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CONNECTICUT REPORTS

Vol. 335

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

FRANCIS T. SCHWERIN, JR., ET AL. *v.* G. JACKSON RATCLIFFE, TRUSTEE, ET AL.

(SC 20208)

(SC 20209)

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

Syllabus

The plaintiffs, potential beneficiaries of two family trusts, sought a judgment declaring the proper distribution of assets from those trusts. Each trust contained explicit language that, upon the expiration of the trust term, the trust principal was to be distributed to the grantor's issue then living, per stirpes. The plaintiffs claimed that, upon the passing of the last measuring life, the principal of the trusts should be distributed in six equal amounts to the six grandchildren of H, the grantor of one of the trusts, and the son of the grantor of the other trust, and that the referenced distribution will be per stirpes, such that the one-sixth share that would have gone to any deceased grandchild of H will instead go to the issue of that grandchild. The plaintiffs filed a motion for summary judgment, claiming that there was no genuine issue of material fact that the trusts grant the principal to the grandchildren of H or their families in equal shares. Certain defendants, other potential beneficiaries of the trust, also filed motions for summary judgment, claiming that there was no genuine issue of material fact with respect to the interpretation of the two trusts and that the court should render judgment declaring that, at the expiration of the term of those trusts, the principal of the trusts should be distributed such that each of the three children of H shall be the head of each stirpe. The trial court denied the plaintiffs' motion for summary judgment, granted the defendants' motions for summary judgment, and rendered judgment declaring that, upon the termination of the two trusts, the corpus of each trust will be distributed in equal shares to the three children of H, with living descendants of each of the three children succeeding to the shares of their deceased ancestors. The plaintiffs and the defendant C filed separate appeals from the trial court's judgment. On appeal, although the parties generally agreed that the grantors of the trusts intended a per stirpes distribution, the plaintiffs claimed that the stirpital roots should begin at the level of the grandchildren, resulting in the trust principal being initially divided into six equal shares. C claimed that the stirpital roots should be determined once the trust terms expire and that the roots should be at whatever level of descendants has members living at the time of expiration. The other defendants participating in these appeals claimed that the trial court correctly determined that the stirpital roots should be at the level of

the children, resulting in the trust principal being initially divided into three equal shares. *Held* that the trial court correctly determined that the trusts unambiguously provided that the heads of the respective stirpes should be the grantors' children and, accordingly, properly granted the defendants' motion for summary judgment and rendered judgment in their favor: Connecticut case law and the Restatement (Second) of Property, which provides that, when a gift is made to a class described as the "issue" of a designated person, in the absence of additional language or circumstances that indicate otherwise, the initial division into shares will be on the basis of the number of class members, whether alive or deceased, in the first generation below the designated person, supported the conclusion that the grantors' use of the term "issue" in the trusts at issue indicated that the grantors intended the trust principal to be divided into equal shares on the basis of the number of their children, which was the first generation below each grantor, and that conclusion was consistent with case law favoring an equal distribution of a grantor's estate among the several branches of his or her family, which could be accomplished in the present case only if the trust principal is divided with the three children of H serving as the stirpital roots, consistent with this state's intestate statutes (§§ 45a-438 (a) and 45a-437), which provide for a per stirpes plan of distribution and provide for the stirpital roots to be established at the first generation after the decedent, and consistent with the Uniform Probate Code, which provides that, if an instrument calls for property to be distributed "per stirpes," the property must be divided into as many equal shares as there are surviving children of the designated person and deceased children who left surviving descendants; moreover, contrary to the claim of the plaintiffs and C that, because the two trusts both provided for the principal to be distributed to the grantors' issue "then living," meaning that the grantors intended the initial division of each trust to be to the issue living when the trust terminates, the grantors could not have intended for the initial division to be at the level of the three children of H, who were measuring lives of each trust, as the use of the term "then living" did not modify the method of distributing the trust principal but merely conditioned the receipt of a distribution from those trusts on those issue who survive their expiration; furthermore, although the plaintiffs and C relied on Connecticut cases for the proposition that, if a testator excludes the children as beneficiaries under the trust and directs the gifts to the grandchildren, then the children cannot receive the gifts as representatives of their parents, those authorities, which involved trust documents that directed the gift to a particular class or group of persons, rather than to the more general class of "issue," were not applicable to the present case, as the two trusts at issue do not name a particular class to receive the gifts.

Argued September 17, 2019—officially released March 30, 2020*

* March 30, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Action for a judgment declaring the proper method for distributing the principal of certain trusts, brought to the Superior Court in the judicial district of Hartford and transferred to the Complex Litigation Docket, where Bessemer Trust Company, N.A., was substituted for the named defendant et al.; thereafter, the court, *Sheridan*, *J.*, appointed three guardians ad litem to represent the interests of various individuals; subsequently, Tadhg William Campion was added as a defendant; thereafter, the court denied the plaintiffs' motion for summary judgment, granted the separate motions for summary judgment filed by the defendant William Hale Hubbell et al. and by the defendant Harvey Hubbell V et al., and rendered judgment for the defendants, from which the plaintiffs and Tadhg William Campion filed separate appeals. *Affirmed.*

Brian O'Donnell, with whom were *John R. Ivimey* and *Mary Mintel Miller*, for the appellants in Docket No. SC 20208 and the appellees in Docket No. SC 20209 (plaintiffs).

Linda L. Morkan, with whom was *Andrew A. DePeau*, for the appellee in Docket No. SC 20208 and the appellant in Docket No. SC 20209 (defendant Tadhg William Campion).

Jonathan J. Meter, for the appellees in Docket Nos. SC 20208 and SC 20209 (defendant Harvey Hubbell V et al.).

Steven M. Wise, pro hac vice, with whom was *David B. Zabel*, for the appellees in Docket Nos. SC 20208 and SC 20209 (defendant William Hale Hubbell et al.).

John A. Farnsworth, with whom was *Karen Yates*, for the appellee in Docket Nos. SC 20208 and SC 20209 (substitute defendant Bessemer Trust Company, N.A.).

Robert B. Flynn, for the appellee in Docket Nos. SC 20208 and SC 20209 (Michael D. O'Connell, guardian

ad litem for the minor, unborn and unascertained descendants of the named plaintiff).

James K. Robertson, Jr., self-represented, with whom was *Brian Henebry*, for the appellee in Docket Nos. SC 20208 and SC 20209 (James K. Robertson, Jr., guardian ad litem for the minor, unborn and unascertained descendants of the defendant Harvey Hubbell V et al.)

Opinion

MULLINS, J. The primary issue in these appeals is whether the trial court properly determined the correct generation to serve as the root for the per stirpes distribution of two family trusts. The appeals arise from an action filed by the plaintiffs, Francis T. Schwerin, Jr., and Brenda Hubbell Schwerin, seeking a declaratory judgment regarding the proper distribution of assets from the two family trusts. Each trust contains language that, upon the expiration of the trust term, the trust principal is to be distributed to the grantor's issue then living, per stirpes.[1] The plaintiffs are potential beneficiaries of these trusts and brought this action against the defendants,[2] who are the trustees of the trusts and other

[1] Under a per stirpes distribution, "each deceased member of one generation is represented by his descendants of the next succeeding generation. When a stirpital distribution is directed, it is necessary to determine who are the heads of the respective stirpes." *Hartford National Bank & Trust Co.* v. *Thrall*, 184 Conn. 497, 505, 440 A.2d 200 (1981).

[2] The original complaint and summons named numerous defendants, including the three former trustees of the two family trusts, G. Jackson Ratcliffe, Andrew McNally IV, and Richard W. Davies. Subsequently, those defendants were substituted for Bessemer Trust Company, N.A. In the first amended complaint, which is the operative complaint, the plaintiffs named the trustee of the trusts, Bessemer Trust Company, N.A., and the following individuals as the defendants: Elizabeth H. Schwerin, Francis Timothy Schwerin, William Ham Hubbell, Blanca Acususo Hubbell, Harvey Hubbell V, Lisa Lorraine Lugovich, Richard John Lugovich, Cynthia Carole Schwerin, William Hale Hubbell, Stephen Michael Lugovich, John Daniel Lugovich, Timothy Hale Schwerin, Mary Anastasia Campion, Seamus Francis Campion, Martin Ambrose Campion, Augustine Lazarus Schwerin, Elizabeth Lorraine Nunez, Clara Antonia Nunez, Alexandra Louie Hubbell, Craig Thomas Schwerin, Brenda Mercedes Nunez, Jennifer Blanca Nunez, Talpa Guadalupe Nunez, William Hale Lyon Alarcon Hubbell, Andrea Haas Hubbell, Nancy

potential beneficiaries. The trial court rendered summary judgment for the defendants, and the plaintiffs and the defendant Tadhg William Campion (Campion) filed separate appeals.[3]

On appeal, the plaintiffs assert that the trial court incorrectly concluded that the language of the trust agreements treats the children of the grantors as the heads of the respective stirpes for purposes of distribution of the trust principal. The plaintiffs further assert that the trust agreement provides that the heads of the respective stirpes should, instead, be at the level of the grandchildren. Contrary to the plaintiffs' position, Campion asserts in his appeal that the language of the trusts establishes that the heads of the respective stir pes should be at the highest generational level with a member living at the time the trusts terminate. In response, the other defendants participating in the appeals assert that the trial court correctly determined that the trust instruments unambiguously provide that the heads of the respective stirpes should be the grantors' children. We agree with those defendants and, accordingly, affirm the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. This dispute revolves around the proper interpretation of two inter vivos trusts (Hubbell Family Trusts). One trust was created by Harvey Hubbell III on August 23, 1957, and was amended on October 9, 1963 (Hubbell Trust). The other trust was created by

Thomas Schwerin, and Arthur R. Regrave as the personal representative of the estates of Harvey Hubbell IV and Anne Edwards Hubbell. After the action was commenced, the trial court appointed three guardians ad litem to represent the interests of minor, unborn or unascertained beneficiaries. While the case was pending before the trial court, the court granted the motion to add Tadhg William Campion as a defendant. We refer to the defendants by name where appropriate and collectively as the defendants.

[3] The plaintiffs and Campion separately appealed from the judgment of the trial court to the Appellate Court, and we transferred those appeals to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1 or § 65-2.

the mother of Harvey Hubbell III, Louie E. Roche, on September 2, 1957 (Roche Trust).

The Hubbell Trust provides that it will expire upon "the death of the last survivor of the grantor [Harvey Hubbell III], his wife Virginia W. Hubbell, his children Harvey Hubbell, Jr.,[4] William [Ham] Hubbell and Elizabeth H. Schwerin, and his grandchildren Lisa Lorraine Hubbell[5] and Francis Timothy Schwerin[6] . . . ." (Footnotes added.)

The Roche Trust provides that it will expire upon "the death of the last survivor of the grantor [Roche], her son Harvey Hubbell,[7] her grandchildren Harvey Hubbell, Jr., William [Ham] Hubbell and Elizabeth H. Schwerin, and her great-grandchildren Lisa [Lugovich] and Francis Timothy Schwerin . . . ." (Footnotes added.)

Thus, the measuring lives for the Hubbell Family Trusts are as follows: Harvey Hubbell III; Roche, the mother of Harvey Hubbell III; Virginia W. Hubbell, the wife of Harvey Hubbell III; Harvey Hubbell IV, a son of Harvey Hubbell III; the defendant William Ham Hubbell, a son of Harvey Hubbell III; the defendant Elizabeth H. Schwerin, the daughter of Harvey Hubbell III; and the plaintiff Francis T. Schwerin, Jr., and the defendant Lisa Lugovich, the two grandchildren of Harvey Hubbell III who were alive at the time those trusts were created.[8]

[4] Harvey Hubbell IV is referred to as Harvey Hubbell, Jr., in the Hubbell Family Trusts. We refer to him as Harvey Hubbell IV for clarity.

[5] Although Lisa Lorraine Lugovich is referred to as Lisa Lorraine Hubbell in the Hubbell Family Trusts, we hereinafter refer to her as Lisa Lugovich for consistency.

[6] The Hubbell Family Trusts refer to the plaintiff Francis T. Schwerin, Jr., and not to the defendant Francis Timothy Schwerin.

[7] Although Harvey Hubbell III is referred to as Harvey Hubbell in the Hubbell Family Trusts, we refer to him as Harvey Hubbell III for clarity.

[8] The Roche Trust includes Roche as a measuring life but does not include Virginia W. Hubbell. The Hubbell Trust includes Virginia W. Hubbell but not Roche. Because both Roche and Virginia W. Hubbell are deceased, these differences do not impact our analysis.

Accordingly, the Hubbell Family Trusts will expire upon the death of the last survivor of the measuring lives.

Five of the individuals who are the measuring lives are deceased.[9] The plaintiff Francis T. Schwerin, Jr., and the defendants Elizabeth H. Schwerin and Lisa Lugovich are still alive. It is undisputed that the Hubbell Family Trusts will expire upon the death of the last survivor of those three individuals.

The trust language at issue in these appeals is the language that addresses the distribution of the principal of the Hubbell Family Trusts upon expiration. The Hubbell Trust provides in relevant part: "Upon the expiration of the trust term the trustees, subject to the provisions hereinafter contained, shall convey and deliver all property then belonging to the principal of the trust to grantor's issue then living, per stirpes."

The Roche Trust provides in relevant part: "Upon the expiration of the trust term the trustees shall convey and deliver all property then belonging to the trust, including the principal and any undistributed income thereof, absolutely to the issue of the grantor then living, per stirpes, or in default of such issue to the persons who would be entitled to take the same in accordance with the laws of the [s]tate of Connecticut then in force if the grantor had died at the expiration of the trust term, intestate, and a resident of the [s]tate of Connecticut, and the absolute owner of said property."

The plaintiffs brought this declaratory judgment action in the Superior Court, asking the court to resolve the conflict over the proper method for distribution of the trust principal when the Hubbell Family Trusts expire. Specifically, the plaintiffs asked the trial court to declare that, "upon the passing of the last measur-

[9] The trial court found as follows: Roche died in 1961; Harvey Hubbell III died in 1968; Virginia W. Hubbell died in 1998; and Harvey Hubbell IV died in 2010. In addition, the parties represented in their briefs that William Ham Hubbell died in 2017.

ing life—i.e., the passing of the last of [Elizabeth H. Schwerin, Francis T. Schwerin, Jr., and Lisa Lugovich]—the principal of the Hubbell Family Trusts will be distributed in six equal amounts to the six grandchildren of Harvey Hubbell III, and the referenced distribution will be per stirpes, such that the one-sixth share that would have gone to any deceased grandchild of Harvey Hubbell III will instead go to the issue of each such deceased grandchild." The plaintiffs filed a motion for summary judgment, alleging that there was "no genuine issue of material fact that [the Hubbell Family Trusts] grant principal to . . . [the grandchildren of Harvey Hubbell III] or their families in equal shares."

The defendants William Hale Hubbell and William Hale Lyon Alarcon Hubbell (William Hale Hubbell defendants) also filed a motion for summary judgment, asserting that there was no genuine issue of material fact with respect to the interpretation of the Hubbell Family Trusts. They further asserted that the court should render judgment declaring that, at the expiration of the term of the Hubbell Family Trusts, the principal of those trusts should be distributed such that each child of Harvey Hubbell III shall be the head of each stirpe.

The defendants Harvey Hubbell V, Lisa Lugovich, Richard John Lugovich, Stephen Michael Lugovich and John Daniel Lugovich (Lugovich defendants) also filed a motion for summary judgment, claiming that there was no genuine issue of material fact as to any allegations raised in the complaint. They also claimed that, "upon termination of the Hubbell Family Trusts, the corpus of each trust should be divided equally into three shares, which are representative of the three children of Harvey Hubbell III, with living descendants of each of the three children succeeding to the shares of their deceased ancestors . . . ."

The trial court denied the plaintiffs' motion for summary judgment and granted the motions for summary

judgment filed by the William Hale Hubbell defendants and the Lugovich defendants. The trial court then rendered judgment in favor of the defendants and declared as follows: "Upon the termination of the August 23, 1957 [Hubbell Trust], as amended on October 9, 1963, and the September 2, 1957 [Roche Trust], by the passing of [the] last measuring life under said trusts, the corpus of each trust will be distributed in equal shares to the three children of Harvey Hubbell III, with living descendants of each of the three children succeeding to the shares of their deceased ancestors." These appeals followed.

We begin by setting forth the standard of review that governs our review of the claims on appeal. "The standard of review of a trial court's decision granting summary judgment is well established. Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant the defendant's motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Internal quotation marks omitted.) *King* v. *Volvo Excavators AB*, 333 Conn. 283, 290–91, 215 A.3d 149 (2019).

The resolution of these appeals requires us to determine the proper interpretation of substantially similar language in each of the Hubbell Family Trusts. Specifically, the Roche Trust provides that the trust principal shall be distributed "to the issue of the grantor then living, per stirpes . . . ." The Hubbell Trust provides that the trust principal shall be distributed "to grantor's issue then living, per stirpes." All of the parties are in

agreement that those two trusts should be interpreted in the same manner. The dispute involves the issue of which generation should serve as the stirpital roots.[10]

"[W]here the manifestation of the settlor's intention is integrated in a writing, that is, if a written instrument is adopted by the settlor as the complete expression of the settlor's intention, extrinsic evidence is not admissible to contradict or vary the terms of the instrument in the absence of fraud, duress, undue influence, mistake, or other ground for reformation or rescission. . . . If a [trust instrument] is unambiguous within its four corners, intent of the parties is a question of law requiring plenary review. . . . Where the language of the [trust instrument] is clear and unambiguous, the [instrument] is to be given effect according to its terms. A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . . Similarly, any ambiguity in a [trust instrument] must emanate from the language used . . . rather than from one party's subjective perception of the terms. . . .

[10] The parties assert and the trial court concluded that the distribution of the principal of both of the Hubbell Family Trusts should occur in the same manner. Although we ultimately agree with the trial court that the "the corpus of each trust will be distributed in equal shares to the three children of Harvey Hubbell III, with living descendants of each of the three children succeeding to the shares of their deceased ancestors," the basis for that conclusion as it relates to the Roche Trust is slightly different from that of the Hubbell Trust. Specifically, the language in the Roche Trust that provides for the corpus to be divided "to the issue of the grantor then living" requires that the first division of that trust principal would be to Roche's one son, Harvey Hubbell III. Because Harvey Hubbell III is no longer alive, at the expiration of the trust, the corpus would be divided into three equal shares with the living descendants of each of the three children of Harvey Hubbell III succeeding to the shares of their deceased ancestors. Moreover, because Harvey Hubbell III was the only child of Roche, this opinion does not distinguish between the issue of Roche and the issue of Harvey Hubbell III, and any reference in this opinion to the children or to the grandchildren of the testators or of the grantors of the Hubbell Family Trusts is to the children or the grandchildren of Harvey Hubbell III. See footnote 11 of this opinion.

"If, however, the trust instrument is an incomplete expression of the settlor's intention or if the meaning of the writing is ambiguous or otherwise uncertain, evidence of the circumstances and other indications of the transferor's intent are admissible to complete the terms of the writing or to clarify or ascertain its meaning . . . ." (Citations omitted; internal quotation marks omitted.) *Palozie* v. *Palozie*, 283 Conn. 538, 547–48, 927 A.2d 903 (2007). Furthermore, "[i]t is well settled that in the construction of a testamentary trust, the expressed intent of the testator must control. This intent is to be determined from reading the instrument as a whole in the light of the circumstances surrounding the testator when the instrument was executed, including the condition of his estate, his relations to his family and beneficiaries and their situation and condition." (Internal quotation marks omitted.) *Pikula* v. *Dept. of Social Services*, 321 Conn. 259, 268, 138 A.3d 212 (2016).

"The cardinal rule of testamentary construction is the ascertainment and effectuation of the intent of the testator, if that [is] possible. If this intent, when discovered, has been adequately expressed and is not contrary to some positive rule of law, it will be carried out. . . . The most inflexible rule of testamentary construction and one universally recognized is that the intention of the testator should govern the construction, and this intention is to be sought in the language used by the testator in the light of the circumstances surrounding and known to him at the time the will was executed. . . . In seeking the testator's testamentary intent, the court looks first to the will itself . . . . It studies the will as an entirety. The quest is to determine the meaning of what the [testator] said and not to speculate upon what [he] meant to say . . . ." (Citations omitted; internal quotation marks omitted.) *Hartford National Bank & Trust Co.* v. *Thrall*, 184 Conn. 497, 502, 440 A.2d 200 (1981).

With these principles in mind, we return to the language of the Hubbell Family Trusts. The Roche Trust requires the principal to be distributed "to the issue of the grantor then living, per stirpes . . . ." The Hubbell Trust provides that the trust principal shall be distributed "to grantor's issue then living, per stirpes."

"Per stirpes means literally by roots or stock or by representation. Black's Law Dictionary (5th Ed. [1979]) [p. 1030]. Under a stirpital distribution, each deceased member of one generation is represented by his descendants of the next succeeding generation. When a stirpital distribution is directed, it is necessary to determine who are the heads of the respective stirpes." *Hartford National Bank & Trust Co.* v. *Thrall*, supra, 184 Conn. 505.

It is well established "that, in the absence of words indicating a contrary intent, a will is to be interpreted as intending to distribute an estate per stirpes, and in accordance with the [Connecticut] statute of distributions." *Close* v. *Benham*, 97 Conn. 102, 107, 115 A. 626 (1921). "[T]he per stirpes . . . rule has for two centuries commended itself to the judgment of the community as one of justice, and has been and is the rule applied by the law in [the] case of intestate estate. . . . The statute of distribution governs in all cases where there is no will; and where there is one, and the testator's intention is in doubt, the statute is a safe guide." (Citation omitted; internal quotation marks omitted.) *Heath* v. *Bancroft*, 49 Conn. 220, 223–24 (1881).

Indeed, "we have held in numerous cases that, in the absence of any direction to the contrary, the per stirpes rule of distribution should be adopted. . . . In most of these there was some implication of an intent to make a per stirpes distribution, though no explicit direction to that effect, and in some the unequal consequences of a per capita distribution were pointed out as one of

the considerations in favor of adopting the per stirpes rule." (Citation omitted.) *Mooney* v. *Tolles*, 111 Conn. 1, 12–13, 149 A. 515 (1930). In the present case, not only do we presume a per stirpes method of distribution in the absence of any explicit language to the contrary, but the language in the Hubbell Family Trusts explicitly provides for distribution on a per stirpes basis.

That does not end our inquiry, however. In the present case, although the parties generally agree that the testators intended a per stirpes distribution, they dispute what that means under the circumstances. Specifically, the plaintiffs assert that the stirpital roots should begin at the level of the grandchildren, resulting in the trust principal being initially divided into six equal shares. Campion asserts that the stirpital roots should be determined once the Hubbell Family Trusts expire and that the roots should be at whatever level of descendants has members living at the time of expiration. The other defendants participating in the appeals assert that the trial court correctly determined that the stirpital roots should be at the level of the children, resulting in the trust principal being initially divided into three equal shares.

Having concluded that the Hubbell Family Trusts require per stirpes distribution, we turn back to the language of those trusts to determine the proper generational level at which to locate the stirpital roots. Specifically, we consider what the grantors meant by the use of the term "issue," as used in the operative language of the Hubbell Family Trusts. " 'In construing the word "issue," we have often noted that, in its primary meaning, "issue" connotes lineal relationship by blood.' . . . The word 'will be so construed unless it clearly appears that [it was] used in a more extended sense.' " (Citation omitted.) *Connecticut Bank & Trust Co.* v. *Coffin*, 212 Conn. 678, 685, 563 A.2d 1323 (1989). This court has also recognized that "antilapse statutes generally obtaining

in the United States . . . allow a construction of 'issue' in a manner permitting a distribution per capita among the first generation with a per stirpes representation in the next generation . . . ." *Warren* v. *First New Haven National Bank*, 150 Conn. 120, 124–25, 186 A.2d 794 (1962). In other words, the initial division is to be made in as many shares as there are members of the first generation (per capita), and each deceased member of one generation is represented by his or her descendants of the next succeeding generation (per stirpes).

The Restatement (Second) of Property is consistent with our case law. It explains as follows: "If a gift is made to a class described as the 'issue' or 'descendants' of a designated person, or by a similar multigenerational class gift term, in the absence of additional language or circumstances that indicate otherwise . . . (3) the initial division into shares will be on the basis of the number of class members, whether alive or deceased, in the first generation below the designated person." 3 Restatement (Second), Property, Donative Transfers § 28.2, p. 254 (1988). Applying this principle to the language in the Hubbell Family Trusts supports our conclusion that the grantors' use of the term "issue" indicates that the grantors intended the trust principal to be divided into equal shares on the basis of the number of their children, as that was the first generation below each grantor.[11]

Comment (b) to § 28.2 of the Restatement (Second) further explains: "If a gift is made to the 'issue' or 'descendants' of a designated person, in the absence of additional language or circumstances that indicate other-

[11] We note that the initial division of the Roche Trust is into one share representing 100 percent of the trust principal because Harvey Hubbell III was the only child of Roche. The first true division of that trust principal would be at the level of the children of Harvey Hubbell III, who would each receive a one-third share, with the living descendants of each of the three children succeeding to the shares of their deceased ancestors. See footnote 10 of this opinion.

wise, the initial division of the subject matter is made into as many shares as there are issue, whether living or not, of the designated person in the first degree of relationship to the designated person. Each issue in the first degree of relationship who survives to the date of distribution takes one share of the subject matter of the gift to the exclusion of any of such first degree issue's descendants. The share of an issue of the first degree who does not survive to the date of distribution is divided into as many shares as there are descendants, whether living or not, of that deceased issue who are in the second degree of relationship to the person whose issue are designated. Such issue in the second degree of relationship [who] survive to the date of distribution each take one share resulting from such division to the exclusion of their respective descendants. The share of an issue of the second degree who does not survive to the date of distribution is divided into as many shares as there are descendants, whether living or not, in the third degree of relationship to the designated ancestor who are also descendants of the deceased second degree descendant, etc. This is referred to as a per stirpes plan of distribution." Id., § 28.2, comment (b), p. 255. In the present case, as we explained previously in this opinion, the testators explicitly provided for a per stirpes plan of distribution, and interpreting "issue" as requiring that division to begin with their children is consistent with that express instruction.

We are also guided by the fact that this court has explained that "[j]urisdictions in the United States . . . have tended toward a construction in favor of a per stirpes division and have construed 'issue,' when its meaning is unrestricted by the context, as including all lineal descendants in the order in which they would be entitled, at the death of the ancestor, to take his property under the law of intestate succession." *Warren* v. *First New Haven National Bank*, supra, 150 Conn. 125.

Indeed, we have stated that, "[w]hen a conveyance creates a class gift by a limitation in favor of a group described as the issue of B . . . then, unless a contrary intent of the conveyor is found from additional language or circumstances, distribution is made to such members of the class as would take, and in such shares as they would receive, under the applicable law of intestate succession if B had died intestate on the date of the final ascertainment of the membership in the class, owning the subject matter of the class gift." (Internal quotation marks omitted.) Id., 126–27, quoting 3 Restatement, Property § 303 (1), p. 1655 (1940). Therefore, in the present case, the testators' unqualified use of the term "issue" supports the application of a per stirpes plan of distribution with the stirpital roots at the generation of their children.

In this case, as we previously have noted, the trust instruments explicitly call for a distribution on a per stirpes basis without any other explicit direction. Thus, our resolution of this case requires that we consider the rationale supporting a per stirpes method of distribution because that rationale informs the proper generational level at which to locate the stirpital roots. As this court has explained, when the testator has not expressly provided otherwise, our law favors an equal distribution of the testator's estate "*among the several branches of his family* . . . ." (Emphasis added.) *Stamford Trust Co.* v. *Lockwood*, 98 Conn. 337, 347, 119 A. 218 (1922), overruled in part on other grounds by *Connecticut Bank & Trust Co.* v. *Coffin*, 212 Conn. 678, 693, 563 A.2d 1323 (1989). In the present case, each child represents a branch of the grantor's family. Specifically, the grantor Harvey Hubbell III had three children, namely, William Ham Hubbell, Harvey Hubbell IV, and Elizabeth H. Schwerin. Therefore, there are three branches of that grantor's family. William Ham Hubbell had one child, Harvey Hubbell IV had two children and Elizabeth H.

Schwerin had three children. Thus, if the trust principal is divided with the grandchildren serving as the stirpital roots or with the stirpital roots anywhere other than at the level of the children, there will be an unequal distribution of the estate of Harvey Hubbell III among the three branches of his family. That is, the branch of the family representing Elizabeth H. Schwerin would receive the most because she had three children, the branch representing Harvey Hubbell IV would receive the second most because he had two children and the branch representing William Ham Hubbell would receive the least because he had only one child. As this court concluded in *Stamford Trust Co.* "[t]hat a per capita distribution among issue of every degree would . . . result in an unequal distribution of the testator's estate among the several branches of his family, is apparent. On the other hand, a distribution per stirpes among the issue of whatever degree, the issue of each life tenant taking as a class by right of representation, satisfies not only the language of the will and the indicated intent of the testator, but also the policy of our law." *Stamford Trust Co.* v. *Lockwood*, supra, 347.

Such a distribution is also consistent with Connecticut's intestate statutes, which provide for a per stirpes plan of distribution and provide for the stirpital roots to be established at the first generation after the decedent. See General Statutes § 45a-438 (a)[12] ("[a]fter distri-

[12] General Statutes § 45a-438 (a) provides: "After distribution has been made of the intestate estate to the surviving spouse in accordance with section 45a-437, the residue of the real and personal estate shall be distributed equally, according to its value at the time of distribution, among the children, including children born after the death of the decedent, as provided in subsection (a) of section 45a-785, and the legal representatives of any of them who may be dead, except that children or other descendants who receive estate by advancement of the intestate in the intestate's lifetime shall themselves or their representatives have only so much of the estate as will, together with such advancement, make their share equal to what they would have been entitled to receive had no such advancement been made."

bution has been made of the intestate estate to the surviving spouse in accordance with section 45a-437, the residue of the real and personal estate shall be distributed equally, according to its value at the time of distribution, among the children, including children born after the death of the decedent . . . and the legal representatives of any of them who may be dead"); see also General Statutes § 45a-439.[13] Therefore, the law of intestate succession in Connecticut supports an interpretation of the language of the Hubbell Family Trusts that provides for an initial division into three equal shares among the three children of Harvey Hubbell III, which is then to be distributed on a per stirpes basis.

Our interpretation of the Hubbell Family Trusts is also consistent with the Uniform Probate Code,[14] which provides in relevant part: "If a governing instrument calls for property to be distributed 'per stirpes,' the prop-

[13] General Statutes § 45a-439 provides in relevant part: "(a) (1) If there are no children or any legal representatives of them, then, after the portion of the husband or wife, if any, is distributed or set out, the residue of the estate shall be distributed equally to the parent or parents of the intestate, except that no parent who has abandoned a minor child and continued such abandonment until the time of death of such child shall be entitled to share in the estate of such child or be deemed a parent for the purposes of subdivisions (2) to (4), inclusive, of this subsection. (2) If there is no parent, the residue of the estate shall be distributed equally to the brothers and sisters of the intestate and those who legally represent them. (3) If there is no parent or brothers and sisters or those who legally represent them, the residue of the estate shall be distributed equally to the next of kin in equal degree, and no representatives shall be admitted among collaterals after the representatives of brothers and sisters. (4) If there is no next of kin, the residue of the estate shall be distributed equally to the stepchildren and those who legally represent them. . . ."

[14] The plaintiffs and Campion assert that it was improper for the trial court to rely on the Uniform Probate Code in its analysis. Although the trial court explained that its interpretation of the language in the Hubbell Family Trusts was consistent with the Uniform Probate Code, it did not rely on that code in reaching its conclusion. Furthermore, although we recognize that Connecticut has not adopted the Uniform Probate Code, and that courts of this state are not bound to follow it, it is useful, persuasive authority in this context.

erty is divided into as many equal shares as there are (i) surviving children of the designated ancestor and (ii) deceased children who left surviving descendants. Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants." Unif. Probate Code § 2-709 (c) (amended 1993), 8 U.L.A. 316 (2013).

The plaintiffs and Campion assert that the trial court incorrectly concluded that the grantors intended for the stirpital roots to be established at the generational level of the children because the Hubbell Family Trusts both provide for the principal to be distributed to the grantors' issue "then living . . . ." Specifically, Campion asserts that the phrase "then living" is used to modify the term "issue," meaning that the grantors intended the initial division of each trust to be to the issue living at the termination of the trust, and, because all three children of Harvey Hubbell III are measuring lives of each trust, the grantors could not have intended for the initial division to be at the level of the children. We disagree.

The use of the term "then living" does not alter the testators' intention for per stirpes distribution of the trust principal. Instead, the term "then living" is used to identify those who receive a distribution under the Hubbell Family Trusts. In other words, the use of the term "then living" does not modify the method of distributing the trust principal but merely conditions the receipt of a distribution from those trusts on surviving their expiration. See 3 Restatement (Second), supra, § 28.2, p. 254 ("[i]f a gift is made to a class described as the 'issue' or 'descendants' of a designated person, or by a similar multigenerational class gift term, in the absence of additional language or circumstances that indicate other-

wise, (1) [a] class member must survive to the date of distribution in order to share in the gift; and (2) such class member in order to share in the gift must have no living ancestor who is a class member"); see also, e.g., *Travis* v. *Wolcottville School Society*, 113 Conn. 618, 631–32, 155 A. 904 (1931) (language in will bequeathing gift to beneficiary " 'if living' " at time of death of testator's wife "conditioned the gift upon the survival of the beneficiary after the death of the testator's wife"). The commentary to the Restatement (Second) explains: "If a gift is made to the 'issue' or 'descendants' of a designated person, in the absence of additional language or circumstances that indicate otherwise, the initial division of the subject matter is made into as many shares as there are issue, *whether living or not*, of the designated person in the first degree of relationship to the designated person." (Emphasis added.) 3 Restatement (Second), supra, § 28.2, comment (b), p. 255.

The appellate courts of this state have not addressed the precise impact that the phrase "then living" has on per stirpes distribution, but we find a Massachusetts Appeals Court case instructive. In *Bank of New England, N.A.* v. *McKennan*, 19 Mass. App. 686, 477 N.E.2d 170, review denied, 395 Mass. 1102, 481 N.E.2d 197 (1985), the court addressed "whether the phrase 'according to the stocks' in [a trust], when applied to the distribution of the trust principal to the testator's 'issue then living,' calls for the stocks to be the three children of the testator . . . or to be the nine grandchildren of the testator . . . ." Id., 688.

The court reasoned that, because the testator had included the term " 'according to the stocks,' " which it interpreted to mean per stirpes, the testator had intended his children to be the heads of the respective stirpes. Id., 688 n.1, 689–91. Accordingly, the court concluded that "the testator provided for an income distribution by which the grandchildren took only propor-

tional shares of what their individual parents had, rather than equal shares." Id., 690. Similar to the Hubbell Family Trusts in the present case, the trust at issue in *Bank of New England, N.A.*, provided for the children to be measuring lives. See id., 687. Therefore, like the children in the present case, the children in *Bank of New England, N.A.*, could never receive gifts under the trust but were still the stirpital roots for the per stirpes division. See id., 691.

It is important to note that the Massachusetts intestate statute would not have provided for a per stirpes distribution but would have provided, instead, that each grandchild take a share of the trust principal per capita. See Mass. Ann. Laws c. 190, §§ 2 through 4 (Law. Co-op. 1981).[15] Nevertheless, the Massachusetts Appeals Court concluded that the testator's use of the phrase

[15] Mass. Ann. Laws c. 190, § 2 (Law. Co-op. 1981), provides: "The personal property of a deceased person not lawfully disposed of by will shall, after the payment of his debts and the charges of his last sickness and funeral and of the settlement of the estate, and subject to the preceding section and to chapter one hundred and ninety-six, be distributed among the persons and in the proportions hereinafter prescribed for the descent of real property."

Mass. Ann. Laws c. 190, § 3 (Law. Co-op. 1981), provides in relevant part: "When a person dies seized of land, tenements or hereditaments, or of any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, they shall descend, subject to his debts and to the rights of the husband or wife and minor children of the deceased as provided in this and in the two preceding chapters and in chapter one hundred and ninety-six, as follows:

"(1) In equal shares to his children and to the issue of any deceased child by right of representation; and if there is no surviving child of the intestate then to all his other lineal descendants. If all such descendants are in the same degree of kindred to the intestate, they shall share the estate equally; otherwise, they shall take according to the right of representation. . . ."

Mass. Ann. Laws c. 190, § 4 (Law. Co-op. 1981), provides: "Degrees of kindred shall be computed according to the rules of the civil law; and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree."

Mass. Ann. Laws c. 190, §§ 2 through 4 (Law. Co-op. 1981), is now codified as amended at Mass. Ann. Laws c. 190B, § 2-103 (LexisNexis 2011).

" 'my issue living on the quarterly payment days . . . according to the stocks' " was sufficient to rebut the presumption of the state's intestate statute and provide for per stirpes distribution of the trust principal with the children of the testator as the stirpital roots. *Bank of New England, N.A.* v. *McKennan*, supra, 19 Mass. App. 688–90.

In reaching its conclusion, the Massachusetts Appeals Court also explained that its determination that the children should serve as the stirpital roots is consistent with other language in the trust because the terms of the trust did not single out the grandchildren of the testator. See id., 690–91. Specifically, that court explained: "[T]he will as a whole manifests no intention to single out the testator's grandchildren as deserving of equal or special treatment. Indeed, [a]rticle [s]even [of the will] does not even mention the grandchildren individually or as a class. Rather, it expresses itself solely in terms of the testator's 'issue,' who are to receive both the income of the trust while at least one of the testator's children is alive and the principal of the trust upon the death of the last child. Nor is the term 'issue' restricted to grandchildren. To the contrary, by definition in the will, the term includes both 'children' and all 'lineal descendants to the remotest degree.' In view of the testator's omission of any express reference to his grandchildren, which would have been easy to provide had it been desired, it can be inferred that the testator was concerned, not with providing specifically for them, but for his 'issue' as a whole, according to the stocks from which they came, i.e., his children." (Footnote omitted.) Id.

Because the language of the will at issue in *Bank of New England, N.A.*, is substantially similar to the language of the Hubbell Family Trusts, we find the reasoning of that case persuasive. Specifically, like the will at issue in that case, the Hubbell Family Trusts do not

single out the testators' grandchildren as the beneficiaries individually, instead providing for the division of the trust principal among the testators' "issue" as a whole.[16] It is noteworthy that the Massachusetts Appeals Court held as it did in *Bank of New England, N.A.*, because its conclusion was contrary to the intestate statute in Massachusetts, which provided for a per capita distribution. See Mass. Ann. Laws c. 190, §§ 2 through 4 (Law. Co-op. 1981). The reasoning of the Massachusetts Appeals Court in *Bank of New England, N.A.*, is even more persuasive in the present case because our conclusion regarding the proper method for distributing the principal of the Hubbell Family Trusts is consistent with the intestate statutes of this state, which would require the children to be the stirpital roots. See General Statutes §§ 45a-438 (a) and 45a-439.

The plaintiffs and Campion also assert that construing the Hubbell Family Trusts such that the children are the heads of the respective stirpes is inconsistent with the terms of those trusts as a whole because they provide for the children and the two grandchildren of Harvey Hubbell III to be measuring lives, and, therefore, the children can never be beneficiaries under the Hubbell Family Trusts. In support of their position, the plaintiffs and Campion point to a number of cases from this jurisdiction for the proposition that, if a testator excludes the children as beneficiaries under the trust and directs the gifts to the grandchildren, then the children cannot receive the gifts as representatives of their parents. We find these cases inapposite.

In the cases on which the plaintiffs and Campion rely, the trust document directs the gift to a particular class or group of persons, rather than to the more general

[16] Although the Hubbell Family Trusts do single out some of the grandchildren of Harvey Hubbell III as measuring lives, neither of the trusts singles out the grandchildren individually or as a class for purposes of naming beneficiaries.

class of "issue." See, e.g., *Hartford National Bank & Trust Co.* v. *Thrall*, supra, 184 Conn. 499 n.1 ("[u]pon the death of my said children and of my said grandchild said trust shall terminate, and I do then give, devise and bequeath said the rest, residue and remainder of my estate to their children, if any they have, as a class, to be divided among them per stirpes, share and share alike, to them and to their heirs forever" (internal quotation marks omitted)); *Hartford-Connecticut Trust Co.* v. *Beach*, 100 Conn. 351, 356–57, 123 A. 921 (1924) ("the remaining principal of the general share or parcel at the beginning of this [s]eventh article mentioned shall be distributed equally to all my grandchildren and the issue of such deceased grandchildren as may be born during my lifetime, if any, they to take per stirpes and not per capita" (internal quotation marks omitted)). These cases are inapplicable here because the Hubbell Family Trusts do not name a particular class to receive the gifts.

Similarly, the plaintiffs and Campion rely on § 301 of the Restatement of Property to support the position that the stirpital roots should be at the first generational level with members still living when the trust terminates. We disagree.

Section 301 of the Restatement of Property applies "[w]hen a conveyance creates a class gift by a limitation in favor of a group described as 'B and his children,' or as 'B and the children of C,' or as 'children of B and children of C,' or by other words similarly limiting property to one or more named persons plus one or more described groups, or to two or more described groups, and the membership in such class has been ascertained in accordance with the rules stated in §§ 285–299 . . . ." 3 Restatement, supra, § 301, pp. 1640–41. As we have explained, the language in the trusts in the present case makes a gift to the grantors' issue, generally, rather than to a more specific, particular class of people. Therefore, we conclude that § 303

of the Restatement of Property is applicable to the language in the Hubbell Family Trusts because, as previously noted, that section applies "[w]hen a conveyance creates a class gift by a limitation in favor of a group described as the 'issue of B,' or as the 'descendants of B,' and the membership in such class has been ascertained in accordance with the rules stated in §§ 292 and 294–299 . . . ." 3 id., § 303 (1), p. 1655.

Although we agree with the plaintiffs and Campion that, under the terms of the Hubbell Family Trusts, the children and some of the grandchildren of Harvey Hubbell III who are named as measuring lives can never be beneficiaries under those trusts, that fact does not preclude the children from being the stirpital roots. Indeed, our conclusion is consistent in this regard with that of the Massachusetts Appeals Court in *Bank of New England, N.A.* v. *McKennan*, supra, 19 Mass. App. 688–91, which concluded that the testator's children were the stirpital roots for the per stirpes division, even though they could never receive gifts under the trust.

The plaintiffs and Campion also rely on a number of cases from New York to support the position that the stirpital roots should be at the highest generational level having any members still living at the time the Hubbell Family Trusts terminate. Campion asserts that New York's proximity to Connecticut would make New York law on the subject especially persuasive because attorneys in Connecticut, particularly those practicing in Fairfield county, would be familiar with New York law and would consider it when drafting trusts in Connecticut. We disagree.

First, it is undisputed that the Hubbell Family Trusts explicitly provide that they are governed by Connecticut law. Second, it is well established that New York law differs significantly from Connecticut law regarding per stirpes distribution. The consolidated laws of New York provide in relevant part: "A per stirpes disposition or

distribution of property is made to persons who take as issue of a deceased ancestor in the following manner: The property so passing is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The share of a deceased issue in such nearest generation who left surviving issue shall be distributed in the same manner to such issue." N.Y. Est. Powers & Trusts Law § 1-2.14 (McKinney 2012). Therefore, New York law explicitly provides that the number of shares in the initial division of an estate is to be based on the number of issue surviving at the time of distribution. This law is wholly inconsistent with Connecticut's intestate statute, which provides that the number of shares in the initial division of an estate, after distribution is made to a surviving spouse, is to be based on the number of children of the decedent, regardless of whether the children are dead or alive. See General Statutes § 45a-438 (a) ("[a]fter distribution has been made of the intestate estate to the surviving spouse in accordance with section 45a-437, the residue of the real and personal estate shall be distributed equally, according to its value at the time of distribution, among the children, including children born after the death of the decedent . . . and the legal representatives of any of them who may be dead").

In addition to the choice of law provisions in the Hubbell Family Trusts, the difference between the per stirpes method of distribution in the applicable New York statute and the method of distribution in the applicable Connecticut statute makes the New York cases cited by Campion inapplicable in the present case. It is axiomatic that, in Connecticut, "in the absence of words indicating a contrary intent, a will is to be interpreted as intending to distribute an estate per stirpes,

and in accordance with the [Connecticut] statute of distributions." *Close* v. *Benham*, supra, 97 Conn. 107.

Campion also asserts that the trial court improperly considered Restatement (Second) of Property and Restatement (Third) of Property because neither one was in existence at the time the Hubbell Family Trusts were drafted and, therefore, was not available to the testators or their attorneys. We disagree that reference to these Restatements was improper. Restatements of the law seek to compile and distill the common law that exists. When seeking to ascertain the testator's intent in a particular testamentary instrument, we have never limited our review to only cases decided prior to the execution of the instrument. Indeed, a review of our case law reveals that this court routinely refers to Restatements that were published after the testamentary instrument was executed. See, e.g., *Hartford National Bank & Trust Co.* v. *Thrall*, supra, 184 Conn. 498, 504–505 (citing to volume 3 of Restatement of Property, which was published in 1940, to interpret will executed in 1916); *Warren* v. *First New Haven National Bank*, supra, 150 Conn. 121, 126–27 (citing to volume 3 of Restatement of Property, which was published in 1940, to interpret will executed in 1937). Because Restatements are compilations of the common law, we see no reason to treat them differently. Accordingly, we conclude that it was not improper for the trial court to rely on volume 3 of the Restatement (Second) of Property, which was published in 1988, and volume 1 of the Restatement (Third) of Property, which was published in 1999, to construe the trusts in the present case that were executed in 1957.

On the basis of the foregoing, we conclude that the trial court properly granted the defendants' motions for summary judgment and rendered judgment declaring that, at the expiration of the term of the Hubbell Family Trusts, the principal of those trusts should be distributed such that each child of Harvey Hubbell III shall be the head of each stirpe.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* LINDA KOSUDA-BIGAZZI (SC 20341)

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

Syllabus

The defendant, who had been charged with murder and tampering with physical evidence, filed a motion in the trial court to dismiss the charges against her on the ground that the police prejudiced her prosecution when they executed search warrants for her home and seized and examined privileged information that was thereafter published in their arrest warrant application. The police had gone to the home that the defendant shared with H, the defendant's husband, to perform a wellness check after H's employer reported that he had not been seen in several months. After observing human remains in the home, the police executed two search warrants. During the second search, the police seized three separate files from a filing cabinet. The first file, labeled "INCIDENT 2017," contained about twenty-five pages, most of which were handwritten. The second file, labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017," contained about 150 pages. The third file contained estate planning documents. The police then obtained an arrest warrant for the defendant's alleged murder of H. The arrest warrant application included the verbatim text of a handwritten, four page narrative from the seized material that apparently described the events that led to H's death. The defendant alleged that, during the search of her home, the police read and inspected two documents that were protected by the attorney-client privilege, namely, the four page narrative and a document that reflected her trial strategy, both of which, she claimed, the state could use in preparation of its case against her in violation of her constitutional rights to a fair trial and the effective assistance of counsel. The trial court conducted an evidentiary hearing pursuant to *State* v. *Lenarz* (301 Conn. 417) to determine the extent of the violation of the attorney-client privilege and the prejudice to the defendant, and whether the state's remedial actions and other remedies could serve to cure any prejudice. During the hearing, the court accepted the parties' written stipulation that the contents of the second file were covered by the attorney-client privilege. The court also heard the testimony of witnesses from the state's attorney's office, who stated that they had acted to limit additional exposure to potentially privileged materials by halting the investigation until after the resolution of the *Lenarz* hearing and by having the case

handled by a different state's attorney's office. The court denied the defendant's motion to dismiss, concluding that the defendant failed to establish that the contents of the first file were protected by the attorney-client privilege or that much of the contents of the third file were protected by that privilege. The court further determined that the prejudice to the defendant that was caused by the invasion of the attorney-client privilege could be cured by a remedy short of dismissal of the charges. The court also ordered the state to take certain remedial actions to limit further prejudice to the defendant before prosecution could resume. Following the court's denial of the defendant's motion to dismiss, the defendant appealed to this court pursuant to the statute (§ 52-265a) permitting the Chief Justice to certify an appeal involving a matter of substantial public interest and in which a delay may work a substantial injustice. *Held*:

1. The defendant could not prevail on her claim that the trial court committed clear error in determining that she had failed to establish that the documents in the first file and many of the documents in the third file were protected by the attorney-client privilege:

a. The trial court did not abuse its discretion in precluding one of the defendant's expert witnesses, D, from testifying regarding the substance of certain out-of-court statements that the defendant made to D regarding the fact that she had created the documents in the first file for the purpose of seeking legal advice, as those statements constituted inadmissible hearsay and were properly admitted only as a basis for D's expert opinion, and the record contained no other evidence that would serve to establish the defendant's intent when she created those documents; moreover, the trial court did not abuse its discretion in precluding the testimony of two other expert witnesses, W and S, as W and S had no knowledge relating to the defendant's intent in creating the documents in the first file and, thus, could not have provided any information that would have assisted the court as the trier of fact, and W's and S's testimony would have been cumulative of D's testimony and centered on the ultimate issue of whether the defendant established that those documents were privileged, which was a determination for the trial court alone to make.

b. The defendant could not prevail on her claim that the manner in which she maintained the documents in the first file established that they were privileged; the location of the privileged second file next to the first file in the filing cabinet did not serve to transfer the attorney-client privilege from one file to another, and the defendant's proximity claim was contrary to the well established principle that the attorney-client privilege must be established for each document separately.

c. The defendant could not prevail on her claim that the documents in the first file were sufficient in and of themselves to be considered privileged on the ground that their content was obviously useful to preparing her defense: the defendant failed to establish whether the handwritten documents in the first file describing her medical issues

and the incident that led to H's death were created for the purpose of seeking legal advice or for some other personal purpose, as the documents did not reflect notes describing actual communications or memorializations of communications between the defendant and her attorney, and the defendant did not adduce any additional evidence to establish that she had created those documents for the purpose of seeking legal advice or that she had communicated or intended to communicate those documents to her attorney; moreover, the printouts of the defendant's medical records in the first file were preexisting documents that were outside the scope of the attorney-client privilege, as they predated the incident that gave rise to the attorney-client relationship at issue by approximately nine years, and the defendant did not introduce evidence to establish that those printouts were created for the purpose of seeking legal advice.

d. Although the documents contained in the first file were substantively identical to the documents in the privileged second file, the documents in those two files were not the same and, thus, the first file was not privileged: both files contained documents containing the narrative describing the incident that led to H's death, but they were not exact copies, and there were many versions of the narrative that were told in substantively different ways and were of different lengths and detail; moreover, nothing in the first file suggested that the documents contained therein were communications between the defendant and her attorney or that they were created at the behest of an attorney for the purpose of seeking legal advice; furthermore, the first file contained a variety of documents, some of which appeared like journal entries, others that were in a narrative style that described traumatic events, and others that were preexisting documents, and the record did not support the defendant's claim that the state's stipulation that the second file was privileged should transfer to the first file.

e. The defendant could not prevail on her claim that the estate planning documents in the third file should be covered by the attorney-client privilege as communications made to an attorney for the purposes of drafting a will: that file contained an executed will rather than a draft of a will that would be considered a communication in the context of a will dispute; moreover, other records and documents in the third file were insufficient to support the defendant's assertion that those records and documents were communications inextricably linked to the giving of legal advice, and the records and documents therein did not contain anything suggestive of the defendant's trial strategy.

2. The trial court did not abuse its discretion in determining that dismissal of the charges against the defendant was not warranted and that the state met its burden of showing, by clear and convincing evidence, that the remedial steps it took could cure any presumed prejudice and prevent future prejudice to the defendant: the court credited the testimony of witnesses at the *Lenarz* hearing that the police officers' exposure to privileged materials was not intentional, and the state, once it was

alerted to the privileged nature of the documents, halted its investigation of the defendant, created a taint team to remove privileged documents before they could reach new prosecutors, removed the case from the original investigative body, and assigned new prosecutors; moreover, the defendant's state constitutional (article first, § 19) right to individual voir dire could serve to mitigate any prejudice by exposing whether prospective jurors had been exposed to privileged materials and by uncovering potential biases; furthermore, the trial court's preclusion of testimony by the defendant's expert witness about media exposure of the privileged materials did not prevent the defendant from demonstrating the extent of the prejudice she suffered, as that expert's testimony was not relevant or sufficiently reliable and would not have assisted the court in determining whether any prejudice could be remedied.

(*One justice concurring separately*)

Argued October 15, 2019—officially released April 8, 2020*

Procedural History

Information charging the defendant with the crimes of murder and tampering with physical evidence, brought to the Superior Court in the judicial district of New Britain, where the court, *Oliver*, *J.*, denied the defendant's motion to dismiss, and the defendant, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest is involved, appealed to this court. *Affirmed.*

Patrick Tomasiewicz, for the appellant (defendant).

Kathryn W. Bare, assistant state's attorney, with whom were *Sarah Hanna*, assistant state's attorney, and, on the brief, *Christian M. Watson*, supervisory assistant state's attorney, for the appellee (state).

Opinion

D'AURIA, J. The principal issue in this interlocutory public interest appeal, brought pursuant to General

* April 8, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Statutes § 52-265a,[1] is whether police officers executing a search and seizure warrant for the home of the defendant, Linda Kosuda-Bigazzi, invaded her attorney-client privilege to the extent that the charges of murder in violation of General Statutes § 53a-54a and tampering with physical evidence in violation of General Statutes § 53a-155 brought against her should be dismissed pursuant to *State* v. *Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011), cert. denied, 565 U.S. 1156, 132 S. Ct. 1095, 181 L. Ed. 2d 977 (2012). The defendant claims that the trial court improperly denied her motion to dismiss the charges because the police prejudiced all further prosecution against her by examining, reading, and publishing privileged information that was in the arrest warrant application, a prejudice so extreme that the only appropriate remedy is dismissal of the criminal charges, as we ordered in *Lenarz*.

The documents the defendant claims are privileged had been located within three files—exhibits A, B, and C—in a locked file cabinet in an office in the defendant's home. The parties stipulated that the privilege covered all of the contents of exhibit B, a file labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017."[2] The defendant asserts that the privilege also covered the two other seized files: one labeled "INCIDENT 2017" (exhibit A), and one containing estate planning documents (exhibit C). She contends that the documents located within exhibit A are privileged because they are substantively identical to some of the documents located within and next to exhibit B. She contends that exhibit C is privileged because it contains documents communicated to her

[1] General Statutes § 52-265a (a) provides in relevant part: "[A]ny party to an action who is aggrieved by an order or decision of the Superior Court in an action which involves a matter of substantial public interest and in which delay may work a substantial injustice, may appeal under this section from the order or decision to the Supreme Court . . . ."

[2] We describe some of the documents contained within exhibit B only generally to protect the defendant's attorney-client privilege.

attorney for estate planning purposes. Ultimately, she argues that the invasion of her attorney-client privilege during the search of her home will prejudice her prosecution to such an extent that the only just remedy is dismissal of the charges against her in connection with the death of the decedent. She therefore moved to dismiss the criminal information, which the trial court denied after conducting a twelve day hearing pursuant to *Lenarz* (*Lenarz* hearing). For the reasons that follow, we affirm the trial court's order and denial of the defendant's motion to dismiss.

We agree with the trial court that the defendant failed to establish that the documents within exhibits A and C are protected by the attorney-client privilege for purposes of the *Lenarz* hearing. The defendant did not establish that the documents are communications or that she created the documents with the intent to communicate them to an attorney for the purpose of seeking legal advice. Regarding exhibit B, the record supports the trial court's unchallenged ruling that the privilege covers certain documents contained within that file.[3] We therefore conclude that the trial court did not abuse its discretion in determining that the defendant was prejudiced by the examination and seizure of the privileged documents within exhibit B. However, we conclude that the trial court properly determined that the state demonstrated, by clear and convincing evidence, that the remedial actions the state has taken, and the order that the trial court entered for further prosecution of the case, as well as individual jury voir dire, can cure the prejudice to the defendant. The state's actions in the present case therefore do not rise to the level of the extreme prejudice demonstrated in *Lenarz*, and dismissal of the criminal information is not warranted. We

[3] Pursuant to the trial court's order, exhibit B remains under seal in the trial court clerk's office, subject to review only upon prior authorization by a judge of the Superior Court.

affirm the order of the trial court and the denial of the motion to dismiss.

I

The following facts, as found by the trial court, and procedural history are relevant to our review of the defendant's claims. On February 5, 2018, Officer Kevin Mellon of the Burlington Police Department went to the residence shared by the defendant and the decedent to perform a wellness check on the decedent.[4] The decedent's employer had not seen or heard from him since August, 2017. Before Mellon entered the residence, the state police barracks in Litchfield received a phone call from Attorney Brian S. Karpe, who stated that the defendant was inside the residence and that the police should not enter until Karpe arrived at the home. Upon his arrival, Karpe entered the residence "for a period of time" and then "allowed the police inside to conduct a limited search to check on [the decedent]." In the basement of the residence, Mellon observed human remains covered by a tarp. The Office of the Chief Medical Examiner positively identified the remains as those of the decedent.

That same evening, at about 11 p.m., Detective Michael W. Fitzsimons, who was assigned to the state police Western District Major Crime Squad, obtained a search and seizure warrant for the residence "for potential evidence relating to a crime involving the human remains found in the basement." The following day, a second search warrant issued, authorizing the police to search for evidence relating to the crime of murder.

During the second search of the residence, the police cut the locks on the file cabinet from which they seized the three separate files. Those files became (1) defense exhibit A—a file labeled "INCIDENT 2017," containing

[4] In accordance with our policy of protecting the privacy interest of the victims of family violence, we decline to identify the decedent. See General Statutes § 54-86e.

about twenty-five pages of mostly handwritten pages, (2) defense exhibit B—a blue accordion file folder labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017," containing about 150 pages, and (3) defense exhibit C—a file containing estate planning documents. The day after the execution of the second search warrant, the police obtained an arrest warrant charging the defendant with murder and tampering with physical evidence. At the time the arrest warrant was issued, the trial court granted the state's request to seal for fourteen days after the defendant's arrest the police affidavit that was submitted in support of the arrest warrant application. The arrest warrant application included the verbatim text of a handwritten, four page "narrative," apparently describing the events leading to the death of the decedent.[5]

In moving to dismiss the criminal charges, the defendant alleged that the police had read and inspected two documents protected by the attorney-client privilege—the narrative and a document reflecting her trial strategy.[6] According to the defendant, the state could use the

[5] Two narratives are located within exhibit A, and one narrative is located within exhibit B. The substance and text of the narratives themselves are copies in that they are handwritten and exactly identical. Because the defendant did not establish which is the original version of the narrative and which are copies, we refer to them all as "copies." Each copy, however, is marked differently. During the *Lenarz* hearing, State Police Detective Edmund Vayan testified, and defense counsel acknowledged, that the documents are not identical. Copy #1 (exhibit A) has the defendant's first and last name in handwriting across the top of page one. No other copy has that marking. Copies #1 and #2 (exhibit A) have a thin blackout mark at the top of page one. Copy #3 (exhibit B) has a much thicker blackout mark at the top of page one. Copies #1 and #2 have the year 2017 handwritten and circled in the top right corner of the first page, just above the handwritten initials of the defendant. On Copy #3 (exhibit B), the year 2017 is handwritten directly above the defendant's initials, but is not circled, in the top right corner of the first page. The bottom right corner also contains the handwritten initials of the defendant. State Police Detective Corey Clabby testified that the arrest warrant application quoted from the copy contained within exhibit A, not exhibit B.

[6] Although both exhibit A and exhibit B contain the "narrative," only exhibit B contains trial strategy documents.

information in these documents "in plea negotiations, witness preparation, jury selection, and case presentation, including cross-examination and closing argument, as well as in drafting suggested jury instructions." She further argued: "Despite the best intentions and efforts of the state's attorney's office, it will be humanly impossible not to consider the privileged information during plea negotiations, case preparation and the trial of the matter." According to the defendant, the actions of the police will deprive her of her right to a fair trial and her sixth amendment right to effective counsel.[7] The trial court conducted the *Lenarz* hearing to explore the extent of the invasion of the attorney-client privilege, the prejudice to the defendant, and whether the state's remedial actions and any additional remedies could serve to cure the prejudice, thereby protecting the defendant's rights to the assistance of counsel and a fair trial.

The *Lenarz* hearing included testimony from numerous law enforcement witnesses, including the state's attorney for the New Britain judicial district, Brian Preleski, and an expert witness for the defendant, Attorney Mark Dubois. Dubois, who was qualified by the court as an expert in the field of attorney-client privilege, reviewed the contents of defense exhibits A, B, and C and offered his opinion as to whether the privilege covered each document. State's Attorney Preleski testified as to the remedies the state implemented to cure any prejudice to the defendant as well as recommended procedures for the future prosecution of the defendant. The remedies included having the case handled by the Hartford judicial district and a different state police

[7] The defendant also claimed that the invasion of her attorney-client privilege impacted her fifth amendment right against self-incrimination under the United States constitution, arguing that she "is now faced with the heavy burden of having to waive her privilege of not having to testify and may be forced to testify to explain" the case that the state will mount against her. The defendant does not pursue this claim in this appeal.

investigative unit, and having the New Britain State's Attorney's Office act as an insulated "taint" team to review, remove, and redact privileged documents, motions, and transcripts before they could reach the Hartford judicial district.

Having heard the evidence and considered the parties' positions, the trial court found as follows: Regarding the documents contained within defense exhibit A, the trial court found that the defendant had failed to establish that those documents describing the incident in question were privileged, specifically because she failed to establish that she had created the documents with the intent to provide them to counsel for the purpose of obtaining legal advice. The court found that the defendant failed to establish that the documents describing her medical condition were privileged because she had made only vague and generalized assertions about them that were insufficient to satisfy the narrowly construed attorney-client privilege. The court also found that, to the extent information in certain documents could have been construed as trial strategy, it was "not sufficiently specific to a defense so as to be prejudicial to the defendant" and that the defendant had failed to show that she had the intent to establish the attorney-client relationship. The trial court found that certain other documents within exhibit A contained eleven year old information, were preexisting, and not privileged. Finally, regarding the documents describing the "tumultuous relationship between the defendant and the decedent," the trial court found that the defendant had not produced sufficient evidence at the *Lenarz* hearing "to establish either that the document[s] [were] created at the request of any attorney or with the intent to be provided to any attorney for the purpose of obtaining legal advice."

Regarding defense exhibit C, the trial court found that both draft and executed estate planning documents were not privileged because they were either "docu-

ments of the sort meant to be made public and provided to third parties as a matter of course" or nonprivileged, preexisting documents. The court found that the defendant had failed to carry her burden of establishing that invoices, household bills, and other paperwork contained within exhibit C were privileged because she had "failed to show the nexus between the exhibits and the culmination of the legal advice: the executed estate planning files." The court also found that the defendant had failed to sustain her burden of establishing that copies of a document apparently authored by the decedent were privileged because she failed to adduce sufficient evidence to establish that the attorney-client privilege was applicable to them. Regarding documents containing biographical information about the decedent and documentation related to his previous marriage, the trial court found that the defendant had failed to show that she would be the proper party to be able to invoke the attorney-client privilege. Finally, as to any privileged documents within exhibit C, the trial court found that "the defendant has failed to assert or establish that the privileged documents contain evidence of the defendant's trial strategy or position. Accordingly, this court finds that the defendant suffered no injury for law enforcement's invasion of the privilege as to exhibit C, ending the court's inquiry as to this exhibit."

The court accepted a written stipulation from the parties that the attorney-client privilege covered the entire contents of exhibit B.[8] On the basis of the stipulation, the evidence presented at the *Lenarz* hearing, and its own review of the documents within exhibit B, the trial court found that the defendant had "met her burden of proof in establishing that law enforcement officials

[8] Exhibit B contains a plethora of documents—about 150 pages—some of which are also included in exhibit A. Both exhibit A and exhibit B contain the "narrative" document. See footnote 5 of this opinion. Exhibit B also includes multiple trial strategy documents that were not included in exhibit A.

seized from her home communications protected by the attorney-client privilege." The state conceded, and the court accepted, that "certain of the privileged communications [could] be construed to reflect a potential trial strategy and/or the defendant's position as a then potential criminal defendant." Given that invasion of the privilege and the nature of the documents, the defendant argued that the presumption of prejudice announced in *Lenarz* was applicable. See *State* v. *Lenarz*, supra, 301 Conn. 437 ("because the disclosure of [attorney-client communications containing information concerning the defendant's trial strategy] is inherently prejudicial, prejudice should be presumed" (emphasis omitted)). The state did not seek to rebut that presumption as to exhibit B but, rather, sought to establish that the prejudice could be cured by a remedy short of dismissal of the charges against the defendant.

Specifically regarding prejudice to the defendant, the trial court, on the basis of the testimony throughout the *Lenarz* hearing, found that the police officers' initial invasion of the attorney-client privilege was unintentional. The state presented the testimony of Preleski to describe the prosecution's efforts to minimize future prejudice. Preleski was not present at the search of the defendant's home. He was contacted by the prosecuting attorney, then Assistant State's Attorney Christian M. Watson, to review the seized documents and to determine if they were privileged, as well as to consider potential future procedures for the defendant's prosecution. Preleski testified that the New Britain State's Attorney's Office acted to "limit additional exposure to potentially privileged materials with an eye toward future 'taint-free' investigations and prosecution of this matter." The state's actions included treating the New Britain State's Attorney's Office as a "taint team," halting the investigation of the matter until after the resolution of the *Lenarz* issue, and having the case handled by another state's attorney's

office that had no knowledge of the privileged communications.

In accordance with the state's remedial actions and recommendations, and to limit any further prejudice to the defendant, the trial court ordered that (1) the case was to be transferred out of the New Britain judicial district, (2) and no longer prosecuted by the New Britain state's attorney, (3) or investigated by the state police Western District Major Crime Squad, (4) the trial was not to be held in the New Britain judicial district but that the case was to be transferred to a judicial district to be determined by the chief administrative judge for criminal matters, along with the chief state's attorney, to be litigated by prosecutors without knowledge of the privileged communications and investigated by a state law enforcement agency without knowledge of the privileged communications, (5) privileged documents would remain exhibits under seal in the courthouse clerk's office, subject to review only upon prior authorization by a judge of the Superior Court after submission of a properly certified written motion, (6) motions and other filings from the *Lenarz* hearing on the motion to dismiss, if filed under seal, would remain under seal and be maintained by the clerk of the court with disclosure permitted only upon authorization by a judge of the Superior Court, (7) the courthouse clerk's file from the *Lenarz* hearing was not to be disclosed or subject to review by the subsequent prosecuting authority or investigative agency, and requests for copies would be subject to redaction by the court, (8) audio recordings of the *Lenarz* hearing were not to be reviewed by the incoming prosecutors or investigators, (9) the transcripts of closed court sessions were not to be available to the successor prosecuting authority or investigating agency, (10) the New Britain State's Attorney's Office would act as an aid to the court and an additional buffer, having already been exposed to the privileged materials, (11) transcripts sought by future

prosecutors and investigators would be reviewed and filtered through the New Britain State's Attorney's Office and a judge of the Superior Court, subject to redaction, and (12) state police troopers from Troop L in Litchfield with knowledge of the contents were not to be permitted to discuss the substance of the materials with any other law enforcement agency or prosecutor's office.

In light of these ordered remedies, the trial court denied the defendant's motion to dismiss on the basis of three determinations: (1) the defendant had failed to establish that exhibit A was protected by the attorney-client privilege, (2) the defendant had failed to establish that exhibit C was, by and large, protected by the privilege, and (3) the prejudice to the defendant caused by the invasion of the privilege could be cured by a remedy short of dismissal of the criminal information. The defendant filed a petition for certification to appeal to this court pursuant to § 52-265a (a). Because the application raised a "matter of substantial public interest . . . in which delay may work a substantial injustice," the Chief Justice granted the application. See General Statutes § 52-265a (a).

The trial court did not clearly err when it found that the defendant failed to establish that the documents within exhibit A and in much of exhibit C are protected by the attorney-client privilege. Specifically, the defendant did not meet her burden of establishing that the documents reflect privileged communications between herself and her attorney, or that she created the documents with the intent to communicate them to an attorney for the purpose of seeking legal advice, or that she transformed preexisting documents in such a manner as to render them privileged. In this appeal, we do not review the documents within exhibit B to determine whether the defendant met her burden of establishing that they were privileged because the state does not challenge the trial court's finding that exhibit B contains

privileged documents or the trial court's acceptance of the parties' written stipulation that the contents of exhibit B are privileged. See footnote 8 of this opinion and accompanying text. Furthermore, the state does not challenge the trial court's finding that the investigating officers prejudiced the defendant by reading documents within exhibit B that reflected "potential trial strategy and/or the defendant's position as a then potential criminal defendant." Rather, the state asserts in its brief to this court that any prejudice to the defendant "has already been, and will continue to be, cured by [the] state's [previous] prompt actions [to minimize future prejudice to the defendant] and the remedy fashioned by the trial court." Therefore, according to the state, dismissal of the charges against the defendant is not required. The trial court did not abuse its discretion in finding that the state demonstrated, by clear and convincing evidence, that the state's remedial actions can cure any prejudice to the defendant. The state's actions in the present case therefore do not rise to the level of the extreme prejudice demonstrated in *Lenarz*, and dismissal of the criminal information is not warranted.

II

To address the defendant's claims, we must first evaluate whether the trial court correctly determined that the defendant did not meet her burden of establishing that the attorney-client privilege protects the documents contained within exhibits A and C that the police seized. We review the trial court's determination that the defendant did not meet her burden under the clear error standard. See, e.g., *State* v. *Lenarz*, supra, 301 Conn. 424 (applying clearly erroneous standard of review to trial court's findings).

"Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confi-

dence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived." (Internal quotation marks omitted.) *Rienzo* v. *Santangelo*, 160 Conn. 391, 395, 279 A.2d 565 (1971), quoting 8 J. Wigmore, Evidence (McNaughton Rev. 1961) § 2292, p. 554; see also *Olson* v. *Accessory Controls & Equipment Corp.*, 254 Conn. 145, 159, 757 A.2d 14 (2000) (evaluating whether communications between defendant's attorney and entity she hired to prepare report were inextricably linked to rendering of legal advice). "In Connecticut, the attorney-client privilege protects both the confidential giving of professional advice by an attorney acting in the capacity of a legal advisor to those who can act on it, as well as the giving of information to the lawyer to enable counsel to give sound and informed advice. . . . The privilege fosters full and frank communications between attorneys and their clients and thereby promote[s] the broader public interests in the observation of law and [the] administration of justice." (Internal quotation marks omitted.) *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, 267 Conn. 279, 329–30, 838 A.2d 135 (2004). The privilege applies, however, only when necessary to achieve its purpose; it is not a blanket privilege. See *Harrington* v. *Freedom of Information Commission*, 323 Conn. 1, 12, 144 A.3d 405 (2016).

The attorney-client privilege applies to oral and written communications. See, e.g., E. Prescott, Tait's Handbook of Connecticut Evidence (6th Ed. 2019) § 5.16.1 (b), p. 262 ("[c]ommunications between an attorney and a client can be written as well as oral"); see also 1 Restatement (Third), The Law Governing Lawyers § 69, comment (b), p. 525 (2000) ("A communication can be in any form. Most confidential client communications to a lawyer are written or spoken words . . . ."). The present case involves documents, and our analysis will focus on that form of communication. The privilege must be established for "each document separately con-

sidered" and must be narrowly applied and strictly construed. (Internal quotation marks omitted.) *Harrington* v. *Freedom of Information Commission*, supra, 323 Conn. 12. "The burden of establishing the applicability of the privilege rests with the party invoking it"; id.; see also *State* v. *Hanna*, 150 Conn. 457, 466, 191 A.2d 124 (1963) ("[t]he burden of proving the facts essential to the privilege is on the person asserting it"); and the burden applies in both civil and criminal contexts.

First, a party can establish that a document is privileged by showing that the document is itself the record or memorialization of a communication between the client and the attorney. See 1 Restatement (Third), supra, § 69, p. 525 ("[a] communication . . . is any expression through which a privileged person . . . undertakes to convey information to another privileged person and any document or other record revealing such an expression"); see also *United States* v. *DeFonte*, 441 F.3d 92, 95 (2d Cir. 2006) (memorializations of private conversations between client and attorney protected from disclosure by attorney-client privilege). If the document is not a record of a communication, a party can still establish privilege by showing that (1) the document was created with the intent to communicate the contents to an attorney, and (2) the client actually communicated the contents to the attorney. See id., 96 ("A rule that recognizes a privilege for any writing made with an eye toward legal representation would be too broad. A rule that allows no privilege at all for such records would discourage clients from taking the reasonable step of preparing an outline to assist in a conversation with their attorney."). Perhaps the most obvious example is a client's outline or notes made in preparation for a meeting with an attorney, or at the attorney's behest to facilitate communication between attorney and client, and then the client and the attorney actually communicate about the contents of the notes. See, e.g., *United States ex rel. Locey* v.

Drew Medical, Inc., Docket No. 6:06-cv-564-Orl-35KRS, 2009 WL 88481, *2–3 (M.D. Fla. January 12, 2009) (chronology "prepared at the direction of counsel to communicate information to counsel for the purposes of seeking legal advice . . . is protected by the attorney-client privilege"); *Bernbach* v. *Timex Corp.*, 174 F.R.D. 9, 10 (D. Conn. 1997) (client's notes contained in her notebooks were privileged because notes were made for purpose of seeking legal advice and were communicated to attorney in confidence).

In the context of creating documents for the purpose of seeking legal advice, one final wrinkle arises when a party asserting the attorney-client privilege creates a document with the intent to communicate the contents to an attorney but, on the basis of the circumstances, the actual communication does not take place. If, for example, a party asserting the privilege could establish creation of a document for the purpose of seeking legal advice but that the police seized the document prior to the actual communication to the attorney, the document may maintain its privileged status. See *State* v. *Lenarz*, supra, 301 Conn. 441 n.18 ("[i]f a person creates a document with the intent to communicate it to an attorney for the purpose of facilitating the attorney's representation of that person, it would be entirely inconsistent with the purpose of the attorney-client privilege to allow third parties to obtain access to the document up to the time that the person actually communicates it to the attorney").

Last, although more tenuous, there is some support for the proposition that a party could establish the attorney-client privilege by showing transformation of a preexisting document into a communication for the purpose of seeking legal advice and that the document was communicated to or intended to be communicated to an attorney. Preexisting documents are documents that are *not* a record of a communication and were *not* created for the purpose of seeking legal advice. See 1 R.

Mosteller et al., McCormick on Evidence (8th Ed. 2020) § 89, p. 632 ("A professional communication in writing, as a letter from client to lawyer for example, will of course be privileged. These written privileged communications are readily to be distinguished from preexisting documents or writings, such as deeds, wills, and warehouse receipts, not in themselves constituting communications between client and lawyer." (Footnote omitted.)). "[Preexisting] documents that are not in themselves communications . . . are treated in different ways, depending on how the attorney acquired them." E. Prescott, supra, § 5.16.1 (c), p. 262. A preexisting document does not become privileged merely because it is "transferred to or routed through an attorney." *Resolution Trust Corp.* v. *Diamond*, 773 F. Supp. 597, 600 (S.D.N.Y. 1991); see also 1 Restatement (Third), supra, § 69, comment (j), p. 530 ("[a client authored] document that is not a privileged document when originally composed does not become privileged simply because the client has placed it in the lawyer's hands"). However, a preexisting document could become privileged if it were somehow transformed for the purpose of seeking legal advice and communicated or intended to be communicated to an attorney. See *Angst* v. *Mack Trucks, Inc.*, Docket Nos. 90-3274, 90-4329, 1991 WL 86931, *2 (E.D. Pa. May 14, 1991) (reasoning that plaintiff's handwritten notes made for personal use, not for purpose of securing attorney, would not fall within privilege, but typed compilation and summary created for purpose of securing counsel would fall within privilege). The oft stated shorthand rule for preexisting documents provides: "If the client would have to produce [the document], were the client in possession of [it], then the attorney must produce it; if the client would not have to produce, the attorney would not have to produce." E. Prescott, supra, § 5.16.1 (c), p. 262, citing *Fisher* v. *United States*, 425 U.S. 391, 403–404, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976).

With these principles in mind, we examine the record to evaluate whether the trial court clearly erred in deter-

mining that the defendant had failed to establish that the documents within exhibits A and C constitute communications, or that she had failed to establish that she created the documents for the purpose of seeking legal advice and actually communicated the contents or intended to communicate the contents to her attorney, or that she failed to establish that she transformed preexisting documents into nondiscoverable, privileged communications.

A

The defendant first asserts that the trial court clearly erred when it found that exhibit A was not privileged. Specifically, she argues that the court erroneously determined that she had not met her burden of establishing that she created the documents with the intent to communicate them to her attorney for the purpose of seeking legal advice. The defendant contends that she met her burden of establishing that the documents warrant the protection of the attorney-client privilege on the basis of (1) expert testimony, (2) the fact that the documents within exhibit A were located in her file cabinet directly next to exhibit B, labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017," and (3) the fact that exhibit A contained written statements substantively identical to the documents within exhibit B. Finally she asserts that the documents must be privileged on the basis of the fact that the state stipulated to the privilege covering exhibit B. We disagree. The trial court record the defendant developed regarding the factual circumstances surrounding the creation of the documents within exhibit A is sparse, at best, and does not support her argument that the trial court clearly erred in determining that she did not establish that she created the documents within exhibit A for the purpose of seeking legal advice.

1

First, the defendant attempts to rely on the trial court's limitation of Dubois' testimony as well as the

trial court's preclusion of two additional experts in support of her position that she established that she had created the documents within exhibit A for the purpose of seeking legal advice. We review the trial court's ruling on evidentiary matters, as well as its determination concerning the admissibility of testimony from expert witnesses, for abuse of discretion. See, e.g., *State* v. *Iban C.*, 275 Conn. 624, 634, 881 A.2d 1005 (2005); see also *State* v. *Williams*, 317 Conn. 691, 701–702, 119 A.3d 1194 (2015) (affording trial courts "wide discretion in determining whether to admit expert testimony and, unless the trial court's decision is unreasonable, made on untenable grounds . . . or involves a clear misconception of the law, we will not disturb its decision" (internal quotation marks omitted)).

In her brief, the defendant states that she "advised Dubois that the documents in both exhibits A and B had been created, accumulated and organized prior to her . . . visits with . . . attorneys, and that the file was prepared to organize her thoughts and communicate to her lawyers what she had been dealing with and what happened regarding the untimely death of the [decedent], for the purpose of seeking legal advice." Indeed, Dubois testified that he met with the defendant and, on the basis of that meeting, concluded that all of the documents within exhibit A were privileged. However, the trial court did not admit Dubois' testimony about the defendant's intent when *creating* the documents for the truth of the matter because the statements constituted inadmissible hearsay. In fact, the trial court explicitly did not permit Dubois to opine as to the defendant's intent in creating the documents. The court stated: "[H]e's not allowed to opine, it's my opinion that she intended to create a privilege—the court will not allow that." Defense counsel asked if he could make an offer of proof, and the court responded: "No. An offer of proof as to his opinion as to her intent to create the privilege, no. You can lay out the facts, you can lay out his review,

you can lay out his conversation, but not as to the intent; that's up to this court."

The trial court did not abuse its discretion in permitting Dubois' testimony relating to the defendant's hearsay statements to him under § 7-4 (b) of the Connecticut Code of Evidence[9] as the basis for his expert opinion and for no other substantive purpose. See *Milliun* v. *New Milford Hospital*, 310 Conn. 711, 726, 80 A.3d 887 (2013) ("[I]nadmissible facts upon which experts customarily rely in forming opinions can be derived from sources such as conversations . . . . [However, § 7-4 (b)] expressly forbids the facts upon which the expert based his or her opinion to be admitted for their truth unless otherwise substantively admissible under other provisions of the [c]ode." (Emphasis omitted; internal quotation marks omitted.)). Section 7-4 (b) "does not constitute an exception to the hearsay rule or any other exclusionary provision of the [c]ode." (Internal quotation marks omitted.) Id. Any statements the defendant made to Dubois about her intent in creating the documents were made out of court, did not fall within any hearsay exception, and were properly admitted only as a basis for Dubois' expert opinion, not for the truth of whether the defendant created the documents for the purpose of seeking legal advice.

The record contains no other evidence that would help establish the defendant's intent at the time she created the documents or her intent to communicate the documents to obtain legal advice.[10] The defendant

[9] Section 7-4 (b) of the Connecticut Code of Evidence provides in relevant part: "The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. . . . The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence."

[10] In *Lenarz*, the defendant testified in an ex parte hearing before the trial court that he prepared the documents in order to obtain advice from counsel and then communicated those documents to counsel. See *State* v. *Lenarz*, supra, 301 Conn. 423; id., 457–58 (*Palmer*, *J.*, dissenting). The trial court credited that testimony and found that the documents were privileged

herself did not testify at any point during the *Lenarz* hearing. She did not attest to when, or for what purpose, she created the documents or that she in fact communicated the documents to her attorney for the primary purpose of seeking legal advice. Nor did she or anyone else explain the relationship between the documents within exhibit A and any corresponding versions contained within exhibit B, which (if any) is an original, which is a copy, the reason(s) for creating multiple versions, or any similar information. Under these circumstances, the trial court did not abuse its discretion in determining that the "defendant ha[d] failed to establish that she created or compiled any of the documents contained in exhibit A on the advice of counsel," absent any evidence that the defendant (1) created the documents for, or at the request of, her attorney, (2) intended to communicate the contents to an attorney, or (3) actually communicated them to an attorney.

The defendant also contends that the trial court improperly precluded expert testimony that would have supported her argument that the documents within exhibit A are privileged. Specifically, during the *Lenarz* hearing, she proffered Attorney William F. Dow III as "an expert in criminal law . . . an expert [in] the protections afforded to [the defendant] under the state constitution for search and seizure . . . [and] as an

because the defendant had established the necessary element of communication. Id., 423; see id., 458 n.5 (*Palmer*, *J.*, dissenting). On appeal to this court, the state in *Lenarz* did not contest the propriety of that procedure.

In the present case, the defendant requested an ex parte hearing and offered to submit a sworn affidavit. The state objected, and the trial court did not permit ex parte testimony from the defendant. We express no view about whether the trial court could appropriately permit the defendant to create a record in this fashion because the defendant does not brief the issue in this appeal.

The trial court excluded and did not consider the direct testimony of Karpe or any of his testimony on cross-examination on the basis of defense counsel's invocation of the attorney-client privilege during Karpe's testimony on cross-examination. We similarly do not consider any of Karpe's testimony on direct or cross-examination, as it is not part of the factual record.

expert as to privilege." Dow also would have opined "on the ultimate remedy and . . . on the constitutional violations that occurred here." The defendant also proffered Attorney Hubert J. Santos as an expert to provide similar testimony—that the documents were covered by the attorney-client privilege. The trial court precluded both experts pursuant to § 7-2 of the Connecticut Code of Evidence,[11] *State* v. *Favoccia*, 306 Conn. 770, 51 A.3d 1002 (2012), and *State* v. *Taylor G.*, 315 Conn. 734, 110 A.3d 338 (2015).

"An expert witness ordinarily may not express an opinion on an ultimate issue of fact, which must be decided by the trier of fact. . . . Experts can [however] sometimes give an opinion on an ultimate issue where the trier, in order to make intelligent findings, needs expert assistance on the precise question on which it must pass." (Internal quotation marks omitted.) *State* v. *Iban C.*, supra, 275 Conn. 634–35. But see id., 636–37 (trial court abused its discretion by admitting testimony on ultimate issue of fact that was not helpful to jury in deciding precise question on which it had to pass).

In the present case, the trial court determined that the expert testimony of Attorneys Dow and Santos would have improperly infringed on the court's function, would not have assisted the court as the trier of fact, improperly included conclusions of law, and would have been cumulative of the testimony of Dubois. We conclude that the trial court did not abuse its discretion in precluding both experts from testifying. The court's decision was reasonable because neither Dow nor Santos could have provided any information that would have been of assistance to the court in determining

[11] Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

whether, as a matter of fact, the defendant had created any of the documents for the purpose of seeking legal advice. Neither Dow nor Santos could have provided any additional evidence as to whether the documents qualified as communications made by the defendant to her attorney because neither of them had any knowledge relating to the defendant's intentions in creating the documents, which is the key element necessary to establish the applicability of the attorney-client privilege. Moreover, the content of the defendant's proffer of the testimony of Dow and Santos was cumulative of Dubois' testimony and centered on an ultimate issue—whether the defendant established that the documents were privileged—that was a determination for the trial court alone to make. See Conn. Code Evid. § 7-3 (a) ("[t]estimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that . . . an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue").

2

The defendant next asserts that the manner in which she maintained the documents is sufficient to establish that the documents are privileged. We are not persuaded. We credit the defendant's characterization that exhibits A and B were "carefully maintained" files under lock and key, located "centimeters apart from one another" in "two different folders nestled together," rather than loose pieces of paper left unprotected in the office in the defendant's home in which they were seized. Nothing in the record contradicts that characterization. However, the mere fact that exhibit A, labeled "INCIDENT 2017," was located next to exhibit B, labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017," by itself, does not serve to transfer the privilege from one file to another. That kind of proximity argument—

documents located adjacent to nearby related privileged documents are also privileged—simply does not measure up to the well established standard of proof for establishing privilege and would lead to illogical results.

For example, if an attorney were inadvertently to disclose a privileged e-mail communication within a batch of hundreds of communications, that attorney could hardly argue that the privilege should somehow transfer to all the e-mails in the batch simply because they were "nestled together." See *PSE Consulting, Inc.* v. *Frank Mercede & Sons, Inc.*, supra, 267 Conn. 331 n.29 (declining to "transfer" privilege from one confidential e-mail covered by privilege to another nonconfidential e-mail, even though e-mails were related in time and general subject matter). More troubling is the fact that the defendant's proximity argument flies in the face of the well established principle that the privilege must be established for each document separately. See, e.g., *Harrington* v. *Freedom of Information Commission*, supra, 323 Conn. 12. The defendant cites no case law, and we have found none, that supports the proposition that placing a document next to a privileged document transforms what would be a nonprivileged document into one protected by the attorney-client privilege.

Instead, the defendant asks us to substitute her preferred logic—which we do not find inescapable—for concrete evidence that would establish that she intended to communicate the documents within exhibit A for the purpose of seeking legal advice. Practically speaking, it is at least as plausible an inference that the defendant created two separate files, labeled differently, with two different purposes or intentions in mind. The file labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017," which contains documents pertaining to trial strategy, could be viewed as the file the defendant created for her current or prospective attorney. Labeling, after all, can be one indication of whether a communica-

tion is intended to seek or to provide legal advice.[12] Compare *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 519–20, 14 A.3d 998 (2011) (document expressly labeled "CONFIDENTIAL Attorney-Client Communication DO NOT DISCLOSE" and transmitted from assistant town attorney to first selectman for purpose of providing legal advice was covered by attorney-client privilege (internal quotation marks omitted)), with *Cadlerock Properties Joint Venture, L.P.* v. *Commissioner of Environmental Protection*, 253 Conn. 661, 675 n.13, 757 A.2d 1 (2000) (memoranda labeled "CONFIDENTIAL-ATTORNEY CLIENT PRIVILEGE," but "not created for the purpose of obtaining legal advice" and in which no legal advice was sought, were not covered by attorney-client privilege (internal quotation marks omitted)), cert. denied, 531 U.S. 1148, 121 S. Ct. 1089, 148 L. Ed. 2d 963 (2001). The label on exhibit A, "INCIDENT 2017," on the other hand, does not, on its face, manifest the same intent to seek legal advice as the file labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017." We need not—and ought not—speculate as to the defendant's intent in creating the separately marked

[12] Although labeling reflects one indication of an intent to communicate a document or a file of documents to an attorney, certainly, labeling a file "Confidential Attorney-Client Privilege" would not be sufficient on its own to establish that the privilege covers every document within the file. See *Fisher* v. *United States*, supra, 425 U.S. 403 ("since the privilege has the effect of withholding relevant information from the [fact finder], it applies only where necessary to achieve its purpose"). Indeed, our in camera review of the documents within exhibit B reveals that it is by no means obvious that certain documents are privileged, for example, a certificate of baptism from 1947, a copy of a parking meter receipt, a printout of a facsimile receipt log from 2012, and printed directions from the website Mapquest. The parties do not challenge the trial court's acceptance of their written stipulation that the contents of exhibit B are privileged, and we, therefore, decline to analyze each document within exhibit B to evaluate its privilege status. See part I of this opinion. That conclusion, however, does not prevent this court from analyzing and deciding the issues on which the parties in fact disagree—whether the defendant established that the privilege covers the documents within exhibits A and C, and whether *Lenarz* compels the dismissal of the charges against her.

files. Rather, the defendant bore the burden of proving that her intent in creating the documents within exhibit A was to communicate the information for the purpose of seeking legal advice. See *Harrington* v. *Freedom of Information Commission*, supra, 323 Conn. 12. She did not meet that burden by relying on the proximity of the documents.

3

The defendant urges us to conclude that the documents are sufficient in and of themselves to be considered privileged because their content is obviously useful to preparing her defense. We are not persuaded. Although it is true that documents containing information relating to the actual express communications between individuals and their attorneys may, on their face, establish the communication element necessary to invoke the privilege; *United States* v. *DeFonte*, supra, 441 F.3d 95; the documents within exhibit A do not reflect actual communications between the defendant and her attorney. Exhibit A contains three categories of documents: (1) handwritten documents describing the incident that led to the decedent's death and the conditions leading to it, (2) handwritten documents describing a health related problem of the defendant, and (3) printouts from a medical provider summarizing the defendant's visit and evaluation there in April, 2008, and containing handwritten phone numbers in the margins.

The trial court did not clearly err in determining that the defendant did not establish that the third category of documents, the medical records, were anything other than preexisting documents that were outside the scope of the attorney-client privilege. They predate the incident that gave rise to the attorney-client relationship by about nine years, and the defendant introduced no evidence to establish that they were created for the purpose of seeking legal advice. If the defendant thought

that the documents could aid in her defense, brought them to her attorney, and discussed the information contained therein, she may have been able to establish that the conversation about the information would be privileged, but not the documents themselves. See 1 Restatement (Third), supra, § 69, comment (j), pp. 529–30 ("A client may communicate information to a lawyer by sending writings or other kinds of documentary or electronic recordings that came into existence prior to the time that the client communicates with the lawyer. The privilege protects the information that the client so communicated but not the [preexisting] document or record itself.").

On the basis of the record, we agree with the trial court that the defendant failed to establish whether the first two categories of documents (the handwritten notes describing the incident that led to the decedent's death and the medical issues) were created for the purpose of seeking legal advice or created for some other personal purpose and are more properly characterized as preexisting documents. None of these handwritten documents reflects notes describing actual communications or memorializations of communications between the defendant and her attorney.

Documents that do not reflect actual communications between attorney and client require additional evidence by the party asserting the attorney-client privilege to establish that they were created for the purpose of seeking legal advice and that actual legal advice was sought or intended to be sought. In the present case, the defendant did not adduce any additional evidence to establish that she created the documents for the purpose of seeking legal advice or that she communicated or intended to communicate the documents to her attorney. Without more, the defendant has not established that the trial court clearly erred in determin-

ing that she failed to establish that the documents within exhibit A are privileged communications.

The defendant asks us to rely on an intermediate appellate court case from the state of Washington for the proposition that the content of written materials, such as those contained within exhibit A, suffices to establish intent and, therefore, that the documents within exhibit A warrant the protection of the attorney-client privilege. See *State* v. *Perrow*, 156 Wn. App. 322, 231 P.3d 853 (2010). In *Perrow*, the Washington Court of Appeals upheld the trial court's dismissal of criminal charges against the defendant on the ground that he was prejudiced when a police detective seized, reviewed and analyzed privileged documents that the defendant had prepared at the direction of his attorney. Id., 325–26. *Perrow* is clearly distinguishable from the present case.

In *Perrow*, the trial court made the following findings: "(1) . . . [the defendant] retained the services of . . . an attorney; (2) [the attorney's] representation involved . . . representation during the investigative stage of the potential criminal charges . . . (3) [the defendant] was aware of [the] allegations based on his conversation with [the detective] . . . (4) [the attorney] first met with [the defendant] . . . after previously speaking with him by telephone and receiving faxed documents concerning the allegations; (5) [the attorney] asked [the defendant] to provide him with information about . . . [the] allegations; (6) during . . . [a] meeting, [the attorney] asked [the defendant] to gather additional information and to put that information into writing; (7) [the defendant] prepared written materials for his attorney which consisted of a green composition book, a black composition book, miscellaneous notes located in his office, and a yellow [notepad]; and (8) [the attorney] met with [the defendant] . . . to review the information and [to] discuss the case." Id., 329. On the basis of those findings, the trial court concluded: "An [attorney-client] relationship had been formed and existed at

the time the papers and notebooks were seized . . . ." (Internal quotation marks omitted.) Id. The state, on appeal, did not challenge those findings, and the appellate court agreed that the privilege applied. Id., 329–30.

So far as the elements necessary to establish the applicability of the attorney-client privilege in Washington are consistent with our jurisprudence on the privilege, the defendant in the present case has failed to establish nearly every single element that the defendant in *Perrow* established. Although there is evidence within exhibit B that the defendant spoke to several attorneys, the defendant did not establish that she retained the services of her attorney prior to the execution of the search warrant. Nor did she establish that she met with her attorney prior to preparing the documents or that her attorney asked her to prepare information about the allegations. Finally, she did not establish that she prepared the written materials for her attorney or that she met with her attorney for the purpose of having counsel review those materials. We therefore conclude that the trial court did not clearly err when it declined to blanket these documents with the protection of the attorney-client privilege without evidence of the defendant's intent to create the documents for the purpose of seeking legal advice.

4

Relatedly, the defendant argues that the documents within exhibit A are covered by the attorney-client privilege because they are substantively identical to, or are copies of, documents contained within exhibit B. The defendant asserts that, because the parties stipulated that the contents of exhibit B are privileged, the contents of exhibit A must also be privileged. The defendant argues that, because almost every one of the approximately twenty-five pages within exhibit A is substantively identical to some of the approximately 150 pages

within exhibit B, "[i]t makes no sense that the same statement and documents that the state admitted were privileged in one file were not in another [file] . . . ." We disagree. Our review of the documents contained within exhibits A and B confirms that, with the exception of one document with the name, phone number, and date of contact with a medical doctor, the entire contents of exhibit A are substantively identical to documents also contained within exhibit B. However, on this record, we are unable to agree with the defendant that she has demonstrated that the documents within exhibit A are covered by the attorney-client privilege.[13]

We disagree with the defendant's statement that the documents are "the same . . . ." In fact, the documents are not "the same . . . ." Both exhibit A and exhibit B contain "the narrative" document, but they are not exact copies because the defendant's initials are in different locations on the pages. See footnote 5 of this opinion. Additionally, there are many versions of the narrative describing the incident that led to the decedent's death that are told in substantively different ways and are of different lengths and detail. This is not a case in which a lawyer or client printed an e-mail exchange that took place (a communication) and kept one physical copy in a file folder and saved a duplicate copy in an electronic file. The present case is notably

[13] Exhibit A is made up not of the original documents seized from the defendant's home but of photocopies made by the police. Therefore, our ability to review the documents is somewhat hampered. The trial court did not make a finding as to whether the materials in exhibit A were exact copies of the documents within exhibit B (which is made up of the documents actually seized from the defendant's home). Although the contents of the narratives are identical, the documents have different markings. For example, the narratives in exhibits A and B contain the initials of the defendant and the year in different locations on the pages. See footnote 5 of this opinion. The defendant did not establish which narrative she handwrote first, when she made copies, or when and for what purpose she marked those copies differently. As noted in footnote 3 of this opinion, the trial court has sealed exhibit B. We have reviewed exhibit B in camera and necessarily describe the documents within it only generally.

distinct from that scenario—most importantly because the documents are not, on their face, communications between attorney and client. The file contains a variety of documents—some that appear to be more like journal entries, others more narrative in style and describing traumatic events, and others that are clearly preexisting documents. See part II A 3 of this opinion. Nothing within the documents suggests that the writings reflect communications between the defendant and her attorney. Finally, the defendant has not established, and we cannot infer, that the documents were created at the behest of an attorney and for the purpose of seeking legal advice. The documents could just as easily be viewed as preexisting documents created for some other personal reason. Simply stated, nothing in the record supports the defendant's position that the documents within exhibit A are identical copies of privileged communications.

The defendant next claims that the state's stipulation as to exhibit B should transfer to exhibit A to render the documents within exhibit A privileged. This argument is belied by the trial court record. Notably, the defendant did not raise this issue before the trial court. Rather, both parties proceeded with the *Lenarz* hearing under the assumption that the stipulation applied only to exhibit B, not exhibit A. The defendant initially proposed the idea of a stipulation toward the end of the first day of the *Lenarz* hearing. Defense counsel addressed the trial court, stating: "In the effort to streamline this process because these examinations have been—they got to be excruciating to listen to—through the court, I was going to ask that the state, if [it] would stipulate to the fact that the criminal defense attorney file, labeled October, 2017 . . . is privileged. Would the state stipulate to that?" The defendant had first discussed the idea with the state over the preceding trial court break. The state responded: "I thought that was the whole purpose of this hearing, Your Honor.

And, obviously, this is the first that I'm hearing of it. If counsel had brought this to my attention a week ago, three days ago, I could have actually reflected on that and done, you know, my due diligence . . . . I am remiss at this point to do that at this exact moment."

On the second to last day of the *Lenarz* hearing, the state agreed to the defendant's suggestion that the parties stipulate to the privilege covering the contents of exhibit B. The written stipulation provided in relevant part: "The aforementioned blue accordion folder marked "CRIMINAL DEFENSE ATTORNEY Oct 2017" and its contents are protected by the attorney-client privilege . . . ." Before accepting the stipulation, the trial court discussed the matter with the parties on the record.[14] It was clear from this discussion that defense counsel, the prosecutor, and the trial court all understood that the state had stipulated that the privilege applied only to the content of exhibit B (as the defendant had initially suggested), and that the state contested the privilege as to the contents of exhibits A and

[14] The following colloquy took place:

"The Court: . . . That's a stipulation, the state, stipulating, Attorney Watson, that exhibit B . . . in its entirety [consists of] items protected by the attorney-client privilege?

"[The Prosecutor]: That's the basis of the stipulation, Your Honor. What I've discussed with [defense counsel] is that the state didn't feel as though it could make an argument to the court in light of the evidence that was adduced at trial that would support a finding that it wasn't. So, the state entered into that stipulation agreement with [defense counsel], specifically as it pertains to [exhibit B], which is the criminal defense attorney file marked October . . . 2017; *that stipulation doesn't cover, as it's—it's not specifically indicated in that document, but it doesn't cover* [exhibits A and C]. . . .

"The Court: And, with specificity, *the state is not stipulating and is contesting whether or not the contents of state police* [*exhibit A and C*] *are privileged*?

"[The Prosecutor]: Correct, Your Honor. . . .

"The Court: Had you discuss[ed] this with your client? . . .

"[Defense Counsel]: Yes, Your Honor. . . . I faxed a copy to her. We reviewed it. We discussed it on multiple occasions over the weekend, and she agrees with the same." (Emphasis added.)

C. Defense counsel stated that he had discussed the stipulation with the defendant on multiple occasions and that she also agreed to the terms of the stipulation.

The record and the written agreement establish that the parties intended that the attorney-client privilege would apply only to the contents of exhibit B, not exhibit A. The parties voluntarily entered into an agreement setting to rest their dispute about the privilege covering the contents of exhibit B. See, e.g., *Gillis* v. *Gillis*, 214 Conn. 336, 339–40, 572 A.2d 323 (1990). In this appeal, the defendant would have us alter that agreement by extending the stipulation to protect the contents of exhibit A as privileged. We decline to do so. See, e.g., id., 340 (a "stipulation . . . cannot be altered or set aside without the consent of all the parties, unless it is shown that the stipulation was obtained by fraud, accident or mistake" (internal quotation marks omitted)). This stipulation, in and of itself, is insufficient to warrant extending the privilege to the contents of exhibit A. Under the circumstances of this case, a stipulation as to one document cannot serve to establish that different versions of substantively identical documents located in a different file are records of a communication or that the defendant created the new versions of the documents for the purpose of seeking legal advice. To conclude otherwise could expand the privilege to cover documents that have no indicia of a communication between attorney and client. The attorney-client privilege does not serve that purpose. The privilege is narrowly applied, strictly construed, and applies only when necessary to foster full and frank *communications* between attorneys and their clients. See, e.g., *Harrington* v. *Freedom of Information Commission*, supra, 323 Conn. 12. That interest is not served by permitting a blanket application of the privilege to these documents within exhibit A, for which the defendant has offered no evidence to establish that she either com-

municated with or intended to communicate with her attorney for the purpose of seeking legal advice.[15]

B

Exhibit C is referred to by the parties as the defendant's estate planning file. According to the defendant, all of the documents within the file should be covered by the attorney-client privilege as communications made to an attorney for the purpose of drafting a will, pursuant to *Gould*, *Larson*, *Bennet*, *Wells & McDonnell*, *P.C.* v. *Panico*, 273 Conn. 315, 869 A.2d 653 (2005). In *Panico*, we reasoned that a draft of an unexecuted will is a form of communication. Id., 323. We concluded that communications, in the form of drafts of a will, between a client and an attorney that do not result in an executed will are privileged. Id., 320. The defendant's reliance on *Panico* is unavailing, however, because exhibit C contains an *executed* will, not a draft of a will that would be considered a communication within the context of a will dispute. The estate planning attorney who prepared the defendant's will did not testify during the *Lenarz* hearing to establish that the documents within the estate planning file were communicated to her by the defendant for will preparation purposes or to develop a trial strategy. The defendant herself did not testify. The defendant relies exclusively on the testi-

[15] The state asserts in its brief to this court that the defendant waived the privilege as to exhibit A by failing to claim it at the time of the police search of her home, at the time of her arrest, or at her arraignment. According to the state, the defendant was the only person who knew about the existence, location, and placements of the documents in her home, and she alone had the "responsibility to assert and maintain [the attorney-client privilege] . . . and failed to do so." (Citation omitted.) Our precedent on the issue indicates that "[voluntary] disclosure of confidential communications . . . constitutes a waiver of [the] privilege as to those items." (Internal quotation marks omitted.) *Harp* v. *King*, 266 Conn. 747, 767, 835 A.2d 953 (2003). Because we conclude that the trial court did not err in determining that the defendant failed to establish that the documents within exhibit A are covered by the privilege, however, we need not reach the issue of whether she waived the privilege.

mony of Dubois, who testified that, in his expert opinion, the documents were privileged. The trial court permitted Dubois' testimony as to the defendant's hearsay statements of intent solely as a foundation for his expert opinion, not for the truth of whether the defendant actually intended to communicate, or communicated, the documents to her attorney. See part II A 1 of this opinion. We therefore have no record as to whether the documents within the file were in fact documents created, or communicated to an attorney, for the purpose of seeking legal advice.

The privilege protects *communications* between client and attorney for the purpose of seeking legal advice; *Ullmann* v. *State*, 230 Conn. 698, 711, 647 A.2d 324 (1994); and the defendant must meet her burden of establishing that what she claims is protected by the privilege was in fact a communication between herself and her attorney. Unlike exhibit A, exhibit C contains documents that appear to be reports or invoices generated by third parties, for example, a life insurance policy statement. Such documents could be considered communications if the defendant has established that they were communications inextricably linked to the giving of legal advice. See, e.g., *Olson* v. *Accessory Controls & Equipment Corp.*, supra, 254 Conn. 168 (upholding Appellate Court's conclusion that report compiled by third party was covered by attorney-client privilege because attorney hired third party to assemble report so attorney could provide appropriate legal advice to client and report was "connected intimately to the rendering of legal advice"). In *Olson*, the attorney had written suggestions on a report compiled by a third party reflecting the attorney's legal opinion, and those suggestions directly related to how the client should respond to a state environmental compliance order. See id., 167–68.

Additionally, the trial court record in *Olson* established that the attorney had hired the third party to

conduct studies and to assemble a report so that the attorney "could utilize . . . facts [contained in the studies and report] in tendering legal . . . advice to the defendant in anticipation of possible litigation . . . ." Id., 165. In that case, the record and the documents supported a conclusion that the report amounted to a communication between the client and the attorney. See id., 168. The record and the documents in the present case are insufficient to support the defendant's assertion that the documents contained within exhibit C were communications inextricably linked to the giving of legal advice.

In light of the defendant's having offered no evidence to the trial court that the documents within exhibit C should be covered by the attorney-client privilege, we find no factual basis to support a conclusion that many of the documents within exhibit C are privileged, preexisting documents. Exhibit C includes statements and invoices from home oil deliveries, home electricity and water company statements, and photocopies of business cards. Other documents within exhibit C include an original and two copies of a power of attorney, an invoice from the attorney who prepared the power of attorney, a life insurance premium statement, and two copies of a document written by the decedent in 2007 describing his wishes for the final disposition of his body after his death.

More important, the documents within exhibit C do not contain anything suggestive of the defendant's trial strategy. When the state invades an individual's attorney-client privilege, as long as the documents are not trial strategy, the defendant bears the burden of establishing that her prosecution will be prejudiced. See *State* v. *Lenarz*, supra, 301 Conn. 427–28 n.8.

The trial court did not clearly err in determining that the defendant did not satisfy her burden of establishing that she communicated, or intended to communicate,

the documents to an attorney for the purpose of seeking legal advice or that the documents are in any way prejudicial to her prosecution.[16]

III

Having concluded that the trial court correctly determined that the defendant had failed to establish that the documents within exhibits A and C are protected by the attorney-client privilege, we next consider whether the prejudice to the defendant from the invasion of the privilege regarding exhibit B can be cured by a remedy short of dismissal of the charges against her. In doing so, we must consider the state's conduct and any prejudice to the defendant. The defendant contends that she was prejudiced in two ways: (1) investigators and prosecutors had access to privileged communications that would impact her right to effective counsel and a fair prosecution—the issue in *Lenarz*, and (2) her privileged communications had been exposed to the *general public* to the point that she would not be able to select an impartial or unbiased jury. Cf. *State* v. *Reynolds*, 264 Conn. 1, 224–25, 836 A.2d 224 (2003) (motion for change of venue properly denied when pretrial publicity was not so pervasive or prejudicial as to require new venue, and there was no reason to believe that any influence from such publicity could not be overcome by voir dire process), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004). We con-

[16] The trial court found that a limited number of documents within exhibit C were covered by the privilege but did not identify those documents. The state does not challenge the trial court's conclusion that certain documents within exhibit C are privileged. Rather, the state contends that, because none of the documents within exhibit C reflects "trial strategy," the defendant bears the burden of establishing that she has been prejudiced by any invasion of the attorney-client privilege as to those documents. See *State* v. *Lenarz*, supra, 301 Conn. 427–28 n.8. The trial court did not abuse its discretion in determining that the defendant did not put forth evidence to establish that dismissal of the charges against her is warranted on the basis of prejudice to her prosecution resulting from the fact that the police read the contents of exhibit C. See part III of this opinion.

clude that the trial court's comprehensive order for the further prosecution of the case can serve to cure any prejudice because the state's conduct and the prejudice to the defendant did not rise to the level of that in *Lenarz*. Individual voir dire of prospective jurors can serve to mitigate any prejudice that the defendant may have suffered as a result of the public's exposure to privileged materials.

This court reviews the remedy ordered by the trial court—including the denial of the defendant's motion to dismiss the criminal charges—for abuse of discretion. See *State* v. *Lenarz*, supra, 301 Conn. 443 ("the decision to grant or deny a motion to dismiss a criminal charge rests within the sound discretion of the trial court, and is one that we will not disturb on appeal absent a clear abuse of that discretion" (internal quotation marks omitted)). For guidance, we look to our analysis in *Lenarz*, in which we concluded that the state's conduct and the prejudice to the defendant in that case warranted dismissal of the charge of which he had been tried and convicted. See id., 419. In *Lenarz*, the police seized the defendant's computer and sent it to the state forensic science laboratory to be forensically searched. Id., 420. The next day, defense counsel advised the trial court that materials in the computer were attorney-client privileged. Id. The trial court issued an order providing that any communications between the defendant and defense counsel should remain unread. Id. The state laboratory discovered written materials in the computer containing detailed discussions of the defendant's trial strategy. Id., 421. One document, titled "[s]trategy [i]ssues," listed objectives for a court appearance by the defendant. (Internal quotation marks omitted.) Id., 442. Another document stated near the top of its first page that "[t]he following material is confidential and I would ask that you review it." (Internal quotation marks omitted.) Id., 441–42. A third document stated within its first two sentences that

the defendant had been asked to keep a log of events pertinent to the case and that "[t]his document is the result . . . ." (Internal quotation marks omitted.) Id., 442.

Having found and read the documents, state laboratory personnel copied them and sent them to the police department. Id., 421. The police department forwarded them to the prosecutor, who provided copies for defense counsel. Id. The trial court ordered the police and the prosecutor to turn over any questionable materials to the court and ordered the materials to be placed under seal. Id. The prosecutor did not dispute that he had maintained possession of the materials for six weeks. Id.

On appeal, we explained that the documents that the prosecutor had read, copied, and held contained "highly specific and detailed" communications about the defendant's "trial strategy." Id., 439. The state, by reading those documents, invaded the defendant's attorney-client privilege. Rather than placing the burden on the defendant to establish that he was prejudiced as a result of the invasion, we concluded that, when the materials reveal a defendant's trial strategy, prejudice to the defendant may be presumed. Id., 425. Knowledge of a defendant's trial strategy, after all, threatens a defendant's sixth amendment right to the assistance of counsel because "[f]ree two-way communication between client and attorney is essential if the professional assistance guaranteed by the sixth amendment is to be meaningful." (Internal quotation marks omitted.) Id., 434. We also explained that the state may then "rebut that presumption by clear and convincing evidence." Id., 425. Ultimately, in *Lenarz*, we concluded that the state had failed to rebut the presumption, specifically because the prosecutor, after reviewing materials containing trial strategy, tried the case to conclusion, and the prejudice caused by the state's intrusion into the

defendant's attorney-client privilege would have been irreparable on retrial. Id., 426. We therefore reversed the judgment of conviction and remanded the case to the trial court with direction to grant the defendant's motion to dismiss the charge of which he had been convicted and to render judgment thereon. Id., 452.

To be sure, some aspects of the search and seizure of the defendant's documents in the present case give us pause, and there is room for improvement in the training of police officers. No officers should read out loud the contents of potentially privileged documents. Once aware that documents are potentially privileged, officers should take immediate steps to prevent any further invasion of the privilege or prejudice to any individual. The officers executing the second search warrant of the defendant's home in the present case clearly should have exercised greater caution in handling the privileged and potentially privileged documents that they discovered. However, the pretrial remedial measures promptly taken by the state support a conclusion that the trial court did not abuse its discretion when it concluded that the conduct at issue did not rise to the extreme level of warranting a dismissal of the charges against the defendant, as was the case in *Lenarz*.

On February 6, 2018, detectives, including Detectives Corey Clabby and Edmund Vayan, arrived at the defendant's home to execute a search warrant. Clabby testified at the *Lenarz* hearing that, during their search, they found several locked file cabinets. Before unlocking any of the file cabinets, they waited "several hours" for the second search warrant to arrive. Eventually, the crime scene supervisor, Lieutenant Mark Davison, decided to proceed, and Vayan cut most of the locks to examine the contents of the drawers.[17] Clabby found

[17] The record is unclear as to whether the locks were cut before or after the second search warrant was issued or after it was brought to the officers at the defendant's home by Fitzsimons. The trial court found that the docu-

and took out exhibit B, labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017." He read through the file in its entirety.

When defense counsel questioned Clabby as to why he read through a file clearly marked for a lawyer, Clabby responded that he could not tell whose file it was. He stated that there were two people living in the home—the defendant and the decedent—and that he did not know who the documents belonged to at the time. He did not recall seeing the defendant's name or signature on any of the documents, and, thus, he could not verify whether the writings belonged to the defendant. He also testified that, in his experience, contacting an attorney before an arrest would be unusual and that he "had no evidence to support the fact that [the defendant] had contacted the attorney at that time." After progressing through the file, Clabby began to realize that it was likely that exhibit B did in fact belong to the defendant. He nonetheless continued to read through the entire file.

Clabby also looked through exhibit A, labeled "INCIDENT 2017," which was located directly behind the "CRIMINAL DEFENSE ATTORNEY Oct 2017" file. The trial court credited Clabby's testimony that he read out loud from a document located in the incident file but never read out loud from documents located within the criminal defense file.[18] Several other detectives were present when Clabby read from the incident file. Clabby

ments were seized during the execution of the second search warrant. Neither party challenges this finding in this appeal, and the issue of the legality of the search under the fourth amendment to the United States constitution is not before us.

[18] To the extent that the defendant argues that Clabby either read from the criminal defense file or read out loud from the incident file after intentionally locating a similar document within the incident file, the trial court explicitly credited Clabby's testimony as to how the discovery and reading of documents proceeded. As a reviewing court, we defer to such credibility determinations. See, e.g., *State* v. *Kendrick*, 314 Conn. 212, 223, 100 A.3d 821 (2014).

testified that he did not discuss the contents of the files with the other state troopers on the scene. Clabby further testified that, when he realized the gravity of the contents of the criminal defense file, he called Vayan into the room, they discussed the matter, and brought it to the attention of Davison. Clabby testified that he then placed the documents in a banker's box so that they could be moved to the living room for processing. Vayan corroborated the sequence of events outlined by Clabby, and the trial court credited Vayan's testimony as well.

Preleski testified as to how the prosecution of the defendant proceeded following the February 6, 2018 search and seizure of the documents. Preleski testified that Watson, the prosecutor, contacted him on March 19, 2018, regarding the seized documents. That same day, Preleski personally reviewed the documents and became concerned "that there may have been documents that were covered by the attorney-client privilege." The following day, March 20, 2018, Preleski notified defense counsel, and the administrative judge, who also was the presiding criminal judge for the New Britain judicial district, about the nature of the documents. The materials were then submitted under seal to the court on either March 21 or 22, 2018. Within those few days, Preleski also alerted Chief State's Attorney Kevin T. Kane to indicate to him that he "[felt] that we had a *Lenarz* issue in the office with respect to . . . those documents."

About two months later, on May 10 and 11, 2018, Preleski and Kane reviewed all of the seized documents after deciding that Preleski's office, inclusive of the prosecutor, Watson, "would, in substance, become the taint team"—"a separate group of government attorneys who would be responsible for litigating any issues that may arise concerning the government examination of [the] defendant, but who would not communicate what they learned to the prosecutors." *United States*

v. *Taveras*, 233 F.R.D. 318, 320 (E.D.N.Y. 2006). Between May 17 and 21, 2018, Preleski conducted interviews to determine whether the state police Western District Major Crime Squad could continue in an investigatory role. Preleski and Watson decided that the case would be removed from the Western District Major Crime Squad and that any further investigation would be handled by the state police Central District Major Crime Unit. Individuals from the Western District Crime Squad were told not to discuss the contents of the documents they had seized.

Preleski also testified that he and Watson decided that the case, moving forward, would be handled by the Hartford judicial district under the direction of Hartford State's Attorney Gail P. Hardy and Supervisory Assistant State's Attorney Vicki Melchiorre. Preleski testified that he took steps to confirm that the Hartford judicial district had not had any access to the contents of the documents. Preleski recommended, and the trial court adopted, additional steps regarding the sealing of the documents to prevent exposure to the documents by others. The trial court did not adopt Preleski's recommendation to order the case to be handled by the Hartford judicial district. Instead, the court ordered the case transferred to a judicial district to be determined by the chief administrative judge for criminal matters, with input from Kane, to be litigated by prosecutors who had no knowledge of the privileged communications.

Our review of the trial court's remedy regarding the search and seizure of the documents at issue, and the remedial steps instituted following the seizure, leads us to conclude that the trial court did not abuse its discretion by denying the defendant's motion to dismiss the criminal charges against her. Rather, the trial court thoughtfully adopted well reasoned steps that can limit any unauthorized exposure to documents covered by the privilege.

The character of the majority of the privileged documents that prosecutors read in the present case is quite different from the e-mails between the defendant and his attorney that were implicated in *Lenarz*. Many appear to be common personal documents such as receipts, bills, invoices, etc. Other documents are clearly of a personal and private nature in that they describe a range of traumatic to everyday events of the defendant's life but not communications to an attorney or trial strategy. They read like contemporaneous notes, more akin to journal notes, and, although personal and private, do not obviously suggest a communication with an attorney or a trial strategy. The documents that appear to pose questions for an attorney could have been interpreted as the defendant's thoughts about what a trial strategy might be but are not as specific or detailed as the communications in *Lenarz*. In *Lenarz*, the defendant and the attorney had communicated about specific witnesses and what they would potentially say while testifying during trial. See *State* v. *Lenarz*, supra, 301 Conn. 446–47 and n.22. In the present case, it was not apparent to the detectives reviewing the documents whether the defendant had actually communicated her strategies to her attorney, whether the attorney agreed, who the witnesses might be, or what strategy might be adopted. Even if we assume, arguendo, that some of the documents at issue did outline trial strategy, the state has already conceded that the defendant was prejudiced but argues that the prejudice can be cured by remedial measures.

Also, the trial court in *Lenarz* had alerted the parties that there could be privileged materials in the defendant's computer. See id., 420. The prosecutor in *Lenarz* defied a court order, read privileged materials, and held onto those materials for six weeks before notifying defense counsel. Id., 421. In contrast, the trial court in the present case credited the testimony of witnesses who stated that the exposure to privileged materials

was not intentional. Once alerted to the privileged nature of the documents, the state halted the investigation of the defendant, created a taint team, removed the case from the original investigative body, and assigned new prosecutors. The state's action in the present case was swift, in contrast to the state's actions in *Lenarz*.

Finally, and critical to the issue of remedying prejudice, in *Lenarz*, the case had proceeded through trial to the defendant's conviction with the same prosecutor who had read and held onto trial strategy materials for six weeks. See id., 426. Because the prosecutor had been exposed to the privileged materials, the state had the use of the information in preparing for trial. Id., 445. The record even "strongly" suggested that the "prosecutor may have revealed the defendant's trial strategy to witnesses and investigators"; id.; and, therefore, a remedy short of dismissal of the charges of which the defendant had been convicted, including remand, would not have been appropriate. See id., 444. We explicitly stated in *Lenarz* that one method of curing prejudice is by appointing a new prosecutor who has not been exposed to the privileged materials—the exact remedy that the trial court ordered in the present case before the investigation, which was in its incipient stages, proceeded any further. See id., 451. Thus, we conclude that the trial court in the present case did not abuse its discretion by not dismissing the charges prior to trial and, instead, entering an order intended to protect the defendant from further prejudice.

Regarding the exposure of documents that did occur and any prejudice that the defendant may have suffered as a result of the public's exposure to them, the defendant's constitutional right to individual voir dire of potential jurors under article first, § 19, of the state constitution, which is incorporated in the General Statutes and the rules of practice, can serve to mitigate any

prejudice. See General Statutes § 54-82f; Practice Book § 42-12. "One of the principal purposes of individual voir dire . . . is the discovery of factors that may predispose a prospective juror to decide a case on legally irrelevant grounds . . . . [I]f there is any likelihood that some prejudice is in the juror's mind which will even subconsciously affect his [or her] decision of the case, the party who may be adversely affected should be permitted questions designed to uncover that prejudice." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Griffin*, 251 Conn. 671, 698–99, 741 A.2d 913 (1999). We are confident that individual voir dire can mitigate any prejudice to the defendant by revealing whether prospective jurors have been exposed to any privileged materials and by uncovering any potential biases. We will not prejudge, before trial, whether the trial court can or cannot ensure the defendant a fair trial. See *State* v. *Reynolds*, supra, 264 Conn. 223 ("A defendant cannot rely . . . on the mere fact of extensive pretrial news coverage to establish the existence of inherently prejudicial publicity. Prominence does not, in itself, provide prejudice." (Internal quotation marks omitted.)).

The defendant contends that she was unable to demonstrate the extent of the prejudice she suffered as a result of the public's exposure to privileged materials because the trial court precluded her from offering the testimony of David Lasker, "an expert witness in the subject matter of quantifying media exposure to the general population through the medium of the Internet, radio and television." According to the defendant, Lasker "would have demonstrated [the existence of] insurmountable prejudice" as a result of the publication in the media of the "narrative" within the arrest warrant application. The trial court permitted the defendant to make an extensive offer of proof as to the testimony of Lasker. On the basis of that proffer, the court determined that Lasker's opinion would not be sufficiently

reliable, would not be relevant, and would not assist the finder of fact in determining whether any prejudice could be remedied. We conclude that the trial court did not abuse its discretion in precluding the expert's testimony at this stage of the proceeding.

The defendant's main concern centered on the fact that the public was exposed to privileged materials when the police quoted from those materials in the arrest warrant application, which the media published. That concern is obviated by our determination that information in the documents within exhibit A that was then recited in the arrest warrant application is not covered by the attorney-client privilege. We conclude that the trial court did not abuse its discretion in precluding the testimony of Lasker on the basis of its articulated justifications and our determination that exhibit A is not covered by the attorney-client privilege. Moreover, we will not presume that the trial court—as in any case—cannot, through individual voir dire and instructions to the jury, ensure that the defendant will not suffer prejudice from media coverage surrounding this case when it proceeds to trial.

Therefore, we conclude that the trial court did not abuse its discretion in determining that dismissal of the charges against the defendant is not warranted and that the state met its burden of showing, by clear and convincing evidence, that the remedial steps it took can cure any presumed prejudice and prevent future prejudice to the defendant.

The trial court's order and decision denying the defendant's motion to dismiss the charges against her are affirmed.

In this opinion the other justices concurred.

McDONALD, J., concurring. I join the majority opinion and agree that, for the purpose of the *Lenarz* hear-

ing; see *State* v. *Lenarz*, 301 Conn. 417, 22 A.3d 536 (2011), cert. denied, 565 U.S. 1156, 132 S. Ct. 1095, 181 L. Ed. 2d 977 (2012); the trial court's determination that the defendant, Linda Kosuda-Bigazzi, failed to establish that the documents in exhibits A and C were protected by the attorney-client privilege was not clearly erroneous. I write separately to emphasize the unique factual circumstances of this case and that the trial court's determination was for a specific and limited purpose—to determine whether the criminal charges against the defendant should be dismissed. I do not read the majority opinion as addressing whether the defendant could reassert the attorney-client privilege if circumstances change at trial and the state seeks to affirmatively use this evidence against the defendant.

With respect to part II A of the majority opinion, this case presents a unique factual record that is unlikely to reoccur. Specifically, the documents that the defendant claims are privileged were located within three files, exhibits A, B, and C, in a locked filing cabinet. During the *Lenarz* hearing, the parties stipulated that all the documents contained in exhibit B, a file labeled "CRIMINAL DEFENSE ATTORNEY Oct 2017," were covered by the attorney-client privilege. The defendant contends that the privilege also covers the other two files that were seized by the police, exhibits A and C. The defendant asserts, among other things, that the documents contained in exhibit A, a file labeled "INCIDENT 2017," are privileged because they are substantively identical to some of the documents contained in exhibit B, which the state stipulated are privileged. Because the defendant did not establish that the documents in exhibit A are "communications" or that she created them with the intent to communicate them to an attorney for the purpose of seeking legal advice, I agree with the majority that the trial court's conclusion that the defendant failed to meet her burden of establishing that those

documents are privileged was not clearly erroneous. This determination, however, is based on the record solely as it was developed at the *Lenarz* hearing and does not necessarily preclude the defendant from reasserting the privilege at trial if the state seeks to affirmatively use this evidence against the defendant. That would present a different evidentiary issue. Cf. *State* v. *Casanova*, 255 Conn. 581, 594, 767 A.2d 1189 (2001) ("[the law of the case] doctrine is inapplicable here because the issue raised by the pretrial motion to dismiss was different from the evidentiary issue subsequently presented to the trial court"). The trial court's privilege determination was made in the context of determining whether the charges against the defendant should be dismissed in accordance with our decision in *State* v. *Lenarz*, supra, 301 Conn. 425–26, not whether the documents would be admissible at trial.

Accordingly, I concur in the majority opinion.

ORDERS

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STEPHEN J. WILLIAMS *v.* COMMISSIONER OF MOTOR VEHICLES

The plaintiff's petition for certification to appeal from the Appellate Court, 196 Conn. App. 907 (AC 41811), is denied.

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

Stephen J. Williams, self-represented, in support of the petition.

Anthony C. Famiglietti, assistant attorney general, and *Eileen Meskill*, assistant attorney general, in opposition.

Decided October 6, 2020

STATE OF CONNECTICUT *v.* NASIR R. HARGETT

The defendant's petition for certification to appeal from the Appellate Court, 196 Conn. App. 228 (AC 42405), is granted, limited to the following issues:

"1. Did the Appellate Court correctly conclude that the evidence was insufficient to entitle the defendant to a jury instruction on self-defense?

"2. Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in excluding as irrelevant evidence that the victim was under the influence of phencyclidine (PCP) at the time of the murder and that a woman had informed a group of individuals, including the defendant, that the victim had just robbed her at knifepoint?

"3. Did the Appellate Court correctly conclude that the trial court did not abuse its discretion in declining to sanction the state for its late disclosure of the murder weapon and related materials?"

Jennifer Bourn, supervisory assistant public defender, in support of the petition.

Robert J. Scheinblum, senior assistant state's attorney, in opposition.

Decided October 6, 2020

JAN GAWLIK *v.* SCOTT SEMPLE ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 197 Conn. App. 83 (AC 42550), is denied.

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

Jan Gawlik, self-represented, in support of the petition.

Steven R. Strom, assistant attorney general, in opposition.

Decided October 6, 2020

PATRICIA SPICER *v.* JOHN MONTAGNESE ET AL.

The plaintiff's petition for certification to appeal from the Appellate Court, 197 Conn. App. 902 (AC 42839), is denied.

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

Robert M. Singer, in support of the petition.

Decided October 6, 2020

STATE OF CONNECTICUT *v.* CHARLES J. INGALA

The defendant's petition for certification to appeal from the Appellate Court, 199 Conn. App. 240 (AC 41135), is denied.

Adele V. Patterson, senior assistant public defender, in support of the petition.

Timothy J. Sugrue, assistant state's attorney, in opposition.

Decided October 6, 2020

STATE OF CONNECTICUT *v.* ALFRED P. MAYO

The defendant's petition for certification to appeal from the Appellate Court, 199 Conn. App. 166 (AC 41562), is denied.

Alfred P. Mayo, self-represented, in support of the petition.

Denise B. Smoker, senior assistant state's attorney, in opposition.

Decided October 6, 2020

STATE OF CONNECTICUT *v.* CARLOS A. ROMERO

The defendant's petition for certification to appeal from the Appellate Court, 199 Conn. App. 39 (AC 42213), is denied.

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

J. Christopher Llinas, in support of the petition.

Mitchell S. Brody, senior assistant state's attorney, in opposition.

Decided October 6, 2020

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CONNECTICUT APPELLATE REPORTS

Vol. 200

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* JOHN PJURA
(AC 41869)

Prescott, Elgo and Devlin, Js.

Syllabus

The defendant, who had been convicted of the crimes of assault in the second degree and larceny in the sixth degree, appealed to this court from the judgment of the trial court, claiming that he was deprived of his right to a fair trial because of prosecutorial impropriety and that the evidence was insufficient to prove that he intended to cause the victim, H, serious injury when he punched H in the head and fractured his skull. The defendant had attempted to leave a shoe store with a pair of sneakers he had not paid for. H, an assistant manager at the store, and R, a cashier there, observed the defendant leave the store without paying for the sneakers. H followed the defendant into a neighboring store, where he confronted him and told him that he would not call the police if he returned the sneakers. The defendant complied and, as they headed back to the shoe store, H became uncomfortable and radioed R to call the police. The defendant then used his dominant right hand to punch H in the head with a closed fist, after which the defendant fled in his car. D, a shopper at the neighboring store, heard the impact of the punch about fifteen to twenty feet away. *Held*:

1. There was sufficient evidence from which the jury could have reasonably found that the act of punching H directly in the head and with great force was strongly corroborative of the defendant's intention to cause

serious physical injury in an effort to facilitate his escape; the punch caused a life-threatening injury, as it fractured H's skull in multiple places, rendered him unconscious and was heard by D fifteen to twenty feet away, and, although the defendant claimed that his intent was not to cause serious injury but to escape, he testified that he could have shoved H in the chest, punched him in the stomach, tripped him or tried running away rather than engaging in physical contact with H.

2. The defendant could not prevail on his claim that he was denied his right to a fair trial as a result of prosecutorial impropriety, as none of the challenged remarks was improper:

a. The prosecutor did not place evidence of the defendant's postarrest silence before the jury in violation of the trial court's orders, as the prosecutor asked C, a police detective, only about the defendant's conduct in response to C's request to photograph the defendant's hands during his detention by the police, the record was insufficient to determine if the prosecutor intended to elicit improper evidence as to postarrest silence, the question was open-ended, the type of evidence the prosecutor attempted to elicit was ambiguous, the court issued no formal ruling on a motion the defendant had filed to preclude evidence of his postarrest silence and instructed the jury that questions by the attorneys were not evidence; moreover, the prosecutor had a proper motive for asking the defendant on cross-examination if he felt remorse about the incident with H, as defense counsel's questions to the defendant on direct examination opened the door for the prosecutor's follow-up questions, and the prosecutor had a good faith basis to ask the defendant additional questions on recross-examination about his remorse, as the court previously had permitted the prosecutor on cross-examination to impeach the defendant's credibility as to his purported remorse.

b. The prosecutor invited the jury to draw reasonable inferences from the evidence and did not argue facts not in evidence during closing argument about the defendant's intent to cause H serious injury, as defense counsel did not object to the prosecutor's arguments, the defendant's testimony that he could have taken other action to get away and avoid arrest instead of punching H in the head supported the prosecutor's arguments, the prosecutor's arguments as to the defendant's motivation for shopping at H's store were not presented to the jury as facts but, instead, as a submission of a reasonable inferences the jury could draw from the facts and evidence, and the prosecutor's argument about the differing accounts of the incident by H and the defendant merely asked the jury to make a credibility determination.

c. The prosecutor did not frame his statements to the jury by suggesting that it would need to find that R and D lied about the location of the defendant's punch in order to find the defendant not guilty: the prosecutor's statements, to which defense counsel did not object, asked the jury to weigh the credibility of each witness and did not force the jury to find the defendant not guilty only if first concluded that R and

D had lied; moreover, even if R and D had lied, the jury could have found the defendant guilty on the basis of his testimony alone that he punched H in the head.

(*One judge concurring separately*)

Argued May 22—officially released October 20, 2020

Procedural History

Substitute information charging the defendant with one count each of the crimes of robbery in the first degree and assault in the second degree, brought to the Superior Court in the judicial district of Litchfield at Torrington and tried to the jury before *Danaher*, *J.*; verdict and judgment of guilty of assault in the second degree and the lesser included offense of larceny in the sixth degree, from which the defendant appealed to this court. *Affirmed.*

James B. Streeto, assistant public defender, with whom, on the brief, was *MarcAnthony Bonanno*, certified legal intern, for the appellant (defendant).

Brett R. Aiello, special deputy assistant state's attorney, with whom, on the brief, were *Dawn Gallo*, state's attorney, and *David R. Shannon*, senior assistant state's attorney, for the appellee (state).

Opinion

PRESCOTT, J. The defendant, John Pjura, appeals from the judgment of conviction, rendered after a jury trial, of one count of assault in the second degree in violation of General Statutes § 53a-60 (a) (1) and one count of larceny in the sixth degree in violation of General Statutes § 53a-125b. The defendant claims on appeal (1) that there was insufficient evidence to prove beyond a reasonable doubt that he intended to cause serious physical injury to the victim, and (2) that he was denied his right to a fair trial because the prosecutor committed improprieties during the trial by (a) attempting to place evidence of the defendant's postarrest silence

before the jury, (b) arguing facts not in evidence, and (c) arguing to the jury that, in order to find the defendant not guilty, it would have to find that two eyewitnesses and the victim were lying. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our discussion. On September 11, 2016, the defendant attended church with his girlfriend, her son, and her friends, Kim Barnard and Jay Barnard. At some point, Kim Barnard came up with the idea of going to a fair in Bethlehem. The defendant was reluctant to go to the fair because he had a hole in his shoes and was not comfortable with the idea of walking around a muddy fairground with them. Upon hearing this, Kim Barnard suggested that the defendant buy new shoes at a nearby Payless Shoes store. The defendant did not have the ability to pay for his own shoes, so Kim Barnard gave the defendant's girlfriend her credit card so the defendant could buy shoes.

Following the church service, the defendant left with his girlfriend and her son to buy some sneakers. They went to the Famous Footwear store in Torrington. The defendant found a pair of sneakers he liked, and he tried them on. The defendant believed that he could sneak out of the store without paying for the sneakers. To accomplish this, he put his old shoes into the shoe box, left the store, and entered the neighboring Target store.

The victim, Andrew Howe, an assistant store manager at Famous Footwear, observed the defendant trying on the shoes. He then saw the defendant put his old shoes into the shoe box and place the box back on the shelf. The victim and Anna Rogers, a cashier, saw the defendant leave the store without paying for the sneakers. The victim followed the defendant out of the store and

into Target. He confronted the defendant, told him that there were cameras everywhere within the store and that if the defendant returned the stolen shoes that he would not call the police. The defendant complied with the victim's directions, and the two headed back to Famous Footwear without a struggle or argument. While heading back to the store, however, the victim, sensing that the mood had changed, became uncomfortable and radioed Rogers to call the police. The defendant then punched the victim in the head with his dominant right hand, sprinted to his vehicle, and drove away. The force of the punch was so strong that Mark Dalessandro, a shopper at Target, heard its impact from approximately fifteen to twenty feet away. The victim was unable to brace himself and immediately collapsed to the ground. He suffered serious injuries, including a depressed skull fracture and a subarachnoid hemorrhage. He underwent surgery to reconstruct his skull. As a result of his injuries, he had to relearn to walk and to talk and was unable to drive.

After the incident, Torrington police sent out a "be on the lookout" alert with a description of the suspect. They also published a photograph of the suspect on their Facebook page. On September 18, 2016, several members from the Barnards' church approached Jay Barnard with the photograph of the suspect from the Facebook page. Jay Barnard recognized the defendant from the photograph. He confronted the defendant later that day and asked him either to turn himself in to the police or to clear up the matter. The defendant denied that the photograph was of him. Following this conversation, the defendant began walking in the direction of the police department. He did not, however, turn himself in to the police and instead began wandering around the area.

Later that day, the Torrington police were dispatched after a concerned citizen reported the presence of a

suspicious person in her backyard. The police located the defendant, but he managed to flee from them. Later that evening, the Torrington police were dispatched to a house where a suspicious person was reported to have been sleeping on a pantry floor. The officers located the suspicious person, who was identified as the defendant, and arrested him.

The defendant was charged with robbery in the first degree in violation of General Statutes § 53a-134 (a) (1) and assault in the second degree in violation of § 53a-60 (a) (1). The jury found the defendant not guilty of robbery but returned a guilty verdict on the lesser included offense of larceny in the sixth degree. The jury also found the defendant guilty of assault in the second degree. The court, *Danaher*, *J.*, sentenced the defendant to six years of imprisonment. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to prove beyond a reasonable doubt that he intended to cause serious physical injury to the victim. Specifically, the defendant asserts that there was no direct or circumstantial evidence from which the jury reasonably could infer that he acted with the necessary intent. The defendant further argues that the evidence established only his intent to flee the scene to avoid being taken into police custody. We disagree.

We begin our analysis with the well established standard of review for assessing an insufficiency of the evidence claim. "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 [jury] reasonably could have concluded that the cumulative

force of the evidence established guilt beyond a reasonable doubt. . . .

"We note that the jury 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 jury to conclude that a basic fact or an inferred fact is true, the jury 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." (Internal quotation marks omitted.) *State* v. *Papandrea*, 302 Conn. 340, 348–49, 26 A.3d 75 (2011).

"A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, the actor causes such injury to such person or to a third person . . . ." General Statutes § 53a-60 (a). "Serious physical injury" is statutorily defined as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . ." General Statutes § 53a-3 (4). "Assault in the second degree under § 53a–60 (a) (1) is a specific intent, rather than a general intent, crime." *State* v. *Perugini*, 153 Conn. App. 773, 780 n.7, 107 A.3d 435 (2014), cert. denied, 315 Conn. 911, 106 A.3d 305 (2015). "Intent is a question of fact, the determination of which should stand unless the conclusion drawn by the trier is an unreasonable one. . . . [T]he [jury is] not bound to accept as true the defendant's claim of lack of intent or his explanation of why he lacked intent. . . . Intent may be, and usually is, inferred from the defendant's verbal or physical

conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Intent may be gleaned from circumstantial evidence such as the type of weapon used, the manner in which it was used, the type of wound inflicted and the events leading up to and immediately following the incident. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Citations omitted; internal quotation marks omitted.) *State* v. *Andrews*, 114 Conn. App. 738, 744–45, 971 A.2d 63, cert. denied, 293 Conn. 901, 975 A.2d 1277 (2009).

Next, we examine the circumstantial evidence presented at trial from which the state contends a jury reasonably could infer that the defendant punched the victim with the intent to cause serious injury. The victim caught the defendant stealing the sneakers from Famous Footwear and instructed him to return them. While heading back to the store, the defendant became fearful of the prospect of going to jail and wanted to flee to evade responsibility for his actions. The defendant believed that the victim would continue to follow him if he tried to continue walking. As a result, the defendant threw a closed-fisted punch at the victim's head with his dominant right hand and fled the scene. The sound of the punch was audible to a bystander standing fifteen to twenty feet away. The punch was so hard that it knocked the victim unconscious and caused him to collapse to the ground without the ability to brace himself. The punch fractured the victim's skull in multiple places and was a life-threatening injury. Given these facts presented at trial, the jury reasonably could have found that the act of punching the victim directly and with great force in the head is strongly corroborative

of an intention to cause serious physical injury. See *State* v. *Mendez*, 154 Conn. App. 271, 279, 105 A.3d 917 (2014) (rejecting defendant's insufficiency of evidence claim and holding that jury could have reasonably inferred that defendant intended to cause serious physical injury when defendant punched victim in jaw).

The defendant further argues that when he punched the victim, his intent was not to cause serious physical injury but, rather, that his sole intent was to escape. We are not persuaded. "The existence of an intent to escape does not necessarily negate the existence of an intent to cause serious physical injury when making the escape." *State* v. *Andrews*, supra, 114 Conn. App. 746. Under the factual circumstances of this case, the jury reasonably could have inferred that the defendant intended to cause the victim serious physical injury in an effort to facilitate his escape. The defendant testified that he intended only to avoid capture when he punched the victim. He also admitted, however, that he could have tried shoving the victim in the chest, punching him in the stomach, or tripping him to avoid going to jail. He further stated that he could have tried running away rather than engaging in any physical contact with the victim, although he noted that the victim might have chased him if he attempted to flee because the victim appeared to be in good shape. From these facts, the jury reasonably could infer that the defendant believed it necessary to severely injure the victim in order to escape successfully. Such evidence permits a reasonable inference that, while the defendant was contemplating fleeing in order to avoid police involvement, he made an intentional decision to punch the victim in the head with great force in order to effectuate his escape. See id. (evidence permitted reasonable inference that defendant made intentional decision to turn car in direction of victim and to drive directly at him with intent to cause serious physical injury when attempting to

escape). We therefore conclude that there was sufficient evidence from which the jury could have reasonably found that the defendant intended to cause serious physical injury to the victim.

II

The defendant next claims that he was denied his right to a fair trial because the prosecutor committed improprieties during the trial by (1) attempting to place evidence of the defendant's postarrest silence before the jury, (2) arguing facts not in evidence, and (3) arguing to the jury that in order to find the defendant not guilty, it would have to find that two eyewitnesses and the victim were lying. Because we conclude that none of the challenged remarks was improper, we reject the defendant's claim.[1]

"The standard we apply to claims of prosecutorial impropriety is well established. In analyzing claims of

[1] As a preliminary matter, we note that the defendant did not preserve some of his claims of prosecutorial impropriety by objecting to the alleged improprieties at trial. Specifically, the defendant failed to object to the alleged improprieties that the prosecutor made during his closing argument by arguing facts not in evidence and by arguing to the jury that in order to find the defendant not guilty, it would have to find that two eyewitnesses and the victim were lying, in violation of *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002). Although the defendant did not preserve these claims, "[o]nce prosecutorial impropriety has been alleged . . . it is unnecessary for a defendant to seek to prevail under *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 it is unnecessary for an appellate court to review the defendant's claim under *Golding*." (Internal quotation marks omitted.) *State* v. *Fasanelli*, 163 Conn. App. 170, 174, 133 A.3d 921 (2016). "The reason for this is that . . . appellate review of claims of prosecutorial [impropriety involves] a determination of whether the defendant was deprived of his right to a fair trial, and this determination must involve the application of the factors set out by [our Supreme Court] in *State* v. *Williams*, 204 Conn. 523, 540, 529 A.2d 653 (1987). . . . The consideration of the fairness of the entire trial through the *Williams* factors duplicates, and, thus makes superfluous, a separate application of the *Golding* test." (Citation omitted; internal quotation marks omitted.) *State* v. *Daniel W.*, 180 Conn. App. 76, 110, 182 A.3d 665, cert. denied, 328 Conn. 929, 182 A.3d 638 (2018).

prosecutorial impropriety, we engage in a two step analytical process. . . . The two steps are separate and distinct. . . . We first examine whether prosecutorial impropriety occurred. . . . Second, if an impropriety exists, we then examine whether it deprived the defendant of his due process right to a fair trial. . . . In other words, an impropriety is an impropriety, regardless of its ultimate effect on the fairness of the trial. Whether that impropriety was harmful and thus caused or contributed to a due process violation involves a separate and distinct inquiry. . . . [If] 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 . . . .'' (Internal quotation marks omitted.) *State* v. *Brett B.*, 186 Conn. App. 563, 573, 200 A.3d 706 (2018), cert. denied, 330 Conn. 961, 199 A.3d 560 (2019). ''The defendant also has the burden to show that, considered in light of the whole trial, the improprieties were so egregious that they amounted to a denial of due process.'' (Internal quotation marks omitted.) Id.

''To determine whether any improper conduct by the [prosecutor] violated the defendant's fair trial rights is predicated on the factors set forth in *State* v. *Williams* [204 Conn. 523, 540, 529 A.2d 653 (1987)], with due consideration of whether that misconduct was objected to at trial. . . . These factors include the extent to which the [impropriety] was invited by defense conduct or argument . . . the severity of the [impropriety] . . . the frequency of the [impropriety] . . . the centrality of the [impropriety] to the critical issues in the case . . . the strength of the curative measures adopted . . . and the strength of the state's case.'' (Internal quotation marks omitted.) *State* v. *Rios*, 171 Conn. App. 1, 52, 156 A.3d 18, cert. denied, 325 Conn. 914, 159 A.3d 232 (2017). With these principles in mind, we turn to

whether the prosecutor's challenged remarks in the present case were improper.

A

The defendant first contends that the prosecutor improperly attempted to elicit evidence of the defendant's postarrest silence in direct violation of prior orders or rulings of the court that the state would not be permitted to question witnesses about the defendant's postarrest silence. Specifically, the defendant argues that the prosecutor violated these orders during his examination of Detective James Crean, who testified regarding the defendant's arrest and detention with the police, and during the prosecutor's cross-examination of the defendant in which he asked the defendant about whether he felt any remorse following the incident. The state responds that no impropriety occurred because the question to Detective Crean was open-ended, no answer was suggested, and no answer was elicited. Moreover, the state contends that defense counsel opened the door to the topic of remorse during direct examination, and that the prosecutor had a good faith basis for asking those questions due to the defendant's testimony on direct and redirect examination. On the basis of our review of the challenged remarks, we conclude that the prosecutor's conduct did not rise to the level of an impropriety.

The following additional facts are relevant to this claim. Prior to trial, the defendant filed a motion in limine seeking to bar the state from eliciting evidence of the defendant's postarrest silence pursuant to *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). The prosecutor acquiesced and indicated that he did not intend to offer such evidence. He stated that he intended to offer only evidence that the defendant initially failed to comply with Detective Crean's request

to photograph his hands. The prosecutor further represented that he intended to ask Detective Crean questions relating only to the defendant's conduct, rather than any statements he made or did not make. In light of the prosecutor's representation, the court did not enter an order on the defendant's motion in limine, stating that "no other action is necessary regarding this motion."

During the state's presentation of evidence, the prosecutor called Detective Crean to testify. During Detective Crean's direct examination, the prosecutor asked, "[w]ell, did you attempt to speak with—did you attempt to interview [the defendant]?" Defense counsel immediately objected to this question and asked to approach the bench. After a sidebar discussion, questioning resumed without the prosecutor pursuing the question to which counsel had objected, from which it can be inferred that the court sustained the objection. In any event, no answer was ever provided in response to the objectionable question.

With respect to the issue of the defendant's remorse, defense counsel, during her direct examination of the defendant, asked him what his reaction was when he learned of the extent of the victim's injuries after he had been arrested. The defendant responded that he was "[d]evastated" and "shocked" because he "didn't think that [he] could ever do that much damage, it's crazy." On cross-examination, the prosecutor followed up on this testimony by asking, "[n]ow, you would agree with me, in regard to that video, you showed no signs of remorse in a sense you didn't look back to see if he was okay, right?" Defense counsel objected to that question, and the prosecutor responded that his question was meant to impeach the credibility of the defendant's purported remorse. The court overruled the objection. The prosecutor then posed the question again, and the defendant responded, "I just wanted to

get away at that point, I was just scared, I just ran to the car."

On redirect examination, defense counsel asked the defendant if he had any remorse for his actions, and the defendant answered, "I'm deeply, deeply sorry about it. And I would never wish that upon anybody." On recross-examination, the prosecutor returned to this subject by asking the defendant, "at what point in time did you apologize to the manager?" The court sustained an objection to this question. The prosecutor then asked, "[a]nd don't answer this, there may be an objection; did you ever apologize to the manager?" The court sustained an additional objection, and then issued a limiting instruction to the jury regarding the questions concerning the defendant's remorse.[2]

It "is well settled that prosecutorial disobedience of a trial court order, even one that the prosecutor considers legally incorrect, constitutes improper conduct. . . . In many cases, however, this black letter principle is easier stated than applied. A prosecutor's advocacy obligations may occasionally drive him or her close to the line drawn by a trial court order regarding the use of certain evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 533, 122 A.3d 555 (2015). "Even when it is determined that a prosecutor has breached a trial court order, it can be difficult to distinguish between a mere evidentiary misstep and a potential due process violation. . . . Not every misstep by a prosecutor that exceeds the bounds of a trial court order rises to the level of prosecutorial impropriety that implicates a defendant's due process rights, thus requiring resort to the second step in the

[2] It is unclear from the record why the court sustained the objections to the prosecutor's additional questions about the defendant's remorse. Defense counsel did not state a reason for the objection, and the court did not explain why it sustained the objections, after having previously allowed the state to pursue this line of inquiry.

prosecutorial impropriety analysis." Id., 534. "Whether a prosecutorial question or comment that runs afoul of a trial court order implicates a defendant's due process rights is a case specific determination. This determination turns on the degree to which the breach undermines a trial court's ruling that protects the integrity of the fact-finding process by restricting the admission of unreliable or unduly prejudicial evidence." Id.

We turn first to the defendant's argument that the prosecutor committed an impropriety by asking Detective Crean if he had interviewed the defendant. We conclude that the objectionable question posed by the prosecutor, under the circumstances here, did not constitute impropriety.

We note at the outset that there was no formal order on the defendant's motion in limine. On the basis of the prosecutor's representation that he intended to offer only evidence of the defendant's conduct in response to Detective Crean's request to photograph his hands, the court concluded that no further action was necessary on the motion in limine. Any attempt by the prosecutor to ask a question eliciting evidence of the defendant's postarrest silence, albeit objectionable, would thus not constitute a direct violation of a court order.

"It would be a rare trial, indeed, if counsel for one side or the other did not pose an objectionable question . . . . Our rules of practice provide a means to prevent improper questions from being answered. The rules of practice [work] . . . when defense counsel's objection to [a] question [is] sustained by the court." *State* v. *Camacho*, 92 Conn. App. 271, 297, 884 A.2d 1038 (2005), cert. denied, 276 Conn. 935, 891 A.2d 1 (2006). In the present case, defense counsel immediately objected to the challenged question, which resulted in a sidebar during which the court either sustained the objection or the prosecutor agreed to withdraw the question. The

court also issued general instructions to the jury at the start of trial and after closing arguments in which it emphasized that questions, objections, arguments, and statements made by the attorneys were not evidence. Because we presume that jurors "follow the instructions given by a judge," we assume that the jury did not consider this question as evidence during its deliberation. (Internal quotation marks omitted.) *State* v. *Perez*, 147 Conn. App. 53, 111, 80 A.3d 103 (2013), aff'd, 322 Conn. 118, 139 A.3d 654 (2016). Accordingly, the prosecutor's question did not result in the jury hearing any evidence regarding the defendant's postarrest silence.[3] Moreover, the prosecutor immediately turned to a different subject and did not ask additional questions that risked eliciting evidence regarding the defendant's postarrest silence.

Additionally, it is unclear whether the prosecutor intended to elicit evidence regarding the defendant's postarrest silence by asking the challenged question to Detective Crean. The prosecutor's question was open-ended, and the type of evidence that he was attempting to elicit from Detective Crean was ambiguous. Although there is no direct evidence of the prosecutor's intent, it is possible that the prosecutor had a tangible, good faith basis for asking the question. For example, the prosecutor had indicated at the hearing on the motion in limine that he intended to elicit testimony regarding the defendant's conduct in response to Detective Crean's request to photograph his hands. It is thus possible that the question regarding whether Crean had interviewed the defendant was nothing more than a poorly phrased and ill-advised attempt to place a legitimate line of inquiry before the jury.[4] The prosecutor, therefore, may not necessarily have had any improper motive

[3] Indeed, the defendant has not raised any claim on appeal that a *Doyle* violation actually occurred.

[4] It is clear that such evidence would have been permissible. Both the court and defense counsel stated that they did not believe such evidence would violate *Doyle* and was thus permissible.

for asking such a question. Indeed, this is not a case in which we have direct evidence of the prosecutor's intent to ask a question in direct violation of a court order. See *State* v. *Reynolds*, 118 Conn. App. 278, 293, 983 A.2d 874 (2009) (concluding that prosecutor's questions improperly violated trial court order because prosecutor's representations to court revealed that she intended to elicit evidence court had expressly disallowed), cert. denied, 294 Conn. 933, 987 A.2d 1029 (2010). On the basis of the record, we have no way of determining the prosecutor's actual motive for asking this question, and we need not engage in needless speculation as to the reason the objectionable question was asked in the absence of direct evidence of the prosecutor's intent. See *State* v. *Camacho*, supra, 92 Conn. App. 297. Because the record is unclear as to what the prosecutor's motive was for asking the challenged question, the record is insufficient to determine whether the prosecutor was attempting to elicit improper evidence regarding the defendant's postarrest silence.[5]

[5] Even if we were to assume that the prosecutor's question constituted impropriety, we are not persuaded that the defendant was deprived of his due process right to a fair trial. Under our review of the *Williams* factors, we first note that the prosecutor's question was not invited by the defense. The first factor thus favors the defense.

We conclude, however, that the remaining factors favor the state. In regard to the severity and frequency factors, "the severity of the impropriety is often counterbalanced in part by the third *Williams* factor, namely, the frequency of the [impropriety] . . . ." (Internal quotation marks omitted.) *State* v. *Daniel W.*, supra, 180 Conn. App. 113. "Improper statements that are minor and isolated will generally not taint the overall fairness of an entire trial." (Internal quotation marks omitted.) Id. Here, the alleged impropriety concerning the defendant's postarrest silence was not pervasive throughout the trial but was confined to a single question during the course of twenty-one transcribed pages of direct examination of Detective Crean. Thus, the potential impropriety, a single question to which the court appears to have sustained an objection, cannot be classified as "frequent" or "severe" given the lengthy direct examination and the absence of any evidence elicited. Moreover, the question was not central to the critical issue of whether the defendant intended to cause serious physical injury to the victim. The curative measures that the court took were also strong. Defense counsel immediately objected to the question, and no evidence was elicited. Although the

We next turn to the defendant's contention that the prosecutor's questions regarding the defendant's remorse were improper. "Generally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. Even though the rebuttal evidence would ordinarily be inadmissible on other grounds, the court may, in its discretion, allow it where the party initiating inquiry has made unfair use of the evidence. . . . This rule operates to prevent a defendant from successfully excluding inadmissible prosecution evidence and then selectively introducing pieces of this evidence for his own advantage, without allowing the prosecution to place the evidence in its proper context. . . . The doctrine of opening the door cannot, of course, be subverted into a rule for injection of prejudice. . . . The trial court must carefully consider whether the circumstances of the case warrant

court did not issue a specific curative instruction to the jury concerning this question, we conclude that any potential improper effect was diminished by the court's general instructions to the jury at the start of trial and before closing argument. In those instructions, the court emphasized that questions, objections, arguments, and statements made by the attorneys were not evidence. The strength of the curative measures factor thus weighs in favor of the state. See *State* v. *Ross*, 151 Conn. App. 687, 702–703, 95 A.3d 1208 (court's general instructions to jury that arguments made by counsel were not evidence diminished any improper effect of instances of claimed impropriety), cert. denied, 314 Conn. 926, 101 A.3d 271 (2014).

Finally, the last *Williams* factor, which assesses the overall strength of the state's case, also weighs in favor of the state. As previously observed, there was sufficient evidence from which the jury could have reasonably found that the defendant intended to cause serious physical injury to the victim. Specifically, the defendant acknowledged his belief that the victim would continue to follow him if he tried to continue walking. He then admitted to punching the victim with a closed fist using his dominant right hand and fleeing the scene. The force of his punch immediately knocked the victim unconscious and fractured his skull in multiple places. The state's case was thus strong. We therefore conclude that the prosecutor's question concerning Detective Crean's attempt to interview the defendant, even if improper, did not deprive the defendant of his due process right to a fair trial.

further inquiry into the subject matter, and should permit it only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence. . . . Thus, in making its determination, the trial court should balance the harm to the state in restricting the inquiry with the prejudice suffered by the defendant in allowing the rebuttal." (Internal quotation marks omitted.) *State* v. *Brown*, 309 Conn. 469, 479, 72 A.3d 48 (2013).

Here, the defendant, when asked during direct examination by his counsel about his reaction to learning the extent of the victim's injuries, testified that he was "[d]evastated" and "shocked." Such testimony opened the door for the prosecutor to ask him follow-up questions about his remorse. In response to an objection from defense counsel, the prosecutor stated that his question was meant to examine the credibility of the defendant's purported remorse. It is thus clear from the record that the prosecutor had a proper motive for asking the defendant about his remorse for this particular question and that he was not attempting to elicit evidence of the defendant's postarrest silence. As a result, it cannot be said that he acted improperly in asking this question.

Although the trial court later sustained defense counsel's objections to two additional questions asked by the prosecutor during recross-examination regarding the defendant's remorse, when considered in context, neither of these questions constitutes prosecutorial impropriety. The issue of remorse arose again during the redirect examination of the defendant, and the prosecutor's questions on recross-examination were in direct response to that testimony. Although the court ultimately sustained the objections to the questions, we conclude that the prosecutor did not engage in impropriety by asking them, particularly in light of the fact that the court had earlier permitted the prosecutor to

impeach the defendant's credibility as to his purported remorse during cross-examination.

During argument conducted in the absence of the jury, defense counsel asked the court to issue a curative instruction as to the prosecutor's questions concerning remorse. In response, the prosecutor told the court that he believed his questions during recross-examination were fair game because the defendant had testified that he was remorseful and that he was merely trying to test the defendant's credibility in making these statements. On the basis of these representations, and the consideration that the defendant had opened the door to the issue of his remorse on direct and redirect examination, the prosecutor had a good faith basis for asking additional questions on the subject. See *Edwards* v. *Commissioner of Correction*, 141 Conn. App. 430, 441, 63 A.3d 540 (no prosecutorial impropriety when prosecutor had good faith basis for asking questions to impeach defendant's credibility), cert. denied, 308 Conn. 940, 66 A.3d 882 (2013). Accordingly, the prosecutor's questioning did not constitute impropriety because he had good faith reasons for asking these questions and was not trying to improperly elicit evidence of the defendant's postarrest silence. In light of these considerations, we conclude that none of the prosecutor's questions concerning the defendant's remorse were improper.

In sum, we conclude (1) that no improper evidence was presented to the jury when the prosecutor asked Detective Crean if he had attempted to interview the defendant, (2) that the record is unclear regarding whether the prosecutor intended to offer evidence of the defendant's postarrest silence, (3) that, even if we assume that the question was improper, the defendant was not deprived of his due process right to a fair trial, and (4) that the prosecutor's questions concerning the defendant's remorse were not improper. Therefore, we conclude that the prosecutor did not improperly place

evidence concerning the defendant's postarrest silence before the jury.

B

We next turn to the defendant's contention that the prosecutor engaged in impropriety by arguing facts not in evidence during his closing argument and rebuttal. Specifically, the defendant claims that the prosecutor argued facts not in evidence during his closing argument by (1) speculating about what the defendant could have done to evade arrest instead of punching the victim in the head, (2) arguing that the defendant knew he had to do something serious to get away from the victim and that he could strike the victim to accomplish this, (3) arguing that the defendant stole the sneakers because he wanted the new, popular model that he took, and (4) distorting the facts by arguing to the jury that the victim's and the defendant's accounts of what happened as they walked back to Famous Footwear from Target contradicted each other. The state argues in response that the prosecutor did not argue facts not in evidence and instead urged the jury to draw reasonable inferences from the evidence presented at trial. We are not persuaded that the prosecutor's remarks were improper.

The following additional facts are relevant to our consideration of this aspect of the defendant's prosecutorial impropriety claim. During trial, the victim testified that, after he witnessed the defendant stealing the shoes, he followed him into Target, confronted him, and the defendant agreed to return to Famous Footwear with him. On the walk back, he told the defendant that he would not call the police if the defendant returned the shoes, and that he could retrieve his old shoes. The victim also testified that the brand of Nike shoes that the defendant took were new and in demand. Rogers further testified that the shoes at Famous Footwear

were generally more expensive than those at the Payless Shoes store. The defendant later testified, however, that he did not recall passing a Payless Shoes store when he was trying to find a place to purchase sneakers, and that he decided to go to Famous Footwear first because he figured, on the basis of the store's name, that it sold shoes. The defendant stated that, prior to the date of the incident, he had never heard of Famous Footwear.

The issue of the defendant's intent to cause serious physical injury to the victim arose later during cross-examination. On cross-examination, the defendant testified that, after he agreed to return to Famous Footwear with the victim, he kept pleading with the victim to let him return the shoes he stole and asked to have his old shoes back. Although the defendant and the victim proceeded back to Famous Footwear amicably at first, the victim then radioed Rogers, asking her to call the police, and the defendant reacted by punching the victim in the head. The defendant testified that he intended only to avoid capture when he punched the victim. As previously discussed, the defendant also admitted during cross-examination that he could have tried shoving the victim in the chest, punching him in the stomach, tripping him, or simply running away to avoid going to jail. The defendant testified, however, that the victim might have chased him if he attempted to flee because the victim appeared to be in good shape.

During closing argument, the prosecutor revisited this theme, and made the following comments to the jury: "And when you deliberate to reach your verdict on that and you consider that element, did he intend to cause serious physical injury, just go through all the question[s] I asked him. What he could have done, he could have pushed him, he could have shoved him, he could [have] just tried to run away with the sneakers, he could have punched him in his stomach. I didn't ask him, but I think it's common sense, he could have kicked

him in the groin, right? So, there's a lot of things he could have done but, instead, he chose to close his right fist, his dominant hand, his strong hand, he chose to throw a punch, he chose to throw that punch at his skull . . . . He knew that walking away wasn't enough to get away with the sneakers, he knew that he had to do something to seriously take [the victim] out of the equation, and that's what he did." The prosecutor also argued that, "the state submits to you, the reasonable inference that you can draw from the facts and the evidence, is that he didn't want to shop at Payless, he didn't want the knockoff or off brands sold by Payless, he wanted to go to pay more, Famous Footwear, and that's where they went. He wanted the Nike SBs, the new hot sneaker."

During his rebuttal argument, the prosecutor made additional arguments concerning the defendant's intent to cause serious physical injury and the defendant's credibility. First, the prosecutor followed up on the theme that the defendant knew he needed to use significant force to escape from the victim by stating that "[the defendant] knew he could strike [the victim], knock him unconscious and get out of there." Second, the prosecutor attempted to bring the defendant's credibility into question by comparing his version of the events with the victim's. Specifically, the prosecutor noted that "[the defendant] says he pleaded with [the victim], just give me my old sneakers back. And [the victim] says the opposite. [The victim] says, I said to him, just come back to the store, give me your sneakers, give me those sneakers, I'll give you your sneakers, I don't have to call the police. So, who do you believe there? The defendant who testified he—obviously, the outcome of this case is important to him. Or [the victim] who said, I remember saying, 'call the police,' and I woke up in Hartford Hospital. That was, really, the sum and substance of his testimony. Who do you believe there? Whose version of

events do you believe?" The defendant did not object to any aspect of the prosecutor's closing or rebuttal arguments.

"Certainly, prosecutorial [impropriety] of a constitutional magnitude can occur in the course of closing arguments. . . . When making closing arguments to the jury, [however, counsel] must be allowed a generous latitude in argument, as the limits of legitimate argument and fair comment cannot be determined precisely by rule and line, and something must be allowed for the zeal of counsel in the heat of argument." (Internal quotation marks omitted.) *State* v. *Brett B.*, supra, 186 Conn. App. 573–74. In fulfilling his duties, however, a prosecutor "must confine himself to the evidence in the record. . . . [A] lawyer shall not . . . [a]ssert his personal knowledge of the facts in issue, except when testifying as a witness. . . . Statements as to facts that have not been proven amount to unsworn testimony, which is not the subject of proper closing argument. . . . Our case law reflects the expectation that jurors will not only weigh conflicting evidence and resolve issues of credibility as they resolve factual issues, but also that they will consider evidence on the basis of their common sense. Jurors are not expected to lay aside matters of common knowledge or their own observation and experience of the affairs of life, but, on the contrary, to apply them to the evidence or facts in hand, to the end that their action may be intelligent and their conclusions correct. . . . A prosecutor may invite the jury to draw reasonable inferences from the evidence; however, he or she may not invite sheer speculation unconnected to evidence." (Citation omitted; internal quotation marks omitted.) *State* v. *Marrero*, 198 Conn. App. 90, 119, A.3d (2020).

We agree with the state that the prosecutor's comments invited the jury to draw reasonable inferences from the evidence presented at trial rather than arguing

facts not in evidence. We note at the outset that defense counsel failed to object to any aspect of the prosecutor's closing argument. "A defendant's failure to object to an alleged impropriety strongly suggests that his counsel did not perceive the argument to be improper. If counsel did not believe that the argument was improper at the time, it is difficult for this court, on review, to reach a contrary conclusion." Id., 121–22. "We emphasize the responsibility of defense counsel, at the very least, to object to perceived prosecutorial improprieties as they occur at trial, and we continue to adhere to the well established maxim that defense counsel's failure to object to the prosecutor's argument when it was made suggests that defense counsel did not believe that it was unfair in light of the record of the case at the time." (Internal quotation marks omitted.) Id., 122. Accordingly, the failure of defense counsel to object to the prosecutor's closing arguments indicates that she did not perceive his arguments to be unfair.

Additionally, there was ample evidence presented at trial to support the prosecutor's arguments. In response to the prosecutor's questions, the defendant expressly admitted that he could have tried shoving the victim, tripping him, or punching him in the stomach in order to get away and evade arrest. He also testified that, although he could have tried running away rather than engaging in any physical contact with the victim, the victim might have chased him if he attempted to flee because the victim appeared to be in good shape. The prosecutor, in discussing the defendant's intent to cause serious physical injury to the victim during his closing argument, reiterated these themes. Rather than engaging in speculation unconnected to the evidence produced at trial, the prosecutor was instead inviting the jury to draw the reasonable inference that the defendant intended to cause serious physical injury to the victim because he chose to initiate the type of direct physical

contact that was more likely to cause such injury. The prosecutor's comments were, therefore, proper.

Furthermore, the prosecutor's comments concerning the defendant's motivation for shopping at Famous Footwear were also derived from the evidence. Although the defendant testified that he had never heard of Famous Footwear, the prosecutor introduced evidence that the retail prices of shoes at Famous Footwear were generally higher than those at Payless Shoes and that the sneakers the defendant took, Nike SBs, were popular and in demand at the time of the incident. On the basis of this evidence, the prosecutor argued to the jury that the defendant wanted to shop at Famous Footwear because he wanted to pay more and that he wanted the new popular sneaker. The prosecutor did not present these statements as established facts and, instead, noted that he was "submitting" them to the jury as a reasonable inference it could draw from the facts and the evidence. The "submitting" language, along with appropriate evidence produced at trial from which the jury could have reasonably inferred the prosecutor's submission, indicates that the prosecutor was not arguing facts not in evidence. See *Williams* v. *Commissioner of Correction*, 169 Conn. App. 776, 787, 153 A.3d 656 (2016) (prosecutor's use of restrictive "I submit" language indicated that he was raising inferences rather than expressing his own opinion or providing facts not in evidence). We thus conclude that such comments were not improper.

Finally, contrary to the defendant's contention, we conclude that the prosecutor did not engage in impropriety by arguing to the jury that the victim's and the defendant's accounts of what happened as they walked back to Famous Footwear from Target were contradictory. The victim testified that he told the defendant that he would not call the police if the defendant returned

the sneakers that he had taken. In contrast, the defendant testified that he had been the one to raise the issue of returning the sneakers without police involvement. Thus, although both accounts were similar in content, they differ on the issue of who stated that no police involvement was necessary if the defendant returned the sneakers and took back his old ones. By noting that the accounts were opposites and asking the jurors to assess which version they believed, the prosecutor was merely asking the jury to make a credibility determination on the basis of the testimony of the victim and the defendant. We therefore conclude that these comments were not improper.

C

Finally, the defendant contends that the prosecutor engaged in impropriety by arguing to the jury that, in order to find the defendant not guilty, it would have to find that two eyewitnesses and the victim were lying, in violation of *State* v. *Singh*, 259 Conn. 693, 793 A.2d 226 (2002). We do not agree.

The following additional facts are relevant to this claim. During closing argument, defense counsel highlighted an inconsistency in the testimony of some of the state's witnesses. Specifically, Rogers and Dalessandro told the police after the incident that the defendant had punched the victim in the face, but Rogers later testified at trial that the defendant hit the victim in the head. On rebuttal, the prosecutor responded to defense counsel's argument by remarking, "[t]he first thing I'll say is, if the punch was to the face, why are there no injuries to the face? You heard the doctor testify there was a small hematoma in the area of where the fracture was, that's where the punch was. So, a seventeen year old girl and Mr. Dalessandro tell the police what they saw, the police write it out and they sign it. And they say the punch was in the face, but now they come here and

say it was in the head. Are they lying? Does that call their credibility into question in your minds? We'll talk about credibility in a minute, but that is a nonissue." When later discussing the witnesses' credibility, the prosecutor stated: "And when you assess credibility, remember [the defendant] took the [witness] stand; were Dalessandro and Anna Rogers, were they lying about what they saw? Yes, assess their credibility, but assess his as well." As previously observed, the prosecutor also commented on the defendant's and the victim's accounts of the incident, stating that their versions were opposites and asking the jurors whose version they believed.

"[C]ourts have long admonished prosecutors to avoid statements to the effect that if the defendant is innocent, the jury must conclude that witnesses have lied. . . . The reason for this restriction is that [t]his form of argument . . . involves a distortion of the government's burden of proof. . . . Statements of this type create the risk that the jury may conclude that, in order to acquit the defendant, it must find that the witness has lied." (Citation omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Ciullo*, 314 Conn. 28, 50, 100 A.3d 779 (2014). "[C]losing arguments providing, in essence, that in order to find the defendant not guilty, the jury must find that witnesses had lied, are . . . improper." *State* v. *Singh*, supra, 259 Conn. 712. "[W]hen [however] the prosecutor argues that the jury must conclude that one of two versions of directly conflicting testimony must be wrong, the state is leaving it to the jury to make that assessment. Moreover, by framing the argument in such a manner, the jury is free to conclude that the conflict exists due to mistake (misperception or misrecollection) or deliberate fabrication." *State* v. *Albano*, 312 Conn. 763, 787, 97 A.3d 478 (2014).

Here, the prosecutor's comments that the defendant challenges on appeal did not implicate a core justification for the *Singh* rule because they did not force the jury to find the defendant not guilty only if it first concluded that the other witnesses had lied. The defendant expressly stated during cross-examination that he punched the victim in the head. The jury was thus not required to find that Rogers and Dalessandro were lying about the location of the punch to find the defendant not guilty because, even if they were lying, the defendant himself admitted to punching the victim in the head. The jury thus could have found the defendant guilty on the basis of his testimony alone. Moreover, the prosecutor did not frame his statements in a manner that suggested to the jury that it would need to find that the state's witnesses had lied in order to find the defendant not guilty. The prosecutor instead framed his arguments by asking the jury to weigh the credibility of each witness. Such arguments concerning witness credibility are entirely permissible. See *State* v. *Dawes*, 122 Conn. App. 303, 312, 999 A.2d 794 (prosecutor's comments were proper when based on evidence adduced at trial and reflect prosecutor's effort to invite jury to draw reasonable credibility inferences), cert. denied, 298 Conn. 912, 4 A.3d 834 (2010). Defense counsel also failed to object to any of these statements challenged on appeal. Such a failure indicates that she did not believe these comments to be improper in light of the record at that time. *State* v. *Marrero*, supra, 198 Conn. App. 122. In light of these considerations, we conclude that the prosecutor did not violate *Singh*.

The judgment is affirmed.

In this opinion ELGO, J., concurred.

DEVLIN, J., concurring in the judgment. I agree with parts I, and II B and C of the majority opinion, as well as that portion of part II A discussing the prosecutor's

questions regarding the defendant's remorse. I write separately because I believe that the prosecutor's default on his express commitment not to inquire as to the defendant's postarrest assertion of his *Miranda*[1] rights amounted to prosecutorial impropriety. I do not, however, believe that this impropriety deprived the defendant of his due process right to a fair trial and therefore agree that the judgment should be affirmed.

The relevant factual and procedural history are aptly stated in the majority opinion. The defendant, John Pjura, was arrested and charged, inter alia, with assault in the second degree in violation of General Statutes § 53a-60 (a) (1) for allegedly punching the unsuspecting victim, Andrew Howe, in the side of the head, causing catastrophic injuries.

Prior to trial, defense counsel filed, inter alia, a motion in limine styled: "Motion in Limine to Preclude Evidence of the Defendant's Postarrest Silence or Invocation of Right to Counsel." The motion stated that, following the defendant's arrest, the police reportedly read him his *Miranda* rights and, when asked if he understood those rights, the defendant remained silent. He also remained silent when asked routine booking questions. The motion further asserted that, when Detective James Crean, who was investigating the allegations in the captioned matter, approached the defendant in the holding area and explained that he wanted to speak to the defendant about the incident at Famous Footwear, the defendant stated, "I want a lawyer."

On February 28, 2018, the court held a hearing on, inter alia, the defendant's pretrial motions. On March 12, 2018, the trial court issued a comprehensive written "Ruling Re: Pretrial Motions" that, inter alia, addressed the defendant's motion in limine regarding his postarrest silence or invocation of his right to counsel. The trial court stated: "The

[1] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

defendant moved, on February 21, 2018, to preclude the state from offering as evidence the defendant's postarrest silence and/or invocation of his right to counsel. At the hearing on February 28, 2018, the *state indicated that it had no intention of offering such evidence.*

"The court concludes that no other action is necessary regarding this motion." (Emphasis added.)

At that February 28, 2018 hearing, the prosecutor told the court that he did not intend to offer evidence of the defendant's failure to cooperate with the booking process. With respect to the testimony of Detective Crean, the following colloquy occurred:

"The Court: No statements, simply that he didn't put his hands out when asked to?

"[The Prosecutor]: Yeah. Did he initially comply with your request to photograph his hands?

"The Court: [Defense counsel]?

"[Defense Counsel]: I don't think that goes to the [issue pursuant to *Doyle* v. *Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)].

"The Court: All right. So long as there are no statements, that's conduct, the conduct would be offered. All right.

"[The Prosecutor]: That's an accurate way of—

"[Defense Counsel]: Conduct.

"[The Prosecutor]: —summarizing what I intend to offer, conduct.

"[Defense Counsel]: —conduct other than silence.

"[The Court]: Understood."

On March 22, 2018, Detective Crean was called to testify before the jury during the state's case-in-chief. During the

prosecutor's direct examination of Detective Crean, the following exchange occurred:

"[The Prosecutor]: And when you came into work that following Monday did anyone convey any information to you regarding the Famous Footwear robbery?

"[Detective Crean]: That would have been the 19th?

"[The Prosecutor]: Yes.

"[Detective Crean]: Yeah, on the 19th, yes, I was notified that [the defendant] was in our lockup. . . .

"[The Prosecutor]: What did that mean to you, though?

"[Detective Crean]: What they said was, is—

"[Defense Counsel]: Objection, Your Honor.

"The Court: Sustained.

"[The Prosecutor]: *Well, did you attempt to speak with—did you attempt to interview* [*the defendant*]*?*

"[Defense Counsel]: Objection, Your Honor. May we approach?

"The Court: Yes." (Emphasis added.)

The majority opinion categorizes this question as objectionable but not prosecutorial impropriety because (1) there was no formal court order that the prosecutor violated, (2) it may be inferred that, at the sidebar, the trial court sustained the objection to the question, (3) the question was not answered, (4) the trial court instructed the jury that unanswered questions are not evidence, and (5) it is unclear what the prosecutor's intent was in asking the challenged question. I respectfully disagree.

Our Supreme Court has stated that, "[i]n analyzing claims of prosecutorial impropriety, we engage in a two step process. . . . The two steps are separate and distinct: (1) whether [an impropriety] occurred in the first instance;

and (2) whether that [impropriety] deprived a defendant of his due process right to a fair trial." (Footnote omitted; internal quotation marks omitted.) *State* v. *O'Brien-Veader*, 318 Conn. 514, 524, 122 A.3d 555 (2015). The defendant has the burden of satisfying both of these analytical steps. Id.

It "is well settled that prosecutorial disobedience of a trial court order, even one the prosecutor considers legally incorrect, constitutes improper conduct." *State* v. *Ortiz*, 280 Conn. 686, 704, 911 A.2d 1055 (2006). "In many cases, however, this black letter principle is easier stated than applied. A prosecutor's advocacy obligations may occasionally drive him or her close to the line drawn by a trial court order regarding the use of certain evidence." *State* v. *O'Brien-Veader*, supra, 318 Conn. 533.

Our Supreme Court has acknowledged that, "[e]ven when it is determined that a prosecutor has breached a trial court order, it can be difficult to distinguish between a mere evidentiary misstep and a potential due process violation. . . . Not every misstep by a prosecutor that exceeds the bounds of a trial court order rises to the level of prosecutorial impropriety that implicates a defendant's due process rights, thus requiring resort to the second step in the prosecutorial impropriety analysis." Id., 534.

"Whether a prosecutorial question or comment that runs afoul of a trial court order implicates a defendant's due process rights is a case specific determination. This determination turns on the degree to which the breach undermines a trial court's ruling that protects the integrity of the fact-finding process by restricting the admission of unreliable or unduly prejudicial evidence." Id.

Applying these principles to the present case requires resolution of three questions: (1) Was there a court order? (2) What interest was the trial court seeking to protect with its order? And (3) did the prosecutor's conduct undermine the trial court's ruling to such a degree that it can

fairly be characterized as impropriety as opposed to an evidentiary misstep?

It is true that, on the formal motion in limine filed by the defense seeking to preclude evidence of the defendant's postarrest silence or invocation of his right to counsel, the court concluded that no action was necessary. This, of course, was predicated on the court's finding that, "[a]t the hearing on February 28, 2018, the state indicated that it had no intention of offering such evidence." But for this representation by the prosecutor, it is virtually certain that the trial court would have granted the motion in limine, as the defendant's custodial silence and "I want a lawyer" statement are classic invocations of *Miranda* rights. It seems to me wrong that a prosecutor can avoid the consequences of violating a court order by making a promise to a judge that obviates the need for a formal order—and subsequently breaking that promise. I would conclude that the situation with respect to the ruling on the motion in limine is tantamount to a court order and that the prosecutor's question should be analyzed in that context.

Even, however, if one construes the written ruling on the motion in limine not to be a court order, as the majority does, there still was an order that was based on the February 28, 2018 colloquy. It is clear that the trial court directed that the only subject matter that the prosecutor could permissibly inquire about was the defendant's postarrest *conduct* in refusing to show his hands for photographing, as evidenced by the following colloquy:

"The Court: No statements, simply that he didn't put his hands out when he was asked to?

"[The Prosecutor]: Yeah. . . .

"The Court: All right. So long as there are no statements, that's conduct, the conduct would be offered. All right.

"[The Prosecutor]: That's an accurate way of—

"[Defense Counsel]: Conduct—

"[The Prosecutor]: —summarizing what I intend to offer, conduct.

"[Defense Counsel]: —conduct other than silence.

"The Court: Understood."

In my view, one cannot reasonably construe that exchange as anything other than the court's crystal clear ruling that the prosecutor's inquiry should be limited to the defendant's conduct and that he should not inquire about any statements the defendant may or may not have made postarrest. It was an order, and the prosecutor was required to comply with it.

So, what interest was the trial court trying to protect with this ruling? On the basis of the portion of Detective Crean's police report that was recited in the motion in limine, the defendant's only response when asked to be interviewed was, "I want a lawyer." The defendant had been arrested, was in police custody, and given his *Miranda* rights—that included his right to counsel. For almost one-half century it has been the law in our country that a person who exercises his or her right to silence or counsel will not be penalized for such exercise. *Doyle* v. *Ohio*, supra, 426 U.S. 610. The trial court's ruling sought to prevent the fundamentally unfair deprivation of due process that arises when one's assertion of the right to silence or counsel is used against him.

The question then becomes: Did the prosecutor's conduct undermine the court's ruling to a degree that rises to the level of impropriety? When Detective Crean sought to speak to the defendant about the incident at Famous Footwear, the defendant stated that he wanted a lawyer. In front of the jury, the prosecutor asked: "Well, did you attempt to *speak* with—did you attempt to *interview* this [defendant]?" (Emphasis added.) The most foreseeable response to this question would be

for the witness to testify in accordance with his police report, namely, that the defendant stated that he wanted a lawyer and was otherwise silent.

Now, as the majority correctly observes, the question was not answered and the defendant is not asserting that, in fact, a *Doyle* violation occurred. But that was not due to anything the prosecutor did. The whole purpose of the motion in limine and the trial court's direction to counsel was to avoid the situation that did occur—the jury being left to wonder: What exactly did the defendant say when the police tried to interview him?

It should not be too much to expect prosecutors to keep their word. When they make an express promise to a trial judge that is relied on by the court and opposing counsel, they should abide by it. In the present case, the prosecutor did not do that. I see that as improper.

I fully join in the majority's cogent analysis that this one improper question did not deprive the defendant of a fair trial. See footnote 5 of the majority opinion.

I concur in the judgment.

AMERICAN TAX FUNDING, LLC *v.* DESIGN LAND DEVELOPERS OF NEWTOWN, INC., ET AL.
(AC 42074)

Keller, Elgo and Eveleigh, Js.

Syllabus

The plaintiff, A Co., sought to foreclose municipal tax liens on certain real property owned by the defendant estate. After A Co. had commenced this action, R Co. was substituted as the plaintiff and filed an amended complaint. Thereafter, the estate was defaulted for failure to plead, and the trial court granted R Co.'s motion for judgment and rendered judgment in part in favor of R Co. as against the estate as to certain counts of the amended complaint. On the estate's appeal to this court, *held* that the estate's appeal was dismissed as moot, there having been

no practical relief that that this court could grant, as the judgment as against the estate was a nullity because the estate was not a legal entity that could be sued, and, therefore, the trial court did not have jurisdiction to render a judgment against it; moreover, vacation of the judgment as against the estate was appropriate under the circumstances of this case because the estate did not cause the appeal to be moot and it would prevent the judgment from spawning legal consequences and clear the path for future relitigation of the issues.

Argued December 4, 2019—officially released October 20, 2020

Procedural History

Action to foreclose municipal tax liens on certain real property owned by the named defendant et al., and for other relief, brought to the Superior Court in the judicial district of Danbury, where Reoco, LLC, was substituted as the plaintiff; thereafter, the substitute plaintiff filed an amended complaint; subsequently, the defendant estate of Francis D. D'Addario et al. were defaulted for failure to plead; thereafter, the court, *Russo*, *J.*, granted the substitute plaintiff's motion for judgment and rendered judgment in part for the substitute plaintiff; subsequently, the substitute plaintiff withdrew the remaining count of the amended complaint, and the defendant estate of Francis D. D'Addario appealed to this court. *Appeal dismissed*; *judgment vacated.*

Paul N. Gilmore, for the appellant (defendant estate of Francis D. D'Addario).

David L. Gussak, with whom, on the brief, was *Gary J. Greene*, for the appellee (substitute plaintiff).

Opinion

EVELEIGH, J. The defendant estate of Francis D. D'Addario (estate)[1] appeals from the judgment of the

[1] The named defendant, Design Land Developers of Newtown, Inc., and the estate were the record owners of the property at issue in 2004. The University of Bridgeport, Evergreen National Indemnity Company, Design Landfill Developers of Milford, Inc., Red Knot Acquisitions, LLC, and the Department of the Treasury-Internal Revenue Service, were also named as defendants in this action as subsequent encumbrancers in interest. The estate, however, is the only defendant involved in this appeal.

trial court rendered in favor of the substitute plaintiff, Reoco, LLC (Reoco).[2] On appeal, the estate claims, inter alia, that the court improperly granted Reoco's motion for judgment on default with respect to two counts of the amended complaint, which sought an in personam money judgment against the estate for the 2005 and 2006 taxes due on the subject property. For the following reasons, we dismiss the appeal and vacate the judgment of the trial court as against the estate.

The following facts and procedural history are relevant to our resolution of this appeal. The estate owned a 120.26 acre parcel of land located at 2 Buttonshop Road in Newtown (property). The estate failed to pay municipal property taxes to the town of Newtown (town) for the 2004, 2005 and 2006 tax years. Consequently, the town imposed tax liens on the property and recorded them in the town land records. The town subsequently assigned the tax liens to American Tax Funding, LLC (American Tax Funding), which recorded the assignments in the town land records.

American Tax Funding commenced this foreclosure action on May 4, 2011. The complaint contained three counts, which sought the foreclosure of a tax lien for each of the respective tax years. The summons listed the estate as a defendant, and on the address line, it included "c/o F. Lee Griffith, III, Co-Executor, 1 Canterbury Green, 201 Broad Street, Stamford, CT 06901;c/o Albert F. Paolini, Co-Executor, 551 Morehouse Road, Easton, CT 06612; c/o David D'Addario, Lawrence D'Addario & Lawrence Schwartz, Co-Executors, 10 Middle St., #1402, Bridgeport, CT 06604." The return of service indicates that service on the estate was executed by service on David D'Addario, as coexecutor.[3]

[2] The original and named plaintiff in this case, American Tax Funding, LLC, filed a motion to substitute Reoco as the party plaintiff on January 13, 2012, which was granted by the trial court.

[3] The return of service also listed service on Albert Paolini as coexecutor. Paolini, however, was deceased at the time of service.

On June 23, 2014, Reoco filed a withdrawal of counts two and three of the complaint and, subsequently, filed a request to amend the complaint on July 23, 2014. The amended complaint sought the foreclosure of the 2004 tax lien and the collection of the 2005 and 2006 taxes. On September 2, 2014, Reoco filed a motion for default for failure to plead with respect to the estate, which was granted on September 10, 2014. Thereafter, Reoco filed a motion for a default judgment regarding counts two and three only—the collection counts for tax years 2005 and 2006. On November 20, 2014, the estate filed a motion to set aside the default and an answer containing special defenses to counts two and three. On November 26, 2014, the estate filed an objection to Reoco's motion for a judgment on the default.

The court granted Reoco's motion for a default judgment on December 4, 2014, and rendered judgment in favor of Reoco as against the estate as to counts two and three of the amended complaint.[4] The estate filed a motion to reargue on which the trial court did not rule. Reoco subsequently withdrew the remaining count of the complaint seeking the foreclosure on the 2004 municipal tax lien. The estate timely filed this appeal.

After the parties filed their appellate briefs[5] and oral argument was held, on March 19, 2020, this court, sua sponte, ordered the parties to file supplemental briefs

[4] The judgment was rendered against the estate, as well as Design Land Developers of Newtown, Inc., and the University of Bridgeport. The judgment amount was entered as follows: "Count Two Principal: $34,518.82"; "Count Two Interest: $25,126.27"; "Count Two Fees: $24"; "Count Three Principal: $37,163.94"; "Count Three Interest: $53,075.81"; "Count Three Fees: $24"; "Additional Fees: $7175.58"; "Reasonable Attorney's Fees: $3000"; "Costs of Collection: $1361"; "Total Judgment Amount: $161,469.42."

[5] On appeal, the estate claims that the trial court erred in rendering judgment for Reoco because Reoco did not have standing to pursue an in personam action, and, thus, the trial court lacked subject matter jurisdiction. In light of our determination that the appeal is moot and that the trial court lacked subject matter jurisdiction to render judgment against the estate, we do not address this claim.

addressing the following questions: "[1] whether the estate . . . as opposed to a representative of the estate, has standing to invoke the jurisdiction of this court, and, [2] if not, what the remedy should be with regard to the trial court judgment." After the parties filed supplemental briefs,[6] this court, on July 14, 2020, ordered the parties to file further supplemental briefs with respect to the follow question: "Did the trial court lack subject matter jurisdiction over this case because the [estate] is not a legal entity that has the capacity to be sued?" On August 13, 2020, the parties filed their second set of supplemental briefs. In its brief, Reoco claims that this case "presents a factual situation [that] may be addressed under the statutory umbrella of [General Statutes] § 52-123, which provides for the correction of a circumstantial defect such as" the one presented in this case.[7] In contrast, the estate argues that, even

[6] In its first supplemental brief, the estate claimed that because it is not a legal entity, the judgment rendered against it by the trial court is a nullity. It further claimed that, because there is no practical relief that this court could provide, this court lacked jurisdiction over the appeal on the ground of mootness. Reoco asserted in its first supplemental brief that the estate lacked standing to bring this appeal and claimed that this court has several options for disposing of this appeal. Specifically, Reoco claimed that this court could dismiss the appeal and remand the matter to the trial court "for such disposition as that forum may determine." Reoco suggested that that action would likely result in the estate filing a motion to dismiss and, ultimately, result in another appeal. Reoco also claimed that the appeal could be stayed and the case remanded to the trial court to dispose of the matter. Although that action, Reoco explained, would also likely result in another appeal after the trial court's decision, "the matter, if still viable, would be reactivated in this forum with such supplemental briefing and argument as the trial court's disposition may require."

[7] In support of this claim, Reoco relies on *Lussier* v. *Dept. of Transportation*, 228 Conn. 343, 636 A.2d 808 (1994). In that case, the administrator of the estate of the decedent, who was killed in a motor vehicle accident, brought a highway defect action. Id., 345. The issue on appeal was whether a defect in the civil summons form, which listed the defendant as the state of Connecticut, Department of Transportation (department), deprived the trial court of subject matter jurisdiction when the caption in the complaint identified the defendant as the Commissioner of Transportation (commissioner), and the commissioner was named as the party responsible for highway maintenance. Id., 344. It was "undisputed that the commissioner

though the trial court did not lack subject matter jurisdiction to render a judgment against the estate, this court should determine that the trial court's judgment against the estate is a nullity. The estate further claims,

was properly named in the complaint, that the department was served, and that statutory notice had been provided to [the] then commissioner . . . . The department argue[d], nevertheless, that the defect in the civil summons form that identified the commissioner of the department 'as an agent for service' served to strip the trial court of subject matter jurisdiction." (Footnote omitted.) Id., 349. Our Supreme Court disagreed, concluding that the case presented "a classic example of a common defect in process involving the designation of the defendant," that the designation of the defendant by an incorrect name was a misnomer, and that it was "a circumstantial defect anticipated by . . . § 52-123 that can be cured by amendment. A misnomer must be distinguished from a case in which the plaintiff has misconstrued the identity of the defendant . . . ." (Footnote omitted.) Id., 350. We conclude that *Lussier* is distinguishable from the present case. Here, the original plaintiff did not merely designate the defendant by an incorrect name; it commenced an action against a nonlegal entity that does not have the capacity to be sued. Although David D'Addario, as coexecutor of the estate, had been served, a representative of the estate was never named in the complaint or other pleadings, including the judgment. The action was never brought against a representative of the estate, nor is it clear from the record that a representative acted on behalf of the estate throughout the proceedings. We conclude that the present case is more akin to *Just Restaurants* v. *Thames Restaurant Group, LLC*, 172 Conn. App. 103, 158 A.3d 845 (2017), in which this court addressed a situation similar to the one in the present case. In *Just Restaurants*, the primary issue was whether the trial court lacked subject matter jurisdiction over the action, which was commenced by the named plaintiff using a fictitious or assumed business name, or a trade name. Id., 104. The trial court rendered judgment in favor of the substitute plaintiff, and the defendant appealed to this court, claiming that the trial court erred by granting a motion to substitute the party plaintiff and by failing to dismiss the action for lack of subject matter jurisdiction. Id., 107. Specifically, it claimed that, because the named plaintiff was a trade name and was without a separate legal existence from the substitute plaintiff, the named plaintiff did not have the legal capacity to bring the action solely in its name, which deprived the trial court of subject matter jurisdiction. Id. On appeal, this court concluded that, "[p]ursuant to our law, the initiation of the action solely by the named plaintiff, which is not a legal entity and does not have a separate legal existence, cannot confer jurisdiction on the court; a dismissal, therefore, is required." Id., 108. Although, in the present case, the estate is named as a defendant and did not commence the action, the same reasoning applies. The action was wrongly commenced against a nonlegal entity, which deprived the trial court of jurisdiction over that entity.

in both of its supplemental briefs, that, because the judgment against it is a nullity, no practical relief can be provided by this court and that, therefore, this court lacks subject matter jurisdiction over the appeal on the ground of mootness. We conclude that, because the present action was brought against the estate itself and not a representative of the estate, there was nothing in the record clearly indicating that the executor, and not the estate, was the real party in interest, and no motion to substitute has ever been filed, the trial court lacked jurisdiction to render judgment against the estate.

We begin our analysis by setting forth the relevant standard of review. "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 . . . . [T]his court has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time." (Internal quotation marks omitted.) *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, 197 Conn. App. 269, 273–74, 231 A.3d 386 (2020). "[O]nce the question of lack of jurisdiction of a court is raised, [it] must be disposed of no matter in what form it is presented . . . [and] [t]he court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *Deutsche Bank National Trust Co.* v. *Bialobrzeski*, 123 Conn. App. 791, 798, 3 A.3d 183 (2010); see also *Carten* v. *Carten*, 153 Conn. 603, 610, 219 A.2d 711 (1966). "If it becomes apparent to the court that such jurisdiction is lacking, the appeal must be dismissed." (Internal quotation marks omitted.) *M.U.N. Capital, LLC* v. *National Hall Properties, LLC*, 163 Conn. App. 372, 374, 136 A.3d 665, cert. denied, 321 Conn. 902, 136 A.3d 1272 (2016).

Moreover, because mootness implicates this court's subject matter jurisdiction, it may be raised at any time, including by this court sua sponte, and is a threshold matter that must be resolved first. See *State* v. *Charlotte Hungerford Hospital*, 308 Conn. 140, 143, 60 A.3d 946 (2013); *Commissioner of Transportation* v. *Rocky Mountain, LLC*, 277 Conn. 696, 703, 894 A.2d 259 (2006). "This is so because [i]t is a [well settled] general rule that the existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow." (Internal quotation marks omitted.) *Argent Mortgage Co., LLC* v. *Huertas*, 288 Conn. 568, 575, 953 A.2d 868 (2008). "Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary." (Internal quotation marks omitted.) *In re Kamari C-L.*, 122 Conn. App. 815, 823, 2 A.3d 13, cert. denied, 298 Conn. 927, 5 A.3d 487 (2010).

For this court to determine whether there is any practical relief that can be afforded the estate in its appeal from the judgment rendered against it, we must first examine the issue of whether the trial court had jurisdiction to render the judgment against the estate.[8] "It is elemental that in order to confer jurisdiction on the court the [party] must have an actual legal existence,

[8] We note that "[t]his court has jurisdiction to determine whether a trial court had subject matter jurisdiction to hear a case." *State* v. *Martin M.*, 143 Conn. App. 140, 144 n.1, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013); see also *Gemmell* v. *Lee*, 42 Conn. App. 682, 684 n.3, 680 A.2d 346 (1996) (appellate court has jurisdiction to determine whether trial court had subject matter jurisdiction); *Vincenzo* v. *Warden*, 26 Conn. App. 132, 133, 599 A.2d 31 (1991) ("[t]his court has jurisdiction to determine whether a trial court had jurisdiction"). Furthermore, "it is axiomatic that this court has jurisdiction to determine whether it has jurisdiction. *Castro* v. *Viera*, [207 Conn. 420, 430, 541 A.2d 1216 (1988)]; *State* v. *S & R Sanitation Services, Inc.*, 202 Conn. 300, 301, 521 A.2d 1017 (1987)." *First National Bank of Chicago* v. *Luecken*, 66 Conn. App. 606, 610, 785 A.2d 1148 (2001), cert. denied, 259 Conn. 915, 792 A.2d 851 (2002).

that is he or it must be a person in law or a legal entity with legal capacity to sue. . . . An estate is not a legal entity. It is neither a natural nor artificial person, but is merely a name to indicate the sum total of the assets and liabilities of the decedent or incompetent. . . . Not having a legal existence, it can neither sue nor be sued." (Citations omitted; internal quotation marks omitted.) *Isaac* v. *Mount Sinai Hospital*, 3 Conn. App. 598, 600, 490 A.2d 1024, cert. denied, 196 Conn. 807, 494 A.2d 904 (1985); see also *Estate of Rock* v. *University of Connecticut*, 323 Conn. 26, 32, 144 A.3d 420 (2016); *Ellis* v. *Cohen*, 118 Conn. App. 211, 215, 982 A.2d 1130 (2009).

In the present case, American Tax Funding brought this action and named the estate as a defendant in the complaint. The summons lists the estate as a party, and the return of service demonstrates that service on the estate was executed by serving David D'Addario, as coexecutor.[9] The complaint, however, did not name any of the coexecutors of the estate as parties in their representative capacities. Additionally, Reoco never amended the complaint to name the coexecutors of the estate in the action, and the coexecutors have not been named in the estate's appeal to this court, nor do their names appear on any of the appellate materials. This appeal was filed by Attorney Paul N. Gilmore on behalf of the estate.[10] All materials filed by the appellant have been submitted under the name, and on behalf, of the estate. Accordingly, the present case does not present a situation in which the file is replete with references to

[9] See footnote 3 of this opinion.

[10] The estate does not dispute these facts. In its first supplemental brief, it asserts: "The complaint demonstrates that the defendants are the estate and a corporate defendant (not an estate fiduciary). . . . Judgment was entered against the estate and the corporate defendant. . . . The estate, as a defendant against which judgment entered, lodged and briefed the appeal before this honorable court. No estate fiduciary was sued by the plaintiff; no estate fiduciary was made a defendant in this civil action." (Citations omitted.)

the coexecutors,[11] or where the coexecutors effectively were treated as parties by the other parties or the court, such that this court can conclude that the coexecutors were the real parties in interest. See *Estate of Brooks* v. *Commissioner of Revenue Services*, 325 Conn. 705, 706 n.1, 159 A.3d 1149 (2017) (although coexecutors were not named in complaint, action was clearly maintained on estate's behalf by coexecutors), cert. denied, U.S. , 138 S. Ct. 1181, 200 L. Ed. 2d 314 (2018); *In re Probate Appeal of Kusmit*, 188 Conn. App. 196, 198 n.1, 204 A.3d 776 (2019) (although summons listed named plaintiff as estate of Connor Kusmit, it was undisputed that action was maintained by coadministrators of estate); *Estate of Machowski* v. *Inland Wetlands Commission*, 137 Conn. App. 830, 832 n.1, 49 A.3d 1080 ("Although bringing the action in the name of the estate raised a substantial question [regarding this court's subject matter jurisdiction], in the circumstances of this case, we conclude that the executors were the real parties in interest, were named in operative documents,

[11] Our review of the record discloses that the names of the coexecutors do not appear on any documents until 2015, when the Reoco filed a form titled "Financial Institution Execution Proceedings-Judgment Debtor Who Is Not A Natural Person, Application and Execution," as well as a form titled "Exemption Claim Form Financial Institution Execution." On both forms, Reoco named the estate and indicated that the forms were in care of the coexecutors. On June 7, 2016, David D'Addario and Lawrence D'Addario, as coexecutors of the estate, filed a motion for a protective order with respect to postjudgment depositions. Although the motion primarily discusses the protective order, it contains a discussion that is relevant to our analysis. The coexecutors stated that "*none of the coexecutors of the estate are named as individual defendants in this action*, so they are not judgment debtors. *The named defendant is the estate.*" (Emphasis added.) The coexecutors then explained that they are the only executors of the estate and that two of the executors named on the summons, Schwartz and Paolini, are deceased and have been so since 1993 and 2000, respectively. The other executor named on the summons, Griffith, resigned as a coexecutor of the estate more than twenty-five years earlier and his whereabouts are not known to the current coexecutors. Subsequently, the court ordered argument to be scheduled. Counsel for David D'Addario and Lawrence D'Addario then requested the motion for a protective order be marked off, which the court granted that same day.

and were effectively treated as parties by the other parties and the court. In these circumstances, dismissal would result in substantial injustice.), cert. denied, 307 Conn. 921, 54 A.3d 182 (2012).

"No principle is more universal than that the judgment of a court without jurisdiction is a nullity. . . . Such a judgment . . . may always be challenged." (Internal quotation marks omitted.) *Highgate Condominium Assn., Inc.* v. *Miller*, 129 Conn. App. 429, 435, 21 A.3d 853 (2011); see also *Argent Mortgage Co., LLC* v. *Huertas*, supra, 288 Conn. 576; *Thompson Gardens West Condominium Assn., Inc.* v. *Masto*, 140 Conn. App. 271, 277, 59 A.3d 276 (2013); *Myrtle Mews Assn., Inc.* v. *Bordes*, 125 Conn. App. 12, 16, 6 A.3d 163 (2010); *Bicio* v. *Brewer*, 92 Conn. App. 158, 167, 884 A.2d 12 (2005). "It is well established that a court is without power to render a judgment if it lacks jurisdiction and that everything done under the judicial process of courts not having jurisdiction is, ipso facto, void. . . . A judgment void on its face and requiring only an inspection of the record to demonstrate its invalidity is a mere nullity, in legal effect no judgment at all, conferring no right and affording no justification . . . . It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. . . . A void judgment is without life and will be ignored everywhere. . . . A court is without power to render a judgment if it lacks jurisdiction of the parties or of the [subject matter], one or both. In such cases, the judgment is void, has no authority and may be impeached." (Citations omitted; internal quotation marks omitted.) *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 25-26, 682 A.2d 1046 (1996); see also *In re DeLeon J.*, 290 Conn. 371, 377, 963 A.2d 53 (2009) ("[A] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . The subject matter jurisdiction requirement may not be waived by any party, and also

may be raised by a party, or by the court sua sponte, at any stage of the proceedings, including on appeal." (Internal quotation marks omitted.)); *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 535, 911 A.2d 712 (2006) ("a judgment rendered without subject matter jurisdiction is void"); *Selby* v. *Building Group, Inc.*, 129 Conn. App. 599, 603, 19 A.3d 1289 (2011) ("It is axiomatic that a court does not have personal jurisdiction over a nonparty. If a court lacks jurisdiction over a person . . . the court has no authority to award a judgment against that person . . . ." (Internal quotation marks omitted.)); *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 713, 927 A.2d 312 ("[i]f a court has never acquired jurisdiction over a defendant or the subject matter . . . any judgment ultimately entered is void and subject to vacation or collateral attack" (internal quotation marks omitted)), cert. denied, 284 Conn. 927, 934 A.2d 243 (2007); *Bicio* v. *Brewer*, supra, 92 Conn. App. 167 (same).

Because the estate was not a legal entity that could be sued, the trial court did not have jurisdiction to render a judgment against the estate. See *Freese* v. *Dept. of Social Services*, 176 Conn. App. 64, 84-85, 169 A.3d 237 (2017). Its judgment as to the estate, therefore, is a nullity and was void ab initio. Accordingly, it follows that there is no practical relief that this court can grant with respect to the appeal from a judgment that is a nullity and has no force and effect. See *Koennicke* v. *Maiorano*, supra, 43 Conn. App. 25-26. The appeal from that judgment, therefore, is moot[12] and must be dismissed.[13] See *Barber* v. *Barber*, 193 Conn. App. 190, 216, 219 A.3d 378 (2019).

[12] As we noted previously in this opinion, the estate claimed, in both of its supplemental briefs, that, because the judgment against it was a nullity, no practical relief could be provided by this court and that, therefore, this court lacks subject matter jurisdiction over the appeal on the ground of mootness.

[13] In light of our determination that the appeal must be dismissed for lack of jurisdiction due to mootness, we need not address the standing issue

We further conclude that, under the circumstances of this case, the judgment of the trial court against the estate should be vacated.[14] "Our law of vacatur is scanty and has been developed [almost] entirely in the context of civil litigation." (Internal quotation marks omitted.) *State* v. *Boyle*, 287 Conn. 478, 488, 949 A.2d 460 (2008). In making this determination, we are guided by case law from our Supreme Court. In *State* v. *Charlotte Hungerford Hospital*, supra, 308 Conn. 142, the defendant hospital appealed from a judgment of the trial court requiring it to comply with a certain subpoena. After this court affirmed the trial court's judgment, our Supreme Court granted the petition for certification to appeal. Id. Thereafter, the underlying case was settled and the state no longer sought to enforce the subpoena. Id. Our Supreme Court determined that the appeal was moot because there was no practical relief that could be

raised in the first question posed to the parties, which would provide an independent basis for the determination regarding jurisdiction. See *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, supra, 197 Conn. App. 271 n.2; see also *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 602 n.10, 119 A.3d 1153 (2015) ("We recognize that the mootness doctrine is implicated in this appeal and likely provides an independent basis for our subject matter jurisdiction determination. Because we decide the case on the basis of aggrievement, however, we need not reach the mootness issue."); *Kelly* v. *Kurtz*, 193 Conn. App. 507, 539 n.13, 219 A.3d 948 (2019) (because Appellate Court agreed with trial court's determination regarding plaintiff's lack of standing, it did not address mootness argument).

[14] Although this court is dismissing the appeal as moot, it is appropriate for this court to vacate the judgment of the trial court as well. See *State* v. *Charlotte Hungerford Hospital*, supra, 308 Conn. 146 ("[t]he appeal is dismissed and the judgments of the Appellate Court and the trial court are vacated); *State* v. *Boyle*, 287 Conn. 478, 491, 949 A.2d 460 (2008) ("[t]he appeal is dismissed and the judgment of the Appellate Court is vacated"); *In re Candace H.*, 259 Conn. 523, 527, 790 A.2d 1164 (2001) ("[t]he appeal is dismissed and the judgment of the Appellate Court is vacated"); *In re Jessica M.*, 250 Conn. 747, 748, 738 A.2d 1087 (1999) ("[t]he appeal is dismissed and the judgments of the Appellate Court and the trial court are vacated"); *Amalgamated Transit Union Local 1588* v. *Laidlaw Transit, Inc.*, 33 Conn. App. 1, 6, 632 A.2d 713 (1993) ("[t]he appeal is dismissed in part and the judgment is vacated as to that portion that states that the defendant had complied with the arbitration award").

granted, and it dismissed the appeal sua sponte. Id., 143. The court went on to vacate the judgments of this court and the trial court for two reasons: "First, the hospital is not responsible for the mootness of its certified appeal. Second, the Appellate Court's unreviewable judgment may have preclusive effects against the hospital in subsequent litigation." Id. The court explained: "Although the remedy of vacatur is rooted in our supervisory authority, we have generally followed the federal courts' approach in applying that doctrine. . . . In *United States* v. *Munsingwear*, *Inc.*, 340 U.S. 36, 40, 71 S. Ct. 104, 95 L. Ed. 36 (1950), the United States Supreme Court explained that vacatur of a mooted case clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance." (Citation omitted; internal quotation marks omitted.) *State* v. *Charlotte Hungerford Hospital*, supra, 143. Because the hospital did not voluntarily forfeit its appeal by participating in the settlement between the state and the claimant, the settlement was " 'happenstance' . . . with respect to the hospital, and vacatur [was] appropriate" in that case. (Citation omitted.) Id., 145. Our Supreme Court also determined that this court's unreviewable judgment could have preclusive, rather than merely precedential, effect against the hospital in future litigation, and that "[v]acatur of the trial court decision will further aid in the antipreclusionary aspect of the vacatur remedy. See *In re Jessica M.*, [250 Conn. 747, 749, 738 A.2d 1087 (1999)]." *State* v. *Charlotte Hungerford Hospital*, supra, 146 n.8.

State v. *Boyle*, supra, 287 Conn. 486–87, involved similar circumstances in which the appeal was rendered moot during its pendency and was, therefore, dismissed. Our Supreme Court next addressed the state's contention that the judgment of this court, which had reversed the judgment of the trial court, should be

vacated because it was likely to spawn legal consequences. Id., 487–88. The court in *Boyle* explained: "In determining whether to vacate a judgment that is unreviewable because of mootness, the principal issue is whether the party seeking relief from [that] judgment . . . caused the mootness by voluntary action. . . . A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." (Internal quotation marks omitted.) Id., 489. Our Supreme Court vacated the judgment of this court "to [eliminate] a judgment, review of which was prevented through happenstance and to [clear] the path for future relitigation of the issues . . . ." (Internal quotation marks omitted.) Id., 490–91; see also *In re Candace H.*, 259 Conn. 523, 527 and n.5, 790 A.2d 1164 (2002) (vacatur of judgment of Appellate Court was appropriate "when public interest is served" and to prevent judgment "from spawning any legal consequences" (internal quotation marks omitted)).

In the present case, the judgment of the trial court is a nullity and as such, it is not subject to review on appeal, although it is subject to vacation. See *Angiolillo* v. *Buckmiller*, supra, 102 Conn. App. 713 ("[i]f a court has never acquired jurisdiction over a defendant or the subject matter . . . any judgment ultimately entered is void and subject to vacation or collateral attack" (internal quotation marks omitted)). The estate did not cause the appeal to be moot, as it was the original plaintiff that commenced the action against a nonlegal entity, and no party ever sought a substitution of the proper party. The estate " 'ought not in fairness be forced to acquiesce in' " a judgment that is a nullity and which the trial court never had jurisdiction to render against the estate. *State* v. *Boyle*, supra, 287 Conn. 489. Vacating the judgment would prevent it from spawning legal consequences and would clear the path for future

relitigation of the issues. See id., 491; see also *In re Candace H.*, supra, 259 Conn. 527 n.5.

The appeal is dismissed and the judgment against the estate is vacated.

In this opinion the other judges concurred.

SUSANNE P. WAHBA *v.* JPMORGAN CHASE BANK, N.A.
(AC 42389)

Lavine, Alvord and Harper, Js.

Syllabus

The plaintiff sought to recover damages from the defendant bank for violations of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.) that she alleged occurred in its handling of the modification process with respect to her mortgage. The plaintiff had obtained a mortgage loan from W Co. that was secured by certain real property. The plaintiff and W Co. thereafter engaged in discussions regarding a mortgage modification and eventually reached an agreement. A few days prior to the consummation of the modification agreement, W Co.'s assets, including the plaintiff's existing loan, were acquired by the defendant after W Co. was deemed a failed financial institution and was taken over by the Federal Deposit Insurance Corporation. The plaintiff continued to submit applications for various loan modifications or programs but failed to obtain new loan terms until several years later, when the plaintiff and the defendant executed a new loan agreement. The plaintiff commenced the present action alleging that the defendant engaged in deceptive and unfair trade practices with respect to the loan modification process and the defendant filed a counterclaim, seeking to foreclose on the mortgage. After a jury trial, the jury found in favor of the defendant on the plaintiff's CUTPA claim. After a bench trial on the counterclaim, the court found in favor of the defendant and rendered a judgment of strict foreclosure. From the judgment, the plaintiff appealed to this court. *Held*:

1. This court declined to review the plaintiff's claim of error as to the trial court's judgment of strict foreclosure, the plaintiff having failed to adequately brief that claim; the plaintiff's briefs contained no citation to any evidentiary rulings made within the bench trial on the defendant's foreclosure counterclaim that the plaintiff claims were in error and, therefore, any claim that the judgment of strict foreclosure was made in error was deemed abandoned.

2. The plaintiff's claim that the trial court improperly granted the defendant's motion in limine to preclude evidence of W Co.'s conduct pertaining to the 2008 modification agreement was dismissed as moot, the plaintiff having failed to challenge both of the court's independent bases for its evidentiary ruling; the court granted the motion in limine because W Co.'s conduct was not pleaded in the plaintiff's complaint and because the defendant could not be held liable for W Co.'s purported conduct without the plaintiff first having exhausted her administrative remedies pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA) but, on appeal, the plaintiff challenged only the court's interpretation and application of FIRREA and, therefore, this court could grant no practical relief to the plaintiff.

3. The trial court did not abuse its discretion in granting the defendant's motion in limine to preclude evidence of a consent order between the defendant and the federal government on the basis that it was not relevant to the pleadings: the consent order made no reference to the plaintiff or her mortgage loan and the plaintiff did not allege in her pleadings the activity of the defendant that the government had identified as being improper; moreover, because the plaintiff failed to adequately brief how the preclusion of two other documents was harmful, this court declined to consider the plaintiff's claim of error as to the court's evidentiary ruling regarding these two documents.

4. The trial court did not abuse its discretion in denying the plaintiff's request to amend her complaint; the request to amend was filed the morning that the jury trial was to begin and the court noted its concern that allowing the amendment would cause an undue delay of the trial due it its substantial changes to the pleadings.

Argued February 10—officially released October 20, 2020

Procedural History

Action to recover damages for violations of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant filed a counterclaim seeking to foreclose a mortgage on certain real property owned by the plaintiff; thereafter, the court, *Povodator*, *J.*, granted the defendant's motions in limine to preclude certain evidence and denied the plaintiff's request to amend her complaint; subsequently, the plaintiff's claim was tried to the jury before *Povodator*, *J.*; verdict for the defendant; thereafter, the defendant's counterclaim was tried to the court, *Povodator*, *J.*; judgment for the defendant on the complaint and on the

counterclaim, from which the plaintiff appealed to this court. *Appeal dismissed in part*; *affirmed*.

Thomas P. Willcutts, for the appellant (plaintiff).

Brian D. Rich, for the appellee (defendant).

Opinion

ALVORD, J. The plaintiff, Susanne P. Wahba, appeals from the judgment of the trial court rendered in favor of the defendant, JPMorgan Chase Bank, N.A., after a jury trial on the plaintiff's complaint and a court trial on the defendant's counterclaim.[1] On appeal, the plaintiff

[1] The court conducted two trials in this matter and rendered judgment in favor of the defendant; a jury trial was held in March, 2017 as to the plaintiff's claim under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and a court trial was held in October, 2017 as to the defendant's counterclaim seeking foreclosure. In the concluding sentence of the plaintiff's principal appellate brief, the plaintiff maintains that "both the jury's verdict [on her complaint] and the court's judgment on the defendant's counterclaim, which was substantially linked to the jury's verdict, should be set aside and the case remanded for a new trial." The defendant contends that the plaintiff has failed to brief any claim of error with respect to the court's judgment of strict foreclosure. We agree with the defendant and, accordingly, consider only the plaintiff's claims of error as to the court's judgment with respect to her CUTPA claim.

"It is well settled that claims on appeal must be adequately briefed . . . . Claims that are inadequately briefed generally are considered abandoned." (Citations omitted.) *Grimm* v. *Grimm*, 276 Conn. 377, 393, 886 A.2d 391 (2005), cert. denied, 547 U.S. 1148, 126 S. Ct. 2296, 164 L. Ed. 2d 815 (2006). "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.) *Ward* v. *Greene*, 267 Conn. 539, 546, 839 A.2d 1259 (2004). The plaintiff's briefs are limited to challenging the trial court's orders granting the defendant's motions in limine and denying the plaintiff's request to amend her complaint, which orders were issued only in connection with the jury trial. Although the court considered the evidence admitted during the jury trial and took guidance from the jury's verdict in adjudicating the defendant's counterclaim seeking foreclosure, the court did not accept the jury's verdict as determinative of the plaintiff's equitable defenses in the court trial. Furthermore, the court expressly allowed the plaintiff to offer additional evidence during the court trial on the defendant's counterclaim, recognizing that considerations regarding the admissibility of evidence excluded for the purposes of the jury trial might have been different during the court trial. Because the plaintiff provides no citation to any evidentiary ruling made within the foreclosure trial that she contends was in error, the

claims that the court improperly (1) granted the defendant's March 15, 2017 motion in limine precluding evidence regarding a 2008 modification agreement (March 15 motion in limine), (2) granted the defendant's March 16, 2017 motion in limine precluding evidence regarding government regulatory action taken against the defendant (March 16 motion in limine), and (3) denied the plaintiff's request to amend her complaint. We dismiss the plaintiff's first claim as moot because the plaintiff has not challenged both of the trial court's bases for its evidentiary ruling. With regard to the plaintiff's remaining claims, we affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In the 1970s, the plaintiff and her husband purchased property located at 111 Byram Shore Road, Greenwich, which has been subject to different mortgages over the years.[2] Prior to any involvement by the defendant, the plaintiff had most recently obtained a mortgage loan from Washington Mutual (WaMu) in 2003.

In 2008, immediately before WaMu was determined to be a failed financial institution and was taken over

plaintiff's claim of error as to the trial court's judgment of strict foreclosure has been inadequately briefed and, therefore, abandoned.

[2] The plaintiff's husband, Mahmoud Wahba, at times was a joint owner of the property, but not during a time relevant to this appeal. In the defendant's counterclaim of strict foreclosure, the following third parties were identified as junior lienholders on the subject property and named as counterclaim defendants: Mortgage Electronic Registration Systems, Inc.; Bridge Funding, Inc.; Dr. Magdy A. Wahba; American Express Centurion Bank; and Midland Funding, LLC. On May 24, 2016, Dr. Magdy A. Wahba filed an appearance. On May 26, 2016, the court granted the defendant's motion for default for failure to appear against Mortgage Electronic Registration Systems, Inc., American Express Centurion Bank, and Midland Funding, LLC. On June 7, 2016, the court granted the defendant's motion for default for failure to appear against Bridge Funding, Inc. On February 7, 2017, the court granted the defendant's motion for default for failure to disclose defense against Dr. Magdy A. Wahba. None of those rulings is challenged on appeal. Accordingly, none of the aforementioned counterclaim defendants is a participating party in this appeal.

by the Federal Deposit Insurance Corporation (FDIC), there had been discussions between the plaintiff and WaMu and an application for a new loan arrangement with WaMu. On September 25, 2008, the defendant acquired the assets of WaMu from the FDIC, including the existing loan to the plaintiff. On September 29, 2008, within four days of the defendant's acquisition of the plaintiff's mortgage, the plaintiff and the defendant consummated a modification agreement (2008 modification agreement), which, inter alia, raised the fixed interest rate of the existing WaMu note.

Following the execution of the 2008 modification agreement, the plaintiff submitted to the defendant three applications for various loan modifications or programs between 2008 and 2012, seeking more advantageous terms for her mortgage loan. She failed to obtain approval of new loan terms until August 29, 2012, when the plaintiff and the defendant executed the currently operative loan agreement.

The plaintiff commenced this action in September, 2013, alleging that the defendant engaged in deceptive and unfair trade practices in violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110b et seq.[3] The plaintiff's CUTPA claim against the defendant was tried to the jury in March, 2017. At trial, the plaintiff presented two arguments in support of her claim. First, the plaintiff argued that the defendant modified the WaMu note, pursuant to the terms of the 2008 modification agreement, knowing that the plaintiff had been induced to sign the agreement on the basis of false and deceptive representations, namely, that the 2008 modification agreement was a necessary precondition for the plaintiff to qualify for

[3] In count two of the plaintiff's complaint, she also sought to have the court quiet title to the property, but the court entered summary judgment in favor of the defendant on that count. The plaintiff does not challenge that decision on appeal.

more favorable mortgage modification terms. Second, the plaintiff argued that the defendant engaged in a deceptive mortgage modification scheme that was designed to purposefully extend the modification process without any intention of finalizing a favorable modification agreement. The jury returned a verdict for the defendant, finding that the plaintiff failed to prove that the defendant violated CUTPA.

This appeal stems from the court's rulings on several motions filed on the eve of trial.[4] On appeal, the plaintiff challenges the court's rulings on (1) the defendant's March 15 motion in limine seeking to preclude evidence regarding the conduct of WaMu pertaining to the 2008 modification agreement, (2) the defendant's March 16 motion in limine seeking to preclude evidence regarding government regulatory action taken against the defendant, and (3) the plaintiff's March 16, 2017 request to amend her complaint seeking to include allegations concerning the conduct of WaMu pertaining to the 2008 modification agreement. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff's first claim on appeal is that the court improperly granted the defendant's March 15 motion in limine precluding evidence of WaMu's conduct pertaining to the 2008 modification agreement.[5] We conclude that this claim is moot because the plaintiff has not challenged both of the trial court's bases for its evidentiary ruling.

[4] The parties filed the motions after jury selection had been completed. The jury trial on the plaintiff's CUTPA claim was scheduled to begin on March 16, 2017. On that morning, the court heard oral argument on the motions immediately prior to the scheduled start of trial. Due, in part, to the court's need to hear additional argument on the parties' motions, the court delayed the start of trial until the next morning, March 17, 2017.

[5] The defendant's March 15 motion in limine sought to preclude evidence of the foundation of the 2008 modification agreement, namely, negotiations by and between the plaintiff and WaMu.

Our review of the record indicates that the court granted the defendant's March 15 motion in limine on two independent bases: (1) WaMu's conduct pertaining to the 2008 modification agreement was not pleaded in the plaintiff's complaint; and (2) WaMu's conduct was not relevant because, under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1821 (d) (2018), the defendant cannot be held liable for the purported conduct of WaMu without the plaintiff first exhausting her administrative remedies.[6] The defendant's March 15 motion in limine was argued before the court on March 16 and 17, 2017. On March 17, 2017, the court stated its concerns with admitting the evidence of WaMu's conduct pertaining to the 2008 modification agreement as follows: "Aside from the fact that none of this is in the [c]omplaint . . . I also have a problem . . . about FIRREA . . . having a requirement that before you can assert a claim against a successor, whether it's the FDIC or the bank that takes over, you need to go through the administrative process." Ultimately, the court found that "[t]here [was] nothing [alleged] in the complaint that suggested

[6] "FIRREA provides an administrative review process for all claims asserted against assets of a failed institution. . . . The administrative review process provided by FIRREA is a prerequisite to judicial review." *Aber-Shukofsky* v. *JPMorgan Chase & Co.*, 755 F. Supp. 2d 441, 445 (E.D.N.Y. 2010).

Title 12 of the United States Code, § 1821 (d) (13) (D), provides: "Except as otherwise provided in this subsection, no court shall have jurisdiction over—

"(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

"(ii) *any claim relating to any act or omission of such institution* or the Corporation as receiver." (Emphasis added.)

"Given FIRREA's clear language, the Second Circuit has consistently held that courts lack subject matter jurisdiction to hear a claim against a failed bank taken into receivership by the FDIC unless the plaintiff has exhausted the administrative claims process." *Aber-Shukofsky* v. *JPMorgan Chase & Co.*, supra, 446.

anything about antecedent conduct during the life of WaMu" and, accordingly, precluded evidence of the plaintiff's discussions with WaMu preliminary to the 2008 modification agreement.

"Where an appellant fails to challenge all bases for a trial court's adverse ruling on [her] claim, even if this court were to agree with the appellant on the issues that [she] does raise, we still would not be able to provide [her] any relief in light of the binding adverse finding[s] [not raised] with respect to those claims. . . . Therefore, when an appellant challenges a trial court's adverse ruling, but does not challenge all independent bases for that ruling, the appeal is moot." (Citation omitted; internal quotation marks omitted.) *State* v. *Lester*, 324 Conn. 519, 526–27, 153 A.3d 647 (2017).

On appeal, the plaintiff argues only that the court's interpretation and application of FIRREA in granting the defendant's March 15 motion in limine was in error.[7] The plaintiff does not challenge the trial court's exclusion of evidence on the basis that it was not pleaded in the complaint.[8] Because the plaintiff on appeal has

[7] In her principal appellate brief, the plaintiff also suggested that the defendant employed "trial by ambush" tactics in timing its March 15 motion in limine and injecting FIRREA into the case. The plaintiff expressly abandoned that claim at oral argument before this court. Therefore, we do not consider that claim. See *Cunningham* v. *Commissioner of Correction*, 195 Conn. App. 63, 65 n.1, 223 A.3d 85 (2019), cert. denied, 334 Conn. 920, 222 A.3d 514 (2020).

[8] In her brief, the plaintiff contends that the defendant's March 15 motion in limine did not argue that evidence concerning WaMu should be precluded because it was not properly within the scope of the allegations of the plaintiff's complaint and only sought to preclude such evidence on the basis of FIRREA. The plaintiff states that, in light of the arguments or lack thereof presented in the defendant's March 15 motion in limine, it is her understanding and position that the WaMu evidence was precluded on the sole basis of FIRREA. The record reveals that the plaintiff's understanding and position is incorrect. First, during oral argument on the March 15 motion in limine, the defendant objected to the plaintiff offering evidence of the plaintiff's discussions with WaMu predating the 2008 modification agreement on the ground that such evidence was not within the allegations of the plaintiff's complaint. Second, the court expressly stated in its ruling that "[t]here [was]

not challenged one of the two independent bases for the trial court's exclusion of the evidence, even if this court were to conclude that the trial court improperly applied FIRREA, we can grant no practical relief to the plaintiff. See *State* v. *Lester*, supra, 324 Conn. 528. Accordingly, we conclude that the plaintiff's claim is moot and this court lacks subject matter jurisdiction to consider it.

II

The plaintiff's second claim on appeal is that the court improperly granted the defendant's March 16 motion in limine precluding evidence regarding government regulatory action taken against the defendant. The plaintiff argues that such evidence was improperly precluded because it is relevant to the defendant's decision to approve the plaintiff's requested loan modification in August, 2012.[9] The defendant contends that the court properly precluded the evidence because it lacks relevance to the plaintiff's specific claims, would cause undue prejudice to the defendant, and lacks any probative value relative to the claims or defenses in this case. We agree with the defendant that the court properly granted its March 16 motion in limine.

The following additional facts and procedural history are relevant to this claim. After the 2008 modification

nothing [alleged] in the [plaintiff's] complaint that suggested anything about antecedent conduct during the life of WaMu."

[9] In her objection to the defendant's March 16 motion in limine, the plaintiff also argued that such evidence is relevant to "the public policy that was adopted by our government in the aftermath of the banking/mortgage crisis of 2008 and whether or not the defendant engaged in conduct that was . . . violative of the public policy considerations attaching to the parties' dealings." At trial, however, the court provided a charge to the jury on public policy as follows: "With respect to mortgage modifications specifically, public policy requires a mortgage servicer to treat a borrower fairly during the course of the modification process. Further during this period of time, there was an evolving policy encouraging solutions to homeowner mortgage problems that did not require foreclosure." The plaintiff does not challenge the propriety of this charge on appeal.

agreement and until 2012, the plaintiff submitted to the defendant three unsuccessful applications for various modifications or programs, seeking more advantageous terms for her mortgage loan. On the first occasion, the defendant told the plaintiff that her income was too high to qualify for a program to which she had applied. On the second occasion, substantially later in time, the defendant told the plaintiff that her income was too low to qualify. On the third occasion, "senior management" initially instructed that the plaintiff's application be denied and, several months later, the plaintiff's mortgage loan had been referred out to pursue foreclosure proceedings. However, the defendant ultimately approved the plaintiff's request for a modification in August, 2012 "per management." On August 29, 2012, the plaintiff and the defendant executed the currently operative loan agreement.

At trial, the plaintiff included on her exhibit list an April 13, 2011 consent order (consent order) between the defendant and the United States Department of the Treasury, Office of the Comptroller of the Currency, under which the defendant "committed to taking all necessary and appropriate steps to remedy the deficiencies and unsafe or unsound practices identified by the [Office of the Comptroller of the Currency], and to enhance the [defendant's] residential mortgage servicing and foreclosure processes." One such step, the foreclosure review, required the defendant to "retain an independent consultant . . . to conduct an independent review of certain residential foreclosure actions regarding individual borrowers with respect to the [defendant's] mortgage servicing portfolio . . . includ-[ing] residential foreclosure actions or proceedings . . . for loans serviced by the [defendant] . . . that have been pending at any time from January 1, 2009 to December 31, 2010 . . . ." Among other things, the independent consultant was charged with determining

"whether any errors, misrepresentations, or other deficiencies identified in the [f]oreclosure [r]eview resulted in financial injury to the borrower," which would require the defendant to submit "a plan, acceptable to the [Office of the Comptroller of the Currency] to remediate all financial injury to borrowers caused by any errors, misrepresentations or other deficiencies identified . . . ."[10]

On March 16, 2017, the defendant filed a motion in limine seeking to preclude the plaintiff from offering into evidence three documents: (1) the consent order, (2) an FDIC press release, and (3) a printout of a website posting from the Department of the Treasury relating to the Troubled Asset Relief Program, as well as any other similar document or testimony relating to government regulatory action taken against the defendant. On March 17, 2017, the court heard oral argument on the defendant's March 16 motion in limine. The court found that, so far as the plaintiff stated in her argument, such evidence was not relevant to the plaintiff's claims. The court granted the defendant's March 16 motion in limine without prejudice to the plaintiff seeking review of that ruling as the evidence was presented at trial.

We first set forth our standard of review. "A trial court may entertain a motion in limine made by either party regarding the admission or exclusion of anticipated evidence. . . . The judicial authority may grant the relief sought in the motion or other relief as it may deem appropriate, may deny the motion with or without prejudice to its later renewal, or may reserve decision

[10] In 2013, the defendant entered into an agreement with the Office of Comptroller of the Currency and the Board of Governors of the Federal Reserve System, resolving the foreclosure review required by regulators. Thereafter, the plaintiff was notified that she was eligible to receive a payment as a result of that agreement. By letter dated April 26, 2013, the plaintiff received a payment of $500, an amount determined by regulators "based on the stage of [the plaintiff's] foreclosure process and other considerations related to [her] foreclosure."

thereon until a later time in the proceeding. . . . [T]he motion in limine . . . has generally been used in Connecticut courts to invoke a trial judge's inherent discretionary powers to control proceedings, exclude evidence, and prevent occurrences that might unnecessarily prejudice the right of any party to a fair trial. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . [Thus, our] review of such rulings is limited to the questions of whether the trial court correctly applied the law and reasonably could have reached the conclusion that it did." (Citation omitted; internal quotation marks omitted.) *McBurney* v. *Paquin*, 302 Conn. 359, 377–78, 28 A.3d 272 (2011).

"[E]vidence is admissible only if it is relevant. . . . Relevant evidence is evidence that has a logical tendency to aid the trier in the determination of an issue. . . . One fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is irrelevant or too remote if there is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in the proof of the latter. . . . The proffering party bears the burden of establishing [relevance]." (Citation omitted; internal quotation marks omitted.) Id., 378.

Before turning to the plaintiff's arguments, we note that in her appellate brief the plaintiff claims harmful error only as to the court's preclusion of the consent order and the related communications pertaining to the foreclosure review. The plaintiff's brief does not

adequately set forth an analysis of how the court's preclusion of evidence of the two other documents, an FDIC press release or a printout of a website posting from the Department of the Treasury, affected the final result of the proceeding. "[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . The harmless error standard in a civil case is whether the improper ruling would likely affect the result. . . . When judging the likely effect of such a trial court ruling, the reviewing court is constrained to make its determination on the basis of the printed record before it. . . . In the absence of a showing that the [excluded] evidence would have affected the final result, its exclusion is harmless." (Internal quotation marks omitted.) *Lane* v. *Cashman*, 179 Conn. App. 394, 435, 180 A.3d 13 (2018). Faced with the plaintiff's failure to adequately brief how the court's exclusion of evidence of an FDIC press release or a printout of a website posting from the Department of the Treasury was harmful, we therefore decline to consider the plaintiff's claim of error related to the challenged evidentiary ruling. See *Lane* v. *Cashman*, supra, 435. Accordingly, we only consider the plaintiff's claim as to the court's ruling on the consent order.

By its terms, the consent order made no reference to the plaintiff or to her mortgage loan. During oral argument on the defendant's March 16 motion in limine, the court noted that regardless of whether the Office of the Comptroller of the Currency identified some deficiencies in the defendant's loan servicing at large, it bears no relevance to whether there were any such deficiencies in the defendant's servicing of the plaintiff's mortgage loan. Although the plaintiff had applied, on the basis of the status of her mortgage loan and the defendant's handling of the same, to collect on any deficiencies identified by the Office of the Comptroller

of the Currency during the foreclosure review process, the plaintiff was not notified of her eligibility and in receipt of compensation until April 26, 2013—approximately eight months after the plaintiff and the defendant executed the currently operative loan agreement in August, 2012. Furthermore, the court found that the plaintiff did not allege in her pleadings the significant activity that the Department of the Treasury identified as being improper, namely, that the defendant deviated from loan documents. "What is in issue is determined by the pleadings and, once they have been filed, the evidence proffered must be relevant to the issues raised in the pleadings." (Internal quotation marks omitted.) *KMK Insulation, Inc.* v. *A. Prete & Son Construction Co.*, 49 Conn. App. 522, 527–28, 715 A.2d 799 (1998). The court properly precluded the consent order on the basis that it was not relevant to the pleadings. We therefore find no abuse of discretion in the court's ruling granting the defendant's March 16 motion in limine.

III

The plaintiff's third claim on appeal is that the court improperly denied the plaintiff's request to amend her complaint, which sought to include allegations concerning WaMu's conduct pertaining to the 2008 modification agreement. Specifically, the plaintiff argues that, because it was apparent to the defendant that at least a portion of the plaintiff's claim rested on WaMu's conduct pertaining to the foundation of the 2008 modification agreement, the requested amendment did not unfairly prejudice the defendant and, therefore, the court improperly denied her request to amend. The defendant responds that the court properly denied the plaintiff's request to amend as the amendment sought to include new allegations relating to the 2008 modification agreement at a belated stage of trial. We agree with the defendant that the court properly denied the plaintiff's request to amend her complaint.

The following additional facts and procedural history are relevant to this claim. On the morning of March 16, 2017, after jury selection had been completed and immediately prior to anticipated opening statements and the presentation of evidence, the plaintiff filed a request to amend her complaint. On that morning, the court heard oral argument on the request. The plaintiff's requested amendment sought to include, inter alia, allegations concerning the communications leading up to the 2008 modification agreement. Specifically, the plaintiff's requested amendment alleged that "the plaintiff contacted [WaMu] . . . concerning a possible modification of the mortgage . . . . Said communications continued with [the defendant] upon its acquiring [WaMu]."[11]

During oral argument on the request to amend, the plaintiff argued that "the evidence would be . . . that essentially the same [WaMu employees] who would have made representations leading up to the execution of that [2008 modification agreement] in favor of [the defendant] were the people who . . . then became [the defendant's] employees and continued to be involved in the execution of that agreement." The plaintiff further maintained that "given the facts that lead up to the sign-of that agreement, I think, the elements are there to have a duty to speak. I think, fraudulent nondisclosure

[11] The plaintiff's original complaint alleged: "After the plaintiff skipped three months of payments on her mortgage, as instructed by [the defendant] in order to qualify for a mortgage modification, [the defendant] informed the plaintiff that she was in default of her mortgage and [the defendant] threatened that if [the plaintiff] did not accept [the 2008 modification agreement], then it would pursue foreclosure proceedings against the property. Under the threat of foreclosure, the plaintiff [entered into the 2008 modification agreement], as demanded by [the defendant], while continuing to negotiate with [the defendant] for a mortgage modification . . . consistent with [the defendant's] original representations concerning the benefits available for the plaintiff in pursuing [the 2008] mortgage modification . . . ." Notably, the plaintiff's original complaint made no reference to WaMu's conduct pertaining to the 2008 modification agreement.

kicks in when a person makes a representation that they know is not true and they know is being relied upon." The court characterized the plaintiff's amendment as including "substantial changes" to the pleadings, articulating a concern for the already selected jury and a delay of trial. Due, in part, to the court's need to hear additional argument on the plaintiff's request to amend, the court delayed the start of trial until the next morning, March 17, 2017.

On March 17, 2017, the court denied the plaintiff's amendment insofar as it concerned the plaintiff's communications with WaMu leading up to the 2008 modification agreement. In so doing, the court stated: "We have to get this going. The case is going to start. . . . The [defendant's] objection is sustained to the [plaintiff's] amendment. We are dealing with a situation where we are talking about misrepresentations made by [the defendant] concerning . . . the [2008 modification agreement]." "This is what the complaint was and is . . . staying as."

We first set forth our standard of review. "Our standard of review of the [plaintiff's] claim is well defined. A trial court's ruling on a motion of a party to amend its complaint will be disturbed only on the showing of a clear abuse of discretion. . . . Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [plaintiff's] burden in this case to demonstrate that the trial court clearly abused its discretion. . . .

"A trial court may allow, in its discretion, an amendment to pleadings before, during, or after trial to conform to the proof. . . . Factors to be considered in passing on a motion to amend are the length of the

delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. . . . The essential tests are whether the ruling of the court will work an injustice to either the plaintiff or the defendant and whether the granting of the motion will unduly delay a trial." (Internal quotation marks omitted.) *Billy & Leo, LLC* v. *Michaelidis*, 87 Conn. App. 710, 714, 867 A.2d 119 (2005).

During oral argument on the plaintiff's request to amend her complaint, the court noted its concern for an undue delay of trial in light of the "substantial changes" to the pleadings and the defendant's argument that the amendment contained wholly new allegations that would require additional preparation. Although the plaintiff contends that the defendant was on notice of the new allegations because of evidence brought out in discovery, the defendant was not on notice that such information would be allowed at trial. See *Billy & Leo, LLC* v. *Michaelidis*, supra, 87 Conn. App. 715. "[T]he plaintiff filed the motion to amend only a day or two before the trial was to commence, and such a late amendment would have prejudiced the defendant in his case. We can find no reason to conclude that the court abused its discretion in making that ruling." Id., 715–16; see *Beckman* v. *Jalich Homes, Inc.*, 190 Conn. 299, 303, 460 A.2d 488 (1983) (trial court did not abuse its discretion by denying request to amend that was filed day before trial and would have added new bases of liability); see also *Connecticut National Bank* v. *Douglas*, 221 Conn. 530, 549, 606 A.2d 684 (1992) ("[w]e have not previously found an abuse of discretion when a trial court, on the eve of trial, concluded that prejudice and delay would result from a substantial amendment to the [pleadings], and we decline to do so in the present circumstances" (internal quotation marks omitted)). Accordingly, we conclude that the court did not abuse

its discretion in denying the plaintiff's request to amend her complaint.

The appeal is dismissed with respect to the defendant's March 15, 2017 motion in limine; the judgment is affirmed and the case is remanded solely for the purpose of setting new law days.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

CONNECTICUT APPELLATE REPORTS

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STATE OF CONNECTICUT *v.* ANDREW ELMASSRI
(AC 42596)

Prescott, Suarez and DiPentima, Js.

Argued October 5—officially released October 20, 2020

Defendant's appeal from the Superior Court in the judicial district of New Britain, *Oliver*, *J.*

Per Curiam. The judgment is affirmed.

HEATHER S. *v.* COMMISSIONER OF CORRECTION
(AC 42085)

Alvord, Cradle and Sullivan, Js.

Argued October 6—officially released October 20, 2020

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Kwak*, *J.*

Per Curiam. The appeal is dismissed.

JUAN MALDONADO *v.* COMMISSIONER OF CORRECTION
(AC 42995)

Alvord, Elgo and Albis, Js.

Argued October 8—officially released October 20, 2020

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The appeal is dismissed.

MARLON SYMS *v.* COMMISSIONER
OF CORRECTION
(AC 42784)

Bright, C. J., and Lavine and Cradle, Js.

Argued October 7—officially released October 20, 2020

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The appeal is dismissed.

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State *v.* Syms. 55

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should be dismissed as moot for failure to challenge each of court's independent bases for its ruling; whether trial court abused its discretion in granting motion in limine; whether trial court abused its discretion in denying plaintiff's request to amend complaint.

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CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

LONNIE ANDERSON *v.* COMMISSIONER OF CORRECTION (AC 42515)

Lavine, Bright and Beach, Js.*

Syllabus

The petitioner, who previously had been convicted of the crimes of assault in the first degree with a firearm and assault of a peace officer with a firearm, sought a writ of habeas corpus, claiming, inter alia, that his trial counsel, B, rendered ineffective assistance by failing to present certain evidence to support his request that the trial court instruct the jury on self-defense. The petitioner's conviction stemmed from an incident in which state marshals, wearing police attire and badges, were attempting to serve a capias warrant on the petitioner at the front door of his residence. When the marshals informed him that they intended to take him into custody, the petitioner drew a firearm and began firing at the marshals. The marshals were unarmed and fled from the residence. The petitioner argued on appeal that B should have introduced the testimony of three individuals, J, H, and L, who had been present at various points in the confrontation and that, if he had done so, the trial court would have given the requested instruction on self-defense. The habeas court rendered judgment denying the habeas petition and, thereafter, denied the petition for certification to appeal, and the petitioner appealed to this court. *Held* that the habeas court did not abuse its discretion in denying the petition for certification to appeal; it was not debatable among jurists of reason that B's performance did not prejudice the petitioner as the petitioner failed to demonstrate that there was a

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

reasonable probability that the outcome of his criminal trial would have been different had B presented the testimony of J, H, and L, as the facts they would have testified to would not have justified a self-defense instruction, in light of the evidence that the marshals were readily identifiable, there was no evidence that any marshal unholstered or brandished a firearm while trying to take the petitioner into custody, and it was undisputed that at the time the petitioner was firing his gun, the marshals were fleeing from the petitioner.

Argued May 20—officially released October 20, 2020

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, geographical area number nineteen, and tried to the court, *Sferrazza*, *J.*; judgment in part denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

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

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (respondent).

Opinion

BRIGHT, J. The petitioner, Lonnie Anderson, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying count one of his amended petition for a writ of habeas corpus.[1] On appeal, the petitioner contends that the

[1] The habeas court granted relief as to count two of the amended petition which alleged that the petitioner's constitutional right to the effective assistance of appellate counsel had been violated. The habeas court concluded that counsel had performed deficiently by withdrawing the appeal and that the petitioner was prejudiced by the withdrawal. Consequently, the habeas court reinstated the petitioner's right to directly appeal the underlying conviction. See *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 133 n.7, 7 A.3d 911 (2010). This aspect of the habeas court's ruling is not at issue in this appeal.

habeas court abused its discretion by denying his petition for certification to appeal because he properly had established in his petition for a writ of habeas corpus that his constitutional right to the effective assistance of trial counsel had been violated during his criminal trial when a jury found him guilty of assault in the first degree with a firearm and assault of a peace officer with a firearm. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the petitioner's appeal.

The record reveals the following relevant underlying facts, which the jury at the petitioner's criminal trial reasonably could have found, and procedural history that are relevant to our consideration of the petitioner's claim. On October 6, 2009, State Marshals Arthur Quinn, Charles Valentino, Joseph Butler, and Richard Krueger went to 434 Indian Avenue in Bridgeport to serve a capias warrant authorizing the marshals to take the petitioner into custody for failing to appear in a child support case. The marshals arrived at approximately 7:45 p.m. Butler and Krueger went to the rear of the address. Quinn and Valentino walked to the front door, and Valentino knocked on the door. Quinn and Valentino wore clothing that identified them as state marshals and displayed badges. Neither marshal carried a firearm. Valentino, who was wearing a marshal's hat, was in possession of the capias warrant and wore a utility belt on which were attached handcuffs, gloves, Mace, and a police baton.

An eight year old relative of the petitioner answered the door, and the marshals asked to speak with the petitioner. The child left and returned with Lyman Anderson, the petitioner's brother. Utilizing a photograph of the petitioner, Quinn and Valentino recognized that

Lyman Anderson was not the subject of the capias warrant. Lyman Anderson went back into the home, and the petitioner came to the front door.

The petitioner arrived at the front door armed with a nine millimeter, semiautomatic pistol that he kept concealed in his sweatpants. Upon inquiry about his identity, the petitioner falsely replied that he was John Anderson. Recognizing the petitioner, the marshals confronted him with the photograph, informed him that he had missed a court date, and stated that they intended to take him into custody. The petitioner took a step back, drew his pistol, and chambered a round. Valentino spotted the firearm and shouted "[g]un!" The marshals ran off the doorstep and headed in opposite directions.

Valentino heard five to six gunshots and perceived a bullet pass close by his head. As Valentino sought cover behind a parked van, he heard more shots. Valentino observed, through the vehicle's windows, the petitioner standing on the top step of the stoop and shooting toward Quinn. Valentino observed the petitioner discard an ammunition magazine and insert a second magazine into the pistol.

During his rapid retreat, Quinn also heard gunshots. Quinn realized that a bullet had struck his left foot. Quinn sustained a second gunshot wound to his right forearm. A neighbor emerged from his home with a towel to help stop the bleeding from Quinn's arm. Also hearing gunshots, Butler and Krueger ran toward the front of the residence from their position at the rear of the residence.

After shooting at Quinn and Valentino, the petitioner returned to the residence. Lyman Anderson attempted to calm the petitioner and suggested that he go outside with his hands raised to surrender. The petitioner, at first, told Lyman Anderson that he did not want to do

so because he was worried that the marshals would fire at him.

A few minutes later, Bridgeport Police Officer Hugo Stern received a call, via a police broadcast, about the incident. Stern arrived at the Indian Avenue residence and saw state marshals hiding near a red car. Stern drew his weapon and saw someone matching the description of the shooter. That person stood on the top step of the entryway. Stern aimed his gun at that person, who was the petitioner, and ordered the petitioner to raise his hands. The petitioner complied.

As Stern cautiously approached the petitioner, he noticed that the petitioner wore an empty holster on his right hip. Stern ordered the petitioner to lie slowly on the ground, and the petitioner complied. Stern then directed the petitioner to spread his arms and legs. The petitioner appeared to cooperate. After Stern holstered his own weapon and attempted to handcuff the petitioner, the petitioner resisted by rising into a crouch and becoming combative. Stern saw the petitioner reach into the waistband of his pants to retrieve an item. Bridgeport Police Officer Bobby Jones came to Stern's assistance, and the officers subdued the petitioner. As the officers rolled the petitioner over, they observed that the petitioner was lying on top of a semiautomatic handgun. The officers seized the weapon. Subsequent testing demonstrated that the weapon was the same gun from which several shots had been fired at the scene. Additionally, the weapon was loaded with a magazine full of cartridges.

The state charged the petitioner with two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (5), one count of assault of a peace officer in violation of General Statutes § 53a-167c and, for each count,

with the commission of a class A, B, or C felony with a firearm in violation of General Statutes § 53-202k.[2]

During the jury trial, the petitioner's trial counsel, J. Patten Brown III, filed a request to charge in which Brown asked the court to provide the pattern jury instruction on self-defense pursuant to General Statutes § 53a-19. The court declined Brown's request to charge the jury on self-defense on the ground that there was insufficient evidence to support the theory that the officers were approaching the petitioner in such a manner prior to the shooting that would justify a self-defense charge.

The jury found the petitioner guilty of assault in the first degree and assault of a peace officer, and his sentence was enhanced on each count pursuant to § 53-202k for the commission of a class A, B, or C felony with a firearm. The petitioner was acquitted of the remaining charges. The court sentenced the petitioner to a total effective sentence of eleven years of incarceration followed by five years of special parole.

On September 30, 2011, the petitioner filed an appeal to the Appellate Court. Brown represented the petitioner at the criminal trial and on direct appeal. On July 26, 2012, Brown withdrew the direct appeal after consulting with the petitioner. On March 10, 2015, the self-represented petitioner filed a petition for a writ of

[2] "[Section] 53-202k is a sentence enhancement provision and not a separate crime. . . . [Our Supreme Court] [has] interpreted § 53-202k to require that the jury, rather than the court, determine whether a firearm was used in the commission of the underlying felony." (Citation omitted.) *State* v. *Nash*, 316 Conn. 651, 656 n.6, 114 A.3d 128 (2015). General Statutes § 53-202k provides: "Any person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined in section 53a-3, except an assault weapon, as defined in section 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

habeas corpus and, on August 31, 2018, the petitioner filed the operative amended petition for a writ of habeas corpus. In the amended petition, the petitioner asserted the following claims: (1) his constitutional right to the effective assistance of trial counsel was violated and (2) his constitutional right to the effective assistance of appellate counsel was violated.

As to his claim of ineffective assistance of trial counsel, the petitioner argued that Brown failed to present evidence that was available to him to support his self-defense theory. Specifically, the petitioner argued that Brown's performance was deficient because he had failed to present the testimony of Bridgeport Police Officer Juan Hernandez, Bridgeport Police Officer Bobby Jones, and Lyman Anderson. The petitioner argued that he was prejudiced by Brown's failures because, had the evidence been presented, the trial court would have given the requested instruction on self-defense and it is reasonably probable that the jury would have concluded that the state failed to disprove self-defense beyond a reasonable doubt.

On November 8, 2018, the habeas court denied the amended petition with regard to the petitioner's claim that the petitioner's constitutional right to the effective assistance of trial counsel had been violated. In its memorandum of decision, the court discussed the testimony on which the petitioner's claim is based. "The petitioner contends that potential testimony could have been elicited from Lyman Anderson, Officer Jones, and Officer Juan Hernandez that at least one of the marshals at the scene was armed. Further, Lyman Anderson could have testified that [the petitioner] discharged his pistol toward Quinn and Valentino in response to one of the marshal's attempts to barge into the residence and grab the petitioner."

As to Lyman Anderson, the court found: "It was the prosecution that called Lyman Anderson to testify at

the criminal trial. Lyman related that, when he went to the front door that his young nephew had opened, he saw four uniformed marshals, one of whom carried a handgun on his person. This testimony, however, contrasted with the statement Lyman gave to the police on the evening of the shooting. In that recorded statement, given a few hours after the incident, Lyman reported that there were two marshals on the doorstep, neither of whom appeared armed with a gun.

"In that recording, Lyman apparently recounted that he saw the petitioner raise his gun and begin firing at the marshals. At the criminal trial, Lyman acknowledged that he had told this version to the police, but he now denied its accuracy. His trial testimony reflected that he was not present near the entryway and was elsewhere in the house when he heard gunfire.

"Both in his recorded statement to the police and in his testimony at the criminal trial, Lyman recalled overhearing his brother lie about his identity. Lyman agreed in that testimony that, once the marshals ascertained he was not Lonnie, he went upstairs, and the petitioner then came downstairs to speak with the marshals.

"At the habeas trial, Lyman testified that Attorney Brown and the defense investigator interviewed him before the criminal trial. He avows that he told them a version of the incident that contradicted both his statement to the police and his eventual trial testimony. He now swears that the marshals never mentioned that they were there to execute the capias; that he saw a marshal attempt to bull his way through the front door, which was only slightly open; that the marshal tried to grab for the petitioner; that four or five marshals were there and all were armed with handguns; and that the marshals initiated the physical conflict." (Emphasis omitted.)

The court then discussed the testimony of Jones and Hernandez. "Officers Bobby Jones and Juan Hernandez, Jr., also testified at the habeas trial. They stated that one of the four marshals had a firearm, but neither identified Quinn nor Valentino as that marshal. Importantly, no witness ever stated that a marshal brandished a handgun while at the doorstep. All witnesses concurred on every occasion that the petitioner began firing at the marshals as they fled, as fast as they could, upon seeing the petitioner's pistol."

On the basis of the evidence presented to it, the habeas court concluded the following: "Thus, even if the testimony of Officers Jones and Hernandez supported a finding that some, unidentified marshal had a handgun on his person, no evidence would have warranted a self-defense instruction under all the circumstances of this case. The jury necessarily determined by its verdict that the state had proved, beyond a reasonable doubt, that Marshals Quinn and Valentino were reasonably identifiable peace officers under . . . § 53a-167c (a) and that the petitioner *intended* to prevent [them] . . . from performing [their] duties . . . while such peace officer[s] [were] acting in the performance of [their] duties. Nor does the habeas testimony of Lyman Anderson assist the petitioner in that regard. As mentioned above, Lyman denied being present during the incident in his criminal trial testimony. His only contribution could be that one of the two marshals at the doorstep possessed a gun on his person but not that that marshal ever drew the weapon.

"It must be kept in mind that General Statutes § 53a-23 commands that a 'person is not justified in using physical force to resist an arrest by a reasonably identifiable peace officer . . . whether such arrest is legal or illegal.' While a person is justified in defending oneself from 'egregiously unlawful conduct—such as an unprovoked assault' by a peace officer, § 53a-23 'was

intended to require an arrestee to submit to an *arrest*, even though he believes . . . that the arrest was . . . unlawful.' *State* v. *Davis*, 261 Conn. 553, 568 [804 A.2d 781] (2002) . . . . General Statutes § 53a-3 (9) defines 'peace officer' to include state marshals.

"In the petitioner's case, there is no claim that taking him into custody under the capias was illegal. Nor is there any contention that the marshals were employing excessive force. Assuming, arguendo, that one of the marshals tried to grab hold of the petitioner's arm, § 53a-23 would negate the viability of a self-defense claim because every arrest entails some degree of physical restraint. Self-defense, in an arrest situation, only justifies the use of defensive force to ward off abusive violence; a claim which never arose in the petitioner's case. Consequently, the court determines that the petitioner has failed to meet his burden of proving either prong of the [*Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] standard with respect to Attorney Brown's trial assistance." (Emphasis in original.) On November 8, 2018, the habeas court denied the amended petition with regard to the petitioner's claim that his constitutional right to the effective assistance of trial counsel had been violated, and, on November 20, 2018, the habeas court denied the petitioner's petition for certification to appeal. This appeal followed.

The petitioner claims that the habeas court erred in concluding that he failed to show both that Brown's representation was deficient and that he was prejudiced by Brown's errors. In particular, he argues that the evidence presented at the habeas trial proved that Brown had evidence available to him to show that Valentino was armed and that Valentino and Quinn grabbed for the petitioner, which caused him reasonably to fear for his life, thereby entitling him to a self-defense instruction. We are not persuaded.

We first set forth the standard of review relevant to our resolution of this appeal. "Faced with the habeas court's denial of certification to appeal, a petitioner's first burden is to demonstrate that the habeas court's ruling constituted an abuse of discretion. . . . A petitioner may establish an abuse of discretion by demonstrating that the issues are debatable among jurists of reason . . . [the] court could resolve the issues [in a different manner] . . . or . . . the questions are adequate to deserve encouragement to proceed further. . . . The required determination may be made on the basis of the record before the habeas court and applicable legal principles. . . .

"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. In other words, we review the petitioner's substantive claims for the purpose of ascertaining whether those claims satisfy one or more of the three criteria . . . adopted by this court for determining the propriety of the habeas court's denial of the petition for certification. Absent such a showing by the petitioner, the judgment of the habeas court must be affirmed. . . .

"We examine the petitioner's underlying claim[s] of ineffective assistance of counsel in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal. Our standard of review of a habeas court's judgment on ineffective assistance of counsel claims is well settled. In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but our review of whether the facts as found by

the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . .

"In *Strickland* v. *Washington*, [supra, 466 U.S. 687], the United States Supreme Court established that for a petitioner to prevail on a claim of ineffective assistance of counsel, he must show that counsel's assistance was so defective as to require reversal of [the] conviction . . . . That requires the petitioner to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. . . . Unless a [petitioner] makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"To satisfy the performance prong [of the *Strickland* test] the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Bagalloo* v. *Commissioner of Correction*, 195 Conn. App. 528, 533–34, 225 A.3d 1226, cert. denied, 335 Conn. 905, 226 A.3d 707 (2020). "To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Breton* v. *Commissioner of Correction*, 325 Conn. 640, 669, 159 A.3d 1112

(2017). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland* v. *Washington*, supra, 466 U.S. 694. "In its analysis, a reviewing court may look to the performance prong or to the prejudice prong, and the petitioner's failure to prove either is fatal to a habeas petition." (Internal quotation marks omitted.) *Delvecchio* v. *Commissioner of Correction*, 149 Conn. App. 494, 500, 88 A.3d 610, cert. denied, 312 Conn. 904, 91 A.3d 906 (2014).

Accordingly, in order to determine whether the habeas court abused its discretion in denying the petition for certification to appeal, we must consider the merits of the petitioner's underlying claim that his criminal trial counsel provided ineffective assistance. With the foregoing principles in mind, we now address the petitioner's claim that Brown failed to present sufficient evidence that was available to him at the petitioner's criminal trial to support his request that the court instruct the jury on self-defense.

We first set forth the well settled substantive principles underlying a defendant's claim of self-defense. "[T]he fair opportunity to establish a defense is a fundamental element of due process of law . . . . This fundamental constitutional right includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified. . . . Thus, [i]f the defendant asserts [self-defense] and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to [an] . . . instruction [on self-defense]. . . . Before an instruction is warranted, however, [a] defendant bears the initial burden of producing sufficient evidence to inject self-defense into the case. . . . To meet that burden, the evidence adduced at trial, whether by the state or the defense, must be sufficient [if credited by the jury] to

raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. . . . This burden is slight, however, and may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible . . . ." (Internal quotation marks omitted.) *State* v. *Best*, 168 Conn. App. 675, 686, 146 A.3d 1020 (2016), cert. denied, 325 Conn. 908, 158 A.3d 319 (2017). "However low the evidentiary standard may be, it is nonetheless a threshold the defendant must cross. The defendant may not ask the court to boost him over the sill upon speculation and conjecture." (Internal quotation marks omitted.) *State* v. *Montanez*, 277 Conn. 735, 750, 894 A.2d 928 (2006).

"[I]n order sufficiently to raise self-defense, a defendant must introduce evidence that the defendant reasonably believed his adversary's unlawful violence to be imminent or immediate. . . . Under . . . § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that his attacker is using or about to use deadly force against him and that deadly force is necessary to repel such attack. . . . The Connecticut test for the degree of force in self-defense is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to be reasonable. . . . Moreover, the evidence must be such that the jury must not have to resort to speculation in order to find that the defendant acted in justifiable self-defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Lewis*, 245 Conn. 779, 811, 717 A.2d 1140 (1998).[3]

[3] General Statutes § 53a-19 (a) provides in relevant part: "[A] person is justified in using reasonable physical force upon another person to defend himself . . . from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person

On appeal, the petitioner argues that (1) Jones and Hernandez could have testified that they had observed a marshal carrying a gun, in contravention of the testimony of Quinn and Valentino that neither of them was armed, and (2) Lyman Anderson could have testified that the marshals attempted to barge through the door into the petitioner's apartment and attempted to grab the petitioner, an action that led to the petitioner shooting at the marshals.[4] The petitioner argues that the aforementioned evidence would have supported the theory of self-defense that Brown had pursued. The petitioner argues further that there is a reasonable probability that the outcome of the criminal trial would have been different and more favorable to the petitioner if Brown had presented such evidence. We disagree.

Although the habeas court concluded that the petitioner failed to establish both deficient performance and prejudice, it is clear to us that the focus of the court's analysis was on the prejudice prong. The court

is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

[4] The petitioner also asserts in his principal brief that, "although the marshals claimed to be identifiable as marshals, none of the other witnesses at the scene recognized them as marshals." This claim is without merit. As the habeas court noted, Lyman Anderson, both in his recorded statement to the police and in his testimony at the petitioner's criminal trial stated that Quinn and Valentino were recognizable as marshals from their clothing. At the habeas trial, he testified that they were clearly wearing police attire, had badges on, shirts that said police and one of the marshals had a shirt that said marshal. In addition, Lyman Anderson testified at the criminal trial that the petitioner did not want to go outside after firing his gun because he was worried that the *marshals* would fire back at him. Furthermore, the petitioner's reliance on Jones' statements at the criminal trial that after the shooting he only saw civilians and not marshals; see footnote 6 of this opinion; makes little sense. That testimony is inconsistent with and contradicted by the evidence from the habeas trial, on which the petitioner relies, that Jones saw a marshal with a gun. It is illogical to argue that the jury could rely both on Jones' testimony that he saw a marshal pointing a gun and also his testimony that he did not see any marshals. Thus, the habeas court's factual finding that Quinn and Valentino reasonably were identifiable as marshals was not clearly erroneous.

accepted that there was evidence before it that at least one of the marshals attempting to apprehend the petitioner was armed. Although the petitioner argues that the court was incorrect in concluding that it could not identify the armed marshal, that issue was not particularly germane to the court's analysis.[5] The court also accepted, for purpose of its analysis, Lyman Anderson's testimony that Quinn and Valentino attempted to grab the petitioner before the petitioner began firing. Nevertheless, the court concluded that the evidence from Jones, Hernandez, and Lyman Anderson not offered during the criminal trial would have made no difference because the facts to which they would have testified would not have justified a self-defense instruction or possibly affected the outcome of the criminal trial. The court reached this conclusion for three reasons. First, there was no evidence that any marshal unholstered or brandished a firearm while trying to take the petitioner into custody. Second, the evidence was clear, and the jury necessarily found, that Quinn and Valentino were clearly identifiable as marshals when they confronted the petitioner, and there was no evidence that they used excessive force when trying to detain the petitioner or that they were acting illegally in enforcing the capias. Third, Quinn and Valentino were both fleeing from the petitioner "as fast as they could," when he began firing at them.

The petitioner does not dispute that no marshal ever removed a gun from his holster. Nor does he dispute that Quinn and Valentino were fleeing from the petitioner when he fired at them. He also does not dispute

[5] The petitioner argues that because Valentino testified during the petitioner's criminal trial that he hid behind a red vehicle as the petitioner fired on him and Quinn, and Jones testified at the habeas trial that he saw a marshal pointing a gun while hiding behind a red vehicle, the marshal pointing the gun could only have been Valentino. At the criminal trial, Valentino testified that he initially ran toward the red vehicle and then ended up hiding behind a silver van.

Lyman Anderson's statements, to the police, at the petitioner's criminal trial, and at the habeas trial, that Quinn and Valentino were readily identifiable as marshals. He similarly does not dispute Lyman Anderson's testimony that the petitioner confirmed that he knew that the individuals at whom he fired his weapon were marshals. Furthermore, the petitioner conceded in his principal brief that "the jury accepted that the marshals were reasonably identifiable peace officers based on the criminal trial evidence . . . ."

The only argument raised by the petitioner in response to these facts is that had the jury heard the evidence presented at the habeas trial, it would have concluded that Quinn and Valentino were not identifiable as marshals. The problem with the petitioner's argument is that the only person who testified that he did not recognize marshals at the scene of the shooting was Jones, and that testimony occurred at the criminal trial.[6] In fact, Jones' testimony at the habeas trial undermines the petitioner's argument because he testified that he saw a marshal pointing a gun while hiding behind a parked vehicle after the shooting had occurred.[7] Similarly, Hernandez testified at the habeas trial that he saw a marshal with a gun when he arrived on the scene.[8]

[6] Jones provided the following relevant testimony at the petitioner's criminal trial. Jones saw an injured "male dressed civilian" near a tree and there were other people who appeared to be civilians with the individual, whom he could not recognize. Additionally, Jones did not see any state marshals while he was at the location of the incident.

[7] During the habeas proceeding, Jones testified to the accuracy of a police report, which stated that Jones personally observed a state marshal taking cover behind a red vehicle with a gun drawn and pointed at the 434 Indian Avenue residence. Jones testified that he did not know which marshal had the gun and that he could not recall anything about the person who had the gun. Upon inquiry about his prior statement at the criminal trial that everybody appeared to be civilians, Jones stated that, "under that level of stress, we can't distinguish between a civilian and a plainclothes state marshal."

[8] Hernandez swore to the accuracy of a supplemental report stating that he saw one of the marshals with a gun. Hernandez testified that he was unable to identify which marshal had the gun and that he could not recall

There simply was no evidence presented at the habeas trial to support a claim that Quinn and Valentino were not identifiable as marshals.

On the basis of the habeas court's factual findings, which are fully supported by the record, we agree with the habeas court's conclusion that the petitioner failed to prove any prejudice arising from Brown's failure to present evidence from Jones, Hernandez and Lyman Anderson as suggested by the petitioner. First, the habeas court was correct that, even assuming arguendo that one of the marshals tried to grab the petitioner's arm, because Quinn and Valentino were reasonably identified as peace officers and there was no evidence that they used excessive force, § 53a-23[9] would negate the viability of a self-defense claim.

The petitioner makes three arguments to the contrary, none of which we find persuasive. First, the petitioner argues that § 53a-23 does not necessarily preclude a self-defense instruction, even if the marshals were reasonably identifiable as peace officers, if there was evidence that they entered the petitioner's apartment without a warrant. In support of this argument, the petitioner relies on a single sentence in *In re Adalberto S.*, 27 Conn. App. 49, 58, 604 A.2d 822, cert. denied, 222 Conn. 903, 606 A.2d 1328 (1992), wherein this court stated: "[A]n unlawful warrantless intrusion into the home creates a privilege to resist arrest." The court in *In re Adalberto S.*, cited to our Supreme Court's holding in *State* v. *Gallagher*, 191 Conn. 433, 442, 465 A.2d 323 (1983), as support for this statement. The problem for the petitioner is that our Supreme Court later overruled *Gallagher* in part and held that "the right to challenge an illegal entry remains a privilege, provided no new crime is committed." *State* v. *Brocuglio*, 264 Conn. 778, 793, 826 A.2d 145 (2003). Furthermore, our Supreme

whether he was able to identify the people who were outside as marshals or whether he was able to identify anybody as marshals.

[9] General Statutes § 53a-23 provides in relevant part: "A person is not justified in using physical force to resist an arrest by a reasonably identifiable

Court noted in *Brocuglio* that, even under *Gallagher*, the right to resist a warrantless entry into one's home was limited: "Under *Gallagher*, the defendant here had a common-law right to resist, *short of committing an assault*, an illegal entry by the police into his home." (Emphasis added.) Id., 795. Consequently, any right the petitioner might have had to resist a warrantless entry into his home by the marshals unquestionably did not include firing on them.

The petitioner further argues that neither the state nor the court raised § 53a-23 as an issue at the petitioner's criminal trial, so there was no basis for the habeas court to rely on it in this case. We disagree. Because the court in the criminal trial concluded that the facts otherwise did not warrant a self-defense instruction, it was not required to consider the statutory bar in § 53a-23. Furthermore, there is nothing in the wording of the statute that makes its application optional.

Alternatively, the petitioner argues that had the jury seen the evidence presented at the habeas trial, it would have concluded that Quinn and Valentino were not reasonably identifiable as marshals. For the reasons previously discussed in this opinion, such an argument is contrary to the facts and without merit.

Additionally, the fact that Quinn and Valentino indisputably were fleeing, as fast as they could, from the petitioner when he fired on them precluded any claim of self-defense. The evidence presented at the petitioner's criminal trial, and not disputed before the habeas court, was that the marshals, who were in the process of trying to take the petitioner into lawful custody, immediately retreated from the petitioner when he pulled out his firearm, and they were in flight at the time the petitioner fired his gun at them. There simply is no basis for the court to give a self-defense instruction when the only evidence presented to the jury is that the marshals were

peace officer [or] special policeman appointed under section 29-18b . . . whether such arrest is legal or illegal."

fleeing from the petitioner when the petitioner fired the weapon. See, e.g., *State* v. *Erickson*, 297 Conn. 164, 197, 997 A.2d 480 (2010); *State* v. *Lewis*, 220 Conn. 602, 619–20, 600 A.2d 1330 (1991); *Commonwealth* v. *Miranda*, 484 Mass. 799, 811–13, 146 N.E.3d 435 (2020); *State* v. *Gonzalez*, 143 N.M. 25, 30, 172 P.3d 162 (2007); *State* v. *Niewiadowski*, 120 N.M. 361, 366, 901 P.2d 779 (App.), cert. denied, 120 N.M. 184, 899 P.2d 1138 (1995). Put another way, in light of the undisputed evidence that Valentino and Quinn were fleeing when the petitioner shot at them, there was insufficient evidence "to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense." (Internal quotation marks omitted.) *State* v. *Best*, supra, 168 Conn. App. 686.

On the basis of the evidence presented at the petitioner's criminal trial, the jury, even if it had heard all of the evidence presented to the habeas court, reasonably could not have found that, at the time the petitioner fired his gun at the marshals, it was objectively reasonable for the petitioner to have believed both that the marshals were about to use deadly physical force or inflict great bodily harm on him, and that it was necessary for the petitioner to shoot at the marshals to prevent such conduct.

Accordingly, the petitioner has failed to prove that there is a reasonable probability that the outcome of his criminal trial would have been different had Brown performed as the petitioner claims he should have. Furthermore, we conclude that it is not debatable among jurists of reason that Brown's performance did not prejudice the petitioner and, thus, the habeas court did not abuse its discretion in denying the petitioner's petition for certification to appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* LONNIE ANDERSON (AC 42703)

Lavine, Bright and Beach, Js.*

Syllabus

Convicted of the crimes of assault in the first degree by means of the discharge of a firearm and assault of a peace officer by means of the discharge of a firearm in connection with his actions in shooting at two state marshals, the defendant appealed to this court. State marshals Q and V arrived at the defendant's residence to serve a capias warrant and take the defendant into custody for failing to appear at a court proceeding. Q and V went to the front door of the defendant's residence and were wearing clothing that identified them as state marshals and they displayed badges. V was in possession of the capias warrant and also was wearing a state marshal's hat. When the defendant came to the door, he provided the marshals with a false name. When the marshals confronted him with his photograph and told him that they would be taking him into custody, the defendant reached back and pulled out a gun. V yelled "gun," and Q and V, who were unarmed, retreated, running in opposite directions. Q received gunshot wounds to his left foot and right forearm, while V was uninjured. Bridgeport police officers arrived on the scene and subdued the defendant. The defendant's brother, L, who was at the residence, testified at trial that Q and V were readily identifiable as state marshals and that he did not observe that the marshals were armed until one of them stepped into the doorway to grab the defendant. Q and V testified that they heard multiple gunshots as they sought cover. On appeal, the defendant claimed that the trial court improperly declined to instruct the jury on self-defense. *Held* that the trial court did not err in rejecting the defendant's request for a jury instruction on self-defense; there was insufficient evidence to raise a question in the mind of a rational juror as to whether the defendant shot at Q and V in self-defense, as Q and V were readily identifiable as state marshals and it was undisputed that, at the time of the shooting, the marshals were in flight away from the defendant and, therefore, the jury could not reasonably have found that it was objectively reasonable for the defendant to believe that Q and V were about to use deadly physical force or inflict great bodily harm and that it was necessary that he shoot at them to prevent such conduct.

Argued May 20—officially released October 20, 2020

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

Procedural History

Substitute information charging the defendant with two counts of the crime of attempt to commit murder, and with one count each of the crimes of assault in the first degree by means of the discharge of a firearm and assault of a peace officer by means of the discharge of a firearm, and with the commission of a class A, B or C felony with a firearm, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Devlin*, *J.*; verdict and judgment of guilty of assault in the first degree by means of the discharge of a firearm and assault of a peace officer by means of the discharge of a firearm, and the defendant's sentence was enhanced for the commission of a class A, B or C felony with a firearm, and the defendant appealed to this court. *Affirmed.*

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

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *C. Robert Satti, Jr.*, supervisory assistant state's attorney, for the appellee (state).

Opinion

BRIGHT, J. The defendant, Lonnie Anderson, appeals from the judgment of conviction, rendered after a jury trial, of assault in the first degree by means of the discharge of a firearm in violation of General Statutes § 53a-59 (a) (5)[1] and of assault of a peace officer by means of the discharge of a firearm in violation of

[1] General Statutes § 53a-59 (a) (5) provides that "[a] person is guilty of assault in the first degree when . . . with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm."

General Statutes § 53a-167c (a) (1);[2] his sentence was enhanced pursuant to General Statutes § 53-202k.[3] On appeal, the defendant claims that the trial court improperly declined to instruct the jury on self-defense. We disagree and affirm the judgment of the trial court.

The record reveals the relevant procedural history and facts, which the jury reasonably could have found. On the evening of October 6, 2009, State Marshals Arthur Quinn, Charles Valentino, Joseph Butler, and Richard Krueger went to 434 Indian Avenue in Bridgeport to serve a capias warrant authorizing the marshals to take the defendant into custody for failing to appear at a court proceeding. At approximately 7:45 p.m., the marshals arrived at the residence. Quinn and Valentino went to the front door, and Butler and Krueger went to the rear of the residence. Quinn and Valentino walked up to the residence and knocked on the door. Quinn and Valentino wore clothing that identified them as state marshals and displayed badges. Neither marshal carried a firearm. Valentino was in possession of the capias warrant and wore a utility belt on which were attached handcuffs, gloves, Mace, and a police baton.

[2] General Statutes § 53a-167c (a) (1) provides in relevant part that "[a] person is guilty of assault of public safety, emergency medical, public transit or health care personnel when, with intent to prevent a reasonably identifiable peace officer . . .from performing his or her duties, and while such peace officer . . . is acting in the performance of his or her duties . . . such person causes physical injury to such peace officer . . . ."

[3] "[Section] 53-202k is a sentence enhancement provision and not a separate crime. . . . [Our Supreme Court] [has] interpreted § 53-202k to require that the jury, rather than the court, determine whether a firearm was used in the commission of the underlying felony." (Citation omitted.) *State* v. *Nash*, 316 Conn. 651, 656 n.6, 114 A.3d 128 (2015). General Statutes § 53-202k provides that "[a]ny person who commits any class A, B or C felony and in the commission of such felony uses, or is armed with and threatens the use of, or displays, or represents by his words or conduct that he possesses any firearm, as defined insection 53a-3, except an assault weapon, as defined insection 53-202a, shall be imprisoned for a term of five years, which shall not be suspended or reduced and shall be in addition and consecutive to any term of imprisonment imposed for conviction of such felony."

An eight year old relative of the defendant answered the door, and the marshals asked to speak with the efendant. The child left and returned with Lyman Anderson, the defendant's brother. Utilizing a photograph of the defendant, Quinn and Valentino recognized that Lyman Anderson was not the subject of the capias. Lyman Anderson then went back into the home, and the defendant came to the front door.

The defendant arrived at the front door armed with a nine millimeter semiautomatic pistol that he kept concealed in his sweatpants. Upon inquiry about his identity, the defendant falsely replied that he was John Anderson. The marshals responded that he was Lonnie Anderson, informed him that he had missed a court date, and stated to him that they had a capias warrant for him. The marshals told the defendant that they intended to take him into custody. The defendant took a step back, drew his pistol, and chambered a round. Valentino spotted the firearm and shouted "[g]un!" The marshals ran off the doorstep and headed in opposite directions.

As they were running away from the defendant's residence, Quinn and Valentino heard several gunshots and Valentino perceived a bullet passing near his head. Valentino heard additional gunshots as he sought cover behind a parked van. Valentino observed, through the vehicle's windows, the defendant standing on the top step of the stoop and shooting toward Quinn. Valentino also saw the defendant discard an ammunition magazine and reload a second magazine into the pistol.

As Quinn was running, he heard multiple gunshots and felt a bullet hit his left foot. Quinn also sustained a second gunshot wound to his right forearm. A neighbor emerged from his home with a towel to help stop the bleeding from Quinn's arm.

A few minutes later, Bridgeport Police Officer Hugo Stern received a call, via a police broadcast, about the incident. Stern arrived at the Indian Avenue residence and saw uniformed state marshals taking cover near a red vehicle. Stern also observed someone matching the description of the shooter. Stern aimed his gun at that person, who was the defendant, and ordered him to raise his hands. The defendant complied.

As Stern cautiously approached the defendant, he noticed that the defendant wore an empty holster on his right hip. Stern ordered the defendant to lie on the ground slowly, and the defendant complied. Stern directed the defendant to spread his arms and legs on the ground, and the defendant appeared cooperative. After Stern holstered his own weapon and attempted to handcuff the defendant, the defendant resisted by rising into a crouch and acting combative. Stern saw the defendant reach into the waistband of his pants and try to retrieve an item. Bridgeport Police Officer Bobby Jones arrived at the scene subsequent to Stern's arrival and came to Stern's assistance. Both officers subdued the defendant. As the officers rolled the defendant over, they observed that the defendant had been lying on top of a semiautomatic handgun. The officers seized the weapon, and later testing demonstrated that the weapon was the same gun from which several shots had been fired. Additionally, the weapon had been reloaded with a magazine full of cartridges.

In a substitute information, the state charged the defendant with two counts of attempt to commit murder in violation of General Statutes §§ 53a-49 and 53a-54a (a), one count of assault in the first degree by means of the discharge of a firearm, one count of assault of a peace officer by means of the discharge of a firearm, and with the commission of class A, B, or C felonies with a firearm in violation of § 53-202k.

On April 25, 2011, the first day of evidence in the defendant's trial, defense counsel filed the following request to charge on self-defense: "Criminal Jury Instructions 2.8-1 Self-Defense and Defense of Others—§ 53a-19. In addition to the language in the pattern instruction, we request the following: 'It is a matter of public interest that potential defenders be able to act without fear that they will be criminally liable if they guess wrong about the person they are defending's rights.' See *Commissioner* v. *Martin*, 369 Mass. 640, 649, 341 N.E.2d 885 (1976). The Connecticut constitution, article I, § 15, protects one's right to carry arms for his own defense and the defense of the State, and presumably for the defense of others. Should you believe that testimony, the fact that the accused might have brought a weapon to the conflict should not have been a factor in the trial court's analysis nor should it affect this court's analysis of the self-defense issue. Under the common law, the fact that a defendant arms himself after an altercation with an aggressor is consistent with self-defense. See, e.g., Bishop, Bishop on Criminal Law, 9th Ed. § 845 at 601 (1923)."

After both parties rested, the court held a charge conference that addressed the requested instruction on self-defense. During the conference, defense counsel, to support the requested charge, relied on the testimony of Lyman Anderson and Bridgeport Detective Mark Belinkie, who had interviewed Lyman Anderson following the defendant's arrest and who also had spoken to Valentino about what had occurred.

Lyman Anderson had provided the following trial testimony relevant to the defendant's requested self-defense charge. The defendant, Lyman Anderson, Lyman Anderson's fiancée, and several acquaintances were using phencyclidine (PCP) and marijuana on the evening of October 6, 2009. Later, in the same evening, Lyman Anderson was eating in the kitchen when he heard radio dispatches going off at the front door. He

went to the front door to get his young relative away from the door. Lyman Anderson identified several marshals by their uniforms; he also observed that a marshal was armed, and that the marshals were holding papers. At least one of the marshals was wearing a hat identifying him as a marshal. Lyman Anderson testified that he initially observed approximately four marshals at the front door. He also testified that he originally told the Bridgeport police during a police interview that he had initially observed only two marshals at the front door. He stated that he remembered seeing the defendant come down the stairs and hearing the marshals ask the defendant if he was Lonnie Anderson. Lyman Anderson testified that the defendant provided a false name to the marshals. He also testified that he did not observe that the marshals were armed until a marshal stepped in the door to grab the defendant and testified further that he did not observe the defendant fire a gun. He testified that, during the shooting, he took his nephew away from the gunfire and went to the basement of the residence. He also testified that, after firing at the marshals, the defendant did not want to go outside to surrender because he was concerned that the marshals would fire back at him.

Belinkie testified, relevant to the defendant's request to charge, that Valentino told him that Quinn tried to grab the defendant before the defendant drew his weapon and began firing.

Defense counsel argued that the testimony of Lyman Anderson and Belinkie was sufficient to support a self-defense charge because the jury reasonably could conclude that the defendant's drug use, coupled with armed men trying to grab him caused the defendant to fear for his life and defend himself with deadly force. Counsel further stated: "Now I—I'd be the first to admit that's not, you know, the strongest evidence out there that I've seen in cases. But I think with the slight standard

or no matter how slight, I think, is a language the [cases] . . . used, I would submit that's enough. And I'll just—with those comments, I'll of course—I object if it's not done, but obviously I don't have any further comments."

The state objected to the defendant's requested instruction on the ground of the absence of any evidence of self-defense, and it argued further that Belinkie's testimony was not proffered as substantive evidence, but was admitted solely as a prior inconsistent statement of Valentino. The state further argued that Lyman Anderson testified that he was taking his young relative to the basement and was hiding behind a wall when the shooting occurred and, therefore, there was no evidence as to what Lyman Anderson specifically observed, outside of his brother raising a firearm. The trial court then reviewed Lyman Anderson's trial testimony. After doing so, the trial court stated: "So, I've reviewed the testimony of Lyman Anderson, and my review does not indicate any testimony he gave which would indicate that the police officers were approaching Lonnie Anderson in a way that would, even under our low standard in Connecticut that would justify a self-defense charge. So—so the defense may have an exception, but the court does not intend to charge the jury on self-defense based [on] the present record." After the trial court delivered its jury instructions, defense counsel took exception to the charge and properly preserved the issue for appeal. See Practice Book § 42-16.

On April 29, 2011, the jury found the defendant guilty of the charges of assault in the first degree and assault of a peace officer, and found the defendant not guilty on the remaining charges. The court sentenced the defendant to a total effective sentence of eleven years of incarceration followed by five years of special parole.[4]

[4] On September 30, 2011, the defendant first appealed from the judgment of conviction. On July 26, 2012, the defendant withdrew that appeal. On March 10, 2015, the defendant filed a pro se petition for a writ of habeas

The defendant claims on appeal that the trial court improperly declined to provide a self-defense instruction to the jury.[5] The defendant argues that Lyman Anderson's testimony about a marshal stepping into the threshold of the residence and attempting to grab the defendant was sufficient to warrant a self-defense instruction, when considered in the context of the evidence at trial. The defendant argues further that there was substantial evidence from which the jury could

corpus and, on August 31, 2018, the defendant filed an amended petition for a writ of habeas corpus arising out of his judgment of conviction. In the amended petition, the defendant asserted the following claims: (1) his constitutional right to the effective assistance of trial counsel was violated and (2) his constitutional right to the effective assistance of appellate counsel was violated.

On November 8, 2018, the habeas court denied in part and dismissed in part the amended petition with regard to the defendant's claim that the defendant's constitutional right to the effective assistance of trial counsel had been violated. The habeas court granted, in part, the amended petition with regard to the defendant's claim that his constitutional right to the effective assistance of appellate counsel had been violated. The habeas court granted relief in the form of the reinstatement of the direct appeal of the underlying conviction. See *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 133 n.7, 7 A.3d 911 (2010). The defendant then filed the present appeal.

[5] We note that the defendant stated in his appellate brief that "it is worth noting that the trial court's decision not to instruct the jury was premised on its belief that Lyman Anderson had not testified that an armed marshal had reached into the home to grab the defendant during the altercation." Our review of the record reveals that the trial court did not premise its ruling on the belief that Lyman Anderson had not testified about an armed marshal reaching into the residence to grab the defendant. During the charge conference, defense counsel stated that he believed that Lyman Anderson testified that "they somehow went to get [the defendant] . . . ." In response, the trial court provided the following statement: "Well, that's important. If Lyman Anderson had testified that there was a—one of the marshals had advanced for his brother *prior to the shots going off*?" (Emphasis added.) The trial court then replayed Lyman Anderson's testimony and ruled that its review of his testimony did not indicate any testimony that would suggest that the marshals were approaching the defendant in a manner that would justify a self-defense charge. Thus, the court considered the entirety of Lyman Anderson's testimony, in particular the timing of the marshals' interactions with the defendant and the shots being fired, and not simply whether, at some point, the marshals attempted to apprehend the defendant.

have concluded that the marshals were not readily identifiable, had entered the residence without permission, and were armed. The defendant argues that the jury reasonably could have concluded that the evidence supported the defendant's belief that deadly physical force was necessary to protect himself because he was confronted by two armed individuals in his home. The defendant also argues that the jury reasonably could have concluded from the evidence that the marshal, who was reaching in to grab him, was about to use deadly physical force because the marshals were armed with a variety of weapons, including handcuffs, batons, and Mace, and at least one of the marshals was armed with a firearm.

The state argues, in response, that the evidence did not warrant an instruction on self-defense because the evidence at trial could not have supported a finding that the defendant did not know that Valentino and Quinn were state marshals, none of the witnesses testified that either marshal brandished a weapon during his interaction with the defendant, and the marshals were fleeing the residence at the time the defendant fired at them. We agree with the state.

The following legal principles are relevant to our analysis of the defendant's claim. "In determining whether the defendant is entitled to an instruction of self-defense . . . we must view the evidence most favorably to giving such an instruction." (Internal quotation marks omitted.) *State* v. *Terwilliger*, 294 Conn. 399, 408–409, 984 A.2d 721 (2009). "[T]he fair opportunity to establish a defense is a fundamental element of due process of law . . . . This fundamental constitutional right includes proper jury instructions on the elements of self-defense so that the jury may ascertain whether the state has met its burden of proving beyond a reasonable doubt that the assault was not justified. . . . Thus,

[i]f the defendant asserts [self-defense] and the evidence indicates the availability of that defense, such a charge is obligatory and the defendant is entitled, as a matter of law, to [an] . . . instruction [on self-defense]. . . . Before an instruction is warranted, however, [a] defendant bears the initial burden of producing sufficient evidence to inject self-defense into the case. . . . To meet that burden, the evidence adduced at trial, whether by the state or the defense, must be sufficient [if credited by the jury] to raise a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. . . . This burden is slight, however, and may be satisfied if there is any foundation in the evidence [for the defendant's claim], no matter how weak or incredible . . . ." (Internal quotation marks omitted.) *State* v. *Best*, 168 Conn. App. 675, 686, 146 A.3d 1020 (2016), cert. denied, 325 Conn. 908, 158 A.3d 319 (2017). "However low the evidentiary standard may be, it is nonetheless a threshold the defendant must cross. The defendant may not ask the court to boost him over the sill upon speculation and conjecture." (Internal quotation marks omitted.) *State* v. *Montanez*, 277 Conn. 735, 750, 894 A.2d 928 (2006).

To raise a claim of self-defense sufficiently to warant an instruction, "a defendant must introduce evidence that the defendant reasonably believed his adversary's unlawful violence to be imminent or immediate. . . . Under General Statutes § 53a-19 (a), a person can, under appropriate circumstances, justifiably exercise repeated deadly force if he reasonably believes both that his attacker is using or about to use deadly force against him and that deadly force is necessary to repel such attack. . . . The Connecticut test for the degree of force in self-defense is a subjective-objective one. The jury must view the situation from the perspective of the defendant. Section 53a-19 (a) requires, however, that the defendant's belief ultimately must be found to

be reasonable. . . . Moreover, the evidence must be such that the jury must not have to resort to speculation in order to find that the defendant acted in justifiable self-defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Lewis*, 245 Conn. 779, 811, 717 A.2d 1140 (1998).[6]

The following additional facts are relevant to our analysis. At the defendant's trial, Quinn provided the following testimony. Quinn, Valentino, Butler, and Krueger arrived at 434 Indian Avenue in Bridgeport to serve a capias warrant and drove to the residence in two state vehicles. Quinn and Valentino were unarmed and wore their state marshal uniforms with identifiable markers on the sleeves and back of their shirts. Quinn and Valentino went to the front door of the residence, while Butler and Krueger went to the rear of the residence. After knocking on the door, a young child answered the door. The marshals asked for an adult and told the child that they were seeking the defendant. Lyman Anderson arrived at the door and the marshals informed him that he did not match the picture attached to the warrant paperwork that they were carrying. Shortly thereafter, the defendant arrived at the front door and provided a false name to the marshals after he was informed that they had a warrant for his arrest. After providing a false name, the defendant took a step back and pulled out a firearm. Valentino yelled "[g]un" and both marshals immediately retreated down the stairs and ran for cover in opposite directions. Quinn testified that neither he

[6] In Connecticut, self-defense is codified in § 53a-19. General Statutes § 53a-19 (a) provides: "Except as provided in subsections (b) and (c) of this section, a person is justified in using reasonable physical force upon another person to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force, and he may use such degree of force which he reasonably believes to be necessary for such purpose; except that deadly physical force may not be used unless the actor reasonably believes that such other person is (1) using or about to use deadly physical force, or (2) inflicting or about to inflict great bodily harm."

nor Valentino attempted to grab the defendant or take him into custody because the young child was back at the door. As Quinn was running for cover, he heard multiple gunshots and felt a bullet hit his left foot. As Quinn sought cover, he realized that he was also shot in his right forearm.

Valentino provided the following testimony. Valentino arrived at the 434 Indian Avenue residence to serve a capias warrant along with Quinn, Butler, and Krueger. Valentino and Quinn wore their state marshal uniforms with identifiable markers and were unarmed. In particular, Valentino wore a hat that identified him as a marshal. Valentino also wore a utility belt with handcuffs, Mace, gloves, and a baton. After knocking on the front door of the residence, a young child answered the door. The marshals informed the child that they were seeking the defendant, and the young child returned with Lyman Anderson. Valentino, who had the capias warrant and a photograph of the defendant, told Lyman Anderson that he was seeking the defendant. Valentino testified that the young child remained at the door during the entire encounter. Valentino stated that Lyman Anderson and the defendant arrived at the front door. Valentino informed the defendant that he was looking for Lonnie Anderson and the defendant provided a false name in response. Valentino testified that he informed the defendant that he identified him as the subject of the capias warrant, informed him that he missed a court date, and stated that the marshals intended to take him into custody. Valentino testified that the defendant denied that he was Lonnie Anderson, Valentino showed him the photograph, and then the defendant reached back and pulled out a firearm. Upon observing the defendant pull out a weapon, Valentino yelled "[g]un" and slammed the door as he retreated away from the stairs. Valentino and Quinn ran in opposite directions away from the door. As Valentino was running away from

the door, he heard gunshots in his direction. While running away from the defendant's residence, Valentino's marshal's hat blew off. Valentino sought cover behind a van and observed the defendant shooting at Quinn. On cross-examination, defense counsel asked Valentino whether he had told the Bridgeport police that "everything kind of hit the fan when . . . Quinn went to grab [the defendant]." Valentino denied that he provided that statement. Defense counsel showed Valentino a document, which was marked for identification purposes only, to refresh Valentino's recollection about the statement that he provided to the Bridgeport police. Valentino responded that he could not recall providing the statement.

Jones, who arrived on the scene after the shooting and assisted in apprehending the defendant, testified on direct examination that he drove to the scene after receiving a report on his radio of an officer being shot. Upon arriving at the scene, he saw an injured male dressed as a civilian standing near a tree. He testified that he did not recall what clothes the male was wearing. He noticed that the male was bleeding. He did not spend any time with the injured man. Jones further testified: "Everything right now seems—seems a blur as to the particulars. . . . Because I was focused on possibly another threat coming from inside that location." On cross-examination, Jones testified that the injured male was not a uniformed officer. On redirect examination, Jones testified that at no point while on the scene of the shooting did he see any state marshals.

After viewing the facts in the light most favorable to the defendant, we conclude that the trial court properly declined to instruct the jury on self-defense. The evidence presented at trial was undisputed that, *at the time of the shooting*, the marshals were readily identifiable to the defendant and that the marshals were in flight at the time the defendant fired his gun.

As to the defendant identifying Quinn and Valentino as marshals, Lyman Anderson testified that he identified the individuals at the door as marshals, one of the marshals was carrying papers, and, at one point, he spoke to the marshals alone because he believed that the marshals were there for him due to his recent release from incarceration. Furthermore, he testified that the defendant told him, after the defendant fired his gun, that he did not want to step outside because he was concerned that *the marshals* would fire back at him. Moreover, Quinn and Valentino both testified that they wore their state marshal uniforms with identifiable markers on the sleeves and back of their shirts, and Valentino wore a utility belt with handcuffs, Mace, gloves, and a baton as the marshals went to the front of the residence and knocked on the door. Valentino also testified that he was wearing a marshal's hat and Lyman Anderson testified that at least one marshal was wearing such a hat. Quinn and Valentino both testified that the defendant arrived at the front door and provided a false name to the marshals after he was informed that they had a warrant for his arrest. Valentino testified that the defendant denied that he was Lonnie Anderson, Valentino presented the photograph of the defendant, and then the defendant reached back and pulled out a firearm.

In response, the defendant relies on Jones' testimony that the injured man he saw was in civilian clothes and that he never saw state marshals at the scene. There are several problems with the defendant's reliance on Jones' testimony. First, Jones did not arrive on the scene until after the shooting occurred. Thus, he could not testify as to what Quinn and Valentino were wearing when they confronted the defendant before the defendant started shooting. For example, Valentino testified that the marshal's hat he was wearing while standing at the defendant's apartment door blew off when he

fled after the defendant pulled his gun. Second, Jones testified that he was responding to a report of an officer shooting, that the injured male was not a uniformed officer, and that he did not pay attention to what the male was wearing. Third, the defendant, at trial, did not rely on Jones' testimony as a basis for his self-defense instruction.

As to whether the defendant was in imminent danger when he fired his gun, Quinn and Valentino both testified that when the defendant pulled out the firearm, they immediately retreated away from the defendant, ran down the stairs, and fled in opposite directions. Quinn and Valentino both testified that they heard multiple gunshots as they ran for cover. Additionally, Valentino testified that, as he sought cover behind a van, he observed the defendant shooting at Quinn. The defendant failed to present any evidence to the contrary.

Thus, the evidence adduced at trial indicates that the marshals immediately retreated from the defendant and away from the front door of the residence when the defendant pulled out his firearm and also indicates that the marshals were in flight, away from the defendant, at the time the defendant fired his gun. The fact that Valentino and Quinn were identifiable to the defendant as state marshals and, more importantly, indisputably were in flight away from the defendant when he fired the shots that were the basis for his conviction distinguishes this case from the following cases on which the defendant relies.

In *State* v. *Deptula*, 31 Conn. App. 140, 142, 623 A.2d 525 (1993), appeal dismissed, 228 Conn. 852, 635 A.2d 812 (1994), this court addressed the issue of whether the trial court improperly failed to instruct the jury on self-defense. At the defendant's trial, the state had relied on the defendant's statement to the police in which the defendant stated that his wife had struck him before

he physically attacked his wife. Id., 148. Neither the defendant nor the victim testified at the criminal proceeding. Id. Therefore, we concluded that the trial court improperly refused to instruct the jury on the issue of self-defense because the evidence suggested that the victim was the initial aggressor and there was no duty for the defendant to retreat because he and his wife were in their apartment. Id.

Similarly, in *State* v. *Darrow*, 107 Conn. App. 144, 145, 944 A.2d 984 (2008), this court addressed the defendant's claim that the trial court improperly declined to instruct the jury on self-defense. The evidence adduced at the defendant's trial included two written confessions and one oral confession from the defendant. Id., 148. In the oral confession, the defendant stated that he caught the victim stealing items from his house and, in the process of catching the victim in the act, the victim was killed in the basement as the victim and the defendant engaged in a physical altercation. Id., 150. The state's chief medical examiner testified that it might have been possible that the victim sustained his mortal injury when his head struck a hard piece of wood on the basement's cement floor. Id. On appeal, this court concluded that the evidence that the defendant killed the victim in his house during the altercation was sufficient to entitle the defendant to a self-defense instruction as a matter of law. Id., 151.

In *State* v. *Best*, supra, 168 Conn. App. 677–79, the underlying criminal proceeding arose out of the defendant's shooting of a mother, her daughter and her daughter's acquaintance. On appeal, the defendant claimed that the trial court improperly failed to provide the jury an instruction on self-defense with regard to certain charges. Id., 676–77. This court concluded that the defendant was entitled to an instruction on self-defense as to the shooting of the daughter and her acquaintance because they did not have permission to

enter the defendant's apartment, pounded on the defendant's door with an object, threatened to harm the defendant, and warned the defendant that they " 'had backup.' " Id., 686–87. This court noted that the defendant was faced with an unknown number of intruders who were pounding on his door and leveling threats. Id. This court also concluded that the defendant was not entitled to a jury instruction on self-defense for his conduct toward the mother because, although there was no dispute that the defendant and the mother were arguing during the events leading up to the shooting, none of the evidence adduced at trial indicated that she posed a threat to the defendant. Id., 688.

In each of the cases relied on by the defendant, sufficient evidence was presented that could have raised a reasonable doubt in the mind of a rational juror as to whether the defendant acted in self-defense. In contrast, the evidence presented at trial, in the present case, was that the marshals, who were in the process of trying to take the defendant into lawful custody, immediately retreated from the defendant when he pulled out his firearm and were in flight at the time the defendant fired his gun at them. There simply was no basis for the court to give a self-defense charge when the only evidence presented to the jury was that the marshals were fleeing from the defendant when the defendant fired his firearm. See, e.g., *State* v. *Erickson*, 297 Conn. 164, 197, 997 A.2d 480 (2010); *State* v. *Lewis*, 220 Conn. 602, 619–20, 600 A.2d 1330 (1991); *Commonwealth* v. *Miranda*, 484 Mass. 799, 811–13, 146 N.E.3d 435 (2020); *State* v. *Gonzalez*, 143 N.M. 25, 30, 172 P.3d 162 (2007); *State* v. *Niewiadowski*, 120 N.M. 361, 366, 901 P.2d 779 (App.), cert. denied, 120 N.M. 184, 899 P.2d 1138 (1995). Put another way, in light of the undisputed evidence that Valentino and Quinn were fleeing when the defendant shot at them, there was insufficient evidence "to raise a reasonable doubt in the mind of a rational juror

as to whether the defendant acted in self-defense." (Internal quotation marks omitted.) *State* v. *Best*, supra, 168 Conn. App. 686. On the basis of the evidence presented at trial, the jury reasonably could not have found, that at the time the defendant fired the gun at the marshals, it was objectively reasonable for the defendant to have believed both that the marshals were about to use deadly physical force or inflict great bodily harm and that it was necessary for him to shoot at the marshals to prevent such conduct. The court, therefore, did not err in refusing to give the defendant's proposed self-defense instruction.

The judgment is affirmed.

In this opinion the other judges concurred.

NATIONSTAR MORTGAGE, LLC *v.* ROBERT GABRIEL ET AL.
(AC 42747)

Moll, Suarez and DiPentima, Js.

Syllabus

The plaintiff mortgage company brought a summary process action against the defendants, tenants of residential property, seeking immediate possession of the premises on the ground that the defendants' rights to occupy had terminated. According to the return of service, each defendant was served with a copy of the notice to quit by abode service. Following the defendants' failure to plead, the trial court granted the plaintiff's motion for default and rendered judgment of possession in favor of the plaintiff. The defendants thereafter filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the notice to quit was not served on all of the designated occupants of the property, as required by statute (§ 47a-23). The defendants filed an affidavit of one of the occupants in support thereof and also filed a motion to open the judgment of possession. The trial court denied both of the defendants' motions. On appeal, the defendants claim that the trial court erred in denying their request for an evidentiary hearing despite their having raised a disputed issue of fact and that the absence of an evidentiary hearing led to clearly erroneous findings by the trial court. *Held* that the trial court properly denied the defendants' motion to dismiss, as

there was ample evidence to support the court's finding that the defendants were served with the notice to quit; the marshal's return of service was prima facie evidence that each defendant had been served by abode service, the affidavit submitted by the defendants, which was the only evidence submitted in support of their motion, did nothing to create a genuine dispute as to any pertinent jurisdictional fact, as it merely acknowledged that the affiant was serviced and made no statement based on the personal knowledge that the other defendants were not served, and there was no affidavit or other documentation from any other defendant to demonstrate that he or she had not been served in any manner, and, therefore, the court was not required to hold an evidentiary hearing before ruling on the motion to dismiss.

Argued September 10—officially released October 20, 2020

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Stamford-Norwalk, Housing Session at Norwalk, and tried to the court, *Spader*, *J.*; judgment for the plaintiff, from which the defendants appealed to this court. *Affirmed.*

Harold R. Burke, for the appellants (defendants).

Peter A. Ventre, with whom, on the brief, was *Crystal L. Cooke*, for the appellee (plaintiff).

Opinion

MOLL, J. In this summary process action, the defendants, Robert Gabriel, Pamela P. Gabriel, Elizabeth Gabriel, John Doe I, John Doe II, Jane Doe I, and Jane Doe II, appeal from the judgment of possession rendered by the trial court in favor of the plaintiff, Nationstar Mortgage, LLC, as well as from the court's denials of their postjudgment motions to open and to dismiss for lack of subject matter jurisdiction. On appeal, the defendants limit their challenge to the court's denial of their motion to dismiss. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In February, 2019,

the plaintiff brought the underlying summary process action to evict the defendants from residential real property located at 21 Richmond Hill Road in Greenwich (property), after several years of protracted foreclosure proceedings.[1] The notice to quit, dated January 16, 2019, directed the defendants to quit possession or occupancy of the property on or before January 30, 2019 (notice to quit), on the ground that they originally had the right or privilege to occupy the property but that such right or privilege had terminated. According to the return of service completed by the state marshal in connection with the notice to quit (return of service), each defendant was served on January 21, 2019, with a copy thereof by way of abode service at the address of the subject property and "afterwards, in Bridgeport, on the 21st of January, 2019" (this latter language did not appear in the return of service with respect to Jane Doe II). The defendants, through their attorney, filed an appearance on February 25, 2019, but failed to file an answer or other responsive pleading. On March 14, 2019, the plaintiff filed a motion for default for failure to plead and for judgment of possession. See General Statutes § 47a-26a.[2] On March 20, 2019, following the defendants' failure to plead within three days,[3] the trial court granted

[1] In a previous foreclosure action filed in 2010 against Robert Gabriel and Pamela P. Gabriel, a judgment of foreclosure entered in favor of the plaintiff in 2013, and in October, 2018, the plaintiff obtained title to the subject property. See *Aurora Loan Services, LLC* v. *Gabriel*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-10-6004581-S (April 24, 2018).

[2] General Statutes § 47a-26a provides: "If the defendant appears but does not plead within two days after the return day, the complainant may file a motion for judgment for failure to plead, served upon the defendant in the manner provided in the rules adopted by the judges of the Superior Court for the service of pleadings. If the defendant fails to plead within three days after receipt of such motion by the clerk, the court shall forthwith enter judgment that the complainant recover possession or occupancy with his costs."

[3] Practice Book § 17-30 (b) provides: "If the defendant in a summary process action appears but does not plead within two days after the return day or within three days after the filing of the preceding pleading or motion, the plaintiff may file a motion for judgment for failure to plead, served in

the plaintiff's motion for default and rendered a judgment of possession in favor of the plaintiff.

On March 25, 2019, the defendants filed a postjudgment motion to dismiss for lack of subject matter jurisdiction, claiming that the notice to quit was not served on all designated occupants of the property, as required by General Statutes § 47a-23 (a) and (c).[4] In support of their motion to dismiss, the defendants submitted the affidavit of Stephen Gabriel,[5] in which he acknowledged residing at the property and accepting service on January 21, 2019, of one copy of the notice to quit. Additionally, on March 25, 2019, the defendants filed a motion to open the judgment of possession predicated on the jurisdictional claim raised in their motion to dismiss. On March 27, 2019, the trial court denied both of the defendants' motions without a hearing and issued an accompanying memorandum of decision. This appeal followed. Additional facts will be set forth as necessary.

The defendants claim on appeal that (1) the trial court improperly denied their request for an evidentiary hearing despite their having raised a disputed issue of fact and (2) the absence of an evidentiary hearing led

accordance with Sections 10-12 through 10-17. If the defendant fails to plead within three days after receipt of such motion by the clerk, the judicial authority shall forthwith enter judgment that the plaintiff recover possession or occupancy with costs."

[4] General Statutes § 47a-23 provides in relevant part: "(a) When the owner . . . desires to obtain possession or occupancy of any land or building . . . and . . . (3) when one originally had the right or privilege to occupy such premises but such right or privilege has terminated . . . such owner . . . shall give notice to each . . . occupant to quit possession or occupancy of such land, building, apartment or dwelling unit . . . before the time specified in the notice for the lessee or occupant to quit possession or occupancy.

* * *

"(c) A copy of such notice shall be delivered to each . . . occupant or left at such . . . occupant's place of residence . . . . Delivery of such notice may be made on any day of the week. . . ."

[5] Stephen Gabriel is one of the Doe defendants.

to clearly erroneous factual findings by the trial court.[6] These arguments, which we address together, are unavailing.[7]

"Our standard of review of a trial court's findings of fact and conclusions of law in connection with a motion to dismiss is well settled. A finding of fact will not be disturbed unless it is clearly erroneous. . . . [If] the legal conclusions of the court are challenged, we must determine whether they are legally and logically correct and whether they find support in the facts. . . . Thus, our review of the trial court's ultimate legal conclusion and resulting [denial] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *JPMorgan Chase Bank National Assn.* v. *Simoulidis*, 161 Conn. App. 133, 135–36, 126 A.3d 1098 (2015), cert. denied, 320 Conn. 913, 130 A.3d 266 (2016).

"Service of a valid notice to quit . . . is a condition precedent to a summary process action under § 47a-23 that implicates the trial court's subject matter jurisdiction over that action." (Internal quotation marks omitted.) *Lyons* v. *Citron*, 182 Conn. App. 725, 731, 191 A.3d 239 (2018). Service of a notice to quit must comply with § 47a-23 (c), which provides in relevant part: "A copy of such notice shall be delivered to each lessee or occupant or left at such lessee's or occupant's place of residence . . . ." "The failure to comply with the statutory

[6] The defendants do not challenge on appeal the contents of the notice to quit, the granting of the motion for default for failure to plead, or the entry of judgment of possession. Their sole claim relates to the denial of their motion to dismiss on the ground of lack of service of the notice to quit on all defendants.

[7] We pause to note that, although the defendants failed to analyze in their appellate brief the court's denial of their motion to open the judgment, we nonetheless address the merits of their claim that the trial court improperly denied their motion to dismiss. We do so because the motions, which were based on nearly identical grounds and sought the same basic relief, were inextricably intertwined and, under the circumstances of the present case, to dispose of the defendants' appeal on the basis of an overly technical application of mootness principles would exalt form over substance.

requirements deprives a court of jurisdiction to hear the summary process action." *Bridgeport* v. *Barbour-Daniel Electronics, Inc.*, 16 Conn. App. 574, 582, 548 A.2d 744, cert. denied, 209 Conn. 826, 552 A.2d 432 (1988).

"Due process does not mandate full evidentiary hearings on all matters, and not all situations calling for procedural safeguards call for the same kind of procedure. . . . So long as the procedure afforded adequately protects the individual interests at stake, there is no reason to impose substantially greater burdens . . . under the guise of due process." (Internal quotation marks omitted.) *Property Asset Management, Inc.* v. *Lazarte*, 163 Conn. App. 737, 748, 138 A.3d 290 (2016). "[If] a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts." *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009); see also *Property Asset Management, Inc.* v. *Lazarte*, supra, 749 ("[a] court is required to hold an evidentiary hearing before adjudicating a motion to dismiss only if there is a genuine dispute as to some pertinent jurisdictional fact").

In the present case, there was no genuine dispute as to any jurisdictional fact necessary to find that the defendants had been served with the notice to quit. The record before the court revealed that all defendants had been served. First, the marshal's return of service was prima facie evidence that each defendant had been served, at a minimum, by abode service. See *Jenkins* v. *Bishop Apartments, Inc.*, 144 Conn. 389, 390, 132 A.2d 573 (1957) ("[t]he return is prima facie evidence of the facts stated therein"). Second, as a result of the entry of default against the defendants for their failure to plead, all material facts in the complaint were deemed admitted. See *Catalina* v. *Nicolelli*, 90 Conn. App. 219,

221, 876 A.2d 588 (2005). Such allegations included the following: "On January 21, 2019, the plaintiff caused a notice to be duly served on the defendants to quit possession of the premises on or before January 30, 2019, as required by law. The original notice to quit is attached hereto and marked [as] exhibit A." As the trial court correctly observed, the affidavit of Stephen Gabriel, which was the only evidence that the defendants submitted in support of their motion to dismiss, did nothing to create a genuine dispute as to any pertinent jurisdictional fact. The affidavit merely acknowledges that Stephen Gabriel was in fact served and makes no statement based on any personal knowledge that the other defendants were not served. The averment in the affidavit stating that Stephen Gabriel received only one copy has little, if any, probative value, as only one copy of the notice to quit was necessary to effect service on him, and there was no representation made in the marshal's return of service that seven copies were left with Stephen Gabriel. Finally, and perhaps most notably, there was no affidavit or other documentation from any defendant to demonstrate that he or she had not been served in any manner. In light of the foregoing, the court was not required to hold an evidentiary hearing before ruling on the defendants' motion to dismiss. Because there was ample evidence to support the court's finding that the defendants were served with the notice to quit, the court properly denied the motion to dismiss.

The judgment is affirmed.

In this opinion the other judges concurred.

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SUPREME COURT PENDING CASES

The following appeal is fully briefed and eligible for assignment by the Supreme Court in the near future.

STATE *v.* JESSE CULBREATH, SC 20276
Judicial District of Hartford

Criminal; Whether Defendant's Statements Were Obtained in Violation of Rule of *Edwards* v. *Arizona* that Custodial interrogation Must Cease Once a Suspect Invokes *Miranda* Right to Counsel; Whether Alleged Prosecutorial Improprieties Deprived Defendant of a Fair Trial. The victim was shot and killed on Judson Street in Hartford. Based upon a tip from a confidential informant that the defendant may have been involved in the homicide, the police stopped a vehicle in which the defendant was a passenger. After a search of the vehicle uncovered a revolver, the defendant was arrested for, inter alia, firearm offenses and taken to the police station. In order to safeguard the fifth amendment privilege against self-incrimination, the United States Supreme Court, in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), adopted a prophylactic rule that requires that suspects be informed of their right to remain silent and their right to counsel prior to any custodial interrogation. Thereafter, in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), that court extended the prophylactic rule of *Miranda*, and held that, once suspect invokes his right to have counsel present during custodial interrogation, all questioning must cease until counsel is made available or the suspect voluntarily reinitiates conversation. Here, the defendant signed a *Miranda* rights waiver form prior to being interviewed by Detective Rykowski. During the interview, the defendant asked: "Is there anybody I can talk to?" When Detective Rykowski sought a clarification, the defendant responded, "Like . . . an attorney or something?" Detective Rykowski stated that, if the defendant wanted an attorney, the interview would have to be terminated. Detective Rykowski then left the interview room to allow the defendant time to decide whether he wanted an attorney. When the interview resumed, neither the defendant nor Detective Rykowski raised the issue of whether the defendant wanted an attorney. The defendant eventually admitted during the interview that the revolver found in the vehicle was his and that he shot the victim, but claimed that the shooting was in self-defense. The defendant was convicted of, inter alia, manslaughter in the first degree and firearm offenses, after a trial in which his inculpatory statements were admitted into evidence. On appeal, the defendant claims for the first time that his statements were obtained in violation of *Edwards* v. *Arizona*. The

defendant contends that he "clearly" invoked his *Miranda* right to counsel when, during the interview, he asked Detective Rykowski, "Is there anybody I can talk to?" and then, upon Detective Rykowski's request for clarification, further stated, "Like . . . an attorney or something?" The defendant argues that Detective Rykowski's failure to stop the interrogation at this point violated the prophylactic rule of *Edwards* v. *Arizona*. Alternatively, relying on *State* v. *Purcell*, 331 Conn. 318 (2019), the defendant claims that, if his invocation of his *Miranda* right to counsel is determined to be ambiguous, Detective Rykowski's failure to seek clarification of his request before resuming the interview violated his right against compelled self-incrimination under article first, § 8, of the state constitution. In addition, the defendant claims that he was deprived of his constitutional right to a fair trial by prosecutorial impropriety. Specifically, he argues that during closing and rebuttal arguments, the prosecutor improperly (1) argued facts not in evidence and mischaracterized the evidence, (2) misrepresented the law related to the defendant's claim of self-defense, and (3) remarked on the defendant's motive to lie and Detective Rykowski's lack of motive to lie.

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

Jessie Opinion
Deputy Chief Staff Attorney

NOTICES OF CONNECTICUT STATE AGENCIES

State of Connecticut
Department of Public Health

Notice of Declaratory Ruling Proceeding

The Department of Public Health (''DPH'') hereby gives notice of its intention to issue a declaratory ruling on a request for declaratory ruling filed by the Chapman Farm, LLC and Stefan Zavatone, Trustee of the Zavatone Children Family Trust (''petitioners'') pursuant to Conn. Gen. Stat. § 4-176, regarding the approval of a subsurface sewage disposal system (''SSDS'') proposed by Aaron Manor Nursing & Rehabilitation Center, which is located at 3 South Wig Hill Road, Chester, Connecticut.

Petitioners request a ruling as to the following:

1. Whether the capacity of the SSDS proposed by Aaron Manner exceeds 7,500 gallons per day depriving DPH of jurisdiction?

2. Whether the SSDS proposed by Aaron Manor is a ''repair'' of an existing system; rather, than a replacement and construction of a new SSDS, requiring compliance with § 19-13-B103a et seq. of the Regulations of Connecticut State Agencies and the Technical Standards?

3. Whether the SSDS proposed by Aaron Manor is in an ''area of special concern'' as specified in, and does not comply with, § 19-13-B103d(e) et seq. of the Regulations of Connecticut State Agencies and the Technical Standards?

The Department of Public Health has prepared this notice in accordance with the Uniform Administrative Procedure Act (''UAPA''), Connecticut General Statute § 4-166 *et seq.*, and specifically Conn. Gen. Stat. § 4-176.

All persons seeking status to participate must petition the DPH by November 20, 2020. All requests seeking status to participate in this matter shall be submitted in writing in accordance with § 4-176(d) of the Connecticut General Statutes and § 19a-9-26 through § 19a-9-28 of the Regulations of Connecticut State Agencies. All filings to be submitted to the DPH shall be sent by email to the DPH, Public Health Hearing Office at phho.dph@ct.gov. It is anticipated that the Hearing Officer will rule on petitions for status by November 25, 2020. A date for hearing will thereafter be scheduled by the Hearing Officer.

By law, a declaratory ruling constitutes a statement of agency law which is binding upon those who participate in the hearing and may also be utilized by the Department of Public Health, on a case by case basis, in future proceedings before it.

Stacy M. Schulman, Esq.
Hearing Officer
October 9, 2020

PAID FAMILY & MEDICAL LEAVE INSURANCE AUTHORITY

NOTICE OF INTENT TO ADOPT GLOSSARY OF TERMS

In accordance with sections 1-121 and 31-49o of the Connecticut General Statutes, notice is hereby given that the Board of Directors of the Connecticut Paid Family and Medical Leave Insurance Authority (''hereinafter the CT Paid Leave Authority'') intend to adopt the following Glossary of Terms which defines key terms that will be used in connection with the administration of the Paid Family & Medical Leave Insurance program.

All written comments regarding these procedures must be submitted by November 20, 2020 to the CT Paid Leave Authority via email at PFMLIAComments@ct.gov.

GLOSSARY OF TERMS

''Bonding Leave'' means leave taken by an employee in order to:

- Bond with a newborn child;
- Process the adoption of a child or bond with a newly adopted child; or
- Process the placement of a foster child or bond with a newly placed foster child.

''Block Leave'' is a one-time continuous absence for a single qualifying reason.

''Caregiver Leave'' leave taken by an employee who is ''needed to care for'' a ''family member'' who has a ''serious health condition.''

''Child,'' ''Son'' or **''Daughter**'' means a biological, adopted or foster child, stepchild, a legal ward, or child of a person standing ''*in loco parentis*,'' of any age

''Covered service member'' means:

- A current member of the United States Army, Navy, Marine Corps, Coast Guard and Air Force or any reserve component thereof, including the Connecticut National Guard performing federal military duty as provided in Title 32 of the United States Code. (This is federal duty only.)
- State military family leave does not cover veterans.

''Family member'' means a ''spouse,'' ''sibling,'' ''son or daughter,'' ''grandparent,'' ''grandchild,'' ''parent,'' or an ''individual related to the employee by blood or affinity whose close association the employee shows to be the equivalent of those family relationships.''

''Family violence'' (also referred to as ''domestic violence'') means a pattern of coercive behavior, including acts or threatened acts, that is used by a perpetrator to gain power and control over a current or former spouse, family member, intimate partner, or person with whom the perpetrator shares a child in common.

- Family or domestic violence includes, but is not limited to: physical violence, injury, or intimidation, sexual violence or abuse, emotional and/or psychological intimidation, harassment, stalking or economic abuse and control

''Family violence leave'' is leave taken by an employee who is a victim of family violence who needs to take time off from work for the following reasons:

- To seek medical care or psychological or other counseling for physical or psychological injury or disability;
- To obtain services from a victim services organization;
- To relocate due to such family violence; or
- To participate in any civil or criminal proceeding related to or resulting from such family violence.

''Grandchild'' means a grandchild related to a person by (A) blood, (B) marriage, (C) adoption by a child of the grandparent, or (D) foster care by a child of the grandparent

''Grandparent'' means a grandparent related to a person by (A) blood, (B) marriage, (C) adoption of a minor child by a child of the grandparent, or (D) foster care by a child of the grandparent

''Health Care Provider'' means:

- A doctor of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices,
- A podiatrist, dentist, clinical psychologist, or optometrist authorized to practice in the state and performing within the scope of his or her practice;
- A chiropractor authorized to practice in the state and performing within the scope of his or her practice;
- A nurse practitioner, nurse-midwife, clinical social worker, or physician assistant authorized to practice in the state and performing within the scope of his or her practice;
- A Christian Science practitioner listed with the First Church of Christ, Scientist, in Boston, Massachusetts; or
- Any health care provider from whom the employer or the employer's group health plan's benefits manager will accept a medical certification to substantiate a claim for benefits.

''Health Care Provider'' for military caregiver leave means:

- A doctor of medicine or osteopathy authorized to practice medicine or surgery by the state in which the doctor practices,
- A podiatrist, dentist, clinical psychologist, or optometrist authorized to practice in the state and performing within the scope of his or her practice;
- A chiropractor authorized to practice in the state and performing within the scope of his or her practice;
- A nurse practitioner, nurse-midwife, clinical social worker, or physician assistant authorized to practice in the state and performing within the scope of his or her practice;
- A Christian Science practitioner listed with the First Church of Christ, Scientist, in Boston, Massachusetts;
- Any health care provider from whom the employer or the employer's group health plan's benefits manager will accept a medical certification to substantiate a claim for benefits;
- A Department of Defense (DOD) health care provider;
- A Veterans Affair (VA) health care provider;
- A DOD TRICARE network authorized private health care provider; or
- A DOD non-network TRICARE authorized private health care provider

NOTE*: TRICARE is the DOD's military health system and includes network and non-network health care providers.)*

''In loco parentis'' means:

- ''In the place of the parent''
- An individual stands *in loco parentis* to a child if he or she has day-to-day responsibilities to care for or financially support the child and the individual intends to take on the role of a parent to that child.
- The person standing *in loco parentis* is not required to have a biological or legal relationship with the child.

NOTE: The federal Department of Labor Administrator's Interpretation No. 2010-3 is a good resource for understanding when an individual is or was ''*in loco parentis*'' to a child.

''Incapacity'' means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment of the serious health condition, or recovery from the serious health condition.

''Individual related to the employee by blood or affinity whose close association the employee shows to be the equivalent of those family relationships'' means any person with whom the employee has a significant personal bond that is or is like a family relationship, regardless of biological or legal relationship.

- This determination is necessarily situation specific and governed by the circumstances of the individuals involved.
- Examples of such relationships include, but are not limited to:
  - A foster child in the same home in which the employee was a foster child for several years and with whom the employee has maintained a sibling-like relationship, despite the lack of a biological or legal relationship;
  - A friend of the family in whose home the employee lived while she was in high school and whom the employee therefore considers to be family, despite the lack of a biological or legal relationship;
  - An elderly neighbor to whom the employee has provided unpaid caregiving assistance and whom the employee considers to be like a grandfather to her;
  - An aunt or uncle who relies on the employee for unpaid care and has maintained as strong and enduring a relationship with the employee as typically seen between individuals and their parents, grandparents, or siblings;
  - A child of an employee's former partner who lived with the employee for several years and maintains a parent-like relationship with the employee; or
  - An unmarried, significant other of the employee with whom the employee maintains a familial, spouse-like relationship, despite their lack of legal relationship to each other; or
  - A person with whom the employee lived for several years, sharing financial responsibilities of the household and one another's common welfare, despite not sharing a romantic, legal, or blood relationship.

''Intermittent Leave'' is leave in separate, non-consecutive time periods rather than a single span of time for a single qualifying reason.

''Needed To Care For'' means the employee is providing (or will provide) physical care or psychological comfort and reassurance

''Next of kin'' (for military caregiver leave) means the service member's nearest blood relative, other than the covered service member's spouse, parent, son or daughter, in the following order of priority:

- A blood relative who the covered service member has specifically designated in writing as his or her nearest blood relative for purposes of military caregiver leave,
- Blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions,
- Brothers and sisters,
- Grandparents,
- Aunts and uncles, and
- First cousins.

''Parent'' means a biological, adopted or foster parent, stepparent, person standing *in loco parentis* to a child or a person who has legal guardianship or custody of a child.

''Parent-in-law'' means the parent of the employee's spouse.

''**Qualifying Exigency leave**'' is leave for one or more of the following activities:

Short notice deployment	To address any issue that arises from a covered servicemember being notified of an impending call or order to active duty, 7 or less calendar days prior to date of deployment.
Military events and related activities	To attend any official ceremony, program, or event sponsored by the military that is related to the covered active duty of a covered servicemember; and/or To attend family support or assistance programs and informational briefings sponsored or promoted by the military, military service organizations, or the American Red Cross that are related to the covered active duty call of a covered military member.
Childcare and school activities (non-routine)	To arrange for alternative childcare arrangements for the child of a covered servicemember's child when existing arrangements need to be changed due to the covered active duty; To provide childcare on an urgent, immediate need basis when the care is necessitated by the disruption caused by covered active duty (but not on a routine, regular, or every day basis); To enroll or transfer a covered servicemember's child in a new school or day care facility when

	existing arrangements need to be changed due to the covered active duty; and/or To attend meetings with staff at school or day-care facility to address issues arising out of the covered active duty (but not to attend routine meetings/functions). NOTE: The child in question must be the child of the servicemember, not necessarily the child of the employee.
Parental leave care (non-routine)	To provide care for a servicemember's parent who is incapable of self-care on an urgent, immediate need basis when the care is necessitated by the disruption caused by the servicemember's covered active duty (but not on a routine, regular or every day basis). • Such care may include: ○ Arranging for alternative care for a parent; ○ Providing care on an immediate basis ○ Admitting or transferring the parent to a care facility; or ○ Attending meetings with staff at a care facility, such as meetings with hospice or social service providers for a parent. NOTE: The parent who needs care must be the parent of the servicemember.
Financial and legal arrangements (Before, during or after deployment)	To act as the covered servicemember's representative before a federal, state, or local agency for purposes of obtaining, arranging, or appealing military service benefits while the covered servicemember is on a covered active duty and for a period of 90 days following termination of covered servicemember's covered active duty. To make or update financial or legal arrangements to address the covered servicemember's absence while on covered active duty Examples: ○ Preparing and executing financial and healthcare powers of attorney. ○ Transferring bank account signature authority. ○ Enrolling in Defense Enrollment Eligibility Reporting System (DEERS). ○ Obtaining military identification card

	○ Preparing or updating a will or living trust.
Counseling	The need to attend counseling arises from the covered active duty of a covered servicemember; • Counseling is for the employee, covered servicemember and/or the covered servicemember's child. • The counseling must be provided by someone other than a healthcare provider. *Examples:* Military Chaplain Pastor/minister A non-HCP offered by the military or a military service organization
Rest and recuperation	To spend time with a covered servicemember who is on short-term, temporary, rest and recuperation leave during the period of deployment.
Post-deployment activities	To attend arrival ceremonies, reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following the termination of covered servicemember's covered active duty; and To address issues that arise from the death of a covered servicemember while on covered active duty. *Examples:* Meeting and recovering the deceased service member. Making funeral arrangements.
Additional activities that arise out of the covered servicemember's covered active duty provided the employer and employee mutually agree that such leave shall be considered a qualifying exigency and agree to both the timing and duration of such leave.	

''Reduced Schedule Leave'' is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday for a period of time, normally from a full-time schedule to a part-time schedule.

''Serious health condition'' means an illness, injury, impairment or physical or mental condition that involves inpatient care or continuing treatment by a health care provider

- ''**Treatment**'' includes examinations to determine if a serious health condition exists and evaluations of the condition.
- A ''**regime of continuing treatment**'' includes, for example, a course of prescription medication (e.g. an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition.

- It does not include taking of over-the-counter medications such as aspirin, antihistamines, or salves, or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider.
- A person has a ''serious health condition'' if he/she has one or more of the following conditions summarized below:

Inpatient Care	• An overnight stay in a hospital, hospice, or residential medical care facility. • Includes any period of incapacity or any subsequent treatment in connection with the overnight stay. *(Note: If surgery is elective, and an overnight stay in the hospital is required, leave is covered.)*
	Incapacity and Treatment:
Continuing Treatment by a Health Care Provider (*any one or more of the following)*	A period of incapacity of more than three consecutive full calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves: - Two or more in-person visits to a health care provider for treatment within 30 days of the first day of incapacity, unless extenuating circumstances exist. The first visit must be within seven days of the first day of incapacity; or - At least one in-person visit to a health care provider for treatment within seven days of the first day of incapacity, which results in a regimen of continuing treatment under the supervision of the health care provider. *Examples: the health provider might prescribe a course of prescription medication or therapy requiring special equipment.*
	Pregnancy: Any period of incapacity due to pregnancy.
	Chronic Conditions Requiring Treatments: Any period of incapacity due to or treatment for a chronic serious health condition which: - Requires periodic visits for treatment by a health care provider at least twice a year; and - Recurs over an extended period of time; and - May cause episodic rather than a continuing period of incapacity.

	Examples: asthma, migraine headaches, diabetes, epilepsy
	Permanent/Long-Term Conditions: A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, but which requires the continuing supervision of a health care provider. *Examples: Alzheimer's disease; terminal states of cancer; severe stroke.*
	Multiple Treatments (Non-Chronic Conditions): Restorative surgery after an accident or other injury; or, A condition that would likely result in a period of incapacity of more than three consecutive full calendar days if the employee or employee's family member did not receive treatment. *Examples: chemotherapy; physical therapy.*

''**Serious health condition resulting in incapacitation that occurs during a pregnancy**'' means:

- Prenatal medical appointments
- Pregnancy-related complications
- Recovery from pregnancies that do not end in a live birth
- Childbirth and delivery, and
- The period of time after the delivery during which the biological mother is certified by her doctor to be unable to perform the requirements for her job.

''Serious injury or illness'' for military caregiver leave means a serious injury or illness that was incurred in the line of duty on active duty in the Armed Forces.

''Sibling'' means the biological sibling, half-sibling, stepsibling, adopted sibling, foster sibling, or sibling-in-law of the eligible employee or the eligible employee's spouse.

''Spouse" means a person to whom one is legally married.

''Workweek'' means the employee's usual or normal schedule (hours/days per week) prior to the start of the family/medical leave.

NOTICE

NOTICE OF PENDENCY OF REINSTATEMENT APPLICATION

In accordance with Section 2-53 of the Connecticut Practice Book, notice is hereby given that the following individual has filed an application for reinstatement to the bar:

Lawrence Dressler

The Standing Committee on Recommendations for Admission to the Bar of Fairfield County will commence a hearing on the above application on Friday, October 23, 2020 at 10 am at Bridgeport Superior Court, 1061 Main Street, Bridgeport, CT 06604 and such future dates as are necessary to conclude the matter.

Please contact Kathleen M. Dunn, Chairperson (203-375-1433) for further information regarding the matter or if you have an objection to the application.