resolution of his bankruptcy proceedings; see footnote 9 of this opinion; and, therefore, the court improperly dismissed these counts. The court concluded that the plaintiff had failed to allege facts setting forth his standing to assert the causes of action pleaded in counts three through eight. We agree with the court.

[13] The plaintiff also contends that the contract approved by the Probate Court specifically excluded Unit #1. That assertion is incorrect. The contract executed by Brian Rider, as conservator, and the association provided: "Unit [#1] . . . is subject to pending litigation between Patrick Rider and Leigh Rider. If the litigation is resolved in favor of Leigh Rider, Leigh Rider shall convey Unit [#1] to the Association." Furthermore, the plaintiff failed to appeal from the decree of the Probate Court approving the sale of the property owned by Leigh Rider, including Unit #1.

A close examination of the relevant counts of the complaint is necessary for the resolution of this claim. Count one of the plaintiff's complaint contained twenty-one paragraphs. Count three, directed against Brian Rider, as conservator, incorporated the first seventeen paragraphs. The remaining paragraphs of count three alleged, inter alia, that Brian Rider, as conservator, had perpetrated a fraud by conveying Unit #1 to the association and that he had failed to take steps to reflect that the plaintiff, in fact, owned Unit #1. Counts four, five and six incorporated all but one paragraph of count three, and added allegations of liability against Houlihan, Pilicy and the Association for their actions related to the transfer of Unit #1 to the Association. Count seven also incorporated all but one paragraph from count three and added allegations that Brian Rider's conduct constituted a breach of fiduciary duty as conservator. Count eight, after incorporating all but one paragraph from count three, contained allegations that Brian Rider, as conservator, had lacked authorization from the Probate Court to transfer Unit #1 and sought a declaratory judgment that the deed transferring ownership from Leigh Rider to the Association was void.

In its memorandum of decision granting the motions to dismiss, the court concluded that the plaintiff lacked standing because he had failed to disclose his actual or potential interest in Unit #1 in his 2014 bankruptcy petition. The court also noted that "[t]he plaintiff did not list any properties that he owned or had any interest in [in his bankruptcy petition]. . . . According to his own complaint, the plaintiff was aware of his potential interest in Unit #1 in 2009, and exercised ownership of the unit, five years before the filing of his bankruptcy petition. . . . Accordingly, the plaintiff had a duty to disclose his interest in Unit #1. His failure to do so means his trustee possesses the claim, not him. Further,

the plaintiff has not presented any order from the Bankruptcy Court allowing him to pursue his claim independently." (Citation omitted.)

On November 30, 2018, the plaintiff filed a motion to reargue and for reconsideration. Therein, he contended that the 2009 oral promise from Leigh Rider to transfer Unit #1 to the plaintiff pertained only to counts one and two, while the balance of the complaint relied on the quitclaim deed that was part of the agreement to settle the 2017 action. Specifically, the plaintiff asserted: "Since it was not possible to list the claims set forth in count three through eight in the plaintiff's 2014 bankruptcy petition, these claims are not property of the bankruptcy estate. Therefore, the plaintiff has standing to assert the claims pertaining to the 2017 quitclaim deed set forth in counts three through eight." The court denied the motion for reargument and reconsideration on January 4, 2019. The plaintiff then filed a second motion for reargument and reconsideration, which the court denied without further comment.

Resolution of this claim requires us to interpret the pleadings, namely, the plaintiff's complaint. "[T]he interpretation of pleadings is always a question [of law] for the court . . . . The modern trend, which is followed in Connecticut, is to construe pleadings broadly and realistically, rather than narrowly and technically. . . . Although essential allegations may not be supplied by conjecture or remote implication . . . the complaint must be read in its entirety in such a way as to give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties. . . . Construction of pleadings is a question of law. Our review of a trial court's interpretation of the pleadings therefore is plenary." (Citation omitted; internal quotation marks omitted.) *Chase Home Finance, LLC* v. *Scroggin*, 178 Conn. App. 727, 743, 176 A.3d 1210 (2017); see also *Alpha Beta*

Capital Partners, L.P. v. *Pursuit Investment Management, LLC*, 193 Conn. App. 381, 419, 219 A.3d 801 (2019) (interpretation of pleadings presents question of law subject to plenary review), cert. denied, 334 Conn. 911, 221 A.3d 446 (2020); *Wiele* v. *Board of Assessment Appeals*, 119 Conn. App. 544, 555, 988 A.2d 889 (2010) (pleadings are to be interpreted broadly, but also must be construed reasonably and not in such way so as to strain bounds of rational comprehension).

A careful review of the plaintiff's complaint reveals that the fraudulent conduct alleged in counts three through six against Brian Rider as conservator, Houlihan, Pilicy and the Association, purportedly occurred in September, 2017, when the transaction involving the sale and transfer of Unit #1 to the Association took place. Those events occurred *prior* to the October 14, 2017 quitclaim deed executed as part of the settlement of the 2017 action. Accordingly, the only basis for the plaintiff to have standing to raise these claims was his interest in Unit #1 that originated in 2009, prior to the bankruptcy proceedings. As we have noted, that interest undisputedly belonged to the bankruptcy estate and not the plaintiff. We agree, therefore, with the court that the plaintiff failed to set forth allegations in counts three through six that establish his standing to pursue such claims.

This analysis and reasoning similarly applies to count seven of the complaint, which alleged breach of fiduciary duty against Brian Rider, as conservator. As alleged in the complaint, the conservatorship terminated on September 28, 2017. That termination preceded the execution of the October 14, 2017 quitclaim deed on which the plaintiff relies in his appellate argument. Thus, the only basis for the plaintiff's standing as to count seven is that from 2009, which, as we repeatedly have noted, belonged to the bankruptcy estate and not the plaintiff. Accordingly, we conclude that

the court properly determined that the plaintiff lacked standing as to count seven of his complaint.

Count eight of the plaintiff's complaint sought a declaratory judgment that the transfer of Unit #1 to the Association was void due to the lack of authorization by the Probate Court. As these events occurred prior to the execution of the October 14, 2017 quitclaim deed, we again conclude that the court properly determined that the plaintiff lacked standing to pursue this claim. The only interest that the plaintiff could have had in Unit #1 originated in 2009 and therefore belonged exclusively to the bankruptcy estate. The plaintiff's post hoc efforts to reinvent the allegations contained in his complaint are unavailing. We therefore conclude that the trial court properly granted the motions to dismiss due to the plaintiff's lack of standing.[14]

The judgment is affirmed.

In this opinion the other judges concurred.

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[14] The plaintiff also claims that the court improperly denied his two motions for reargument and reconsideration. We are not persuaded. "[T]he purpose of reargument is . . . to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts. . . . It also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court. . . . [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." (Internal quotation marks omitted.) *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 47–48 n.13, 231 A.3d 297, cert. denied, 335 Conn. 921, 231 A.3d 1169 (2020). We review the denial of a motion for reargument under the abuse of discretion standard. *Priore* v. *Haig*, 196 Conn. App. 675, 685, 230 A.3d 714 (2020).

As we have concluded that the court properly granted the motions to dismiss the plaintiff's complaint on the basis of his lack of standing, no further discussion is necessary with respect to his claim regarding the denial of his motions for reargument and reconsideration.

STATE OF CONNECTICUT *v.* XAVIER RIVERA (AC 43411)

Alvord, Elgo and Pellegrino, Js.

Syllabus

Convicted, after a jury trial, of various crimes, including murder, in connection with the shooting death of the victim, the defendant appealed. One individual, R, witnessed the shooting and called 911, but later, R was unable to identify the defendant in a photographic array prepared by the police. Several weeks after the shooting, the defendant and V were discussing the shooting in the defendant's vehicle, and the defendant admitted to having killed the victim. Without the defendant's knowledge, V had recorded the conversation on his cell phone and brought the recording to the police and, as the police requested, V then e-mailed the recording to the police. The state introduced a copy of V's recording into evidence at trial, over the defendant's objection. *Held*:

1. The trial court acted within its discretion when it limited two of defense counsel's closing arguments by providing the jury with curative instructions:

   a. Defense counsel improperly asked the jury to engage in speculation and improperly commented on facts not in evidence when counsel asked the jury to consider why the state did not ask R to make an in-court identification of the defendant, there having been no evidence in the record on which the jury could have based such a conclusion and counsel was well aware of the reason why the state did not make such a request; moreover, because it was well within the court's discretion to give its own curative instruction to the jury, the defendant's claim that the court was required to use the jury instruction language set forth in *State* v. *Dickson* (322 Conn. 410) was unavailing, as that argument was based on an incorrect reading of *Dickson*, and the jury instruction language therein was inapplicable.

   b. Defense counsel's investigative omission argument regarding the lack of a voice exemplar taken from the defendant to question whether it was the defendant's voice on the recording made by V improperly commented on facts not in evidence, the record having contained no evidence that defense counsel ever questioned any of the state's witnesses regarding a voice exemplar, ever sought a voice exemplar, or presented any testimony, expert or otherwise, on the subject of voice exemplars or police investigative techniques.

2. The defendant's claim that the trial court erred in admitting into evidence a copy of the recording of the defendant's confession was unavailing: the court did not abuse its discretion because a copy of the recording, rather than the original, was admissible pursuant to the applicable provisions of the Connecticut Code of Evidence (§§ 10-1, 10-2, and 10-3) and

there was ample evidence in the record from which the court could have concluded that admission of the copy of the recording would not be unfair to the defendant; accordingly, because the provisions of the Code of Evidence ensured a fair and just outcome, this court declined to exercise its supervisory powers to heighten the requirements for the admission of copies of digital evidence.

Argued May 15—officially released September 29, 2020

Procedural History

Substitute two part information charging the defendant, in the first part, with the crimes of murder, conspiracy to commit assault in the first degree, unlawful restraint in the first degree, unlawful discharge of a firearm, and carrying a pistol without a permit, and, in the second part, with criminal possession of a pistol or revolver, brought to the Superior Court in the judicial district of Fairfield, where the first part of the information was tried to the jury before *Kavanewsky*, *J.*; verdict of guilty; thereafter, the state entered a nolle prosequi as to the second part of the information, and the court, *Kavanewsky*, *J.*, rendered judgment in accordance with the verdict, from which the defendant appealed. *Affirmed*.

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

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *Marc R. Durso*, senior assistant state's attorney, for the appellee (state).

Opinion

PELLEGRINO, J. The defendant, Xavier Rivera, appeals from the judgment of conviction, rendered after a jury trial, of the crimes of murder in violation of General Statutes § 53a-54a (a), conspiracy to commit assault in the first degree in violation of General Statutes §§ 53a-59 (a) (1) and 53a-48, unlawful restraint in the first degree

in violation of General Statutes § 53a-95, unlawful discharge of a firearm in violation of General Statutes § 53-203, and carrying a pistol without a permit in violation of General Statutes § 29-35 (a). On appeal, the defendant claims that the trial court abused its discretion by (1) impermissibly limiting defense counsel's argument with curative instructions to the jury and (2) admitting into evidence a copy of an audio recording of the defendant over his objections. With regard to his evidentiary claim, the defendant claims, in the alternative, that this court should exercise its supervisory powers to raise the threshold for the admission of copies of digital evidence. We disagree and affirm the judgment of the trial court.

The following facts, which the jury could have reasonably found, and procedural history are relevant to the defendant's appeal. At approximately midnight on December 24, 2016, the defendant, Alexis Vilar and Moises Contreras travelled to the area of 287 North Avenue in Bridgeport, where an AutoZone store and Popeyes Louisiana Kitchen (Popeyes) are located. The parking lot of the AutoZone was the location where a group of car enthusiasts, including the victim, Miguel Rivera,[1] gathered to socialize on a regular basis. The defendant, Vilar, and Contreras were travelling to the area of the AutoZone because the defendant intended to confront the victim there. The defendant travelled alone in his vehicle, and Vilar and Contreras travelled together in Vilar's vehicle. The defendant, Vilar, and Contreras arrived in the area of the AutoZone and Popeyes shortly after midnight, and parked a short distance away from the gathering in the AutoZone parking lot.

The defendant approached the victim on foot and pulled him out of his vehicle. The defendant and Contreras then dragged the victim across the parking lot,

[1] Although the defendant and the victim share the same last name, they are unrelated.

where the defendant struck him across the face with his pistol and Contreras fired two shots from his revolver. The victim pleaded with the defendant, and the defendant proceeded to shoot him several times with his pistol. The victim then made his way toward the Popeyes drive-thru, where he collapsed and ultimately died as a result of the gunshot wounds. Immediately after shooting the victim, the defendant fled the scene in his vehicle, and Vilar and Contreras fled together in Vilar's vehicle. While the incident took place, Jesus Rodriguez was sitting in a parked vehicle in the AutoZone parking lot. From his vehicle, Rodriguez witnessed the incident in its entirety. Rodriguez then proceeded to drive away from the scene and call 911.

On January 15, 2017, the defendant and Vilar spoke privately in the defendant's vehicle about the incident that occurred on December 24, 2016. Without the defendant's knowledge, Vilar recorded the conversation on his cell phone. During the conversation, the defendant admitted to having killed the victim. On January 19, 2018, Vilar brought the recording to the Bridgeport Police Department (department) and identified the voices on the recording as himself and the defendant. Vilar then e-mailed the recording to the police, per their instructions. The defendant was arrested on January 31, 2017, and charged with murder, conspiracy to commit assault in the first degree, unlawful restraint in the first degree, unlawful discharge of a firearm, and carrying a pistol without a permit. Following a jury trial, the defendant was convicted of all five counts. The court thereafter sentenced the defendant to a total effective sentence of fifty-five years of imprisonment, with a mandatory minimum of thirty years, and this appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant challenges his conviction of all counts on the ground that the trial court abused its discretion

by improperly intervening in the closing arguments and, over defense counsel's objection, directing the jury to disregard portions of defense counsel's argument. Specifically, the defendant argues that the court abused its discretion by giving the jury a curative instruction addressing the fact that Rodriguez did not provide an in-court identification of the defendant and a curative instruction regarding defense counsel's "investigative omission" argument.

A

First, we address the defendant's claim that the court abused its discretion by giving a curative instruction to the jury addressing the fact that Rodriguez did not provide an in-court identification of the defendant. Specifically, the defendant claims that the court abused its discretion by impermissibly limiting defense counsel's argument with this instruction. In the alternative, the defendant claims that the court abused its discretion by giving its own instruction to the jury instead of using the language that was prescribed by our Supreme Court 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).[2] We disagree.

The following additional facts and procedural history are relevant to our resolution of the defendant's claims. On January 21, 2017, Rodriguez was interviewed by members of the department. At trial, Rodriguez was called as a witness by the state. While Rodriguez was on the witness stand, the state did not ask for, and

[2] The following language was prescribed by our Supreme Court for use by trial courts when a jury instruction has been requested by the state after a first time in-court identification has not been permitted: "[A]n in-court identification was not permitted because inherently suggestive first time in-court identifications create a significant risk of misidentification and because either the state declined to pursue other, less suggestive means of obtaining the identification or the eyewitness was unable to provide one." *State* v. *Dickson*, supra, 322 Conn. 449.

Rodriguez did not provide, an in-court identification of the defendant. After Rodriguez' testimony, it was stipulated that during his interview with the department, Rodriguez was shown an array of eight photographs, which included a photograph of the defendant, and that Rodriguez did not identify the defendant at that time. During closing arguments, defense counsel made the following statement with regard to Rodriguez: "He was shown . . . an array of photographs that included [the defendant's] picture and . . . he did not pick [the defendant] as the shooter . . . . And he was in court . . . on the witness stand. Did the prosecutor . . . say to him, hey, do you see the guy in this courtroom who you saw? . . . [D]oes the state say to him . . . do you see the guy here in the courtroom? No, never says anything." The trial court then addressed, outside of the presence of the jury, that portion of defense counsel's argument: "[T]here was a stipulation that [Rodriguez] was shown a photo array, which included a picture of the defendant, and yet he did not make an identification of the defendant. . . . However, you proceeded to say in your argument, as I believe, whether or not that the state did not ask . . . Rodriguez the question then, do you see this guy in court? And that's clearly improper argument because the law is that if somebody cannot make an out-of-court identification, that the state is precluded by law from asking the witness, do you see the guy in court?" The court then provided a curative instruction to the jury regarding this portion of defense counsel's argument: "[W]hen . . . Rodriguez, who testified as a witness in court, I think it was suggested . . . the state did not ask him whether or not he could identify the defendant here in court. Disregard that question and any thought of that question. . . . You don't need to know the reason why, but I'm telling you just to disregard that line of questioning."

1

We first address the defendant's claim that the court abused its discretion by limiting defense counsel's argument based on the fact that Rodriguez did not provide an in-court identification of the defendant. We conclude that defense counsel improperly asked the jury to engage in speculation and improperly commented on facts not in evidence, and that it was well within the trial court's discretion to limit defense counsel's closing argument by giving a curative instruction to the jury.

Before addressing the defendant's claim in full, we first set forth the applicable standard of review. Our Supreme Court has held that "[i]t is within the discretion of the trial court to limit the scope of final argument to prevent comment on facts that are not properly in evidence, [and] to prevent the jury from considering matters in the realm of speculation . . . ." *State* v. *Arline*, 223 Conn. 52, 59, 612 A.2d 755 (1992). "A trial court has wide discretion to determine the propriety of counsel's argument and may caution the jury to disregard improper remarks in order to contain prejudice." *State* v. *Herring*, 210 Conn. 78, 102, 554 A.2d 686, cert. denied, 492 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989). Accordingly, we will overturn the trial court's decision to limit counsel's argument in this manner only if the court has committed an abuse of discretion. Id. "In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 392, 3 A.3d 892 (2010).

In support of his argument, the defendant claims that "[defense counsel's] argument about whether the jury should find reasonable doubt in the inability of . . . Rodriguez to identify [the defendant] in court was

proper." This claim, however, mischaracterizes the argument made by defense counsel at trial. Defense counsel was not referring to Rodriguez' inability to identify the defendant, but to the fact that the state did not ask Rodriguez to make an in-court identification of the defendant, as defense counsel had stated: "[H]e was in court . . . on the witness stand. Did the prosecutor . . . say to him, hey, do you see the guy in this courtroom who you saw? . . . [D]oes the state say to him . . . do you see the guy here in the courtroom? No, never says anything." As evidenced by the stipulation regarding Rodriguez, and our Supreme Court's decision in *State* v. *Dickson*, supra, 322 Conn. 446, on which the defendant heavily relies, the state was precluded from asking Rodriguez to make an in-court identification without first requesting permission from the court. As the record clearly shows, the state did not make such a request, nor did it ask Rodriguez to make an in-court identification of the defendant. Defense counsel, however, nevertheless asked the jury to consider why the state did not ask Rodriguez to make an in-court identification of the defendant.

As set forth previously, it is within the discretion of the trial court to limit final arguments for the purpose of preventing comments on facts not properly in evidence, as well as for the purpose of preventing the jury from considering matters in "the realm of speculation . . . ." *State* v. *Arline*, supra, 223 Conn. 59. In asking the jury to consider why the state did not ask Rodriguez to make an in-court identification of the defendant, defense counsel was asking the jury to enter "the realm of speculation," an area that is clearly off limits. See id. Defense counsel was well aware of the reason why the state did not ask Rodriguez to make an in-court identification, and in fact had agreed to a stipulation to that effect. Defense counsel, however, still proceeded to ask the jury to speculate as to that reason, with there

being no evidence in the record on which the jury could have based a conclusion. It is for this reason that the trial court provided a limiting instruction to the jury, and we see no possible alternative that the court could have employed; defense counsel clearly asked the jury to engage in improper speculation, and his argument in this regard was not based on evidence on the record. For these reasons, the trial court was well within its discretion to limit defense counsel's argument by giving a curative instruction to the jury. See id.

2

Next, we address the defendant's alternative argument, namely, that the court committed an abuse of discretion by providing the jury with a curative instruction using language other than the language prescribed by our Supreme Court in *Dickson*. Specifically, the defendant argues that the trial court was required to use the language from *Dickson* to instruct the jury because Rodriguez was unable to make an out-of-court identification of the defendant. Because this argument is based on an incorrect reading of *Dickson*, we conclude that it was well within the trial court's discretion to give its own instruction to the jury.

As established previously, the trial court has wide discretion when determining the propriety of closing arguments and instructing the jury to disregard improper remarks for the purpose of avoiding prejudice. See *State* v. *Herring*, supra, 210 Conn. 102. Accordingly, we will overturn the trial court's decision to provide a limiting instruction to the jury only if the court has abused its discretion. See id.

In *Dickson*, our Supreme Court established that "[i]n 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." *State* v. *Dickson*, supra, 322 Conn. 445. If the court does not permit the requested

in-court identification, and the state requests an instruction, the trial court should then use the following language to instruct the jury: "[A]n in-court identification was not permitted because inherently suggestive first time in-court identifications create a significant risk of misidentification and because either the state declined to pursue other, less suggestive means of obtaining the identification or the eyewitness was unable to provide one." Id., 449. This means that there are several prerequisites that must be met for the trial court to be required to use the language from *Dickson* referenced by the defendant: (1) the state must request permission to make a first time in-court identification; (2) the trial court must deny the request; and (3) the state must then request that the trial court provide an instruction to the jury. See id., 446–49. Because these prerequisites were not satisfied, the jury instruction language set forth by our Supreme Court in *Dickson* was not applicable. Accordingly, we find that it was well within the trial court's discretion to use its own language for the curative jury instruction.

B

We now turn to the defendant's claim that the court abused its discretion by giving a curative instruction to the jury regarding defense counsel's "investigative omission" argument. We conclude that defense counsel improperly commented on facts not in evidence, and that it was well within the court's discretion to limit the defendant's closing argument in this way.

The following additional facts and procedural history are relevant to our resolution of this issue. At trial, Jorge Cintron, a detective with the department, and Vilar were called as witnesses by the state. While on the witness stand, both Detective Cintron and Vilar testified regarding Vilar's recording of the defendant's confession. Neither the state nor defense counsel addressed the topic

of "voice exemplars," or of the investigative methods used by the police with regard to the recording. Furthermore, defense counsel did not call any witnesses.

During closing arguments, defense counsel repeatedly asked the jury to speculate as to why a voice exemplar was never taken from the defendant during the course of the police investigation, questioning whether the voice on the recording was actually that of the defendant. The court addressed this portion of defense counsel's argument by pointing out that it was not supported by the record, and that lack of evidence cannot be argued without a proper foundation in the record. The court then provided a curative instruction to the jury: "I'm going to tell you just to disregard any suggestion that the police could have, or could not have, or didn't, or did—did not get a voice exemplar. I know that's never really been defined for you per se, but disregard that one particular line."

With regard to closing arguments, our Supreme Court has long held that, "[w]hile the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury have no right to consider." *State* v. *Ferrone*, 96 Conn. 160, 169, 113 A. 452 (1921). The trial court has wide discretion to determine the propriety of counsel's argument, and we will overturn the trial court's action limiting the scope of counsel's argument only if the trial court has abused this discretion. See *State* v. *Herring*, supra, 210 Conn. 102. An abuse of discretion exists where the trial court has decided a matter in an arbitrary manner or based on improper or irrelevant factors, where alternative options were available. See *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 392.

In support of his argument, the defendant cites to language employed by our Supreme Court in which the

court stated: "[D]efendants may use evidence regarding the inadequacy of the investigation into the crime with which they are charged as a legitimate defense strategy . . . [and] [a] defendant may . . . rely upon relevant deficiencies or lapses in the police investigation to raise the specter of reasonable doubt, and the trial court violates his right to a fair trial by precluding the jury from considering evidence to that effect." (Citation omitted; internal quotation marks omitted.) *State* v. *Wright*, 322 Conn. 270, 282, 140 A.3d 939 (2016). That language, however, actually undermines the defendant's position, as the court's statement that "the trial court violates [a defendant's] right to a fair trial by precluding the jury from considering *evidence* to that effect"; (emphasis added; internal quotation marks omitted) id.; means that a defendant does not have a right to simply point to alleged deficiencies or lapses in the police investigation—any such deficiencies or lapses must be relevant and must be supported by evidence in the record. See id.

Central to our resolution of this issue is defense counsel's repeated use of the term "voice exemplar" while addressing the jury. In fact, defense counsel used the term voice exemplar only when making his investigative omission argument to the jury; he did not use any broad or general terms to refer to the investigation, or lack thereof, undertaken by the police. The defendant now claims that defense counsel was using the term "voice exemplar" in a general way. "Voice exemplar," however, is an inherently technical term with a technical definition meaning a voice sample taken from an individual "to measure the physical properties of his or her voice . . . ." *State* v. *Palmer*, 206 Conn. 40, 63, 536 A.2d 936 (1988). The record contains no voice exemplar taken from the defendant, nor does it indicate that defense counsel ever questioned any of the state's witnesses as to whether a voice exemplar had been taken, or could or should have been taken. Moreover, there

was no evidence that defense counsel ever sought a voice exemplar.

Furthermore, the defendant did not present any testimony, expert or otherwise, on the subject of voice exemplars or police investigative techniques, and he failed to introduce any relevant evidence, which amounts to exactly what our Supreme Court cautioned against in *Wright* when it stated that "[a] defendant . . . does not have an unfettered right to elicit evidence regarding the adequacy of the police investigation" and "must do more than simply seek to establish that the police could have done more." *State* v. *Wright*, supra, 322 Conn. 284. Given the lack of evidence in the record to support defense counsel's investigative omission argument, "the importance of restricting comments made during closing arguments to matters related to the evidence before the jury"; *State* v. *Rios*, 74 Conn. App. 110, 119, 810 A.2d 812 (2002), cert. denied, 262 Conn. 945, 815 A.2d 677 (2003); and the court's wide discretion to determine the propriety of counsel's closing argument and to instruct the jury to disregard improper remarks to contain prejudice; *State* v. *Herring*, supra, 210 Conn. 102; we conclude that the court acted within its discretion when it provided a limiting instruction to the jury in this regard.

II

The defendant also claims that the court abused its discretion by admitting into evidence, over the defendant's objection, a copy of the recording of the defendant's confession made by Vilar. The defendant further claims, in the alternative, that if the recording was properly admitted this court should exercise its supervisory powers to heighten the requirements for the admissibility of copies of digital evidence. Finally, the defendant claims that if this court declines to exercise its supervisory powers and determines that the copy of the

recording was properly admitted into evidence, we should conclude that the trial court abused its discretion by admitting the recording into evidence based "on Vilar's word alone." We disagree.

A

First, we address the defendant's claim that the court abused its discretion by admitting a copy of the recording made by Vilar into evidence on the basis of an incorrect interpretation of the Connecticut Code of Evidence. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. At trial, Detective Cintron was called as a witness by the state. Detective Cintron testified that Vilar played the recording of the defendant's confession for him on his cell phone, and that he instructed Vilar to e-mail the recording to him. Detective Cintron further testified that, after receiving the recording by e-mail, he downloaded it and saved it onto a compact disc. Additionally, Detective Cintron verified that the recording on the compact disc was exactly the same as the recording on Vilar's cell phone, and that it had not been altered in any way. Before the state offered the recording as a full exhibit, Vilar testified that the recording had not been manipulated, and that he had listened to the recording and identified the voices on the recording as himself and the defendant. Defense counsel objected to the admission of the recording on several grounds, namely, that Vilar did not give his cell phone containing the recording to the police, that the cell phone containing the recording was no longer available, and that there was a gap of time between when the recording was made and when it was given to the police by Vilar. Over defense counsel's objections, the court admitted the recording as a full exhibit and played it for the jury.

Before addressing the defendant's claim in full, we first set forth the applicable standard of review. "To the extent a trial court's admission of evidence is based on an interpretation of the Code of Evidence, our standard of review is plenary." *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007). "We review the trial court's decision to admit evidence, if premised on a correct view of the law, however, for an abuse of discretion." Id. "In order to determine the appropriate standard of review, we must look to the precise nature of the claim raised on appeal." *State* v. *Miller*, 121 Conn. App. 775, 780, 998 A.2d 170, cert. denied, 298 Conn. 902, 3 A.3d 72 (2010). The defendant here argues that the trial court misinterpreted §§ 10-1, 10-2, and 10-3 of the Connecticut Code of Evidence, and thereby incorrectly admitted a copy of the recording into evidence. Because the admission of the recording is at issue, and because that admission was based on the court's interpretation of the Code of Evidence, our standard of review for this claim is plenary. See *State* v. *Saucier*, supra, 218.

As stated previously, the defendant argues that under the Code of Evidence, only the original recording of Vilar's conversation with the defendant on Vilar's cell phone was admissible. Under § 10-1 of the Connecticut Code of Evidence, which adopts the best evidence rule, "except as otherwise provided by the Code," the original of a recording must be admitted into evidence to prove the contents of that recording. Conn. Code Evid. § 10-1. Section 10-3 of the Connecticut Code of Evidence sets forth the situations in which an original recording is not required and provides that the original of a recording is not required, and other evidence of the contents of the recording is admissible, if "[a]ll originals are lost or have been destroyed, unless the proponent destroyed or otherwise failed to produce the originals for the purpose of avoiding production of an original . . . ." Conn. Code Evid. § 10-3 (1). In the present case,

it is clear that the original recording is no longer available, as it was on Vilar's cell phone, which was no longer in his possession at the time of the trial. Pursuant to § 10-3, a copy is admissible if the original is lost or has been destroyed, so long as the proponent did not destroy or fail to produce the original for the purpose of avoiding its production. Conn. Code Evid. § 10-3 (1). The defendant has failed to point to any evidence in the record demonstrating that the original recording was made unavailable for the purpose of avoiding its production at trial. Vilar played the original recording for the police and then e-mailed a copy of the recording to the police, per Detective Cintron's instructions. At no time did the police request or order that Vilar turn over the cell phone containing the original recording. Furthermore, both Vilar and Detective Cintron verified that the copy of the recording e-mailed to the police was an exact copy of the original. On the basis of these facts, we cannot conclude that the original recording was made unavailable for the purpose of avoiding its production. The original and copy were exactly the same in all respects, in that the only practical difference between them was the location where the recording was physically stored. For this reason, there has been no showing of a motive by the state to make the original recording unavailable. Accordingly, the copy of the recording satisfies the requirement of § 10-3 of the Connecticut Code of Evidence that the proponent did not destroy or fail to produce the original for the purpose of avoiding its production, and it was admissible under §§ 10-1 and 10-3 of the Connecticut Code of Evidence. We therefore conclude that the court's admission of the copy of the recording was not based on an improper interpretation of those provisions of the Code of Evidence.

B

Next, we address the defendant's request that we exercise our supervisory powers to heighten the requirements for the admission of copies of digital evidence.

Although "[i]t is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice"; (internal quotation marks omitted) *State* v. *Diaz*, 302 Conn. 93, 106, 25 A.3d 594 (2011); "[o]ur supervisory powers are invoked only in the rare circumstances where [the] traditional protections are inadequate to ensure the fair and just administration of the courts . . . ." (Internal quotation marks omitted.) *State* v. *Kuncik*, 141 Conn. App. 288, 292–93, 61 A.3d 561, cert. denied, 308 Conn. 936, 66 A.3d 498 (2013). Because we conclude that the provisions of the Connecticut Code of Evidence have ensured a fair and just outcome, we decline to exercise our supervisory power as the defendant requests.

After reviewing the record and relevant sections of the Connecticut Code of Evidence, we conclude that it is clear that this case does not constitute the rare circumstance in which we may exercise our supervisory powers. The copy of the recording was properly admitted pursuant to the Code of Evidence, and the jury was left to determine the weight that it should be given. Allowing the jury to make this determination ensures a fair and just outcome, and is the only level of protection that is needed here. Accordingly, we decline to exercise our supervisory authority to heighten the requirements for the admission of copies of digital evidence.

C

Having determined that the court's admission of a copy of the recording into evidence was based on a correct interpretation of the Code of Evidence, and having declined to exercise our supervisory powers to heighten the requirements for the admission of copies of digital evidence, we now address the defendant's final claim that the trial court abused its discretion by admitting the copy of the recording into evidence "on Vilar's word alone." Specifically, the defendant claims that, under § 10-2 of the Connecticut Code of Evidence,

"[t]he offer of a copy of the recording was unfair to the defendant," and that "the trial court should have exercised its discretion to exclude the copy of Vilar's recording . . . ."

Before addressing the defendant's claim in full, we again set forth the applicable standard of review. Where the trial court's decision to admit evidence is based on a correct view of the law, we review that decision for an abuse of discretion. See *State* v. *Saucier*, supra, 283 Conn. 218. The defendant claims that, even if the copy was admitted pursuant to a correct reading of the Connecticut Code of Evidence, the trial court's decision was, nevertheless, erroneous. Accordingly, we will overturn the trial court's decision to admit a copy of the recording into evidence only if the trial court committed an abuse of discretion. See *State* v. *Herring*, supra, 210 Conn. 102. An abuse of discretion exists where the court has decided a matter in an arbitrary manner or on the basis of improper or irrelevant facts, where alternative options are available. See *Hurley* v. *Heart Physicians, P.C.*, supra, 298 Conn. 392.

Section 10-2 of the Connecticut Code of Evidence provides in relevant part that "[a] copy of a . . . recording . . . is admissible to the same extent as an original unless . . . it would be unfair to admit the copy in lieu of the original." Conn. Code Evid. § 10-2 (B). The defendant's claim that it was unfair for the trial court to admit a copy of the recording into evidence is unavailing. There is ample evidence in the record from which the court could have concluded that the admission of the copy of the recording would not be unfair to the defendant. As discussed in part II A of this opinion, there is no evidence demonstrating that the original of the recording was purposefully made unavailable. Additionally, Detective Cintron verified that the copy of the recording was exactly the same as the original on Vilar's cell phone and that the copy had not been altered in any way. Furthermore, it should be

noted that the commentary to § 10-2 recognizes that "in light of the reliability of modern reproduction devices . . . a copy derived therefrom often will serve equally as well as the original when proof of its contents is required." Conn. Code Evid. § 10-2, commentary. For these reasons, we conclude that the trial court's decision that the admission of the copy of the recording would not be unfair to the defendant was not made in an arbitrary or improper manner, as the defendant suggests. Accordingly, it was well within the discretion of the trial court to admit the copy of the recording into evidence.

The judgment is affirmed.

In this opinion the other judges concurred.

AMY SILVER *v.* TREVOR SILVER
(AC 42777)

DiPentima, C. J., and Moll and Harper, Js.*

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the judgment of the trial court granting the plaintiff's postjudgment motion to "clarify and effectuate" the dissolution judgment. During their marriage, the parties founded E Co. The plaintiff owned 10 percent of its corporate stock and the defendant owned the remaining 90 percent of the corporate stock. In its dissolution judgment, the trial court found that the parties each owned a 50 percent equitable interest in E Co. and ordered, inter alia, that the parties execute a redemption agreement to effectuate the buyout of the plaintiff's 10 percent ownership of E Co.'s corporate stock and a deferred compensation agreement to effectuate the buyout of the plaintiff's remaining 40 percent equitable interest in E Co. In her motion, the plaintiff requested that the court clarify whether it intended to have her receive her 40 percent interest in E Co. tax free, notwithstanding that the dissolution judgment required the parties to execute a deferred compensation agreement to carry out that buyout. She further requested that the court order the defendant to execute certain corporate documents prepared by her counsel, which included a redemption agreement

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

pursuant to which the plaintiff would receive her entire 50 percent interest in E Co. tax free and did not include a deferred compensation agreement. The trial court granted the plaintiff's motion, stating that it was clarifying the terms of the dissolution judgment and that it intended that the plaintiff receive the 40 percent interest of E Co. tax free in the buyout. In addition, the court ordered the defendant to execute the corporate documents prepared by the plaintiff's counsel. *Held* that the defendant could not prevail on his claim that the trial court abused its discretion by opening and modifying the dissolution judgment in granting the plaintiff's motion to "clarify and effectuate" the dissolution judgment when the plaintiff did not request such relief; although, in granting the plaintiff's motion, that court modified, rather than clarified, the dissolution judgment, the court properly exercised its statutory (§ 52-212a) authority to open and modify the judgment because the plaintiff, within four months of the judgment, filed a motion that, despite being titled as a motion to "clarify and effectuate" the dissolution judgment was, in substance, a motion to open and modify the judgment pursuant to § 52-212a, and the defendant was apprised of the relief requested by the plaintiff and that the dissolution judgment would be modified if the court granted her motion.

Argued May 18—officially released September 29, 2020

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Diana*, *J.*; judgment dissolving the marriage and granting certain other relief; thereafter, the court granted the plaintiff's motion to clarify and issued a clarification of its decision; subsequently, the court issued an order regarding certain tax payments, and the defendant appealed to this court; thereafter, the court issued an order regarding certain corporate documents, and the defendant filed an amended appeal. *Affirmed.*

Charles D. Ray, with whom, on the brief, was *Angela M. Healey*, for the appellant (defendant).

Yakov Pyetranker, for the appellee (plaintiff).

Opinion

MOLL, J. In this dissolution matter, the defendant, Trevor Silver, appeals from the judgment of the trial

court granting a postdissolution motion filed by the plaintiff, Amy Silver, seeking to "clarify and effectuate" the judgment of dissolution rendered by the court. On appeal, the defendant claims that the court improperly modified the dissolution judgment in granting the plaintiff's motion. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. The parties were married in 2008. In 2012, the parties founded Exusia, Inc. (Exusia), an information technology consulting business.[1] The plaintiff was employed as Exusia's chief financial officer[2] and owned 10 percent of Exusia's corporate stock. The defendant was employed as Exusia's chief executive officer and owned the remaining 90 percent of Exusia's corporate stock.

On October 26, 2016, the plaintiff commenced the present action seeking a dissolution of the parties' marriage on the ground that the marriage had broken down irretrievably. The matter was tried to the court, *Diana, J.*, over the course of several days in October, 2018. Both parties submitted proposed orders and posttrial briefs.

In the plaintiff's proposed orders, with respect to Exusia, the plaintiff requested in relevant part that the court (1) find that, notwithstanding the plaintiff's ownership of 10 percent of Exusia's corporate stock, the plaintiff possessed a 50 percent equitable interest in Exusia, and (2) order the defendant to buy out the plaintiff's 50 percent interest in Exusia. The plaintiff summarized her proposed terms for the division of Exusia as follows: "As and for a lump sum property settlement, the defendant shall buy out the plaintiff's 50 [percent] interest in Exusia. . . . In essence, the defendant

[1] Exusia is an S corporation. "An S corporation is a corporation with no more than 100 shareholders that passes through net income or losses to those shareholders in accordance with Internal Revenue Code, Chapter 1, Subchapter S." *R.D. Clark & Sons, Inc.* v. *Clark*, 194 Conn. App. 690, 702 n.10, 222 A.3d 515 (2019).

[2] The plaintiff's employment at Exusia was terminated in January, 2018.

shall cause Exusia to redeem the plaintiff's 10 [percent] interest, and he shall buy out the plaintiff's 40 [percent] interest, with both payments made in installments over the next ten (10) years. . . . The 10 [percent] redemption payout shall be taxable to the defendant as a constructive distribution. See 26 C.F.R. § 1.1041-2, Treas. Reg. § 1-1041-2.[3] . . . With respect to the 40 [percent] buyout, the court shall order: that the buyout is a transfer of property to a former spouse incident to the divorce, such that no gain or loss shall be recognized;

[3] Title 26 of the Code of Federal Regulations, § 1.1041-2, provides in relevant part: "[(a) (1)] Notwithstanding Q&A-9 of [26 C.F.R.] § 1.1041-1T (c), if a corporation redeems stock owned by a spouse or former spouse (transferor spouse), and the transferor spouse's receipt of property in respect of such redeemed stock is not treated, under applicable tax law, as resulting in a constructive distribution to the other spouse or former spouse (nontransferor spouse), then the form of the stock redemption shall be respected for Federal income tax purposes. Therefore, the transferor spouse will be treated as having received a distribution from the corporation in redemption of stock.

"(2) . . . Notwithstanding Q&A-9 of § 1.1041-1T (c), if a corporation redeems stock owned by a transferor spouse, and the transferor spouse's receipt of property in respect of such redeemed stock is treated, under applicable tax law, as resulting in a constructive distribution to the nontransferor spouse, then the redeemed stock shall be deemed first to be transferred by the transferor spouse to the nontransferor spouse and then to be transferred by the nontransferor spouse to the redeeming corporation. Any property actually received by the transferor spouse from the redeeming corporation in respect of the redeemed stock shall be deemed first to be transferred by the corporation to the nontransferor spouse in redemption of such spouse's stock and then to be transferred by the nontransferor spouse to the transferor spouse.

"[(b) (1)] Section 1041 [of title 26 of the United States Code] will not apply to any of the transfers described in paragraph (a) (1) of this section. . . .

"(2) . . . The tax consequences of each deemed transfer described in paragraph (a) (2) of this section are determined under applicable provisions of the Internal Revenue Code as if the spouses had actually made such transfers. Accordingly, section 1041 applies to any deemed transfer of the stock and redemption proceeds between the transferor spouse and the nontransferor spouse, provided the requirements of section 1041 are otherwise satisfied with respect to such deemed transfer. Section 1041, however, will not apply to any deemed transfer of stock by the nontransferor spouse to the redeeming corporation in exchange for the redemption proceeds. . . ."

see I.R.C. § 1041 (a) (2);[4] that the property shall be treated as acquired by the transferee by gift, and that the basis of the transferee in the property shall be the adjusted basis of the transferor; see I.R.C. § 1041 (b);[5] and that the transfer is related to the cessation of the marriage. See I.R.C. § 1041 (c) (2).[6] . . . The court shall order that the plaintiff's buyout entitlement shall be nondischargeable in bankruptcy. . . . The court shall reserve continuing jurisdiction over the buyout provision above to effectuate and implement the plaintiff's receipt of her 50 [percent] interest." (Footnotes added.) The plaintiff attached to her proposed orders a document setting forth specific terms for her proposed orders regarding Exusia (schedule).

On December 4, 2018, the trial court issued a memorandum of decision rendering a judgment of dissolution. With regard to Exusia, the court found that the parties each owned a 50 percent equitable interest therein and that the fair market value of 100 percent of the equity thereof was $20,000,000. The court then entered the following relevant orders regarding Exusia: "As and for a lump sum property settlement, the defendant shall buy out the plaintiff's 50 percent interest in Exusia.

"The buyout payout structure is set forth as follows: The defendant shall cause Exusia to redeem the plaintiff's 10 percent interest and he shall buy out the plain-

[4] Title 26 of the United States Code, § 1041 (a), provides: "No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of)—

"(1) a spouse, or

"(2) a former spouse, but only if the transfer is incident to the divorce."

[5] Title 26 of the United States Code, § 1041 (b), provides: "In the case of any transfer of property described in subsection (a) [of 26 U.S.C. § 1041]—

"(1) for purposes of this subtitle, the property shall be treated as acquired by the transferee by gift, and

"(2) the basis of the transferee in the property shall be the adjusted basis of the transferor."

[6] Title 26 of the United States Code, § 1041 (c), provides: "For purposes of subsection (a) (2) [of 26 U.S.C. § 1041], a transfer of property is incident to the divorce if such transfer—

tiff's 40 percent interest, with both interests paid out as one payment made in installments over the next ten (10) years. The 10 percent redemption payout shall be taxable to the defendant as a constructive distribution. See 26 C.F.R. § 1.1041-2, Treas. Reg. § 1.1041-2.

"With respect to the 40 percent buyout, the court orders: that the buyout is a transfer of property to a former spouse incident to the divorce, such that no gain or loss shall be recognized; see I.R.C. § 1041 (a) (2); that the property shall be treated as acquired by the transferee by gift, and that the basis of the transferee in the property shall be the adjusted basis of the transferor; see I.R.C. § 1041 (b); and that the transfer is related to the cessation of the marriage. See I.R.C. § 1041 (c) (2).

"The court orders that the plaintiff's buyout entitlement shall be nondischargeable in bankruptcy. The court hereby reserves continuing jurisdiction over the buyout provisions above to effectuate and implement the plaintiff's receipt of her 50 percent interest.

"The specific buyout provisions . . . [are as follows]: (i) The defendant shall cause Exusia to redeem, pursuant to a redemption agreement, the plaintiff's 10 percent interest in [Exusia] for the sum of $2,000,000, which shall be paid in quarterly installments of $50,000. The foregoing 10 percent payment shall commence effective March 15, 2019, and continue on the fifteenth of each and every quarter thereafter for a term of ten years.

"(ii) The defendant shall cause Exusia to enter into a deferred compensation agreement . . . with the plaintiff, in the aggregate amount of $8,000,000 minus $957,000,[7] the plaintiff's 40 percent interest in [Exusia].

"(1) occurs within 1 year after the date on which the marriage ceases, or

"(2) is related to the cessation of the marriage."

[7] On August 10, 2018, the court, *Shay, J.*, found the plaintiff in contempt for withdrawing funds from a business account without the defendant's written consent or a court order. The court stated that it would give "some

The first $43,000 shall be payable to the plaintiff immediately upon execution of [certain] corporate documents, as defined [elsewhere in the dissolution judgment]. The remaining $7,000,000 shall be paid to the plaintiff in equal quarterly installments of $175,000, due on the 15th day of each quarter, for a term of [ten] years ([forty] quarterly payments in total). The first payment is due on March 15, 2019, and shall be paid quarterly as set forth above ([forty] payments of $225,000 for [ten] years). The defendant shall receive a credit in the amount of $675,000 in consideration for the asset/liability division. The final three payments due the plaintiff shall not be paid by the defendant as satisfaction of this credit." (Footnote added.) The foregoing orders substantively paralleled the terms in the plaintiff's proposed orders and in the schedule attached thereto.[8] Neither party appealed from the dissolution judgment.

On January 15, 2019, the plaintiff filed a postdissolution motion to "clarify and effectuate" the judgment of

consideration" to the plaintiff's unauthorized withdrawal, in addition to the statutory factors set forth in General Statutes § 46b-81, in rendering the judgment of dissolution. In the memorandum of decision dissolving the parties' marriage, the court, *Diana*, *J.*, subtracted $957,000—the sum of funds improperly withdrawn by the plaintiff—from the amount owed to the plaintiff for her 40 percent interest in Exusia.

[8] The schedule provided in relevant part: "(1) The defendant shall cause Exusia to redeem, pursuant to a [r]edemption [a]greement, the plaintiff's 10 [percent] interest in [Exusia] for the sum of $3,320,000 [predicated on the plaintiff's valuation of Exusia], which shall be paid in equal monthly installments of $27,666.66. The foregoing 10 [percent] payment shall commence effective January 1, 2019, and continue on the first day of each and every month thereafter.

"(2) The defendant shall cause Exusia to enter into a [d]eferred [c]ompensation [a]greement . . . with the plaintiff, in the aggregate amount of $13,280,000 [predicated on the plaintiff's valuation of Exusia], the plaintiff's 40 [percent] interest in [Exusia]. The first $280,000 shall be payable to the plaintiff immediately upon execution of [certain] [c]orporate [d]ocuments [described elsewhere in the schedule]. The remaining $13,000,000 shall be paid to the plaintiff in equal quarterly installments of $325,000, due on the second payroll installment date each month, for a term of [ten] years ([forty] quarterly payments in total)."

dissolution (January 15, 2019 motion). She requested that the court issue a "clarification" explaining whether it "intend[ed] that [she] receive her 40 [percent] share of Exusia tax free in the buyout, irrespective of the specific method of corporate documents implemented to further this intent . . . . That is, did the court intend that [she] receive her 40 [percent] share of Exusia tax free in the buyout, regardless of references in the [dissolution] judgment to specific corporate documents, e.g., 'deferred compensation agreement'?" The plaintiff maintained that the court intended for her to receive her entire 50 percent interest in Exusia tax free, notwithstanding that the dissolution judgment ordered that 40 percent of her interest would be paid to her by way of a deferred compensation agreement, which would result in the plaintiff bearing a tax burden.[9] The plaintiff represented that her corporate counsel had drafted a redemption agreement pursuant to which the plaintiff would receive her entire 50 percent interest in Exusia tax free but that the defendant's corporate counsel refused to sign the agreement because it allegedly did not comport with the terms of the dissolution judgment. As relief, the plaintiff requested that the court (1) clarify the dissolution judgment with regard to the division of Exusia, and (2) order the defendant to execute the corporate documents prepared by her corporate counsel, which included the redemption agreement.

On January 28, 2019, the defendant, in a combined document, filed (1) a response to the plaintiff's January 15, 2019 motion and (2) a motion to clarify, requesting that the court "clarify its memorandum of decision . . . to provide that the buyout payment due to the [plaintiff] be tax deductible to Exusia as deferred compensation." The defendant asserted that the court adopted the plaintiff's proposal that 40 percent of her interest in Exusia

[9] The plaintiff's counsel admits that he "mistakenly suggested" the use of a deferred compensation agreement in the plaintiff's proposed orders.

be remitted to her by way of a deferred compensation agreement, which would result in Exusia's payment thereof to the plaintiff being tax deductible to Exusia and taxable to the plaintiff. The defendant contended that the plaintiff was seeking to change the terms of the judgment of dissolution to shift the tax burden to the defendant, which would disturb the equal division of the parties' property. As relief, the defendant requested that the court clarify that the payment of the plaintiff's 40 percent interest in Exusia under the deferred compensation agreement would be tax deductible to Exusia.[10]

On January 30, 2019, the plaintiff filed a reply brief. She contended that the court's orders regarding Exusia constituted property assignments that were intended to be tax free to her. She conceded that a deferred compensation agreement was not the proper mechanism to effectuate the buyout of her 40 percent interest in Exusia; however, she maintained that the court intended to award her entire 50 interest in Exusia to her tax free and that the court's reference to a deferred compensation agreement in the judgment of dissolution was not a substantive term thereof.

On January 31, 2019, without holding a hearing, the court granted the plaintiff's January 15, 2019 motion, stating that it was "clarif[ying]" the terms of the judgment of dissolution as follows: "The court intended that the plaintiff receive her 40 [percent] share of Exusia tax free in the buyout, irrespective of references in the judgment of the specific corporate documents used. . . . The defendant shall execute the plaintiff's corporate documents . . . including her redemption agreement, as drafted by the plaintiff's corporate counsel."

On February 19, 2019, the defendant filed a motion to reargue, asserting that (1) the corporate documents

[10] Alternatively, if the court determined that the payment of the plaintiff's 40 percent interest was not tax deductible to Exusia, then the defendant requested that the court extend the time period for the buyout.

prepared by the plaintiff's corporate counsel that the court ordered the parties to execute contained terms that were inconsistent with the judgment of dissolution, and (2) the court's determination that the plaintiff was to receive 40 percent of her interest in Exusia tax free disturbed the equitable division of the parties' assets in the judgment of dissolution. As relief, the defendant requested, inter alia, that the court hear argument on the issue of whether the buyout of the plaintiff's 40 percent interest in Exusia was tax free to the plaintiff and order the parties to execute revised corporate documents prepared by the defendant's corporate counsel. On February 22, 2019, the plaintiff filed an objection to the defendant's motion to reargue.

On March 18, 2019, the court granted the defendant's motion to reargue but, following a hearing, the court denied the defendant's requested relief without prejudice. The same day, the court issued a separate order providing in relevant part that "[t]he plaintiff shall pay no taxes on the money she receives as a result of the redemption agreement." In addition, the court continued the matter to April 24, 2019, when it would address compliance with its order and any "unresolved issues" raised in the defendant's motion to reargue. This appeal, challenging the court's granting of the plaintiff's January 15, 2019 motion and its March 18, 2019 order, followed.

On April 24, 2019, following a hearing, the court issued an order providing in relevant part that certain language proposed by the plaintiff to insert into the corporate documents prepared by her corporate counsel was approved and that the corporate documents were to be revised accordingly. Thereafter, the defendant amended this appeal to encompass the April 24, 2019 order.[11] Additional facts and procedural history will be set forth as necessary.

[11] On July 9, 2019, the trial court ordered that an automatic appellate stay applied to its orders requiring the defendant (1) to sign the corporate documents prepared by the plaintiff's corporate counsel and (2) to remit

On appeal, the defendant claims that the court's granting of the plaintiff's January 15, 2019 motion resulted in a modification, rather than a clarification, of the judgment of dissolution. Specifically, he asserts that the court substantively altered the dissolution judgment's provision requiring the parties to execute a deferred compensation agreement to effectuate the buyout of the plaintiff's 40 percent interest in Exusia by ruling that the plaintiff was to receive said interest tax free and ordering the parties to execute the corporate documents prepared by the plaintiff's corporate counsel, which did not include a deferred compensation agreement among them. The defendant contends that, as a result of the court's modification of the dissolution judgment, his tax burden has been increased whereas the plaintiff's tax burden has been eliminated. The plaintiff argues that the court's granting of the January 15, 2019 motion clarified the dissolution judgment to make clear the court's purported intent to have the plaintiff receive her entire 50 percent interest in Exusia tax free.[12] We agree with the defendant that the court modified, rather than clarified, the judgment of dissolution.

To determine whether the court's granting of the plaintiff's January 15, 2019 motion modified or clarified the judgment of dissolution, "we must first construe the trial court's judgment. It is well established that the construction of a judgment presents a question of law over which we exercise plenary review. . . . In construing a trial court's judgment, [t]he determinative factor is the intention of the court as gathered from all parts of the judgment. . . . The interpretation of a judgment may involve the circumstances surrounding

quarterly payments to the plaintiff. On August 7, 2019, the court issued an order requiring the defendant to make certain monthly and quarterly payments to the plaintiff pursuant to a payment schedule.

[12] The plaintiff also argues that we should decline review of the defendant's appeal because the defendant had filed his own motion to clarify (which the court did not grant). We find this contention to be without merit.

the making of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole." (Internal quotation marks omitted.) *Almeida* v. *Almeida*, 190 Conn. App. 760, 766, 213 A.3d 28 (2019).

"In order to determine the substance of the trial court's actions here, we begin by examining the definitions of both alteration and clarification. An alteration is defined as '[a] change of a thing from one form or state to another; making a thing different from what it was without destroying its identity.' Black's Law Dictionary (4th Ed. 1968). 'An alteration is an act done upon the instrument by which its meaning or language is changed. If what is written upon or erased from the instrument has no tendency to produce this result, or to mislead any person, it is not an alteration.' Id. Similarly, a modification is defined as '[a] change; an alteration or amendment which introduces new elements into the details, or cancels some of them, but leaves the general purpose and effect of the subject-matter intact.' Black's Law Dictionary (6th Ed. 1990).

"Conversely, to clarify something means to 'free it from confusion.' Webster's New World Dictionary of the American Language (2d Ed. 1972). Thus, the purpose of a clarification is to take a prior statement, decision or order and make it easier to understand." *In re Haley B.*, 262 Conn. 406, 413, 815 A.2d 113 (2003).

Applying the foregoing principles to the present case, we conclude that the court's granting of the plaintiff's January 15, 2019 motion resulted in a modification, rather than a clarification, of the judgment of dissolution. In the dissolution judgment, the court ordered, as expressly requested by the plaintiff in her proposed orders, that the parties execute (1) a redemption agreement to effectuate the buyout of the plaintiff's 10 percent ownership of Exusia corporate stock and (2) a deferred compensation agreement to effectuate the

buyout of the plaintiff's remaining 40 percent equitable interest in Exusia. In granting the plaintiff's January 15, 2019 motion, the court removed the requirement that the parties execute a deferred compensation agreement and, in lieu thereof, required the parties to execute a redemption agreement to effectuate the buyout of the plaintiff's entire 50 percent interest in Exusia. In effect, the court cancelled an original element of the dissolution judgment (the deferred compensation agreement) and added a new element in its place (the expanded redemption agreement). Accordingly, the court's order constituted a modification of the dissolution judgment.

Our conclusion that the court modified, rather than clarified, the judgment of dissolution does not end our inquiry. The plaintiff argues that, if the court's ruling constituted a modification of the dissolution judgment, then the court properly exercised its authority to open and modify the judgment within four months thereof. See General Statutes § 52-212a.[13] The defendant does not contend that the dissolution judgment was not subject to being opened and modified within four months pursuant to § 52-212a. Instead, the defendant contends that the plaintiff did not file a motion to *open and modify* the dissolution judgment but, rather, filed a motion to *clarify* the judgment. We distill the defendant's claim to be that the court abused its discretion by opening and modifying the dissolution judgment in granting the plaintiff's January 15, 2019 motion when the plaintiff did not request such relief.[14] See *Von*

[13] General Statutes § 52-212a provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which it was rendered or passed. . . ." See also Practice Book § 17-4.

[14] Although the defendant maintains that the granting of the plaintiff's January 15, 2019 motion resulted in a modification of the judgment of dissolution, the defendant does not challenge on appeal the merits of that ruling; rather, the crux of the defendant's claim is that the trial court committed error by modifying the judgment in response to the plaintiff's motion

Kohorn v. *Von Kohorn*, 132 Conn. App. 709, 711, 716, 33 A.3d 809 (2011) (applying abuse of discretion standard to defendant's claim that trial court improperly modified judgment of dissolution in response to plaintiff's postdissolution " 'motion to reargue and for clarification' " when plaintiff did not seek such relief). We agree with the plaintiff and reject the defendant's contention that the court abused its discretion.

"An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . It is within the province of the trial court to find facts and draw proper inferences from the evidence presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . [T]o conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) Id., 713.

to "clarify and effectuate" the judgment. Thus, we do not address whether the court erred on the merits in modifying the dissolution judgment.

Additionally, in his principal appellate brief, the defendant thinly asserts that (1) the court did not hear argument before granting the plaintiff's January 15, 2019 motion and, thus, did not provide him with a "full opportunity to be heard," and (2) the court, during the hearing on his motion to reargue, did not permit him to offer expert testimony on the implications of the court's modification of the dissolution judgment. In her appellate brief, the plaintiff argues, inter alia, that the defendant has failed to adequately brief these "ancillary" claims. In his reply brief, the defendant asserts that there are no " 'ancillary' issues" before this court and that "the issue in this appeal is whether the trial court improperly modified its dissolution judgment on a motion to clarify that judgment. [The defendant] was heard on this subject in the trial court and presented testimony in opposition to [the plaintiff's] efforts to 'clarify' away her own mistake in calling for a deferred compensation agreement." In light of the foregoing, we conclude that the defendant is not pursuing any additional claims on appeal regarding the court's granting of the January 15, 2019 motion without holding a hearing or declining to allow the defendant to offer expert testimony during the hearing on his motion to reargue.

We first observe that the orders in the judgment of dissolution regarding the division of Exusia were issued pursuant to the court's authority to assign property in a dissolution action under General Statutes § 46b-81.[15] "The Superior Court has jurisdiction to assign property in connection with a dissolution of marriage action, in accordance with § 46b-81, but unlike periodic alimony or child support, which usually are modifiable, the assignment of property is nonmodifiable." *Taylor* v. *Taylor*, 57 Conn. App. 528, 533, 752 A.2d 1113 (2000). That is not to say that a property assignment is never subject to modification. Pursuant to § 52-212a, a court may open and modify a property assignment in acting on a motion seeking such relief filed within four months of the judgment. See *Passamano* v. *Passamano*, 228 Conn. 85, 89 n.4, 634 A.2d 891 (1993) ("a property division order generally cannot be modified by the trial court after the dissolution decree is entered, *subject only to being opened within four months from the date the judgment is rendered under . . . § 52-212a*" (emphasis added)); *Fitzsimons* v. *Fitzsimons*, 116 Conn. App. 449, 454–55, 975 A.2d 729 (2009) (concluding that, pursuant to § 52-212a, trial court was vested with discretion to modify property assignment in granting motion seeking modification filed within six days of dissolution judgment).

In the present case, the plaintiff's January 15, 2019 motion, filed within four months of the judgment of dissolution, was titled as a motion to "clarify and effectuate" the dissolution judgment. "A motion for clarification may be appropriate where there is an ambiguous term in a judgment . . . but, where the movant's request would cause a substantive modification of an

[15] General Statutes § 46b-81 provides in relevant part: "(a) At the time of entering a decree . . . dissolving a marriage . . . pursuant to a complaint under section 46b-45, the Superior Court may assign to either spouse all or any part of the estate of the other spouse. . . ."

existing judgment, a motion to open or set aside the judgment would normally be necessary." (Citation omitted.) *Rome* v. *Album*, 73 Conn. App. 103, 109, 807 A.2d 1017 (2002). The nature of a motion, however, is not determined by its title alone. "A court has broad discretion to treat a motion for clarification of a judgment or a motion to reargue a judgment as a motion to open and modify the judgment provided that the motion is filed within the four month period [set forth in § 52-212a] and the substance of the motion and the relief requested therein is sufficient to apprise the nonmovant of the purpose of the motion." *Von Kohorn* v. *Von Kohorn*, supra, 132 Conn. App. 714–15. Moreover, we are not bound by the characterizations of a motion by the movant or by the trial court. See, e.g., *In re Haley B.*, supra, 262 Conn. 412–13 ("[D]espite the [movant] or the trial court's characterization of the motion, we examine the practical effect of the trial court's ruling in order to determine its nature. . . . Put differently, even though the [movant's] motion was labeled by the trial court as a motion for clarification, we look to the substance of the relief sought by the motion rather than the form." (Citation omitted.)); *Fewtrell* v. *Fewtrell*, 87 Conn. App. 526, 532, 865 A.2d 1240 (2005) ("Although the [movant] herself characterized her . . . pleading as a 'Motion to Modify,' and the [trial] court, in its responsive ruling, utilized language indicating acquiescence to that characterization, neither of these factors influences the actual nature of the motion or the court's responsive ruling. It has been recognized by both this court and our Supreme Court that despite the movant's or the trial court's characterization of a motion, a reviewing court examines the practical effect of the responsive ruling in determining the nature of the pleading. . . . On review, we look to the substance of the relief sought by the motion and the practical effect of the trial court's responsive ruling." (Citations omitted.)).

In the January 15, 2019 motion, the plaintiff asked the trial court to "clarify" the judgment of dissolution by articulating whether the court intended to have her receive her 40 percent interest in Exusia tax free notwithstanding that the dissolution judgment required the parties to execute a deferred compensation agreement to carry out the buyout thereof. In addition, the plaintiff asked the court to order the parties to execute the corporate documents prepared by her corporate counsel. The corporate documents did not include a deferred compensation agreement among them; instead, in addition to other documents, the plaintiff's corporate counsel drafted a redemption agreement that governed the transfer of the plaintiff's entire 50 percent interest in Exusia to the plaintiff. Notwithstanding the plaintiff's use of the term "clarify" in the January 15, 2019 motion, the plaintiff, in essence, was requesting that the court modify a substantive term of the dissolution judgment by eliminating the requirement that the parties execute a deferred compensation agreement with respect to the buyout of the plaintiff's 40 percent interest in Exusia and, in lieu thereof, ordering the parties to use a different vehicle—a redemption agreement—to effectuate the transfer of the plaintiff's entire 50 percent interest in Exusia to her. As we concluded earlier in this opinion, the effect of the court's granting of the January 15, 2019 motion was a modification of the dissolution judgment. Thus, we construe the January 15, 2019 motion as having sought to open and to modify, rather than to clarify, the dissolution judgment.

Additionally, it is evident that the defendant was aware that the plaintiff's January 15, 2019 motion was requesting that the court open and modify the judgment of dissolution. In his January 28, 2019 filing, in part, responding to the January 15, 2019 motion, the defendant argued that the corporate documents prepared by the plaintiff's counsel ran "directly contrary to the [dissolution judgment]. The [plaintiff] propose[s] to do

away altogether with the court's order that the buyout be structured as a redemption agreement for the plaintiff's [10] percent interest and a [deferred compensation agreement] for her remaining 40 percent equitable interest. Instead, the [plaintiff's corporate] counsel simply drafted a single redemption agreement that would require Exusia to pay the entire 50 percent buyout amount . . . in exchange for the plaintiff's 10 [percent] of [Exusia's] shares. This is not what the [plaintiff] proposed, it is not what the [defendant] proposed, and it is not what the court ordered or intended." (Footnote omitted.) These statements demonstrate that the defendant was apprised that the dissolution judgment would be modified if the court granted the January 15, 2019 motion. See *Fitzsimons* v. *Fitzsimons*, supra, 116 Conn. App. 455 n.5 (construing plaintiff's motion to reargue as motion to open and modify judgment of dissolution when, on basis of substance of motion and transcript of hearing thereon, defendant had notice of relief requested by plaintiff and defendant did not claim prejudice); cf. *Von Kohorn* v. *Von Kohorn*, supra, 132 Conn. App. 715–16 (concluding that trial court, in granting plaintiff's postdissolution "motion to reargue and for clarification," improperly modified dissolution judgment by changing lifetime alimony award to eight year alimony award when plaintiff did not request such relief in motion and defendant was not apprised that such relief was requested).[16]

[16] The defendant claims that this court's decision in *Miller* v. *Miller*, 16 Conn. App. 412, 547 A.2d 922, cert. denied, 209 Conn. 823, 552 A.2d 430 (1988), supports his position. We are not persuaded. In *Miller*, the trial court rendered a judgment of dissolution in which, inter alia, it awarded the plaintiff lump sum alimony in the amount of $500,000. Id., 414. The dissolution judgment provided that the defendant could pay the lump sum alimony owed to the plaintiff by transferring securities to her. Id., 416. To comply with the alimony order, the defendant transferred to the plaintiff shares of stock with a market value of $499,923.25 and remitted a check to her for the remaining balance. Id., 414. Within four months of the dissolution judgment, the plaintiff filed a "motion for clarification" asking: "With regard to the lump sum alimony payment of $500,000, what limitations, if any, are

In sum, within four months of the judgment of dissolution, the plaintiff filed a motion that, although titled as a motion to "clarify and effectuate" the judgment of dissolution, was, in substance, a motion to open and modify the judgment pursuant to § 52-212a. The defendant was apprised of the relief requested by the plaintiff. Accordingly, we reject the defendant's claim that the court erred by modifying the dissolution judgment in granting the plaintiff's January 15, 2019 motion.[17]

The judgment is affirmed.

In this opinion the other judges concurred.

there on the defendant's right to transfer to the plaintiff securities that are low in basis, low in dividend yield, and/or not likely to appreciate?" (Internal quotation marks omitted.) Id. In response to the motion, the court issued a memorandum of decision stating that the dissolution judgment had "awarded the plaintiff lump sum alimony of $500,000 which can be invested and earn the plaintiff about $50,000 a year" and that the defendant's transfer of stock did not satisfy the alimony order. Id., 415. On appeal, the defendant claimed that the trial court improperly modified the dissolution judgment in response to the plaintiff's "motion for clarification." Id., 415–16. This court agreed with the defendant, determining that the trial court had impermissibly modified the dissolution judgment. Id., 416–17. This court further observed that the plaintiff had neither appealed from the dissolution judgment nor filed a motion to open and vacate the judgment. Id., 416.

We consider *Miller* to be distinguishable from the present case. There is no indication that the "motion for clarification" filed in *Miller* requested that the trial court modify the dissolution judgment; rather, the only relief sought by the plaintiff in *Miller* was a clarification of the judgment. Thus, as in *Von Kohorn* v. *Von Kohorn*, supra, 132 Conn. App. 715–16, the trial court in *Miller* erred by modifying the dissolution judgment when the plaintiff did not request such relief. In contrast, in the present case, the plaintiff's January 15, 2019 motion, in substance, requested that the trial court open and modify the dissolution judgment.

[17] The defendant also claims that if the trial court erred in granting the plaintiff's January 15, 2019 motion, then it also erred in entering its orders on March 18, 2019, providing that "[t]he plaintiff shall pay no taxes on the money she receives as a result of the redemption agreement," and on April 24, 2019, providing that the corporate documents prepared by the plaintiff's corporate counsel would be revised to include certain language proposed by the plaintiff. As a result of our conclusion that the court did not err in granting the January 15, 2019 motion, we need not address these remaining claims.

DANIEL DIAZ *v.* COMMISSIONER OF CORRECTION (AC 41159)

DiPentima, C. J., and Alvord and Keller, Js.*

Syllabus

The petitioner, who had been convicted of various drug and weapons charges, appealed to this court following the denial of his petition for certification to appeal from the judgment of the habeas court denying his second petition for a writ of habeas corpus. The petitioner had been convicted at a second trial after our Supreme Court had reversed the judgment of conviction at his first trial. At the petitioner's first habeas trial, the court reporter alleged that the habeas judge, C, a police detective, and P, the prosecutor at both of the petitioner's criminal trials, were involved in a scheme in which C gave hand signals to P during her testimony that prompted the judge to interrupt or to allow P to finish her answer before offering a different answer and an opportunity to amend her response. The Office of the Chief State's Attorney thereafter conducted an investigation and prepared a written report, and the habeas judge declared a mistrial after more than six months passed since the judge had last heard evidence. At the petitioner's second habeas trial, the petitioner alleged, inter alia, that P, at his first criminal trial, had intentionally failed to disclose certain exculpatory evidence in violation of *Brady* v. *Maryland* (373 U.S. 83) and elicited perjured testimony from L, who, in exchange for leniency in connection with a drug offense he had been charged with, cooperated with the police in arranging to purchase drugs from the petitioner. The petitioner further alleged that P's *Brady* violations constituted prosecutorial impropriety that rendered his prosecution at his second criminal trial a violation of his right against double jeopardy. Finally, the petitioner alleged that F, his defense counsel at the second criminal trial, had rendered ineffective assistance and had a conflict of interest that resulted from F's employment as a police officer while representing the petitioner. The habeas court denied each of the petitioner's claims, and rendered judgment denying his petition for a writ of habeas corpus and his petition for certification to appeal. *Held*:

1. The habeas court did not abuse its discretion when it denied the petitioner's petition for certification to appeal on the ground that it improperly denied his motion for an evidentiary hearing to preclude the testimony of P and C: the court's prohibition of P's testimony would have frustrated its ability to adjudicate the petitioner's claims, the need for an evidentiary hearing was outweighed by the time and resources that would have

* The listing of judges reflects their seniority status on this court as of the date of oral argument.

been expended to conduct such a proceeding, and, although the court invited the petitioner to make whatever record he wanted as to the hand-signaling scheme that might support his *Brady* and double jeopardy claims, the petitioner did not make an offer of proof, call P, C or the court reporter as witnesses or bring to the court's attention the report by the chief state's attorney's office; moreover, contrary to the petitioner's assertion, the court was not required to conduct a collateral evidentiary hearing to explore the hand-signaling incident, as the second habeas trial was a collateral hearing that was dedicated in part to the adjudication of his *Brady* and double jeopardy claims, the court's denial of his request for an evidentiary hearing was harmless, as any evidence developed at such a hearing as to P's intent to commit *Brady* violations or that damaged her credibility would not have meaningfully enhanced the merits of his double jeopardy claim, and, even if the petitioner had proven that P's nondisclosures constituted a *Brady* violation, the relief was a new trial, which he received when the Supreme Court reversed the judgment of conviction at his first trial; furthermore, the petitioner could not prove his double jeopardy claim, as the evidence overwhelmingly supported the petitioner's convictions, and, thus, it was unlikely that P would have believed during the petitioner's first criminal trial that he was likely to be acquitted in the absence of her allegedly intentional *Brady* violations, and, although L falsely testified during the first criminal trial that he had been arrested for possession of narcotics he purchased from the petitioner, the source of the drugs that led to L's arrest was of minimal relevance to the charges against the petitioner, as the police officers who testified never stated that those drugs were connected to L's cooperation with the police.

2. The habeas court did not abuse its discretion when it denied the petitioner certification to appeal on the ground that it improperly denied his claim that F rendered ineffective assistance; the petitioner did not present this court with any law that held that F's simultaneous representation of the petitioner and his employment as a police officer established a conflict of interest, the petitioner did not point out any specific instances that suggested that F's interests were compromised for the benefit of a third party or any errors by F that were so serious that he did not function as the counsel guaranteed by the sixth amendment, and, although the petitioner asserted that F had a conflict of interest because he was required by statute (§ 54-1f) to arrest the petitioner if F had reasonable grounds to suspect that the petitioner had committed a felony crime, the petitioner did not direct this court to any specific instance in which § 54-1f or any other legal obligation F had as a police officer impaired his ability to provide the petitioner with adequate and uncompromised defense representation.

Argued June 17—officially released September 29, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and transferred to the judicial district of Fairfield, where the matter was tried to the court, *Devlin*, *J.*; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (petitioner).

Mitchell S. Brody, senior assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, and *Angela R. Macchiarulo*, senior assistant state's attorney, for the appellee (respondent).

Opinion

ALVORD, J. The petitioner, Daniel Diaz, appeals from the judgment of the habeas court denying his petition for certification to appeal from the court's denial of his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court (1) abused its discretion in denying his petition for certification to appeal, (2) improperly denied his request for an evidentiary hearing, and (3) improperly denied his ineffective assistance of counsel claim. We conclude that the court properly exercised its discretion in denying the petition for certification to appeal and, accordingly, dismiss the appeal.

The following facts and procedural history are relevant to this appeal. "In early 2001, the [petitioner] was under investigation by the New Britain [P]olice [D]epartment for illegal drug related activities. On March 13, 2001, New Britain police officers arrested Kevin Lockery, who was known by the police as a drug user, for a narcotics offense. In an effort to gain lenient treatment, Lockery identified the [petitioner] as a drug dealer and

provided the police with information about the [petitioner]. At the direction of the police, Lockery called the [petitioner] on a cellular telephone and arranged to purchase five bags of heroin at a specific location in New Britain. Shortly after the [petitioner] received Lockery's call, the [petitioner] left his residence and drove to that location. Lockery did not meet the [petitioner] as arranged, and, after several minutes, the [petitioner] began to drive away.

"Police officers stopped the [petitioner's] automobile. A search of the [petitioner] yielded twenty-five packets of heroin, $1025 and a cellular phone that displayed among received calls the telephone number from which Lockery had called the [petitioner] to arrange the drug purchase. A subsequent search of the [petitioner's] residence, pursuant to a warrant, yielded 168 packets of heroin, sixteen grams of marijuana, a twelve gauge shotgun, several shotgun shells and numerous other items typically used in the sale and distribution of illegal drugs." *State* v. *Diaz*, 109 Conn. App. 519, 522–23, 952 A.2d 124, cert. denied, 289 Conn. 930, 958 A.2d 161 (2008).

In his first criminal trial in 2002, the petitioner was found guilty by a jury of having committed multiple charged offenses, but the judgment of conviction was reversed by our Supreme Court because the petitioner had received an inadequate canvass from the trial court regarding his decision to waive counsel and represent himself. See *State* v. *Diaz*, 274 Conn. 818, 828, 878 A.2d 1078 (2005). In his second criminal trial in 2006, the petitioner was found guilty by a jury of possession of narcotics with intent to sell by a person who is not drug-dependent in violation of General Statutes § 21a-278 (b), two counts of possession of narcotics in violation of General Statutes § 21a-279 (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a) (1). This court affirmed the judgments of conviction on appeal. See *State* v. *Diaz*, supra, 109 Conn. App. 519.

On March 25, 2013, the self-represented petitioner filed a petition for a writ of habeas corpus. On May 13, 2015, the petitioner, with the assistance of counsel, filed an amended petition for a writ of habeas corpus, which is the operative petition in this appeal. The petition contained five counts, only four of which are relevant to this appeal.[1] In the first count, the petitioner alleged that during his first criminal trial, the prosecutor failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Specifically, the petitioner alleged that the prosecutor had failed to disclose (1) Lockery's criminal record, (2) the fact that the drugs that were found on Lockery during his March 13, 2001 arrest were not purchased from the petitioner, as Lockery testified during the first criminal trial, and (3) that the packaging of the drugs that were found on Lockery displayed a different logo than the logo on the packaging of the drugs that were discovered on the petitioner's person and at his residence. In the second count, the petitioner alleged that the prosecutor's deliberate *Brady* violations constituted prosecutorial impropriety, thereby rendering his further prosecution in the second criminal trial a violation of his constitutional right against double jeopardy.

In the third count, the petitioner alleged that Frank Canace, his defense counsel in the second criminal trial, had a conflict of interest as a result of his employment as a New Haven police officer while representing the petitioner as a special public defender. The petitioner alleged that Canace's conflict of interest manifested itself when he failed (1) to move to dismiss the petitioner's criminal charges on double jeopardy grounds, (2)

[1] In the fifth count of his petition, the petitioner alleged ineffective assistance by his appellate counsel in the direct appeal from the judgment of conviction in his second criminal trial, a claim which the habeas court denied. On appeal, the petitioner did not claim that the court's denial was erroneous and, therefore, we do not discuss the fifth count any further in this opinion.

to identify false statements made by police officers in the search warrant affidavit, and (3) to adequately cross-examine police officers concerning their prior inconsistent statements and the discrepancy between the logos on the packaging of the drugs seized from the petitioner and those discovered on Lockery prior to his March 13, 2001 arrest. In the fourth count, the petitioner alleged that Canace rendered ineffective assistance of counsel.

A trial on the petition was held before the habeas court, *Devlin*, *J.*, on July 27, 28 and 31, 2017 (second habeas trial).[2] On August 16, 2017, Judge Devlin issued a memorandum of decision in which he denied each of the petitioner's claims. Thereafter, the petitioner filed a petition for certification to appeal from Judge Devlin's denial of his petition for a writ of habeas corpus. Judge Devlin denied the petition for certification to appeal, and the petitioner filed this appeal. Additional facts will be set forth as necessary.

We begin by setting forth the standard of review of appeals from the denial of a petition for certification to appeal. "Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms* v. *Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms* v. *Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, [the petitioner] must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on the merits. . . . As to the first prong, the standard requires the petitioner to demonstrate that the issues are debatable among jurists of reason; that a court could resolve

[2] For reasons that will be set forth in part I of this opinion, the trial before Judge Devlin was the petitioner's second habeas trial.

the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further. . . . In determining whether the habeas court abused its discretion in denying the petitioner's request for certification, we necessarily must consider the merits of the petitioner's underlying claims to determine whether the habeas court reasonably determined that the petitioner's appeal was frivolous." (Citation omitted; internal quotation marks omitted.) *Lenti* v. *Commissioner of Correction*, 195 Conn. App. 505, 509–10, 225 A.3d 1233, cert. denied, 335 Conn. 905, 226 A.3d 151 (2020).

On appeal, the petitioner raises two claims, both of which he argues satisfy the first prong of the *Simms* standard because they are debatable among jurists of reason, could be resolved differently by another court, and/or involve questions that are adequate to deserve encouragement to proceed further. See, e.g., id., 509. First, the petitioner claims that the court improperly denied his request for an evidentiary hearing prior to permitting the respondent, the Commissioner of Correction, to introduce testimony at his second habeas trial from Mary Rose Palmese, the assistant state's attorney during both of his criminal trials. Second, the petitioner asserts that the court improperly denied his ineffective assistance of counsel claim. For the reasons set forth in parts I and II of this opinion, we conclude that the petitioner has failed to show that his claims are debatable among jurists of reason, that a court could resolve the issues in a different manner, or that the questions are adequate to deserve encouragement to proceed further. We therefore conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal.

I

The petitioner first claims that the court improperly denied his request for an evidentiary hearing prior to

permitting the respondent to introduce testimony from Palmese in his second habeas trial. The following additional facts are relevant to this claim.

In May, 2001, Lockery pleaded guilty to a possession of narcotics charge stemming from his March 13, 2001 arrest; Palmese was the assistant state's attorney at Lockery's plea hearing. Palmese stated the factual predicate for Lockery's charge on the record; the petitioner was not mentioned in Palmese's factual recitation. During the petitioner's first criminal trial, Lockery testified that he was arrested on March 13 for drugs that he had purchased from the petitioner. During the petitioner's first criminal trial there was no other witness who testified that Lockery was arrested for drugs that he had purchased from the petitioner.[3] At some time between the petitioner's first and second criminal trials, Lockery recanted that specific piece of testimony in a letter that, although he had not authored, he had signed and notarized. At the petitioner's second habeas trial, Lockery testified that police officers pressured him to testify during the petitioner's first criminal trial that he was arrested for drugs that he had purchased from the petitioner. Lockery did not testify at the petitioner's second

[3] In his memorandum of decision, Judge Devlin found that, "[i]n the first [criminal] trial, [Detective Jerry Chrostowski] testified that Lockery was arrested for possession of narcotics and agreed to help the police get his supplier, namely, the petitioner. In the second [criminal] trial, he testified that Lockery was arrested for possessing two bags of drugs and the purchase of those drugs had nothing to do with the petitioner." Further on in his analysis, Judge Devlin stated that "[w]hile Chrostowski was clearly inconsistent regarding where Lockery obtained the drugs he was caught with, there was no sense in disturbing the testimony at the second [criminal] trial that they were not connected to the [petitioner]." Chrostowski did testify in the first criminal trial that Lockery offered to provide information on a supplier of his, and that the petitioner was a supplier of his. We disagree, however, that this testimony supports the finding that Chrostowski testified at the first criminal trial that Lockery was arrested on March 13 for drugs that he had purchased from the petitioner. Chrostowski was not asked whether the petitioner was the particular supplier of the drugs for which Lockery was arrested on March 13, and did not testify to that effect.

criminal trial, and Canace unsuccessfully attempted to admit Lockery's recantation letter into evidence at that trial.

In addition, at the first criminal trial, Palmese failed to disclose Lockery's criminal record to the petitioner. An investigator for Palmese searched for information about Lockery in the National Crime Information Center database, which returned results indicating that Lockery did not have any criminal convictions. The search results, however, were for a different individual also named Kevin Lockery.

In his petition, the petitioner alleged that, at his first criminal trial, Palmese intentionally committed *Brady* violations by failing to disclose Lockery's criminal record, failing to disclose the disparities between the logo on the packaging of the drugs that were found on Lockery and the logo on the packaging of the drugs that were found on the petitioner and in his residence, and eliciting perjured testimony from Lockery regarding the source of the drugs leading to his March 13, 2001 arrest. In November and December, 2016, a trial on the petition was held before the court, *Sferrazza*, *J.*, in the judicial district of Tolland (first habeas trial).

According to an allegation made by Lori Guegel, the court reporter at the first habeas trial, an individual, later identified as Jerry Chrostowski of the New Britain Police Department, provided hand signals to Palmese during her testimony at trial. More specifically, Guegel alleged that she observed Chrostowski provide hand signals to Palmese six times during her testimony; each time Palmese would begin to answer the question asked of her before receiving a hand signal from Chrostowski, which, it was alleged, prompted Judge Sferrazza to either interrupt her or to allow her to finish her answer before offering a different answer and the opportunity for her to amend her response to the question. In response to this allegation by Guegel, the Office of the

Chief State's Attorney conducted an investigation.[4] On May 19, 2017, Judge Sferrazza declared a mistrial because more than six months had passed since he last heard evidence in the first habeas trial. On June 20, 2017, at the direction of the Office of the Chief Court Administrator, the matter was transferred to the judicial district of Fairfield and assigned to Judge Devlin.

On July 27, 2017, the petitioner filed a "motion for [an] evidentiary hearing to prohibit the testimony of . . . Palmese and . . . [Chrostowski]" as a "form of sanctioning" the respondent. In support of his motion, the petitioner relied on the allegations that were made by Guegel of hand-signaling during the first habeas trial. The petitioner argued that his suggested "sanction" was necessary because Palmese's credibility and intent were key issues in his petition, which asserted claims of intentional *Brady* violations and prosecutorial impropriety that warranted a double jeopardy bar to his further prosecution in the second criminal trial. The petitioner further argued that, even if the court declined to prohibit testimony from Palmese and Chrostowski, it should have nevertheless granted his request for an evidentiary hearing, "as it [would have] aid[ed] the court with its credibility assessment of the witnesses and assist[ed] with determining whether the *Brady* material was intentionally withheld as a continuing course of conduct in order to delay the truth." When arguing the motion to Judge Devlin, the petitioner added that he wanted "an opportunity to make a record of what allegedly happened" with the hand-signaling incident. Judge Devlin denied the motion, stating that he would not "divert these proceedings into a big trial into that issue."

[4] A February 2, 2017 report was completed following the investigation. The petitioner did not bring the report to the attention of Judge Devlin either in his July 27, 2017 motion for an evidentiary hearing or when arguing that motion on July 27, 2017. The petitioner also failed to offer the report as an exhibit during his second habeas trial.

Judge Devlin nonetheless invited the petitioner to file a written offer of proof and stated, "you can make whatever record you want to make."

In his memorandum of decision, Judge Devlin denied the petitioner's *Brady* and double jeopardy claims. With respect to the *Brady* claims, Judge Devlin found that Lockery's criminal record was exculpatory and that its nondisclosure was unintentional and due to negligence. Judge Devlin found that Palmese did not knowingly elicit perjured testimony from Lockery when he identified the petitioner as the seller of the drugs leading to Lockery's March 13, 2001 arrest. Judge Devlin discounted Palmese's role at Lockery's May, 2001 plea hearing, which occurred several months prior to the petitioner's first criminal trial in 2002, by accepting her testimony that she "did not connect" the plea hearing and the petitioner's first criminal trial due to the high number of cases—approximately 2800—that she prosecuted in the judicial district of New Britain in 2001. Judge Devlin further found that the petitioner had already obtained the relief that he was entitled to for a *Brady* violation: "[O]ur Supreme Court reversed the convictions from the first [criminal] trial and remanded the case for a new trial. . . . A *Brady* violation in the first [criminal] trial would have only entitled the petitioner to a new trial. He has already received such relief, albeit on different grounds."

Judge Devlin also denied the petitioner's claim that Palmese's alleged *Brady* violations in his first criminal trial warranted a double jeopardy bar of his prosecution in the second criminal trial. Judge Devlin stated that he "accept[ed] [Palmese's] testimony that, at no time during the first [criminal] trial, were her actions motivated to prevent a likely acquittal. Moreover, the state had a strong case. The [petitioner] was caught with drugs on his person while leaving the site of what was

supposed to be a drug sale. In addition, his residence contained more drugs and a shotgun."

On appeal, the petitioner argues that, as a result of Judge Devlin's denial of his request for an evidentiary hearing, "[his] judgment as to the *Brady* and double jeopardy claims is incomplete, based on an inadequate record, and fatally flawed." According to the petitioner, Palmese's intent and credibility were central to Judge Devlin's analysis of his claims (1) of intentional *Brady* violations and (2) that, as a result of prosecutorial impropriety by Palmese, his second criminal trial should have been barred by double jeopardy principles under *Oregon* v. *Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), and *United States* v. *Wallach*, 979 F.2d 912 (2d Cir. 1992), cert. denied, 508 U.S. 939, 113 S. Ct. 2414, 124 L. Ed. 2d 637 (1993). Moreover, according to the petitioner, the alleged hand-signaling involving Palmese during the petitioner's first habeas trial was relevant to her intent to commit *Brady* violations and her credibility as a witness in his second habeas trial. Therefore, an evidentiary hearing was necessary to explore that alleged incident. We disagree.

"[Our Supreme Court] consistently [has] held that, unless otherwise required by statute, a rule of practice or a rule of evidence, whether to conduct an evidentiary hearing generally is a matter that rests within the sound discretion of the trial court. . . . On appeal, every reasonable presumption in favor of the trial court's discretionary ruling will be made." (Citations omitted; internal quotation marks omitted.) *State* v. *Michael J.*, 274 Conn. 321, 332–33, 875 A.2d 510 (2005).

We conclude that Judge Devlin did not abuse his discretion in denying the petitioner's request for an evidentiary hearing (1) to "prohibit the testimony of . . . Palmese and . . . [Chrostowski][5] as a form of

[5] The respondent did not call Chrostowski as a witness during the second habeas trial.

sanctioning the [respondent]" or (2) to "aid [Judge Devlin] with [his] credibility assessment of the witnesses, and assist with determining whether the *Brady* material was intentionally withheld as a continuing course of conduct in order to delay the truth." (Footnote added.) First, as Judge Devlin recognized, Palmese was a key witness and, thus, prohibiting the respondent from calling her to testify would have been "rather draconian . . . ." Moreover, were Judge Devlin to have prohibited Palmese from testifying, he would have frustrated his ability to adjudicate the petitioner's claims with the benefit of all the salient evidence.

Second, Judge Devlin properly determined that, under the circumstances of this case, the need for an evidentiary hearing was outweighed by the time and resources that the court would have expended in order to conduct such a proceeding. See *State* v. *Michael J.*, supra, 274 Conn. 337 ("[w]e also recognize that the court reasonably could have concluded that a full evidentiary hearing into the prosecutor's off-the-record conduct would do no more than impugn [her] veracity . . . and impose a staggering burden of time and effort on our already overburdened court system" (internal quotation marks omitted)). We do not suggest that considerations of judicial economy are sufficient standing alone to justify the denial of an evidentiary hearing. See id., 337 n.8. In this case, however, Judge Devlin did not deny the petitioner's request for an evidentiary hearing without, at the same time, extending him the opportunity to develop a record that might support his alleged intentional *Brady* violations and double jeopardy claim. Judge Devlin invited the petitioner to "make whatever record you want to make." The petitioner declined. He did not call as witnesses Palmese or Chrostowski, the participants in the alleged hand-signaling scheme, or Guegel, the purported witness to the alleged hand-signaling. The petitioner failed to bring the February 2, 2017 report completed by the Office of the Chief State's

Attorney to the attention of Judge Devlin. The petitioner declined to file a written offer of proof asserting the relevance of the alleged hand-signaling scheme to the claims made in his petition, despite Judge Devlin's having invited him to do so.

The petitioner argues that his case is analogous to *State* v. *Colton*, 234 Conn. 683, 663 A.2d 339 (1995), cert. denied, 516 U.S. 1140, 116 S. Ct. 972, 133 L. Ed. 2d 892 (1996). In *Colton*, the defendant was tried three times for murder; the first two trials ended in mistrials because the jury could not reach a unanimous verdict. Id., 684–85. In the third trial, the defendant was convicted of murder. Id., 685. Our Supreme Court, however, reversed that conviction and remanded the case for a new trial after concluding that the trial court had violated the defendant's constitutional right to confrontation by precluding certain evidence that showed motive and bias on the part of the state's chief witness. Id.

Following a remand of the case, the state initiated a fourth prosecution of the defendant for murder, which the defendant moved to dismiss, arguing, inter alia, that double jeopardy barred further prosecution due to prosecutorial impropriety occurring during his third trial. Id. The trial court denied the defendant's motion to dismiss, concluding that, as a matter of law, the defendant's claim of prosecutorial impropriety could not be brought in a motion to dismiss because he had not alleged such impropriety either in a motion for a mistrial during the third trial or on appeal from his conviction at the third trial. Id., 685–86.

On appeal, our Supreme Court reversed the judgment of the trial court and remanded the case for the trial court to consider the merits of the defendant's motion to dismiss. Id., 686. The court further stated that, "[i]n order to have a fair opportunity to meet his difficult burden of proving that the prosecutor had engaged in misconduct with the intent to avoid an acquittal that

was likely, the defendant must be able to bring that alleged misconduct to the attention of the court. With regard to off-the-record conduct, the proper time to do so is in a collateral evidentiary proceeding." Id., 697.

The petitioner relies on *Colton* to contend that he was entitled to a collateral evidentiary hearing because the record from his second habeas trial was bereft of evidence of the alleged hand-signaling during his first habeas trial that involved Palmese, Chrostowski, and Judge Sferrazza. In *Colton*, the defendant filed a motion to dismiss the criminal charge pending against him in his fourth criminal trial, raising the collateral issue that double jeopardy principles barred his further prosecution because of prosecutorial impropriety allegedly occurring in his third criminal trial. Id., 685. Our Supreme Court concluded that, because the evidence that the defendant intended to use to demonstrate such impropriety was not part of the record, the defendant was entitled to a collateral evidentiary hearing to uncover that evidence. Id., 696–97.

The petitioner's case is procedurally distinguishable from *Colton*. The petitioner's second habeas trial was, in part, dedicated to adjudicating the merits of his petition alleging intentional *Brady* violations in his first criminal trial and a claim that, as a result of those intentional *Brady* violations, double jeopardy principles should have barred his prosecution in the second criminal trial. The petitioner sought to prove those claims, in part, by offering evidence of Palmese's alleged participation in an improper hand-signaling scheme occurring during her testimony at his first habeas trial, which would serve as circumstantial evidence of her intent with respect to her alleged *Brady* violations during his first criminal trial. The petitioner further sought to use Palmese's alleged participation in the hand-signaling scheme to impeach her credibility as a witness during his second habeas trial. The petitioner did not require a collateral

evidentiary hearing to develop this evidence because he could have developed it in his second habeas trial. Indeed, the petitioner's second habeas trial *was* a collateral proceeding. See *Small* v. *Commissioner of Correction*, 98 Conn. App. 389, 401, 909 A.2d 533 (2006) ("a habeas corpus petition . . . is a collateral attack on a conviction"), aff'd, 286 Conn. 707, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008); see also *State* v. *Colton*, supra, 234 Conn. 697–98 (analogizing need for collateral evidentiary hearing to decide defendant's double jeopardy claim made in his motion to dismiss charge brought in his fourth criminal trial to procedural reason that ineffective assistance of counsel claims are asserted in petitions for writ of habeas corpus, which contain "evidentiary hearing[s]" (emphasis omitted)).

Moreover, as our Supreme Court emphasized in *Michael J.*, it was not its "intention [in *Colton*] to issue a mandate to trial courts that they must conduct an evidentiary hearing in every case in which a defendant claims that the prosecutor might have committed some misdeed off-the-record, particularly when, as in [*Michael J.*], *the record alone provides an adequate basis for a court's factual finding*." (Emphasis added.) *State* v. *Michael J.*, supra, 274 Conn. 340. For similar reasons, we conclude that Judge Devlin was not required to conduct a collateral evidentiary hearing to explore the alleged hand-signaling incident occurring during the petitioner's first habeas trial. Put simply, the petitioner, as invited by Judge Devlin, could have probed the incident during his second habeas trial. To the extent that the petitioner's *Brady* and double jeopardy claims suffered from an evidentiary lacuna, the fault lies with the petitioner, who declined Judge Devlin's invitation to file an offer of proof or to "make whatever record you want to make" regarding the alleged hand-signaling scheme.

Furthermore, even if we were to determine that Judge Devlin abused his discretion in denying the petitioner's request for an evidentiary hearing, we would nevertheless conclude that his denial was harmless because any evidence developed during such an evidentiary hearing that was favorable to the petitioner would not have sufficiently benefited his *Brady* and double jeopardy claims so as to make them meritorious.

First, as Judge Devlin observed, the petitioner received all of the relief that he was entitled to for Palmese's alleged *Brady* violations.[6] The petitioner alleged *Brady* violations in his first criminal trial as a result of Palmese's nondisclosure of (1) Lockery's criminal record, (2) the fact that the drugs that were found on Lockery during his March 13, 2001 arrest were not purchased from the petitioner, as Lockery testified during the first criminal trial, and (3) the fact that the packaging of the drugs that were found on Lockery during his arrest were stamped with a different logo than the packaging of the drugs that were found on the petitioner's person and at his residence. Even if the petitioner had proven that each of these three nondisclosures constituted a *Brady* violation, the remedy was a new trial. See, e.g., *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 231 n.3, 112 A.3d 1 (2015) ("a new trial is required

[6] Judge Devlin found that Lockery's criminal record was exculpatory. See *State* v. *McIntyre*, 242 Conn. 318, 323, 699 A.2d 911 (1997) ("[i]t is well established that . . . exculpatory evidence falls within *Brady*'s definition of evidence favorable to an accused" (internal quotation marks omitted)). He did not, however, state whether he found that the criminal record was material. See id. ("[t]o prevail on a *Brady* claim, the defendant bears a heavy burden to establish: (1) that the prosecution suppressed evidence; (2) that the evidence was favorable to the defense; and (3) that it was material" (internal quotation marks omitted)); id. ("The test of materiality of nondisclosed exculpatory evidence requires that there be a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.)).

because of a *Brady* violation''). The petitioner received that relief.

The petitioner was granted a new trial after our Supreme Court reversed the judgment of conviction in his first criminal trial because he was inadequately canvassed by the trial court regarding his decision to waive counsel and to represent himself. See *State* v. *Diaz*, supra, 274 Conn. 818. At the petitioner's second criminal trial, Lockery did not testify. Accordingly, there was no testimony that Lockery's arrest on March 13, 2001, was for drugs that he had purchased from the petitioner. See footnote 3 of this opinion. Because there was no evidence presented that Lockery purchased those drugs from the petitioner, it was immaterial that they were packaged with a different logo than that reflected on the packaging of the drugs that were found on the petitioner's person when he was arrested on March 13, and in the ensuing search of his residence. Additionally, because Lockery did not testify at the second criminal trial, his criminal record possessed insignificant impeachment value. See also footnote 8 of this opinion. Therefore, we conclude that Judge Devlin's denial of the petitioner's request for an evidentiary hearing had no effect on his *Brady* claims.

Second, we conclude, as did Judge Devlin, that the petitioner could not prove his double jeopardy claim. More specifically, we conclude that, because the state presented a strong case against the petitioner, Palmese's nondisclosure of evidence to the petitioner in his first criminal trial was not motivated to prevent an acquittal that she believed at that time was likely to occur in the absence of prosecutorial impropriety.[7]

[7] "Ordinarily, the [d]ouble [j]eopardy [c]lause imposes no limitation upon the power of the government to retry a defendant who has succeeded in persuading a court to set his conviction aside, unless the conviction has been reversed because of insufficiency of the evidence. *Oregon* v. *Kennedy*, supra, 456 U.S. 676 n.6. In *Kennedy*, however, the United States Supreme Court held that double jeopardy also bars a subsequent prosecution if there was prosecutorial misconduct in the first trial that goaded the defendant

During the petitioner's first criminal trial, multiple police officers testified that Lockery, following his arrest, cooperated in organizing a drug deal with the petitioner. According to their testimony, Lockery provided the police officers with the petitioner's telephone number, which he had listed in his cellular telephone under the contact name BB, and called the petitioner at that number using an officer's telephone to organize the drug deal. Following Lockery's telephone call to the petitioner setting up the drug deal, police officers performing surveillance of the petitioner's residence observed him depart from his residence in a vehicle and travel to the designated meeting location. The petitioner arrived at the meeting location and waited for Lockery's arrival. After some time of waiting for Lockery to arrive, the petitioner began to drive away but was stopped by police officers and searched.

During their search of the petitioner, police officers discovered twenty-five bags of heroin, $1025 in cash, and a cellular telephone that displayed received calls, including calls from the number used by Lockery to organize the drug deal. Those items, as well as information from confidential informants and police surveillance of the petitioner's residence, were used to secure a warrant to search the petitioner's residence. A search pursuant to that warrant was executed on the petitioner's residence in the

into seeking a mistrial. . . . The United States Court of Appeals for the Second Circuit recently held, however, that prosecutorial misconduct may be a bar to a second trial even if there was no mistrial in the first case. . . . The court in [*United States* v. *Wallach*, supra, 979 F.2d 916] held that [i]f any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but *to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his* [*or her*] *misconduct*." (Citations omitted; emphasis added; internal quotation marks omitted.) *State* v. *Colton*, supra, 234 Conn. 691–93; see also id., 696 ("we agree with the [United States Court of Appeals for the Second Circuit] that *Kennedy* logically should be extended to bar a new trial, even in the absence of a mistrial or reversal because of prosecutorial misconduct, if the prosecutor in the first trial engaged in misconduct with the intent 'to

early morning hours of March 14, 2001, which led to the discovery of 168 bags of heroin, sixteen grams of marijuana, a twelve gauge shotgun, shotgun shells, and drug paraphernalia.

In light of the foregoing evidence, which overwhelmingly supported the petitioner's convictions, we conclude that it is unlikely that Palmese would have believed during the first criminal trial that the petitioner was likely to secure an acquittal in the absence of her alleged intentional *Brady* violations. Moreover, other than Lockery, no witness testified during the first criminal trial that he was arrested for possession of narcotics that he had purchased from the petitioner. The testifying police officers stated that Lockery cooperated with their investigation of the petitioner after he was arrested for possession of narcotics, but they never stated that the drugs for which he was arrested and his cooperation with their investigation were connected. Thus, the source of the drugs leading to Lockery's arrest was of minimal relevance to the charges that the petitioner faced.

In addition, Palmese did not charge the petitioner with any crimes related to the drugs that were discovered on Lockery. Therefore, even if Lockery had committed perjury regarding the source of the drugs that were found on him prior to his arrest, we conclude from our review of the record that Palmese would not have suborned that perjury in light of the strength of the state's case against the petitioner, the minimal relevance of the source of the drugs that were found on Lockery, and the lack of charges brought against the petitioner that were related to those drugs.[8] See *United States* v. *Pavloyianis*, 996 F.2d 1467,

prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his [or her] misconduct' ").

[8] For the same reasons, we conclude that Palmese did not intentionally withhold information regarding the difference between the logos on the packaging of the drugs that were discovered on Lockery and the drugs that were found on the petitioner's person and at his residence out of any belief at that time that such an action was necessary to avoid the petitioner's likely acquittal.

1474–75 (2d Cir. 1993) (The court rejected the defendant's claim "that the prosecutor engaged in misconduct with the intention of avoiding what he viewed as a likely acquittal" because "[t]he evidence against [him] was strong enough so that the government had every reason to anticipate a conviction, even had [a witness'] perjury about matters collateral to [the defendant's] guilt been fully disclosed. [The witness'] testimony had been corroborated by significant independent evidence . . . ."); *United States* v. *Wallach*, supra, 979 F.2d 916–17 (concluding that "it is entirely unrealistic to think that the prosecution at [the defendant's] trial apprehended an acquittal" because "[t]he evidence against [him] and his [codefendants] was quite strong," "[t]he prosecution had every reason to anticipate a conviction," and "[t]here was no determination that the prosecutors had actual knowledge" of witness' perjury).

Because of the considerable strength of the evidence against the petitioner at his first criminal trial, we further conclude that any evidence elicited during an evidentiary hearing on the alleged hand-signaling incident that revealed Palmese's intent to commit *Brady* violations or damaged her credibility as a witness would not have meaningfully enhanced the merits of his double jeopardy claim. See *United States* v. *Pavloyianis*, supra, 996 F.2d 1475 (rejecting defendant's contention "that an evidentiary hearing is required for [a] determination of prosecutorial intent" because "[n]o rule of law

Furthermore, even if Palmese knew that an incorrect criminal record for Lockery was provided to the petitioner and intentionally withheld Lockery's actual criminal record from the petitioner, we nevertheless conclude that that criminal record was of little additional impeachment value in light of the fact that the jury knew that Lockery was arrested for possession of narcotics on March 13, 2001, and had cooperated with police officers' investigation of the petitioner in exchange for leniency. *State* v. *Diaz*, supra, 109 Conn. App. 522. Thus, any further impeachment value that the petitioner would have gained by virtue of possessing Lockery's actual criminal record would have been inconsiderable compared to the weight of the evidence that the state presented against him.

requires a hearing in this sort of case *where the relevant facts can be ascertained from the record*" and court's review of record satisfied it that "there was not the slightest indication or evidence that the trial prosecutor anticipated an acquittal" (emphasis added; internal quotation marks omitted)).

Accordingly, we conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal on the ground that it had improperly denied the petitioner's request for an evidentiary hearing.

II

The petitioner next claims that the court improperly denied his ineffective assistance of counsel claim. The petitioner argues that during his second criminal trial, Canace maintained a conflict of interest and performed deficiently. We disagree.

The following additional facts, found by the habeas court, are relevant to this claim. During his second criminal trial, the petitioner was represented by Canace. Canace served as a special public defender representing indigent criminal defendants in, inter alia, the judicial district of New Britain. While representing the petitioner, Canace was employed as a police officer for the city of New Haven. The petitioner was not aware that Canace was employed as a New Haven police officer, and Canace did not inform him of that fact. Before Canace began representing criminal defendants in approximately 1996 or 1997, Canace made known to the New Haven Police Department his desire to do so. To determine whether it was appropriate for Canace to be employed as a New Haven police officer while simultaneously representing criminal defendants, corporation counsel for the city of New Haven solicited opinions on the matter from the American Bar Association, the Statewide Grievance Committee, and the New Haven

state's attorney's office. Corporation counsel concluded that Canace could represent criminal defendants in Connecticut courts, with the exception of those located in the judicial district of New Haven.

Canace did not believe that his representation of the petitioner in New Britain while employed as a New Haven police officer violated rule 1.7 (a) of the Rules of Professional Conduct, which provides in relevant part that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by a personal interest of the lawyer." Nor did Canace believe that General Statutes § 54-1f (b),[9] which authorizes police officers to make arrests of persons under certain circumstances, created a conflict of interest. Accordingly, Canace did not deem it necessary to inform the petitioner of his employment as a New Haven police officer while he represented him in his second criminal trial. See Rules of Professional Conduct 1.7 (b) (4).

In 2006, Preston Tisdale, an attorney employed as the director of the special public defender program at the Division of Public Defender Services, was informed that Canace was employed as a New Haven police officer while also representing criminal defendants as a special public defender. Tisdale consulted with the Office of the Chief Public Defender and, ultimately, decided

[9] General Statutes § 54-1f (b) provides: "Members of the Division of State Police within the Department of Emergency Services and Public Protection or of any local police department or any chief inspector or inspector in the Division of Criminal Justice shall arrest, without previous complaint and warrant, any person who the officer has reasonable grounds to believe has committed or is committing a felony."

that Canace would have to resign as a special public defender. Tisdale provided two reasons for his decision: (1) Canace exhibited a lack of candor in his application for a special public defender contract by vaguely describing his position for the city of New Haven as a " 'municipal employee,' " and (2) other clients of Canace might raise ineffective assistance of counsel claims against him.

In his petition, the petitioner alleged that Canace had a conflict of interest as a result of his employment as a police officer while representing the petitioner. The petitioner further alleged that Canace's conflict of interest presented itself when he failed (1) to move to dismiss the petitioner's criminal charges on double jeopardy grounds, (2) to identify false statements by police officers in the search warrant affidavit, and (3) to adequately cross-examine police officers regarding their prior inconsistent statements and the different logos on the packaging of the drugs seized from the petitioner and those on Lockery's person during his arrest. The petitioner also alleged particular instances in which Canace provided deficient performance at his second criminal trial.

Judge Devlin rejected the petitioner's claim that Canace had a conflict of interest, stating that "[t]here was no evidence offered that . . . Canace's representation of the petitioner was directly adverse to another client" and that he did "not find that . . . Canace's representation of the petitioner was limited by his responsibilities to the New Haven [P]olice [D]epartment." Judge Devlin further concluded that Canace did not provide the petitioner with deficient representation during his second criminal trial.

We begin by setting forth the applicable standard of review and principles of law. "Although the underlying historical facts found by the habeas court may not be disturbed unless they were clearly erroneous, whether

those facts constituted a violation of the petitioner's rights under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard. . . .

"It is axiomatic that the right to counsel is the right to the effective assistance of counsel. . . . As an adjunct to this right, a criminal defendant is entitled to be represented by an attorney free from conflicts of interest. . . .

"Different standards apply to different types of claims of ineffective assistance of counsel. Where the criminal defendant presents a claim of actual ineffectiveness . . . that is, when he challenges his lawyer's performance in the trial court, he must show that: (1) his counsel's performance was deficient in the sense that the counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the [s]ixth [a]mendment; and (2) the deficient performance prejudiced the defense . . . in the sense that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . In such a case, therefore, the defendant must establish (1) deficient performance, and (2) actual prejudice.

"Where, however, the defendant claims that his counsel was burdened by an actual conflict of interest . . . the defendant need not establish actual prejudice. . . . Where there is an actual conflict of interest, prejudice is presumed because counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. . . . In a case of a claimed conflict of interest, therefore, in order to establish a violation of the

sixth amendment the defendant has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an actual conflict of interest adversely affected his lawyer's performance." (Citations omitted; internal quotation marks omitted.) *Phillips* v. *Warden*, 220 Conn. 112, 131–33, 595 A.2d 1356 (1991).

"An actual conflict of interest is more than a theoretical conflict. The United States Supreme Court has cautioned that the possibility of conflict is insufficient to impugn a criminal conviction. . . . A conflict is merely a *potential* conflict of interest if the interests of the defendant may place the attorney under inconsistent duties at some time in the future. . . . To demonstrate an actual conflict of interest, the petitioner must be able to point to *specific instances* in the record which suggest impairment or compromise of his interests for the benefit of another party. . . . A mere theoretical division of loyalties is not enough. . . . If a petitioner fails to meet that standard, for example, where only a potential conflict of interest has been established, prejudice will not be presumed, and the familiar [prongs of *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] will apply." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 127 Conn. App. 538, 550, 15 A.3d 658 (2011), aff'd, 308 Conn. 456, 64 A.3d 325 (2013).

On appeal, the petitioner argues that "Canace's conflict and his deficient performance were linked, the former causing the latter and both causing prejudice," and that the court improperly failed "to find either the conflict alleged in count three or the deficient performance alleged in count four . . . ." The petitioner asserts that Canace had an actual conflict of interest during his representation of the petitioner because his employment as an active duty police officer divided his

loyalty. The petitioner calls to our attention specific instances in the record that demonstrate Canace's conflict of interest and his deficient performance. "Canace failed to point out that Chrostowski was inconsistent and, thus, unreliable on multiple points, including where narcotics were supposedly found in [the] petitioner's home and when he first saw them. Canace further failed to point out that Chrostowski said the police were familiar with [the petitioner] whereas [another officer] said he did not know him. Critically, as this whole situation began with Lockery, Chrostowski was inconsistent between trials about whether Lockery bought drugs from [the] petitioner."

We reject the petitioner's ineffective assistance of counsel claim because he does not provide us with any law, and we are aware of none, that holds that Canace's simultaneous representation of the petitioner and employment as a New Haven police officer categorically establishes an actual conflict of interest. See *Paradis* v. *Arave*, 130 F.3d 385, 391 (9th Cir. 1997) (concluding that employment of petitioner's defense counsel as city park police officer when he was appointed to represent petitioner fell "short of a constitutional violation because there is no showing that [counsel] *actively represented* conflicting interests," and "[p]otentially divided allegiances do not constitute active representation of conflicting interests" (emphasis in original)); *State* v. *Gonzales*, 483 So. 2d 1236, 1236–37 (La. App. 1986) (requiring defendant alleging that his defense counsel had actual conflict as result of his role as reserve police officer to demonstrate how that alleged conflict adversely affected defense counsel's performance); cf. *People* v. *Washington*, 101 Ill. 2d 104, 108–109, 113, 461 N.E.2d 393 (concluding that defendant was denied effective assistance of counsel after finding actual conflict of interest because defense counsel, who served as part-time city attorney for Chicago Heights, "was obliged to

cross-examine and attempt to discredit" Chicago Heights police officer at pretrial hearing), cert. denied, 469 U.S. 1022, 105 S. Ct. 442, 83 L. Ed. 2d 367 (1984); see also *State* v. *Parrott*, 262 Conn. 276, 287, 811 A.2d 705 (2003) ("[i]n the absence of an affirmative duty by the trial court to inquire [with respect to a conflict of interest] . . . a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance in order to obtain reversal of his conviction").

Moreover, the petitioner fails to direct our attention to where in the record we could find "specific instances . . . which suggest impairment or compromise of his interests for the benefit of another party"; (emphasis omitted; internal quotation marks omitted) *Anderson* v. *Commissioner of Correction*, supra, 127 Conn. App. 550; or "errors so serious that counsel was not functioning as the counsel guaranteed by the [s]ixth [a]mendment . . . ." (Internal quotation marks omitted.) *Phillips* v. *Warden*, supra, 220 Conn. 132. Canace's failure to cross-examine Chrostowski as to where, precisely, the police officers discovered the drugs in the petitioner's residence and when he first saw them neither demonstrates a compromise of Canace's loyalty to the petitioner nor an error so serious that he was not functioning as counsel guaranteed under the sixth amendment to the United States constitution. Chrostowski testified in the second criminal trial that, although he was present at the petitioner's residence while it was being searched pursuant to a warrant, he did not partake in the search because he was responsible for monitoring Michelle Gross, an individual residing at the petitioner's residence during the search. Accordingly, because Chrostowski was capable of providing a rational explanation for these slight inconsistencies in his testimony, it was reasonable for Canace not to pursue this avenue of discrediting his testimony. *Strickland* v.

Washington, supra, 466 U.S. 687–88 ("[w]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of *reasonableness*" (emphasis added)). Similarly, Canace's failure to point out that Chrostowski had testified that the police officers were familiar with the petitioner, despite another police officer testifying that he did not know the petitioner, would have been of negligible impeachment value.

Last, the petitioner argues that Canace should have cross-examined Chrostowski regarding inconsistencies in his testimony during the first and second criminal trials regarding the source of the drugs that were found on Lockery. This argument is belied by our review of the records from the first and second criminal trials, which reveal that Chrostowski did not testify that the drugs found on Lockery were purchased from the petitioner. See footnote 3 of this opinion. In addition, in the second criminal trial, Canace asked the investigating police officers whether the location where Lockery was arrested on March 13, 2001, had any relation to the petitioner or their investigation of the petitioner. With this line of questioning, Canace seemingly sought to alert the jury to the fact that the petitioner had no involvement with the drugs that were found on Lockery. Considering that the petitioner was facing multiple narcotics charges, it was a reasonable defense strategy for Canace to highlight for the jury the petitioner's lack of involvement with the drugs that were found on Lockery. See id. Had Canace attempted to expose any perceived inconsistencies in Chrostowski's testimony regarding the source of the drugs that were discovered on Lockery, he may have distracted the jury from reaching the conclusion that he desired: that the petitioner did not

sell Lockery the drugs that led to Lockery's March 13 arrest.[10]

The petitioner also argues that, pursuant to § 54-1f (b), Canace was obligated to arrest the petitioner if he had reasonable grounds to suspect that the petitioner had committed a felony crime. According to the petitioner, this "statutory mandate" to Canace created an actual conflict of interest. Even if we agreed with the petitioner's construction of § 54-1f (b) that it *required* police officers to arrest persons when they have reasonable grounds to suspect those persons had committed felony crimes, the petitioner has not directed us to any "specific instance" in which this statute, or any other legal obligation of Canace as a New Haven police officer, impaired Canace's ability to provide the petitioner with adequate and uncompromised defense representation. See *Anderson* v. *Commissioner of Correction*, supra, 127 Conn. App. 550 ("[t]o demonstrate an actual conflict of interest, the petitioner must be able to point to *specific instances* in the record which suggest impairment or compromise of his interests for the benefit of another party" (emphasis in original; internal quotation marks omitted)). Accordingly, we reject this argument as well.[11]

[10] In his petition and at the second habeas trial, the petitioner asserted other instances that allegedly constituted manifestations of Canace's conflict of interest or his deficient performance during the second criminal trial. In his brief on appeal, however, the petitioner did not discuss those instances when providing analysis of his claim of an actual conflict or deficient performance. Therefore, we do not consider them in this appeal. See *Raynor* v. *Commissioner of Correction*, 117 Conn. App. 788, 796–97, 981 A.2d 517 (2009) ("[R]eviewing courts are not required to review issues that have been improperly presented to th[e] court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)), cert. denied, 294 Conn. 926, 986 A.2d 1053 (2010); see also *Collins* v. *Goldberg*, 28 Conn. App. 733, 738, 611 A.2d 938 (1992) (failure to brief certain claims set forth in complaint constituted abandonment of claims).

[11] Because we conclude that the petitioner failed to prove that Canace actively represented conflicting interests; *Phillips* v. *Warden*, supra, 220 Conn. 133; *Anderson* v. *Commissioner of Correction*, supra, 127 Conn. App.

We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal on the ground that the court improperly denied the petitioner's ineffective assistance of counsel claim.

The appeal is dismissed.

In this opinion the other judges concurred.

550; and performed deficiently at the petitioner's second criminal trial, we do not reach the second prong of *Strickland*. See *Phillips* v. *Warden*, supra, 132.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

VOL. 200

MEMORANDUM DECISIONS

NATIONSTAR MORTGAGE, LLC *v.*
PERRY J. ZANETT ET AL.
(AC 42882)

Bright, C. J., and Lavine and Cradle, Js.

Argued September 14—officially released September 29, 2020

Named defendant's appeal from the Superior Court in the judicial district of Waterbury, *M. Taylor*, *J.*

Per Curiam. The judgment is affirmed.

CITY OF NORWICH *v.* IRINA LOSKOUTOVA ET AL. (AC 42999)

Moll, Alexander and Suarez, Js.

Argued September 14—officially released September 29, 2020

Appeal by the defendant Anton Loskoutov from the Superior Court in the judicial district of New London, *Hon. Emmet L. Cosgrove*, judge trial referee.

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

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NOTICES OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 20-Q: Person-Centered Medical Home (PCMH) Program Update

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after October 1, 2020, SPA 20-Q will amend Attachment 4.19-B of the Medicaid State Plan to change the Person-Centered Medical Home (PCMH) program within the physicians' services benefit category as follows:

Performance and Improvement Supplemental Payment: The methodology for calculating performance and improvement supplemental payments within the PCMH program is being revised as described below.

Quality Measures Updated: The list and description of the quality performance measures for the PCMH program have been updated.

Combined Pool: The performance and improvement payments will now be combined into a single supplemental payment pool, in which practices will be measured on both their performance and improvement.

Scoring: The scoring of each practice's performance and improvement will be updated as follows. Performance Component: Each PCMH practice's performance on the quality performance measures are compared against all Medicaid-enrolled primary care practices that meet the minimum statistical thresholds for such measures and placed into percentiles, which are converted into points and averaged into a composite performance score. A practice earns 1 point for each measure where the rate is at or above the 75th percentile. A practice loses 1 point for each measure where the rate is at or below the 25th percentile. For measure rates that are between the 25th and 75th percentiles, the practice earns 0 points. Total earned performance points are then divided by the maximum possible earned points (i.e. the number of measures the practice qualified for) to yield the Performance Score.

Improvement Component: Each PCMH practice's earned points for improvement for each measure compared to the practice's rates from the previous year are calculated into a composite improvement score. A practice earns 1 point for each qualified measure where the rate for the current measurement year improved compared to the rate from the prior year. A practice loses 1 point for each qualified measure where the rate for the current measurement year worsened compared to the prior year rate. For rates that remain the same across both the measurement year and the year prior, the practice earns 0 points. Total earned improvement points are then divided by the maximum possible earned points (i.e. the number of measures the practice qualified for) to yield the Improvement Score.

Composite Score: Each qualified practice receives both the performance and improvement composite scores that range from -1 to 1. Those with higher overall performance or high improvement receive higher scores (close to 1). Low performers and practices with no improvement receive lower scores (close to -1). The scored practices are plotted on the four quadrant graph with performance on the Y axis and improvement on the X axis as shown in this graph (specifically, quadrant 1 includes practices with high performance and high improvement; quadrant 2 includes practices with high performance and no improvement; quadrant 3 includes practices with low performance and high improvement; and quadrant 4 includes practices with low performance and no improvement):

Payment Amount: Per-member per-month (PMPM) payment amounts for this supplemental payment pool will be distributed based on the quadrant into which the practice falls:

Performance Quadrant	**Supplemental Payment PMPM Amount**
Quadrant 4	No payment
Quadrant 3	$0.30
Quadrant 2	$0.30
Quadrant 1	$0.50

Challenge Pool Supplemental Payment: This SPA also adds a challenge pool for practices that are in the 90th percentile or higher of performance on the challenge pool measures. This payment is $0.20 per member month, paid in the same manner and timeframe as the Performance and Improvement Supplemental Payment.

Effective Date: These changes apply to PCMH quality supplemental payments made in 2021 and future years for each applicable measurement year (which is the calendar year preceding the year in which the payments are scheduled to be made). If the measurement year needs to be adjusted to a shorter period, then the PMPM amounts would be adjusted accordingly.

Adjustment Due to COVID-19: The methodologies for quality payments (both the performance and improvement and challenge supplemental pools) may be adjusted as necessary to account for disruptions in utilization patterns as a result of Coronavirus Disease 2019 (COVID-19).

Purpose: The purpose of this SPA is to improve the effectiveness of the PCMH quality supplemental payments to encourage and reward performance and improvement by more intensively focusing the payments on PCMH practices with higher performance and higher improvement.

Fiscal Impact

The new methodology is designed to be cost-neutral to the previous methodology. Therefore, this SPA is not anticipated to result in any substantial change in annual aggregate expenditures.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 20-Q: PCMH Program Update''.

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than October 14, 2020.

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA) SPA 20-AA: Physicians' Services - HIPAA Compliance Fee Schedule Update

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS).

Changes to Medicaid State Plan

Effective on or after October 1, 2020, SPA 20-AA will amend Attachment 4.19-B of the Medicaid State Plan to incorporate federal October 1, 2020 quarterly updates to the Healthcare Common Procedure Coding System (HCPCS) (billing code additions, deletions and description changes) to the Physician Office & Outpatient fee schedule. DSS is making these changes to ensure that this fee schedule remains compliant with the Health Insurance Portability and Accountability Act (HIPAA).

Fee schedules are published at this link: http://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download'', then Accept or Decline the Terms and Conditions and then select the applicable fee schedule.

Fiscal Impact

DSS estimates that this SPA will increase annual aggregate expenditures by approximately $26,000 in State Fiscal Year (SFY) 2021 and $41,000 in SFY 2022.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: http://portal.ct.gov/dss. Scroll down to the bottom of the webpage and click on ''Publications'' and then click on ''Updates.'' Then click on ''Medicaid State Plan Amendments''. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below).

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105 (Phone: 860-424-5067). Please reference ''SPA 20-AA: Physicians' Services - HIPAA Compliance Fee Schedule Updates.''

Anyone may send DSS written comments about this SPA. Written comments must be received by DSS at the above contact information no later than October 14, 2020.