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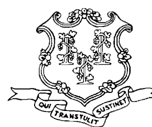

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In addition, the commission heard testimony specifically addressing the character of the abutting residential neighborhood and the quality of life of its residents.[30] Helga Beloin, who stated that she lives across the street from the Shahs, explained to commission members how the proposed use would adversely affect the quality of life for nearby residents. She recounted her firsthand experience with noise emissions, parking problems, loitering, and disruptive behavior in the neighborhood on days when major sporting events are held at the school. Although she tolerated such activity during the daytime, she explained why allowing that activity at night would harm her and other neighbors, stating that when the evening "rolls around, it's over. . . . [W]e're all getting ready for bed . . . it's quiet [and] we can do it . . . . We retired for the night, went to bed, started our new day, you know, refreshed from a good night's sleep. And now that's going to be impossible."

Adverse impact on property values was also a significant concern of abutting property owners.[31] During his

[30] As Lawrence Ganum, who also lives near the school, told commission members, his family "moved here for a reason, for a certain quality of life," and, after noting the problems of noise emissions and loitering in his neighborhood, stated that the proposed use would have "a massive impact on a very quiet, peaceful and comfortable neighborhood."

Karen Draper, a neighbor of the Shahs, testified that the proposed use "will affect the enjoyment of my property, it will increase the amount of loitering at the end of [her street], and will add a considerable amount of traffic." Jeffrey W. Strouse stated that he and his neighbors were "just trying to protect the value of our land and the quality of our lives." Alluding to the various conditions of approval proposed by the school, Robert Haymond, another resident, stated: "I'd just like to ask, why limit the days of the week? Why turn down the lights? Why agree to turn them off early?" Haymond then answered his own question: "[T]he reason is, because they affect the community."

[31] In his remarks, another resident who lives near the school, whom the record identifies only as S. Edelman, opined that the proposed use would cause "major housing depreciation . . . . [There are] about [six to seven] houses; they are exposed to [the school]. Those [six to seven] houses, they also have neighbors, they have houses across the street. You bring the price of one house down, exponentially, the whole neighborhood will go down. People, when they [consider purchasing a home] nowadays, they look at

NOTE: These pages (176 Conn. App. 613 and 614) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 19 September 2017.

rebuttal, Rizio stated that "there was no evidence at all put forth with regard to housing, depreciation of housing values." It nonetheless remained the burden of his client, as the applicant requesting a special permit, to demonstrate to the satisfaction of the commission that its application fully complied with the general standards contained in Article XV, including those concerning the impact on property values. *Loring* v. *Planning & Zoning Commission*, supra, 287 Conn. 778 (*Norcott, J.*, dissenting). During the public hearing, the school provided no evidence whatsoever on that issue, only Rizio's bald assertion that the proposed use "will have no impact on the neighborhood . . . ." Moreover, the commission heard ample testimony about the adverse impact that moving major sporting events at the school from daytime to nighttime would have on the adjacent residential area. In addition, several neighbors opined that the proposed use would detrimentally affect their property values, the character of their neighborhood, and their quality of life. The commission, as arbiter of credibility, was "entitled to credit the testimony and evidence adduced during the [public hearing] in arriving at its ultimate conclusion" as to compliance with the requirements of the regulations. *Children's School, Inc.* v. *Zoning Board of Appeals*, supra, 66 Conn. App. 630; see also *Hayes Family Ltd. Partnership* v. *Town Plan & Zoning Commission*, 115 Conn. App. 655, 662, 974 A.2d 61 (denial of special permit upheld when "evidence was presented that the plaintiffs' proposal would directly impact neighboring residential properties not only by way of increased noise and traffic, but also in that it would adversely affect their property values"), cert.

what's the house [values] on each of the lanes. They don't pay attention that this house has a flaw in terms of being exposed, they look at that one price and the whole neighborhood will come down." On a similar note, Jeffrey W. Strouse reminded the commission that a principal purpose of the regulations, memorialized in the preamble thereto, was "to preserve and protect" property values. Trumbull Zoning Regs., art. I, § 1. In his view, the school's application was likely to damage the value of neighboring residential properties.

denied, 293 Conn. 919, 979 A.2d 489 (2009). In exercising its discretion over whether the general standards of Article XV sufficiently were met, the commission could have concluded, on the record before it, that the school had not established that the proposed use would not adversely affect neighboring property values, the character of the adjacent neighborhood, or the quality of life of its residents.

C

Conclusion

Under the substantial evidence standard that governs challenges to commission determinations, the commission's decision "must be sustained if an examination of the record discloses evidence that supports any one of the reasons given." (Internal quotation marks omitted.) *Rural Water Co.* v. *Zoning Board of Appeals*, supra, 287 Conn. 294. "The question is not whether [a reviewing court] would have reached the same conclusion but whether the record before the [commission] supports the decision reached." *Burnham* v. *Planning & Zoning Commission*, 189 Conn. 261, 265, 455 A.2d 339 (1983). A zoning commission has discretion to determine whether a proposal satisfies the requirements for a special permit; *Irwin* v. *Planning & Zoning Commission*, supra, 244 Conn. 628; and judicial review is confined to the question of whether the commission abused its discretion in finding that an applicant failed to demonstrate compliance therewith. In the present case, testimonial and documentary evidence exists in the record on which the commission could have found that the school did not demonstrate compliance with the general standards of Article XV in multiple respects. The Superior Court, therefore, improperly sustained the plaintiffs' appeal in part.

The judgment is reversed and the case is remanded with direction to dismiss the plaintiffs' appeal.

In this opinion the other judges concurred.

NOTE: These pages (176 Conn. App. 615 and 616) are in replacement of the same numbered pages that appear in the Connecticut Law Journal of 19 September 2017.

CONNECTICUT REPORTS

Vol. 336

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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STATE OF CONNECTICUT *v.* JASMINE LAMANTIA (SC 20190)

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

Syllabus

Convicted, after a jury trial, of the crime of tampering with a witness, the defendant appealed to the Appellate Court, claiming, inter alia, that there was insufficient evidence to support her conviction. The defendant's boyfriend, R, and her former boyfriend, M, had engaged in an altercation outside of her home. M, who was injured, called the police, after which R left the premises. A state police officer who responded to the scene spoke with M in the presence of the defendant, and M told the officer that he had been assaulted by R and another person who was with R at the time. The officer then went to R's residence, where R showed him his cell phone and told him that he should read the text messages between the defendant and R. In those text messages, the defendant informed R that the police were coming and instructed R to have blood on his clothes. The defendant further told R that M had reported to the police that R attacked him but that the defendant's statement to the police was that M was bloody when he arrived at her home because he was in a bar fight somewhere else. The defendant directed R to tell the police that M stalks her and emphasized that they needed to stick to the same story. The officer subsequently confronted the defendant about the text messages, and she stated that the text messages were taken out of context. At trial, however, the defendant denied sending the text messages. The Appellate Court upheld the defendant's conviction, concluding that the jury reasonably could have found that the defendant tampered with a witness, R, by sending him text messages shortly after his altercation with M. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court improperly had upheld her conviction because there was insufficient evidence from which a jury reasonably could find that she had specifically intended to interfere with a witness' testimony at an official proceeding. *Held* that the Appellate Court correctly determined that the jury reasonably could have found that the defendant tampered with a witness when she sent R text messages shortly after his altercation with M: the jury reasonably could have inferred that, when the defendant sent the text messages to R, she believed that an official proceeding was pending or was about to be instituted at which R would likely be a witness, as there was evidence presented at trial that the defendant knew of and contributed to the investigation of the altercation, knew there were

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

witnesses to the altercation, including herself, knew there was physical evidence of the altercation, namely, M's injuries, knew the police were taking M's complaint against R seriously, and knew that the police were interested in contacting R regarding the altercation; moreover, the jury also reasonably could have inferred that the defendant induced or attempted to induce R to testify falsely at that proceeding, as there was evidence that the defendant knew that R was a critical witness to the altercation under investigation and that she had instructed R on how to fabricate his statement to the police so that it would match with her statement, and the defendant's own false testimony before the jury regarding the nature of her relationship with R and her denial that she ever had sent the text messages in question to R reasonably could have led the jury to infer that, because she had no qualms about giving false testimony herself, she intended for R to do the same when it was his turn to testify.

(*Three justices dissenting in two separate opinions*)

Argued October 16, 2019—officially released September 3, 2020**

Procedural History

Substitute information charging the defendant with the crimes of interfering with a police officer and tampering with a witness, brought to the Superior Court in the judicial district of New London, geographical area number twenty-one, and tried to the jury before *A. Hadden*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Pellegrino*, *Js.*, which reversed in part the trial court's judgment and remanded the case to that court with direction to render judgment of not guilty on the charge of interfering with a police officer, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Conrad Ost Seifert, assigned counsel, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Michael Regan*, state's attorney, and *Christa L. Baker*, assistant state's attorney, for the appellee (state).

** September 3, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

KAHN, J. The defendant, Jasmine Lamantia,[1] appeals from the judgment of the Appellate Court affirming the judgment of conviction, rendered after a jury trial, of tampering with a witness in violation of General Statutes § 53a-151 (a).[2] *State* v. *Lamantia*, 181 Conn. App. 648, 671, 187 A.3d 513 (2018). The defendant claims that the Appellate Court incorrectly concluded that there was sufficient evidence to permit a jury to reasonably infer that, when she sent text messages to her boyfriend, Jason Rajewski, after his altercation with David Moulson, the defendant had the specific intent to interfere with a witness' testimony at an official proceeding. Specifically, the defendant contends that there was no evidence to infer that she thought it was more probable than not that a future criminal trial would occur, or that she thought Rajewski would probably testify at such a trial. The state responds that the evidence was sufficient to prove beyond a reasonable doubt that the defendant intended to induce Rajewski to testify falsely in an official proceeding that she believed to be imminent. We conclude that the Appellate Court correctly determined that the jury reasonably could have found that the defendant tampered with a witness by sending Rajewski text messages shortly after his altercation with Moulson. Accordingly, we affirm the judgment of the Appellate Court.

From the evidence presented at trial, the jury could have reasonably found the following facts.[3] On the eve-

[1] At the time of trial, the defendant had changed her last name to Bernardi. For the purposes of this opinion, we continue to refer to her as Lamantia.

[2] This court granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court properly conclude that the evidence was sufficient to prove beyond a reasonable doubt that the defendant intended to induce a witness to testify falsely in an official proceeding that she believed to be pending or imminent, in violation of General Statutes § 53a-151 (a)?" (Internal quotation marks omitted.) *State* v. *Lamantia*, 330 Conn. 919, 194 A.3d 290 (2018).

[3] As the Appellate Court noted, "this case is replete with conflicting testimony regarding the timing and nature of the relationships between the

ning of July 24, 2015, Earl F. Babcock and Rajewski socialized for three or four hours at a bar in Norwich. At that time, the defendant was in a romantic relationship with Rajewski.[4] At some point in the evening, the defendant also arrived at the bar where Babcock and Rajewski were socializing. After midnight and in the early morning hours of July 25, 2015, at the defendant's suggestion, Babcock and Rajewski, in Babcock's car, followed the defendant from the bar to a house located at 18 Bunny Drive in Preston, where some teenagers, including the defendant's son, Joshua Bivens, were having a party. When they arrived, the defendant and Babcock parked their cars, and the defendant immediately went inside the house. Rajewski and Babcock lingered near Babcock's car, and, before they had the opportunity to go inside the house, Moulson, the defendant's former boyfriend, arrived and pulled his car into the driveway, shining the car's headlights on Babcock and Rajewski. Moulson exited his car, and he and Rajewski had a verbal and physical altercation that resulted in

various parties, as well as the events of the night of July 24, 2015, and the early morning of July 25, 2015. It was for the jury, and not this court, to resolve discrepancies in the testimony." *State* v. *Lamantia*, supra, 181 Conn. App. 650 n.1. We observe that one would be hard-pressed to find a criminal case without some degree of conflicting testimony and muddled motivations, and we emphasize that, "[n]otwithstanding our responsibility to examine the record scrupulously, it is well established that we may not substitute our judgment for that of the trial court when it comes to evaluating the credibility of a witness. . . . It is the exclusive province of the trier of fact to weigh conflicting testimony and make determinations of credibility, crediting some, all or none of any given witness' testimony. . . . Questions of whether to believe or to disbelieve a competent witness are beyond our review. As a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *DeMarco*, 311 Conn. 510, 519–20, 88 A.3d 491 (2014). The presence of conflicting testimony is the hallmark of an adversarial system, not the basis upon which to reverse the reasonable findings of a jury.

[4] In July, 2015, the defendant and Moulson lived together and may have also been in a relationship.

Rajewski striking Moulson and Moulson bleeding from his face.

During the altercation, the defendant was inside the house. One of the kids at the party came into the house saying that Rajewski and Moulson were there, and the defendant stepped back outside where she saw Moulson running toward the house with Rajewski and Babcock behind him. Moulson ran into the house to call the police, and the defendant told Babcock and Rajewski that Moulson was calling the police and that they should "get out of [there]." The defendant went back into the house and stood beside Moulson, trying to minister to his wound, while he called the police. Following the defendant's warning that Moulson was calling the police, Babcock and Rajewski left 18 Bunny Drive. Babcock dropped Rajewski off at his home, and then Babcock proceeded directly home himself.

Jonathan Baker, a Connecticut state trooper, received a dispatch to 18 Bunny Drive for an active disturbance at approximately 2:30 a.m.; he and another trooper responded. Baker spoke to Moulson in the presence of the defendant, and Moulson told Baker that, as he pulled into the driveway of the house, he was assaulted by two males, one of whom he identified as Rajewski. Moulson and the defendant gave Baker Rajewski's address, and Baker proceeded to that address to continue the investigation. The other trooper stayed at 18 Bunny Drive to continue speaking with Moulson, which resulted in Moulson being taken into custody in the presence of the defendant.

At Rajewski's residence, Baker knocked on the door and, when Rajewski answered, asked if Rajewski knew why he was there. Rajewski indicated that he did know why Baker was there and presented Baker with his cell phone, telling Baker he should read the text message conversation between the defendant and Rajewski. The

text messages from the defendant notified Rajewski that the police were coming and instructed him to have blood on his clothes. Baker further testified that the defendant told Rajewski that Moulson reported to the police that Rajewski had attacked him while he was in his car but that the defendant's statement to the police was that Moulson was bloody when he got there because he was in a bar fight somewhere else. The defendant directed Rajewski to tell the police that Moulson stalks the defendant and Rajewski followed her to 18 Bunny Drive because he loves her. The defendant emphasized to Rajewski that they needed to stick with the same story, but Rajewski informed her that he was going to tell the truth that Moulson attacked Rajewski first. Based on his review of the text messages, Baker concluded that the defendant had requested that Rajewski lie to him.

While Baker was holding Rajewski's cell phone, Rajewski received a call from Babcock, and Baker answered the call at Rajewski's request, proceeding to have a conversation with Babcock. Baker asked Babcock if they could speak, and Babcock provided Baker with his home address with the understanding that Baker would be there shortly. Baker arrested Rajewski and took him to the state police barracks, and then Baker went to see Babcock at Babcock's home. Baker took Babcock into custody as well and transported him to the barracks for processing. Later that morning, the defendant arrived at the barracks to pick up Moulson. At that time, Baker confronted the defendant about the text messages she had sent to Rajewski. The defendant told Baker that "it was autocorrect, spellcheck made her do that," and that the text messages were "taken out of context and her phone made her do it." Further, when Baker asked what her intent was with respect to the text messages, the defendant responded "that's not how I meant it." Baker placed the defendant under arrest on charges of tampering with a witness in viola-

tion of § 53a-151 (a) and interfering with a police officer in violation of General Statutes § 53a-167a. See footnote 6 of this opinion.

We note that the jury's verdict in the present case was also informed by the following testimony offered by the defendant at trial. The defendant testified that she did not tamper with a witness because she did not send the text messages to Rajewski at all. She denied sending the text messages to Rajewski, claiming that they were not sent from her phone or, if they were, that someone else had sent them. During cross-examination, the defendant denied that she was in a relationship with Rajewski at the time of the altercation with Moulson, claiming that their relationship spanned several months,at the most, from "April to like June-ish." When confronted with a signed statement she gave to the police[5] stating that she had been in a relationship with Rajewski until August, 2015, the defendant testified that she "may have made a mistake . . . ." Regardless of the timing of their relationship, the defendant was adamant that she was not in love with Rajewski either at the time of the altercation with Moulson or afterward. The state introduced into evidence a Facebook message that the defendant sent to Babcock on August 16, 2015, in which she said, "I love [Rajewski] with all my heart and would do anything for him! I'm sure [you] know he just broke up with me. . . . I'm sure you know I lied and said I saw [Moulson] get out of his car and go after [Rajewski] in court. . . . I'm sure [you] know I gave him 100 [percent] of me and loved him unconditionally when he was at his worst! [A]nd would give up everything I have to be with him . . . . [S]o I'm sure [you] know he broke my heart . . . . [P]lease tell him

[5] The defendant became aware that Rajewski had stolen her credit cards in the two weeks prior to the events at issue in the present case. The defendant gave a statement to the police on October 21, 2015, in conjunction with her filing of a complaint against Rajewski alleging that he had stolen her credit cards, a crime for which Rajewski was arrested.

I will be here waiting. And he's my soulmate . . . . [H]e brought out the real me after being abused for [seven] years . . . ." When questioned about this message, however, the defendant once again denied knowing anything about it or having sent it. The defendant claimed, rather, that either the messages were not sent from her account but from a fake account that someone else set up, or that someone had hacked her account.

The jury returned a verdict of guilty of tampering with a witness in violation of § 53a-151 (a), and the trial court imposed a sentence of one year of incarceration, execution suspended, and two years of probation.[6] The defendant appealed, claiming, inter alia, "that the evidence was insufficient to support her conviction of tampering with a witness. Specifically, she [argued] that the state failed to prove that she sent the text messages to Rajewski with the specific intent required for a conviction [under] § 53a-151 (a), that is, the intent to influence a witness at an official proceeding." (Footnote omitted.) *State* v. *Lamantia*, supra, 181 Conn. App. 663–64. The Appellate Court concluded that the "evidence established that the defendant was aware of Baker's investigation of the physical altercation involving Rajewski, Babcock, and Moulson." Id., 670. In addition, the Appellate Court stated that "[t]he jury could also find that the defendant, knowing that Baker investigated the physical altercation that had occurred at [18] Bunny

[6] The defendant was also convicted of interfering with a police officer in violation of § 53a-167a. The trial court imposed a concurrent sentence, as to that conviction, of one year of incarceration, execution suspended, and two years of probation. The defendant claimed on appeal that the evidence was insufficient to support her conviction of interfering with a police officer. *State* v. *Lamantia*, supra, 181 Conn. App. 653–54. The Appellate Court agreed with the defendant, concluding that there was insufficient evidence to sustain her conviction for interfering with a police officer, and remanded the case to the trial court with direction to render a judgment of acquittal on that charge and to resentence the defendant on the conviction of tampering with a witness. Id., 663, 671.

[Drive] and had learned the identity of the participants, including Rajewski, believed that an official proceeding probably would result therefrom." Id. The Appellate Court, therefore, affirmed the witness tampering conviction, concluding that the jury reasonably could have found that the defendant tampered with Rajewski by sending him text messages shortly after his altercation with Moulson. Id., 669–70. This appeal followed.

We now turn to the defendant's claim that there was insufficient evidence for a jury to find that she specifically intended to interfere with a witness' testimony at an official proceeding. "When reviewing a sufficiency of the evidence claim, we do not attempt to weigh the credibility of the evidence offered at trial, nor do we purport to substitute our judgment for that of the jury." (Internal quotation marks omitted.) *State* v. *Ortiz*, 312 Conn. 551, 572, 93 A.3d 1128 (2014); see footnote 3 of this opinion. "[W]e construe the evidence in the light most favorable to sustaining the verdict. . . . We then determine whether the jury reasonably could have concluded that the evidence established the defendant's guilt beyond a reasonable doubt." (Citation omitted.) *State* v. *Elmer G.*, 333 Conn. 176, 183, 214 A.3d 852 (2019). "[W]e do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the [finder of fact's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Crespo*, 317 Conn. 1, 17, 115 A.3d 447 (2015); see also *State* v. *Rodriguez*, 146 Conn. App. 99, 110, 75 A.3d 798 (defendant who asserts insufficiency claim bears arduous burden), cert. denied, 310 Conn. 948, 80 A.3d 906 (2013). When a claim of insufficient evidence turns on the appropriate interpretation of a statute, our review is plenary. See, e.g., *State* v. *Webster*, 308 Conn. 43, 51, 60 A.3d 259 (2013).

"A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he [or she] induces or attempts to induce a witness to testify falsely . . . ." General Statutes § 53a-151 (a). "An 'official proceeding' is any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding." General Statutes § 53a-146 (1). A " '[w]itness' is any person summoned, or who may be summoned, to give testimony in an official proceeding." General Statutes § 53a-146 (6). Section 53a-151 (a) applies to "any conduct that is intended to prompt a witness to testify falsely or refrain from testifying in an official proceeding that the perpetrator believes to be pending or imminent." *State* v. *Cavallo*, 200 Conn. 664, 668, 513 A.2d 646 (1986). Therefore, to support the defendant's conviction, the state had to demonstrate beyond a reasonable doubt that (1) the defendant believed that an official proceeding was pending or was about to be instituted at which Rajewski would likely be a witness, and (2) the defendant induced or attempted to induce Rajewski to testify falsely at that proceeding. See, e.g., *State* v. *Ortiz*, supra, 312 Conn. 554, 562; *State* v. *Pommer*, 110 Conn. App. 608, 614, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008); *State* v. *Bennett-Gibson*, 84 Conn. App. 48, 52–53, 851 A.2d 1214, cert. denied, 271 Conn. 916, 859 A.2d 570 (2004). It is important to note that "[i]ntent 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. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defen-

dant *intended the natural consequences of his voluntary conduct*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Bennett-Gibson*, supra, 53.

An official proceeding that was pending or was about to be instituted includes not only those proceedings that have been initiated, but also those that are probable or "readily apt to come into existence or [to] be contemplated" by a defendant. (Emphasis omitted; internal quotation marks omitted.) *State* v. *Ortiz*, supra, 312 Conn. 570; *State* v. *Foreshaw*, 214 Conn. 540, 551, 572 A.2d 1006 (1990). "The crucial role police involvement would play in that process cannot be disputed"; *State* v. *Foreshaw*, supra, 551; and, as a result, "attempts to influence witnesses that happen to occur during a police investigation are [not] excluded from the purview of the statute," so long as "the defendant acts . . . believing that such a proceeding will probably occur . . . ." *State* v. *Ortiz*, supra, 570–72. In coming to that conclusion in *Ortiz*, this court analyzed the statutory construction of § 53a-151 (a). Id., 561–67. We specifically considered whether, by not including the words "investigation," "inform," or "informant" as included in Model Penal Code § 241.6 (1), the legislature intended to exclude "situations in which the defendant seeks to prevent an individual from speaking with the police." (Internal quotation marks omitted.) Id., 568. "We agree[d] that the legislature restricted the scope of the witness tampering statute by omitting these words, but the scope of the restriction was minimal." Id. "[Section] 53a-151 (a) applies whenever the defendant believes that an official proceeding will probably occur, even if the police are only at the investigation stage."[7] (Empha-

[7] It is well established that, in interpreting a statute, this court is bound by our prior constructions of the statute. See, e.g., *Kasica* v. *Columbia*, 309 Conn. 85, 93–94, 70 A.3d 1 (2013); *Hummel* v. *Marten Transport, Ltd.*, 282 Conn. 477, 494–95, 923 A.2d 657 (2007). We must presume that the legislature is aware not only of this rule of statutory construction, but also of our interpretation of § 53a-151 (a) in *Ortiz*. See, e.g., *State* v. *Courchesne*, 296 Conn. 622, 717, 998 A.2d 1 (2010). It is through this interpretive lens that

sis omitted.) Id., 568–69. Furthermore, "[a]s long as the *defendant* believes that an official proceeding will probably occur, it does not matter whether an official proceeding is *actually* pending or is about to be instituted." (Emphasis in original.) Id., 569. This court has held that, "when [a] [defendant] knows that a witness with relevant information already has spoken with the police, a jury reasonably could infer that the [defendant] believed that the investigation probably would progress into an official proceeding." Id., 571; see also *State* v. *Pommer*, supra, 110 Conn. App. 619–20 (holding that jury reasonably could have inferred that defendant believed official proceeding was about to be instituted when defendant knew police were aware of identities of participants in robbery—one of whom was defendant—and eyewitness had provided that information to police).

In *Ortiz*, the court set forth two hypothetical scenarios that illustrate with precision the minimal nature of the restriction in instances in which the alleged witness tampering has occurred during the police investigation phase, before charges are brought or a suspect is arrested. First, "consider a scenario in which an individual com-

we must view the legislature's determination to amend General Statutes § 53a-155, effective October 1, 2015, by adding a reference to a "criminal investigation conducted by a law enforcement agency," but failing to make a similar amendment at that time to § 53a-151 (a). See Public Acts 2015, No. 15-211, § 9. "Although we are aware that legislative inaction is not necessarily legislative affirmation . . . we also presume that the legislature is aware of [this court's] interpretation of a statute, and that its subsequent nonaction may be understood as a validation of that interpretation." (Internal quotation marks omitted.) *State* v. *Courchesne*, supra, 717. By choosing not to adopt changes to the language of § 53a-151 (a) that were proposed one year after our decision in *Ortiz*, we agree with the conclusion in Justice D'Auria's dissent that "we can infer that the legislature did not reject our interpretation in *Ortiz*, leaving *Ortiz* in place as good law . . . ." Put another way, in light of this court's interpretation of § 53a-151 (a) in *Ortiz*, which made clear that the omission of the term "investigation" effected only a minor limit on the scope of § 53a-151 (a); *State* v. *Ortiz*, supra, 312 Conn. 568–69; we must infer that the legislature, being aware of that interpretation, did not see any need to amend the statute.

mits a crime that results in no physical evidence, and in which the individual thereafter attempts to prevent the one witness to the crime from speaking to the police. The individual certainly could believe that the police would investigate the crime, but he would have no reason to believe that an official proceeding would probably occur because there would be no evidence or witnesses on which the police could rely to identify and arrest the individual.[8] In contrast, when an individual

[8] Just four months following its decision in *Ortiz*, this court considered under what circumstances a jury could reasonably infer that a defendant thought that an official proceeding was probable to support a conviction of tampering with physical evidence in violation of § 53a-155 (a). *State* v. *Jordan*, 314 Conn. 354, 376–79, 102 A.3d 1 (2014) (In considering whether defendant believed that official proceeding was pending or likely to be instituted, this court concluded that "§ 53-155 (a) applies, no matter what stage the police have *actually* reached in their investigation, as long as the defendant believes that it is *probable* that an official proceeding will arise. This interpretation is consistent with the commentary to the Model Penal Code . . . . It is also consistent with our interpretation of an identical phrase in . . . § 53a-151 (a)." (Citation omitted; emphasis in original; footnote omitted; internal quotation marks omitted.)). *Jordan* provided scenarios similar to those provided in *Ortiz*: "For instance, in a scenario in which an individual commits a crime with no witnesses, and he immediately thereafter discards the one piece of physical evidence connecting him to the crime, the individual certainly could believe that the police would investigate the crime, but he would have no reason to believe that an official proceeding would likely occur because there would be no evidence or witnesses upon which the police could rely to locate and arrest him. In contrast, when an individual knows that there is significant evidence connecting him to the crime, a jury reasonably could infer that the individual believed that the investigation probably would progress into an official proceeding. We emphasize, however, that it is not the existence of an investigation that is key but, rather, whether the defendant believes an official proceeding is pending or probable." (Footnote omitted.) Id., 382–83.

With those distinctions in mind, this court concluded in *Jordan* that the defendant discarded the only physical evidence tying him to the crime and that there was no evidence that the police officer knew his identity or of any other information connecting him to the crime. Id., 386. In other words, at that point in time, the discarded physical evidence was the only evidence linking the defendant to the crime. Id. The defendant discarded it to prevent detection or to avoid being implicated in the crime *in the first instance*, and, without such evidence, the police would not know of his involvement in the crime. Id., 381, 384. These facts were similar to the first illustrative

knows that there is significant evidence connecting him to the crime, or, even further, when the individual knows that a witness with relevant information already has spoken with the police, a jury reasonably could infer that the individual believed that the investigation probably would progress into an official proceeding." (Footnote added.) *State* v. *Ortiz*, supra, 312 Conn. 570–71.[9] These two contrasting scenarios make clear that, when the facts demonstrate that the defendant was aware that there was significant evidence connecting him to the crime or that at least one witness had spoken to the police, an attempt to tamper with witnesses during a police investigation falls under the purview of § 53a-151 (a).

The term "[w]itness," as defined by § 53a-146 (6), is broad, because it includes "any person summoned, or

scenario outlined previously, and, therefore, a jury could not reasonably infer that the defendant believed that an official proceeding was probable. Id., 386.

Jordan is distinguishable from the present case. In the present case, the defendant claims that she attempted to convince Rajewski to lie to the police to help prevent him from being arrested and charged with assault. However, Rajewski had *already been implicated in the crime* by Moulson and the defendant, and Babcock was also aware of Rajewski's identity. Even without Rajewski's statement, the police would have known of his involvement in the assault. These facts more closely align with the second illustrative scenario posited by this court in both *Ortiz* and *Jordan*, whereas the facts in *Jordan* more closely align with the first scenario.

[9] Justice Ecker's dissent misconstrues this court's decision in *State* v. *Ortiz*, supra, 312 Conn. 551. That dissent states that, "[o]ur inquiry in *Ortiz* . . . ultimately and necessarily turned on the defendant's intent with respect to the official proceeding itself." The determination of whether the defendant believed that an official proceeding is pending or about to be instituted is not wholly independent of interference in a prearrest police investigation. A jury may consider a defendant's attempt to induce a potential witness to lie to the police during a prearrest investigation as evidence of his intent to affect that witness' conduct at a future, official proceeding. *State* v. *Ortiz*, supra, 564–65; see also *State* v. *Cavallo*, supra, 200 Conn. 673–74. It is immaterial whether a warrant has been issued or an arrest has been made, and "it does not matter whether the police are at the investigation stage, the official proceeding stage, or any other stage . . . ." *State* v. *Ortiz*, supra, 571.

who may be summoned, to give testimony . . . ." (Emphasis added.) If the jury reasonably could find that the defendant knew that an individual had information relevant to the underlying crime, and knew that the individual "had provided a statement" to the police, it would be "reasonable for the jury to infer that the defendant believed that the [individual] probably would be called to testify in conformity with that statement at a future proceeding." (Internal quotation marks omitted.) *State* v. *Sabato*, 321 Conn. 729, 732, 748, 138 A.3d 895 (2016).

In the present case, the jury was presented with evidence that the defendant had more than mere knowledge of an investigation. The jury heard evidence that the defendant knew there had been a physical altercation between Moulson, Rajewski, and Babcock; observed head injuries on Moulson; was present when Moulson called 911 to report the assault; knew that Baker and the other responding state trooper were investigating the altercation; provided the state troopers with the name and home address of Rajewski; and was aware that the troopers had the names of all three men involved in the altercation. The defendant testified that she was present at 18 Bunny Drive at the time of the altercation, and, although she was inside of the house and did not see the start of the altercation, she saw Moulson running from Rajewski and Babcock and into the house with blood on Moulson's face. The defendant and Babcock testified that the defendant warned Rajewski and Babcock that Moulson was calling the police and instructed them to leave 18 Bunny Drive, further indicating that she knew they had been in an altercation and that the police had been summoned. The defendant and Moulson both confirmed that the defendant was present when Moulson called the police to report the incident, and Baker testified that the defendant was present while he spoke with Moulson. The defendant testified that she provided Baker with Rajewski's home

address. Under these circumstances, a jury reasonably could conclude that the defendant (1) had knowledge of—and contributed to—the investigation, (2) knew there were—and identified for the police—witnesses to the incident, including herself, (3) knew there was physical evidence of the crime as evidenced by Moulson's injuries, and (4) knew that the police were taking the complaint seriously enough to track down witnesses in the middle of the night. On the basis of this evidence, the jury could reasonably infer that the defendant believed that the investigation probably would progress into an official proceeding.[10] See *State* v. *Ortiz*, supra, 312 Conn. 570–71.

In addition, the jury was presented with evidence, including the defendant's own testimony, that she knew that Baker was interested in contacting Rajewski regarding the altercation, and that he would probably be called as a witness. The defendant testified that, after Rajewski was identified as a participant in the

[10] Justice Ecker's dissent takes umbrage at the state's assertion during closing arguments that it "had satisfied its burden of proof with respect to the defendant's belief that an official proceeding was pending or imminent because it had established that the defendant 'knew the cops were involved' and, therefore, '[c]learly . . . knew that a proceeding ha[d] been instituted,' " calling that argument an "egregious misstatement of law." A review of the state's closing argument relating to the witness tampering charge suggests that the state's argument contained more than a simple reference to knowing "the cops were involved," by accurately reciting the elements of the offense and the evidence the state felt proved both elements. Specifically, during that portion of the state's closing argument, it argued: "With regards to the charge of tampering with a witness, in order to prove that charge, the state needs to prove two elements, *the defendant believed that an official proceeding was about to be instituted and that* [*Rajewski*] *was likely to be a witness, and the defendant induced or attempted to induce him to testify falsely or with false testimony. This requirement, the requirement of the defendant believing an official proceeding was about to be instituted can be satisfied if the defendant knew that she could have been implicated in a crime and she asked, threatened, or induced a witness to withhold evidence from* [*the*] *police*. It does not matter that it was in the investigative phase of the criminal justice process. It doesn't matter that the police were still figuring out what happened. It just matters that she intended to prevent that witness from speaking with [the] police or [from] telling the police the truth.

"The state feels it has met its burden of proof with regards to both of these elements in that [the defendant] spoke with the police. She knew the

altercation, she provided his address to Baker, who left 18 Bunny Drive to go to Rajewski's home. Rajewski testified that the defendant, knowing that Baker was en route to Rajewski's home, sent Rajewski text messages telling him to get away because the police were coming. Baker's testimony confirmed that the text messages

cops were involved. She told them to leave, the cops were coming. She spoke with them at the home. Clearly, she knew that a proceeding has been instituted. Clearly, she knew an investigation was currently in the process. She knew [Rajewski] was likely to be a witness. How did she know this? By her own testimony, she gave the police [Rajewski's] name. [Moulson] knew that [Rajewski] was likely to be a witness because he told the police he was the one who assaulted him. As far as her inducing or attempting to induce a witness to testify falsely, you heard the officer testify to the text messages that she sent that night. Again, we'll get into that more later. She sent those text messages telling him, hey, this is my story, basically. This is my story, this is what I told the cops. We need to match. This is what you need to tell them. [Rajewski] resisted. He said, no, let's just tell them the truth. Let's tell them the truth. This is what happened. No, our stories need to match. You need to tell them this. So, I feel the state has met its burden of proof with regards to both elements of this crime, and we will we be asking you find the defendant guilty." (Emphasis added.)

Viewed in its entirety, the state's closing argument relating to the witness tampering charge was not misleading. See, e.g., *State* v. *Felix R.*, 319 Conn. 1, 9, 124 A.3d 871 (2015) ("[w]hen reviewing the propriety of a prosecutor's statements, we do not scrutinize each individual comment in a vacuum but, rather, review the comments complained of in the context of the entire trial" (internal quotation marks omitted)). The state's argument was consistent with its theory of the case as articulated on the first day of trial, when the state's attorney noted that "the crux of the state's claim during the course of this case is going to be that [the defendant] lied to [the] police and attempted to get [Rajewski] to lie to [the] police in order to protect him and herself." The state's argument clearly places this case in the second scenario illustrated in *Ortiz*, described previously in this opinion, because, at the time the defendant tampered with a witness, she had knowledge of the existence of multiple witnesses and significant evidence. This is a perfectly permissible line of argument consistent with *Ortiz*. Even if the state had misstated the law during closing argument, the trial court properly instructed the jury on the essential elements of the offense, as the dissent concedes. Further, the court repeatedly instructed the jury, including prior to closing arguments, that, "[i]f in any way counsel makes a statement regarding the law that differs from what I instruct you on, it's what I say that counts." See, e.g., *State* v. *Williams*, 258 Conn. 1, 15 n.14, 778 A.2d 186 (2001) ("[i]t is a fundamental principle that jurors are presumed to follow the instructions given by the judge" (internal quotation marks omitted)). It is also important to note that the defendant did not challenge the claim that an official proceeding was probable. Rather, the defendant's theory of the case was that the text messages and witness tampering claims were fabricated by Rajewski in order to get the defendant in trouble because she previously had him arrested for stealing her credit cards.

from the defendant to Rajewski "essentially [said] the cops [were] coming, make sure you're bloody and . . . [Moulson was] abusive to her." Baker further testified that "[the defendant] want[ed] [Rajewski] to tell the police or [Baker] that [Moulson] stalks her. [The defendant] said [Moulson] was bloody when he got there. [The defendant] told [the troopers] that [Moulson] was in a bar fight somewhere else. And . . . [Rajewski] only followed [the defendant] to that residence [at 18 Bunny Drive] because he loves her." Baker also stated that the defendant told Rajewski "that they need to stick with the same story and it would be good. They have to match." Baker testified that Rajewski was upset with the defendant's text messages and told her "no, I'm telling the truth. [Moulson] tried to kick my ass, so I beat him up. And then . . . enough is enough." Baker further testified that the defendant responded that "[Rajewski's] story has to match [hers]. [Moulson] looks crazy. [Moulson] deserves it because of the beatings he's [done] to [her]." Baker testified that the crux of the text conversation was that the defendant wanted Rajewski to lie to the troopers, specifically, Baker. On the basis of this evidence, a jury reasonably could infer that, knowing that an official proceeding was probable, the defendant's text messages to Rajewski warning him that the police were coming, directing that Rajewski be bloody when Baker arrived, and providing Rajewski with a false narrative of events that matched the false information she allegedly gave to Baker, demonstrated a clear understanding by the defendant that Rajewski's testimony would be critical at a future proceeding. See *State* v. *Sabato*, supra, 321 Conn. 748 ("[i]ndeed, the defendant stated in one of those messages, 'it's YOUR statement that is gonna fuck it up,' thereby demonstrating the defendant's clear understanding that [the witness'] testimony would be critical at such a proceeding").

The same evidence introduced by the state to prove that the defendant believed an official proceeding was

about to be instituted at which Rajewski would likely be a witness was also sufficient to allow the jury to infer that the defendant induced or attempted to induce Rajewski to testify falsely at that proceeding.[11] "[A] jury may consider a defendant's attempt to prevent an individual from giving a statement to the police as evidence of [her] intent to influence the testimony of that individual at a future official proceeding. This conclusion is limited, of course, by the statutory requirements that (1) the defendant believe[d] an official proceeding [had] been or [was] about to be instituted, and (2) the individual probably [would] be called to testify at that proceeding." *State* v. *Ortiz*, supra, 312 Conn. 560. When these statutory requirements are met, it is reasonable to infer that the defendant "intended the natural consequences of [her] act, that is, to induce the [individual] to testify falsely at the [proceeding]." Id., 565. Furthermore, "it does not matter whether the police are at the investigation stage, the official proceeding stage, or any other stage; [so] long as the defendant acts with the intent to prevent a witness from testifying at an official proceeding, believing that such a proceeding will probably occur, the defendant has tampered with a witness within the meaning of § 53a-151 (a)." Id.; see also *State*

[11] The defendant contends that, by sending the text messages to Rajewski, she was solely attempting to prevent Rajewski's arrest. The jury, however, "is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . The trier may draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical. . . . This does not require that each subordinate conclusion established by or inferred from the evidence, or even from other inferences, be proved beyond a reasonable doubt . . . because this court has held that a [jury's] factual inferences that support a guilty verdict need only be reasonable. . . .

"[A]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal." (Internal quotation marks omitted.) *State* v. *Seeley*, 326 Conn. 65, 72–73, 161 A.3d 1278 (2017).

v. *Pommer*, supra, 110 Conn. App. 618 ("[w]e reject the contention that discouraging the witness from speaking to the police could not suffice when there was evidence that the defendant believed an official proceeding was imminent").

The jury was presented with evidence that the defendant knew Rajewski had been involved in a physical altercation with Moulson and Babcock, Baker was actively investigating Moulson's complaint that he was assaulted by Rajewski and Babcock, and Baker was on his way to Rajewski's home to continue his investigation of the alleged assault on Moulson. Evidence was also presented that the defendant knew Rajewski was a critical witness to the investigation and that she instructed Rajewski on how to fabricate his statement to Baker so it matched hers.

As with the first element, the defendant's own testimony supported an inference that she attempted to induce Rajewski to testify falsely at a future official proceeding. This is not a case in which the defendant declined to take the stand to testify and the jury did not have the benefit of her version of events from which to assess her credibility or infer her intent. Nor did the defendant take the stand and testify, as she now claims on appeal, that she only wanted to protect Rajewski and to prevent him from being charged with assault because she loved him.[12] Instead, at trial, the defendant adamantly denied being in a relationship with Rajewski, being in love with him, and sending him any text messages the night of the altercation. She maintained these

[12] This may have been a closer case if the jury had not heard—and clearly discredited—the defendant's own testimony, in which she adamantly denied sending any text messages to Rajewski for any purpose, rather than claim, as she does on appeal, that she sent them to protect him. In essence, the defendant asks this court to determine that the jury could have reasonably inferred an intent from conduct that the defendant herself disavowed under oath at trial.

claims even when repeatedly impeached by her own conflicting testimony, official statements to the police, and incriminatory messages from her Facebook account. The jury obviously found the defendant to be dishonest and not credible because it rejected her claim that someone else had sent the text messages to Rajewski. In other words, the jury reasonably could have concluded that the defendant had no qualms about perjuring herself on the witness stand and, from such a finding, could have inferred, in light of all the other evidence, that the defendant intended Rajewski to do the same thing when the time came. This undermines any suggestion that the defendant could not be presumed to have contemplated that Rajewski should lie at any trial that resulted from the police investigation of the altercation. The defendant's own testimony, coupled with all the other evidence, was sufficient to allow the jury to reasonably infer that the defendant attempted to induce Rajewski to testify falsely at a future official proceeding.[13]

[13] Justice D'Auria contends that the defendant's trial testimony simply is irrelevant to the determination of whether the jury reasonably could have concluded that the defendant was attempting to induce Rajewski to testify falsely at a likely future prosecution, apparently because that testimony occurred sixteen months after the conduct at issue. We disagree with Justice D'Auria. Although the defendant did not testify directly about that element of the offense—instead, she falsely and repeatedly asserted that she did not try to corruptly influence Rajewski at all, an assertion that, for good reason, the jury rejected as incredible—her testimony at trial afforded the jury the opportunity to evaluate firsthand her demeanor, credibility, character, sophistication, and motive. For obvious reasons, all of these considerations are highly relevant to the ultimate determination of the defendant's intent when she urged Rajewski to lie to the police. This is particularly true because state of mind is most often ascertained, as it was here, on the basis of inferences rather than direct evidence, and, so, the ability of the jury to assess the defendant's intent on the basis of her sworn testimony on the witness stand is an important factor supporting the jury's conclusion regarding that element of the offense. The fact that the defendant's testimony was given sixteen months after the events in question does not deprive that testimony of probative value with respect to what the defendant did or intended at that earlier date. Indeed, we are aware of no support in our case law, or anywhere else for that matter, for the proposition that testimony

In support of her claim, the defendant states that the required inference that she believed an official proceeding was about to be instituted was not reasonable because the underlying crime was assault and not murder, and "the probability of murder prosecutions resulting in trials is much higher than a garden variety G.A. prosecution . . . ."[14] We, however, find no prece-

by a witness about past events is irrelevant to the jury's assessment of that witness' intent.

[14] In addition to her claim that the severity of the underlying crime should be a factor to consider, the defendant advances several additional arguments for which we conclude there is no legal basis. First, she claims that the required inference that Rajewski would likely be a witness at a future official proceeding was not reasonable because the case "may be resolved by means of nolle prosequi, diversionary programs, or a guilty plea," or, even if there were a trial, Rajewski could "[exercise] his [f]ifth [a]mendment right to not testify." (Internal quotation marks omitted.) Witness tampering charges may be brought in connection with any official proceeding, regardless of the seriousness of the underlying crime alleged in that proceeding, and the myriad possible future resolutions of the underlying charges are immaterial to a determination of whether the defendant believed an official proceeding was probable when he or she engaged in the alleged witness tampering conduct. See, e.g., *State* v. *Sabato*, supra, 321 Conn. 732 (defendant instructed friend not to cooperate with investigation of cell phone theft); *State* v. *Cavallo*, supra, 200 Conn. 665 (police officer tampered with likely witness at noncriminal arbitration proceeding). It is also immaterial whether there are circumstances that could excuse a potential witness from testifying at an official proceeding, including the investigation not resulting in an official proceeding. See, e.g., *State* v. *Ortiz*, supra, 312 Conn. 569 ("it does not matter whether an official proceeding is actually pending or is about to be instituted" (emphasis omitted)); see also *State* v. *Sabato*, supra, 732, 748 (it was reasonable for jury to infer that, when defendant knew that an individual had relayed relevant information to police, defendant believed that individual would likely be called to testify about that information at future proceeding).

Second, the defendant argues that she did not know how the assault allegations would be resolved because she was not a party to the underlying crime. Any individual—including, but not limited to, friends, family members, and associates—can engage in and be charged with tampering with a witness under § 53a-151 (a), and such charges are not restricted to the targets or defendants of the underlying proceeding. See, e.g., *State* v. *Bennett-Gibson*, supra, 84 Conn. App. 50–51 (sister of defendant in underlying sexual assault case was charged with tampering with witness when she attempted to induce witness to drop charges against her brother). Finally, the defendant claims that, even if the jury could reasonably infer that the defendant believed that Rajewski would be a witness at an official proceeding, the defendant's text messages were nonthreatening and intended merely to protect Rajewski. Any attempt to induce a witness to testify falsely, whether by force or

dent that stands for the proposition that varying levels of criminal severity alone determine a defendant's belief as to the probability of a future proceeding or whether it was reasonable for the jury to reach the same conclusion.[15] To the contrary, this court and the Appellate Court have upheld convictions for tampering with a witness related to a range of criminal and noncriminal activity. See footnote 14 of this opinion.

In addition, if the severity of the underlying crime were a determinative factor when deciding whether an official proceeding was probable, that could lead to unfortunate consequences by encouraging the very behavior the statute seeks to prevent. For example, considering the severity of the underlying crime could leave domestic violence victims vulnerable, because perpetrators could engage in manipulative or controlling behavior designed to prevent victims from being truthful with the police, without fear of being charged with tampering

otherwise, may result in witness tampering charges. See, e.g., id., 48 (sister of defendant offered to help witness with bills, obtain an apartment, or anything else necessary for witness to drop charges against her brother); *State* v. *Coleman*, 83 Conn. App. 672, 675–76, 851 A.2d 329 (defendant provided nonthreatening instruction on what witnesses were to say in order to create alibi for defendant), cert. denied, 271 Conn. 910, 859 A.2d 571 (2004), cert. denied, 544 U.S. 1050, 125 S. Ct. 2290, 161 L. Ed. 2d 1091 (2005).

Nor do we believe that tampering with a witness charges require the tamperer to benefit personally by avoiding criminal charges or a conviction, or that the defendant personally witness the underlying crime, arguments that were not raised by the defendant. We find no precedent to support either of these considerations. Even if being a witness to the underlying crime were a requirement—which it is not—in the absence of the alleged tampering, the defendant in the present case was nonetheless a witness to the underlying crime. If any of the participants in the altercation itself were charged, the defendant could have expected to be called as a witness. She was with Rajewski and Babcock immediately prior to their arrival at the location of the altercation and had a relationship with each of the parties. While she was in the home when the altercation began, she observed the end of it when she saw a bleeding Moulson running toward the house and away from Rajewski and Babcock, who were chasing Moulson.

[15] Likewise, Justice Ecker's dissent looks to the severity of the underlying crime as a factor to consider when assessing whether a jury reasonably concluded that the defendant believed an official proceeding was probable.

with a witness. While the state does not choose to prosecute every crime, and the state is more likely to prosecute some crimes than others, preempting tampering charges for crimes perceived to be less severe would shield a defendant from charges even when other evidence and surrounding circumstances clearly support a reasonable inference that a defendant believed an official proceeding was probable. This is the situation in the present case. Moulson testified that, as a result of the assault, he was ''bleeding pretty severely'' and needed ''seven stitches in [his] eye.'' The defendant testified that she observed and initially tended to this injury while Moulson called 911. Even if we assume that Moulson's injury, which required professional, medical attention, was minor in nature—and we certainly recognize that it is less severe than other crimes including, but not limited to, murder—that fact was not presented to the jury in isolation. The defendant did not have mere passing knowledge that Moulson had been assaulted, but, rather, she was present at the scene of the crime, witnessed the end and aftermath of the altercation, was involved in the police investigation, provided Rajewski's address to Baker, and knew the police were taking the allegations seriously as Baker left to immediately speak to Rajewski despite the early morning hour. Even considering the severity of the underlying crime, this evidence is sufficient for a jury to reasonably conclude that the defendant thought an official proceeding was probable.

In light of both the evidence presented at trial, including the defendant's own discredited testimony, and the reasonable inferences that could be drawn therefrom, we conclude that there was sufficient evidence for the jury to have found beyond a reasonable doubt that, at the time she sent text messages to Rajewski, the defendant (1) believed that an official proceeding was pending or was about to be instituted at which Rajewski would likely be a witness, and (2) induced or attempted

to induce Rajewski to testify falsely at that proceeding. See *State* v. *Ortiz*, supra, 312 Conn. 554, 562. Therefore, the jury reasonably concluded that the defendant was guilty of tampering with a witness pursuant to § 53a-151 (a).

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and PALMER and MULLINS, Js., concurred.

D'AURIA, J., with whom McDONALD, J., joins, dissenting. I respectfully dissent because I conclude that the Appellate Court incorrectly concluded that the evidence was sufficient to convict the defendant, Jasmine Lamantia, of tampering with a witness in violation of General Statutes § 53a-151 (a). I do not consider this a case that only boils down to whether the jury drew permissible inferences from the evidence or engaged in improper speculation, however. Rather, in my view, recent precedents of this court involving two statutes that criminalize offenses against the administration of justice, only one of which the state charged the defendant with violating, along with recent legislative action in response to those precedents, illuminate the legislative intent and, to me, make clear that the defendant's conduct does not fall within the conduct that the legislature sought to criminalize. Specifically, I believe that, to properly examine how § 53a-151 (a) applies to the present case, we must consider, pursuant to General Statutes § 1-2z, that statute's relationship to General Statutes § 53a-155, which criminalizes tampering with physical evidence. Even more specifically, I believe that how the legislature has responded to our case law leaves an ambiguity that requires consideration of pertinent legislative history. That consideration of the legislative history and our case law leads me to conclude that the legislature did not intend to criminalize the defendant's conduct in the present case. I therefore respectfully dissent.

Section 53a-151 (a) criminalizes "tampering with a witness if, believing that an official proceeding is pending or about to be instituted, [an individual] induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding." The allegation in this case is that the defendant attempted to induce her boyfriend, Jason Rajewski, "to withhold testimony and to testify falsely."[1] That allegation arises from an altercation that took place between Rajewski and two other men. Trooper Jonathan Baker of the state police investigated the altercation as a possible assault. The defendant was neither a participant in the altercation nor a witness to it. As the case is presented to us, however, the parties agree that the defendant in fact sought to induce Rajewski to lie to Baker during the course of his investigation. Specifically, she sent text messages to Rajewski in which she encouraged him to have blood on his clothes when Baker arrived to investigate, to tell Baker that the victim, David Moulson, abused her, and to stick to the same story that Rajewski was already bloody when he arrived at the party from a bar fight somewhere else, all to get Baker to believe that Rajewski did not assault Moulson.

The parties disagree over whether there is sufficient evidence that the defendant, by attempting to induce Rajewski to lie during a police investigation, also intended to induce him to give false testimony or to withhold testimony on the ground that she "believ[ed] that an official proceeding [was] . . . about to be instituted . . . ."[2] General Statutes § 53a-151 (a). The state argues that a jury reasonably could have inferred that, when the defendant attempted to induce Rajewski to

[1] No one contends that Rajewski actually testified falsely or withheld testimony, so the allegation is limited to the intent element of *attempting* to induce false testimony.

[2] No one contends that an "official proceeding" was pending at the time the police interviewed any of the witnesses in the present case.

lie to Baker during the investigation into the incident, she also intended to induce him to "testify falsely" or to "withhold testimony" at an official proceeding that was about to be instituted. The defendant argues that, to prove she had the specific intent to induce Rajewski to give false testimony or to withhold testimony, the state would have been required to "prove a chain of likelihoods." According to the defendant, that chain of likelihoods would have required the state to present evidence that she thought that the police would charge Rajewski with a crime, that an official proceeding would be held, and that Rajewski would testify at an official proceeding. On the basis of this court's interpretations of §§ 53a-151 (a) and 53a-155, and the legislative history surrounding those statutes, I agree with the defendant that the legislature did not intend to criminalize her conduct in the present case, in which the chain of likelihoods necessary to satisfy the statutory requirements is so tenuous.

The majority explains that the state had to demonstrate beyond a reasonable doubt the two elements of the crime: (1) the defendant's belief that an official proceeding was about to be instituted, and (2) the defendant's attempt to induce Rajewski to testify falsely at an official proceeding.

I

I begin with the first element—the defendant's belief that an official proceeding was about to be instituted. Our legislature has defined an "official proceeding" as "any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding." General Statutes § 53a-146 (1).

Unlike § 241.6 (1) of the Model Penal Code,[3] our witness tampering statute, § 53a-151 (a), does not explicitly extend to interference with an "investigation . . . ." *State* v. *Ortiz*, 312 Conn. 551, 568, 93 A.3d 1128 (2014). This is not the first time we have been confronted with the question of under what circumstances a jury may find that, at the investigative stage, a defendant subjectively believes that an official proceeding is "about to be instituted . . . ." General Statutes § 53a-151 (a). Therefore, "we do not write on a clean slate, but are bound by our previous judicial interpretations of the language and the purpose of the statute." *Kasica* v. *Columbia*, 309 Conn. 85, 93–94, 70 A.3d 1 (2013).

We recently analyzed § 53a-151 in *State* v. *Ortiz*, supra, 312 Conn. 555, in which the defendant was a " 'principal suspect' " in a murder investigation. During their investigation, the police contacted Kristen Quinn, the defendant's former girlfriend, who, at first, did not provide the police with any useful information and who, after the victim's remains were found, told the defendant that she was in contact with the police and did not want to be involved with him because she thought he might have had something to do with the victim's murder. Id. In the following months, however, the defendant became aware that Quinn had been speaking with the police, and he detailed for her how he had killed the victim with a knife. Id., 557. Later, still, the defendant went to Quinn's house, showed her a handgun and told her that he "had the gun for insurance if she told the cops about what he said about [the victim]." (Internal quotation marks omitted.) Id. The defendant said that, if Quinn spoke to the police, "[her] house was going to go up in smoke." (Internal quotation marks omitted.) Id. He told her "that he was going to put [her down] on [her] knees, put the gun to [her] head and scare

[3] See 2 A.L.I., Model Penal Code and Commentaries (1980) § 241.6 (1), p. 162 (witness tampering extends to any person who believes "that an official proceeding or investigation is pending or about to be instituted").

[her] straight." (Internal quotation marks omitted.) Id. The defendant also stated that he knew where Quinn's grandparents lived. Id. A jury found the defendant guilty of tampering with a witness in violation of § 53a-151 (a), as well as other charges. Id., 553–54.

The defendant appealed to this court, and we addressed his claim that § 53a-151 does not criminalize the act of attempting to prevent someone from giving a statement to the police when no charges are pending. Id., 559. We set forth the statute's two requirements: (1) the defendant "believes that an official proceeding is pending or about to be instituted," and (2) "the defendant induces or attempts to induce a witness to engage in the proscribed conduct." Id., 562. In applying the statute's first requirement to the facts in *Ortiz*, we referred to the phrase, "about to be instituted," as "somewhat ambiguous" and sought to resolve that ambiguity by looking to our cases that interpret identical language in § 53a-155. Id., 569–70. We recognized that "the omission of 'investigation' [in § 53a-151 (a)] was intended to exclude from the scope of the statute situations in which the defendant believes that only an investigation, but not an official proceeding, is likely to occur." Id., 570.

Nevertheless, we recognized that a defendant's interference with a witness during the investigation of a crime may violate § 53a-151 (a) if there was sufficient evidence that, at the time of the interference, the defendant (1) believed that an official proceeding was pending or was about to be instituted, and (2) interfered with the witness in the investigation so as to induce or to attempt to induce the witness to engage in the proscribed conduct (i.e., testify falsely, withhold testimony, elude legal process or absent himself from any official proceeding). Id., 560. Although attempting to induce a witness to lie to or to withhold evidence from police investigators may not always itself satisfy the

subjective intent requirement of § 53a-151 (a), i.e., "believing that an official proceeding is pending or about to be instituted,"[4] we held that, under certain circumstances, a jury may infer that intent from the defendant's attempts to induce the witness to lie or to withhold that evidence. *State* v. *Ortiz*, supra, 312 Conn. 563. Applying that framework, we concluded that there was sufficient evidence that the defendant intended to induce a witness to testify falsely or to withhold testimony at an official proceeding by attempting to induce a witness to lie to the police. Specifically, we held that the jury could have inferred that, by interfering with the police investigation, the defendant intended to influence Quinn to lie during an official proceeding on the basis of evidence that the defendant had confessed to two individuals that he had killed someone, he knew Quinn was in contact with the police, and he had heard that warrants had issued for his arrest. Id., 572–73.

As we noted in *Ortiz*, § 53a-151 (a) is not the only criminal statute that punishes interference with our system of justice or that employs the phrase, "believing that an official proceeding is pending or about to be instituted . . . ." Nor is *Ortiz* the only recent decision of this court interpreting and applying that phrase. *Ortiz* was argued at the same time as *State* v. *Jordan*, 314 Conn. 354, 102 A.3d 1 (2014), although *Jordan* was

[4] We noted in *Ortiz* that, "[a]lthough the statute does not specify whether the term 'belief' is judged by an objective or subjective standard, this court previously has determined that the statute 'focuses on the mental state of the perpetrator to distinguish culpable conduct from innocent conduct.' " *State* v. *Ortiz*, supra, 312 Conn. 569, quoting *State* v. *Cavallo*, 200 Conn. 664, 669, 513 A.2d 646 (1986). Thus, § 53a-151 (a) applies to "any conduct that is intended to prompt a witness to testify falsely or refrain from testifying in an official proceeding that *the perpetrator believes* [is] pending or imminent." (Emphasis added.) *State* v. *Cavallo*, supra, 668. "Put simply, under § 53a-151 (a), as long as the defendant believes that an official proceeding will probably occur, it does not matter whether an official proceeding is actually pending or is about to be instituted." (Emphasis omitted.) *State* v. *Ortiz*, supra, 569.

decided four months after *Ortiz*. In *Jordan*, we interpreted identical language from a related statute, § 53a-155,[5] which criminalizes tampering with physical evidence, not witnesses.

Like the defendant in *Ortiz*, the defendant in *Jordan* argued that the legislature had restricted the scope of the tampering with physical evidence statute, § 53a-155, by omitting from it the word "investigation." Id., 381. In *Jordan*, a police officer had chased a bank robbery suspect who ran down a sidewalk when the officer called out to him. Id., 359. One witness testified to having seen a man who matched the description of the individual remove his jacket while running across the witness' backyard. Id., 359–60. A second witness saw the individual remove his sweatshirt while he was in her backyard, after which the individual headed to the back of her carport, where the witness' husband later found a sweatshirt that was crumpled into a ball. Id., 360. The second witness also located a dark jacket in a neighbor's trash can, and, when the police took the jacket from the trash can, they also discovered a mask, leather gloves and a shopping bag. Id. DNA analysis of the samples that the police took from all of the items of clothing, except a sample that was taken from the collar of the jacket, included the defendant as a contributor of DNA. Id., 363. A jury found the defendant guilty of, among other crimes, tampering with physical evidence in violation of § 53a-155. Id., 364.

[5] At the time of the events in *Jordan*, § 53a-155 (a) provided: "A person is guilty of tampering with or fabricating physical evidence if, *believing that an official proceeding is pending, or about to be instituted*, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding." (Emphasis added.) General Statutes (Rev. to 2007) § 53a-155 (a).

We "agree[d] with the defendant that the legislature restricted the scope of the tampering with physical evidence statute by omitting the word 'investigation.' We disagree[d] with the defendant, however, that [our previous case law had] improperly extend[ed] liability under the evidence tampering statute to conduct that the legislature deliberately excluded from the scope of § 53a-155." Id., 381. As in *Ortiz*, we concluded in *Jordan* that a defendant's attempt to discard evidence during the investigation of a crime may violate the evidence tampering statute, notwithstanding the omission of the word "investigation." Id., 382; see footnote 5 of this opinion. We explained in *Jordan* that the omission of the word "investigation" from the tampering with physical evidence statute did not automatically exclude all physical evidence discarded during a police investigation. *State* v. *Jordan*, supra, 314 Conn. 382. Rather, the statute's application depended on the point in time at which the defendant believed that an official proceeding probably would occur. Id. We emphasized "that it is not the existence of an investigation that is key but, rather, *whether the defendant believes* an official proceeding is pending or probable." (Emphasis added.) Id., 383.

Applying those principles in *Jordan*, we concluded that "the jury could not reasonably have concluded that the defendant believed that an official proceeding against him was probable when he discarded the evidence." Id., 385. The defendant had run within minutes of the attempted bank robbery, and there was no evidence that he believed that the police officer knew his identity or any other information connecting him to the crime. Id., 386. "[A]t that point in time, the clothing was the *only* evidence linking the defendant to the attempted bank robbery. Therefore, it would [have been] unreasonable for the jury to have inferred from the fact that the defendant absconded from the police officer that the defendant [had] believed that an official

proceeding against him was probable." (Emphasis in original.) Id. We concluded that the evidence was insufficient to support the conviction of tampering with physical evidence in violation of § 53a-155. Id., 388. "Instead, the only reasonable inference from the facts . . . [was] that the defendant discarded his clothing to prevent its use in an investigation in order to escape detection and avoid being arrested by the pursuing police officer." Id., 388–89.

In both *Ortiz* and *Jordan*, therefore, we determined that, despite the omission of the term "investigation," both statutes could encompass interference with a police investigation but only if there was proof beyond a reasonable doubt that the defendant *subjectively* "believed" that an "official proceeding [was] pending or about to be instituted," i.e., "that an official proceeding will probably occur." In *Ortiz*, we concluded that there was sufficient evidence of such a belief; in *Jordan*, we concluded that there was not.

After our decisions in *Ortiz* and *Jordan*, the legislature, in Public Acts 2015, No. 15-211, § 9 (P.A. 15-211), amended § 53a-155 but chose not to amend § 53a-151 (a). See, e.g., *Achillion Pharmaceuticals, Inc.* v. *Law*, 291 Conn. 525, 535, 970 A.2d 57 (2009) ("[t]he legislature is presumed to be aware and to have knowledge of all existing statutes and the effect which its own action or nonaction may have on them" (internal quotation marks omitted)). I find the legislature's actions—both the enactment of new language in § 53a-155 and the lack of that language in the related statute, § 53a-151 (a)—relevant to an appropriate analysis under § 1-2z. I consider the legislature's actions even more relevant, given that, when we interpreted § 53a-151 (a) in *Ortiz*, we were guided by the language of § 53a-155, before that statute had been amended. See *State* v. *Ortiz*, supra, 312 Conn. 569–70; see also P.A. 15-211, § 9.

"When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . In seeking to determine that meaning . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." (Internal quotation marks omitted.) *Callaghan* v. *Car Parts International, LLC*, 329 Conn. 564, 570–71, 188 A.3d 691 (2018). Because we have previously construed § 53a-151 (a), "we must consider its meaning in light of our prior cases interpreting the statute . . . ." Id., 571. "When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same general subject matter . . . ." (Internal quotation marks omitted.) *State* v. *Panek*, 328 Conn. 219, 225–26, 177 A.3d 1113 (2018).

In *Ortiz*, we considered the phrase, "about to be instituted," to be "somewhat ambiguous . . . ." (Internal quotation marks omitted.) *State* v. *Ortiz*, supra, 312 Conn. 569. Even after our construction of the term in a number of cases, however, I do not find this ambiguity entirely dispelled, given the legislature's addition of the term "investigation" in one statute, § 53a-155, and its failure to add it to the related statute at issue in the present case, § 53a-151 (a). Specifically, after the legislature's direct response to *Jordan* by amending § 53a-155, we are left with ambiguity as to how broadly or narrowly the legislature intended "official proceeding"

to be construed under § 53a-151 (a). See *Amaral Bros., Inc.* v. *Dept. of Labor*, 325 Conn. 72, 89, 155 A.3d 1255 (2017) ("it is at least ambiguous whether the legislature, in amending [General Statutes] § 31-60 (b) in 1980, intended to repeal [a Department of Labor regulation]"). In my view, it is unclear whether the legislature intended the language of § 53a-151 (a)—in the absence of the term "investigation"—to apply to the interference with an investigation under circumstances such as those in the present case. Therefore, I would turn to the legislative history. In the legislative session directly following *Jordan*, the Judiciary Committee considered Raised Bill No. 1105, "An Act Concerning Minor Revisions to the Criminal Justice Statutes." Raised Bill No. 1105, 2015 Sess., §§ 9 through 11. The proposed legislation included amendments to the witness tampering statute (§ 53a-151), the witness intimidation statute (General Statutes (Rev. to 2015) § 53a-151a), and the evidence tampering statute (§ 53a-155).[6] The proposal would have added

[6] The proposed amendments in §§ 9 through 11 of Raised Bill No. 1105 are as follows. We note that, within the following quoted material, proposed additions are indicated by underlining and proposed deletions are enclosed in brackets.

"Sec. 9. Section 53a-151 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2015*):

"(a) A person is guilty of tampering with a witness if, believing that an <u>investigation or</u> official proceeding is pending or about to be instituted, [he] <u>such person</u> induces or attempts to induce a witness to testify <u>or inform</u> falsely, withhold testimony, <u>information, a document or a thing,</u> elude legal process summoning [him] <u>such person</u> to testify <u>or provide evidence,</u> or absent himself <u>or herself</u> from any official proceeding <u>or investigation to which such person has been summoned</u>.

* * *

"Sec. 10. Section 53a-151a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2015*):

"(a) A person is guilty of intimidating a witness when, believing that an <u>investigation or</u> official proceeding is pending or about to be instituted, such person uses, attempts to use or threatens the use of physical force against a witness or another person with intent to (1) influence, delay or prevent the testimony of the witness in the official proceeding, <u>or the cooperation of the witness in the investigation,</u> or (2) induce the witness to testify <u>or inform</u> falsely, withhold testimony, <u>information, a document or</u>

the term "investigation" to all of the statutes. See id. The amendment to the witness tampering statute also would have criminalized the inducement of an individual to "inform falsely" and to withhold "information" during an investigation. Id., § 9.

The Office of Legislative Research summarized the proposed amendments to the statutes by stating that "[t]he bill expands the scope of these crimes to cover conduct that occurs when a person believes an investigation is pending or about to begin. By law, each of these crimes covers conduct when a person believes an official proceeding is pending or about to begin. The Connecticut Supreme Court ruled that the evidence tampering crime did not cover situations where a person believes that only an investigation but not an official proceeding is likely (*State* v. *Jordan*, 314 Conn. 354 (2014))." Office of Legislative Research, Bill Analysis, S. Bill No. 1105: An Act Concerning Revisions to the Criminal Justice Statutes (2015), available at https://www.cga.ct.gov/2015/BA/2015SB-01105-R000741-BA.htm.

Both the Office of the Chief Public Defender (OCPD) and the Connecticut Criminal Defense Lawyers Association (CCDLA) opposed the proposed amendments and submitted written testimony identifying concerns about the inclusion of the term "investigation." See Conn.

a thing, elude legal process summoning the witness to testify or provide evidence, or absent himself or herself from the official proceeding or investigation to which such person has been summoned.

* * *

"Sec. 11. Section 53a-155 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective October 1, 2015*):

"(a) A person is guilty of tampering with or fabricating physical evidence if, believing that an investigation or official proceeding is pending, or about to be instituted, [he] such person: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such investigation or proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such investigation or official proceeding."

Joint Standing Committee Hearings, Judiciary, Pt. 9, 2015 Sess., pp. 4947–50. The CCDLA warned: "This bill will create scenarios in which parents, friends or associates of witnesses arguably would engage in 'tampering' behavior simply by discussing whether or not the witness should provide a statement to the police or otherwise cooperate with an ongoing investigation. If passed, this proposal will isolate witnesses and enable law enforcement to improperly exert pressure not only on the witnesses but on their families, friends and associates as well." Id., p. 4950, remarks of Elisa L. Villa, president of the Connecticut Criminal Defense Lawyers Association.

The OCPD posed a different scenario: "Assume for instance the following facts: a child age [fifteen] attends a school where there was a confrontation between other students. The [fifteen] year old was not involved but may have observed the confrontation. The [fifteen] year old is walking home from school, is stopped by the police and asked what he saw. The [fifteen] year old is afraid to talk to the police and does not provide any information. When he goes home and tells his parents what transpired, the parents tell him not to speak with anyone about the incident until they consult with an attorney. Are the parents telling this 'witness' to withhold information and therefore can [the parents] be charged with tampering with a witness?" Id., pp. 4947–48, remarks of Deborah Del Prete Sullivan, legal counsel to and director of the Office of the Chief Public Defender.

The proposal that the legislature ultimately enacted amended the tampering with or fabricating physical evidence statute to encompass such interference when a person believes a "criminal investigation conducted by a law enforcement agency" is pending, not just when a person believes an official proceeding is pending or about to be instituted. P.A. 15-211, § 9.[7] The legislature

[7] Section 9 of P.A. 15-211, which amended General Statutes (Rev. to 2015) § 53a-155, provides in relevant part: "(a) A person is guilty of tampering

did not amend either the witness intimidation statute or the witness tampering statute, however.

Because the legislature enacted the amendment to § 53a-155 to include pending *investigations*, we can infer that, in response to *Jordan*, the legislature acted to criminalize conduct that we had not previously interpreted the statute to include—specifically, tampering with evidence during a criminal investigation, without the need to prove that the defendant believed an official proceeding "would probably occur . . . ." *State* v. *Ortiz*, supra, 312 Conn. 570. A rational reason to explain this expansion is that physical evidence could be the only evidence relied on to solve crimes. If physical evidence is destroyed or altered early enough in the investigation stage, the crime could remain unsolvable indefinitely.

Conversely, the legislature did not amend the tampering with a *witness* statute, § 53a-151, to include the inducement of another to inform falsely or to withhold information when a person believes only that an investigation is pending. From this, we can infer that the legislature did not reject our interpretation in *Ortiz*, leaving *Ortiz* in place as good law, and did not intend to expand the scope of the tampering with a witness statute to the same degree as it expanded the scope of the tampering with physical evidence statute. See, e.g., *State* v. *Evans*, 329 Conn. 770, 807, 189 A.3d 1184 (2018) ("[t]he legislature is presumed to be aware of the [courts'] interpreta-

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with or fabricating physical evidence if, believing that <u>a criminal investigation conducted by a law enforcement agency or</u> an official proceeding is pending, or about to be instituted, [he] <u>such person</u>: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such <u>criminal investigation or official</u> proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such <u>criminal investigation or</u> official proceeding. . . ."

Additions to § 53a-155 (a) are indicated by underlining and deletions are enclosed in brackets.

tion of a statute and . . . its subsequent nonaction may be understood as a validation of that interpretation"), cert. denied, U.S. , 139 S. Ct. 1304, 203 L. Ed. 2d 425 (2019).

Having construed the statute and ascertained the legislature's apparent intent regarding the witness tampering statute, I must determine whether the statute applies to the facts of the present case, construing the record in the light most favorable to sustaining the verdict. See, e.g., *State* v. *Elmer G.*, 333 Conn. 176, 183, 214 A.3d 852 (2019). In my view, we must evaluate the defendant's conduct in relation to *Ortiz* and *Jordan*, as well as in relation to the conduct contemplated by the legislature when it considered amending the tampering statutes. These judicial and legislative guideposts make clear to me that the legislature, by not adopting the amendment to the witness tampering statute, did not intend to criminalize interference with every investigation and, specifically, did not intend to criminalize the inducement of others to withhold information or to falsely inform when there is no evidence to support an inference that, at *that* time, the individual also intended to attempt to influence such behavior in a future official proceeding. Rather, the legislature restricted application of the statute to conduct that the tamperer would have believed would induce *false testimony* or the *withholding of testimony* during an *official proceeding*—the intent requirements set forth in *Ortiz*.

First, in *Ortiz*, we discussed two contrasting scenarios by which to evaluate tampering conduct. See *State* v. *Ortiz*, supra, 312 Conn. 570–71. In one scenario, a person who committed a crime prevents the only witness to that crime from speaking to the police. Id., 570. The interference is undertaken to hinder the investigation and to prevent an official proceeding *against himself* from ever taking place. Id. Under *Ortiz*, that conduct would not fall within the scope of the statute. Id.

("[t]he individual certainly could believe that the police would investigate the crime, but he would have no reason to believe that an official proceeding would probably occur because there would be no evidence or witnesses on which the police could rely to identify and arrest [him]"). Id. In the other scenario, the potential tamperer knows that there is significant evidence connecting him to the crime and tampers with a witness who has information relevant to that crime. Id., 570–71. Under *Ortiz*, that conduct would fall within the purview of the statute because the conduct suggests an intent to induce that witness to testify falsely or to withhold evidence. Id., 571.

Although not dispositive, the facts of the present case clearly fall closer to the first scenario than the second. The defendant was not involved in the altercation and had no reason to believe that an official proceeding would probably occur because there was no evidence or witness tying her to a criminal role in the altercation. She was not the alleged perpetrator of the crime; nor did she witness the incident. Some evidence suggests that someone might have inferred that an official proceeding *could* be instituted (the defendant was on the scene when the police arrived, heard Moulson recount his version of events to Baker and knew that one participant had been taken to the police station). But the record is devoid of evidence—and surely not evidence beyond a reasonable doubt—that the defendant in fact *believed* that an official proceeding was about to be instituted, i.e., "would probably occur . . . ." Id., 570. But cf. id., 572–73 ("there was substantial evidence on which the jury could have relied to find that the defendant believed an official proceeding would probably occur," including the defendant's confessions, his contacts with the police, his request to speak to an investigator working on the case, and his statements that he had heard about warrants for his arrest); *State* v.

Cavallo, 200 Conn. 664, 673, 513 A.2d 646 (1986) (state "introduced ample evidence to convince a reasonable finder of fact that, at the time of his attempts to [induce a false account from a witness] . . . the defendant had known that an arbitration proceeding would soon be pending and that, during the hearing, the [witness] would probably be called to testify"); *State* v. *Pommer*, 110 Conn. App. 608, 620, 955 A.2d 637 (The state presented evidence that the "defendant knew that [an individual] had turned herself in to the police and had implicated [the defendant and two others] in the robbery. From this evidence, the jury reasonably could have inferred that the defendant believed that an official proceeding was about to be instituted."), cert. denied, 289 Conn. 951, 961 A.2d 418 (2008). It is true of every investigation that a witness who seeks to interfere will have *some* information about the incident under investigation. Simply knowing about a crime and attempting to prevent the police from discovering more about what transpired does not, in and of itself, constitute witness tampering. In my view, the defendant's mere knowledge of participants' *involvement* in a potential crime under investigation is hardly a sufficient limitation on the scope of the statute, as it would virtually always impute to the defendant a *belief* that an official proceeding is about to be instituted. Importantly, both scenarios in *Ortiz* contemplate a tamperer who is acting to prevent inculpatory evidence about a crime *the tamperer himself* had committed from reaching the police and, ultimately, from reaching a jury.

We know from *Ortiz* that the legislature did not intend to criminalize all interferences with investigations. Missing from the record in the present case is the type of evidence—and, more particularly, the defendant's awareness of that evidence—indicating that an official proceeding "probably would occur . . . ." *State* v. *Ortiz*, supra, 312 Conn. 570. Had her plan succeeded,

no official proceeding would have ever ensued, undermining the argument that she believed an official proceeding was about to be instituted.

In this way, the facts of the present case no more support a conclusion that the defendant believed an "official proceeding . . . [was] about to be instituted"; General Statutes § 53a-151 (a); than did the facts of *Jordan*, and are perhaps more attenuated. Unlike the tamperer in *Jordan*, the defendant in the present case was not the target of the investigation. She did not engage in the altercation under investigation, although she knew the participants. It was not clear whether any one or all of the participants would be arrested that night, let alone that there would be a trial. "Instead, the only reasonable inference from the facts . . . [was] that the defendant [urged Rajewski to bloody his clothes and to get his story straight] in order [for Rajewski] to escape detection and avoid being arrested by the pursuing police officer." *State* v. *Jordan*, supra, 314 Conn. 388–89. In my view, it was therefore unreasonable for the jury to have inferred from the fact that the defendant urged Rajewski to deceive the officer that she subjectively believed "that an official proceeding against him was probable." Id., 386.

II

In light of my conclusion that the legislature did not intend to criminalize the inducement of false testimony or the withholding of testimony during an investigation unless the evidence supports an inference that the defendant subjectively believed that an official proceeding would probably occur, it becomes clear that the state bore a heavy burden to satisfy the second element of the crime—that the defendant intended to attempt to induce false testimony at an official proceeding. In addition to the fact that, as discussed, I do not believe this is a case in which the state can demonstrate that the defendant believed an official proceeding was about

to be instituted, given my understanding of the scope of the statute, I also do not believe that the state met its burden of proving that, on the evening in question, she attempted to convince Rajewski to testify falsely at a future proceeding.

The statute's legislative history contains another guidepost by which we can evaluate whether the legislature intended for the defendant's conduct to come within the second element of the statute—intent to attempt to induce false testimony. In its written testimony about Raised Bill No. 1105, which would have modified all three statutes; see part I of this opinion; the CCDLA warned that expansion of the tampering statute could criminalize friends or associates of witnesses who engage in tampering behavior simply by discussing whether the witness should provide a statement to the police or otherwise cooperate with an ongoing investigation. See Conn. Joint Standing Committee Hearings, supra, p. 4950. In these scenarios, the potential tamperer is not at all involved as a participant in the crime under investigation but only becomes involved by telling a witness to withhold information from the police. The potential tamperer is also not subject to any criminal charges resulting from the investigation, other than a charge of tampering. The tamperer does not stand to benefit personally from the withholding of information. The tamperer's immediate intent, then, is to withhold information from the police to protect someone else from getting into trouble or from being arrested.

Nothing in the record suggests, like the scenario that the CCDLA warned of, that the defendant in the present case was attempting to induce Rajewski to lie *at an official proceeding*. Unlike the defendants in *Ortiz* and *Jordan*, she was not a suspect in the crime the police were investigating. She did not face potential prosecution in connection with the fight that took place. When

the investigating officer, Baker, was asked during trial, "what was the effect of her text messages on your investigation," he responded, "[w]ell, when I left the scene . . . I had no reason to arrest her . . . she was being honest with me. . . . I had to arrest her now. She's trying to get someone to lie to me; that's interfering with my investigation." The defendant did not stand to benefit from information being withheld from the police other than by keeping her boyfriend from being prosecuted. That intent is exactly what the legislature declined to criminalize by not extending § 53a-151 to include interference with *investigations*—conduct that would be considered within § 53a-155 after the legislature's 2015 amendment. See P.A. 15-211, § 9.

This is not to say that a witness tampering charge is appropriate *only* when the tamperer stands to benefit personally by avoiding criminal charges or *only* when the tamperer is a witness to the underlying crime. I acknowledge that, under certain circumstances, an individual who is not involved in the crime and does not witness the crime certainly could be subject to a tampering charge. The Appellate Court examined that exact situation in *State* v. *Bennett-Gibson*, 84 Conn. App. 48, 851 A.2d 1214, cert. denied, 271 Conn. 916, 859 A.2d 570 (2004). In *Bennett-Gibson*, the defendant's sister offered the alleged victim-witness financial incentives to drop the case against her brother. Id., 50. What distinguishes *Bennett-Gibson* from the present case is that the tamperer in *Bennett-Gibson* approached the witness in the courthouse *after* the witness had lodged a formal complaint with the police and *after* the brother had been arrested and charged—all evidence establishing that an official proceeding had begun and that the tamperer intended to influence testimony at that proceeding. Id. *Bennett-Gibson* clearly illustrates the point that, once the official proceeding has begun, the tamperer knows it has begun, and the damaging testimony is looming large at that proceeding; interference even

by a third party may reasonably be inferred to demonstrate an intent to influence or prevent that testimony, thereby supporting a tampering charge. In the absence of evidence of at least an incipient proceeding, and more particularly the defendant's subjective belief that the proceeding was about to begin, an inference of the necessary intent remains legally tenuous.

In an attempt to bolster the state's plainly deficient proof of the defendant's intent on the night in question to induce Rajewski's false testimony at a future proceeding—which is what she was charged with and which I believe fails as a matter of legislative intent and evidence—the majority relies on the defendant's *own* testimony at her *own* trial in her *own* defense sixteen months later. From this, the majority undertakes a leap of logic: that "the jury reasonably could have concluded that the defendant had no qualms about perjuring herself on the witness stand and, from such a finding, could have inferred, in light of all the other evidence, that the defendant intended Rajewski to do the same when the time came."

I agree with the majority that, on the basis of her testimony as well the evidence presented by the state to rebut that testimony, the jury reasonably could have concluded that the defendant was "dishonest and not credible . . . ." For example, it could have concluded that the defendant lied when she testified that she did not send the text messages to Rajewski at all or that someone else had sent them. She also lied when she denied she was in a relationship with Rajewski at the time of the altercation with Moulson. And she lied once again when she insisted she was not in love with Rajewski at the time of the altercation or afterward. As is often the case these days, she was effectively hoisted on her own social media postings,[8] claiming, as with

[8] The defendant's Facebook account contained the following, which was admitted into evidence at trial: "I love [Rajewski] with all my heart and would do anything for him! I'm sure u know he just broke up with me. I'm

the text messages, they either were sent from a fake account or that her account had been hacked. The majority therefore makes a convincing case that she was an unrepentant perjurer.

I am a firm believer in our often stated admonition that the line between fair inference and improper speculation is, "frankly, a matter of judgment," and that it is not my role to substitute my own view for the jury's exercise of that judgment. (Internal quotation marks omitted.) *State* v. *Rhodes*, 335 Conn. 226, 238, A.3d (2020). The defendant, after all, chose a jury trial. But the majority would have us conclude that the jury reasonably could have inferred from the fact that she testified falsely at her own trial, long after Baker's investigation of the altercation between Rajewski and Moulson, that she also intended by her actions all those months before to induce *Rajewski* to testify falsely at any later trial arising from the altercation. This is too much for me.

Could the jury have come to the same conclusion—that she is a liar—if she had lied about her hair color or her age? Possibly, and yet, so what? How do those lies bring her conduct within the scope of the statute? The defendant's false testimony at her own trial is hardly probative—and certainly not dispositive—of her intent to attempt to induce Rajweski to lie at a different official proceeding when she was trying to get him to lie to the police on the evening in question.

The fundamental problem with the defendant's own testimony is that it suffers from a double remoteness problem. Under the majority's reasoning, the defen-

sure you know I lied and said I saw [Moulson] get out of his car and go after [Rajewski] in court. . . . I'm sure u know I gave him 100 [percent] of me and loved him unconditionally when he was at his worst! [A]nd would give up everything I have to be with him! . . . [S]o I'm sure u know he broke my heart . . . . [P]lease tell him I will be here waiting. [A]nd he's my soulmate . . . . [H]e brought out the real me after being abused for [seven] years . . . ."

dant's false testimony in 2017 is projected back in time sixteen months to inform the defendant's intent on the night of the altercation in 2016, and that intent is then propelled forward to influence a future official proceeding, whenever it is held. Proving a defendant's intent to influence a future proceeding by having to demonstrate her subjective belief that that proceeding was about to be instituted is challenging enough. But while it is certainly appropriate to seek to prove the elusive element of intent on the basis of circumstantial evidence; see, e.g., *State* v. *Bonilla*, 317 Conn. 758, 766, 120 A.3d 481 (2015); in my view, using the circumstances of a defendant's *future* testimony to make out a case of an *earlier* intent to influence a *future* proceeding requires that the majority attempt a feat of elasticity that the state does not undertake on its own.

This is how the majority explains it: The defendant's perjury "undermines any suggestion that the defendant could not be presumed to have contemplated that Rajewski should lie at any trial that resulted from the police investigation of the altercation." "[U]ndermin-[ing]" a "suggestion" of the defendant's "presumed" "contemplat[ion]" sixteen months beforehand hardly sounds like proof of an intent beyond a reasonable doubt. Quite simply, I disagree with the majority that the jury's determination of the defendant's credibility at her own trial in 2017 can serve to establish the statutory requirement of intent to attempt to induce false testimony at an official proceeding that, *at best*, may have been about to be instituted in 2016.

The jury reasonably could have inferred from the fact that the defendant lied at her own trial that she lies, especially for her own benefit; however, it could not reasonably infer from this evidence that she intended to induce another person to lie in an official proceeding that did not involve her. Lying, by itself, and outside of the perjury context, is not a crime. Additionally, telling someone else to lie to the police, without more, does

not violate any criminal statute in Connecticut, as it would under federal law. See 18 U.S.C. § 1001 (a) (2018) ("whoever . . . (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact . . shall be fined . . . [or] imprisoned"). The legislative history tells us that the legislature did not intend to reach so far and that there must be some limit on the scope of the witness tampering statute. The limitation lies in requiring proof that the tamperer "believ[es] that an official proceeding is pending or about to be instituted" and "attempts to induce a witness to testify falsely . . . [in] any official proceeding." General Statutes § 53a-151 (a). In the absence of some evidence of belief and intent, the statute sweeps in the friend or parent who the CCDLA warned could be prosecuted for tampering, exclusively on the basis of a discussion of whether to provide a statement to the police or to cooperate with their investigation. See Conn. Joint Standing Committee Hearings, supra, p. 4950. I do not believe the legislature intended to criminalize such conduct.

I agree with the defendant that the chain of inferences required to get from the defendant's texting her boyfriend to lie to the police to intending to have her boyfriend lie while testifying during a trial is simply too tenuous to fall within the conduct that I conclude the legislature intended to criminalize. Moreover, "unless a contrary interpretation would frustrate an evident legislative intent, criminal statutes are governed by the fundamental principle that such statutes are strictly construed against the state." (Internal quotation marks omitted.) *State* v. *Cote*, 286 Conn. 603, 615, 945 A.2d 412 (2008). The majority's conclusion would expand the scope of the witness tampering statute beyond that of our decision in *Ortiz* and would, in my view, conflict with the legislature's rejection of the proposed amendment, which reinforced the view that the statute should not apply to every interference with an investigation.

The statute and our case law demonstrate that an intent to attempt to influence testimony can be inferred only when the defendant subjectively believes that an official proceeding is about to be instituted. The evidence in the present case does not establish that the defendant subjectively believed that an official proceeding probably would occur. The state failed to establish that subjective belief, and the record is devoid of evidence to establish that the defendant acted with the intent to attempt to induce false testimony at a proceeding she did not subjectively believe was about to be instituted.

Accordingly, I would reverse in part the judgment of the Appellate Court and remand the case to that court with direction to direct the trial court to render judgment of not guilty on the charge of witness tampering. I therefore respectfully dissent.

ECKER, J., dissenting. Our witness tampering statute, General Statutes § 53a-151 (a), prohibits anyone who believes "that an official proceeding is pending or about to be instituted" from "induc[ing] or attempt[ing] to induce a witness to testify falsely . . . ." The terms "official proceeding," "witness," and "testify" each have a well-known meaning in the law. The three terms, working together in the same statutory provision, establish a clear legislative purpose to criminalize only words or conduct intended to influence another person to make a false sworn statement, or to desist from making a true sworn statement, in an "official proceeding." An "official proceeding" is statutorily defined as "any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding." General Statutes § 53a-146 (1). A police investigation plainly is not such a proceeding. Indeed,

we previously have recognized that our witness tampering statute does not include "situations in which the defendant believes that only an investigation, but not an official proceeding, is likely to occur." *State* v. *Ortiz*, 312 Conn. 551, 570, 93 A.3d 1128 (2014); see id., 568 (agreeing "that the legislature restricted the scope of the witness tampering statute by omitting [the] words ['investigation,' 'inform,' and 'informant']"). Compare General Statutes § 53a-151 (a) (limiting witness tampering to any person who believes "that an official proceeding is pending or about to be instituted"), with 2 A.L.I., Model Penal Code and Commentaries (1980) § 241.6 (1), p. 162 (witness tampering extends to any person who believes "that an official proceeding *or investigation* is pending or about to be instituted" (emphasis added)).

The majority concludes that the evidence in the present case was sufficient for the jury to find beyond a reasonable doubt that the defendant intended to induce a witness to testify falsely in an official proceeding when she texted her on-again, off-again boyfriend, shortly after he had been in a physical altercation with her other on-again, off-again boyfriend, that they "needed to be on the same page" and "stick with the same story . . . ." I disagree. In light of the evidence before the jury and the state's theory of the case at trial, I believe that, although the evidence is sufficient to support a reasonable inference that the defendant intended to tamper with a suspect in *a police investigation*, it is insufficient to support a reasonable inference that she intended to tamper with a *witness* in an *official proceeding*. Because such conduct falls outside the scope of our witness tampering statute, I would reverse the judgment of the Appellate Court upholding the defendant's witness tampering conviction. Accordingly, I respectfully dissent. In doing so, I note my agreement with the well-reasoned dissenting opinion of Justice D'Auria.

I

As both the Appellate Court and the majority recognize, "this case is replete with conflicting testimony regarding the timing and nature of the relationships between the various parties, as well as the events of the night of July 24, 2015, and the early morning of July 25, 2015. It was for the jury, and not [the] court, to resolve discrepancies in the testimony." *State* v. *Lamantia*, 181 Conn. App. 648, 650 n.1, 187 A.3d 513 (2018); accord footnote 3 of the majority opinion. The following facts, which the jury reasonably could have found, are construed in the light most favorable to sustaining the jury's verdict. See, e.g., *State* v. *Elmer G.*, 333 Conn. 176, 183, 214 A.3d 852 (2019).

The defendant was in, or recently had been in, a romantic relationship with Jason Rajewski at the same time that she also was romantically involved with David Moulson. The entanglement led to a confrontation between the two men. During the early morning hours of July 25, 2015, Moulson left a bar in Norwich to follow the defendant, Rajewski, and Earl F. Babcock to a house at 18 Bunny Drive in Preston. The undisputed testimony at trial established that Moulson had followed the defendant in the past using a tracking application installed on her cell phone.

Moulson arrived at 18 Bunny Drive at approximately 2:30 a.m. A physical altercation between Moulson, Rajewski, and Babcock immediately ensued. The incident took place in the driveway outside the house while the defendant was inside. The defendant did not observe the physical altercation and was unaware of its occurrence until she saw a bloodied Moulson running toward the house, with Rajewski and Babcock following behind him. The defendant informed Rajewski and Babcock that they should leave because Moulson was calling the police.

Sometime after Rajewski left Bunny Drive, but before Jonathan Baker, a Connecticut state trooper, arrived at Rajewski's house to investigate the incident, the defendant sent Rajewski a series of text messages. Unfortunately, the text messages were not preserved or introduced into evidence at the defendant's trial. In the absence of this direct evidence, Baker described the text messages for the jury, after refreshing his recollection by reviewing his police report, which itself was never admitted into evidence.[1] According to Baker,[2] the defendant's first text message to Rajewski "essentially [said that] the cops are coming, make sure you're bloody and . . . [that Moulson] is abusive to her." Rajewski responded "okay." Baker informed the jury that the defendant then sent another text message telling Rajewski "[t]o wait outside because the police were coming. Then she [told Rajewski that] he's going to stand by her side and to delete the conversation." In her next text message, Baker continued, the defendant instructed Rajewski to "tell the police . . . that [Moulson] stalks her." Baker testified that "[the defendant] said [Moulson] was bloody when he got there. [The defendant] told [the troopers] that [Moulson] was in a bar fight somewhere else. And . . . [Rajewski] only followed [the defendant] to that residence [on Bunny Drive] because he loves her." According to Baker, "[e]ssentially, [the defendant was] telling [Rajewski]

[1] During its deliberations, the jury asked to review Baker's police report but was informed that the report was "never presented as evidence during the course of this trial and therefore . . . you are not entitled to review [it]."

[2] It is unclear at certain points in Baker's testimony whether he is reading the text messages transcribed in his police report verbatim, summarizing them, or interjecting his own opinions about their content and intended purpose. To the extent that any ambiguity in the record exists, I resolve it in the light most favorable to sustaining the jury's verdict. See, e.g., *State* v. *Elmer G.*, supra, 333 Conn. 183 ("In reviewing a claim of insufficiency of the evidence, we construe the evidence in the light most favorable to sustaining the verdict. . . . We then determine whether the jury reasonably could have concluded that the evidence established the defendant's guilt beyond a reasonable doubt." (Citation omitted.)).

that they need to stick with the same story and it would be good. They have to match."

Baker testified that Rajewski became upset and told the defendant "no, I'm telling the truth. [Moulson] tried to kick my ass, so I beat him up. . . . [E]nough is enough." Baker added that the defendant next texted Rajewski "a [question] mark" and then the following message: "[Moulson's] ducked up. Your story has to match mine. [Moulson] looks crazy. He deserves it because of the beatings he's [done] to me." Baker continued: "[The defendant was] telling [Rajewski] that [Moulson] told [the police] that [Rajewski] attacked [Moulson] in his car." Rajewski responded that "there's no story," and "[Rajewski] essentially [got] angry with [the defendant], now saying that [she had] brought [Moulson] there for [Rajewski] to do that. She says [she] didn't know." According to Baker, Rajewski texted the defendant that he "didn't know [Moulson] was going to come out swinging like an idiot. [Rajewski] then [texted the defendant] that he's not going to tell a story, [that] he's just going to tell what happened. He— rephrase. That was [the defendant] saying not the story, just what I know, I saw nothing." Baker testified that Rajewski then texted the defendant that "the cops are here now. And the last two [texts from the defendant were sent] either while I'm talking to [Rajewski] or while [Rajewski was] being processed." In those final texts, the defendant asked Rajewski if "he [took] the keys" and indicated that "the truth is fine, but you two [i.e., Rajewski and Moulson] are telling two different stories, [and] you need to be on the same page."

The state's legal theory at trial warrants mention because it contains a fatal flaw that adumbrates the evidentiary deficiency requiring reversal of the defendant's witness tampering conviction. In its closing argument, the state informed the jury that, in order to find the defendant guilty of tampering with a witness, the

state need only prove that the defendant intended to tamper with a witness in *a police investigation*. The state argued that "the requirement of the defendant believing an official proceeding was about to be instituted can be satisfied if the defendant knew that she could have been implicated in a crime and she asked, threatened, or induced a witness to withhold evidence from [the] police. It does not matter that it was in the investigative phase of the criminal justice process. It doesn't matter that the police were still figuring out what happened. *It just matters that she intended to prevent that witness from speaking with* [*the*] *police or* [*from*] *telling the police the truth*." (Emphasis added.) The state further argued that the defendant "[c]learly . . . knew that a proceeding ha[d] been instituted" and "[c]learly . . . knew an investigation was currently in [progress]" because she "knew the cops were involved" and she had spoken to the police. This theory of guilt was manifestly erroneous as a matter of law.

II

Two points require comment before addressing the case law construing our witness tampering statute and the requirement that the defendant specifically intend to induce false testimony in an "official proceeding." Both points relate to a troubling lack of focus in the state's theory of criminal wrongdoing at trial. First, the state never informed the jury precisely which statement or statements in the defendant's text messages either were false or sought to induce Rajewski to testify falsely; nor did it identify for the jury the "official proceeding" in which the defendant expected Rajewski's testimony would occur (e.g., the prosecution of Rajewski, Moulson or Babcock, or some combination thereof, for the crime of assault or breach of the peace, the infraction of creating a public disturbance, or some other charge). These are not minor deficiencies in a prosecution charging a defendant with tampering with

a witness (i.e. attempting to induce a witness to testify falsely) in an official proceeding. Although I do not doubt that the evidence is sufficient to conclude that the defendant intended to promote an inaccurate version of events in *some* fashion, it is a matter of significant concern to me that the state failed to identify the specific falsehood or the specific proceeding serving as the basis of the witness tampering conviction.[3] It was the state's burden to prove beyond a reasonable doubt that the defendant intended to induce "false testimony," and, in order to fulfill that burden, the state had to prove the falsity of one or more statements that the defendant asked Rajewski to make to the police. Although the defendant's suggestion that she and Rajewski should "match" their "stories" to be "on the same page" certainly is suggestive of a desire to provide a false version of one or more facts, the state neglected to identify precisely what part or parts of the defendant's "story" were false or were intended to induce false testimony, just as it failed to identify the official proceeding with which the defendant intended to interfere. In light of the unfortunate lack of specificity pervading the defendant's trial in this case, we should exercise care on appeal to ensure that the evidence is sufficient to sustain a conviction under our witness tampering statute.

Second, the state erroneously informed the jury that a police investigation is an official proceeding, even though the statutory definition of an "official proceeding" plainly excludes police investigations. See General Statutes § 53a-146 (1). The state compounded this error by arguing that it had satisfied its burden of proof with respect to the defendant's belief that an official proceed-

[3] With respect to the purported falsity of the text messages, there was no evidence, for example, whether Moulson was abusive to the defendant, whether he stalked her, whether he had been in a bar fight earlier in the evening or whether he was bloody when he arrived at the house on Bunny Drive.

ing was pending or imminent because it had established that the defendant "knew the cops were involved" and, therefore, "[c]learly . . . knew that a proceeding ha[d] been instituted."[4] I recognize that the trial court properly instructed the jury on the essential elements of the offense, but, nonetheless, neither the trial court, defense counsel, nor the state corrected this egregious misstatement of law. See *State* v. *Otto*, 305 Conn. 51, 77, 43 A.3d 629 (2012) ("prosecutors are not permitted to misstate the law . . . and suggestions that distort the government's burden of proof are likewise improper" (citation omitted)). The state's reliance on an erroneous legal theory informs my view of the facts that the jury reasonably and logically could have found in the present case.

III

I begin my analysis with the language of our witness tampering statute and the governing case law. Section 53a-151 (a) provides that "[a] person is guilty of tamper-

[4] For reasons that I discuss more fully in this opinion, I fundamentally disagree with the majority that, when "[v]iewed in its entirety, the state's closing argument relating to the witness tampering charge was not misleading." Footnote 10 of the majority opinion. As the majority acknowledges, the state's theory of the case was that the defendant knowingly tampered with a witness in a police investigation and that such conduct, *standing alone*, was sufficient to satisfy the state's burden to establish the defendant's intent to interfere in an official proceeding. Our witness tampering statute, however, deliberately excludes "situations in which the defendant believes that only an investigation, but not an official proceeding, is likely to occur." *State* v. *Ortiz*, supra, 312 Conn. 570. Although evidence that the defendant was aware of the existence of a police investigation may, depending on the attendant factual circumstances, support an inference that the defendant intended to interfere with an official proceeding, the inferred fact regarding the defendant's subjective belief is an essential element of the crime that the state bears the burden of proving beyond a reasonable doubt. The state's theory of the case at trial, like the majority's analysis in this appeal, misconceives the state's burden of proof by treating mere knowledge of an active police investigation as a substitute for the statutory requirement that the defendant intend *to induce a witness to testify falsely in an official proceeding*, contrary to the plain language, intent, and purpose of our witness tampering statute, and contrary to controlling precedent.

ing with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding."[5] A "witness" is defined as "any person summoned, or who may be summoned, to give testimony in an official proceeding." General Statutes § 53a-146 (6). An "official proceeding" is "any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding." General Statutes § 53a-146 (1). "Thus, the witness tampering statute has two requirements: (1) the defendant believes that an official proceeding is pending or about to be instituted; and (2) the defendant induces or attempts to induce a witness to engage in the proscribed conduct. These requirements serve the purpose of part XI of the Connecticut Penal Code, in which § 53a-151 (a) is found, as they punish those who interfere with the courts and our system of justice." (Internal quotation marks omit-

[5] The word "testify" in § 53a-151 (a) is not defined in the definitional section of part XI of our penal code; see generally General Statutes § 53a-146; but, in this context—that is, when used in conjunction with the words "witness" and "official proceeding"—the term manifestly refers only to statements made *under oath*. See, e.g., *Sickle* v. *Torres Advanced Enterprise Solutions, LLC*, 884 F.3d 338, 349–50 (D.C. Cir. 2018) (relying on dictionary definition of testify: " '[t]o make a declaration of truth or fact under oath' "), quoting The American Heritage Dictionary of the English Language (New College Ed. 1976) p. 1330; *State* v. *Salafia*, 29 Conn. Supp. 305, 310, 284 A.2d 576 (1971) (*Shea, J.*) ("The power to compel 'testimony' imports the power to require an oath of a witness, because the word is usually defined as meaning oral statements of a person under oath. [Webster's Third New International Dictionary (1961) p. 2362; Black's Law Dictionary (4th Ed. 1968) p. 1646]."); see also Black's Law Dictionary (11th Ed. 2019) p. 1778 (defining "testimony" to mean, inter alia, "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition"); cf. *State* v. *Taborsky*, 139 Conn. 475, 487, 95 A.2d 59 (1953) ("[t]estimony given in court under oath is not in the same category as statements made to police officers outside of court").

ted.) *State* v. *Ortiz*, supra, 312 Conn. 562. These two requirements are conjunctive and interactive—the criminal conduct consists of words or conduct exhibiting an intent to induce false testimony *in an official proceeding*. See id., 554 ("[b]ecause the jury reasonably could have found that the defendant believed that an official proceeding was about to be instituted and that [the prospective witness] probably would be called to testify at that proceeding, we conclude that the jury reasonably could have inferred that the defendant intended to induce [the witness] to testify falsely or to withhold testimony at that proceeding"). Thus, any charge of witness tampering, if based on efforts by a defendant to influence a witness during a criminal investigation prior to the commencement of any "official proceeding," must be supported by direct or circumstantial evidence reflecting the defendant's intent to influence the testimony of a "witness" in that future proceeding.

As we recognized in *State* v. *Ortiz*, supra, 312 Conn. 568, our witness tampering statute is based on § 241.6 (1) of the Model Penal Code, which provides in relevant part that "[a] person commits an offense if, believing that an official proceeding *or investigation* is pending or about to be instituted, he attempts to induce or otherwise cause a witness *or informant* to . . . testify *or inform* falsely . . . ." (Emphasis added.) Model Penal Code and Commentaries, supra, § 241.6 (1) (a), p. 162. When it enacted § 53a-151, our legislature purposefully omitted the words "investigation," "informant" and "inform" because it intended to exclude tampering with a witness in a police investigation from the scope of criminal culpability under that statute, unless the defendant has the specific intent to interfere with an "official proceeding." See *State* v. *Ortiz*, supra, 568; cf. *Heirs of Ellis* v. *Estate of Ellis*, 71 S.W.3d 705, 713–14 (Tenn. 2002) ("When the legislature enacts provisions of a uniform or model act without significant alteration, it may

be generally presumed to have adopted the expressed intention of the drafters of that uniform or model act. . . . However, when the legislature makes significant departures from the text of that uniform act, we must likewise presume that its departure was meant to express an intention different from that manifested in the uniform act itself." (Citation omitted.)). Thus, § 53a-151 plainly applies only when the defendant has the specific "intent to influence a witness' conduct at an *official proceeding*." (Emphasis added.) *State* v. *Ortiz*, supra, 554. *Ortiz* thus identifies a critical outer limit to the reach of our witness tampering statute on the basis of the operative text and legislative history.[6]

The issue presented in this appeal is whether the evidence was sufficient to prove beyond a reasonable doubt that the defendant had intended to influence Rajewski's testimony in a future official proceeding when she sent him the text messages following his physical altercation with Moulson. To resolve this question, and "to distinguish culpable conduct from innocent conduct"; (internal quotation marks omitted) id., 569; the statute directs us to focus on the defendant's state of mind rather than the actual status of the official proceeding. The defendant's belief regarding the pendency or imminence of an official proceeding is not measured by "temporal proximity" but, rather, by "probability of occurrence," because "mere temporal proximity does not sufficiently implement the goal of punishing the obstruction of justice." Id.; see also Model Penal Code and Commentaries, supra, § 241.6, comment 2, pp. 166–67 ("The prosecution must establish that the defendant held the specified belief but need not prove that a proceeding or investigation was in fact pending or about to be instituted. In assessing such belief, the word[s] 'about [to begin]' as [they appear]

[6] In my view, the foregoing statutory analysis finds additional, supplementary support in the later legislative proceedings examined at length in Justice D'Auria's dissenting opinion.

in this subsection should be construed more in the sense of probability than of temporal relation. What is important is not that the actor believe that an official proceeding or investigation will begin within a certain span of time but rather that [she] recognize that [her] conduct threatens obstruction of justice [in connection with such a proceeding].").

Our case law makes clear that § 53a-151 (a) applies to conduct intended to induce a witness to give a false statement to the police if—but only if—"a jury reasonably could infer" from that conduct that the defendant had "the requisite intent to induce the [witness] to lie" or to withhold testimony in a future official proceeding. *State* v. *Ortiz*, supra, 312 Conn. 564–65. For example, in *Ortiz*, we held that the evidence was sufficient to support a reasonable inference that the defendant had the requisite intent, even though an official proceeding was not pending or about to be instituted in a temporal sense at the time he threatened a witness to prevent her from giving a statement to the police, because the evidence was sufficient to support a finding that the defendant intended "not only [that the witness] withhold information from the police but also withhold testimony or provide false testimony at a future official proceeding." Id., 573. Likewise, in *State* v. *Cavallo*, 200 Conn. 664, 513 A.2d 646 (1986), we concluded that the evidence established the requisite intent because the state "introduced ample evidence to convince a reasonable finder of fact that, at the time of his attempts to so induce the woman, the defendant had known that an arbitration proceeding would soon be pending *and that, during the hearing, the woman would probably be called to testify about her meetings with the defendant* . . . . From this evidence, the jury could reasonably have inferred that the defendant intended to induce the woman to testify falsely." (Emphasis added.) Id., 673–74.

The fundamental flaw in the majority's reasoning is that it conflates the defendant's knowledge of the existence of a police investigation with the defendant's belief that a future official proceeding is probable, and, in conflating these two different mental states, the majority permits the state to substitute a less demanding mens rea for the operative statutory requirement.[7] The present case illustrates the point. The defendant plainly knew that the police were investigating a minor crime involving a brief fight between two men, and her conduct solidly supports the conclusion that she wanted to avoid an arrest of Rajewski, one among multiple subjects of the investigation. But this state of mind is not enough to establish a violation of our witness tampering statute. To establish that the defendant engaged in criminally culpable conduct intended to "interfere with the courts and our system of justice"; (internal quotation marks omitted) *State* v. *Ortiz*, supra, 312 Conn. 562; the state must produce sufficient evidence for the jury reasonably to find that the defendant undertook her actions with the intent to induce the witness to testify falsely in a future official proceeding. That is, the state must prove not only that the defendant acted under the belief that an official proceeding was likely to be instituted, but also that she intended to induce

[7] The specific intent requirement contained in § 53a-151 cannot be minimized or brushed aside because it serves a vital constitutional function—without it, the statute would be vulnerable to a first amendment challenge. See *State* v. *Cavallo*, supra, 200 Conn. 672 ("We have held today that a defendant is guilty of tampering with a witness only if he intends that his conduct directly cause a particular witness to testify falsely or to refrain from testifying at all. So interpreted, § 53a-151 warns the public that it applies only to conduct intentionally undertaken to undermine the veracity of the testimony given by a witness. Members of the public therefore have no basis for concern that they might be subject to prosecution when their statements unwittingly cause a witness to testify falsely. As long as intent is a necessary element of the crime under § 53a-151, which penalizes only verbal acts relating to a specific pending prosecution, the statute casts no chilling effect on general exhortations concerning cooperation with judicial proceedings.").

the witness to lie in that proceeding. By allowing knowledge of the investigation alone to satisfy the state's burden of proof regarding the defendant's specific intent, the majority has effectively added back into the statute the very words that the legislature intentionally omitted when it adopted a modified version of § 241.6 (1) of the Model Penal Code.[8]

The facts of *Ortiz* are instructive because they serve to highlight what is missing here. The defendant, Akov Ortiz, allegedly murdered Louis Labbadia after discovering that Labbadia had given a statement to the police implicating him in the commission of a burglary.

[8] In my view, the majority mistakenly relies on the jury's rejection of the defendant's in-court testimony to supply the missing evidence of intent. For the reasons cogently explained in Justice D'Auria's dissenting opinion, the defendant's credibility, or lack thereof, in the course of providing testimony at trial is too remote and attenuated from her alleged commission of the crime to support a reasonable inference that, at the time she texted Rajewski in 2015, she intended to induce him to testify falsely at a future official proceeding. The jury plainly was free to disbelieve any or all of the defendant's testimony. It was not free, however, to infer from that disbelief that, because the defendant was the type of person who was willing to lie at trial, she also probably had the specific intent, seventeen months earlier, to tell Rajewski to lie to the police for the purpose of inducing him to testify falsely in a different official proceeding at some undetermined point in the future. Cf. Conn. Code Evid. § 4-5 (a) ("[e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person"); *State* v. *Smith*, 313 Conn. 325, 334, 96 A.3d 1238 (2014) ("[e]vidence of a defendant's uncharged misconduct is inadmissible to prove that the defendant committed the charged crime or to show the predisposition of the defendant to commit the charged crime" (internal quotation marks omitted)); *State* v. *Meehan*, 260 Conn. 372, 395–96, 796 A.2d 1191 (2002) (drawing "distinction between using [uncharged misconduct] evidence to prove an act and using [such] evidence to prove intent" and holding that evidence of defendant's uncharged misconduct did not make it "more or less likely that the defendant" had specific intent to commit crime charged). By holding otherwise, the majority impermissibly dilutes the state's burden of proof on the essential element of intent in violation of the constitution. See, e.g., *State* v. *King*, 289 Conn. 496, 519, 958 A.2d 731 (2008) ("any defendant found guilty on the basis of insufficient evidence has been deprived of a constitutional right" (internal quotation marks omitted)).

Id., 555. "[T]he police considered [Ortiz] a 'principal suspect' in Labbadia's murder." Id. The police questioned Ortiz' former girlfriend, Kristen Quinn, "who, at the time, did not provide the police with any useful information. . . . Quinn informed [Ortiz] that she was in contact with the police and did not want to be involved with [Ortiz] because she thought he might have been involved in Labbadia's murder." Id. About one week later, after Labbadia's body was discovered, the police found a "[d]istraught" and "upset" Ortiz on the Arrigoni Bridge in Middletown. (Internal quotation marks omitted.) Id. "[Ortiz] informed the officers that he was tired of being accused of things, of something he didn't do, and that anytime anything big ever happen[ed] in Middletown, he [was] blamed for it. Specifically, [Ortiz] stated that he had heard that there were warrants for his arrest out through the Middletown Police Department and that the Middletown police [were] trying to kill [him]." (Internal quotation marks omitted.) Id., 555–56. After he was taken to the hospital, Ortiz told the police that "he was tired of being accused of something he didn't do and that he was hearing that the police were accusing him of killing . . . Labbadia." (Internal quotation marks omitted.) Id., 556.

"In the following months, [Ortiz] knew that Quinn was speaking with the police." Id., 557. He nonetheless confessed to Quinn that he had killed Labbadia. Approximately two months later, Ortiz went to Quinn's home, displayed a small handgun and asked her to come outside. Ortiz "told Quinn that he had the gun for insurance if she told the cops about what he said about [Labbadia]. [Ortiz] said that if Quinn spoke to the police [her] house was going to go up in smoke . . . . [Ortiz] stated that he knew where Quinn's grandparents lived. [Ortiz] told Quinn that he was going to put [her down] on [her] knees, put the gun to [her] head and scare [her] straight." (Internal quotation marks omitted.) Id. "Quinn subsequently

informed the police of these events." Id. Ortiz was arrested, charged, and convicted of, among other crimes, tampering with a witness. Id., 558.

On appeal, Ortiz argued that the evidence was insufficient to support his tampering with a witness conviction, but we rejected this claim because his intent to influence testimony in an official proceeding could be inferred under the circumstances. Id., 572–74. The evidence supporting this inference consisted of, among other things, Ortiz' belief that there "were warrants for his arrest out through the Middletown Police Department and that the Middletown police [were] trying to kill him." (Internal quotation marks omitted.) Id., 573. We determined that this evidence was sufficient to support a reasonable inference that, at the time he threatened Quinn, Ortiz "believed that an official proceeding probably would be instituted, *regardless of whether Quinn informed the police about the defendant's confession*." (Emphasis added.) Id. Our inquiry in *Ortiz*, in other words, ultimately and necessarily turned on the defendant's intent with respect to the official proceeding itself. Our holding proves the point: "Because the jury reasonably could have found that [Ortiz] believed that an official proceeding was about to be instituted and that Quinn probably would be called to testify at that proceeding, we conclude that the jury reasonably could have inferred that [Ortiz] intended to induce Quinn to testify falsely or to withhold testimony at that proceeding." Id., 554.

In contrast to *Ortiz*, in the present case, there was no evidence to support a reasonable inference that, at the time she sent the text messages to Rajewski, the defendant subjectively believed that an official proceeding likely would be instituted or that Rajewski would be a witness in such a proceeding. Nothing in the defendant's text messages directly or indirectly references the presentation of formal charges or an actual criminal case that may follow the decision to prosecute, or the

introduction of evidence at an eventual criminal trial. Cf. *State* v. *Sabato*, 321 Conn. 729, 748, 138 A.3d 895 (2016) (holding that defendant's "Facebook messages amply supported a finding that the defendant believed that an official proceeding would probably occur" because, in those messages, "the defendant acknowledged that the police were 'getting warrants' and 'building a case' against him," and wrote that he would "eat the charge"); *State* v. *Cavallo*, supra, 200 Conn. 673 (holding that state had "introduced ample evidence to convince a reasonable finder of fact that, at the time of his attempts to [induce the witness to testify falsely], the defendant had known that an arbitration proceeding would soon be pending" because defendant himself initiated arbitration proceeding less than one month later); *State* v. *Mark*, 170 Conn. App. 241, 252, 154 A.3d 564 (evidence was sufficient to support reasonable inference that defendant believed there would be "official proceeding" because, among other reasons, defendant mentioned that "he did not want to leave evidence of the murder weapon at the scene"), cert. denied, 324 Conn. 927, 155 A.3d 1269 (2017).

I recognize that criminal defendants will not always verbalize their subjective intent or state the ultimate purpose of their efforts to obstruct justice. It will always be appropriate, and sometimes necessary, to look at the factual circumstances surrounding the defendant's conduct in each case to ascertain whether it is reasonable to infer that the defendant's attempt to induce a witness to give a false statement to the police was undertaken in contemplation of an official proceeding. Our case law implicitly recognizes that various factors inform this analysis, including, but not limited to, the severity of the crime under investigation,[9] the quantity

[9] The majority states that "[w]itness tampering charges may be brought in connection with any official proceeding, regardless of the seriousness of the underlying crime alleged in that proceeding . . . ." Footnote 14 of the majority opinion. I am not suggesting otherwise. My point is that the severity of the crime is a factor that should be taken into account as part of the

and quality of the evidence, and the status of the relevant police investigation. See, e.g., *State* v. *Jordan*, 314 Conn. 354, 383, 102 A.3d 1 (2014) ("when an individual knows that there is significant evidence connecting him to the crime, a jury reasonably could infer that the

inquiry into the defendant's mental state because, in the absence of any direct proof of intent, the context of the offense helps to inform that inquiry. Depending on the seriousness of the crime under investigation, the defendant may have different goals in mind when attempting to induce an individual to give false information to the police; in serious cases, the defendant may be thinking of a process involving not only an arrest but a trial and the prospect of a lengthy prison term; in a less serious situation involving trespassing or minor assault, for example, the defendant may be thinking of nothing beyond whether the subject of the investigation will be arrested. Our case law implicitly recognizes that the severity of the crime is part of the surrounding circumstances that inform the inquiry into the defendant's state of mind, i.e., whether the defendant subjectively believed that an official proceeding was likely to be instituted. For instance, in *State* v. *Sabato*, supra, 321 Conn. 748, although the Appellate Court upheld a defendant's conviction of tampering with a witness in connection with the relatively minor crime of theft of a cell phone, the defendant had articulated his intent to interfere with a future official proceeding, and, therefore, it was unnecessary to consider the circumstances surrounding the defendant's words and conduct in order to ascertain his state of mind. See id. (defendant's Facebook messages "acknowledged that the police were getting warrants and building a case against him" and that defendant intended to "eat the charge" (internal quotation marks omitted)). In contrast to *Sabato*, the defendant in the present case did not articulate her subjective intent. Accordingly, it is necessary to consider the circumstances surrounding the defendant's words and conduct, including the severity of the crime at issue in the future official proceeding, in order to determine whether the evidence is sufficient to support a finding that the defendant believed "that an official proceeding . . . [was] about to be instituted"; General Statutes § 53a-151 (a); when she texted Rajewski.

Contrary to the majority, I do not believe that a fact intensive inquiry, which includes as one factor relevant to the defendant's state of mind the severity of the crime at issue in the future official proceeding, will somehow encourage criminal behavior or invite unnecessary subjectivity, as the majority suggests. By identifying objective factors such as the severity of the crime to guide the inquiry, we actually will reduce the degree of subjectivity involved. It is axiomatic that "[i]ntent is generally proven by circumstantial evidence because direct evidence of the accused's state of mind is rarely available. . . . Therefore, intent is often inferred from conduct . . . and from the cumulative effect of the circumstantial evidence and the rational inferences drawn therefrom." (Citations omitted; internal quotation marks omitted.) *State* v. *Turner*, 252 Conn. 714, 748, 751 A.2d 372 (2000). The severity of the crime, like the other facts and circumstances surrounding a defendant's conduct, is circumstantial evidence of the defendant's intent.

individual believed that the investigation probably would progress into an official proceeding"); *State* v. *Foreshaw*, 214 Conn. 540, 543, 550–51, 572 A.2d 1006 (1990) (jury reasonably could have found that defendant believed an official proceeding was about to be instituted when she discarded murder weapon because, after she shot and killed victim in presence of numerous eyewitnesses, she told police that she had discarded weapon "so that she would not be caught with it"); *State* v. *Mark*, supra, 170 Conn. App. 253 ("the defendant knew that the victim's body was lying on the sidewalk in public view; surely the defendant was aware that an investigation and official proceeding probably would ensue when someone found the victim's body"); *State* v. *Guerrera*, 167 Conn. App. 74, 105, 142 A.3d 447 (2016) ("the jury could have inferred that the defendant was aware that a criminal prosecution was probable in light of the number of witnesses who had seen him with the victim, the threats he made to those witnesses to try to silence them, his knowledge that [his brother] told people about killing the victim, and his firsthand knowledge of the murder and the assault"), aff'd, 331 Conn. 628, 206 A.3d 160 (2019); *State* v. *Njoku*, 163 Conn. App. 134, 139–42, 133 A.3d 906 (holding that evidence was sufficient to sustain defendant's conviction of tampering with witness because, after rape of victim, execution of search warrant and collection of defendant's DNA, defendant asked intermediary to visit victim's family and to "try to convince them . . . [to] reach an agreement outside the court with him" (internal quotation marks omitted)), cert. denied, 321 Conn. 912, 136 A.3d 644 (2016); *State* v. *Pommer*, 110 Conn. App. 608, 619–20, 955 A.2d 637 (evidence was sufficient to establish that defendant tampered with witness in official proceeding because "[t]he defendant knew that the police were aware of the identities of the participants in the robbery" and that one participant "had turned herself in to the police" and implicated defendant), cert. denied, 289 Conn. 951, 961 A.2d 418 (2008).

In light of the foregoing principles, I believe that that the evidence was insufficient to support a reasonable inference that, at the time the defendant texted Rajewski, she had an intent to influence the testimony of a witness in a future official proceeding, as opposed to an intent to influence the statement of a suspect in the ongoing police investigation. The crime at issue was not serious—the state itself characterized the assault as "minor"[10]—and the likelihood of a full-blown prosecution in such cases is hardly a foregone conclusion. The realistic probability of formal proceedings also was diminished by the relatively equivocal nature of the evidence. There were no eyewitnesses to the assault aside from the participants, and they gave wildly different accounts of what had transpired—Moulson testified that he had been attacked by Rajewski and Babcock, whereas both Rajewski and Babcock testified that they had been attacked by Moulson.[11] In addition, the police had just begun their investigation, and, in the immediate aftermath of the altercation, it was unclear whether a crime had been committed, who had committed the crime, and whether any charges were likely to be filed. The minor nature of the crime, the conflicting accounts and muddled motivations of the participants, combined with their inebriated state at the time of the assault,[12] leads me to believe that an "official proceeding," although certainly *possible*, did not rise to the level of *probable*. See *State* v. *Reynolds*, 264 Conn. 1, 97, 836 A.2d 224 (2003) ("An inference is not legally supportable . . . merely because the scenario that it contemplates is remotely possible under the facts. To permit such a

[10] The police did not transport Moulson to the hospital for medical treatment of his injury. Instead, they arrested him and detained him overnight.

[11] The defendant's attempt to influence Rajewski's statement to the police appears to be consistent with Rajewski's testimony on this point.

[12] Rajewski testified that he had had "quite a few" alcoholic beverages at Pistol Pete's bar and was drunk at the time the assault occurred. Babcock testified that he also was drinking alcohol that evening and likely had anywhere from one to three beers.

standard would be to sanction fact-finding predicated on mere conjecture or guesswork."), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); see also *State* v. *Jordan*, supra, 314 Conn. 386 (holding that "the jury would necessarily have to stack inferences based on surmise to conclude that the defendant believed that an official proceeding was probable" when he discarded clothing implicating him in attempted robbery while fleeing police). At most, the evidence reflects that the defendant intended to tamper with a witness in a police investigation, and, as previously explained, our witness tampering statute does not extend to "situations in which the defendant believes that only an investigation, but not an official proceeding, is likely to occur."[13] *State* v. *Ortiz*, supra, 312 Conn. 570.

To support its contrary conclusion, the majority relies on this court's statement in *Ortiz* that, anytime a defendant knows "that a witness with relevant information already has spoken with the police, a jury reasonably could infer that the [defendant] believed that the investigation probably would progress into an official proceeding."[14] Id., 571. This statement must be construed in

[13] Tampering with a witness is a serious crime with severe penalties—it is a class C felony punishable by a term of imprisonment of "not less than one year nor more than ten years . . . ." General Statutes § 53a-35a (7); see also General Statutes § 53a-151 (b). Ironically, the minor crime of assault in the third degree, the investigation into which the defendant interfered in an effort to protect one or both of her boyfriends during the early morning hours of July 25, 2015, is a misdemeanor offense punishable by a maximum term of one year of imprisonment. See General Statutes § 53a-36 (1); see also General Statutes § 53a-61 (b).

[14] In *Ortiz*, this court contrasted the scenario in which there was no evidence linking an individual to a crime and, therefore, no reason to believe that the "the police would investigate the crime," with the scenario in which "an individual knows that there is significant evidence connecting him to the crime, or, even further, when the individual knows that a witness with relevant information already has spoken with the police . . . ." *State* v. *Ortiz*, supra, 312 Conn. 570–71. Only in the latter scenario could "a jury reasonably . . . infer that the individual believed that the investigation probably would progress into an official proceeding." Id., 571.

light of the factual context in which the case arose—the crime at issue in *Ortiz* was serious (murder), the police investigation was extensive, the relevant information was damning (Ortiz' confession to the crime of murder), and Ortiz verbalized his belief that an official proceeding was likely to be instituted. Id., 555–58, 572–73. *Ortiz* does not stand for the blanket proposition that it is reasonable to presume that *every* police investigation will result in the initiation of an official proceeding or that every effort to tamper with a witness at the investigative stage will be sufficient to establish the intent to influence that witness in such a proceeding. Indeed, in *Ortiz*, this court emphasized that the defendant's state of mind, rather than the status of the police investigation, is the key to ascertaining whether the defendant's conduct falls within the scope of our witness tampering statute. See id., 571–72 ("it does not matter whether the police are at the investigation stage, the official proceeding stage, or any other stage; as long as the defendant acts with the intent to prevent a witness from testifying at an official proceeding, believing that such a proceeding will probably occur, the defendant has tampered with a witness within the meaning of § 53a-151 (a)"). The mens rea requirement ensures that the defendant "recognize[s] that his conduct threatens obstruction of justice"; (internal quotation marks omitted) id., 570; and "distinguish[es] culpable conduct from innocent conduct." (Internal quotation marks omitted.) Id., 564.

It is well established that "[i]ntent may be, and usually is, inferred from [a] defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances." (Internal quotation marks omitted.) Id., 565. The factual circumstances surrounding the defendant's conduct therefore are critically important in ascertaining whether it is reasonable to infer that she specifically intended to tamper with a "witness" in an "official proceeding" within the meaning

of § 53a-151 (a). Common sense and experience teach us that the likelihood of a future official proceeding, and the further likelihood of sworn testimony of the relevant witness being adduced at that proceeding, necessarily depends on various factors, including, but not limited to, the factors previously enumerated: the severity of the crime, the identity and importance of the witness, the quantity and quality of the evidence, and the status of the police investigation. Each case must be evaluated on its specific facts, and the focus must remain on the defendant's belief that an official proceeding involving the testimony of the witness likely will result. See *State* v. *Jordan*, supra, 314 Conn. 383 ("[t]his analysis ensures that the focus of the inquiry is on the culpability of the actor, rather than on external factors wholly unrelated to [the actor's] purpose of subverting the administration of justice" (internal quotation marks omitted)). To hold otherwise is to rewrite our witness tampering statute to include *all police investigations*, and this we cannot do. See *Doe* v. *Norwich Roman Catholic Diocesan Corp.*, 279 Conn. 207, 216, 901 A.2d 673 (2006) ("It is axiomatic that the court itself cannot rewrite a statute to accomplish a particular result. That is a function of the legislature." (Internal quotation marks omitted.)).

My conclusion, once again, is informed by the fact that our legislature purposefully omitted tampering with an individual in a police investigation from the purview of our witness tampering statute. That legislative choice is an important determination of public policy that cannot be stripped of all meaning. See *Lewis* v. *Gaming Policy Board*, 224 Conn. 693, 709, 620 A.2d 780 (1993) ("the primary responsibility for formulating public policy must remain with the legislature," not the courts (internal quotation marks omitted)). Nor can we ignore completely the rule of lenity. "[I]t is axiomatic that we must refrain from imposing criminal liability where the legislature has not expressly so intended."

(Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 434, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005); see also *State* v. *Drupals*, 306 Conn. 149, 160, 49 A.3d 962 (2012) ("[W]hen the statute being construed is a criminal statute, it must be construed strictly against the state and in favor of the accused. . . . [C]riminal statutes [thus] are not to be read more broadly than their language plainly requires and ambiguities are ordinarily to be resolved in favor of the defendant. . . . Rather, penal statutes are to be construed strictly and not extended by implication to create liability which no language of the act purports to create." (Citations omitted; internal quotation marks omitted.)).

The majority's holding strays too far afield from the statutory text and materially alters its meaning in the process. The phenomenon is not uncommon—a statute is extended to its outer limit by construction in one or more judicial opinions, with each decision taking one successive step away from the original text by jumping off from the gloss adopted in the previous case, until the gloss becomes the law itself, and the original text merely a distant speck on the horizon. Referring to this phenomenon, Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit cautioned: "As we are supposed to enforce the *statutes* [enacted by legislature], and not the glosses on those statutes, we must take care that the judicial process does not contribute to the distortion of meaning." (Emphasis in original.) *Hickey* v. *Duffy*, 827 F.2d 234, 242 (7th Cir. 1987). "Unless courts continually check back with the sources of their authority, the process of interpretation can become a rumor chain. Tiny variations at each retelling cascade, until the tale is unrecognizable to its originator." Id.; see also *National Labor Relations Board* v. *International Brotherhood of Electrical Workers, Local 340*, 481 U.S. 573, 597–98, 107 S. Ct. 2002, 95 L. Ed. 2d 557 (1987) (Scalia, J., concurring

in the judgment) ("[T]he [c]ourt, having already sanctioned a point of departure that is genuinely not to be found within the language of the statute, finds itself cut off from that authoritative source of the law, and ends up construing not the statute but its own construction. Applied to an erroneous point of departure, the logical reasoning that is ordinarily the mechanism of judicial adherence to the rule of law perversely carries the [c]ourt further and further from the meaning of the statute. Some distance down that path, however, there comes a point at which a later incremental step, again rational in itself, leads to a result so far removed from the statute that obedience to text must overcome fidelity to logic."). In my view, the majority opinion has distorted the meaning of our witness tampering statute by applying a judicial gloss that extends criminal culpability to conduct that the legislature clearly and expressly intended to exclude from the scope of § 53a-151 (a), namely, a defendant's attempt to influence another person's statement to the police for the purpose of influencing a police investigation. I therefore dissent.

ORDERS

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THE BANK OF NEW YORK MELLON *v.* ACHYUT M. TOPE ET AL.

The named defendant's petition for certification to appeal from the Appellate Court, 202 Conn. App. 540 (AC 40959), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the named defendant's challenge to the plaintiff's standing to prosecute this action, and, thus, the trial court's subject matter jurisdiction to adjudicate the matter, represented an improper collateral attack on one or more of the earlier judgments rendered by the trial court in favor of the plaintiff?"

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

Thomas P. Willcutts, in support of the petition.

William R. Dziedzic, in opposition.

Decided June 1, 2021

DISCIPLINARY COUNSEL *v.* FRANK CANNATELLI

The respondent's petition for certification to appeal from the Appellate Court, 203 Conn. App. 236 (AC 44091), is denied.

Frank Cannatelli, self-represented, in support of the petition.

Decided June 1, 2021

STATE OF CONNECTICUT *v.* MICHAEL J. MARSALA

The defendant's petition for certification to appeal from the Appellate Court, 204 Conn. App. 571 (AC 41994), is denied.

Deren Manasevit, assigned counsel, in support of the petition.

Timothy F. Costello, senior assistant state's attorney, in opposition.

Decided June 1, 2021

STATE OF CONNECTICUT *v.* JAMAR BOYD

The defendant's petition for certification to appeal from the Appellate Court, 204 Conn. App. 446 (AC 43082), is denied.

Robert T. Rimmer, assigned counsel, in support of the petition.

Jonathan M. Sousa, deputy assistant state's attorney, in opposition.

Decided June 1, 2021

KIRSHAN NANDABALAN *v.* COMMISSIONER OF MOTOR VEHICLES

The plaintiff's petition for certification to appeal from the Appellate Court, 204 Conn. App. 457 (AC 43691), is denied.

Devin W. Janosov, in support of the petition.

Christine Jean-Louis, assistant attorney general, in opposition.

Decided June 1, 2021

BAC HOME LOANS SERVICING, LP *v.* SANDRA LEE ET AL.

The named defendant's petition for certification to appeal from the Appellate Court (AC 44479) is denied.

John L. Giulietti, in support of the petition.

Christopher J. Picard, in opposition.

Decided June 1, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 205

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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IN RE SEQUOIA G. ET AL.*
(AC 44346)

Elgo, Suarez and DiPentima, Js.

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights as to her minor children, S, B and A. She claimed that the court improperly found that it was in the best interests of the children to terminate her parental rights. *Held* that there was ample evidence to support the trial court's conclusion that termination of the mother's parental rights was in the best interests of the minor children as the court's findings as to the children's best interests, made pursuant to statute (§ 17a-112 (k)), were factually supported and legally sound, such that this court would not substitute its

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

judgment for that of the trial court: it was not inappropriate for the court to have considered, as to the emotional ties factor in § 17a-112 (k) (4), the bond between the children and their foster parents, and, although the court did not specifically discuss the feelings and emotional ties of the children with respect to the mother when stating its findings, it did not follow that the court failed to consider those feelings and ties, as reading the court's decision as a whole revealed that the court considered them and that it determined that the children and the mother did not have a strong bond; moreover, when the court's decision was read as a whole, the court's factual findings supported its conclusion under § 17a-112 (k) (3) that the mother had not complied with her obligations in connection with certain of the court's orders, including that it was not clearly erroneous for the court to find that she had not fulfilled her obligations regarding visitation with the children; furthermore, as to A, the mother did not direct this court to any case law indicating that a court has an obligation, sua sponte, to consider a less onerous means of achieving permanency planning in the absence of a motion specifically seeking an alternative permanency plan, and, because the issue of whether a transfer of guardianship was appropriate for A was never raised in the trial court, it made no findings regarding whether such a transfer was in A's best interest and a more appropriate disposition for A than the one approved by the court.

Argued April 8—officially released June 8, 2021**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of Litchfield at Torrington, Juvenile Matters, where the matter was tried to the court, *Hon. Joseph W. Doherty*, judge trial referee; judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

David B. Rozwaski, assigned counsel, for the appellant (respondent mother).

Benjamin A. Abrams, assistant attorney general, with whom, on the brief, were *William Tong*, attorney

** June 8, 2021, the date that this opinion was released as a slip opinion, is the operative date for all substantive and procedural purposes.

general, and *Evan O'Roark*, assistant attorney general, for the appellee (petitioner).

Joseph A. Geremia, Jr., for the minor children.

Opinion

DiPENTIMA, J. The respondent mother, Michelle L., appeals from the judgments of the trial court terminating her parental rights with respect to her minor children, Sequoia, Benjamin and Anice.[1] On appeal, the respondent claims that the court improperly found that it was in the best interests of the children to terminate her parental rights. We disagree with the respondent and, accordingly, affirm the judgments of the trial court.

The following facts, which the court found by clear and convincing evidence, and procedural history, are relevant. "The family has an extensive history with [the Department of Children and Families (department)]. . . . On July 31, 2008, neglect petitions were filed with the Superior Court for juvenile matters with regard to Sequoia, Tevvon and Benjamin. The children were adjudicated neglected and a disposition of protective supervision was entered on April 29, 2009, and expired on June 17, 2009. On March 30, 2012, a ninety-six hour hold was invoked with regard to Sequoia, Tevvon, Benjamin and Anice. The hold was vacated on April 3, 2012. On April 8, 2012, neglect petitions were filed with the Superior Court for juvenile matters . . . regarding Sequoia, Tevvon, Benjamin and Anice. The children were adjudicated neglected and a disposition of protective supervision was entered on November 14, 2012, and expired on May 14, 2013. . . . Following a team meeting . . . the department was concerned about Sequoia returning to the care of either parent. She was placed in a therapeutic foster home.

[1] The court also terminated the parental rights of the father with respect to these three children. Because the father is not participating in this appeal, we will refer in this opinion to the respondent mother as the respondent.

"On November 21, 2016, Tevvon, Benjamin and Anice were removed from the father's care through an [order of temporary custody] . . . . Protective supervision of those three children was vested in the respondent. On January 26, 2017, and January 27, 2017, [the department] received referrals regarding the children's safety in [the respondent's] home. When [the department] responded to those referrals, [the respondent] reportedly yelled, screamed and used profanity. Tevvon, Benjamin and Anice were removed from her custody pursuant to a ninety-six hour hold on January 27, 2017. On January 30, 2017, an order of temporary custody was filed and granted. On March 30, 2018, the court granted a motion to modify the protective supervision to commitment regarding Tevvon, Benjamin and Anice. All three children were committed to [the custody of the petitioner, the Commissioner of Children and Families]. On April 23, 2018, [the petitioner] filed with the court four petitions for termination of parental rights regarding Sequoia, Tevvon, Benjamin and Anice." On September 24, 2019, prior to the start of evidence, the petitioner moved to withdraw [her] termination of parental rights petition as to Tevvon and, instead, filed a motion for permanent transfer of guardianship seeking to vest guardianship of Tevvon in his foster father, Gary R.

In its memorandum of decision, filed August 28, 2020, the court noted that the trial took place over the course of five days. The court stated that, despite having proper notice, the respondent was not present for trial and did not present any evidence or testimony to refute the grounds alleged in the termination of parental rights petitions. The court noted that, according to her counsel, the respondent was in Indiana. The court granted the petitioner's petition for a permanent transfer of guardianship as to Tevvon and appointed Gary R., as his permanent legal guardian.

The court found in the adjudicatory phase, by clear and convincing evidence, that the department made reasonable efforts at reunification; see General Statutes § 17a-112 (j) (1); and that the respondent had failed to achieve a sufficient degree of personal rehabilitation within the meaning of § 17a-112 (j) (3) (B).[2] The court proceeded to the dispositional phase, in which it determined that it was in the best interests of Sequoia, Benjamin and Anice that the respondent's parental rights be terminated with respect to those three children. This appeal followed.

On appeal, the respondent does not challenge either the conclusions the court made during the adjudicatory phase or the court's decision to transfer permanent guardianship as to Tevvon.[3] Her sole claim on appeal concerns the findings and conclusions made by the court during the dispositional phase, with respect to Sequoia, Benjamin and Anice. We do not agree with the respondent.

The following legal principles and standard of review guide our analysis. "This court will overturn a determination that termination of parental rights is in the best interests of a child only if the court's findings are clearly erroneous." *In re Kiara Liz V.*, 203 Conn. App. 613,

[2] "[A] hearing on a petition to terminate parental rights consists of two phases, adjudication and disposition. . . . In the adjudicatory phase, the trial court determines whether one of the statutory grounds for termination of parental rights . . . exists by clear and convincing evidence. If the trial court determines that a statutory ground for termination exists, it proceeds to the dispositional phase." (Internal quotation marks omitted.) *In re Alison M.*, 127 Conn. App. 197, 203–204, 15 A.3d 194 (2011).

[3] The petitioner filed a motion to strike portions of the respondent's appellate appendix that contained copies of documents that are dated after the close of evidence and after the court filed its memorandum of decision. All of the challenged documents pertain to Tevvon, and the respondent does not challenge the court's decision to transfer his permanent guardianship to Gary R. Because these documents are not evidence and, moreover, are not relevant to our resolution of the issues raised in this appeal, we do not consider them.

626, 248 A.3d 813 (2021).[4] "In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [the child's] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven factors delineated in [§ 17a-112 (k)]. . . . The seven factors serve simply as guidelines for the court and are not statutory prerequisites that need to be proven before termination can be ordered. . . . There is no requirement that each factor be proven by clear and convincing evidence." (Footnote omitted; internal quotation marks omitted.) *In re Joseph M.*, 158 Conn. App. 849, 868–69, 120 A.3d 1271 (2015); see also General Statutes § 17a-112 (k).[5]

[4] The respondent acknowledges that reviewing courts apply a clearly erroneous standard to such claims, but invites us to apply a sufficiency of the evidence standard to our review of the court's best interest determination. See *In re Malachi E.*, 188 Conn. App. 426, 443–44 n.6, 204 A.3d 810 (2019) (declining to adopt evidentiary sufficiency standard of review to best interest determination as it is not used by our Supreme Court). The respondent, however, provides no law or analysis in support of her requested standard of review. See *Connecticut Light & Power Co.* v. *Dept. of Public Utility Control*, 266 Conn. 108, 120, 830 A.2d 1121 (2003) (appellate courts not required to review issues improperly presented through inadequate brief).

[5] General Statutes § 17a-112 (k) provides in relevant part that, "in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled

The court made findings pursuant to each of the seven statutory factors in § 17a-112 (k) before determining, by clear and convincing evidence, that termination of the respondent's parental rights was in the best interests of Sequoia, Benjamin and Anice, who at the time of the court's decision were fifteen, twelve and nine years old, respectively. The respondent challenges the court's findings as to two of these factors.

The respondent argues regarding the emotional ties factor, § 17a-112 (k) (4), that the court did not comment on the relationship between the children and her, but rather focused solely on the relationship between the foster parents and the children. She contends that the court ignored the testimony of Anice's foster parent, Gary R., that she had weekly phone contact with the respondent and had expressed that she would like to live with the respondent or her father and, if that is not possible, she would like to continue living with Gary R.[6] We are not persuaded.

their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the unreasonable act of any other person or by the economic circumstances of the parent."

[6] The respondent also argues that the court ignored the testimony of Gary R. that Tevvon had weekly phone contact with the respondent. Given that the court did not terminate the respondent's parental rights regarding Tevvon and that the respondent expressly stated in her brief that she was not contesting the court's transfer of guardianship regarding Tevvon, we do not address this argument.

The court found as to the emotional ties factor that Benjamin has a positive relationship with his foster parents and Sequoia has a positive relationship with her foster mother, whom she approaches readily for affection and care. The court found that Anice would like to be adopted by Gary R. if she cannot return to her biological parents.

It was not inappropriate for the court to have considered the bond between the children and their foster parents. The plain language of § 17a-112 (k) (4) provides that the trial court shall consider and make written findings regarding "the feelings and emotional ties of the child . . . to . . . any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties . . . ." The court's findings as to the emotional ties factor indicate that the three children had been in their placements for more than one year at the time of its decision. In *In re Nevaeh W.*, 317 Conn. 723, 731–33, 120 A.3d 1177 (2015), our Supreme Court stated that "[n]othing in [§ 17a-112 (k) (4)], however, required the trial court to consider only the children's emotional ties with the respondent. . . . To the contrary, this court has repeatedly recognized that, in the dispositional stage, it is appropriate to consider the importance of permanency in children's lives. . . . Indeed . . . [i]n regard to children who have bonded with their foster parents, [o]nce new psychological relationships form, separation from the new parents becomes no less painful and no less damaging to a child than separation from natural or adoptive caregiving parents. . . . Termination of a biological parent's rights, by preventing further litigation with that parent, can preserve the stability a child has acquired in a successful foster placement and, furthermore, move the child closer toward securing permanence by removing barriers to adoption." (Citations omitted; internal quotation marks omitted.)

Although the court did not specifically discuss the feelings and emotional ties of the children with respect to the respondent when stating its findings regarding § 17a-112 (k) (4), it does not follow that the court failed to consider those feelings and ties. Our Supreme Court stated in *In re Nevaeh W.*, that, "in considering the trial court's findings pursuant to § 17a-112 (k) (4), we are mindful that an opinion must be read as a whole, without particular portions read in isolation, to discern the parameters of its holding" and determined that even though the trial court did not specifically mention the emotional ties between the children and the respondent in its statutory findings during the dispositional phase, that the memorandum of decision, when read as a whole, indicated that the court considered the children's emotional ties to the respondent. Id., 733.

In the present case, reading the court's decision as a whole reveals that the court considered the feelings and emotional ties the children had with the respondent. The court found that the respondent relocated to Indiana and visited one time in one year. The court also found that the respondent had difficulties "managing the children's behaviors during visits, as they were frequently arguing and fighting. She struggles with basic conversation and affection with the children, and needs to demonstrate active engagement in their lives and show interest in their well-being. . . . [The respondent] participated in the updated court-ordered psychological evaluations with [Jessica] Biren Caverly, [a psychologist], in August, 2017. . . . It was reported that [the respondent] consistently demonstrates emotional coldness, detachment and flattened affect, especially in interactions with the children. . . . It was reported that the parents cannot appreciate the traumatic environment they created for their children and how it can impact children long after removal from their home. It [was] reported that neither [the respondent] nor the father demonstrated any significant engagement or

bond with the children." The court further determined that Anice's desire to live with the respondent or her father is "not realistic or possible." The court also found that "Tevvon, Benjamin and Anice look to their older sisters Azelia and Sequoia more readily as parental and attachment figures tha[n] they do to either of their parents." It is clear from these findings that the court determined that the children did not have a strong bond with the respondent. Even if, however, such a bond were present, "the existence of a bond between a parent and a child, while relevant, is not dispositive of a best interest determination." *In re Kiara Liz V.*, supra, 203 Conn. App. 626.

The respondent's next argument concerns the court's findings regarding the extent to which she had fulfilled her obligations in connection with the orders of the court. See General Statutes § 17a-112 (k) (3). The following relevant specific steps were ordered by the court to facilitate reunification and agreed to by the respondent: "Keep all appointments set by or with [the department]. Cooperate with [the department's] home visits, announced or unannounced, and visits by the child(ren)'s court-appointed attorney and/or guardian ad litem. . . . Visit the child(ren) as often as [the department] permits." See *In re Shane M.*, 318 Conn. 569, 587, 122 A.3d 1247 (2015) (specific steps constitute order of court). The court found, inter alia, that the respondent had not fulfilled these court-ordered obligations.

The respondent contends that, because she has resided out of state, "it is unlikely that the [department] or the children's attorney and/or guardian[s] ad litem would conduct home visits. Regarding visitation with the children, the [respondent] did visit with the children when she was living in [Connecticut] and when she is able to make trips now back to [Connecticut], she arranges for visits with the children and, more importantly, she has weekly phone contact with the children." We are not persuaded by this argument.

When reading the court's decision as a whole, the court's factual findings support its conclusion that the respondent had not complied with the court orders at issue. The court found that, although the department had offered supervised visitation, the respondent did not continue visitation with Sequoia, Benjamin or Anice, but "left her children behind" and moved to Indiana. Evidence presented at trial supports this finding. A social worker with the department testified that after the respondent moved to Indiana in June, 2018, she had supervised visits with some or all three of the children in January, 2019, and June, 2019. A "Social Study in Support of Petition for Termination of Parental Rights,"[7] dated April 16, 2018, which was admitted as a full exhibit at trial, indicates that the respondent has not been consistent in keeping appointments with the department and has refused to permit the department to conduct home visits since November, 2017. In that social study, it was noted that the respondent has visited with the children, but struggled with appropriately parenting the children during visits. A subsequent "Social Study in Support of Permanency Plan," dated July 1, 2019, which was admitted as a full exhibit at trial, stated that the respondent had visited the children twice since she moved to Indiana in June, 2018. The court also had before it evidence of the children's varying degrees of phone contact

[7] Pursuant to General Statutes § 45a-717 (e): "(1) The court may, and in any contested case shall, request the Commissioner of Children and Families . . . to make an investigation and written report to it, within ninety days from the receipt of such request. The report shall indicate the physical, mental and emotional status of the child and shall contain such facts as may be relevant to the court's determination of whether the proposed termination of parental rights will be in the best interests of the child, including the physical, mental, social and financial condition of the biological parents, and any other factors which the commissioner . . . finds relevant to the court's determination of whether the proposed termination will be in the best interests of the child. . . . (3) The report shall be admissible in evidence, subject to the right of a party to require that the person making it appear as a witness and be subject to examination."

with the respondent. The July 1, 2019 social study noted that Benjamin communicates with the respondent "a few times a month" on the phone, that Anice "does not communicate often on the phone" with the respondent and that Sequoia talks to the respondent weekly on the phone.

Particularly in light of the evidence that the respondent refused to allow the department to conduct home visits since November, 2017, and that she has visited with the children only twice in person since moving to Indiana in June, 2018, it was not clearly erroneous for the court to find that she had not fulfilled her obligations in connection with the court orders regarding visitation with the children.

Although the respondent did not file a motion for transfer of guardianship as to Anice, she additionally argues that the court erred in finding that it was in Anice's best interest to terminate the respondent's parental rights with respect to her because Anice, who resides in the same household as Tevvon, "would probably be happy" with a permanency plan similar to that of Tevvon, wherein guardianship would be transferred to Gary R. She contends that Gary R. testified that he would be willing to be a permanent resource for Anice and that terminating her parental rights with respect to Anice would subject her to further disruption wherein she would be removed from the home she lives in with Tevvon.

The respondent has not directed us to any case law indicating that a court has an obligation, sua sponte, to consider a "less onerous means of achieving permanency planning" in the absence of a motion specifically seeking an alternative permanency plan. Rather, our statutory scheme provides as follows: "A permanency plan is the proposal for what the long-term, permanent solution for the placement of the child should be. General Statutes §§ 17a-111b (c) and 46b-129 (k). Our statutory scheme provides five permanency options: (1)

reunification with a parent; (2) long-term foster care; (3) permanent guardianship; (4) transfer of either guardianship or permanent guardianship; or (5) termination followed by adoption. General Statutes §§ 17a-111b (c) and 46b-129 (k) (2). If during the course of the juvenile proceedings the child is placed in the care and custody of the petitioner . . . the petitioner must file a motion for review of a permanency plan within nine months of that placement. General Statutes § 46b-129 (k) (1) (A). When the petitioner files a motion to review a permanency plan, the respondent parents and qualifying relatives may file a motion in opposition to the proposed plan. General Statutes § 46b-129 (k) (1) (A). If the permanency plan is opposed, the court must hold an evidentiary hearing, at which [t]he commissioner shall have the burden of proving that the proposed permanency plan is in the best interests of the child or youth. General Statutes § 46b-129 (k) (1) (A). After the hearing, the court shall approve a permanency plan that is in the best interests of the child . . . and takes into consideration the child's . . . need for permanency. General Statutes § 46b-129 (k) (2). If the trial court approves a permanency plan of termination followed by adoption, the petitioner shall file a petition for termination of parental rights not later than sixty days after such approval if such petition has not previously been filed . . . . General Statutes § 46b-129 (k) (6) (A)." (Footnotes omitted; internal quotation marks omitted.) *In re Adelina A.*, 169 Conn. App. 111, 121–23, 148 A.3d 621, cert. denied, 323 Conn. 949, 169 A.3d 792 (2016).

The respondent filed a motion in opposition to the proposed permanency plan in which she stated that it was in the best interests of the children that they be reunited with her, and she did not request a permanent transfer of guardianship as to Anice. Because the issue of whether a transfer of guardianship was appropriate

for Anice was never raised in the trial court, it made no findings regarding whether a transfer of guardianship was in Anice's best interests and a more appropriate disposition *for Anice* than the one approved by the court. See, e.g., *In re Azareon Y.*, 309 Conn. 626, 633–39, 72 A.3d 1074 (2013) (when respondent did not request trial court to consider alternatives to petitioner's permanency plan, record on appeal was inadequate to review substantive due process claim). We cannot review this aspect of the respondent's best interest claim because it was not raised in the trial court and no exceptional circumstances exist. "It is well settled that [o]ur case law and rules of practice generally limit [an appellate] court's review to issues that are distinctly raised at trial. . . . [O]nly in [the] most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court or the opposing party to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Citations omitted; internal quotation marks omitted.) *Blumberg Associates Worldwide, Inc.* v. *Brown & Brown of Connecticut, Inc.*, 311 Conn. 123, 142, 84 A.3d 840 (2014); see also *In re Skylar B.*, 204 Conn. App. 729, 745, A.3d (2021) (only properly filed motion provides requisite notice to all interested parties and court of alternative disposition as well as evidence relevant for court to evaluate merits of transfer of guardianship versus termination of parental rights and adoption).

In the present case, there was ample evidence to support the court's conclusion that termination of the respondent's parental rights was in the best interests of Sequoia, Benjamin and Anice. The respondent chal-

lenged the court's findings only as to two of the statutory factors; both challenges we have rejected. Moreover, even if the respondent were able to demonstrate that error existed with respect to one or both of these factors, it would not necessarily affect our disposition of the appeal for "a trial court's determination of the best interests of a child will not be overturned on the basis of one factor if that determination is otherwise factually supported and legally sound." (Internal quotation marks omitted.) *In re Xavier H.*, 201 Conn. App. 81, 102, 240 A.3d 1087, cert. denied, 335 Conn. 981, 241 A.3d 705 (2020), and cert. denied, 335 Conn. 982, 241 A.3d 705 (2020). "The balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference. . . . Although a judge [charged with determining whether termination of parental rights is in a child's best interest] is guided by legal principles, the ultimate decision [whether termination is justified] is intensely human. It is the judge in the courtroom who looks the witnesses in the eye, interprets their body language, listens to the inflections in their voices and otherwise assesses the subtleties that are not conveyed in the cold transcript." (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 497, 940 A.2d 733 (2008). We conclude that the court's findings as to the children's best interests are factually supported and legally sound and we will not substitute our judgment for that of the trial court.

The judgments are affirmed.

In this opinion the other judges concurred.

NANCY SCHOTT *v.* TERRENCE JOHN SCHOTT (AC 43541)

Elgo, Alexander and DiPentima, Js.

Syllabus

The defendant, whose marriage to the plaintiff previously had been dissolved, appealed to this court from the decision of the trial court denying his motion to modify his alimony obligation. Pursuant to a separation agreement entered into by the parties and incorporated in the court's judgment of dissolution, the defendant was obligated to pay alimony to the plaintiff until, inter alia, the plaintiff's cohabitation with another individual. On appeal, the defendant claimed that, pursuant to the plain language of the separation agreement, the court was obligated to terminate his alimony obligation in light of evidence of the plaintiff's cohabitation. *Held* that the trial court improperly denied the defendant's motion to modify his alimony obligation: the separation agreement plainly and unambiguously provided, in mandatory language, that the defendant's alimony obligation shall be terminated upon cohabitation by the plaintiff, and the court found that, following the dissolution of the parties' marriage, the plaintiff cohabitated with another individual, which was substantiated by evidence adduced at a hearing on the motion; moreover, although the court expressly found that the plaintiff experienced a change in circumstances, it nonetheless failed to apply the relevant provision of the statute (§ 46b-86 (b)) regarding cohabitation, and, instead, sua sponte invoked § 46b-86 (a), which permits modification of an alimony order upon a showing of a substantial change in circumstances, which was error, as the defendant's postjudgment motion for modification was premised on cohabitation pursuant to § 46b-86 (b).

Argued April 20—officially released June 15, 2021

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Waterbury and tried to the court, *Hon. Robert T. Resha*, judge trial referee; judgment dissolving the marriage and granting certain other relief; thereafter, the court, *Ficeto, J.*, denied the defendant's motion to modify alimony, and the defendant appealed to this court. *Reversed*; *further proceedings*.

Prerna Rao, for the appellant (defendant).

Opinion

ELGO, J. The defendant, Terrence John Schott, appeals from the judgment of the trial court denying his postjudgment motion to modify his alimony obligation. He claims that, pursuant to the plain terms of the parties' separation agreement, the court was obligated to terminate that obligation once it found that the plaintiff, Nancy Schott, was cohabitating with another person. We agree and, accordingly, reverse the judgment of the trial court.

The relevant facts are not in dispute. The parties married in 1996. Following the subsequent breakdown of their marriage, they entered into a separation agreement that the court incorporated into its April 22, 2014 judgment of dissolution (separation agreement). Pursuant to §§ 5.1 and 5.3 of that agreement, the defendant was obligated to pay alimony to the plaintiff until "the death of either party, the [plaintiff's] remarriage, or the [plaintiff's] cohabitation according to the statutes . . . ."

On June 21, 2019, the defendant filed a postjudgment motion to modify his alimony obligation, which was predicated on the plaintiff's alleged cohabitation "with another individual for at least two years . . . ." The court held a hearing on the motion, at which the plaintiff testified that she had been living with Michael Cerone for approximately two years. The plaintiff also testified that she was in a romantic relationship with Cerone. At the conclusion of the hearing, the defendant asked the court to terminate his alimony obligation "retroactive as of two years for when [the plaintiff] and [Cerone] had moved in together or, alternatively, back to the date of the filing of this motion."

In its subsequent memorandum of decision, the court found that "[a]t some point [Cerone] moved into [the plaintiff's] home with her." The court further found that, "[i]n March, 2019, the plaintiff and Cerone purchased

a 2800 square foot home in Port St. Lucie. The plaintiff's name is on the deed, however the mortgage is solely in Cerone's name." The court nevertheless did not make any specific finding as to precisely when the plaintiff began her cohabitation with Cerone. After invoking the substantial change in circumstances provision of General Statutes § 46b-86 (a), the court stated: "The court finds that the plaintiff's living arrangement with Cerone is such that she receives a benefit. She has an ownership interest in the Port St. Lucie home. Her expenses, however, appear to remain the same. The evidence at the hearing indicates that the plaintiff continues to pay half the household expenses, including the mortgage, and bears the expense of maintaining her animals. She is disabled and has no ability to earn beyond her disability income. Although the plaintiff has experienced a change in circumstances, the court finds that the change is not such that it warrants a modification of alimony after considering the factors set forth in [General Statutes] § 46b-82." The court thus denied the defendant's motion for modification, and this appeal followed.[1]

On appeal, the defendant claims that the court improperly denied his motion to modify his alimony obligation. He contends that, pursuant to the plain language of the separation agreement, the court was obligated to terminate that obligation in light of the plaintiff's cohabitation with Cerone. We agree.

"It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties

[1] The plaintiff did not file a brief in this appeal. We, therefore, ordered that this appeal shall be considered on the basis of the defendant's brief and the record alone. See *Barr* v. *Barr*, 195 Conn. App. 479, 480 n.1, 225 A.3d 972 (2020).

from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . When the language is clear and unambiguous . . . the contract must be given effect according to its terms, and the determination of the parties' intent is a question of law." (Internal quotation marks omitted.) *Nation-Bailey* v. *Bailey*, 316 Conn. 182, 191–92, 112 A.3d 144 (2015); see also *Gold* v. *Rowland*, 325 Conn. 146, 157–58, 156 A.3d 477 (2017) (whether contractual language is plain and unambiguous is question of law subject to plenary review).

We begin with the relevant provisions of the separation agreement. Sections 5.1 and 5.2 obligate the defendant to pay alimony to the plaintiff.[2] Critical to this appeal is § 5.3, which provides: "Alimony *shall terminate* upon the death of either party, the [plaintiff's] remarriage, or the [plaintiff's] cohabitation according to the [s]tatutes, but in any event no later than [ten] years from the date of the [plaintiff's] vacating the marital residence, whichever occurs first."[3] (Emphasis added.)

[2] Section 5.1 of the separation agreement provides: "The [defendant] shall pay the [plaintiff] alimony in the amount of [$175] per week beginning with the [defendant's] first pay-day after the [plaintiff] vacates the marital residence. Said payment will be by bank electronic funds transfer within 48 hours of receipt of the [defendant] receiving his paycheck."

Section 5.2 of the separation agreement provides: "The [defendant's] alimony obligation shall increase to [$220] per week when the [plaintiff] is no longer receiving dependent benefits from Social Security."

[3] As our Supreme Court has observed, § 46b-86 (b) is "known as the 'cohabitation statute,' " and defines cohabitation in relevant part as " 'living with another person,' " which entails "a fact specific determination." *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 485–86, 678 A.2d 469 (1996).

We conclude that § 5.3 of the separation agreement plainly and unambiguously provides that the defendant's alimony obligation shall be terminated upon cohabitation by the plaintiff. As was the case in *Nation-Bailey* v. *Bailey*, supra, 316 Conn. 195, the separation agreement here "treats cohabitation as an event akin to death or remarriage, both of which are events that ordinarily terminate a periodic alimony obligation absent an express provision to the contrary in the court's decree or incorporated settlement agreement." Moreover, the language of § 5.3, which provides in relevant part that alimony "shall terminate" upon the plaintiff's cohabitation, is mandatory in nature.

Particularly instructive in this regard is *Boreen* v. *Boreen*, 192 Conn. App. 303, 217 A.3d 1040, cert. denied, 333 Conn. 941, 218 A.3d 1046 (2019). In *Boreen*, the plaintiff claimed that the court "improperly concluded that the only remedy available upon a finding that she was 'living with another person' was to terminate the defendant's alimony obligation." Id., 305. This court rejected that argument in light of the mandatory language utilized by the parties in the separation agreement, which treated cohabitation as an event akin to death or remarriage. Id., 321. As we explained: "[T]he language employed by the parties in the separation agreement to direct terminating the alimony obligation is mandatory, not permissive. . . . [T]he agreement provides that alimony 'shall' terminate when the plaintiff commenced living with another person. The use of the word 'shall' usually connotes a requirement, unlike the word 'may,' which implies some degree of discretion." Id. We further noted that "[t]he only remedy explicitly provided for in the separation agreement upon . . . a finding [of cohabitation] is to terminate the defendant's alimony obligation." Id., 320. For those reasons, this court concluded that "the parties clearly and unambiguously intended that the defendant's alimony obligation be terminated upon a court's finding

that the plaintiff is living with another person." Id., 321. That precedent compels a similar conclusion here.

In the present case, the court found that, following the dissolution of the parties' marriage, "[a]t some point [Cerone] moved into [the plaintiff's] home with her." The court further found that, "[i]n March, 2019, the plaintiff and Cerone purchased a 2800 square foot home in Port St. Lucie. The plaintiff's name is on the deed, however the mortgage is solely in Cerone's name." The evidence adduced at the hearing on the motion to modify substantiates those findings, and there is no dispute that the plaintiff was cohabitating with Cerone at some point after the dissolution judgment was rendered. Because the separation agreement entered into by the parties, and incorporated into the judgment of dissolution, plainly and unambiguously provides that the defendant's alimony obligation "shall terminate" upon the plaintiff's cohabitation, the court improperly denied the defendant's motion to modify.

In its memorandum of decision, the court expressly found that "the plaintiff has experienced a change in circumstances . . . ." The court nonetheless failed to apply the relevant provisions of the cohabitation statute; see General Statutes § 46b-86 (b); and instead sua sponte invoked the provisions of § 46b-86 (a), which permits modification of an alimony order upon a showing of a substantial change in circumstances. This was error, as the defendant's postjudgment motion for modification was premised on cohabitation pursuant to § 46b-86 (b), and not a substantial change in circumstances pursuant to § 46b-86 (a). As our Supreme Court repeatedly has instructed, "[§] 46b-86 (b) requires only a change of circumstances, not a substantial change as required by § 46b-86 (a)." (Internal quotation marks omitted.) *D'Ascanio* v. *D'Ascanio*, 237 Conn. 481, 486, 678 A.2d 469 (1996); see also *Kaplan* v. *Kaplan*, 185 Conn. 42, 45–46, 440 A.2d 252 (1981). Once the court found that the plaintiff had been living with Cerone

and had experienced a change in circumstances, it was required to grant the defendant's motion to modify his alimony obligation in accordance with the plain mandate of the separation agreement.

The remaining question is the precise date on which that obligation terminated, which requires a factual determination as to when the plaintiff began cohabiting with Cerone. See *D'Ascanio* v. *D'Ascanio*, supra, 237 Conn. 485–86. Because the court did not make such a finding, further proceedings are necessary to resolve that factual issue.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

ADAM M. ZACHS *v.* COMMISSIONER OF CORRECTION (AC 43380)

Moll, Alexander and Bishop, Js.

Syllabus

The petitioner, who had been convicted of the crime of murder, sought a writ of habeas corpus, claiming, inter alia, that his criminal trial counsel, D and W, had rendered ineffective assistance. The petitioner, who had shot the victim during an altercation at a café, testified at trial that the gun he was carrying at the time of the shooting had accidentally discharged. When the state sought to present rebuttal testimony from six witnesses as to prior uncharged conduct by the petitioner related to his use of guns, the trial court, at the request of D, who sought to avoid a conflict of interest, admitted W pro hac vice for the purpose of cross-examining the state's rebuttal witnesses, two of whom were then represented by D in other matters. Neither D nor W thereafter cross-examined the rebuttal witnesses. The court, at D's request, instructed the jury as to certain lesser included offenses within the crime of murder and on the affirmative defenses of not guilty by reason of mental disease or defect and extreme emotional disturbance. The petitioner alleged that D was ineffective because, inter alia, the affirmative defenses and lesser included offenses were inconsistent with the petitioner's trial testimony, that the only reasonable trial strategy would have been for

D to pursue a claim that the gun accidentally discharged and that the petitioner's conduct fit the parameters of the lesser included offense of manslaughter in the second degree. The petitioner also grounded his ineffective assistance of counsel claim in D's conflict of interest in concurrently representing two of the state's rebuttal witnesses and D's decision to have W handle the cross-examination of those witnesses, which the petitioner asserted was insufficient to ameliorate the possibility that he would be prejudiced by D's conflict of interest. The petitioner further asserted that D was ineffective in having conceded the issue of whether the petitioner had intended to kill the victim by asserting the affirmative defenses and by presenting a theory of the case at trial that was inconsistent with the petitioner's testimony that the gun accidentally discharged. The petitioner also asserted that W was ineffective for having failed to cross-examine the rebuttal witnesses. The habeas court denied the habeas petition, concluding, inter alia, that neither D nor W had rendered ineffective assistance, and that the petitioner mischaracterized the defense case D had presented in that D had argued repeatedly before the jury that the gun discharged accidentally. The court further determined that the petitioner had procedurally defaulted on and waived his claim that D's concurrent representation of the two rebuttal witnesses constituted an actual conflict of interest. The habeas court thereafter granted the petitioner certification to appeal, and the petitioner appealed to this court. *Held*:

1. The habeas court correctly denied the petitioner's claim that D rendered ineffective assistance, as the petitioner failed to establish that there was no tactical justification for D's defense strategy, which was consistent with the petitioner's testimony that the gun accidentally discharged: the evidence supported the court's finding that D's primary strategy was to argue that the gun was fired accidentally, as the first issue D discussed during closing argument to the jury was whether the petitioner intended to kill the victim, D later reminded the jury that it had to make a determination as to that issue, and he spent a significant amount of time arguing that the shooting was accidental; moreover, the petitioner's claim that it was unreasonable for D to present a defense that was inconsistent with the petitioner's testimony was misplaced, as D's strategy to show that the petitioner lacked the intent to kill the victim comported with the petitioner's explanation of how the gun discharged, it was not deficient performance to pursue defenses that were inconsistent with each other, and it was inconsistent with the principle that a defendant is innocent until proven guilty for the petitioner to suggest that D, by presenting the affirmative defenses, conceded that he intended to kill the victim, the trial court having made it abundantly clear to the jury that it had to first decide whether the petitioner was guilty of murder before it could reach the affirmative defenses; furthermore, D's decision to present the affirmative defenses and the supporting testimony of a psychologist was not unreasonable because of the mere

possibility that it could have led to the admission of the state's rebuttal evidence, as the psychologist had been called to testify before D requested jury instructions as to the affirmative defenses, the court, prior to the psychologist's testimony, had ruled against the admission of evidence of prior incidents in which the petitioner displayed guns, and the court instructed the jury that the rebuttal evidence could not be used as evidence of intent.

2. The petitioner could not prevail on his claim that the habeas court erred in concluding that he procedurally defaulted on and waived his conflict of interest claim as to D:

a. The habeas court appropriately concluded that the conflict of interest claim was procedurally defaulted, as the petitioner could not establish good cause for not raising that issue on direct appeal; contrary to the petitioner's assertion that his claim could not be procedurally defaulted because the record was inadequate to raise it on direct appeal, the factual and legal basis of the claim was available to counsel at the time of appeal, as the record established that D explained the conflict to the trial court, which then explained to the petitioner that D would have a conflict if he cross-examined the rebuttal witnesses, the trial court acquired the petitioner's assent to proceed with W handling the cross-examination of the state's rebuttal witnesses, and the record revealed the immediate consequences of D's apparent conflict of interest, as W handled the cross-examination but asked no questions.

b. The petitioner's claim that the habeas court improperly found that he waived his conflict of interest claim as to D was unavailing: the record indicated that D and the petitioner discussed the conflict during a recess at trial, and that the petitioner subsequently stated to the trial court his approval of having W cross-examine the rebuttal witnesses after the trial court advised him that D could not adequately and fairly cross-examine them as a result of the conflict; moreover, contrary to the petitioner's assertion that his waiver of D's conflict of interest was premised on cross-examination of the state's rebuttal witnesses actually occurring, the defense plan was not to ask any questions of the rebuttal witnesses, and, with the exception of two of the rebuttal witnesses who had heard from the petitioner about one of the prior incidents at issue, none of the state's six rebuttal witnesses was cross-examined; furthermore, the petitioner's waiver of his conflict of interest claim did not foreclose him from claiming that W's handling of those cross-examinations constituted ineffective assistance.

c. The habeas court correctly determined that the petitioner had procedurally defaulted on his claim pursuant to *United States* v. *Cronic* (466 U.S. 648) that prejudice against him should have been presumed because of D's conflict of interest, the *Cronic* claim having had a factual basis that was identical to the petitioner's unsuccessful conflict of interest claim.

3. The habeas court correctly denied the petitioner's claim that he was entitled to a presumption of prejudice under *Cronic*, which was based

on his assertion that W rendered ineffective assistance by failing to cross-examine two of the state's rebuttal witnesses and to subject its case to meaningful adversarial testing: W's actions did not rise to a level that would constitute such a failure, and, even if it were presumed that it was error for W not to have cross-examined the two rebuttal witnesses, his failure was not complete, as the testimony of the rebuttal witnesses was admitted for the limited purpose of credibility, the issue concerned only two of dozens of witnesses who testified during trial, the substantially similar testimony of two other witnesses was unchallenged, and D subjected the state's case to meaningful adversarial testing through his objections, voir dire and cross-examinations of the state's witnesses, and presentation of four defense witnesses; moreover, although analysis of W's alleged failures was more appropriate pursuant to the performance and prejudice test for ineffective assistance of counsel under *Strickland* v. *Washington* (466 U.S. 668), no further analysis was necessary, the petitioner having explicitly stated that his claim should not be analyzed for prejudice under *Strickland*.

4. The habeas court did not improperly decline to consider the aggregate effect of the trial court's alleged errors; because the petitioner failed to prove each of his individual underlying claims of error and our Supreme Court has declined to adopt such a cumulative error analysis, it was not within this court's authority to grant the petitioner the relief he sought.

Argued April 15—officially released June 15, 2021

Procedural History

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

Jennifer B. Smith, with whom was *Aaron J. Romano*, for the appellant (petitioner).

Samantha L. Oden, deputy assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

BISHOP, J. The petitioner, Adam M. Zachs, appeals from the judgment of the habeas court, *Newson, J.*, denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court improperly

(1) denied his ineffective assistance of counsel claim regarding the defense strategy employed at his criminal trial by one of his defense attorneys, Attorney Edward J. Daly, Jr., (2) determined that his conflict of interest claim was both procedurally defaulted and waived, (3) denied his ineffective assistance of counsel claim regarding the failure of his other defense attorney, Attorney Brian W. Wice, to cross-examine the state's rebuttal witnesses at his criminal trial, and (4) declined to apply a cumulative prejudice approach and consider the aggregate effect of counsels' alleged errors. We affirm the judgment of the habeas court.

The jury in the petitioner's criminal trial reasonably could have found the following facts. On March 22, 1987, the petitioner went to the Prospect Café in West Hartford to watch a basketball game on television. Shortly thereafter, the victim, Peter Carone, and his fiancée, Kathleen O'Brien, arrived to watch the basketball game and sat next to the petitioner at the bar. The victim bought the petitioner a drink after he moved down a seat to make room for the victim and O'Brien. The petitioner, the victim, and O'Brien spent most of the afternoon seated at the bar together, having drinks and casually discussing the basketball game.

Later that evening, the victim told a joke to another patron at the bar about a "spit shine." As part of this joke, he spat on the bar and wiped it up with a napkin. The petitioner, a regular customer at the bar, was offended by the victim's actions. He sat at the bar for a few more minutes, then walked to the other end of the bar to tell the bartender and the waitress that he wanted to pay his bill and leave. The petitioner told the waitress that he was "disgusted" by the victim's actions, called him a "pig," and stated that "the only reason he's not going to deck the guy . . . was because there were ladies present." The petitioner then left the bar, and went to his car and sat in it for a few minutes before

reentering the bar to speak to the waitress about what had happened. As the petitioner approached the waitress, the victim turned to him to apologize and to discuss why the petitioner had left the bar. The petitioner and the victim spoke about the incident for a few minutes and then stepped outside the bar to talk. The petitioner testified that they both insisted that they did not want to fight.

The petitioner and the victim stood outside the bar "[i]immediately in front of [the] main door." Several witnesses had a partial view of where they were standing and intermittently looked out the window to see if a fight would break out. After about four minutes, the victim turned and approached the main door to the bar. Just as the victim reached the door, the petitioner shot him once in the back with a pistol that he had tucked into the waistband of his pants, killing the victim.[1]

The petitioner subsequently was charged with murder in violation of General Statutes § 53a-54a (a). At his criminal trial, he was represented by Attorney Daly and, for a limited portion of the trial, by Attorney Wice, who was licensed to practice law in Texas and was admitted by the trial court pro hac vice for the limited purpose of cross-examining the state's rebuttal witnesses. See part II of this opinion. Attorney Daly[2] requested jury instructions on the lesser included offenses of manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide. He also requested jury instructions on the affirmative defenses of not guilty by reason of mental disease or defect and extreme emotional disturbance. With no objections from the state, the court granted those requests. After a jury

[1] The petitioner concedes that the state "presented undisputed evidence that the petitioner fatally shot the victim at [the] Prospect Café in [West] Hartford on March 22, 1987."

[2] The parties stipulated that Attorney Daly died on April 4, 2002. His file from the criminal trial could not be located.

trial, the petitioner was found guilty of murder and sentenced to sixty years of incarceration on October 13, 1988. The petitioner was released after posting an appeal bond and thereafter absconded to Mexico where he lived under an assumed identity until being returned to the United States in 2011. Although the petitioner had filed a direct appeal from the judgment of conviction, his appeal was dismissed after his disappearance on the basis of a motion filed by the state.

On September 28, 2012, the self-represented petitioner filed a petition for a writ of habeas corpus. The petitioner filed the operative petition, his fourth amended petition for a writ of habeas corpus, with the assistance of counsel on September 17, 2018. The fourth amended petition contained eight counts, five of which are relevant to this appeal. Specifically, in count two, the petitioner alleged that Attorney Daly rendered ineffective assistance by presenting an objectively unreasonable defense. In count three, the petitioner alleged that Attorney Daly had a conflict of interest that materially prejudiced his defense, and, in count four, he alleged that this conflict of interest entitled him to a presumption of prejudice under *United States* v. *Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). In count five, the petitioner alleged that Attorney Wice, who handled only a small portion of the petitioner's criminal trial, was ineffective in failing to cross-examine two of the state's rebuttal witnesses. Count five included claims brought under *Cronic* and *Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Last, in count eight, the petitioner alleged that the cumulative effect of his counsels' actions deprived him of a fair trial. The claims set forth in the remaining counts have not been advanced on appeal.

A trial on the habeas petition was held on November 26 and 27, 2018. On July 23, 2019, the habeas court, *Newson, J.*, issued a memorandum of decision in which

it denied each of the petitioner's claims. Thereafter, the petitioner filed a petition for certification to appeal from the judgment denying his petition for a writ of habeas corpus. The habeas court granted the petition for certification to appeal. This appeal followed. Additional facts and procedural history will be set forth as necessary.

Before we turn to the petitioner's claims, we briefly set forth our standard of review for habeas corpus appeals. "The habeas court is afforded broad discretion in making its factual findings, and those findings will not be disturbed unless they are clearly erroneous. . . . Historical facts constitute a recital of external events and the credibility of their narrators. . . . Accordingly, [t]he habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, 306 Conn. 664, 677, 51 A.3d 948 (2012).

I

We first address the petitioner's claim that the habeas court improperly concluded that Attorney Daly did not provide ineffective assistance with regard to the defense strategy he employed at the petitioner's criminal trial. Specifically, the petitioner argues that the affirmative defenses advanced by Attorney Daly were objectively unreasonable and that the only reasonable trial strategy was to pursue a conviction of manslaughter that was based on a defense that the petitioner's gun had accidentally discharged. Additionally, the petitioner argues that the court's characterization of Attorney Daly's trial strategy was clearly erroneous. We agree with the court's characterization of Attorney Daly's strategic choices at trial and with the court's subsequent conclusion that the

petitioner failed to demonstrate that counsel's strategy was objectively unreasonable.[3]

The following additional facts are relevant to our resolution of this claim. To support the affirmative defenses posed by defense counsel, the petitioner testified at his criminal trial concerning an incident that occurred in February, 1986, when, while he was asleep, a large male kicked in his bedroom door. The petitioner explained that he went to bed early that night, then was suddenly awakened to find the large male standing over him and threatening to kill him. The individual threatened to kill the petitioner if he "ever tormented his sister again." The petitioner did not know to whom he was referring. After the incident, the petitioner testified that he became afraid to leave his house. A few days later, he saw an advertisement for a gun shop. The incident prompted the petitioner to purchase two firearms, a .22 caliber Beretta and, eventually, the nine millimeter Smith & Wesson that he used in the shooting. He explained that he had purchased these firearms because he was still scared from the encounter and carried one of them with him for "[e]very occasion."

The petitioner further explained that this incident greatly impacted how he handled the confrontation with the victim on March 22, 1987, and testified that he accidentally discharged the gun, which caused the victim's

[3] The petitioner also asserts in the introductory portion of his ineffective assistance of counsel argument in his brief that his rights under article first, §§ 8 and 9, of the constitution of Connecticut were violated. However, beyond that cursory assertion, the petitioner's brief does not contain any substantive analysis of potential Connecticut constitutional violations. Accordingly, we decline to review these claims. See *State* v. *Buhl*, 321 Conn. 688, 724, 138 A.3d 868 (2016) ("We repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.)); see also *Whistnant* v. *Commissioner of Correction*, 199 Conn. App. 406, 420 n.13, 236 A.3d 276, cert. denied, 335 Conn. 969, 240 A.3d 286 (2020).

death. The petitioner testified that he tried to end their conversation outside the bar, but the victim "stepped very close" to the petitioner and continuously told him that he thought it was "stupid" that he had left the bar. The petitioner became nervous and began to step backward, but the victim matched each step, moving toward the petitioner until his back was pressed against either a wall or a fence. The petitioner explained that "[e]verything was very dim and foggy and . . . in speaking to him, I felt like my brain wasn't in control of my mouth, that I was listening to the words come out of my mouth, that it wasn't me speaking them." He testified that he was instantly reminded of the break-in incident. It felt like there was a "movie screen" in his head and that all he could see was the individual who had broken into his bedroom. The next thing that the petitioner recalled was the victim hitting the side of his head, at which point the sensation of seeing a "movie screen" abruptly stopped. He suddenly realized that he was holding a gun and that the victim was standing in front of him, not the individual from the break-in. He did not remember drawing the gun. Then, the victim swung his hand and knocked the gun from the petitioner's hands, launching it upward. The petitioner explained that he reached out to catch the gun before it dropped to the ground, catching it "sandwiched between [his] two hands" with the barrel pointing toward himself. As he attempted to flip the gun around, he accidentally discharged it.

The petitioner did not consult with any physicians about the break-in incident prior to the confrontation with the victim, but, at the criminal trial, Attorney Daly called Charles A. Opsahl, a psychologist, who testified that he had met with the petitioner approximately forty to forty-five times beginning in October, 1987. Dr. Opsahl opined that the petitioner was suffering from post-traumatic stress disorder as a result of the break-in. He further opined that the petitioner entered a "dissociative

state"[4] during his argument with the victim as a result of his post-traumatic stress disorder and ultimately concluded that the dissociative state "had a major impact on his ability to control his behavior. . . . He was out of control because of the dissociative state."

The state presented rebuttal evidence from Anne M. Phillips, a clinical psychologist, and Peter M. Zeman, a psychiatrist. Dr. Phillips concluded, on the basis of her two interviews with the petitioner, that there was no evidence of cognitive impairment, a neuropsychological deficit, a thought disorder, or an impulse disorder. Dr. Zeman concluded, on the basis of his four interviews with the petitioner, that the petitioner did suffer from post-traumatic stress disorder of moderate intensity as a result of the break-in incident and that the petitioner experienced feelings of "depersonalization," a "very much more limited kind of dissociative phenomena" during the confrontation with the victim. Dr. Zeman ultimately concluded, however, that the petitioner did not enter a "full-blow[n] dissociative state" and that there was no evidence of "blocking of thought" or delusions.[5] He further concluded that "[the petitioner's] psychiatric condition did not substantially affect his behavior or his control at that time." The state also presented a number of lay witnesses in rebuttal who testified about two prior incidents during which the petitioner drew guns on other individuals.

[4] Dr. Opsahl defined dissociative state as "a technical term used to describe when a person essentially loses control of the person they are and becomes someone else or goes somewhere else in mental terms."

[5] Dr. Zeman defined "blocking of thought, thought disorder, and delusional thinking [as] all terms which describe a psychotic state of mind in which somebody who's extremely out of touch with reality on the basis, for example, of a psychotic illness such as schizophrenia, will have a jumbling of his or her thinking, thoughts will be confused, jumbled, out of order or there may be long periods of what are called blocking of thought where there's lapses of thought as if somebody's thoughts have just shut off and then start up again. I saw—I saw no evidence of that in my evaluation of [the petitioner]."

Attorney Daly requested jury instructions on the affirmative defenses of not guilty by reason of mental disease or defect and extreme emotional disturbance,[6] as well as lesser included offenses of manslaughter in the first degree, manslaughter in the second degree, and criminally negligent homicide.[7]

We first set forth the general principles surrounding ineffective assistance of counsel claims and our standard of review. "In *Strickland* v. *Washington*, [supra,

[6] The affirmative defense of mental disease or defect is a defense in "any prosecution for an offense" and provides that "it shall be an affirmative defense that the defendant, at the time the defendant committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law." General Statutes § 53a-13 (a).

Extreme emotional disturbance is an affirmative defense to murder, which is set forth in the applicable statute defining murder: "Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a) of this section, on the question of whether the defendant acted with intent to cause the death of another person." General Statutes § 53a-54a (b).

[7] "A person is guilty of manslaughter in the first degree when: (1) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or (2) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he committed the proscribed act or acts under the influence of extreme emotional disturbance, as provided in subsection (a) of section 53a-54a, except that the fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subsection; or (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." General Statutes § 53a-55 (a).

"A person is guilty of manslaughter in the second degree when: (1) He recklessly causes the death of another person; or (2) he intentionally causes or aids another person, other than by force, duress or deception, to commit suicide." General Statutes § 53a-56 (a).

"A person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person, except where the defendant caused such death by a motor vehicle." General Statutes § 53a-58 (a).

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." (Internal quotation marks omitted.) *Vazquez* v. *Commissioner of Correction*, 128 Conn. App. 425, 430, 17 A.3d 1089, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011).

"The first component, generally referred to as the performance prong, requires that the petitioner show that counsel's representation fell below an objective standard of reasonableness. . . . In *Strickland*, the United States Supreme Court held that [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the

circumstances, the challenged action might be considered sound trial strategy. . . . [C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." (Internal quotation marks omitted.) *Santiago* v. *Commissioner of Correction*, 90 Conn. App. 420, 425, 876 A.2d 1277, cert. denied, 275 Conn. 930, 883 A.2d 1246 (2005), cert. denied sub nom. *Santiago* v. *Lantz*, 547 U.S. 1007, 126 S. Ct. 1472, 164 L. Ed. 2d 254 (2006). "Furthermore, [a]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Marshall* v. *Commissioner of Correction*, 184 Conn. App. 709, 726, 196 A.3d 388, cert. denied, 330 Conn. 949, 197 A.3d 389 (2018).

"To satisfy the second prong of *Strickland*, that his counsel's deficient performance prejudiced his defense, the petitioner must establish that, as a result of his trial counsel's deficient performance, there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal. . . . The second prong is thus satisfied if the petitioner can demonstrate that there is a reasonable probability that, but for that ineffectiveness, the outcome would have been different." (Internal quotation marks omitted.) *Horn* v. *Commissioner of Correction*, 321 Conn. 767, 776, 138 A.3d 908 (2016).

"In a habeas appeal, although this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, 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." (Internal quotation marks omitted.) *Griffin* v. *Commissioner of Correction*, 119 Conn. App. 239, 241, 987 A.2d 1037, cert. denied, 295 Conn. 912, 989 A.2d 1074 (2010).

Additionally, we note that the death of trial counsel, which deprives the petitioner of testimony on the reasoning behind strategic decisions, poses a "significant hurdle" to a habeas corpus petitioner seeking to prove a claim of ineffective assistance of trial counsel. *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 823, 234 A.3d 78, cert. granted, 335 Conn. 931, 236 A.3d 218 (2020); see footnote 2 of this opinion. "The death of the petitioner's trial counsel prior to a habeas corpus trial, however, does not absolve a petitioner of his heavy burden of overcoming the strong presumption that counsel provided effective assistance." Id. With the foregoing principles in mind, we now address the merits of the petitioner's claim.

The thrust of the petitioner's argument on his ineffective assistance of counsel claim is that the affirmative defenses Attorney Daly presented at the criminal trial were inconsistent with the petitioner's testimony and the lesser included offenses on which the court instructed the jury. He asserts that the only objectively reasonable trial strategy would have been for counsel to pursue a claim that the weapon was accidentally discharged and to argue that the petitioner's conduct fit the parameters of manslaughter in the second degree. The petitioner also argued before the habeas court that Attorney Daly, by offering the affirmative defenses, conceded the issue of intent and presented a theory of the case that was inconsistent with the petitioner's testimony that the gun accidentally discharged.

The habeas court rejected the petitioner's argument, finding that the petitioner had "wholly misstate[d] or mischaracterize[d] the defense case presented by Attorney Daly. While Attorney Daly did present evidence of a mental disease or defect the petitioner was suffering from at the time of this incident, he wholly maintained, as a first line of defense, that the gun went off accidentally and argued repeatedly before the jury that [it]

consider that fact in context with the state's obligation to prove that the petitioner fired the gun intentionally in order to convict him of murder." After making this finding, the court concluded that it was not objectively unreasonable for counsel to have presented the affirmative defenses and the lesser included offenses, questioning "how it could ever be objectively deficient performance for defense counsel to use available facts, especially the client's own story, to offer the jury information that, if accepted, would result in an acquittal on the most serious charge." Thus, the court resolved the ineffective assistance of counsel claim on the performance prong of *Strickland* and did not reach the issue of prejudice.

The petitioner first argues that it was clearly erroneous for the habeas court to find that an accidental discharge of the gun was Attorney Daly's "first line of defense." In making this assertion, the petitioner provides numerous examples in the record where Attorney Daly advanced the affirmative defenses. Our role, however, is simply to determine whether the court's finding has *some* support in the record, and, to fulfill this obligation, we look at the entire record and not merely portions of the record. See, e.g., *Orcutt* v. *Commissioner of Correction*, 284 Conn. 724, 741–42, 937 A.2d 656 (2007); see also *Ampero* v. *Commissioner of Correction*, 171 Conn. App. 670, 690–91, 157 A.3d 1192, cert. denied, 327 Conn. 953, 171 A.3d 453 (2017). The court cited to several examples in Attorney Daly's closing argument during which he stressed that the primary issue in the case was whether the petitioner intended to kill the victim. Our review of the record reveals that, in Attorney Daly's closing argument, after a short explanation of the jury's role and a factual summary of the case, the first issue he discussed (in the form of a question he posed to the jury) was, "[d]id [the petitioner] intentionally kill [the victim] on March 22, 1987?" He later reminded the jury that the first determination it

had to make was whether the petitioner intended to kill the victim. Attorney Daly also spent a significant amount of time arguing that the shooting was accidental on the basis of the peculiar location of the wound and trajectory of the bullet, and the fact that only a single gunshot was fired. In making its assessment, the habeas court found that Attorney Daly used the evidence advanced in support of the affirmative defenses as an explanation for why the petitioner carried guns with him and why he would have drawn the gun. There is also support in the record for this finding.[8] In sum, it was not clearly erroneous for the habeas court to find that Attorney Daly's primary defense strategy was to argue that the gun was fired accidentally.

The petitioner next argues that it was objectively unreasonable to present a defense that was inconsistent with the petitioner's testimony. Because we agree that Attorney Daly's primary defense strategy was to show that the petitioner lacked the intent to kill the victim, which comports with the petitioner's explanation of how the gun discharged, the petitioner's primary argument is misplaced. To the extent that the petitioner argues that the affirmative defenses and lesser included offenses were inconsistent with *each other*, it is well established that it is not improper for defense counsel to pursue defenses that are inconsistent with each other. This court has concluded that it is consistent with

[8] During closing argument, Attorney Daly stated: "There's nobody in that jury box in this courtroom any unhappier than I am about the prospect of people such as [the petitioner] walking around with that weapon in their belt. I'm not justifying his having done it; I'm explaining to you why he did it . . . I'm trying to tell you he did it for some reason other than downright meanness. He did it . . . [because] it was the only way, the only—his only link with security. It's the only way he could feel secure." Attorney Daly further stated: "I respectfully suggest to you that the only person who would get all upset about it, who would eventually draw his gun, is somebody who was suffering from a mental disease or a defect of such a character as to destroy the control mechanisms in his mind. And when those mechanisms got interfered with, he took the loaded gun [out] of his pocket and it went off."

our case law to present "inconsistent and alternative theories of defense" to the jury. (Internal quotation marks omitted.) *Jackson* v. *Commissioner of Correction*, 129 Conn. App. 325, 330, 20 A.3d 75, cert. denied, 302 Conn. 947, 31 A.3d 382 (2011); see also *State* v. *Nathan J.*, 294 Conn. 243, 262, 982 A.2d 1067 (2009) (explaining that "it is axiomatic that a defendant may present inconsistent defenses to the jury").

The petitioner further argues that, by presenting the affirmative defenses, "Attorney Daly conceded that the petitioner intended to kill the victim, which conflicted with his request for [a jury instruction on] a lesser included offense, which the jury would only consider if [it] found that the petitioner did *not* possess the requisite intent to kill." (Emphasis in original.) This suggestion is inconsistent with the fundamental principle of our justice system that a defendant is innocent until proven guilty. See, e.g., *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The court made it abundantly clear to the jury that it first had to decide whether the petitioner was guilty of murder and that only then would it reach the affirmative defenses.[9] The jury was further instructed that, if the elements of the crime of murder were not found, it was then to proceed to the lesser included offenses. A defendant does not concede the elements of murder by advancing an affirmative defense of mental disease or defect, or extreme emotional disturbance. The state still had to prove that the petitioner had the required intent to kill in order to convict him of murder.

[9] The trial court instructed the jury: "If you find that the state has failed to prove to you beyond a reasonable doubt any one of these elements, then you must find the [petitioner] not guilty of murder. If you find that the state has convinced you of each of these elements beyond a reasonable doubt, you must then consider the two affirmative defenses the [petitioner] has raised in this case. . . . The burden that the [petitioner] has as to the affirmative defense . . . does not diminish in any way the burden that the state has of proving his intent, whether it be the general intent or specific intent."

Last, the petitioner argues that presentation of the affirmative defenses was unreasonable because it added "unnecessary complexities to the case" by allowing the state to call witnesses in rebuttal whose testimony tended to show "that the charged offense was not an isolated incident and that the petitioner engaged in a pattern of displaying his gun when threatened." In reviewing claims of ineffective assistance of counsel, we must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." (Internal quotation marks omitted.) *Gaines* v. *Commissioner of Correction*, supra, 306 Conn. 679. At the time that Attorney Daly called Dr. Opsahl to lay the groundwork for the affirmative defenses, which was before Attorney Daly had requested the jury instructions, the court had already ruled against admitting evidence of the prior incidents in which the petitioner had displayed his guns. We do not find this strategic decision to be objectively unreasonable on the basis of a mere possibility that it could have led to the admission of the state's rebuttal evidence, particularly given that the court instructed the jury that the rebuttal evidence could *not* be used as evidence of intent.[10]

[10] The court instructed the jury as follows: "Now, you'll probably note that the state did not offer this in its direct case. And there is a reason for that. The law prohibits the state from offering past misconduct to show a propensity for doing misconduct. . . . Even with the admission of this evidence, you are not permitted to use that evidence in that way. The evidence is being admitted for two purposes. The first is that, what was admitted in the defense case was certain history of the [petitioner], particularly the event of February, 1986, in which he was—his bedroom door was alleged to have been kicked in and that he was threatened by an individual . . . . And [Dr. Opsahl] had given an opinion on the basis of that history that his purchase of guns and his use [of them] as in this particular case resulted in a loss of control or behavior. And from the standpoint that that event [in] February continued to come back and he was reenacting that event. So, it's allowed for the state, then, once that's offered, to show evidence whether or not there has been, on prior occasions, loss of control or behavior. So, this evidence . . . is to be used by you to determine whether

In reaching our conclusion on this claim, we stress that "*Strickland* does not guarantee perfect representation, only a reasonably competent attorney"; (internal quotation marks omitted) *Ampero* v. *Commissioner of Correction*, supra, 171 Conn. App. 681; and that a petitioner will not be able to demonstrate that trial counsel's decisions were objectively unreasonable unless there was "no . . . tactical justification for the course taken." (Internal quotation marks omitted.) *Marshall* v. *Commissioner of Correction*, supra, 184 Conn. App. 726. We cannot conclude that there was no tactical justification for Attorney Daly's defense strategy. Given that Attorney Daly's primary line of defense was consistent with the petitioner's testimony, it was not objectively unreasonable to provide additional layers of defense, supported by expert testimony, should the jury find the petitioner guilty of murder. We agree with the habeas court's skepticism as to whether "it could ever be objectively deficient performance for defense counsel to use available facts, especially the client's own story, to offer the jury information that, if accepted, would result in an acquittal on the most serious charge." The habeas court correctly concluded that the petitioner failed to establish that Attorney Daly's performance was deficient and, thus, correctly denied his ineffective assistance of counsel claim as to Attorney Daly.

II

The petitioner next claims that the habeas court erred in concluding that his conflict of interest claim as to Attorney Daly was both procedurally defaulted and waived. The petitioner also claims that the conflict of interest resulted in a complete structural breakdown of the adversarial system, thus warranting the presumption of prejudice under *Cronic*. The respondent, the

or not . . . Dr. Opsahl's opinion or diagnosis was based on factual matters. And, secondly, whether or not the [petitioner] has been truthful to the doctor in relating events and truthful with you in relating events."

Commissioner of Correction, argues that the habeas court properly determined that the petitioner's conflict of interest claim was both procedurally defaulted and waived. We agree with the respondent.[11]

The following additional facts are relevant to our resolution of this claim. In September, 1987, roughly one year before the petitioner's criminal trial, the petitioner's father contacted Attorney Wice, a high school friend who had a law practice based in Texas, and asked him to assist in the petitioner's representation. After receiving permission from Attorney Daly to assist him with the case, Attorney Wice flew to Connecticut to meet with the petitioner and his family. Attorney Daly agreed that Attorney Wice would act as second chair and assist with research, strategy, crafting a defensive theory, and anything else that would be helpful. During the next several months, Attorney Wice reviewed various discovery materials and frequently met with Attorney Daly to craft trial strategy. On January 20, 1988, Attorney Wice filed a motion for permission to appear as counsel pro hac vice so that he could join Attorney Daly in representing the petitioner at his criminal trial. The court denied the motion.[12] After the denial of the motion, Attorney Wice largely stopped assisting with trial preparation but still attended court every day with the petitioner.

Five days before the start of trial, the state filed a notice of intent to introduce evidence of prior bad acts, specifically testimony concerning two prior events during which the petitioner threatened strangers with a

[11] The petitioner asserts in the introductory portion of his conflict of interest argument in his brief that his rights under article first, §§ 8 and 9, of the constitution of Connecticut were violated. For the same reasons set forth in footnote 3 of this opinion, we decline to review these claims.

[12] The petitioner challenged the denial of the pro hac vice motion in count one of the operative habeas petition. The habeas court concluded that the claim was procedurally defaulted. The petitioner has not challenged this ruling on appeal.

firearm. The state sought to introduce this testimony in its case-in-chief, but the court denied the request. After the defense rested, the state sought to introduce rebuttal testimony from six witnesses who would discuss these incidents and the petitioner's relationship with guns. The court maintained its prior ruling that the evidence would be inadmissible as proof of the petitioner's intent but allowed the state to present the testimony in an offer of proof to determine the admissibility of the evidence for the purpose of discrediting Dr. Opsahl. At that point, Attorney Daly requested a recess and a discussion with the prosecutor off the record, indicating that the presentation of the rebuttal witnesses "presents a rather grave problem for me." After the recess, Attorney Daly explained that two of the state's proposed witnesses, Robert Udolf and John Rubino, "are clients of mine and my office, and have been for some substantial period of time." Udolf and Rubino had been identified as potential state's witnesses during jury selection, but Attorney Daly did not raise the potential conflict at that time. He proposed that Attorney Wice be admitted pro hac vice for the limited purpose of cross-examining the state's rebuttal witnesses. The following exchange then occurred between the court and the petitioner:

"The Court: And [petitioner], would you come forward. You were in court when the names came up from [Attorney Daly] concerning the offer of certain evidence in connection with your conduct in front of certain offered witnesses. At that point, [Attorney Daly] indicated that he had represented two of these witnesses previously and that they were clients of his, which raises at least an apparent conflict. And that he wanted a recess in order to talk with you concerning his representation and his ability to be in a position to adequately and fairly cross-examine these witnesses. He had discussed this with you?

"[The Petitioner]: Yes, sir.

"The Court: And he's named the two witnesses to you that are—or previously had been clients of his?

"[The Petitioner]: Yes, Your Honor.

"The Court: And that, by virtue of that, that he does have a present conflict in cross-examining adequately and fairly those two witnesses.

"[The Petitioner]: Yes, sir.

"The Court: And he suggested, for that purpose, that another attorney be engaged by you to do that cross-examination.

"[The Petitioner]: Yes, Your Honor.

"The Court: And you're satisfied that he does have that conflict?

"[The Petitioner]: Yes, sir.

"The Court: And for that purpose you have asked [Attorney] Wice to stand in for at least those two witnesses?

"[The Petitioner]: Yes, sir.

"The Court: And [Attorney Daly] indicated that, rather than having some question about their testimony or the aggregate testimony, that [Attorney] Wice do the whole cross-examination of all of the witnesses concerning these two events.

"[The Petitioner]: Yes, Your Honor.

"The Court: And are you satisfied with that arrangement?

"[The Petitioner]: Yes, Your Honor."

The court then partially reversed its prior ruling on the motion for admission pro hac vice, allowing Attorney Wice to be admitted for this limited purpose, noting,

"I don't see the availability of another counsel who would be more equipped to do it because [Attorney] Wice has sat through the whole trial and knows all the evidence that's been presented. So that he's certainly in a—from a standpoint of knowledge—in a better position than any other counsel starting off."

With this arrangement in place, the state proceeded with its offer of proof outside the presence of the jury. Witnesses Thomas Cronin and Mark Higby described an incident in October, 1986, during which Cronin had a confrontation with the petitioner at the Prospect Café. While at the bar, Cronin's brother-in-law made a comment about a Jewish friend, which the petitioner overheard. Thirty minutes later, the petitioner approached Cronin and his brother-in-law, and said, "[d]on't you ever fucking say something about Jewish people again because, if you do, next time I come in here I'm going to be looking for you." The petitioner then lifted his shirt, revealing a gun tucked into his waistband. Attorney Daly explained to the court that he would handle cross-examination of the witnesses who testified about the October, 1986 first incident because his two clients, Udolf and Rubino, would testify about only the second incident. Nevertheless, Attorney Daly did not cross-examine either witness.

Witnesses Udolf, Rubino, Higby,[13] and Kevin McCurry then testified concerning an incident that occurred at the Pacifico Bar and Restaurant (Pacifico) in West Hartford on January 23, 1987. Udolf testified that he went to Pacifico to meet two women for drinks and that they had to ask the petitioner to stop "bothering" them. The petitioner followed the group outside and "start[ed] a major argument about something." Udolf testified that

[13] Higby was the petitioner's roommate at the time of these events. He was present at the Prospect Café during the confrontation in October, 1986, but heard from the petitioner about the second incident at issue, which occurred at the Pacifico Bar and Restaurant in West Hartford on January 23, 1987.

he began to feel scared and started to grab chemical Mace from his pocket, at which point the petitioner drew his gun, pointed it at Udolf, and said, "that's nothing, tough guy . . . ." Rubino testified that he went to Pacifico on January 23, 1987, and, as he was waiting for the valet to bring him his car, he saw the petitioner draw his gun on Udolf. McCurry testified that he was employed as the valet at Pacifico on the same night and also witnessed the confrontation. Higby testified that the petitioner later told him about the incident. Attorney Wice did not cross-examine any of the witnesses, although both he and Attorney Daly objected to the testimony being presented to the jury.

After the offer of proof, the court allowed the proffered evidence to be submitted to the jury for a limited purpose.[14] The witnesses were then recalled in the presence of the jury and walked through their testimony a second time. In addition, Julie Dolinger, a former roommate of the petitioner who did not testify during the offer of proof, also testified that the petitioner had showed her his guns and how to load them, and told her about the Pacifico incident. During the offer of proof, Attorney Daly had dealt with the two witnesses who testified about the Prospect Café incident, and Attorney Wice had dealt with the four witnesses who testified about the Pacifico incident. When their testimony was presented to the jury, however, Attorney Daly handled the testimony of the Prospect Café witnesses, Higby and Cronin, as well as the Pacifico incident witnesses, Higby, McCurry, and Dolinger, who were *not* his clients. He briefly cross-examined Higby and Dolinger but did not cross-examine Cronin or McCurry. Attorney Wice handled the testimony of the two Pacifico witnesses who were Attorney Daly's clients, Udolf and Rubino, but did not cross-examine either of them.

The petitioner claimed that Attorney Daly's concurrent representation of Udolf and Rubino resulted in an

[14] See footnote 10 of this opinion.

actual conflict of interest and that having Attorney Wice handle their cross-examination was insufficient to ameliorate the possibility that Attorney Daly's conflict would prejudice the petitioner. The respondent asserted in his return that the petitioner had procedurally defaulted on his conflict of interest claim by failing to raise it at trial or on direct appeal. The respondent claimed, as well, that the petitioner had waived the claim. The court agreed with the respondent, concluding that this conflict of interest claim was both procedurally defaulted and waived.

Before we address the petitioner's claims, we briefly set forth the law concerning conflicts of interest in criminal representation. "It is well established that the sixth amendment to the United States constitution guarantees the right to effective assistance of counsel. . . . Where a constitutional right to counsel exists, our [s]ixth [a]mendment cases hold that there is a correlative right to representation that is free from conflicts of interest." (Citations omitted; internal quotation marks omitted.) *State* v. *Vega*, 259 Conn. 374, 386, 788 A.2d 1221, cert. denied, 537 U.S. 836, 123 S. Ct. 152, 154 L. Ed. 2d 56 (2002).

"In a case of a claimed conflict of interest . . . in order to establish a violation of the sixth amendment the defendant has a two-pronged task. He must establish (1) that counsel actively represented conflicting interests and (2) that an *actual conflict of interest* adversely affected his lawyer's performance. . . . Where there is an actual conflict of interest, prejudice is presumed because counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. . . . Accordingly, an ineffectiveness claim predicated on an actual conflict of interest is unlike other ineffectiveness claims in that the petitioner need not establish

actual prejudice." (Emphasis in original; internal quotation marks omitted.) *Grover* v. *Commissioner of Correction*, 183 Conn. App. 804, 813, 194 A.3d 316, cert. denied, 330 Conn. 933, 194 A.3d 1196 (2018).

A

The petitioner first argues that the habeas court improperly determined that his conflict of interest claim regarding Attorney Daly was procedurally defaulted because he did not raise the claim at trial or on direct appeal. We agree with the habeas court that this conflict of interest claim could have been raised on direct appeal and, thus, the habeas court properly ruled that the claim was procedurally defaulted.

A habeas court's conclusion that a petitioner's claim was in procedural default involves a question of law, over which our review is plenary. See, e.g., *Johnson* v. *Commissioner of Correction*, 285 Conn. 556, 566, 941 A.2d 248 (2008).

We begin with a review of the procedural default rule. "Under the procedural default doctrine, a [petitioner] may not raise, in a collateral proceeding, claims that he could have made at trial or on direct appeal in the original proceeding, unless he can prove that his default by failure to do so should be excused." (Internal quotation marks omitted.) *Cator* v. *Commissioner of Correction*, 181 Conn. App. 167, 199, 185 A.3d 601, cert. denied, 329 Conn. 902, 184 A.3d 1214 (2018). Ordinarily, if the respondent "alleges that a [petitioner] should be procedurally defaulted from now making the claim, the [petitioner] bears the burden of demonstrating good cause for having failed to raise the claim directly, and he must show that he suffered actual prejudice as a result of this excusable failure." *Hinds* v. *Commissioner of Correction*, 151 Conn. App. 837, 852, 97 A.3d 986 (2014), aff'd, 321 Conn. 56, 136 A.3d 596 (2016).

This cause and prejudice test derives from *Wainwright* v. *Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), and has been held by our Supreme Court to be "the appropriate standard for reviewability in a habeas corpus proceeding of constitutional claims not adequately preserved at trial because of a procedural default . . . ." *Johnson* v. *Commissioner of Correction*, 218 Conn. 403, 409, 589 A.2d 1214 (1991); see also *Jackson* v. *Commissioner of Correction*, 227 Conn. 124, 132, 629 A.2d 413 (1993) (holding that "the *Wainwright* cause and prejudice standard should be employed to determine the reviewability of habeas claims that were not properly pursued on direct appeal").

The habeas court explained that the record was sufficient for the petitioner to raise his conflict claim on direct appeal: "The petitioner . . . [argues] that this matter required additional evidence to be developed during an evidentiary hearing, which could not have been accomplished on appeal. The petitioner's focus is misplaced. There is no question that an evidentiary hearing could not have been held during the appeal. However, there was an inquiry and a canvass regarding this conflict of interest on the record. The question of whether the canvass was legally sufficient, which the petitioner attempts to turn into the 'need' for an evidentiary hearing, is exactly what could have been challenged before the trial court or addressed by the Appellate Court, if the issue had been properly raised. . . . The petitioner again attempts to turn his failure to offer any prior challenge to a court ruling into a need for additional factual findings for the first time by way of collateral attack. If the trial court record was allegedly inadequate for review, then the petitioner must bear that burden because he has not offered any proof that something external to the defense prohibited a challenge from being made, an additional canvass requested, or from an appeal from being filed." (Citation omitted.)

The petitioner argues again on appeal that the claim could not be procedurally defaulted because the record was inadequate to raise the claim on direct appeal. Specifically, he contends that the testimony of Attorney Wice at the habeas hearing that he had not been prepared at the criminal trial for the cross-examination was necessary to establish the claim. Although our Supreme Court has stated that, "[a]lmost without exception, we have required that a claim of ineffective assistance of counsel must be raised by way of habeas corpus, rather than by direct appeal, because of the need for a full evidentiary record for such [a] claim"; (internal quotation marks omitted) *State* v. *Crespo*, 246 Conn. 665, 687–88, 718 A.2d 925 (1998), cert. denied, 525 U.S. 1125, 119 S. Ct. 911, 142 L. Ed. 2d 909 (1999); this rationale does not apply to claims when the evidentiary record was adequate for review on direct appeal. See *McCarthy* v. *Commissioner of Correction*, 192 Conn. App. 797, 811–13, 218 A.3d 638 (2019) (freestanding due process claim based on fabrication of evidence procedurally defaulted because petitioner was aware of alleged fabrication during criminal trial and at time of direct appeal).

In *Crespo*, our Supreme Court analyzed whether a defendant could seek review, in a direct criminal appeal, of a conflict of interest claim not raised at trial under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), and concluded that the record was inadequate for a reviewing court to determine whether counsel's actions were the result of a legitimate trial strategy or a possible conflict: "We cannot know for certain from the record, however, whether [counsel's actions constituted a legitimate trial strategy], nor can we determine from the record whether [counsel] adequately explained to the defendant any possible conflict, if one existed, and obtained the defendant's consent to his continued representation. We may speculate regarding the divergence of [counsel's] and the defendant's interests, but

there are no facts from which we may conclude, as a matter of law, that a conflict actually existed. We have recognized that the trial transcript seldom discloses all of the considerations of strategy that may have induced counsel to follow a particular course of action. . . . It is because of this typical lack of an adequate record that we ordinarily require a defendant to raise conflict of interest claims in a habeas corpus proceeding. . . . Although we cannot conclude with any degree of certainty from the record that the offer of the stipulation was an actual conflict of interest, we are equally unable to determine that it was not. Resolution of this issue, therefore, must await the development of an adequate factual record in an appropriate, posttrial proceeding." (Citations omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Crespo*, supra, 246 Conn. 693–94. Similarly, in *State* v. *Navarro*, 172 Conn. App. 472, 489–92, 160 A.3d 1116, cert. denied, 326 Conn. 910, 164 A.3d 681 (2017), this court declined to review a conflict of interest claim on direct appeal. We explained that, when a defendant identifies only "several *potential* conflicts," the record is inadequate to determine whether counsel labored under a conflict of interest, as a successful conflict of interest claim requires a showing of an *actual* conflict of interest. (Emphasis in original.) Id., 491.

The concerns highlighted in *Crespo* and *Navarro* are not present in this case, the record of which contains sufficient information for the conflict of interest claim to have been reviewed on direct appeal. The record reveals the exact nature of Attorney Daly's conflict of interest, and the canvass reveals that the court explained to the petitioner that Attorney Daly would have a "present conflict" if he were to cross-examine Udolf and Rubino. In *Collins* v. *Commissioner of Correction*, 202 Conn. App. 789, 796, 799–800, 246 A.3d 1047, cert.denied, 336 Conn. 931, 248 A.3d 1 (2021), this court held that a habeas court improperly found that a conflict of interest

claim was defaulted where "[counsel] never raised the potential for a conflict of interest with the court, nor did the court raise the issue on its own. As such, it was not until the habeas trial itself that [counsel] explained on the record specifically *why*" he proceeded with the course of action that was claimed to have been tainted by the conflict of interest. (Emphasis in original.) Id., 798. In the present case, the record clearly establishes that Attorney Daly brought the conflict to the court's attention and explained the nature of the conflict. The court then discussed the conflict with the petitioner and acquired his assent to proceed with Attorney Wice handling the cross-examination of Udolf and Rubino. The record also reveals the immediate consequences of the apparent conflict, that Attorney Wice handled the cross-examination of Udolf and Rubino but ultimately asked no questions.

"[T]he existence of cause for a procedural default must ordinarily turn on whether the [petitioner] can show that some objective factor external to the defense impeded counsel's efforts to comply with the [s]tate's procedural rule. . . . [For example] a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . or . . . some interference by officials . . . would constitute cause under this standard." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, supra, 285 Conn. 568. The habeas court properly observed that the factual and legal basis for this claim was apparent on the record and, thus, available to counsel at the time of appeal. Accordingly, the petitioner cannot establish good cause for not raising the issue on direct appeal. The court appropriately concluded that the claim was procedurally defaulted.

B

The petitioner also claims that the habeas court improperly found that he had waived his conflict of interest claim regarding Attorney Daly. The respondent

argues that the court properly found that the petitioner's waiver was knowing and intelligent. We agree with the respondent.

"Where there is an actual or potential conflict . . . the court must obtain a valid waiver from the defendant if counsel is to continue to represent the defendant. A valid waiver of a constitutional right . . . must be knowing and intelligent, accomplished with sufficient awareness of the relevant circumstances and likely consequences. . . . [T]he fact that a defendant, with full awareness of the circumstances and consequences of the potential conflict, waives his right to the effective assistance of counsel must appear on the record in clear, unequivocal, unambiguous language." (Internal quotation marks omitted.) *DaSilva* v. *Commissioner of Correction*, 132 Conn. App. 780, 790, 34 A.3d 429 (2012). "If the defendant reveals that he is aware of and understands the various risks and pitfalls, and that he has the rational capacity to make a decision on the basis of this information, and if he states clearly and unequivocally . . . that he nevertheless chooses to hazard [the] dangers of waiving conflict-free representation, then his waiver may appropriately be accepted. . . . The waiver is not vitiated simply because the defendant, with the benefit of hindsight, might have chosen differently. A defendant need not be prescient in order to waive knowingly and intelligently the right to conflict-free representation." (Citations omitted; internal quotation marks omitted.) *State* v. *Tilus*, 157 Conn. App. 453, 467, 117 A.3d 920 (2015), appeal dismissed, 323 Conn. 784, 151 A.3d 382 (2016).

In concluding that the petitioner had waived his conflict of interest claim, the habeas court stated: "The record in the present case reveals that, after being notified of the conflict and being provided with the opportunity to discuss the matter with Attorney Daly, the petitioner indicated to the court that he had discussed the

nature of the conflict with counsel, that he understood it and the limitations that it placed on Attorney Daly, that he understood the proposed resolution of having Attorney Wice cross-examine the problematic witnesses, and that he was willing to proceed with the case. The waiver was adequate on its face, and the petitioner has failed to provide any evidence to support the allegation that he did not fully understand it or . . . was otherwise unsure of his decision." We agree with the court. The record indicates that the petitioner and Attorney Daly discussed the conflict during the recess, the court explained that Attorney Daly could not "adequately and fairly" cross-examine Udolf and Rubino as a result of the conflict, and that the petitioner approved of having Attorney Wice cross-examine the two witnesses.

The petitioner argues that his waiver was premised on cross-examination actually occurring, but neither the trial record nor the habeas record reveals that the petitioner was ever told cross-examination would occur or that he instructed Attorney Wice to cross-examine Udolf and Rubino. To the contrary, as the respondent points out, the record indicates that the petitioner was told that the plan was not to ask the witnesses any questions. Indeed, with the exception of the petitioner's roommates, who heard about the incident at Pacifico from the petitioner, *none* of the rebuttal witnesses who testified about the incidents at the Prospect Café and Pacifico was asked questions on cross-examination. Furthermore, that the petitioner waived his conflict of interest claim and approved of having Attorney Wice handle the cross-examination of Udolf and Rubino does not foreclose him from claiming that Attorney Wice's handling of those examinations was ineffective. We address that claim in part III of this opinion.

In sum, the court properly concluded that the conflict of interest claim was waived.

C

The petitioner also made a claim in a separate count of his habeas petition that Attorney Daly's conflict of interest "prevented him from subjecting the state's witnesses to any meaningful cross-examination," and, thus, prejudice should have been presumed under *United States* v. *Cronic*, supra, 466 U.S. 648. The habeas court also determined that the petitioner's *Cronic* claim was procedurally defaulted, which the petitioner now disputes.

The doctrine of procedural default is applicable to *Cronic* claims that could have been raised on direct appeal. See generally *Taylor* v. *Commissioner of Correction*, 324 Conn. 631, 153 A.3d 1264 (2017). Accordingly, for the same reasons discussed previously, we conclude that the habeas court correctly determined that the petitioner's *Cronic* claim was procedurally defaulted, as it has a factual basis that is identical to his conflict of interest claim.

III

The petitioner next claims that the habeas court improperly denied his claim of ineffective assistance as to Attorney Wice's failure to cross-examine Udolf or Rubino. The petitioner argues that Attorney Wice failed to subject the state's case to meaningful adversarial testing, and, therefore, prejudice is presumed under *Cronic*. The respondent argues that the court correctly determined that the petitioner was not entitled to a presumption of prejudice under *Cronic*. We agree with the respondent.

We reiterate the legal principles set forth in part I of this opinion, particularly that a claim of ineffective assistance of counsel requires a showing that counsel's performance was both deficient and resulted in prejudice to the petitioner. See *Vazquez* v. *Commissioner of Correction*, supra, 128 Conn. App. 430. "*Strickland*

recognized, however, that [i]n certain [s]ixth [a]mendment contexts, prejudice is presumed. . . . In . . . *Cronic* . . . which was decided on the same day as *Strickland*, the United States Supreme Court elaborated on the following three scenarios in which prejudice may be presumed: (1) when counsel is denied to a [petitioner] at a critical stage of the proceeding; (2) when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; and (3) when counsel is called upon to render assistance in a situation in which no competent attorney could do so." (Citation omitted; internal quotation marks omitted.) *Davis* v. *Commissioner of Correction*, 319 Conn. 548, 554–55, 126 A.3d 538 (2015), cert. denied sub nom. *Semple* v. *Davis*, U.S. , 136 S. Ct. 1676, 194 L. Ed. 2d 801 (2016). "This is an irrebuttable presumption. See *State* v. *Frye*, 224 Conn. 253, 262, 617 A.2d 1382 (1992) (right to counsel is so basic that its violation mandates reversal even if no particular prejudice is shown and even if there is overwhelming evidence of guilt) . . . ." (Internal quotation marks omitted.) *Newland* v. *Commissioner of Correction*, 322 Conn. 664, 699–700, 142 A.3d 1095 (2016) (*McDonald, J.*, dissenting). "[C]ourts have rarely applied *Cronic*, emphasizing that only [nonrepresentation], not poor representation, triggers a presumption of prejudice." (Internal quotation marks omitted.) *Hutton* v. *Commissioner of Correction*, 102 Conn. App. 845, 856, 928 A.2d 549, cert. denied, 284 Conn. 917, 931 A.2d 936 (2007). "The United States Supreme Court has emphasized . . . how seldom circumstances arise that justify a court in presuming prejudice, and concomitantly, in forgoing particularized inquiry into whether a denial of counsel undermined the reliability of a judgment . . . ." (Internal quotation marks omitted.) *Leon* v. *Commissioner of Correction*, 189 Conn. App. 512, 531, 208 A.3d 296, cert. denied, 332 Conn. 909, 209 A.3d 1232 (2019). Our Supreme Court has further explained

that "specific errors in representation, for which counsel can provide some reasonable explanation, are properly analyzed under *Strickland*. . . . Counsel's complete failure to advocate for a defendant, however, such that no explanation could possibly justify such conduct, warrants the application of *Cronic*." (Citation omitted.) *Davis* v. *Commissioner of Correction*, supra, 556.

The habeas court concluded that the petitioner was not entitled to a presumption of prejudice under *Cronic*, explaining that, "[u]nlike the *Cronic* line of cases, the issue here does not deal with any witnesses in the state's case-in-chief; it only involves two of four witnesses who testified to the same incident, and the evidence was admitted only for a limited purpose of the credibility [and] the overall accuracy of one of the defense experts' opinion on the petitioner's mental health, and as to the credibility of inferences and testimony the petitioner gave about his familiarity with handling guns. Given the narrow issue involved, the fact that only two out of the dozens of witnesses who testified in the case were concerned, and the fact that the same or substantially similar testimony from two other witnesses remains unchallenged, this is not the type of issue that undermines the confidence in the fabric of the entire trial." (Footnote omitted.)

We agree with the court that Attorney Wice's actions do not rise to a level that our jurisprudence dictates would constitute a failure to subject the state's case to meaningful adversarial testing and thus require a presumption of prejudice. The second *Cronic* exception is exceedingly narrow. See *Leon* v. *Commissioner of Correction*, supra, 189 Conn. App. 533; *Hutton* v. *Commissioner of Correction*, supra, 102 Conn. App. 856. "[T]he United States Supreme Court made clear . . . that the second exception in *Cronic* applies only when the attorney's failure is complete, rather than simply an alleged failure at specific points in the trial . . . ."

Taylor v. *Commissioner of Correction*, supra, 324 Conn. 647 n.5. Even if we presume that it was error not to cross-examine Udolf and Rubino, it cannot be said that Attorney Wice's failure was "complete." As an example of an "utter lack of advocacy," in *Edwards* v. *Commissioner of Correction*, 183 Conn. App. 838, 851, 194 A.3d 329 (2018), this court found that counsel's actions had resulted in a failure to subject the state's case to any meaningful adversarial testing. This court summarized, stating that, "[a]lthough [counsel] claimed to have formed a 'theory of the case'—that the petitioner did not attack the victim—he did nothing at the petitioner's criminal trial to advance that theory. The petitioner consistently has claimed that he did not assault the victim. Despite the petitioner's adamance, [counsel] declined to cross-examine *any* of the three people who were present at the time of the assault. As noted previously, [counsel] failed to meaningfully cross-examine *any* of the state's witnesses except for a police officer, whom he asked irrelevant questions." (Emphasis added.) Id., 850.

Here, the petitioner challenges only Attorney Wice's failure to cross-examine two of the state's six rebuttal witnesses. Our review of the record confirms that the remainder of the state's case was subjected to meaningful adversarial testing. During the examination of the lead police detective, Attorney Daly conducted multiple voir dire examinations and objected frequently but did not conduct a cross-examination. He then, again, conducted multiple voir dire examinations during examination of the second police detective and conducted a cross-examination. He cross-examined the first law enforcement officers who responded to the crime scene, the state's medical and firearms experts, and the majority of the state's lay witnesses, including patrons and employees of the Prospect Café. Furthermore, Attorney Daly called four defense witnesses, including members of the petitioner's family and Dr. Opsahl.

Thus, the state's case was subjected to meaningful adversarial testing.

Accordingly, Attorney Wice's alleged failures are more appropriately analyzed under the performance and prejudice test outlined in *Strickland*. Because, however, the petitioner does not challenge on appeal the habeas court's determination that he failed to establish prejudice under *Strickland*, no additional analysis is necessary.[15] In fact, the petitioner explicitly stated in his brief to this court that "[h]is claim should not be analyzed for prejudice under *Strickland*." We agree with the habeas court that *Cronic* does not apply to the petitioner's claim; thus, the petitioner was required to prove prejudice, and the habeas court's finding of no prejudice stands unchallenged. The habeas court correctly denied the petitioner's ineffective assistance of counsel claim.

IV

Last, the petitioner contends that the habeas court improperly declined to apply a cumulative prejudice approach to his claims and to consider the aggregate effect of counsel's alleged errors. The respondent argues that Connecticut state courts have declined to adopt a

[15] After resolving the *Cronic* claim, the habeas court resolved the petitioner's *Strickland* claim by concluding that the petitioner had failed to establish prejudice, concluding: "[T]he petitioner would need to show some actual harm . . . . Here, the petitioner failed to present Rubino or Udolf as witnesses to prove the allegedly helpful information that could have, or should have, been elicited form them via cross-examination, which, alone is sufficient to defeat his claim. . . . An additional basis is that [McCurry] and [Higby] were two additional witnesses who testified about the same incident . . . during the offer of proof and before the jury. Neither of them was subjected to any cross-examination during either proceeding, and the petitioner offers no challenges at all to the testimony or handling of either witness. Therefore, even if some challenge to the credibility of Udolf or Rubino had been offered, the testimony of these other two witnesses would have gone to the jury unchallenged. Therefore, the petitioner's claim fails because he has failed to show any harm . . . ." (Citations omitted.)

cumulative error approach and that, regardless, because the petitioner failed to demonstrate that counsel acted deficiently, there are no errors to accumulate. We agree with the respondent.

"Our appellate courts . . . have consistently declined to adopt this [cumulative error analysis]. When faced with the assertion that the claims of error, none of which individually constituted error, should be aggregated to form a separate basis for a claim of a constitutional violation of a right to a fair trial, our Supreme Court has repeatedly decline[d] to create a new constitutional claim in which the totality of alleged constitutional error is greater than the sum of its parts. . . . Because it is not within the province of this court to reevaluate decisions of our Supreme Court . . . we lack authority under the current state of our case law to analyze the petitioner's ineffective assistance claims under the cumulative error rule." (Citations omitted; internal quotation marks omitted.) *Cooke* v. *Commissioner of Correction*, 194 Conn. App. 807, 819, 222 A.3d 1000 (2019), cert. denied, 335 Conn. 911, 228 A.3d 1041 (2020). We cannot grant the relief the petitioner seeks.

Moreover, the habeas court concluded that, because "the petitioner has failed to prove each of the individual claim[s] upon which this final 'catchall' claim rests, it is not necessary to engage in any additional detailed discussion. [Because] all other claims have failed on their individual merits, this claim, too, fails." Thus, even if aggregate error analysis were viable here, it is not necessary to consider the aggregate effect of the alleged errors because we agree with the habeas court's disposition of the petitioner's individual claims.

The judgment is affirmed.

In this opinion the other judges concurred.

MARCUS FAIR *v.* COMMISSIONER OF CORRECTION (AC 43583)

Prescott, Cradle and Suarez, Js.

Syllabus

The petitioner, who had been convicted of murder and criminal possession of a firearm, sought a writ of habeas corpus, claiming that his trial counsel provided ineffective assistance. Following an evidentiary hearing, the habeas court denied the petition, concluding that the petitioner had failed to demonstrate that his trial counsel had acted deficiently by failing to present certain expert testimony or to impeach a testifying witness, M, regarding M's alleged motivation to testify untruthfully, and that any failure on behalf of the petitioner's trial counsel to impeach M with respect to M's conflicting statements regarding the identification of the shooter did not prejudice the petitioner. Thereafter, the habeas court 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, the petitioner having failed to demonstrate that the issues raised in his petition were debatable among jurists of reason, that the court could have resolved the issues in a different manner or that the questions were adequate to deserve encouragement to proceed further; the petitioner failed to demonstrate that he was prejudiced by the alleged deficient performance of his trial counsel, as the petitioner failed to demonstrate that the outcome of his trial would have been different if his trial counsel had presented evidence about the Jamaican etymology of a term that was allegedly used by the shooter when he fired his weapon, as there was no evidence that the term could be used only by a person of Jamaican descent and, in light of the evidence presented at trial that the shooter was wearing a Jamaican hat and fake dreadlocks, the jury could have inferred that the petitioner used the term in an effort to conceal his identity; moreover, the petitioner failed to present any credible evidence in support of his theory that M agreed to cooperate with the police to avoid criminal liability and also failed to demonstrate that any further inquiry into the matter was likely to have affected the jury's assessment of M's testimony; furthermore, the petitioner failed to demonstrate that he was prejudiced by his trial counsel's alleged failure to impeach M concerning the fact that M had made inconsistent statements to the police regarding the shooter's identity, as these statements were presented to the jury during the criminal trial and the state presented proof, independent of M's testimony, of the petitioner's guilt beyond a reasonable doubt.

Argued February 8—officially released June 15, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Hon. Samuel S. Sferrazza*, judge trial referee; judgment denying the petition; thereafter, the court denied the petition for certification to appeal, and the petitioner appealed to this court. *Appeal dismissed.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (petitioner).

Melissa E. Patterson, senior assistant state's attorney, with whom, on the brief, were *Sharmese Walcott*, state's attorney, and *Michael Proto*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SUAREZ, J. The petitioner, Marcus Fair, appeals, following the denial of his petition for certification to appeal, from the judgment of the habeas court denying his third amended petition for a writ of habeas corpus. The petitioner claims that the habeas court abused its discretion by denying his petition for certification to appeal because he demonstrated that he was deprived of his right to the effective assistance of counsel during his underlying criminal trial. We conclude that the habeas court did not abuse its discretion in denying the petition for certification to appeal and, accordingly, dismiss the appeal.

In 2005, the petitioner was convicted, following a jury trial, of murder in violation of General Statutes (Rev. to 2003) § 53a-54a (a) and criminal possession of a firearm in violation of General Statutes (Rev. to 2003) § 53a-217 (a) (1). Following his conviction, the petitioner was sentenced by the trial court, *Espinosa, J.*, to a total effective term of sixty-five years of imprisonment. In an unsuccessful direct appeal to this court, the petitioner

raised a claim of instructional impropriety and a claim that the trial court had abused its discretion in excluding evidence of prior inconsistent identification statements. *State* v. *Fair*, 104 Conn. App. 519, 522, 525, 935 A.2d 196 (2007).

The following facts, as described by this court in its decision on the petitioner's direct appeal, are relevant to this appeal. "In the late evening of January 13, 2004, Dwayne Knowlin and Joshua Mims left Knowlin's home on Nelson Street in Hartford to get something to eat. As they walked home, the [petitioner] approached. The [petitioner] wore a black mask that concealed his head; his face was visible from his lips to his eyebrows. The [petitioner] stopped in front of Knowlin and Mims, took out a black revolver and opened fire. Knowlin and Mims immediately ran. After jumping a fence and with the [petitioner] no longer in sight, Knowlin collapsed, informing Mims that he was shot. Knowlin's breathing became labored, and Mims called for an ambulance. Knowlin died that evening.[1]

"The next day, Howard Fair, the uncle of the [petitioner], heard rumblings from family members that the [petitioner] was involved in the shooting. He confronted the [petitioner], who admitted to shooting Knowlin. The [petitioner] explained that he 'had a beef' with the 'kids on Nelson Street' and alleged that they had shot at him and his cousin a month earlier. The [petitioner] told his uncle that he wanted revenge. As Howard Fair recounted, the [petitioner] stated that 'he was going to get back at them, no one in particular, just said he's gonna, you know, they shot at him so he's going to go shoot back at them.' Fearing for his nephew's safety, Howard Fair encouraged the [petitioner] to turn himself in to the authorities.

[1] "Harold Wayne Carver II, the state's chief medical examiner, testified that the cause of Knowlin's death was 'a gunshot wound of the chest and abdomen.' " *State* v. *Fair*, supra, 104 Conn. App. 521 n.3.

On January 16, 2004, the [petitioner] and his uncle entered the Harford [P]olice [D]epartment. At that time, Howard Fair gave a statement implicating the [petitioner] in Knowlin's death, and the [petitioner] was arrested. The police subsequently presented a photographic array to Mims, who immediately identified the [petitioner] as the shooter. At trial, Mims testified that he had known the [petitioner] for approximately five years and that he observed the [petitioner's] face 'a whole minute' before the shooting." (Footnote in original.) Id., 521–22.

We note that, in addition to the foregoing facts, which were consistent with the state's theory of the case, there was also evidence before the jury of the following facts. On the night of the shooting, the petitioner wore a yellow, green, and red hat with fake dreadlocks attached to it. As the petitioner approached Knowlin and Mims, Mims heard someone ask the petitioner if he was "Budda." Another person replied, "no, that ain't Budda, that's Blirt." As the petitioner fired the gun, he said "bumbaclot."

When the police arrived at the scene, Sylvia Hernandez, a patrol officer for the Hartford Police Department, questioned Mims about what had occurred. Mims did not initially identify the petitioner as the shooter but told Officer Hernandez that the shooter was a black male with a medium complexion. Mims repeatedly stated that the shooter was wearing a "Jamaican hat." Officer Hernandez then asked Mims if the shooter was a Hispanic, black, or Jamaican male. Mims replied that he thought the shooter was a Jamaican male. The police then transported Mims to the police station where he provided a sworn, written statement about what happened, along with a description of the shooter.

During the course of the investigation of the shooting, the police recovered a baggie containing a black powdery substance in the driveway of 8 Clay Street, close to the location where first responders found Knowlin.

The police did not test the powder or the baggie, nor did they investigate who, if anyone, was in possession of the baggie at the time of the shooting.

On January 14 and 15, 2004, Detective Robert Davis of the Hartford Police Department received six voicemails from multiple anonymous persons who believed that the petitioner was involved in the shooting. On the basis of these voicemails, in which the callers included the petitioner's name and nickname, Detective Davis identified the petitioner as a suspect in the shooting.

On the evening of January 16, 2004, Howard Fair, accompanied by the petitioner, voluntarily went to the Hartford police station. Detective Davis had not made any attempt to locate the petitioner, nor did he request that the petitioner come to the police station. Detective Davis spoke to Howard Fair for approximately fifteen or twenty minutes before Howard Fair provided Davis with a sworn, written statement implicating the petitioner in Knowlin's death.[2]

On March 16, 2011, the petitioner, as a self-represented litigant, commenced the present habeas action. On March 6, 2012, the court appointed habeas counsel. On August 13, 2015, the petitioner, through counsel, filed a third amended petition for a writ of habeas corpus. The petitioner alleged that his confinement is unlawful because the representation afforded him by his trial counsel, Robert Meredith and Michael Isko, "was not within the range of competence displayed by lawyers with ordinary training and skill," and that,

[2] The defense presented evidence, through its cross-examination of Howard Fair, that, on January 14, 2004, the petitioner was under the influence of phencyclidine (PCP) when he confessed to shooting Knowlin. Howard Fair further testified that, on January 16, 2004, the petitioner was under the influence of PCP when he was present at the Hartford police station. Howard Fair also testified that he told the police that the petitioner was under the influence of PCP both when they arrived at the police station and when the petitioner confessed to him.

"[t]here [was] a reasonable probability that 'but for' [their] errors and omissions . . . the outcome of the petitioner's trial would have been different."[3] In his posttrial brief, the petitioner focused on the allegations that his trial counsel failed (1) "to introduce all the prior inconsistent statements of Mims regarding the description of the shooter," (2) "to offer expert testimony as to Jamaican slang to impeach Mims and point to third party culpability," (3) "to offer expert testimony regarding the effects of phencyclidine (PCP), also known as 'angel dust,' as those effects bear on diminished capacity to form requisite intent and as to the reliability of the petitioner's confessions," and (4) "to demonstrate Mims' motivation to cooperate with the police and falsely identify the petitioner as the shooter."

On July 7, 2017, and August 20, 2019, the habeas court, *Hon. Samuel S. Sferrazza*, judge trial referee, presided over the habeas trial. The petitioner called two witnesses to testify, private investigator Ken Novi and Officer Hernandez. Novi testified in relevant part about the meaning of the word "bumbaclot" and stated that it was a "Jamaican slang term." He also testified that he spoke to the petitioner during his investigation and that the petitioner spoke "Americanized English" and did not speak with a Jamaican accent. The petitioner's counsel examined Officer Hernandez,[4] in relevant part, about the description that Mims provided to her on the night of the shooting. She was unable to recall the details of Mims' statement. The petitioner's counsel asked a litany of questions about the murder investigation, to which Officer Hernandez repeatedly answered

[3] The petition also included a second count in which the petitioner asserted a violation of his confrontation rights under the United States constitution. In its memorandum of decision denying the petition, the habeas court stated that "the petitioner never discussed that claim in his posttrial brief, and the court regards that contention as abandoned." In the present appeal, the petitioner does not raise a claim related to that aspect of the court's ruling.

[4] Following the criminal trial, but before the habeas trial, Officer Hernandez changed her last name to McGrath. For the sake of consistency, we will continue to refer to her as Officer Hernandez.

that she did not remember the details of the investigation. The petitioner's counsel showed Officer Hernandez a police report that she prepared about the murder, and she testified that it did not refresh her recollection of the investigation.

On October 4, 2019, in a thorough memorandum of decision, the habeas court denied the third amended petition for a writ of habeas corpus. First, the court rejected the claim that the petitioner's trial counsel rendered deficient performance by virtue of the fact that they failed to present expert testimony concerning the effects of PCP use in an effort to undermine the reliability of the petitioner's confession to Howard Fair.[5] The court, observing that the petitioner failed to present expert testimony of such nature during the habeas trial, concluded that the petitioner failed to demonstrate what expert testimony would have been available to his trial counsel at the time of trial and, thus, had failed to demonstrate that they had acted deficiently in failing to present such evidence.

Next, the court addressed the claim that the petitioner's trial counsel rendered deficient performance in failing to impeach Mims regarding his motivation to testify untruthfully. Specifically, the petitioner argued that his trial counsel failed to establish that Mims' identification and trial testimony was influenced by his expectation of favorable treatment by the police. This argument

[5] In its memorandum of decision, the court referred to the petitioner's claim that such expert testimony could have "undermined the reliability of the petitioner's *confessions* to his uncle and the police." (Emphasis added.) Later in its decision, the court referred to the fact that "[t]he crux of the prosecution case was the petitioner's *multiple confessions* to committing the crime." (Emphasis added.) We note that there was no evidence before the jury that the petitioner provided the police with a confession. Although, during the criminal trial, the court denied the petitioner's motion to suppress statements that he had made in the presence of law enforcement, the state did not introduce any such statements in evidence. As we have explained, however, the jury had before it evidence of the petitioner's confession to his uncle, Howard Fair. We are not persuaded that this inaccuracy in the court's decision undermines its analysis.

was related to the discovery of the baggie containing a black powder by the police, near the location where first responders found Knowlin. The court stated: "Defense counsel unsuccessfully attempted to cross-examine Mims regarding whether he expected to receive some benefit in the form of the police ignoring the discovery of a baggie containing a black powder close to the victim's body . . . . The trial judge sustained the state's objection to this line of questioning because of an insufficient nexus between Mims and the baggie to support an inference of favorable treatment by the police in exchange for Mims' identification of the petitioner as the shooter.'' The court further stated: "The trial judge did allow cross-examination as to whether the police inquired of Mims about the baggie. Mims testified that the police never mentioned that discovery at all. It should be recalled that at the time the baggie was seized, Mims *refused* to disclose that he knew who shot his friend. That identification came about one week later.

"No credible evidence was adduced at the habeas trial to support the petitioner's suspicion on this point. Mims conceded he withheld pertinent information from the police on the night of the homicide. The police received [evidence concerning] the petitioner's admissions a few days later without any assistance from Mims. Mims' later identification of the petitioner was not the basis for the petitioner's arrest, but simply confirmed the veracity of the petitioner's multiple admissions to the crime.

"Also, defense counsel adequately cross-examined Detective Gregory Gorr [of the Hartford Police Department] about whether the baggie or its contents were subjected to testing or further investigation. Detective Gorr acknowledged that they were not. The court finds that the petitioner has failed to prove deficient performance as to this specification of ineffective assistance.'' (Emphasis in original.)

Next, the court addressed the petitioner's remaining allegations of deficient performance, all of which were related to his trial counsel's alleged failure to adequately impeach Mims with respect to aspects of his identification of the petitioner as the shooter. The court observed that the petitioner's arguments focused on the fact that, on the night of the shooting, Mims failed to identify the petitioner, described the shooter as a Jamaican male, and stated that the shooter was wearing a black mask. The petitioner also attached great significance to Mims' statement that the shooter had used the term "bumbaclot." The petitioner argued that if his trial counsel had presented evidence concerning the etymology of that term, it would have tended to cast doubt on the accuracy of the identification. The court rejected all of these arguments on the ground that, even if deficient performance was rendered by the petitioner's trial counsel, it did not prejudice the petitioner.

The court observed that, at the habeas trial, the petitioner presented evidence that the term "bumbaclot" was "a highly offensive Rastafarian insult" but that "[d]efense counsel [at the time of the criminal trial] never produced expert testimony as to its meaning or culture of origin. In other words, the jury was never informed that the term was Jamaican slang." The court stated: "At the criminal trial, Mims testified that he had heard the word previously, although he did not know its precise meaning. The petitioner argues that, had the jury known the term was Jamaican, it would have discredited Mims' identification of the petitioner, who is not Jamaican, and cast doubt on the petitioner's confession."

The court rejected that conclusion and stated: "Mims also testified that the shooter wore a . . . dreadlock wig and hat. That is, the shooter appeared to impersonate a person of Jamaican background. The use of a Jamaican insult is also consistent with Mims' testimony on that issue. Under the particular circumstances before

the jury in the petitioner's case, such testimony was not unequivocally exculpatory or even significantly so."

The court further stated: "Although in his testimony Mims denied that he initially described the shooter as Jamaican, the jury heard the evidence through a police witness that he had. Mims explained that he only characterized the perpetrator's hat as Jamaican and not the person wearing it. In any event, the jury knew that Mims admitted [to] deceiving the police on the night of the shooting.

"The petitioner also tried to attach importance to the fact that Mims originally described the shooter as wearing a black mask, without modifying that description as a football type mask. The court regards that omission as trivial. . . .

"Also, Mims' description of the shooter as dressed in black and of medium complexion carries little probative weight. Mims acknowledged trying to deceive the police about the fact [that] he knew the shooter. He admitted he failed to tell the police about the fake dreadlocks. His initial description was rather nondescript; no distinctive clothing; medium complexion.

"In his posttrial brief, the petitioner characterized Mims as the 'crux' of the state's case. This is an overstatement of Mims' role, although he was an important witness. The crux of the [prosecution's] case was the petitioner's multiple confessions to committing the crime. . . . Mims' testimony was *confirmatory* rather than *primary*.[6]

"There was no credible evidence proffered at the habeas trial that Mims was coached to [identify] the

[6] We interpret the court's description in this regard to reflect its belief that Mims' testimony helped to establish the certainty of what was shown by *other* inculpatory evidence that was presented by the state at the criminal trial, including the evidence of the petitioner's confession to Howard Fair.

petitioner nor that Mims even knew the police had a suspect in custody when he [selected] the petitioner's photograph as the shooter from the [photographic] array 'immediately.' " (Emphasis in original; footnote added.)

On October 11, 2019, the habeas court denied the petitioner's certification to appeal. This appeal followed.[7] Additional facts and procedural history will be set forth as necessary.

We begin by setting forth the legal principles and the standard of review relevant to this claim. "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

[7] In his petition for certification to appeal, the petitioner stated that the grounds on which he proposed to appeal were related to the habeas court's errors in (1) "denying the petitioner's claims," (2) "the assessment of prejudice," (3) "its findings," and (4) "its application of the law." He also stated that these grounds included "any issues which are unearthed after a thorough review by appellate counsel."

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*, [466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], 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* standard] 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. . . . 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. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . 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." (Citations omitted; internal quotation marks omitted.) *Anderson* v. *Commissioner of Correction*, 201 Conn. App. 1, 11–13, 242 A.3d 107, cert. denied, 335 Conn. 983, 242 A.3d 105 (2020).

Although the petitioner argues that the court improperly rejected his claim of ineffective assistance of counsel, he has, in this appeal, narrowed the specific allegations of ineffective representation on which he relies. The petitioner focuses on his argument that his trial counsel's failure to reasonably impeach Mims' identification testimony constituted deficient performance and that, "even in the face of [the petitioner's] supposed confession, properly discrediting Mims would have sufficiently undermined confidence in the verdict, such that the petitioner proved prejudice" before the habeas court. In his brief to this court, the petitioner focuses on only two claims from his third amended petition: that his trial counsel failed (1) to "utilize available evidence about the Jamaican patois word 'bumbaclot' to the advantage of the petitioner's defense" and (2) to "utilize other available evidence to support the petitioner's defense by impeaching Mims . . . ."[8] We agree with

[8] The petitioner does not raise a claim of error related to the habeas court's rejection of his claim of ineffective assistance as it relates to expert testimony concerning PCP.

We note that the petitioner also argues that he "litigated, but did not brief or argue," a claim that his trial counsel was ineffective for failing to object

the habeas court that the petitioner failed to demonstrate that he was prejudiced by the alleged deficient performance on which he relies. Accordingly, we will not address the performance prong of the *Strickland* standard.

We first address the petitioner's contention that he was prejudiced by his trial counsel's failure to produce evidence about the word "bumbaclot." Specifically, the petitioner argues that his trial counsel failed to present evidence of the word's Jamaican origin, which could have cast doubt on whether the petitioner, who is not Jamaican, was the shooter. At the habeas trial, Novi testified about the meaning of the word "bumbaclot" and its Jamaican etymology. Novi noted that, in the neighborhood where the murder occurred, "there are a lot of Jamaican restaurants, and there are . . . people of Jamaican descent there." At the criminal trial, Mims testified that the petitioner lived in a neighborhood near the location of the murder. At the criminal trial, Mims testified that he "ha[d] no idea" what the word "bumbaclot" meant but that he had heard the word before.

We agree with the habeas court that the facts to which Novi testified were unlikely to have affected the outcome of the trial. The essence of the petitioner's argument is that Novi's testimony would have led the jury to conclude that the petitioner, who is not of Jamaican descent, would have been unlikely to have used the term "bumbaclot." The petitioner's argument seems

on hearsay grounds to Howard Fair's testimony about the rumors he heard about the petitioner's involvement in the murder. He contends, "[n]evertheless, that [this] issue is relevant to this court's prejudice inquiry." The petitioner raised an argument of this nature in his third amended petition. He did not, however, discuss the claim in his posttrial brief, and the habeas court did not address the claim in its memorandum of decision. Accordingly, we cannot review the claim. See *Henderson* v. *Commissioner of Correction*, 129 Conn. App. 188, 198, 19 A.3d 705 ("[a] reviewing court will not consider claims not raised in the habeas petition or decided by the habeas court"), cert. denied, 303 Conn. 901, 31 A.3d 1177 (2011).

to rest on the faulty premise that the term at issue could be used only by a person of Jamaican descent. As the habeas court observed, however, in light of the evidence presented at the criminal trial that, at the time of the shooting, the petitioner was wearing a mask, headwear described as a "Jamaican hat," and fake dreadlocks, the jury could have inferred that the petitioner had used the Jamaican term as part of an overall attempt to conceal his identity. Thus, we agree with the habeas court that, even if the jury heard testimony about the meaning and origin of the word "bumbaclot," it is unlikely that this testimony would have affected the outcome of the trial.

We next address the petitioner's contention that he was prejudiced by his trial counsel's failure to adequately impeach Mims on the basis of Mims' prior inconsistent statements concerning the shooter and his alleged desire to avoid criminal liability stemming from the discovery by the police of the powdery substance near the location where first responders found Knowlin.[9] We begin by addressing the claim that the petitioner's trial counsel rendered ineffective assistance by failing to adequately impeach Mims with respect to his desire to avoid prosecution for the black substance. We note that during Mims' cross-examination at the criminal trial, the petitioner's counsel showed Mims a picture of the baggie and asked him to confirm that he was never charged with a crime in connection with it. The state objected to this question on relevance grounds, and, after a sidebar conference, the court directed the petitioner's counsel to rephrase the question.[10] The petitioner's counsel then asked Mims if anyone from the Hartford Police Department asked him about a substance that was found in the driveway of 8 Clay Street,

[9] The petitioner has not pointed to anything in the record that supports his assertion that Mims had a motive to cooperate with the police or even that Mims could have faced criminal liability in connection with the baggie of black powder that the police discovered.

[10] The court stated: "The question will be . . . did the police ask you about any substances that were found that day."

to which he replied "[n]o." Shortly thereafter, the petitioner's counsel cross-examined Detective Gorr, who testified that the police did not test the baggie for fingerprints or DNA. Detective Gorr also testified that the police "didn't have any reason to believe it was related to [their] primary [crime] scene" on Nelson Street.[11] As the habeas court observed, the petitioner's trial counsel did attempt to pursue a line of inquiry related to Mims' motivation to cooperate with the police but abandoned this strategy when it became clear that the police did not connect the baggie to Mims and, therefore, that he never faced criminal liability in connection with its discovery. As the habeas court correctly observed, there simply was no credible evidence presented in support of the petitioner's theory at the criminal or habeas trials. Accordingly, the petitioner failed to demonstrate that any further inquiry into this subject by his trial counsel was likely to have affected the jury's assessment of Mims' testimony.

Additionally, the petitioner is unable to demonstrate that he was prejudiced by his trial counsel's alleged failure to impeach Mims concerning the fact that he made prior inconsistent statements to the police concerning the shooter. As the habeas court correctly observed, Mims testified at the criminal trial that, on the night of the shooting, he had deceived the police by refusing to identify the petitioner as the shooter. Thus, despite being provided with evidence that Mims was initially deceptive in terms of identifying the petitioner, the jury found the petitioner guilty of the crimes with which he was charged.

We also agree with the habeas court that the petitioner's focus on efforts made by his trial counsel to undermine the accuracy of Mims' identification of him as the

[11] The evidence reflects that Knowlin was shot in front of 20 Nelson Street, which was the primary crime scene. He then ran with Mims and collapsed near 8 Clay Street, which is where the baggie was found.

shooter overlooks the fact that, independent of Mims' testimony, the state presented proof beyond a reasonable doubt of his guilt. As the habeas court aptly observed, the police had learned about the petitioner's involvement in the murder before Mims identified him as the shooter. There was evidence before the jury that Detective Davis first learned that the petitioner was a suspect from the voicemails he received on January 14 and 15, 2004. On January 16, 2004, the petitioner voluntarily arrived at the police station with Howard Fair, who provided a statement that the petitioner had confessed to him about his role in the shooting. The jury heard ample testimony from Howard Fair about the petitioner's confession. Only after Detective Davis received these anonymous tips and Howard Fair's statement did he present Mims with a photographic array that included a photograph of the petitioner. Mims identified the petitioner from this photographic array within a matter of seconds.[12]

We agree with the habeas court that Mims' testimony was an important aspect of the state's case, yet, in light of the totality of the evidence available to the jury, we are not persuaded that the outcome of the case would have been different had the petitioner's trial counsel impeached Mims in the manner prescribed by the petitioner. Accordingly, we conclude that the petitioner failed to demonstrate that he was prejudiced by his trial counsel's performance.

For the foregoing reasons, we conclude that the petitioner has failed to demonstrate that the issues raised in his petition for certification to appeal are debatable among jurists of reason, that the court could resolve the issues in a different manner, or that the questions

[12] The habeas court stated: "There was no credible evidence proffered at the habeas trial that Mims was coached to [identify] the petitioner nor that Mims even knew the police had a suspect in custody when he [selected] the petitioner's photograph as the shooter from the [photographic] array 'immediately.' "

are adequate to deserve encouragement to proceed further. Thus, the petitioner has failed in his burden of demonstrating that the court's denial of his petition for certification to appeal reflected an abuse of discretion.

The appeal is dismissed.

In this opinion the other judges concurred.

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NOTICES

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2021–2022 court year is as follows: September 8, 2021; October 12, 2021; November 15, 2021; December 13, 2021; January 10, 2022; February 14, 2022; March 21, 2022; and April 25, 2022.

Carl D. Cicchetti
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2021–2022 court year is as follows: September 1, 2021; October 4, 2021; November 8, 2021; January 3, 2022; January 31, 2022; February 28, 2022; April 4, 2022; and May 9, 2022.

Carl D. Cicchetti
Chief Clerk

Docket and Assignment Posting Dates for Supreme and Appellate 2021–2022 Court Years

Docket and case assignment information is available on the Judicial Branch website and at http://appellateinquiry.jud.ct.gov. The electronic posting on the Judicial Branch website is the official notice of the dockets and assignments except for incarcerated self-represented parties and individuals who have an exemption from e-filing who will continue to receive notice by mail. See Practice Book sections 69-1 and 69-3. Notice of the cases the Appellate Court determines should be considered onthe court's motion calendar for dismissal or sanction will also be by mail. The information below provides docket and assignment posting dates for both courts for the 2021 – 2022 court year.

Supreme Court Docket	**Information available on or about**
First Term Docket	Posted to the website June 28, 2021
Second Term Docket	Posted to the website August 20, 2021
Third Term Docket	Posted to the website September 24, 2021
Fourth Term Docket	Posted to the website October 25, 2021
Fifth Term Docket	Posted to the website November 29, 2021
Sixth Term Docket	Posted to the website January 6, 2022
Seventh Term Docket	Posted to the website February 7, 2022
Eighth Term Docket	Posted to the website March 14, 2022
Supreme Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website July 29, 2021
Second Term Assignment	Posted to the website September 16, 2021
Third Term Assignment	Posted to the website October 15, 2021
Fourth Term Assignment	Posted to the website November 19, 2021
Fifth Term Assignment	Posted to the website December 23, 2021
Sixth Term Assignment	Posted to the website January 27, 2022
Seventh Term Assignment	Posted to the website March 2, 2022
Eighth Term Assignment	Posted to the website April 8, 2022
Appellate Court Docket	**Information available on or about**
First Term Docket	Posted to the website July 13, 2021
Second Term Docket	Posted to the website August 23, 2021
Third Term Docket	Posted to the website September 28, 2021
Fourth Term Docket	Posted to the website November 9, 2021
Fifth Term Docket	Posted to the website December 14, 2021
Sixth Term Docket	Posted to the website January 20, 2022
Seventh Term Docket	Posted to the website February 28, 2022
Eighth Term Docket	Posted to the website April 4, 2022

. . . *continued*

Appellate Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website August 13, 2021
Second Term Assignment	Posted to the website September 21, 2021
Third Term Assignment	Posted to the website October 26, 2021
Fourth Term Assignment	Posted to the website December 7, 2021
Fifth Term Assignment	Posted to the website January 13, 2022
Sixth Term Assignment	Posted to the website February 17, 2022
Seventh Term Assignment	Posted to the website March 25, 2022
Eighth Term Assignment	Posted to the website April 28, 2022