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particular defense strategy—something generally obtained at the habeas trial through the testimony of trial counsel or someone directly familiar with her strategy—was utterly lacking. Ordinarily, such evidence is crucial to meet the high hurdle imposed on a petitioner to show that his counsel's exercise of professional judgment fell outside the wide range considered competent for constitutional purposes. See *O'Neil* v. *Commissioner of Correction*, 142 Conn. App. 184, 190–91, 63 A.3d 986 (lack of testimony by defense counsel about strategy was factor in determining petitioner failed to meet burden of demonstrating deficient performance), cert. denied, 309 Conn. 901, 68 A.3d 656 (2013). Like the claim of ineffective assistance regarding self-defense, because the petitioner bears the burden of demonstrating that counsel's representation was deficient, the habeas court was required to consider whether Polan's decision not to pursue a formal third-party culpability instruction might be viewed as a reasonable strategic decision under the facts and circumstances of this case as viewed from the position of counsel at the time of the decision. The habeas court failed to conduct this inquiry and made no relevant factual findings.

To summarize, we agree with the respondent that the habeas court, in analyzing whether Polan's performance fell outside the wide range of competent performance, failed affirmatively to entertain whether Polan properly had weighed the pros and cons of various trial strategies and chose to defend the petitioner in a manner different than the strategy the habeas court thought she should have pursued. Although the death of counsel arguably made the petitioner's case more difficult to prove than it might otherwise have been, that unfortunate reality does not lessen the petitioner's significant burden. Because the petitioner was unable, due to a lack of evidence, to negate all possibility that Polan engaged in a reasonable, albeit only partially successful, defense strategy on the record available, he failed to meet his

burden and the habeas court should have denied his petition for a writ of habeas corpus.

The judgment is reversed and the case is remanded with direction to deny the petition for a writ of habeas corpus.

In this opinion the other judges concurred.

MICHAEL DEVINE, ADMINISTRATOR (ESTATE OF TIMOTHY DEVINE) *v.* LOUIS FUSARO, JR., ET AL.* (AC 42164)

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

Syllabus

The plaintiff administrator of the estate of the decedent, D, sought to recover damages from the defendants, four members of the tactical unit of the State Police, for the wrongful death of D following his suicide after a standoff with law enforcement on certain public property in Groton. The plaintiff's complaint alleged that, in response to a Groton police captain's request for the assistance of the tactical unit, the defendants arrived at the scene of the standoff, and, after several hours of unsuccessful negotiations with D, who was suicidal and armed with a handgun, they used less than lethal ammunition on him. D then shot himself in the head and died as a result of the gunshot. The trial court granted the defendants' motion to dismiss on the ground that the action was barred by the doctrine of sovereign immunity. In reaching its decision, the court determined that the wrongful death action, as alleged in the complaint, satisfied the four criteria of the test set forth in *Spring* v. *Constantino* (168 Conn. 563), and, therefore, it was brought against the defendants in their official, rather than individual, capacities. On the plaintiff's appeal to this court, *held* that the trial court properly granted the defendants' motion to dismiss the plaintiff's action on the ground of sovereign immunity: contrary to the plaintiff's contention, the four criteria of the *Spring* test were satisfied, and, therefore, the defendants were sued in their official, rather than their individual, capacities, as the defendants were state officials, the action against them concerned a matter in which they were representing the state and acting in the scope of their official police duties, the state was the real party in interest because the damages sought by the plaintiff were premised entirely on injuries alleged to have been caused by the official acts of the defendants, and a judgment against the defendants would impact

* The plaintiff's motion for reconsideration was granted by this court on August 5, 2020. This opinion has been superseded by *Devine* v. *Fusaro*, 205 Conn. App. 554, A.3d (2021).

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* MICHAEL J. MARSALA (SC 20249)

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

Syllabus

Convicted, after a jury trial, of the crime of criminal trespass in the first degree, the defendant appealed to the Appellate Court, claiming that the trial court improperly declined to instruct the jury on the infraction of simple trespass as a lesser included offense. The defendant's conviction stemmed from his conduct in entering and panhandling on shopping mall property despite having been previously banned from the property by mall security officers and having been told by a private duty police officer, S, that he would be arrested for trespassing if he entered the property again. At trial, the defendant claimed that the first degree criminal trespass statute (§ 53a-107 (a) (1)) requires that an order not to enter the property be communicated "by the owner of the premises or other authorized person" and that the state failed to prove that S was authorized to communicate such an order to the defendant. Following the close of evidence, the defendant requested a jury instruction on simple trespass as a lesser included offense of first degree criminal trespass, which the trial court denied. The defendant appealed to the Appellate Court, which affirmed the judgment of conviction. On the granting of certification, the defendant appealed to this court, claiming that the Appellate Court incorrectly determined, for purposes of *State* v. *Whistnant* (179 Conn. 576), that there was no evidence that could have permitted the jury to find him not guilty of first degree criminal trespass but also find him guilty of simple trespass. Specifically, the defendant claimed that the jury could have agreed with him that the state failed to prove that mall security personnel and S were authorized to ban him from mall property, and thus have found him not guilty of first degree criminal trespass, but nonetheless have found that the state proved that the defendant had been told multiple times that he was not allowed to enter the property to panhandle and thus have found him guilty of simple trespass. *Held* that the Appellate Court correctly concluded that the trial court properly declined the defendant's request to instruct the jury on simple trespass as a lesser included offense of first degree criminal trespass because the prerequisites set forth in *Whistnant* for obtaining a jury instruction on a lesser included offense were not satisfied; the jury could not consistently have found the defendant not

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

guilty of first degree criminal trespass but guilty of simple trespass, as required by *Whistnant*, because the element of criminal and simple trespass requiring proof that the defendant knew he was not licensed or privileged to enter the property necessarily requires proof that he was not in fact licensed or privileged to enter, and, if the jury accepted the defendant's claim that the state had failed to prove that the security officers and S were authorized to ban him from entering the mall, there would have been no evidence permitting the jury to find that his entry at the time of his arrest was unlawful, an element of simple trespass.

Argued February 20—officially released September 16, 2020**

Procedural History

Substitute information charging the defendant with the crime of criminal trespass in the first degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, and tried to the jury before *Markle*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Alvord*, *Moll* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Laila M. G. Haswell, senior assistant public defender, for the appellant (defendant).

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, *Matthew R. Kalthoff*, assistant state's attorney, and *Laurie N. Feldman* and *Brett R. Aiello*, deputy assistant state's attorneys, for the appellee (state).

Opinion

MULLINS, J. In this certified appeal, the defendant, Michael J. Marsala, appeals from the judgment of the Appellate Court affirming his judgment of conviction, rendered after a jury trial, for criminal trespass in the

** September 16, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

first degree in violation of General Statutes § 53a-107.[1] He challenges the Appellate Court's conclusion that the trial court properly declined to instruct the jury on the infraction of simple trespass; see General Statutes § 53a-110a;[2] as a lesser included offense of criminal trespass in the first degree. Because we agree with the Appellate Court's conclusion that the prerequisites set forth in *State* v. *Whistnant*, 179 Conn. 576, 427 A.2d 414 (1980), for obtaining a jury instruction on a lesser included offense were not satisfied in the present case,[3] we affirm the judgment of the Appellate Court.[4]

The record reveals the following relevant facts, which the jury reasonably could have found, and procedural

[1] General Statutes § 53a-107 provides in relevant part: "(a) A person is guilty of criminal trespass in the first degree when: (1) Knowing that such person is not licensed or privileged to do so, such person enters or remains in a building or any other premises after an order to leave or not to enter personally communicated to such person by the owner of the premises or other authorized person . . . ."

[2] General Statutes § 53a-110a provides: "(a) A person is guilty of simple trespass when, knowing that such person is not licensed or privileged to do so, such person enters or remains in or on any premises without intent to harm any property.

"(b) Simple trespass is an infraction."

[3] Under *State* v. *Whistnant*, supra, 179 Conn. 576, "[a] defendant is entitled to an instruction on a lesser [included] offense if . . . the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant [not guilty] of the greater offense but guilty of the lesser." Id., 588.

[4] Because we conclude that the defendant failed to satisfy *Whistnant*, we do not reach the state's alternative ground for affirmance, in which the state contends that the defendant would not have been entitled to an instruction on the infraction of simple trespass even if he had satisfied *Whistnant* because infractions are categorically prohibited from being submitted to the jury as lesser included offenses of crimes.

history. The Connecticut Post Mall of the Centennial Collection, formerly known as the Westfield Connecticut Post (mall), is located at 1201 Boston Post Road in Milford (mall property). At all relevant times, the mall was owned by the Westfield Corporation (Westfield). Westfield contracted with an independent entity, Professional Security Consultants (PSC), to provide security services on mall property. During the holiday shopping season, November through January, the mall hires Milford police officers to assist PSC with security and to conduct traffic control. While working these "private duty" jobs, the officers are essentially part of PSC's security staff; they report directly to PSC and assist PSC employees with enforcing the mall's security policies. For their work on these private duty jobs, the officers are paid by the city of Milford, which is, in turn, reimbursed by the mall.

By November, 2015, the defendant was well known to PSC. He was frequently seen in mall parking lots "panhandling," i.e., asking customers for money. Panhandling is prohibited on mall property. Prior to November 28, 2015, PSC security official Wilfred Castillo received ten to fifteen complaints about the defendant's panhandling. On several of these occasions, Castillo confronted the defendant and told him that "panhandling isn't allowed on [mall] property, and that he would have to leave." In response to Castillo's directives, the defendant would leave the mall property without incident.

PSC also had a "ban notice," dated July 9, 2015, on file in its office for the defendant. The ban notice stated that the defendant had been banned from mall property for one year. Under PSC policy, ban notices can be reviewed and approved (or potentially reversed) by PSC's director of security, Thomas Arnone, or by Arnone's assistant, as well as by the general manager

of the mall, Dan Kiley.[5] Based on the existence of this ban notice, the defendant was not permitted to be on mall property.

On November 27, 2015, Officer Joanna Salati of the Milford Police Department was working a private duty job when she saw the defendant panhandling on mall property. She contacted PSC on her radio and confirmed that the defendant previously had been banned. Salati approached the defendant and told him that "he had to leave . . . because he was banned from being on mall property" and that "the next time he's caught on mall property, he's going to be arrested" for trespassing. Salati decided not to arrest the defendant for trespassing at that time because "it was too busy." The defendant left the property in response to Salati's directive.

The following day, November 28, 2015, Salati again saw the defendant on mall property "approaching customers." When the defendant saw Salati walking toward him, he began walking "quickly" away from her. Salati eventually caught up with the defendant and arrested him.

The defendant was charged with criminal trespass in the first degree in violation of § 53a-107 (a) (1). As the basis for this charge, the state alleged, in an amended long form information, that, "on November 28, 2015 . . . [the defendant], knowing that he was not licensed or privileged to do so, did enter . . . [mall property] after having been directed not to return to the property by authorized mall security personnel and/or authorized

[5] There was no evidence presented at the defendant's trial about the circumstances that led to this purported July 9, 2015 one year ban. The ban notice was submitted as an exhibit for identification purposes only, and neither party introduced any evidence as to who had issued the ban, whether the duration of the ban was communicated to the defendant, or whether the decision to issue the ban had been reviewed and approved by Kiley or anyone else outside of PSC.

officers of the Milford Police Department . . . .'' The defendant elected a trial by jury.

At trial, the parties' dispute centered around the element of criminal trespass in the first degree that requires the defendant's unlawful entry to have occurred ''after an order to leave or not to enter [was] personally communicated to [the defendant] by the owner of the premises or other authorized person . . . .'' General Statutes § 53a-107 (a) (1). As proof that such an order had been communicated to the defendant prior to his entry onto mall property on November 28, 2015, the state relied on Salati's testimony that, on November 27, 2015, she told the defendant that ''he had to leave . . . because he was banned from being on mall property'' and that ''the next time he's caught on mall property, he's going to be arrested'' for trespassing.

The crux of the defense was that § 53a-107 (a) (1) requires the order not to enter to be communicated ''by the owner of the premises or other *authorized* person,'' and the state failed to prove that Salati had been authorized to communicate such an order to the defendant. (Emphasis added.) The defendant pointed out that the state called no witnesses from Westfield to testify about the authority it had granted to PSC or the private duty officers working for PSC to ban individuals from entering mall property. The defendant also introduced into evidence a document titled ''Enforcement—Banning Procedures: Use of Physical Force'' and subtitled ''Lesson Plan 9'' (lesson plan) that PSC's corporate office had prepared for purposes of training PSC's staff. The lesson plan provides, under the heading of ''Temporary Suspension'': ''Suspend the privilege of being on the property for an amount of time that is determined by the severity of the incident and local and state ordinances. Any suspension for more than [twenty-four] hours must [be] approved [by] the [c]enter [m]anager.'' The lesson plan further provides, under the heading of

"Reason to [S]uspend": "1. Only those individuals who have committed a crime at [the] [s]hopping [c]enter will be considered for banning and as in compliance with local, state and federal ordinances. 2. The [d]irector of [s]ecurity, [a]ssistant [d]irector of [s]ecurity or [s]ecurity [s]upervisor can only temporarily ban suspects for the remainder of the business day."

Relying on the lesson plan, defense counsel argued during closing argument that the state never proved that Westfield had authorized PSC to ban violators of the panhandling prohibition from mall property for one year (as reflected in the July 9, 2015 ban notice), or for any period of time longer than the remainder of the business day. Defense counsel further argued that this policy extended to Salati because Salati was working in a private capacity, assisting PSC's staff, and that her November 27, 2015 order to stay off mall property indefinitely exceeded her authority as set forth in the lesson plan.

The state, for its part, introduced evidence that PSC, and by extension Salati, did indeed have authority to ban people from mall property. Arnone, PSC's director of security, testified that PSC was authorized to ban people for periods of six months or one year and that PSC issued between 360 and 370 such bans per year. Arnone further testified that the lesson plan was not a "complete statement" of PSC's banning authority and that he had a verbal understanding with Kiley, the mall's general manager, whereby PSC's banning authority extended beyond what was set forth in the lesson plan.

Following the close of evidence, the defendant filed a written request for a jury instruction on the infraction of simple trespass, which he asserted was a lesser included offense of criminal trespass in the first degree.[6] The state opposed the instruction on the grounds that

[6] The defendant requested the following instruction: "If you have unanimously found the defendant not guilty of the crime of criminal trespass in

(1) the second prong of *Whistnant* was not satisfied; see footnote 3 of this opinion; because simple trespass requires proof of an element that criminal trespass in the first degree does not, namely, that the defendant enter or remain on the premises "without intent to harm any property"; General Statutes § 53a-110a (a); and (2) infractions cannot be submitted to the jury as lesser included offenses of crimes. The trial court agreed with both of the state's arguments and denied the defendant's request for the instruction.

The jury subsequently found the defendant guilty of criminal trespass in the first degree. The court imposed a sentence of one year incarceration, execution suspended after four months, followed by two years of conditional discharge.

The defendant appealed to the Appellate Court, claiming that the trial court should have instructed the jury on the infraction of simple trespass as a lesser included offense. See *State* v. *Marsala*, 186 Conn. App. 1, 2–3, 7, 198 A.3d 669 (2018). In rejecting this claim, the Appellate Court concluded that the defendant's requested instruction failed the third and fourth elements of *Whistnant*; see footnote 3 of this opinion; because there was no reasonable view of the evidence

the first degree, you shall then consider the lesser offense of simple trespass. Do not consider the lesser offense until you have unanimously acquitted the defendant of the greater offense.

"A person is guilty of simple trespass when, knowing that he is not licensed or privileged to do so, he enters any premises without intent to harm any property. For you to find the defendant guilty of simple trespass, the state must prove the following elements beyond a reasonable doubt: first that he entered the premises. Premises is not defined in the law so it has the common meaning. The second element is that he entered knowing he was not licensed or privileged to do so. To be licensed or privileged the defendant must have either consent from the owner of the premises or other authorized person or have some other right to be on the premises. A person acts knowingly with respect to conduct when he is aware that his conduct is of such nature or such circumstances exist." (Internal quotation marks omitted.) *State* v. *Marsala*, 186 Conn. App. 1, 5–6, 198 A.3d 669 (2018).

that permitted the jury consistently to find the defendant not guilty of criminal trespass in the first degree but guilty of simple trespass.[7] See *State* v. *Marsala*, supra, 21. More specifically, the Appellate Court determined that, "if the jury was to reject the evidence presented by the state that the defendant received an order not to enter from an authorized person"; id., 20; the jury necessarily also would have had to find that the state failed to prove the "knowledge" element of simple trespass because "there was no other evidence, introduced by either the state or the defendant, from which the jury could have found that the defendant knew he was not privileged to enter or remain on mall property." Id., 19–20. Accordingly, the Appellate Court concluded that the defendant was not entitled to an instruction on simple trespass as a lesser included offense of criminal trespass in the first degree and affirmed his conviction.[8] Id., 21. This certified appeal followed.[9]

[7] There was no dispute that the defendant had made a proper request for the instruction and, therefore, that the first element of *Whistnant* was satisfied. See *State* v. *Whistnant*, supra, 179 Conn. 588. With respect to the second element, which requires a showing that "it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser"; id.; the Appellate Court concluded that this element was satisfied because simple trespass does not require proof of an element that criminal trespass in the first degree does not. See *State* v. *Marsala*, supra, 186 Conn. App. 9–10. Contrary to the trial court's determination, the Appellate Court concluded that the "without intent to harm any property" language of the simple trespass statute; General Statutes § 53a-110a (a); is not an element of the offense that the state must prove beyond a reasonable doubt. *State* v. *Marsala*, supra, 9–10. The state has not challenged this aspect of the Appellate Court's decision on appeal to this court.

[8] The Appellate Court did not reach the state's alternative ground for affirmance that infractions can never be submitted to the jury as lesser included offenses of crimes. See *State* v. *Marsala*, supra, 186 Conn. App. 8 n.8.

[9] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court [correctly] conclude that the defendant was not entitled to an instruction on the infraction of simple trespass as a lesser included offense of criminal trespass in the first degree?" *State* v. *Marsala*, 330 Conn. 964, 199 A.3d 1079 (2019).

The defendant claims that the Appellate Court incorrectly determined, for purposes of the third and fourth prongs of *Whistnant*, that there was no evidence that permitted the jury to consistently find him not guilty of criminal trespass in the first degree but guilty of simple trespass. Specifically, the defendant argues that the jury could have agreed with him that the state failed to prove that PSC and Salati were authorized to ban him from mall property, and thus found him not guilty of criminal trespass in the first degree, but nonetheless found that the state proved that the defendant had been told multiple times that he was not allowed to enter the property to panhandle. The defendant also asserts that the jury could have credited the testimony from Salati that the defendant tried to leave the property when Salati saw him on the day of the incident. The defendant contends that this evidence provided the jury with an independent basis to find, for purposes of the simple trespass statute, that the defendant knew he was not licensed or privileged to be panhandling on mall property.

The state responds that, under the facts of this case, if the jury found that the state had failed to prove that PSC and Salati were authorized to exclude the defendant from mall property, it could not then have found that the defendant knew he was not permitted on the property on November 28, 2015. The state emphasizes that, in order to establish that the defendant knew his entry was unlawful for purposes of simple trespass, it was required to prove not just "the defendant's mere *belief*" that his entry was unlawful, but that it was *in fact* unlawful. (Emphasis in original.) The state argues that, if the jury found that the state never proved that PSC and Salati were authorized to ban the defendant, there was no other evidence in the record upon which the jury could have found that he had in fact been banned and, therefore, that his entry on November 28, 2015, was unlawful.

We note at the outset that, as the state's brief acknowledges, the element of criminal and simple trespass requiring proof that the defendant knew he was not licensed or privileged to enter the property necessarily requires proof that he was not in fact licensed or privileged to enter. See *State* v. *Harper*, 167 Conn. App. 329, 338, 143 A.3d 1147 (2016) ("to prove that the defendant knew that he did not have a license or privilege to be at [the property], the state was necessarily required to prove that, in fact, he did not have such a right or privilege"); see also General Statutes § 53a-3 (12) ("[a] person acts 'knowingly' with respect to . . . a circumstance described by a statute defining an offense when he is aware . . . *that such circumstance exists*" (emphasis added)). We agree with the state that, if the jury had found that the state never proved that PSC and Salati were authorized to ban the defendant, there was no other evidence in the record upon which the jury could have found that the defendant did not have license or privilege to enter mall property on November 28, 2015. Accordingly, we conclude that the defendant's requested instruction fails the fourth element of *Whistnant*.[10]

We begin with the general principles governing our review. The defendant's claim that he had improperly been denied an instruction on a lesser included offense "requires us, on appeal, to review the facts in the light most favorable to the defendant. . . . Whether one offense is a lesser included offense of another presents a question of law. . . . Accordingly, our review is de novo. . . .

"The applicable legal principles are well established. A defendant is entitled to an instruction on a lesser

[10] We therefore need not address the third element of *Whistnant* in this case. We note, however, that this court has observed in other cases that, "[d]espite being conceptually distinct parts of the *Whistnant* formulation, the third and fourth prongs are subject to the same evidentiary analysis . . . [and, therefore, can be analyzed] simultaneously." (Internal quotation marks omitted.) *State* v. *Jones*, 289 Conn. 742, 762, 961 A.2d 322 (2008).

[included] offense if . . . the following conditions are met: (1) an appropriate instruction is requested by either the state or the defendant; (2) it is not possible to commit the greater offense, in the manner described in the information or bill of particulars, without having first committed the lesser; (3) there is some evidence, introduced by either the state or the defendant, or by a combination of their proofs, which justifies conviction of the lesser offense; and (4) the proof on the element or elements which differentiate the lesser offense from the offense charged is sufficiently in dispute to permit the jury consistently to find the defendant [not guilty] of the greater offense but guilty of the lesser. *State* v. *Whistnant*, [supra, 179 Conn. 588]." (Citations omitted; internal quotation marks omitted.) *State* v. *Jones*, 289 Conn. 742, 758–59, 961 A.2d 322 (2008). Because we conclude in the present case that the defendant's requested instruction fails the fourth element of *Whistnant*, we limit our analysis to that element.

This court previously elaborated on the fourth element of *Whistnant* and noted that "[t]he fourth prong of *Whistnant* specifically requires that the 'proof' be 'sufficiently in dispute.' " *State* v. *Manley*, 195 Conn. 567, 579, 489 A.2d 1024 (1985). This court further explained: "Such proof is sufficient when it is marked by [a] quality [such as] to meet with the demands, wants or needs of a situation . . . . In the *Whistnant* context, therefore, the proof is sufficiently in dispute [when] it is of such a factual quality that would permit the finder of fact reasonably to find the defendant guilty [of] the lesser included offense. This requirement serves to prevent a jury from capriciously convicting on the lesser included offense when the evidence requires either conviction on the greater offense or acquittal. . . . Moreover, the trial court, in making its determination whether the proof is sufficiently in dispute, [although] it must carefully assess all the evidence whatever its source, is not required to put the case to the jury on a basis [of a

lesser included offense] that essentially indulges and even encourages speculations as to [a] bizarre reconstruction [of the evidence]." (Citations omitted; internal quotation marks omitted.) Id., 579–80.

We therefore begin by identifying the element that differentiates simple trespass from criminal trespass in the first degree. We then determine whether, in light of the evidence introduced at trial, that element was sufficiently in dispute so as to permit the jury consistently to have found the defendant not guilty of criminal trespass in the first degree but guilty of simple trespass.

"A person is guilty of simple trespass when, knowing that such person is not licensed or privileged to do so, such person enters or remains in or on any premises . . . ." General Statutes § 53a-110a (a). To obtain a conviction for criminal trespass in the first degree, the state must prove these same elements, as well as the additional element that the defendant's unlawful entry occurred "after an order to leave or not to enter [is] personally communicated to [the defendant] by the owner of the premises or other authorized person . . . ." General Statutes § 53a-107 (a) (1); see *State* v. *Kinchen*, 243 Conn. 690, 703, 707 A.2d 1255 (1998) (criminal trespass in first degree under § 53a-107 (a) (1) requires proof "(1) that the defendant, knowing he was not privileged or licensed to do so, entered or remained in [or on the premises]; and (2) that the defendant committed that act after an order to leave or not to enter had been personally communicated to him by the owner or other authorized person" (internal quotation marks omitted)).

As previously noted, the state attempted to prove this element of criminal trespass in the first degree by introducing Salati's testimony that she told the defendant on November 27, 2015, that "he had to leave . . . because he was banned from being on mall property" and that "the next time he's caught on mall property,

he's going to be arrested" for trespassing. The defendant did not dispute that Salati had said this to him on November 27, 2015. Instead, he attempted to place this element in dispute by establishing reasonable doubt as to whether Salati was an "authorized person," within the meaning of § 53a-107 (a) (1), to communicate such an order to him.

As support for this defense, the defendant introduced the lesson plan into evidence. That document provided that "[a]ny suspension for more than [twenty-four] hours must [be] approved [by] the [c]enter [m]anager"; "[o]nly those individuals who have committed a crime . . . will be considered for banning"; and PSC personnel "can only temporarily ban suspects for the remainder of the business day." Defense counsel relied on the lesson plan to argue that PSC and, by extension, Salati were authorized to ban violators of the panhandling prohibition only for the remainder of the business day and, therefore, that Salati's November 27, 2015 order never to return exceeded her authority.

Even if this evidence placed in dispute the differentiating element of criminal trespass in the first degree, it would not have provided the jury with a basis to find the defendant not guilty of that charge but still find him guilty of simple trespass. This is because, under the unique circumstances of the present case, if the jury credited this defense and found that the state failed to prove that PSC and Salati were authorized to ban the defendant from mall property for longer than the remainder of the business day, there was no other evidence in the record to permit the jury rationally to find that, when the defendant entered mall property the next day, on November 28, 2015, he was not "licensed or privileged to do so . . . ." General Statutes § 53a-110a (a). Our conclusion in this regard is illuminated by the state's theory of guilt at trial.

The only theory advanced by the state for why the defendant did not have license or privilege to enter mall

property on November 28, 2015, was that he previously had been banned from the property. The state never pursued the theory that the defendant's entry was unlawful because he intended to engage in the unauthorized activity of panhandling.[11] It is well settled that the state cannot obtain a conviction based on a theory that it never pursued at trial. See *State* v. *Carter*, 317 Conn. 845, 853–54, 120 A.3d 1229 (2015); *State* v. *Fourtin*, 307 Conn. 186, 208, 211, 52 A.3d 674 (2012). Accordingly, the

[11] The state charged the defendant with trespass based on the fact that he "enter[ed]" mall property after having been ordered not to do so. Throughout the trial, the state's focus in establishing that the entry was unlawful was on the fact that the defendant previously had been banned. When defense counsel objected to the prosecutor's attempt to elicit evidence of the defendant's prior instances of panhandling on mall property on the ground that such evidence was unduly prejudicial, the prosecutor explained the probative value of that evidence: "Again, one of the elements of this particular crime is that the defendant unlawfully entered the property. The entry was unlawful because he had been banned from the property. That ban was necessary because of the solicitation."

The prosecutor also elicited from Arnone and Castillo the fact that, based on the July 9, 2015 ban notice stating that the defendant had been banned for one year, the defendant was not "permitted to be on mall property" when he entered on November 28, 2015. Finally, after eliciting from Castillo that, on the prior occasions when the defendant was found panhandling, Castillo would simply tell him "to leave" mall property because panhandling was not allowed, the prosecutor then elicited the following:

"[The Prosecutor]: If you could just look up when you're done. Does [the ban notice] refresh your recollection as to what date the defendant was banned from mall property?

"[Castillo]: Yeah. Yes, it was July 9, 2015.

"[The Prosecutor]: And for how long was that ban in place?

"[Castillo]: One year.

"[The Prosecutor]: *How does it change the status of an individual on mall property once they have been banned? How does that change your interaction with him?*

"[Castillo]: *My interaction is different because he is trespassing, and our policy is to contact police when there is a trespasser.*" (Emphasis added.)

Nor did the prosecutor contend during closing argument that the defendant's entry was unlawful because he intended to panhandle. Indeed, the prosecutor emphasized: "[The defendant] may not have liked the fact that he wasn't allowed to be on [mall] property, and, in fact, we don't have to prove in this case whether the reasons that he wasn't allowed on mall property were proper or *even what those reasons were*." (Emphasis added.) Finally, consistent with the state's theory of unlawful entry, the trial court instructed the jury that it must determine whether the defendant "unlawfully *entered*" mall property. (Emphasis added.)

state could have proved the "unlawful entry" element of both criminal trespass in the first degree and simple trespass only by establishing that a valid ban was in fact in place against the defendant on November 28, 2015, so as to render his entry onto mall property on that date unlawful. See, e.g., *State* v. *Fourtin*, supra, 211 (determination of whether evidence was sufficient to sustain conviction must be made "in light of the state's theory of guilt at trial").

In light of the evidence introduced at trial, however, if the jury were to find that the state failed to prove that PSC and Salati were authorized to ban the defendant for longer than the rest of the business day, the jury could not consistently then have found that there was a valid ban in place against the defendant when he entered mall property on November 28, 2015. The jury would have been required to find that the July 9, 2015 ban notice, which purported to ban the defendant for one year, was invalid. There was no evidence that the ban had been issued by anyone other than an employee of PSC. The ban notice was submitted as an exhibit for identification purposes only, and neither party introduced any evidence as to who had issued the ban or whether the issuer had authority to do so. Although Arnone testified that ban notices are generally submitted to Kiley, the mall's general manager, to be "finalized," there was no evidence that this particular ban notice was submitted for review, or ever approved, by Kiley.

Therefore, there was no way that the jury could have credited the defendant's defense that bans issued by PSC personnel were not authorized beyond the business day on which they were issued, yet also have found that the July 9, 2015 ban notice was valid more than four months later, on November 28, 2015, without resorting to improper speculation as to whether it had been either issued or approved by someone outside of PSC with authority to do so. See *State* v. *Manley*, supra,

195 Conn. 579–80 (*Whistnant* does not permit instruction to be given "on [an evidentiary] basis . . . that essentially indulges and even encourages speculations" (internal quotation marks omitted)). Likewise, insofar as Salati's communication to the defendant on November 27, 2015, could be construed as its own independent ban from mall property, any such ban (under the defendant's theory) would no longer have been in effect when the defendant entered mall property the next day on November 28, 2015.

Accordingly, if the jury accepted the defendant's defense that the state failed to prove that PSC and Salati were authorized to ban him indefinitely, there was no evidence permitting the jury to find that his entry on November 28, 2015, was unlawful. Because unlawful entry is an element of simple trespass, the jury could not consistently have found the defendant not guilty of criminal trespass in the first degree but guilty of simple trespass, as required by the fourth element of *Whistnant*. Put another way, the dispute at trial was not about the differentiating element of criminal trespass in the first degree—whether an order not to enter had been personally communicated to the defendant by an authorized person—but the common element of whether the defendant's entry was unlawful. Under such circumstances, the jury cannot rationally convict *only* on the greater offense, and no lesser included instruction is warranted. See *State* v. *Langley*, 128 Conn. App. 213, 233–34, 16 A.3d 799 (defendant was not entitled to instruction on criminally negligent homicide as lesser included offense of murder or of manslaughter in first degree, when evidence permitted jury to find either that defendant intentionally lit victim on fire or had "nothing to do whatsoever with [his] injuries," because "[s]uch competing theories do not revolve around the [differentiating] element of intent but the defendant's culpable conduct more generally"), cert.

denied, 302 Conn. 911, 27 A.3d 371 (2011); see also *United States* v. *Whitman*, 887 F.3d 1240, 1247 (11th Cir. 2018) ("[w]hen a defendant relies on an exculpatory defense that, if believed, would lead to acquittals on both the greater and lesser charges," that defendant is not entitled to instruction on lesser offense (internal quotation marks omitted)), cert. denied, U.S. , 139 S. Ct. 1276, 203 L. Ed. 2d 289 (2019); *United States* v. *Nur*, 799 F.3d 155, 159 (1st Cir. 2015) (lesser included offense instruction was inappropriate when "the scope of rational dispute [is limited] to elements common to the two offenses").

The defendant's arguments for why the jury could have found that the state failed to prove that PSC and Salati were authorized to ban people for more than the rest of the business day, but nonetheless found him guilty of simple trespass, are unavailing. First, the defendant contends that the jury could have credited Salati's testimony that the defendant began walking "quickly" away when she started to approach him on November 28, 2015, as if to try to escape, as well as Castillo's testimony that he told the defendant on numerous, prior occasions that "panhandling isn't allowed on [mall] property and that he would have to leave." Although this evidence may suggest that the defendant *subjectively believed* he was not licensed or privileged to be on mall property, it is insufficient as a matter of law to support the inference that he *in fact* was not licensed or privileged to be there. See *State* v. *Harper*, supra, 167 Conn. App. 341–42 (holding that there was insufficient evidence to sustain conviction for criminal trespass in third degree and observing that, "even if [the defendant's evasive conduct upon encountering police] could have supported the inference that the defendant . . . did not believe that [he] had a license or privilege to be at [the premises] that evening, such . . . conduct did not establish that [he] in fact had no license or privilege to be there"). Therefore, if the jury credited

the defendant's defense at trial, that does not provide an independent basis for finding his entry to be unlawful.

Moreover, we agree with the state that the jury could not properly have relied on Castillo's testimony that he had many times told the defendant to leave because of his panhandling as proof that the defendant's entry on November 28, 2015, was unlawful because it would have been inconsistent with the theories advanced by the parties at trial. As previously explained; see footnote 11 of this opinion and accompanying text; the state's theory of guilt was that the defendant was not licensed or privileged to enter mall property on November 28, 2015, because he previously had been banned, not because he had entered the property in order to panhandle. It was the defendant's initial act of entering the property, as distinct from entering it to engage in an unauthorized activity, that constituted the trespass.[12] See *State* v. *Belton*, 190 Conn. 496, 500, 461 A.2d 973 (1983) ("[t]o enter unlawfully contemplates an entry which is accomplished unlawfully, [whereas] to remain unlawfully contemplates an initial legal entry which becomes unlawful at the time that the actor's right, privilege or license to remain is extinguished"). In any event, for

[12] The defendant contends that the "theory of the case doctrine does not preclude the defendant from making lesser included offense requests that are not precisely aligned with a prosecution's theory at trial." We disagree that the theory of the case doctrine is irrelevant to our application of the fourth element of *Whistnant* under the circumstances of the present case.

The fourth *Whistnant* element, which requires the jury to consistently be able to find the defendant not guilty of the greater offense but guilty of the lesser, is in place in order "to prevent a jury from capriciously convicting on the lesser included offense when the evidence requires either conviction on the greater offense or acquittal." (Internal quotation marks omitted.) *State* v. *Manley*, supra, 195 Conn. 579. Because the state cannot sustain a conviction on the basis of a theory of guilt that it never presented; see *State* v. *Fourtin*, supra, 307 Conn. 211; it cannot be said that the jury could "consistently" find the defendant not guilty of the greater offense but guilty of the lesser for purposes of the fourth element of *Whistnant*, if the only way for the jury to find that the state proved the elements of the lesser offense would be to adopt a theory of guilt as to those elements that the state never presented at trial.

the reasons explained previously in this opinion, if the jury accepted the defendant's theory that PSC lacked authority to ban people indefinitely, it could not rationally then have found that these admonishments from Castillo, a PSC employee, rendered the defendant's entry unlawful on November 28, 2015.

Finally, the defendant argues that the jury reasonably could have found that Salati's communication to the defendant on November 27, 2015, did not amount to an "order" not to enter mall property within the meaning of § 53a-107 (a) (1) but was nonetheless sufficient to provide the defendant with the requisite knowledge that he was not permitted to enter the property the following day. We disagree.

Section 53a-107 (a) (1) requires the defendant to have entered the property in defiance of a prior "order . . . not to enter" communicated by an authorized person. Because the term "order" is not defined in the statute, we look to the dictionary to ascertain its commonly approved meaning. See, e.g., *State* v. *Drupals*, 306 Conn. 149, 161–62, 49 A.3d 962 (2012); see also General Statutes § 1-1 (a). The word "order" is defined as "[a]n authoritative indication to be obeyed; a command or direction." American Heritage College Dictionary (4th Ed. 2007) p. 979. This definition unquestionably encompasses Salati's November 27, 2015 communication to the defendant. Salati testified that she approached the defendant while in full police uniform and told him that "he had to leave . . . because he was banned from being on mall property" and that "the next time he's caught on mall property, he's going to be arrested" for trespassing. Salati further testified that she "could [not] have been more clear" about this. Salati's November 27, 2015 communication was undoubtedly an "order" not to enter mall property. The jury could not reasonably have concluded otherwise.[13]

[13] As the defendant notes in his brief, defense counsel also questioned Salati's credibility and urged the jury to disregard her testimony because she

Accordingly, in light of the evidence introduced by the parties at trial, we can exclude as a matter of law the possibility that the jury rationally could have found the defendant guilty only of simple trespass, and not criminal trespass in the first degree. The trial court properly denied the defendant's request for an instruction on the lesser included offense.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

TOWN OF REDDING ET AL. *v.* GEORGETOWN LAND DEVELOPMENT COMPANY, LLC, ET AL.
(SC 20322)

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

Syllabus

The plaintiffs, the town of Redding, the town water pollution control commission, and a regional fire district, sought to foreclose municipal liens against the defendant R Co., a tax lien investment company and assignee of certain real estate tax liens originally levied on real property by a special taxing district authorized by the legislature. The town and the fire district filed motions for partial summary judgment with respect to priority, claiming that, under a 2007 public act (P.A. 07-196, § 4 (b) (3)) giving the special taxing district's liens priority "over all other liens or

had shown a propensity in the past to target the defendant. The defendant, however, did not offer any evidence to contravene the substance of Salati's testimony that she unequivocally ordered the defendant, on November 27, 2015, not to reenter mall property. Defense counsel merely made an unsubstantiated argument regarding her general credibility. We conclude that this is insufficient to place the differentiating element of criminal trespass in the first degree in sufficient dispute so as to warrant an instruction on a lesser included offense. See *United States* v. *Whitman*, supra, 887 F.3d 1246–47 ("[in the absence of] any evidence to support the bare assertion of [a defendant's] lawyer that the government failed to prove an element of the greater offense, the trial court [i]s not required to instruct the jury about lesser included offenses" (internal quotation marks omitted)).

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

encumbrances except a lien for taxes of the town of Redding," their tax liens had priority over the liens that R Co. had acquired from the special taxing district. R Co. also filed a motion for partial summary judgment, claiming that its liens were of equal priority, rather than subordinate, to those of the town and the fire district. The trial court determined that the liens of the town and the fire district were superior to the liens acquired by R Co., granted the motions for partial summary judgment filed by the town and the fire district, denied R Co.'s motion, and rendered a judgment of strict foreclosure in favor of the town and the fire district. R Co. appealed from the judgment of strict foreclosure, claiming that the trial court incorrectly had concluded that its liens were subordinate to those of the town and the fire district. *Held* that the trial court correctly determined that the liens acquired by R Co. from the special taxing district were subordinate to those of the town but incorrectly concluded that they also were subordinate to those of the fire district; Connecticut statutes addressing the subject of lien priority indicate that the legislature intended the phrase "except a lien for taxes of the town" in the priority clause of P.A. 07-196, § 4 (b) (3), to convey, not just the absence of priority of the special taxing district's liens over the town's liens, but subordination to them, and the priority clause also clearly and unambiguously provided the special taxing district's lines with priority over those of the fire district.

Argued December 17, 2019—officially released September 21, 2020**

Procedural History

Action to foreclose municipal tax liens on certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Danbury, where the defendant Georgetown Special Taxing District et al. were defaulted for failure to appear; thereafter, the case was transferred to the judicial district of Hartford, Complex Litigation Docket, where the court, *Miller*, *J.*, granted the motions for partial summary judgment with respect to priority filed by the named plaintiff and by the plaintiff Georgetown Fire District and denied the motion for partial summary judgment with respect to priority filed by the defendant RJ Tax Lien Investments, LLC; subsequently, the court, *Schuman*, *J.*, rendered judgment of strict foreclosure, from which the defendant RJ Tax Lien Investments,

** September 21, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

LLC, appealed. *Reversed in part*; *vacated in part*; *judgment directed.*

Anthony J. LaBella, with whom, on the brief, were *Deborah M. Garskof* and *Neal L. Moskow*, for the appellant (defendant RJ Tax Lien Investments, LLC).

Adam J. Cohen, with whom were *Michael LaVelle* and *Lukas J. Thomas*, for the appellees (named plaintiff et al.).

Opinion

MULLINS, J. This appeal requires us to determine the priority of tax liens levied on real property by the Georgetown Special Taxing District (taxing district) pursuant to No. 07-196, § 4 (b) (3), of the 2007 Public Acts (P.A. 07-196)[1] relative to tax liens held by other municipal entities on that same property. The plaintiffs, the town of Redding (town), the Redding Water Pollution Control Commission (commission), and Georgetown Fire District (fire district), brought this action to foreclose municipal liens against the defendant RJ Tax Lien Investments, LLC,[2] an assignee of real estate tax

[1] Public Act 07-196, § 4 (b) (3), provides: "In order to provide for the collection and enforcement of its taxes, fees, rents, benefit assessments and other charges, the [taxing] district is hereby granted all the powers and privileges with respect thereto as districts organized pursuant to section 7-325 of the general statutes, and as held by municipal corporations or as otherwise provided in this section. Such taxes, fees, rents or benefit assessments, if not paid when due, shall constitute a lien upon the premises served and a charge against the owners thereof, which lien and charge shall bear interest at the same rate as delinquent property taxes. Each such lien may be continued, recorded and released in the manner provided for property tax liens and shall take precedence over all other liens or encumbrances except a lien for taxes of the town of Redding. Each such lien may be continued, recorded and released in the manner provided for property tax liens."

[2] Numerous other entities, as well as one individual, were named as defendants, including the taxing district and Georgetown Land Development Company, LLC, which owned the properties at issue in the foreclosure action. None of these other defendants is a party to this appeal. For the sake of clarity, we refer to RJ Tax Lien Investments, LLC, as the defendant throughout this opinion, and the other, nonparticipating defendants by name when necessary.

liens originally levied by the taxing district. The town and the fire district filed motions for partial summary judgment with respect to priority, asserting that, under P.A. 07-196, § 4 (b) (3), their tax liens had priority over the liens that the defendant had acquired from the taxing district. The trial court agreed, granted their motions for partial summary judgment, and subsequently rendered a judgment of strict foreclosure in favor of the town and the fire district. The defendant appeals from the judgment of strict foreclosure, claiming that the trial court incorrectly concluded that its liens were subordinate to those of the town and the fire district.[3] Although we agree with the trial court that the liens acquired by the defendant from the taxing district are subordinate to those of the town, we agree with the defendant that the trial court incorrectly concluded that they are subordinate to those of the fire district. Accordingly, we reverse the judgment insofar as the trial court granted the fire district's motion for partial summary judgment with respect to priority, and we remand the case with direction to vacate that portion of the judgment subordinating the liens acquired by the defendant to the fire district's liens, to render judgment consistent with this opinion, and for the setting of new law days.

The relevant facts of this case are undisputed. At all relevant times, Georgetown Land Development Company, LLC (Georgetown), owned, and was in the process of developing, approximately fifty-one acres of property located in the town (property).[4] In order to facilitate the financing and development of this project,

[3] The parties that moved for summary judgment with respect to priority stipulated during the trial court proceedings that the commission's liens for unpaid sewer charges are subordinate to the tax liens held by the defendant, the town, and the fire district. See General Statutes §§ 7-254 (b) and 7-258 (a). Accordingly, we need not address the priority of the commission's liens in this opinion.

[4] Although the property is comprised of dozens of individual parcels of real estate, the parties in the present appeal do not differentiate between them for purposes of litigating the issue of priority. For simplicity, we refer to the individual parcels collectively as the property throughout this opinion.

the legislature enacted No. 05-14 of the 2005 Special Acts, which later was amended by P.A. 07-196. These acts authorized the creation of a special taxing district that could finance the project by issuing municipal bonds and by assessing taxes and other charges on the real property located within the taxing district's territorial boundaries. See P.A. 07-196, § 4 (b) (1).[5] Georgetown established the taxing district pursuant to this legislative grant.

The taxing district assessed real estate taxes against the property for the 2007 through 2014 grand lists, which automatically became liens once they were not timely paid,[6] in the total amount of $19,992,861.84. The taxing district assigned certain of these liens, totaling $1,159,692 in unpaid taxes, to the defendant.

The town and the fire district also levied real estate taxes against the property. The town obtained tax liens for the 2009 through 2014 grand list years totaling $3,055,802.01. The fire district's liens, pertaining to the same grand list years, total $145,069.

[5] Public Act 07-196, § 4 (b) (1), provides that the taxing district "shall have the power to fix, revise, charge, collect, abate and forgive reasonable taxes, fees, rents and benefit assessments, and other charges for the cost of the improvements, financing costs, operating expenses and other services and commodities furnished or supplied to the real property in the [taxing] district in accordance with the applicable provisions of the general statutes which apply to districts established under section 7-325 of the general statutes, and special act 05-14, as amended by this act, and in the manner prescribed by the [taxing] district. Notwithstanding any provision of the general statutes, the [taxing] district may pay the entire cost of any improvements, including the costs of financing such improvements, capitalized interest and the funding of any reserve funds necessary to secure such financing or the debt service of bonds or notes issued to finance such costs, from taxes, fees, rents, benefit assessments or other revenues and may assess, levy and collect said taxes, fees, rents or benefit assessments concurrently with the issuance of bonds, notes or other obligations to finance such improvements based on the estimated cost of the improvements prior to the acquisition or construction of the improvements or upon the completion or acquisition of the improvements."

[6] See P.A. 07-196, § 4 (b) (3) ("taxes, fees, rents or benefit assessments, if not paid when due, shall constitute a lien upon the premises served and a charge against the owners thereof").

In July, 2015, the plaintiffs commenced this foreclosure action against Georgetown, the defendant, and numerous other lienholders. The town and the fire district each filed motions for partial summary judgment on the issue of priority only, maintaining that their tax liens on the property were superior in priority to the tax liens that the defendant had acquired by assignment from the taxing district. The defendant filed a motion for partial summary judgment, asserting that its liens were of equal priority, rather than subordinate, to those of the town and the fire district.

The trial court, *Miller*, *J.*, agreed with the town and the fire district, and concluded that their tax liens had priority over the liens assigned to the defendant by the taxing district. Judge Miller relied on P.A. 07-196, § 4 (b) (3), specifically the phrase providing that any liens obtained by the taxing district "shall take precedence over all other liens or encumbrances except a lien for taxes of the town . . . ." Judge Miller construed this phrase as subordinating the taxing district's liens to those of the town. With respect to the fire district, Judge Miller reasoned that the fire district's liens were of equal priority to the town's liens pursuant General Statutes § 7-328 (a),[7] and that, because the town's liens were superior to those of the taxing district, so, too, were the fire district's liens. Accordingly, Judge Miller determined that the liens of the town and the fire district were superior to the liens acquired by the defendant, granted each of their motions for partial summary judg-

[7] In concluding that the fire district's liens were of equal priority to those of the town, Judge Miller relied on a clause in § 7-328 (a) that provides that tax liens held by a "district" created pursuant to General Statutes § 7-325 (a) "shall be a lien upon the property in the same manner as town taxes . . . and foreclosed in the same manner as liens for town taxes or enforced in accordance with any provision of the general statutes for the collection of property taxes. . . ." For purposes of § 7-328 (a), the term "district" is defined to include "any fire district . . . ." General Statutes § 7-324.

ment with respect to priority, and denied the defendant's motion.

Thereafter, the trial court, *Schuman*, *J.*, rendered a judgment of strict foreclosure in favor of the town and the fire district. The defendant appealed to the Appellate Court from that judgment of strict foreclosure, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

On appeal, the defendant claims that the liens it acquired from the taxing district are of equal priority to those of the town and the fire district, rather than subordinate to them.[8] The defendant contends that Judge Miller misconstrued P.A. 07-196, § 4 (b) (3), and failed to properly adhere to other Connecticut statutes that generally recognize that liens held by municipal entities are of equal priority for purposes of a foreclosure action. We agree with the trial court that the defendant's liens are subordinate to the town's liens. We agree with the defendant, however, that the trial court incorrectly determined that the defendant's liens are subordinate to the fire district's liens.

We begin with the general principles governing our review. "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the

[8] The parties in the present appeal agree that the taxing district's assignment of the tax liens to the defendant does not affect the priority of those liens pursuant to General Statutes § 12-195h, which provides in relevant part: "Any municipality . . . may assign, for consideration, any and all liens filed by the tax collector to secure unpaid taxes on real property as provided under the provisions of this chapter. . . . The assignee or assignees of such liens shall have and possess the same powers and rights at law or in equity as such municipality and municipality's tax collector would have had if the lien had not been assigned with regard to the precedence and priority of such lien . . . ." The taxing district qualifies as a "municipality" for purposes of § 12-195h. See General Statutes § 12-171 (adopting definition of "municipality" set forth in General Statutes § 12-141, which includes taxing districts).

moving party is entitled to judgment as a matter of law. . . . Our review of the trial court's decision to grant [a] motion for summary judgment is plenary. . . . On appeal, we must determine whether the legal conclusions reached by the trial court are legally and logically correct and whether they find support in the facts set out in the memorandum of decision of the trial court." (Citations omitted; internal quotation marks omitted.) *Lucenti* v. *Laviero*, 327 Conn. 764, 772–73, 176 A.3d 1 (2018).

The material facts are undisputed in the present case. The sole issue is whether, under the relevant provisions of the taxing district's enabling legislation, its tax liens are subordinate, rather than equal in priority, to the liens held by the town and the fire district. This issue is one of statutory construction. "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . 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. . . . The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019). Questions of statutory construction are matters of law subject to plenary review. E.g., *Rutter* v. *Janis*, 334 Conn. 722, 730, 224 A.3d 525 (2020).

The taxing district's power to obtain liens for property taxes and other charges is set forth in P.A. 07-196, § 4 (b) (3), which provides in relevant part: "In order to provide for the collection and enforcement of

its taxes, fees, rents, benefit assessments and other charges, the [taxing] district is hereby granted all the powers and privileges with respect thereto as districts organized pursuant to section 7-325 of the general statutes, and as held by municipal corporations or as otherwise provided in this section. Such taxes, fees, rents or benefit assessments, if not paid when due, shall constitute a lien upon the premises served and a charge against the owners thereof, which lien and charge shall bear interest at the same rate as delinquent property taxes. *Each such lien . . . shall take precedence over all other liens or encumbrances except a lien for taxes of the town . . . .*" (Emphasis added.) It is the meaning of this final sentence of P.A. 07-196, § 4 (b) (3) (priority clause), that is at the heart of the parties' dispute.

Because we reach different conclusions regarding how this language applies to the town and the fire district, we first address the priority of the town's liens. The town contends that the priority clause indicates the legislature's intent to subordinate the taxing district's liens to its liens, whereas the defendant contends that the priority clause merely puts their respective liens on parity with each other. We conclude that the town's interpretation is the only reasonable one.

The priority clause provides the taxing district's liens with priority over "all other liens or encumbrances *except* a lien for taxes of the town . . . ." (Emphasis added.) P.A. 07-196, § 4 (b) (3). "In determining whether the statutory language is plain and unambiguous, words and phrases [must] be construed according to the commonly approved usage of the language . . . . General Statutes § 1-1 (a). We ordinarily look to the dictionary definition of a word to ascertain its commonly approved usage." (Internal quotation marks omitted.) *Redding Life Care, LLC* v. *Redding*, 331 Conn. 711, 718, 207 A.3d 493

(2019). The word "except" is defined with substantial similarity in dictionaries. For instance, Webster's Third New International Dictionary defines "except" to mean "to take or leave out . . . from a number or a whole: exclude or omit . . . ." Webster's Third New International Dictionary (2002) p. 791. Similarly, The American Heritage Dictionary of the English Language defines "except" as "[w]ith the exclusion of; other than . . . ." The American Heritage Dictionary of the English Language (5th Ed. 2011) p. 618. The dictionary definitions of "except" lead us to believe that the legislature intended to remove the town's tax liens from the class of liens over which the taxing district's liens have priority.

The defendant is correct in pointing out, however, that, although this exclusion provides that the taxing district's liens do not have priority over the town's liens, it does not necessarily indicate that they are subordinate, rather than equal, to the town's liens.[9]

A review of other statutes addressing the subject of lien priority, however, persuades us that the legislature intended the phrase "except a lien for taxes of the town" in the priority clause to convey, not just the absence of priority over the town's liens, but subordination to them. See, e.g., *Board of Education* v. *Tavares Pediatric Center*, 276 Conn. 544, 557 n.10, 888 A.2d 65 (2006) ("[w]hen interpreting statutory language, we may seek guidance from statutory provisions relating to the same subject matter" (internal quotation marks omitted)); *Connecti-*

[9] We note that the priority clause is not ambiguous merely because, when considered in a vacuum, it is silent as to whether the taxing district's liens are subordinate to the town's liens rather than equal to them. "[T]he fact that . . . relevant statutory provisions are silent . . . does not mean that they are ambiguous. . . . [O]ur case law is clear that ambiguity exists only if the statutory language at issue is susceptible to more than one plausible interpretation." (Citations omitted; internal quotation marks omitted.) *State* v. *Orr*, 291 Conn. 642, 653–54, 969 A.2d 750 (2009).

cut Light & Power Co. v. *Dept. of Public Utility Control*, 266 Conn. 108, 123, 830 A.2d 1121 (2003) ("[b]ecause the legislature is always presumed to have created a harmonious and consistent body of law, the proper construction of any statute must take into account the mandates of related statutes governing the same general subject matter" (internal quotation marks omitted)).

The language in the priority clause is similar to that consistently used by the legislature in numerous other statutes in order to subordinate various types of liens to municipal tax liens. See, e.g., General Statutes § 7-239 (b) (water use lien "shall take precedence over all other liens or encumbrances except taxes"); General Statutes § 7-339ii (e) (2) (municipal benefit assessments "shall take precedence over all other liens or encumbrances except a lien for property taxes"); General Statutes § 8-29 (town planning commission benefit assessment lien "shall take precedence of all other encumbrances except taxes"); General Statutes § 17b-125 (a) (town reimbursement agreement lien "shall have precedence over all subsequently recorded encumbrances, except tax liens or other municipal liens of such towns"); General Statutes § 47-258 (b) (unit owners' association lien "is prior to all other liens and encumbrances on a unit except . . . liens for real property taxes"); General Statutes § 49-73b (b) (town expenditures lien "shall take precedence over any other encumbrance except municipal tax assessments on such real estate").

Like the priority clause at issue in the present case, none of these statutes expressly provides that the subject liens are "subordinate" or "inferior" to tax liens. Nonetheless, in light of General Statutes § 12-172, which provides that tax liens on real property have priority over all other types of encumbrances unless other-

wise provided by law,[10] it is clear that, in these statutes, the legislature used the phrase "except taxes," or a substantially similar phrase, for the purpose of indicating that the subject liens are subordinate to tax liens.[11] See *Brock* v. *State ex rel. Wyoming Workforce Services*, 394 P.3d 460, 463, 465 (Wyo. 2017) (statute providing that compensation fund liens "have priority over all claims except taxes" clearly and unambiguously "indicates that a lien for taxes is superior to a claim for contributions to the unemployment compensation fund" (emphasis omitted; internal quotation marks omitted)). That the legislature phrased the priority clause in nearly identical fashion suggests a similar result was intended. Indeed, the exception in the priority clause is even more specific because it applies, not to tax liens generally, but specifically to tax liens held by the town.

Conversely, if the legislature wants to establish equal priority between certain types of liens and taxes, it does so with explicit language. See, e.g., General Statutes § 8-268 (a) (relocation assistance lien for displaced tenant

[10] General Statutes § 12-172 provides in relevant part that tax liens on real property, "unless otherwise specially provided by law . . . shall take precedence of all transfers and encumbrances in any manner affecting such interest in such item, or any part of it. . . ." See *Brown* v. *General Laundry Service, Inc.*, 139 Conn. 363, 367, 94 A.2d 10 (1952) (observing that, under Connecticut law municipal tax liens "would take precedence over any other [e]ncumbrance on the property, irrespective of the time at which that [e]ncumbrance might have attached"), vacated on other grounds sub nom., *United States* v. *New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954); see also *United States* v. *Gilmore*, 62 F. Supp. 2d 576, 582 (D. Conn. 1999); *Wilcox* v. *Bliss*, 116 Conn. 329, 334, 164 A. 659 (1933).

[11] Indeed, the town and the fire district concede that, in the present case, the "except taxes" language conveys subordination to tax liens. Specifically, they concede that the commission's liens for unpaid sewer charges are subordinate to the parties' tax liens pursuant to General Statutes §§ 7-254 (b) and 7-258 (a); see footnote 3 of this opinion; both of which provide that such liens "shall take precedence over all other liens and encumbrances except taxes . . . ."

"shall have the same priority as . . . a lien for municipal taxes"); General Statutes § 8-270 (a) (relocation assistance lien "shall have the same priority as . . . a lien for municipal taxes"); General Statutes § 12-124a (b) ("[l]iens recorded under the provisions of this subsection shall have the same precedence as tax liens under section 12-172"); General Statutes § 32-602 (e) (payments to Capital Region Development Authority in lieu of real property taxes "shall have the same lien and priority, and may be enforced by the authority in the same manner, as provided for municipal real property taxes"); General Statutes § 47a-56i (c) (town expenditures to make rental dwellings habitable "shall be secured by a lien on such property which shall have the same priority as a lien for municipal taxes").

Although these statutes did not address lien priority between municipal entities, as is the situation in the present case, they nonetheless demonstrate that, when the legislature provides a particular lien with priority over all other encumbrances "except" a particular other type of lien, it generally intends the former to be subordinate to the latter. Consistent with these statutes, we conclude, in the present case, that the phrase in the priority clause, "shall take precedence over all other liens or encumbrances except a lien for taxes of the town," was intended to subordinate the taxing district's liens to those of the town. Had the legislature intended to place the town's and the taxing district's liens on parity with each other, it easily could have said so explicitly, as it has done in the numerous aforementioned statutes. See, e.g., *Plourde* v. *Liburdi*, 207 Conn. 412, 416, 540 A.2d 1054 (1988) ("[t]he use of different words [in the context of] the same [subject matter] must indicate a difference in legislative intention" (internal quotation marks omitted)).

Nonetheless, the defendant argues that, under General Statutes §§ 12-181[12] and 12-192,[13] municipal entities, such as the town and the taxing district, have equal priority and cannot foreclose each other's tax liens. We disagree.

Whether §§ 12-181 and 12-192 permit a municipality to foreclose another municipality's tax liens is largely beside the point. There is, of course, nothing precluding *the legislature*, which has exclusive and broad discretion to exercise the power of taxation; see *Pepin* v. *Danbury*, 171 Conn. 74, 82, 368 A.2d 88 (1976); from enacting legislation that subordinates the tax liens of a specially created taxing district to those of the municipality in which it sits (or any other municipal entity) if it deems such action appropriate. As previously

[12] General Statutes § 12-181 provides in relevant part: "[A]ll municipalities having tax liens upon the same piece of real estate may join in one complaint for the foreclosure of the same . . . . If all municipalities having tax liens upon the same piece of real estate do not join in a foreclosure action, any party to such action may petition the court to cite in any or all of such municipalities as may be omitted, and the court shall order such municipality or municipalities to appear in such action and be joined in one complaint. . . . If one or more municipalities having one or more tax liens upon the same piece of property are not joined in one action, each of such municipalities shall have the right to petition the court to be made a party plaintiff to such action and have its claims determined in the same action, in which case the same court shall continue to have jurisdiction of the action and shall have the same rights to dispose of such action as if all municipalities had originally joined in the complaint. . . . If one or more municipalities foreclose one or more tax liens on real estate and acquire absolute title thereto and if any other municipality having one or more tax liens upon such real estate at the time such foreclosure title becomes absolute has not, either as plaintiff or defendant, been made a party thereto, the tax liens of each of such other municipalities shall not be thereby invalidated or jeopardized."

[13] General Statutes § 12-192 provides in relevant part: "If two or more municipalities have tax liens against any of such properties, they may join in the proceeding. Upon foreclosure in such a case, the court shall decree that each municipality has an undivided interest in such property in proportion to the amount due upon the tax lien or liens it has against it, plus any interest, lien fees and other charges which have accrued upon them since the bringing of the petition. . . ."

explained, that is precisely what the legislature did in enacting P.A. 07-196, § 4, which unambiguously provides the town with the requisite authority to foreclose on the taxing district's liens.

In any event, to the extent that there is any tension between §§ 12-181 and 12-192 and our construction of P.A. 07-196, § 4 (b) (3), we are mindful of "the well established principle of statutory interpretation that requires courts to apply the more specific statute relating to a particular subject matter in favor of the more general statute that otherwise might apply in the absence of the specific statute. . . . The provisions of one statute which specifically focus on a particular problem will always, in the absence of express contrary legislative intent, be held to prevail over provisions of a different statute more general in its coverage." (Internal quotation marks omitted.) *Studer* v. *Studer*, 320 Conn. 483, 497–98, 131 A.3d 240 (2016).

Sections 12-181 and 12-192 are statutes of general applicability, whereas P.A. 07-196, § 4 (b) (3), was specially enacted by the legislature to address the issue of priority between these specific parties relative to this particular development project. The legislature was free to draft P.A. 07-196, § 4 (b) (3), in whatever manner it thought best to address any unique issues it had identified, including, if it deemed appropriate, to ensure that the town maintained primary authority to assess and levy real estate taxes. See *Windham First Taxing District* v. *Windham*, 208 Conn. 543, 557, 546 A.2d 226 (1988) ("special tax districts [created pursuant to chapter 105 of the General Statutes] are authorized to supply services where lacking, or to augment them when they are already provided by the municipality, but cannot displace or preempt the town's primary authorized power to provide and tax for such services"). Put simply, the specific provisions of P.A. 07-196, § 4 (b) (3),

must prevail over the generally applicable §§ 12-181 and 12-192.[14]

Having concluded that the defendant's liens are subordinate to those of the town, we next address their priority relative to the tax liens held by the fire district. We conclude that the priority clause of P.A. 07-196, § 4 (b) (3), which gives the taxing district's liens priority "over all other liens or encumbrances except a lien for taxes of the town," clearly and unambiguously provides the taxing district with priority over the fire district. By listing the town's tax liens as the only type of lien

[14] The defendant also relies on *Stratford* v. *Thorough*, Superior Court, judicial district of Fairfield, Docket No. CV-12-6030347-S (April 21, 2015) (*Jennings*, *J.*) (60 Conn. L. Rptr. 216), and *Cordani* v. *Stramiglia*, Superior Court, judicial district of Litchfield, Docket No. CV-94-0066507 (March 15, 1995) (*Pickett*, *J.*) (14 Conn. L. Rptr. 164), as support for its position that taxing districts' tax liens are of equal priority to town tax liens. Both decisions concluded that tax liens held by taxing districts were of equal priority to those of the municipalities in which the taxing districts were based. See *Stratford* v. *Thorough*, supra, 217; *Cordani* v. *Stramiglia*, supra, 165. We find those decisions inapposite, however, because the taxing districts in those cases were established pursuant to General Statutes § 7-325 and, thus, were subject to the distinct provisions set forth in chapter 105 of the General Statutes, whereas the taxing district in the present case was established by a special act of the legislature and is subject to the priority clause of P.A. 07-196, § 4 (b) (3), which is worded differently than any of the provisions in chapter 105.

We acknowledge that the initial clause of P.A. 07-196, § 4 (b) (3), provides that "the [taxing] district is hereby granted all the powers and privileges with respect thereto as districts organized pursuant to section 7-325 of the general statutes, and as held by municipal corporations or as otherwise provided in this section." Nevertheless, insofar as the liens of taxing districts created pursuant to § 7-325 are in fact entitled to equal priority to town liens, we are not persuaded that this reference to § 7-325 sheds any light on the meaning of the priority clause. As previously stated, the priority clause unambiguously provides the town's liens with priority over the taxing district's liens. Because the priority clause addresses the specific subject of lien priority, generalized references elsewhere in the statute to the powers provided by § 7-325 do not compel a different construction. See *Miller's Pond Co., LLC* v. *New London*, 273 Conn. 786, 809, 873 A.2d 965 (2005) ("[i]t is well settled that [when] statutes contain specific and general references covering the same subject matter, the specific references prevail over the general" (internal quotation marks omitted)).

that is not inferior to the taxing district's liens, the legislature is presumed to have intended to exclude all other types of liens and encumbrances, including tax liens held by the fire district, to be inferior to the taxing district's liens. "[W]e consider the tenet of statutory construction referred to as expressio unius est exclusio alterius, which may be translated as the expression of one thing is the exclusion of another. . . . [When] express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850–51, 937 A.2d 39 (2008).

That the priority clause gives the taxing district priority "over *all other* liens or encumbrances except a lien for taxes of the town" leaves no doubt that the legislature intended no further exceptions. (Emphasis added.) P.A. 07-196, § 4 (b) (3). "There cannot be any broader classification than the word all. . . . In its ordinary and natural meaning, the word all leaves no room for exceptions." (Citation omitted; internal quotation marks omitted.) *Burkle* v. *Car & Truck Leasing Co.*, 1 Conn. App. 54, 56–57, 467 A.2d 1255 (1983); see also *Canton* v. *Cadle Properties of Connecticut, Inc.*, 316 Conn. 851, 858, 114 A.3d 1191 (2015) (legislature's use of word "all" "support[s] the broadest possible reading" of statute). We therefore conclude that the defendant's tax liens are superior to those of the fire district.[15]

In sum, the fire district's tax liens are subordinate to those of the defendant, which are, in turn, subordinate

[15] We note that our construction of the priority clause is not inconsistent with § 12-172, which, as previously noted; see footnote 10 of this opinion and accompanying text; provides that tax liens on real property have priority over all other encumbrances on the property "unless otherwise specially provided by law . . . ." The priority clause of P.A. 07-196, § 4 (b) (3), fits within this caveat of § 12-172 because, as we have explained, it clearly and unambiguously sets forth the relative priority of tax liens held by the taxing district vis-à-vis the town and all other liens.

to those of the town. The trial court properly granted the town's motion for partial summary judgment but improperly granted the fire district's motion.

The judgment is reversed insofar as the trial court granted the motion for partial summary judgment with respect to priority filed by Georgetown Fire District and the case is remanded with direction to vacate that portion of the judgment subordinating the liens acquired by RJ Tax Lien Investments, LLC, to Georgetown Fire District's liens, to render judgment consistent with this opinion, and for the setting of new law days; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* CODY M.*
(SC 20213)

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

Syllabus

Convicted, after a jury trial, of two counts of violating a standing criminal protective order and two counts of threatening in the second degree, the defendant appealed to the Appellate Court, claiming, inter alia, that his conviction of two counts of violating a protective order violated the constitutional prohibition against double jeopardy and that the trial court improperly instructed the jury as to the one of the counts of violating a protective order by incorrectly defining the term "harassing." The defendant's conviction stemmed from his actions toward the victim when they appeared before a juvenile court for a hearing relating to their children. At the time, the defendant was subject to a standing criminal protective order that, with limited exceptions, prohibited him from contacting the victim in any manner and from threatening or harassing her. As the hearing began, the defendant attempted to engage in

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

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

small talk with the victim, telling her that he still loved her and asking her why she had blocked his phone calls, but she ignored him. The defendant's tone then changed, he whispered to the victim that she was going to have problems, and, when she looked at him, he mouthed that he was going to kill her. The Appellate Court affirmed the judgment of conviction, concluding, inter alia, that the defendant's double jeopardy claim failed because his conviction of each count of violating a protective order was supported by a separate and distinct act even though those acts arose from the same conversation. The Appellate Court also concluded that the trial court did not improperly instruct the jury as to the definition of the term "harassing." On the granting of certification, the defendant appealed to this court. *Held*:

1. The Appellate Court correctly concluded that the defendant's conviction of two counts of violating a standing criminal protective order did not violate the constitutional prohibition against double jeopardy: because the purpose of the statute (§ 53a-223a) under which the defendant was convicted is to protect victims of domestic violence by increasing the penalty for violating protective orders, the legislature intended to punish separately each discrete act that violates a protective order, rather than to punish only the course of action that those acts constitute, and, therefore, conviction of multiple counts is permitted for distinct acts that constitute separate violations of § 53a-223a; in the present case, the defendant's statements, although made in quick succession, constituted two distinct acts in violation of two different conditions of the protective order and, thus, were separately punishable, as the defendant's act of whispering to the victim that he loved her and asking her why she had blocked his phone calls violated the protective order's no contact provision, and the defendant's escalation of his behavior by asserting that she was going to have problems and mouthing that he would kill her was in violation of the order's provision prohibiting him from threatening the victim.
2. The defendant could not prevail on his claim that the Appellate Court improperly upheld the trial court's jury instruction as to the second count of violating a standing criminal protective order because, even if the trial court incorrectly defined the term "harassing," any error was harmless beyond a reasonable doubt; the state having alleged in that second count that the defendant had violated the protective order by either threatening or harassing the victim, and the jury having found the defendant guilty of threatening in the second degree on the basis of the same underlying conduct as that on which the second count was based, the jury necessarily found the defendant guilty of threatening the victim as charged in the second count.

(*Two justices concurring and dissenting in one opinion*)

Argued November 14, 2019—officially released September 21, 2020***

*** September 21, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with two counts each of the crimes of criminal violation of a standing criminal protective order and threatening in the second degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before *O'Keefe*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *Sheldon*, *Elgo* and *Flynn*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

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

Robert J. Scheinblum, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, *Laura DeLeo*, senior assistant state's attorney, and *Bruce R. Lockwood*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ROBINSON, C. J. The principal issue in this certified appeal is whether multiple convictions for violation of a standing criminal protective order, arising from a series of statements made during a court hearing by the defendant, Cody M., to the person protected by the order, violate the constitutional protection from double jeopardy. The Appellate Court affirmed the judgment, rendered after a jury trial, convicting the defendant of two counts of criminal violation of a standing criminal protective order in violation of General Statutes § 53a-223a,[1] one count of threatening in the second degree

[1] General Statutes § 53a-223a provides: "(a) A person is guilty of criminal violation of a standing criminal protective order when an order issued pursuant to subsection (a) of section 53a-40e has been issued against such person, and such person violates such order.

"(b) No person who is listed as a protected person in such standing criminal protective order may be criminally liable for (1) soliciting, requesting, commanding, importuning or intentionally aiding in the violation of the standing criminal protective order pursuant to subsection (a) of

in violation of General Statutes (Rev. to 2015) § 53a-62 (a) (2),[2] and one count of threatening in the second degree in violation of § 53a-62 (a) (3). *State* v. *Meadows*, 185 Conn. App. 287, 290, 197 A.3d 464 (2018). We granted the defendant's petition for certification to appeal,[3] and the defendant now claims that the Appellate Court incorrectly concluded that (1) his conviction of two counts of violating a standing criminal protective order did not violate his constitutional right against double jeopardy, and (2) the trial court's jury instruction correctly defined the term "harassing" with respect to the penalty enhancement under § 53a-223a (c) (2). We conclude that the defendant's conviction of two counts of violating a standing criminal protective order did not violate his right against double jeopardy and that any possible instructional error in the trial court's definition of "harassing" was harmless, and, accordingly, we affirm the judgment of the Appellate Court.

section 53a-8, or (2) conspiracy to violate such standing criminal protective order pursuant to section 53a-48.

"(c) Criminal violation of a standing criminal protective order is a class D felony, except that any violation that involves (1) imposing any restraint upon the person or liberty of a person in violation of the standing criminal protective order, or (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the standing criminal protective order is a class C felony."

[2] As the Appellate Court aptly noted, "[No.] 16-67 of the 2016 Public Acts . . . amended subsection (a) of § 53a-62 by redesignating the existing subdivisions (2) and (3) as subdivision (2) (A) and (B) without modifying the language of that provision. We refer to the 2015 revision of § 53a-62 (a) (3) because that is the statute under which the defendant was charged and convicted." *State* v. *Meadows*, 185 Conn. App. 287, 290 n.1, 197 A.3d 464 (2018).

[3] We granted the defendant's petition for certification to appeal, limited to the following issues: "Did the Appellate Court [correctly] conclude that (1) the defendant's constitutional right to be free from double jeopardy was not violated when he was convicted of two counts of violation of a standing criminal protective order on the basis of different words spoken to the protected person during a single, brief, and uninterrupted statement, and (2) the jury was properly instructed that to 'harass' means to 'trouble, worry or torment' for purposes of an enhanced penalty for violating a standing criminal protective order?" *State* v. *Meadows*, 330 Conn. 947, 947–48, 196 A.3d 327 (2018).

The record reveals the following facts, which the jury reasonably could have found, and procedural history. On May 12, 2015, the trial court, *Keegan*, *J.*, issued a standing criminal protective order against the defendant, ordering that he, inter alia, "not assault, threaten, abuse, harass, follow, interfere with . . . stalk" or "contact . . . in any manner, including by written, electronic or telephone contact," the victim, who is the mother of his children. One exception to the order permitted contact with the victim "for purposes of visitation, as directed by [the] family court." Subsequently, on September 1, 2015, both the victim and the defendant were present at a juvenile court hearing. The defendant, who was incarcerated at the time, was brought to the hearing and placed near the victim.

When the hearing began, the defendant tried to engage in "small talk" with the victim, but she ignored him and did not make eye contact. The victim testified that the defendant had "whispered to me that he still loved me and had asked me why I had a block on the phone and that I said I would never do this to him . . . . [W]hen I wasn't responding to him, his tone changed and he told me that 'you're going to have problems when I get home, bitch,' and . . . I looked at him, and he told me that he was going to fucking kill me." The conversation was only as loud as a whisper, except for the last statement, which the defendant mouthed to the victim. The victim then told the defendant to stop threatening her, and he responded that he was not. The victim thought the statements were threats, and she was afraid. At some point, an assistant attorney general present for the hearing informed the court that the defendant was speaking to the victim.

After the hearing ended, a judicial marshal removed the defendant from the courtroom. Once the defendant was outside of the courtroom, he continued to make remarks about the victim, saying, "I'm gonna get that bitch when I get out. . . . I'm gonna kill that fucking

bitch, I'm gonna fuck that bitch up, I'm gonna fucking kill her." Subsequently, the defendant reiterated these statements while meeting with a social worker, also stating that, "if he's not with [the victim], he's going to make sure nobody else is with her," and that, "if she chooses not to be with him, he will beat the f'ing shit out of her." He also said "he would make her another Tracey Morton."[4]

In the operative information,[5] the state charged the defendant with two counts of violation of a standing criminal protective order and two counts of threatening in the second degree.[6] The case was tried to a jury, which found the defendant guilty on all four counts, and the trial court rendered a judgment of conviction in accordance with the jury's verdict.[7]

The defendant appealed from the judgment of conviction to the Appellate Court, which affirmed the judgment of conviction. *State* v. *Meadows*, supra, 185 Conn.

[4] It appears that the defendant's reference to "Tracey Morton" is a misstatement of the name of the victim in a high profile case of family violence. See part I A of this decision.

[5] The state initially charged the defendant with one count of violation of a standing criminal protective order, threatening in the second degree, and disorderly conduct in violation of General Statutes § 53a-182.

[6] Count one of the operative information provides: "In the Superior Court of Connecticut, New Haven judicial district, geographical area twenty-three, Assistant State's Attorney Laura DeLeo accuses the defendant, CODY [M.], of VIOLATION OF A STANDING CRIMINAL PROTECTIVE ORDER, and charges that, on or about September 1, 2015, at or about the location of 239 Whalley Avenue, in the city of New Haven, CODY [M.], did violate the terms of a standing criminal protective order that had issued against him, to wit: by having contact with the protected person, in violation of [§] 53a-223a."

Count two provides: "In the Superior Court of Connecticut, New Haven judicial district, geographical area twenty-three, Assistant State's Attorney Laura DeLeo accuses the defendant, CODY [M.], of VIOLATION OF A STANDING CRIMINAL PROTECTIVE ORDER, and charges that, on or about September 1, 2015, at or about the location of 239 Whalley Avenue, in the city of New Haven, CODY [M.], did violate the terms of a standing criminal protective order that had issued against him, to wit: by threatening and harassing the protected person, in violation of [§] 53a-223a."

[7] The trial court sentenced the defendant to a total effective sentence of eight years imprisonment with seven years of special parole.

App. 308. With respect to the issues relevant to this certified appeal, the Appellate Court first rejected the defendant's claim that his two convictions for violating a standing criminal protective order were a double jeopardy violation, concluding that each conviction was supported by a "separate and distinct [act], and it matters not that they arose from the same conversation."[8] Id., 298. The Appellate Court also disagreed with the defendant's claim that the trial court improperly defined the term "harassing conduct" when instructing the jury as to the second count of violating a standing criminal protective order, holding that the definition used was consistent with the decision in *State* v. *Larsen*, 117 Conn. App. 202, 209 n.5, 978 A.2d 544, cert. denied, 294 Conn. 919, 984 A.2d 68 (2009). See *State* v. *Meadows*, supra, 299–301. This certified appeal followed. See footnote 3 of this opinion. Additional facts and procedural history will be set forth in the context of each claim on appeal.

I

We begin with the defendant's claim that his two convictions under § 53a-223a for violations of a standing criminal protective order violated the constitutional prohibition against double jeopardy. The Appellate Court's analysis of this issue centered on the premise that the defendant violated "two separate provisions" of the order; one count originated from his initial contact, and the second count was based on the defendant's threat to the victim. See *State* v. *Meadows*, supra, 185 Conn. App. 298. The Appellate Court considered each violation "distinct" and deemed its decision in *State* v. *Nixon*, 92 Conn. App. 586, 886 A.2d 475 (2005), which had held a series of knife stabs to be a single, continuous act, inapposite. See *State* v. *Meadows*, supra, 297–99.

[8] Although the defendant did not preserve this double jeopardy claim at trial, the Appellate Court considered it pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). See *State* v. *Meadows*, supra, 185 Conn. App. 293–94.

"A defendant's double jeopardy claim presents a question of law, over which our review is plenary. . . . The double jeopardy clause of the fifth amendment to the United States constitution provides: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. The double jeopardy clause [applies] to the states through the due process clause of the fourteenth amendment. . . . This constitutional guarantee prohibits not only multiple trials for the same offense, but also multiple punishments for the same offense in a single trial. . . . Although the Connecticut constitution does not include a double jeopardy provision, the due process guarantee of article first, § 9, of our state constitution encompasses protection against double jeopardy." (Citation omitted; internal quotation marks omitted.) *State* v. *Bernacki*, 307 Conn. 1, 9, 52 A.3d 605 (2012), cert. denied, 569 U.S. 918, 133 S. Ct. 1804, 185 L. Ed. 2d 811 (2013).

"In accordance with *Blockburger* v. *United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), double jeopardy claims challenging the constitutional validity of convictions pursuant to two distinct statutory provisions are traditionally analyzed by inquiring whether each provision requires proof of a fact of which the other does not require proof. . . . We prefer a different form of analysis in the circumstances of this case, in which only one statutory provision is at issue.[9] The proper double jeopardy inquiry when a defendant is convicted of multiple violations of the *same* statutory provision is whether the legislature intended to punish the individual acts separately or to punish only the course of action which they constitute." (Citations omitted; emphasis in original; footnote added; internal quotation marks

[9] For an example of a case that reviews a similar issue but analyzes double jeopardy under separate statutory provisions, see *State* v. *Culver*, 97 Conn. App. 332, 338–39 n.7, 904 A.2d 283, cert. denied, 280 Conn. 935, 909 A.2d 961 (2006).

omitted.) *State* v. *Garvin*, 242 Conn. 296, 304, 699 A.2d 921 (1997). Put differently, we must determine the "unit of prosecution" intended by the legislature in enacting § 53a-223a. See *Bell* v. *United States*, 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (employing unit of prosecution analysis to determine whether Congress intended "cumulative punishment for each woman" transported in violation of Mann Act); *State* v. *Garvin*, supra, 306–307 (legislature intended unit of prosecution to be number of bail bonds breached rather than number of times defendant failed to appear); *State* v. *Tweedy*, 219 Conn. 489, 498–99, 594 A.2d. 906 (1991) (legislature intended "the course of committing a larceny . . . as the time frame for completion of the offense of robbery" (internal quotation marks omitted)).

"The issue, [although] essentially constitutional, becomes one of statutory construction." *State* v. *Rawls*, 198 Conn. 111, 120, 502 A.2d 374 (1985). "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, including the question of whether the language actually does apply. . . . In seeking to determine that meaning, General Statutes § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and [common-law] principles governing the same gen-

eral subject matter . . . .”[10] (Internal quotation marks omitted.) *State* v. *Terwilliger*, 314 Conn. 618, 653–54, 104 A.3d 638 (2014).

A

We begin our analysis by determining the requisite unit of prosecution under § 53a-223a. The defendant asserts that the Appellate Court incorrectly concluded that the statutory language of § 53a-223a, specifically, the word “involves” in subsection (c), clearly indicates that the legislature intended the unit of prosecution to be on a “transactional basis.” The defendant contends that a violation of a protective order is a continuing offense and that, because the conversation at issue in this case lasted only for a short time, it should be viewed as a single violation. Finally, the defendant requests that we apply the rule of lenity to resolve any statutory ambiguity on this point.

In response, the state argues that the text and purpose of § 53a-223a support viewing separate violations as distinct criminal acts, and, as a result, each distinct contact or threat to the victim may be punished. The state argues that a violation of a protective order is more analogous to sexual assault, which is a separate act crime, than kidnapping, which is a continuous act crime. The state contended at oral argument before this court that § 53a-223a is unambiguous and argues in its brief that the statute clearly permits multiple convic-

[10] “Of course, [w]e have long held that [c]riminal statutes are not to be read more broadly than their language plainly requires . . . . Moreover, [a] penal statute must be construed strictly against the state and liberally in favor of the accused. . . . [A]mbiguities are ordinarily to be resolved in favor of the defendant. . . . In the interpretation of statutory provisions [however] the application of common sense to the language is not to be excluded. . . . Thus, [e]ven applying the view that a penal statute should be strictly construed, the words of a statute are to be construed with common sense and according to the commonly approved usage of the language.” (Citations omitted; internal quotation marks omitted.) *State* v. *Love*, 246 Conn. 402, 412 n.13, 717 A.2d 670 (1998).

tions for separate acts because, inter alia, the statutory text does not expressly state that a violation is a continuing act. The state supports this argument by contrasting § 53a-223a with a related statute, General Statutes § 53a-222, which governs violations of conditions of release and includes language specifically indicating that a violation is a continuing offense. See General Statutes § 53a-222 (a) ("intentionally violates one or more of the imposed conditions of release"). We agree with the state and conclude that the defendant's multiple convictions in this case did not violate his double jeopardy rights.

We begin with the language of § 53a-223a, which provides in relevant part: "(a) A person is guilty of criminal violation of a standing criminal protective order when . . . such person violates such order.

* * *

"(c) Criminal violation of a standing criminal protective order is a class D felony, except that any violation that involves (1) imposing any restraint upon the person or liberty of a person in violation of the standing criminal protective order, or (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the standing criminal protective order is a class C felony."

The plain language of the statute does not define when a violation begins and ends; instead, it states only that one is guilty if "such person violates such order." General Statutes § 53a-223a (a). The statute can reasonably be read to prohibit either a course of conduct or discrete acts, each of which may be sufficient to constitute a violation. As a result, we must look outside the statutory text for indicators of legislative intent. When § 53a-223a is construed in light of similar, surrounding statutes, it is apparent the legislature purposefully omitted language that was included in those provisions. We are cognizant of "the principle that the

legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires us to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coherency of our construction. . . . Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed. . . . That tenet of statutory construction is well grounded because [t]he General Assembly is always presumed to know all the existing statutes and the effect that its action or [nonaction] will have upon any one of them." (Internal quotation marks omitted.) *State* v. *Fernando A.*, 294 Conn. 1, 21, 981 A.2d 427 (2009). In contrast, § 53a-222 follows a similar structure to § 53a-223a but provides in relevant part: "(a) A person is guilty of violation of conditions of release in the first degree when, while charged with the commission of a felony, such person is released . . . and intentionally violates *one or more* of the imposed conditions of release. . . ." (Emphasis added.) This "one or more" language in § 53a-222 (a) demonstrates that, regardless of whether a defendant violates the conditions of release once or more than once, he nevertheless is guilty of only one count. The absence of such language in § 53a-223a indicates that the legislature did not have a similar intent with respect to a standing criminal protective order and, as a result, supports a reading permitting violations of multiple provisions of an order to support multiple convictions under the statute.

We disagree with the defendant's construction of § 53a-223a, which does not resolve the ambiguity in the statute. Specifically, the defendant relies on subsection

(c) of the statute and contends that the legislature's use of "the open-ended term 'involve' thereby impl[ies] that the occurrence or transaction constituting the violation of the protective order can be broader than the acts in the proscribed list." We disagree. The word "involves" in subsection (c) is irrelevant to determining the unit of prosecution because it does not, in the first instance, define whether a violation, as provided in subsection (a), is a discrete act or a continuing course of conduct. Simply because a violation involves threatening does not, under the statutory text, preclude punishment for additional violations because subsection (c) functions only as a sentence enhancement for certain types of violations that are made punishable under subsection (a), namely, those implicating harassing or threatening conduct. In the absence of explication of what it means to "[violate] such order" in subsection (a) itself, the word "involves" in subsection (c) provides no meaningful guidance.

Additionally, under the defendant's interpretation, persons who violate an order repeatedly would be shielded from prosecution because any violation would be continuous. See *State* v. *Snook*, 210 Conn. 244, 262, 555 A.2d 390 ("If we adopted the defendant's reasoning, the commission of one act likely to impair the health and morals of a minor would insulate the perpetrator from further criminal liability for any additional acts of the same character perpetrated on the same minor in subsequent encounters. Such a result defies rationality."), cert. denied, 492 U.S. 924, 109 S. Ct. 3258, 106 L. Ed. 2d 603 (1989); *In re Walker* v. *Walker*, 86 N.Y.2d 624, 628, 658 N.E.2d 1025, 635 N.Y.S.2d 152 (1995) ("Under [the] appellant's argument, a violator already penalized for [wilfully] failing to obey an order of protection would garner immunity from further official sanction for persistent, separate violations . . . . Such an approach is in no way compelled or warranted by the

governing statutes, sentencing principles or reasonable statutory analysis. Its incongruous and untenable result would also constitute an invitation to violate and no incentive to obey." (Citation omitted.)).

The result portended by the defendant's interpretation of § 53a-223a, which suggests that violations of that statute are continuous in nature, is inconsistent with the purpose of the statute, as demonstrated by its legislative history. The legislature enacted § 53a-223a as No. 96-228 of the 1996 Public Acts, entitled "An Act Concerning Domestic Violence." In this act, the legislature created the standing criminal restraining order[11] in response to the well-known tragedy involving Tracey Thurman Motuzick, who had been abused by her ex-husband after his release from jail in 1996. See 39 H.R. Proc., Pt. 10, 1996 Sess., p. 3326, remarks of Representative Ellen Scalettar. In response to this notorious case, the legislature created a new type of restraining order that judges could issue at a defendant's sentencing in a family violence case. Id. The bill's leading proponent, Representative Scalettar, stated that the bill "imposes a significant penalty on those who violate the order. It would be a [c]lass D [f]elony. . . . [T]his bill will give to victims of domestic violence . . . increased protection and increased peace of mind, which they well deserve."[12] Id., p. 3327. Under the defendant's proposed

[11] This language was later amended to read "standing criminal protective order . . . ." Public Acts 2010, No. 10-144, § 6.

[12] The legislative history also indicates that the legislature was aware of the statute's ambiguity at the time of its enactment. Representative Arthur J. O'Neill discussed this issue: "[T]he way it reads, it seems to say that a person is guilty of a violation if a person violates the order. . . . [I]s that existing language? *It seems a little circular to me* . . . ." (Emphasis added.) 39 H.R. Proc., supra, p. 3341. Representative Scalettar responded: "I believe that is existing language . . . . It would either be [General Statutes § 46b-38c] or the civil restraining orders statute." Id. Earlier in the discussion, Representative Scalettar explained that "[t]his is the same language as used in [§] 46b-38c (e) with respect to criminal protective orders *and it would have the same meaning as that statute has been interpreted.*" (Emphasis added.) Id., p. 3340. The statutory language in civil statutes does not, how-

interpretation, a defendant may contact a victim and later assault her, each in violation of an order, but only be convicted of one count. Such a result would be inconsistent with the legislature's desire to protect victims by increasing the penalty for violating protective orders, suggesting that § 53a-223a should be read to permit criminal liability for each discrete act in violation of an order.[13] As the unit of prosecution is no longer ambiguous after considering the surrounding statutory scheme and legislative history, we decline to apply the rule of lenity, as urged by the defendant. See, e.g., *State* v. *Lutters*, 270 Conn. 198, 219, 853 A.2d 434 (2004) ("courts do not apply the rule of lenity unless a reasonable doubt persists about a statute's intended scope *even after resort to the language and structure, legislative history, and motivating policies of the statute*" (emphasis in original; internal quotation marks omitted)).

Numerous other jurisdictions consider protective order violations to be discrete acts. For example, in *Jacobs* v. *State*, 272 So. 3d 838 (Fla. App. 2019), review denied, Florida Supreme Court, Docket No. SC19-1008 (November 22, 2019), the Florida District Court of Appeal affirmed the defendant's conviction of two counts of violating a stalking injunction after he approached and threatened the victim. Id., 839–40. The court held his two violations to be "distinct criminal acts," namely,

ever, provide assistance when determining the unit of prosecution. Because of the importance of this issue, the legislature may want to consider the consistency of § 53a-223a with the surrounding penal statutes.

[13] Indeed, separate punishment for each act that constitutes a violation of a protective order is responsive to the nature of domestic violence offenses. "An abuser's recurrent exertion of power and control over the survivor pervades the survivor's experience, and without effective intervention, battering *typically escalates in frequency and severity over time*. . . . Intimate partner abuse rarely consists only of a single, isolated event; instead, the abusive partner more commonly engages in an ongoing process of violence and control." (Emphasis added; footnotes omitted.) J. Stoever, "Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders," 67 Vand. L. Rev. 1015, 1023–24 (2014).

one when he approached the victim and a second when he contacted her. Id., 841. The fact that the acts occurred nearly simultaneously was of no consequence because "[e]ach act is of a separate character and type, and each is born of a separate impulse." Id., 842; see also *Triggs* v. *State*, 382 Md. 27, 50, 852 A.2d 114 (2004) (upholding defendant's conviction on eighteen counts because "each separate [telephone] call constitutes contact in violation of a protective order"); *Commonwealth* v. *Housen*, 83 Mass. App. 174, 177, 982 N.E.2d 66 (permitting multiple convictions for violations of protective order for separate contacts with victim and her children), review denied, 465 Mass. 1105, 989 N.E.2d 898 (2013); *State* v. *Strong*, 380 Mont. 471, 478, 356 P.3d 1078 (2015) (upholding trial court's denial of defendant's motion to dismiss three of four counts of violating order of protection arising from four telephone calls made over seven hours); *State* v. *McGee*, 135 N.M. 73, 78–79, 84 P.3d 690 (2003) (conviction of several counts of violating order of protection, when four telephone calls were made within minutes of each other, did not violate double jeopardy), cert. denied, 135 N.M. 160, 85 P.3d 802 (2004); *In re Walker* v. *Walker*, supra, 86 N.Y.2d 626, 630 (upholding defendant's convictions for three violations of a protective order when defendant sent victim three letters); *Hill* v. *Randolph*, 24 A.3d 866, 871–73 (Pa. Super. 2011) (permitting multiple contempt counts for violations of protective order when defendant entered victim's home and assaulted victim); *Cable* v. *Clemmons*, 36 S.W.3d 39, 43 (Tenn. 2001) (upholding three of defendant's six convictions for criminal contempt for violating protective order in one interaction when defendant "abused [the victim] physically; produced a knife and threatened to kill her; and then vandalized [the victim's] personal property"); *State* v. *Medina*, Docket No. 48053-1-II, 2016 WL 6599649, *4 (Wn. App. November 8, 2016) (decision without pub-

lished opinion, 196 Wn. App. 1054) (upholding seven counts for violation of court order for multiple text messages sent in one day because "[e]ach time [the defendant] messaged [the victim], he took the affirmative action of picking up the phone, typing a message to [the victim], and pressing 'send' "), review denied, 187 Wn. 2d 1028, 391 P.3d 448 (2017); *State* v. *Brown*, 159 Wn. App. 1, 11, 248 P.3d 518 (2010) ("the unit of prosecution is each single violation of a no-contact order"), review denied, 171 Wn. 2d 1015, 249 P.3d 1029 (2011).

B

Having determined that the legislature permitted convictions for multiple distinct acts that constitute separate violations of § 53a-223a, we must next consider whether the defendant's statements in this case constituted a single act or multiple acts. According to the defendant, a violation of a protective order is analogous to the knife assaults in *State* v. *Nixon*, supra, 92 Conn. App. 589, which were held to be a single, continuous act. The defendant argues that the temporal closeness of the statements is determinative when deciding whether the violations should be considered one act or two. In response, the state contends that the jury could have reasonably found two distinct acts because the defendant violated two distinct conditions of the protective order and each was a completed offense. Additionally, the state argues that the two acts were separated by an "intervening event," that is, when the victim ignored the defendant. We agree with the state and conclude that each conviction was supported by a separate act.

"[D]istinct repetitions of a prohibited act, however closely they may follow each other . . . may be punished as separate crimes without offending the double jeopardy clause. . . . The same transaction, in other words, may constitute separate and distinct crimes

where it is susceptible of separation into parts, each of which in itself constitutes a completed offense. . . . [T]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the [statute]." (Citations omitted; internal quotation marks omitted.) *State* v. *Miranda*, 260 Conn. 93, 122–23, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002).

"We look to the following factors to determine whether, on this record, the defendant engaged in distinct courses of conduct and, therefore, separately punishable [acts]: (1) the amount of time separating the acts; (2) whether the acts occurred at different locations; (3) the defendant's intent or motivation behind the acts; and (4) whether any intervening events occurred between the acts, such that the defendant had the opportunity to reconsider his actions." *State* v. *Ruiz-Pacheco*, 336 Conn. 219, 241, 244 A.3d 908 (2020).

We conclude that the defendant's statements constitute two distinct acts because the victim's resistance, effectuated by her silence, was an intervening event causing the defendant to escalate his behavior. The defendant's initial statement, in which he explained that he loved the victim and inquired as to why she had a block on her phone, constituted a completed offense, namely, contacting the victim in violation of that provision of the order. In contrast, the second set of statements occurred only after "[the victim] wasn't responding to him" and "his tone [had] changed." The defendant stated that the victim was "going to have problems when [he got] home, bitch." The victim then "looked at him, and he told [her] that he was going to fucking kill [her]." What separates the defendant's statements into two criminal acts is the defendant's clear escalation, showing a "fresh impulse" to move from nonthreat-

ening conversation to threatening conversation.[14] *State* v. *Schoonover*, 281 Kan. 453, 497, 133 P.3d 48 (2006). Put differently, the statements supporting count one are a nonthreatening contact, but, upon realizing the victim was not responding, the defendant effectuated a different purpose and made a threatening statement to the victim, supporting a second, distinct count. This renders this case distinguishable from *State* v. *Nixon*, supra, 92 Conn. App. 586, on which the defendant relies. Compare id., 591 ("the defendant twice stabbed the same victim, at the same place and during the same time period, with the same instrument, with the same common intent to inflict physical injury"), with *State* v. *Brown*, 299 Conn. 640, 653–54, 11 A.3d 663 (2011) (first act of attempted robbery ended after "the victim slapped the gun away . . . then escaped," and second act began when defendant chased and shot victim). This escalation, after the victim's intervening resistance, separates the statements into discrete acts. But see *Whylie* v. *United States*, 98 A.3d 156, 165 (D.C. 2014) (one week break in calls by defendant does not necessarily create "fresh impulse").

Although the defendant made his statements at two points close in time, the criminal acts nevertheless are distinct. "It is not dispositive in a double jeopardy analysis that multiple offenses were committed in a short time span and during a course of conduct that victimized a single person." *State* v. *Urbanowski*, 163 Conn.

[14] At oral argument before this court, the state asserted that, if the defendant had said only "I'm going to kill you," that would be one distinct act supporting one count of violating a protective order, even though it violated two conditions, namely, a contact and a threat. According to the state, charging the defendant in this case with two counts without running afoul of double jeopardy protections "depends on some separation in time, however brief." Therefore, the state concedes the limits on its ability to charge a defendant for protective order violations. In other words, if the violations in this case arose from a single act, such as a violation for contacting the victim and a violation for threatening her, as presented by the "I'm going to kill you" hypothetical, there could be only one charge.

App. 377, 393, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017); see also *State* v. *D'Antonio*, 274 Conn. 658, 717, 877 A.2d 696 (2005) (conviction of two counts of interference with officer stemming from acts toward different officers does not violate double jeopardy, even though acts were "within minutes of each other"); *State* v. *Scott*, 270 Conn. 92, 100, 851 A.2d 291 (2004) (conviction of two counts of sexual assault was permissible, "irrespective of the brief period of time separating them"), cert. denied, 544 U.S. 987, 125 S. Ct. 1861, 161 L. Ed. 2d 746 (2005); *State* v. *Lytell*, 206 Conn. 657, 667, 539 A.2d 133 (1988) (defendant's actions toward two victims supported conviction of two counts of robbery, "irrespective of whether the robbery was spatially linked with another robbery"); *State* v. *Marsala*, 93 Conn. App. 582, 589, 889 A.2d 943 (each telephone call violates § 53a-183 (a), "regardless of how close in time the calls were made"), cert. denied, 278 Conn. 902, 896 A.2d 105 (2006). Accordingly, we conclude that the defendant's two convictions for violation of a standing criminal protective order did not violate the constitutional protection against double jeopardy.

II

The defendant next claims that the Appellate Court improperly upheld the trial court's jury instruction with respect to the second count of violation of a standing criminal protective order because it incorrectly defined "harassing" as "to trouble, worry, or torment" for purposes of the penalty enhancement under § 53a-223a (c). The defendant asserts that (1) harassment involves "persistence," which is absent from the trial court's definition, (2) the legislature did not intend "harassing" to mean "troubling" or "worrying," (3) the lower standard utilized by the trial court will encompass virtually any contact in violation of a protective order because defendants may easily "trouble" or "worry" their victims, and (4) the Appellate Court incorrectly relied on

other cases utilizing these jury instructions. In response, the state argues the trial court's definition was proper, and, in any event, any error was harmless beyond a reasonable doubt. We agree with the state and conclude that any error in the trial court's instruction was harmless.[15]

Because the defendant did not object to the jury instructions at trial; *State* v. *Meadows*, supra, 185 Conn. App. 299;[16] we review his claim pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "*Golding* provides that a defendant may prevail on an unpreserved claim when (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Sawyer*, 335 Conn. 29, 49–50, 225 A.3d 668 (2020).

For purposes of this *Golding* analysis, we assume that the trial court's instructional definition of harassing was improper, but we nevertheless conclude that,

[15] We note that the defendant contends that (1) the claimed instructional error was not harmless beyond a reasonable doubt, and (2) contrary to the United States Supreme Court's decision in *Neder* v. *United States*, 527 U.S. 1, 15–17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), the Connecticut constitution does not permit harmless error review if a jury instruction incorrectly states the elements of the crime. For its part, the state contends that this court should not consider the defendant's state constitutional claim because the argument is inapplicable to this case and the claim fails on the merits.

[16] Although the defendant did not object to the instructions at trial or expressly seek review under *State* v. *Golding*, supra, 213 Conn. 239–40, the Appellate Court extended review under *State* v. *Elson*, 311 Conn. 726, 754–55, 91 A.3d 862 (2014), because the claim was one of "constitutional magnitude." *State* v. *Meadows*, supra, 185 Conn. App. 299. We note that preservation and reviewability are not at issue in this certified appeal, and we consider the defendant's claim accordingly.

because the jury found the defendant guilty of threatening as charged in the third count, the jury necessarily found him guilty of threatening the victim as charged in connection with the second count, as the charges were based on the same underlying conduct. As such, any error as to the definition of "harassing" was harmless.[17] Under § 53a-223a (c) (2), a defendant is guilty of a class C felony for criminal violation of a protective order for "threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the standing criminal protective order . . . ." In the present case, the trial court instructed the jury on count two in the following manner: "The defendant is charged in count . . . two with criminal violation of a standing criminal protective order. . . . For you to find the defendant guilty of this charge, the state must prove

[17] The defendant argues that the state abandoned the harmless error analysis by failing to brief it below. Specifically, the defendant argues that the state briefed only that the instructional error was waived under *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), and plain error. The state counters that it essentially briefed harmlessness below by arguing "the absence of 'manifest injustice' under the plain error doctrine." We agree with the state.

We recognize that the state bears the burden of establishing harmlessness. See, e.g., *State* v. *Peeler*, 271 Conn. 338, 384, 857 A.2d 808 (2004) ("[i]f the claim is of constitutional magnitude, the state has the burden of proving the constitutional error was harmless beyond a reasonable doubt" (internal quotation marks omitted)), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005). Because this is the state's burden, the Appellate Court has declined to reach harmlessness when the state has failed to argue the issue on appeal. See, e.g., *State* v. *Liam M.*, 176 Conn. App. 807, 824 n.14, 172 A.3d 243, cert. denied, 327 Conn. 978, 174 A.3d 196 (2017); *State* v. *Perez*, 147 Conn. App. 53, 124, 80 A.3d 103 (2013), aff'd, 322 Conn. 118, 139 A.3d 654 (2016).

In the present case, however, the state has sufficiently asserted harmlessness below to merit our review. First, the defendant did not clearly brief either plain error or *Golding* review in his initial brief to the Appellate Court. The state, therefore, could not be sure under what standard the defendant was proceeding. Second, the state's argument asserting that there was no manifest injustice with respect to plain error implicitly incorporated a harmless error analysis. As such, we will proceed to analyze harmlessness in this certified appeal.

the following elements beyond a reasonable doubt. . . . [T]he first element is that a court issued a standing criminal protective order against the defendant. . . . The second element is that the defendant violated a condition of the order. To violate a condition means to act in disregard of or to go against the condition. *In this case, the state alleges that threatening or harassing the* [*victim*] was forbidden by the order, and you have the order. As far as what's the definition of a threat, use the same definition that I'm going to give you on threatening.[18] As far as what's harassing, harassing is to trouble, worry, or torment; that's the legal definition. Trouble, worry, or torment." (Emphasis added; footnote added.)

In *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61, 129 S. Ct. 530, 172 L. Ed. 2d 388 (2008), the United States Supreme Court held that, when a jury is instructed on multiple theories of guilt and one is improper, the error may be reviewed for harmlessness.[19] "An instructional error

[18] With respect to the third count, charging threatening in violation of § 53a-62, the trial court instructed: "A threat can . . . be punishable [only] when it is a true threat, that is, a threat that a reasonable person would understand is a serious expression of an intent to harm or assault and not mere puffery, bluster, jest, or hyperbole, or a—and then you see the little arrow up there, I added something—or a spontaneous act of frustration. In determining whether the threat is a true threat, consider the particular factual context in which the allegations—in which the allegedly threatening conduct occurred, which could include the reaction of the person allegedly being threatened and the defendant's conduct before and after the alleged threatening conduct."

[19] The defendant contends that the harmlessness rule in *Neder* v. *United States*, 527 U.S. 1, 15–17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), guides the analysis in the present case. See id., 17 ("[when] a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless"). We disagree. Although the court in *Hedgpeth* v. *Pulido*, supra, 555 U.S. 57, relied on *Neder* to extend harmlessness to a multiple theories of guilt case, which was not at issue in *Neder*, it indicated that the "substantial and injurious effect" standard applied rather than the uncontested element and overwhelming evidence analysis used in *Neder*. Id., 61–62. For this reason, we do not reach the defendant's claim

arising in the context of multiple theories of guilt no more vitiates all the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted." (Emphasis omitted.) Id. When reviewing instructional errors based on multiple theories of guilt, "a reviewing court finding such error should ask whether the flaw in the instructions 'had substantial and injurious effect or influence in determining the jury's verdict.' " Id., 58, quoting *Brecht* v. *Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); see also *Skilling* v. *United States*, 561 U.S. 358, 414 n.46, 130 S. Ct. 2896, 177 L. Ed. 2d 619 (2010) (*Hedgpeth*'s harmless error analysis "applies equally to cases on direct appeal").

Federal courts of appeals applying this harmlessness standard to cases involving multiple theories of guilt have required varying degrees of proof of harm.[20] See *Sorich* v. *United States*, 709 F.3d 670, 674 (7th Cir. 2013) ("[w]e have described the [harmless error] inquiry . . . as a question of whether the trial evidence was such that the jury must have convicted the petitioners on both [alternative] theories"), cert. denied, 571 U.S. 1131,

that the Connecticut constitution does not permit harmless error review of element instructional errors or the issue of "whether [this court should] adopt the controversial *Neder* rule as a state constitutional matter" under *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992).

[20] "[*Hedgpeth*] requires a reviewing court to determine whether the relevant error 'had substantial and injurious effect or influence in determining the jury's verdict.' However, the circuits are divided in their interpretation of this standard. Some [federal courts of appeals] have interpreted the rule as imposing a less demanding standard on the defendant-appellant to establish grounds for reversal, merely requiring it to be shown, for example, that the jury did not necessarily make the findings to rely on the valid theory of guilt. Other [courts], however, impose a more demanding standard, for example, finding an error harmless unless the defendant-appellant can show not only that the jury did not necessarily rely on the valid theory of guilt, but also had evidence that could rationally lead to an acquittal on the basis of the valid theory." E. Khalek, Note, "Searching for a Harmless Alternative: Applying the Harmless Error Standard to Alternative Theory Jury Instructions," 83 Fordham L. Rev. 295, 295–96 (2014).

134 S. Ct. 952, 187 L. Ed. 2d 786 (2014); *United States* v. *Jefferson*, 674 F.3d 332, 361 (4th Cir.) ("if the evidence that the jury necessarily credited in order to convict the defendant under the instructions given . . . is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground, the conviction may be affirmed" (internal quotation marks omitted)), cert. denied, 568 U.S. 1041, 133 S. Ct. 648, 184 L. Ed. 2d 482 (2012); *United States* v. *Skilling*, 638 F.3d 480, 482 (5th Cir. 2011) (discussing how one way to show "an [alternative theory] error is harmless" is "if the jury, in convicting on an invalid theory of guilt, necessarily found facts establishing guilt on a valid theory"), cert. denied, 566 U.S. 956, 132 S. Ct. 1905, 182 L. Ed. 2d 807 (2012); see also *United States* v. *McKye*, 734 F.3d 1104, 1110 n.6 (10th Cir. 2013) (not relying on *Hedgpeth* but concluding that "the submission of an alternative theory for making [a] finding cannot sustain the verdict unless it is possible to determine the verdict rested on the valid ground" or "the jury necessarily made the findings required to support a conviction on the valid ground" (internal quotation marks omitted)). Nevertheless, we are persuaded by the common thread in several of these cases that permits a finding of harmlessness if the jury necessarily found facts to support the conviction on a valid theory.

In the present case, the state charged the defendant with violating a criminal protective order under two alternative theories, threatening *or* harassing the victim. The defendant does not raise an instructional error claim as to the trial court's instruction on threatening.[21]

[21] The defendant does argue that there was a limiting instruction in place that restricted the jury on the evidence it could consider under counts three and four, so the jury could not have relied on the same evidence for each count. This is inconsistent with the record. The trial court provided several limiting instructions, including one that limited what evidence could be considered under each count. But this instruction actually provided that evidence regarding certain statements made by the defendant should be considered under the first two counts. As a result, there was less evidence

As the jury found the defendant guilty on count three for threatening, the jury necessarily found that the defendant threatened the victim in violation of the criminal protective order in connection with count two.[22] See *United States* v. *Jefferson*, supra, 674 F.3d 362–63 (considering jury's findings on other counts in harmlessness analysis); *United States* v. *Wilkes*, 662 F.3d 524, 544 (9th Cir. 2011) ("[T]he jury's guilty verdict on the separate substantive count of bribery [of a public official] in violation of 18 U.S.C. § 201 confirms beyond any reasonable doubt that the jury would have convicted [the defendant] of honest services fraud . . . . Any error

to prove intent in connection with the third and fourth counts, and the limiting instruction would not affect the jury's verdict on these counts.

The court instructed the jury, after hearing evidence on the May hearing at which the protective order was put in place, to limit the use of certain statements made by the defendant. Initially, the court limited the statements in the following manner: "[The defendant's] statements in part are offered as circumstantial evidence of what his mental state might've been on September 1 with regard to count three, which is a specific intent crime, and count four, which—in which he's charged with uttering a threat with—with reckless disregard of the consequences that might occur, and I'll explain further in my final instructions, okay?" Then, the court corrected its original instruction and stated: "I said the statements of—recorded on May 12 were admitted—the statements of the defendant were recorded for a limited purpose, and I said [that] they're offered to show his intent with regard to the threatening. I misspoke there, and I'll go through these all again, and I'll have a list. Actually, they're offered with regard to [the defendant's] intent on the violation of the standing criminal restraining order counts and not the threatening, okay?"

[22] In a statement before the court and outside the presence of the jury, defense counsel conceded that the factual basis for count three is incorporated into count two. Defense counsel stated: "So, the proposed limiting instruction that I am asking for is that, if you find beyond a reasonable doubt [that] the defendant is guilty of threatening in the second degree as alleged in count three of the information, you may use that finding when determining whether the defendant is also guilty beyond a reasonable doubt of committing the crime of violating the standing criminal restraining order, as alleged in count two of the information.

* * *

"[*The*] *defense cannot argue and would concede that . . .* [*count*] *three is incorporated into count . . . two and, therefore, could be a basis of this violation.*" (Emphasis added.)

concerning the jury instruction was harmless."), cert. denied, 566 U.S. 981, 132 S. Ct. 2119, 182 L. Ed. 2d 881 (2012). In the present case, it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error . . . ." *Neder* v. *United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). As a result, we conclude that any instructional error as to count two was harmless under the fourth prong of *Golding*. See, e.g., *State* v. *Peeler*, 271 Conn. 338, 399, 857 A.2d 808 (2004) ("we need not reach the merits of the defendant's constitutional claims because, even if we were to assume that the defendant's claims are valid, the state has established beyond a reasonable doubt that any impropriety was harmless"), cert. denied, 546 U.S. 845, 126 S.C. 94, 163 L. Ed. 2d 110 (2005).

The judgment of the Appellate Court is affirmed.

In this opinion PALMER, D'AURIA and MULLINS, Js., concurred.

ECKER, J., with whom McDONALD, J., joins, concurring in part and dissenting in part. I agree with the majority that multiple, distinct acts constitute separate violations of a standing criminal protective order, contrary to General Statutes § 53a-223a.[1] I disagree, however, that the statements made in the present case by the defendant, Cody M., were separate and distinct acts.

[1] General Statutes § 53a-223a provides in relevant part: "(a) A person is guilty of criminal violation of a standing criminal protective order when an order issued pursuant to subsection (a) of section 53a-40e has been issued against such person, and such person violates such order.

* * *

"(c) Criminal violation of a standing criminal protective order is a class D felony, except that any violation that involves (1) imposing any restraint upon the person or liberty of a person in violation of the standing criminal protective order, or (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the standing criminal protective order is a class C felony."

The record reflects that the defendant's statements were uttered within seconds of each other in a continuous and uninterrupted stream of contact with the victim. In my view, there was neither an intervening event between the defendant's statements nor a change in the defendant's intent; his statements concerned the same general subject matter and were undertaken with a singular purpose. The defendant therefore committed only a single violation of the standing criminal protective order, for which he may be punished only once under the double jeopardy clause. Accordingly, I respectfully dissent from part I B of the majority opinion. I agree with the majority that any alleged error in the jury instruction on the definition of "harassing" was harmless and, therefore, join part II of the majority opinion.

The record reflects that there was a valid standing criminal protective order, which prohibited the defendant from, among other things, (1) "assault[ing], threaten[ing], abus[ing], harass[ing], follow[ing], interfer[ing] with, or stalk[ing]" the victim, or (2) "contact[ing] the [victim] in any manner . . . ." On September 1, 2015, the defendant was in the custody of the Department of Correction, which transported the defendant to a juvenile court proceeding regarding his children with the victim. Despite the existence of a formal court order prohibiting the defendant from contacting the victim, except as "allowed for purposes of visitation, as directed by [the] family court," he was placed in a seat at the same table as the victim in the courtroom, with nothing but one empty chair between them. At some point during the proceeding, the defendant began "trying to make small talk" with the victim. Specifically, the defendant whispered to the victim that he still loved her and asked her why she had a block on her phone. The defendant also reminded the victim that she had said she "would never do this to him . . . ." The victim "just ignored" the defendant and kept her eyes focused on the trial

judge. The defendant's "tone changed," and he told the victim that she was "going to have problems" when he got "home, bitch," which "caught [the victim's] attention . . . ." The victim looked at the defendant, who mouthed "that he was going to fucking kill" her. The victim responded by saying "stop threatening me, I can hear you . . . ." The defendant replied "I didn't or I'm not." One of the attorneys informed the trial judge that the defendant was "speaking to the [victim] while Your Honor is presiding." The trial judge admonished the defendant that "this is not the time for visit[ation] or socialization."

On the basis of his in-court statements to the victim, the defendant was charged with two counts of violating a standing criminal protective order under § 53a-223a and one count of threatening under General Statutes (Rev. to 2015) § 53a-62 (a) (2). Specifically, count one charged the defendant with violation of a standing criminal protective order "by having contact with" the victim, count two charged the defendant with violation of a standing criminal protective order "by threatening and harassing" the victim, and count three charged the defendant with threatening the victim. The defendant also was charged, in count four of the information, with a second count of threatening on the basis of threats he made to the victim outside of the courtroom after the conclusion of the juvenile court proceeding. The jury found the defendant guilty of all of the crimes charged. The trial court sentenced the defendant to five years of incarceration on the first count of violation of a standing criminal protective, followed by a consecutive sentence of three years of incarceration and seven years of special parole on the second count of violation of a standing criminal protective order. The trial court also imposed two concurrent one year terms of incarceration on the threatening counts, to be served concurrently with the first count of violation of a standing criminal protective order. Thus, the total effective sen-

tence was eight years of incarceration followed by seven years of special parole.

On appeal, the defendant claims that, on these facts, his conviction under counts one and two of two offenses under the same statutory provision, § 53a-223a, violates his constitutional right to be free from double jeopardy. As the majority rightly points out, "[t]he proper double jeopardy inquiry when a defendant is convicted of multiple violations of the same statutory provision is whether the legislature intended to punish the individual acts separately or to punish only the course of action which they constitute." (Emphasis omitted; internal quotation marks omitted.) Part I of the majority opinion, quoting *State* v. *Garvin*, 242 Conn. 296, 304, 699 A.2d 921 (1997). Thus, to resolve the issue on appeal, we must "determine the 'unit of prosecution' intended by the legislature in enacting § 53a-223a."

I agree with the majority that, in enacting § 53a-223a, the legislature intended "to permit criminal liability for each discrete act in violation" of a standing criminal protective order. I further agree with the majority that, to determine whether the defendant's statements constituted a single act or multiple acts, we should consider the following factors: "(1) the amount of time separating the acts; (2) whether the acts occurred at different locations; (3) the defendant's intent or motivation behind the acts; and (4) whether any intervening events occurred between the acts, such that the defendant had the opportunity to reconsider his actions." (Internal quotation marks omitted.) Part I B of the majority opinion, quoting *State* v. *Ruiz-Pacheco*, 336 Conn. 219, 241, 244 A.3d 908 (2020). Our agreement ends, however, with the application of these factors, which leads the majority to conclude that the defendant's statements during the juvenile court proceeding can be separated into multiple, discrete acts. Instead, given the proximity in time and space, the defendant's singular intent, and

the lack of any intervening events between the defendant's statements, it is clear to me that the defendant committed a single violation of the standing criminal protective order under § 53a-223a.

It is undisputed that the first and second factors in the analysis, namely, the amount of time separating the defendant's statements and the location where they were uttered, favor the defendant. The defendant and the victim were seated in the same place in the courtroom throughout the encounter. The amount of time between the defendant's initial statements and his threatening statements was extremely brief. Indeed, as the trial court observed, "this is a trial about what happened in the course of about ten seconds." These factors are not dispositive, of course, because spatial and temporal proximity alone do not always trigger a double jeopardy violation. "[D]istinct repetitions of a prohibited act, however closely they may follow each other . . . may be punished as separate crimes without offending the double jeopardy clause." (Citation omitted; internal quotation marks omitted.) *State* v. *Miranda*, 260 Conn. 93, 122, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002). But the immediate proximity of the statements in place and time are an important part of any analysis turning on discreteness and severability, and the fact that the statements were made during a brief and uninterrupted verbal contact with the victim strongly supports the conclusion that the defendant committed a single violation of the standing criminal protective order rather than two separate violations.

The third and fourth factors only bolster this conclusion. I reject the majority's characterization of the victim's silence as an "intervening event" that separated the defendant's initial affectionate statements from the threatening statements that followed immediately thereafter. To begin with, the victim's response—whether silent or spoken—strikes me as a red herring

in this particular context. The defendant's verbalizations to the victim over a ten second time span constituted one act or transaction, whether delivered as a monologue or part of a dialogue, in the same way that a single, short telephone call from the defendant to the victim would have been one act or transaction, regardless of the parties' speaking roles. If the majority's analysis is sustainable, it must explain why its logic would not subject a defendant to multiple violations of § 53a-223a (perhaps many, if the communication consisted of a back and forth dialogue) for a single, short telephone call consisting of content similar to that occurring here. I believe that an unacceptable degree of arbitrariness enters the analysis when the number of criminal violations depends on the speaker's punctuation choices, sentence or paragraph structure, or the conversational turns occurring in a brief, uninterrupted communication.

Moreover, even if such considerations were appropriate in the present context, it is more accurate, in my view, to characterize the victim's silence as a *non*event, or perhaps a *continuation* of the same event, rather than an intervening event in these circumstances. The victim did nothing and said nothing. There was no change of location or alteration of any other objective condition that would fit our normal understanding of what constitutes an intervening event. Silence, of course, can mean many different things, and the victim's failure to respond clearly meant something to the defendant, but it changed nothing except his emotional stratagem; he quickly replaced affectionate overtures with angry threats in his effort to persuade the victim to unblock his phone calls. The fact is that nothing happened between the defendant's initial statements and his threatening statements—nothing was said and nothing was done by the victim or anyone else in the courtroom. I am unaware of any case law, and the majority

has cited none, holding that silence or inaction is an intervening event in the double jeopardy context.[2]

This brings me to the final factor on which the majority relies—its perception of a change in the defendant's intent. This point, in my estimation, confuses the defendant's singular intention during the prohibited contact—to persuade the victim to accept his phone calls—with the rapid change in tone or tactics used to achieve that objective. The fact that the defendant substituted threats for affection does not mark the end of one crime and the beginning of another. Whether through statements of endearment or intimidation, his purpose and intent remained the same, namely, to manipulate the victim into unblocking his phone number. I disagree with the majority that, during the few seconds between the defendant's initial statements and his threatening statements, he developed a " 'fresh impulse' " or a "different purpose . . . ." Part I B of the majority opinion; see *Whylie* v. *United States*, 98 A.3d 156, 165 (D.C.

[2] The one case on which the majority relies, *State* v. *Brown*, 299 Conn. 640, 11 A.3d 663 (2011), illustrates precisely what is missing from this case—an actual intervening event that creates a temporal or spatial break sufficient to provide the defendant with a "clear opportunity . . . to reconsider his actions" and "[to formulate] a new criminal intent that was separate and distinct from the intent behind the initial [offense]." *State* v. *Ruiz-Pacheco*, supra, Conn. ; see id., (holding that defendant's two assault convictions did not violate double jeopardy clause because there was "[a] distinct break" in both time and place in fighting, and second assault was motivated by "a separate and distinct criminal intent"). In *Brown*, the defendant attempted to rob the victim, but the victim fought back by "slapp[ing] the gun away," "struggl[ing] for control of the gun," and "escap[ing] and [running] down" the street. *State* v. *Brown*, supra, 653. The victim's escape was an intervening event because it represented a fork in the road; the defendant could either chase after the victim or flee the scene of the crime. The defendant chose to chase the victim, shoot him, and rob him. Id., 653–54. The defendant's first crime (attempted robbery) and his second crime (completed robbery) were "two separate and severable crimes"; id., 654; because they were separated by time and space, the victim's escape, and the defendant's formulation of a new and distinct criminal intent. The facts of *Brown* contrast sharply with the facts of the present case, and *Brown* provides no support for the outcome reached here.

2014) (holding that it would be "rank speculation" to conclude that one week break between phone calls "cor responded to a fork in the road and a fresh impulse not in evidence"); cf. *United States* v. *Chipps*, 410 F.3d 438, 449 (8th Cir. 2005) (under "impulse test," which "treat[s] as one offense all violations that arise from that singleness of thought, purpose or action, which may be deemed a single impulse," there was only "a single impulse underlying [the defendant's] assaultive conduct" in light of "the uninterrupted nature of the attack on [the victim]" (internal quotation marks omitted)); *Hagood* v. *United States*, 93 A.3d 210, 226 (D.C. 2014) (describing "fresh impulse or fork-in-the-road test," which asks whether, "at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest," and holding "that something more than a momentary interruption is required to sever the singular continuous possession of a weapon into distinct, separately punishable criminal actions" (internal quotation marks omitted)).

Under the majority's holding today, an individual who violates a standing criminal protective order by uttering an uninterrupted stream of vile threats commits only one violation of § 53a-223a, but an individual who precedes, intersperses, or concludes his threats with "small talk" commits two or more separate violations of the statute. I can perceive no reason, and the majority offers none, why the legislature would want to punish the latter individual more harshly in this context than the former. Indeed, given the purpose of the statute and the legislative policy that it was designed to implement—to protect victims of domestic violence—it makes no sense to punish individuals who pose an unequivocal threat to the victim less harshly than those who do not. Such an outcome is not only illogical but also results "in convictions that are disproportionate to an offender's

conduct,'' in violation of the double jeopardy clause. *State* v. *Morales*, 174 Wn. App. 370, 388, 298 P.3d 791 (2013); see id., 387–88 (holding that threat to cause bodily harm to single identified person at particular time and place was only one unit of prosecution of harassment, regardless of how many times threat was communicated to others).

The defendant's statements were made as part of a brief, one-sided verbal contact with the victim. As such, his conduct constituted only a single violation of the standing criminal protective order under § 53a-223a. Because the defendant stands convicted of two offenses under the same statutory provision for a single act or transaction in violation of the double jeopardy clause, I would reverse the defendant's conviction under count one of the information and remand the case for resentencing.[3] See *State* v. *Miranda*, supra, 260 Conn. 130 (''[u]nder the aggregate package view . . . the court may reconstruct the sentence in any way necessary to ensure that the punishment fits both the crime and the defendant''). I therefore dissent from part I B of the majority opinion.

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[3] Although the defendant was convicted twice under the same statute for the same conduct, his conviction under count two of the information is the greater of the two offenses because any violation of a standing criminal protective order that involves, among other things, threatening or harassing is a class C felony rather than a class D felony. See General Statutes § 53a-223a (c); see also General Statutes § 53a-35a (1) (A) (7) and (8) (providing that class C felony is punishable by ''a term not less than one year nor more than ten years,'' whereas class D felony is punishable by ''a term not more than five years''). It is well established that, ''when a defendant has been convicted of greater and lesser included offenses'' in violation of the double jeopardy clause, ''the trial court must vacate the conviction for the lesser offense . . . .'' *State* v. *Polanco*, 308 Conn. 242, 245, 61 A.3d 1084 (2013).

ORDERS

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IN RE KIARA LIZ V.

The petition of the respondent father for certification to appeal from the Appellate Court, 203 Conn. App. 613 (AC 44264), is denied.

David B. Rozwaski, assigned counsel, in support of the petition.

Carolyn A. Signorelli and *Evan O'Roark*, assistant attorneys general, in opposition.

Decided June 15, 2021

STATE OF CONNECTICUT *v.* HASSAN FOSTER

The defendant's petition for certification to appeal from the Appellate Court, 203 Conn. App. 740 (AC 41235), is denied.

Hassan Foster, self-represented, in support of the petition.

Samantha L. Oden, deputy assistant state's attorney, in opposition.

Decided June 25, 2021

WELLS FARGO BANK, N.A., TRUSTEE
v. TINA ROBERTSON ET AL.

The petition of the named defendant et al. for certification to appeal from the Appellate Court, 203 Conn. App. 903 (AC 42480), is denied.

Tina DeMello, self-represented, and *Ronald H. DeMello*, self-represented, in support of the petition.

Victoria L. Forcella, in opposition.

Decided June 25, 2021

BAYVIEW LOAN SERVICING, LLC *v.*
JEANNE M. MACRAE-GRAY ET AL.

The petition of the defendant Glenn S. MacCrae-Gray for certification to appeal from the Appellate Court, 203 Conn. App. 903 (AC 43805), is denied.

Glenn S. MacCrae-Gray, self-represented, in support of the petition.

Claudia M. Sklar and *Joshua P. Joy*, in opposition.

Decided June 25, 2021

KATIE N. CONROY *v.* AMMAR A. IDLIBI

The defendant's petition for certification to appeal from the Appellate Court, 204 Conn. App. 265 (AC 42416), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the trial court had not abused its discretion when, without holding an evidentiary hearing, it denied the defendant's motion to open the dissolution judgment based on allegations of fraud?"

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

Ammar A. Idlibi, self-represented, in support of the petition.

Decided June 25, 2021

ASNAT REALTY, LLC, ET AL. *v.* UNITED ILLUMINATING COMPANY ET AL.

The plaintiffs' petition for certification to appeal from the Appellate Court, 204 Conn. App. 313 (AC 42893), is denied.

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

Stephen G. Walko and *Andrea C. Sisca*, in support of the petition.

Elizabeth C. Barton and *Taylor C. Amato*, in opposition.

Decided June 25, 2021

JEROME RICE *v.* COMMISSIONER OF CORRECTION

The petitioner Jerome Rice's petition for certification to appeal from the Appellate Court, 204 Conn. App. 513 (AC 42970), is denied.

Naomi T. Fetterman, assigned counsel, in support of the petition.

Sarah Hanna, senior assistant state's attorney, in opposition.

Decided June 25, 2021

IN RE ANGELA V. ET AL.

The petition of the respondent mother for certification to appeal from the Appellate Court, 204 Conn. App. 746 (AC 44201), is denied.

Albert J. Oneto IV, assigned counsel, in support of the petition.

John E. Tucker, assistant attorney general, in opposition.

Decided June 25, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 205

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

LAWRENCE DRESSLER *v.* EUGENE RICCIO
(AC 43385)

Moll, Alexander and Suarez, Js.

Syllabus

The plaintiff sought to recover damages from the defendant attorney for, inter alia, legal malpractice in connection with the defendant's representation of the plaintiff in a federal criminal case involving certain fraudulent real estate transactions. The plaintiff entered into a plea agreement in the federal case. The plaintiff's three count complaint alleged legal malpractice, breach of fiduciary duty and a violation of the Connecticut Unfair Trade Practices Act (CUTPA) (§ 42-110a et seq.). As to the legal malpractice and breach of fiduciary duty claims, the plaintiff alleged that he was required to pay an excessive amount in restitution as part of his sentence in the federal case as a result of the defendant's deficient representation of him. As to the CUTPA claim, the plaintiff alleged that he was compelled to retain the defendant as his criminal defense counsel in lieu of another attorney as a result of certain statements that the defendant made to him that were untrue, misleading and deceptive. The trial court granted a motion to strike filed by the defendant as to the plaintiff's CUTPA claim, and a motion for summary judgment filed by the defendant as to the legal malpractice and breach of fiduciary duty claims, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly granted the defendant's motion to strike the plaintiff's CUTPA claim; pursuant to Connecticut case law, representations made by an attorney to a prospective client regarding the attorney's expertise and/or competence do not relate to the entrepreneurial aspects of the practice of law and therefore are outside of the ambit of CUTPA; moreover, if the defendant breached the governing standard of care and the plaintiff suffered harm as a result, then the plaintiff's remedy would be to bring an action claiming legal malpractice, not a violation of CUTPA.
2. The trial court lacked subject matter jurisdiction over the plaintiff's legal malpractice and breach of fiduciary duty claims because they were not ripe for review pursuant to *Taylor* v. *Wallace* (184 Conn. App. 43): to succeed on those claims, the plaintiff would have had to demonstrate that the defendant's alleged conduct led to the imposition of an erroneous restitution order by the federal sentencing court, which would necessarily have undermined the validity of his sentence, and such a collateral attack on the plaintiff's sentence is not permissible because, as long as a plaintiff's conviction or sentence remains valid, it cannot be vitiated indirectly by a tort action commenced against counsel; accordingly, as to the summary judgment rendered in the defendant's favor on these claims, the form of the judgment was improper because a judgment of dismissal must be rendered when the court lacks subject matter jurisdiction.

Argued January 12—officially released July 6, 2021

Procedural History

Action to recover damages for, inter alia, legal malpractice, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Abrams*, *J.*, granted the defendant's motion to strike; subsequently, the court, *Abrams*, *J.*, granted the defendant's motion for summary judgment and rendered judgment thereon, from which the plaintiff appealed to this court. *Reversed in part*; *judgment directed.*

Lawrence Dressler, self-represented, the appellant (plaintiff).

Michael R. Keller, with whom were *Eva M. Kolstad*, and, on the brief, *James L. Brawley*, for the appellee (defendant).

Opinion

MOLL, J. The plaintiff, Lawrence Dressler, appeals from the judgment of the trial court rendered in favor of the defendant, Eugene Riccio. On appeal, the plaintiff claims that the court improperly granted the defendant's (1) motion to strike count three of the plaintiff's amended complaint asserting a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and (2) motion for summary judgment as to counts one and two of the plaintiff's amended complaint asserting legal malpractice and breach of fiduciary duty claims, respectively. We conclude that the court properly granted the defendant's motion to strike the plaintiff's CUTPA claim set forth in count three. As for the summary judgment rendered in the defendant's favor on counts one and two, the defendant argues, as an alternative ground for affirmance, that the court lacked subject matter jurisdiction over those claims because they are not ripe for review pursuant to *Taylor* v. *Wallace*, 184 Conn. App. 43, 47–52, 194

A.3d 343 (2018). We agree with the defendant's ripeness argument; however, rather than affirming the summary judgment on that alternative ground, we conclude that the judgment is improper in form because the court's lack of subject matter jurisdiction over counts one and two necessitates a judgment of dismissal with respect to those counts. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. In February, 2013, in relation to certain fraudulent real estate transactions, the plaintiff was indicted by a federal grand jury on a charge of conspiracy to commit bank, mail, and wire fraud in violation of 18 U.S.C. § 1349 (2006).[1] Initially, Attorney John R. Williams represented the plaintiff as his criminal defense counsel. Subsequently, the plaintiff retained the defendant, who filed an appearance on the plaintiff's behalf in the federal criminal case on February 22, 2013, the day of the plaintiff's arraignment. In October, 2013, after entering into a plea agreement, the plaintiff pleaded guilty to the conspiracy charge. In March, 2014, the plaintiff was sentenced to twenty months of incarceration followed by three years of supervised release with special conditions. Additionally, as part of his sentence, the plaintiff was ordered to pay, inter alia, $403,450.75 as restitution.

On July 14, 2017, the plaintiff commenced the present action against the defendant. Subsequently, the plaintiff filed an amended three count complaint (i.e., the operative complaint). Count one asserted legal malpractice. Count two asserted breach of fiduciary duty. Both counts one and two were predicated on allegations that, inter alia, the plaintiff was required to pay an excessive amount in restitution as a result of the defendant's deficient representation in the federal criminal case. Count

[1] The plaintiff also was indicted on a charge of making a false statement to a financial institution in violation of 18 U.S.C. §§ 2 and 1014 (2006). That charge was subsequently dismissed.

three asserted a violation of CUTPA and was based on allegations that the plaintiff was compelled to retain the defendant as his criminal defense counsel in lieu of Attorney Williams as a result of certain statements that the defendant made to him that were untrue, misleading, and deceptive.

On January 16, 2019, the defendant filed a motion to strike count three, claiming that the plaintiff's CUTPA claim was legally insufficient because, inter alia, the defendant's alleged conduct did not relate to the entrepreneurial aspects of the practice of law. On February 5, 2019, the plaintiff filed a memorandum of law in opposition. On February 19, 2019, the defendant filed a reply. Thereafter, with leave of the court, the plaintiff filed a surreply. On May 17, 2019, the court granted the motion to strike, concluding that the allegations pleaded by the plaintiff in support of count three did not concern the entrepreneurial aspects of the practice of law and, thus, were legally insufficient to state a viable CUTPA claim.

On April 15, 2019, before the court had stricken the CUTPA claim, the defendant filed a motion for summary judgment, accompanied by a supporting memorandum of law and exhibits, directed to the plaintiff's amended complaint in its entirety. The defendant asserted that (1) pursuant to *Taylor* v. *Wallace*, supra, 184 Conn. App. 43, the plaintiff's claims were not ripe for review, (2) the applicable statutes of limitations had expired as to all of the plaintiff's claims, and (3) the plaintiff could not establish a prima facie case as to his legal malpractice and breach of fiduciary duty claims because he had failed to disclose an expert witness. On May 30, 2019, the plaintiff filed a memorandum of law, accompanied by exhibits, in opposition to the motion for summary judgment. On June 14, 2019, the defendant filed a reply. On September 9, 2019, the court granted the motion for summary judgment as to the plaintiff's legal malpractice

and breach of fiduciary duty claims in counts one and two, respectively, solely on the basis that they were statutorily time barred and that no genuine issue of material fact existed to toll the applicable statute of limitations. The court did not address the defendant's other claims raised in support of his motion for summary judgment. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The plaintiff first claims that the trial court improperly granted the defendant's motion to strike count three of the plaintiff's amended complaint asserting a violation of CUTPA.[2] We disagree.

"Because a motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court, our review of the court's ruling . . . is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner

[2] On June 4, 2019, pursuant to Practice Book § 10-44, the defendant filed a motion for judgment on the stricken CUTPA count. On the basis of the record before us, it appears that the court never adjudicated the motion for judgment. It is well established that "[t]he granting of a motion to strike . . . ordinarily is not a final judgment . . . ." (Internal quotation marks omitted.) *Sempey* v. *Stamford Hospital*, 180 Conn. App. 605, 618, 184 A.3d 761 (2018). Nevertheless, "[i]n similar circumstances where a count of a complaint was stricken, but the plaintiff failed to plead over, no judgment was entered thereon and the remaining counts were disposed of by way of summary judgment, this court has considered the appeal to have been from a final judgment." *DeCorso* v. *Calderaro*, 118 Conn. App. 617, 624, 985 A.2d 349 (2009), cert. denied, 295 Conn. 919, 991 A.2d 564 (2010); see also *Sieranski* v. *TJC Esq, A Professional Services Corp.*, 203 Conn. App. 75, 80–81 n.4, 247 A.3d 201 (2021) (declining defendant's invitation to reconsider issue of whether final judgment existed in appeal—filed after rendering of summary judgment—that challenged granting of motion to strike count of plaintiff's original complaint notwithstanding fact that judgment had not been rendered on stricken count, where this court previously had denied defendant's motion to dismiss appeal predicated on same issue). Accordingly, under the circumstances of this case, we conclude that this appeal is taken from a final judgment.

most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Karagozian* v. *USV Optical, Inc.*, 335 Conn. 426, 433–34, 238 A.3d 716 (2020).

The following additional facts are relevant to our disposition of the plaintiff's claim. In support of his CUTPA claim, the plaintiff alleged in relevant part as follows. On or about February 22, 2013, the plaintiff hired the defendant to defend him in the federal criminal case in lieu of his prior counsel, Attorney Williams. During a meeting between the plaintiff and the defendant that preceded the defendant's retention as counsel, the defendant "aggressively solicited the plaintiff by making disparaging remarks about [Attorney Williams], in one or more of the following ways: (a) the defendant told the plaintiff that [Attorney Williams] was a 'flame thrower' because he sued the government frequently and would thereby harm the plaintiff's chances of reaching a favorable resolution with the federal government; (b) the defendant told the plaintiff that [Attorney Williams] had already caused considerable damage to the plaintiff's case in that the plaintiff was like a patient on the operating table with his guts hanging out and it was up to the defendant to put the plaintiff back together; [and] (c) the defendant had a close relationship with the federal government which would work in the plaintiff's favor, as opposed to [Attorney Williams], who had a bad relationship with the federal government." The plaintiff further alleged that "[t]he statements made to the plaintiff were misleading, untrue and deceptive and meant to cause the plaintiff considerable distress and force the plaintiff to hire the defendant to defend him rather than [Attorney Williams], which the plaintiff ultimately did."

In moving to strike the plaintiff's CUTPA claim, the defendant argued in relevant part that the claim was

insufficient as a matter of law because the plaintiff had failed to allege conduct by the defendant that implicated the entrepreneurial aspects of the practice of law, such as the defendant's billing practices or his manner of soliciting clients. In opposition to the motion to strike, the plaintiff argued that, in making the alleged statements to the plaintiff, the defendant was soliciting the plaintiff's business and, thus, was engaged in entrepreneurial activity. The court concluded that the defendant's alleged conduct did not pertain to the entrepreneurial aspects of the practice of law and, accordingly, granted the defendant's motion to strike the CUTPA claim.

On appeal, the plaintiff claims that the court improperly granted the defendant's motion to strike the CUTPA claim because the defendant's alleged statements to the plaintiff during their meeting constituted solicitation of business and, therefore, implicated the entrepreneurial aspects of the practice of law. We are not persuaded.

Pursuant to CUTPA, "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." General Statutes § 42-110b (a). Our Supreme Court has stated that, "in general, CUTPA applies to the conduct of attorneys. . . . The statute's regulation of the conduct of any trade or commerce does not totally exclude all conduct of the profession of law. . . . Nevertheless, [our Supreme Court has] declined to hold that every provision of CUTPA permits regulation of every aspect of the practice of law . . . . [Our Supreme Court has] stated, instead, that, only the entrepreneurial aspects of the practice of law are covered by CUTPA." (Citations omitted; internal quotation marks omitted.) *Suffield Development Associates Ltd. Partnership* v. *National Loan Investors, L.P.*, 260 Conn. 766, 781, 802 A.2d 44 (2002).

"[A]lthough all lawyers are subject to CUTPA, most of the practice of law is not. The entrepreneurial exception is just that, a specific exception from CUTPA immunity for a well-defined set of activities—advertising and bill collection, for example. See *Haynes* v. *Yale-New Haven Hospital*, 243 Conn. 17, 34–38, 699 A.2d 964 (1997) (reasoning that practice of law and medicine may give rise to CUTPA claims only for entrepreneurial aspects, such as solicitation of business and billing, and not for claims involving issues of competence and strategy). It is not a catch-all provision intended to subject any arguably improper attorney conduct to CUTPA liability." (Internal quotation marks omitted.) *Suffield Development Associates Ltd. Partnership* v. *National Loan Investors, L.P.*, supra, 260 Conn. 782. "Our CUTPA cases illustrate that the most significant question in considering a CUTPA claim against an attorney is whether the allegedly improper conduct is part of the attorney's professional representation of a client or is part of the entrepreneurial aspect of practicing law." Id., 781.

Our research has revealed limited appellate authority in this state examining the contours of the entrepreneurial exception to CUTPA immunity with respect to conduct that constitutes solicitation of business. Nevertheless, our resolution of this issue is specially guided by three of our Supreme Court's decisions.

First, in *Beverly Hills Concepts, Inc.* v. *Schatz & Schatz, Ribicoff & Kotkin*, 247 Conn. 48, 717 A.2d 724 (1998), the plaintiff asserted various claims, including legal malpractice and a violation of CUTPA, against several attorneys and a law firm. Id., 50. Following a bench trial, the trial court rendered judgment in the defendants' favor, inter alia, on the CUTPA claim. Id., 50–51. An appeal and a cross appeal were filed with this court and, thereafter, transferred to our Supreme Court. Id., 51. As to the CUTPA claim, our Supreme

Court concluded that, as a matter of law, "CUTPA [did] not apply to the facts of th[e] case." Id., 79. Of significant import, the record in that case supported a finding that one of the defendant attorneys had represented to the plaintiff that the defendant law firm "possessed expertise in the field of franchising, and that the firm was well qualified to handle the plaintiff's legal affairs." Id., 52. By concluding that, as a matter of law, CUTPA was inapplicable to the facts of that case, it necessarily follows that our Supreme Court also concluded that an attorney's representation to a prospective client during the retention process regarding the expertise of the attorney, and/or the attorney's law firm, falls outside of the scope of CUTPA.

Second, in *Haynes* v. *Yale-New Haven Hospital*, supra, 243 Conn. 17, the plaintiff asserted claims of medical malpractice and a violation of CUTPA against a hospital. Id., 21. In support of the CUTPA claim, the plaintiff alleged that, although it was certified as a major trauma center, the defendant hospital had failed to meet the applicable standards of care for such a center. Id. The trial court rendered summary judgment in favor of the defendant hospital on the medical malpractice and CUTPA claims. Id., 22. The plaintiff appealed to this court, and, subsequently, our Supreme Court transferred the appeal to itself. Id., 19 n.3. As to the CUTPA claim, our Supreme Court affirmed the summary judgment, stating in relevant part that "[b]y holding itself out as a major trauma center . . . [the defendant hospital] was representing to the public that it would meet the applicable standards of competency for a major trauma center. We conclude that this representation is simply what all physicians and health care providers represent to the public—that they are licensed and impliedly that they will meet the applicable standards of care. If they fail to meet the standard of care and harm results, the remedy is not one based upon CUTPA, but upon malpractice." Id., 39.

Third, in *Janusauskas* v. *Fichman*, 264 Conn. 796, 826 A.2d 1066 (2003), the plaintiff asserted, inter alia, claims of medical malpractice and a violation of CUTPA against the defendant, an ophthalmologist. Id., 799, 801. The facts in that case reflected that, following surgery performed by the defendant to correct the plaintiff's nearsightedness, the plaintiff experienced various vision problems notwithstanding that the defendant had (1) advertised in a brochure that he was " 'one of the country's leading doctors in his field' " and (2) represented to the plaintiff that he had successfully treated other individuals with severe nearsightedness and believed that he could improve the plaintiff's vision. Id., 799, 810–11. Following the close of the plaintiff's case-in-chief, the defendant moved for a directed verdict on the CUTPA claim, which the trial court granted. Id., 802. This court and our Supreme Court affirmed the directed verdict on the CUTPA claim. Id., 798. With respect to the defendant's brochure advertisement, citing *Haynes*, our Supreme Court concluded that the advertisement "simply represent[ed] to the public that the defendant [would] meet the standard of care applicable to a 'leading doctor.' If the defendant fail[ed] to meet this standard of care and harm result[ed], the remedy would be based upon malpractice, and not upon CUTPA." Id., 810. With respect to the defendant's representations to the plaintiff, our Supreme Court stated that "[t]hese representations are of the sort that physicians and other health care providers may make to their patients within the course of treatment. They are representations that a reasonable patient may find material in determining whether to undergo a contemplated course of therapy . . . . As with representations regarding the standard of care, if these representations fail to satisfy the requirement of informed consent, and harm results, the remedy would be based upon malpractice, and not upon CUTPA." Id., 811.

We construe the three aforementioned cases[3] to instruct that representations made by an attorney to a prospective client regarding the attorney's expertise and/or competence do not relate to the entrepreneurial aspects of the practice of law. Thus, such representations are outside of the ambit of CUTPA.

Applying this rationale to the present case, we conclude that, as a matter of law, the plaintiff failed to plead a viable CUTPA claim. In support of the CUTPA claim, the plaintiff alleged that, during the meeting between the parties, the defendant stated that (1) in contrast to Attorney Williams, he had a close relationship with the federal government, "which would work in the plaintiff's favor," and (2) notwithstanding the "considerable damage" caused by Attorney Williams, he was capable of salvaging the plaintiff's case.[4] The allegations that the defendant made disparaging remarks about Attorney Williams cannot be isolated from the allegations that the defendant made comments highlighting his expertise and/or competence; rather, the former accentuate the latter. These alleged statements constituted repre-

[3] Although *Haynes* and *Janusauskas* are medical malpractice cases, we consider their reasoning regarding CUTPA to be highly instructive in legal malpractice cases.

[4] With regard to the CUTPA claim, the plaintiff also alleged that "[t]he defendant refused to release a copy of the plaintiff's file upon repeated requests, precluding the plaintiff from fully determining the facts underlying a cause of action against the defendant. The defendant went so far as to represent to the Connecticut Grievance Panel that he had an agreement with the Office of the United States Attorney that forbid him from releasing the contents of the plaintiff's entire file, other than the plaintiff's own closing files, when no such agreement existed, thus fraudulently concealing the plaintiff's cause of action under . . . General Statutes § 52-595." The plaintiff made substantively similar allegations in the other two counts of his amended complaint. We do not construe these allegations as supporting the merits of the CUTPA claim; rather, the ostensible purpose of these allegations was to avoid the running of the statute of limitations contained in CUTPA. Even assuming that these allegations were pleaded to support the merits of the CUTPA claim, we conclude that an attorney's refusal to release a current or former client's file does not constitute entrepreneurial activity and, thereby, falls outside of the scope of CUTPA.

sentations by the defendant to the plaintiff that he was competent to handle the plaintiff's criminal matter. If the defendant breached the governing standard of care and the plaintiff suffered harm as a result, then the plaintiff's remedy would be to bring an action claiming legal malpractice,[5] not a violation of CUTPA.

In sum, we conclude that the court properly granted the defendant's motion to strike count three of the plaintiff's amended complaint asserting a violation of CUTPA.[6]

II

The plaintiff next claims that the trial court improperly granted the defendant's motion for summary judgment as to counts one and two asserting legal malpractice and breach of fiduciary duty, respectively, on the ground that they were time barred. The defendant argues, as an alternative ground for affirmance, that the court lacked subject matter jurisdiction over those tort claims because they are not ripe for review pursuant to *Taylor* v. *Wallace*, supra, 184 Conn. App. 43. We agree with the defendant's ripeness argument.[7]

[5] We note that, although count one of the plaintiff's amended complaint asserted legal malpractice, the allegations concerning the defendant's statements to the plaintiff during the meeting between the parties were not pleaded in support of that count.

[6] As an alternative ground for affirmance, the defendant argues that the plaintiff's CUTPA claim was time barred. Because we conclude that the court properly struck the CUTPA claim on the ground that it was legally insufficient, we do not address further this alternative ground for affirmance.

[7] The defendant also argues that the summary judgment rendered in his favor can be affirmed on the basis that the court correctly concluded that the limitation period had expired as to the plaintiff's tort claims. Additionally, as an alternative ground for affirmance, the defendant argues that the plaintiff could not prevail on the tort claims because he failed to disclose an expert witness. Our conclusion that the trial court lacked subject matter jurisdiction over the tort claims is dispositive of the portion of the plaintiff's appeal challenging the summary judgment rendered in the defendant's favor, and, thus, we need not address the defendant's additional arguments.

As a preliminary matter, we note that, "[o]rdinarily, we would consider the defendant's alternat[ive] grounds for affirmance only after finding merit in at least one of the claims raised on appeal. [O]nce the question of lack of jurisdiction of a court is raised, [however, it] must be disposed of no matter in what form it is presented . . . and the court must fully resolve it before proceeding further with the case." (Internal quotation marks omitted.) *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, 266 Conn. 572, 578–79, 833 A.2d 908 (2003); see also *Taylor* v. *Wallace*, supra, 184 Conn. App. 47 ("Subject matter jurisdiction [implicates] the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . The objection of want of jurisdiction may be made at any time . . . [a]nd the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention. . . . The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings." (Internal quotation marks omitted.)). Thus, as a threshold issue, we must consider the defendant's argument that the court lacked subject matter jurisdiction to entertain the plaintiff's tort claims because they are not ripe for review.[8] See *Dow & Condon, Inc.* v. *Brookfield Development Corp.*, supra, 579 (considering, "as a threshold

[8] Although the defendant raised the ripeness argument in his motion for summary judgment, the trial court did not address it in its decision granting the motion. "Our Supreme Court has stated that [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. . . . This rule applies equally to alternat[ive] grounds for affirmance. . . . One such exceptional circumstance is a claim that implicates the trial court's subject matter jurisdiction, which may be raised at any time and, thus, is not subject to our rules of preservation." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Board of Education* v. *Bridgeport*, 191 Conn. App. 360, 378–79 n.8, 214 A.3d 898 (2019). "[R]ipeness implicates the court's subject matter jurisdiction"; id., 379 n.8; and, therefore, it is proper for us to consider the ripeness issue presented by the defendant.

issue," defendant's claimed alternative ground for affirmance that plaintiff lacked standing, and, therefore, trial court lacked subject matter jurisdiction).

"[J]usticiability comprises several related doctrines . . . [including ripeness]. . . . A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction. . . . [B]ecause an issue regarding justiciability raises a question of law, our appellate review [of the ripeness of a claim] is plenary. . . . [T]he rationale behind the ripeness requirement is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . . Accordingly, in determining whether a case is ripe, a trial court must be satisfied that the case before [it] does not present a hypothetical injury or a claim contingent [on] some event that has not and indeed may never transpire." (Internal quotation marks omitted.) *Taylor* v. *Wallace*, supra, 184 Conn. App. 47–48.

Counts one and two of the plaintiff's amended complaint asserted legal malpractice and breach of fiduciary duty, respectively. As to legal malpractice, "[i]n general, the plaintiff . . . must establish: (1) the existence of an attorney-client relationship; (2) the attorney's wrongful act or omission; (3) causation; and (4) damages. . . . [T]he plaintiff typically proves that the defendant attorney's professional negligence caused injury to the plaintiff by presenting evidence of what would have happened in the underlying action had the defendant not been negligent." (Internal quotation marks omitted.) Id., 48. As to breach of fiduciary duty, the plaintiff must establish: "[1] [t]hat a fiduciary relationship existed which gave rise to . . . a duty of loyalty . . . an obligation . . . to act in the best interests of the plaintiff, and . . . an obligation . . . to act in good faith in any matter relating to the plaintiff; [2] [t]hat the defendant advanced his or her own interests to the detriment of the plaintiff; [3] [t]hat the plaintiff sustained damages;

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

The defendant's ripeness argument is premised on this court's holding in *Taylor* v. *Wallace*, supra, 184 Conn. App. 47–52. In *Taylor*, the plaintiff brought a legal malpractice action against the defendant, who was the plaintiff's appointed counsel in a prior habeas action, alleging that the defendant had provided him with deficient representation. Id., 45–46. Additionally, the plaintiff alleged that the defendant had defrauded the state. Id., 46. At the time that he had filed the legal malpractice action, the plaintiff was serving a twenty-five year term of incarceration stemming from a murder conviction. Id., 45, 48. The conviction remained intact notwithstanding that the plaintiff had filed numerous petitions seeking postconviction relief, including a habeas petition that was still pending at the time of the legal malpractice action. Id., 45, 48–49. The defendant moved to dismiss the plaintiff's complaint, asserting that the legal malpractice claim was barred by statutory immunity and that the plaintiff lacked standing to pursue his claim of fraud. Id., 46. The trial court agreed with the defendant on both grounds and dismissed the complaint. Id.

The plaintiff appealed from the judgment of dismissal. Id. For the first time on appeal, the defendant argued that the trial court lacked subject matter jurisdiction over the plaintiff's legal malpractice claim because it was not ripe for review. Id., 47. More particularly, "[r]elying to a degree on *Heck* v. *Humphrey*, [512 U.S. 477, 486–87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)], the defendant suggest[ed] that th[e] case [was] not ripe for adjudication because (1) a habeas corpus action [was] pending, and sound policy considerations militate[d] against the possibility of inconsistent resolutions arising out of the same transaction; (2) the injury

resulting from [the] alleged professional negligence in [that] instance [was] incarceration, and, as the plaintiff remain[ed] validly incarcerated in any event, any consideration of damages would invoke a hypothetical inquiry; and (3) the holding of [*Heck*] should be adopted by this court." (Footnote omitted.) *Taylor* v. *Wallace*, supra, 184 Conn. App. 49.

This court proceeded to examine *Heck*, in which "a prisoner brought an action pursuant to 42 U.S.C. § 1983 alleging that unlawful procedures had led to his arrest, that exculpatory evidence had knowingly been destroyed, and that unlawful identification procedures had been used at this trial. *Heck* v. *Humphrey*, supra, 512 U.S. 478–79. He claimed monetary relief and did not seek release from custody. Id., 479. His conviction had been affirmed and a federal habeas petition had been denied. Id. The United States Court of Appeals for the Seventh Circuit had affirmed the District Court's dismissal of the plaintiff's action, reasoning that, '[i]f, regardless of the relief sought, the plaintiff [in a federal civil rights action] is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so.' . . . Id., 479–80.

"The United States Supreme Court affirmed, although on slightly different reasoning. Id., 490. It began its analysis with a discussion of the common law of torts, and analogized the circumstance of the case before it to malicious prosecution: an element of the cause of action under the common law is a favorable outcome of the underlying criminal case against the plaintiff. Id., 484. The element was required in order to avoid inconsistent resolutions and collateral attacks on convictions. Id., 484–85.

"The court concluded 'that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, *or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid*, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus . . . . A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the [trial] court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of this conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.' . . . Id., 486–87. The court noted that the injury of being convicted and imprisoned is not compensable under § 1983 unless the conviction has been overturned. Id., 487 n.7." (Emphasis in original.) *Taylor* v. *Wallace*, supra, 184 Conn. App. 49–51.

This court then stated that it "agree[d] with the policy enunciated in *Heck*: [I]f success in a tort action would necessarily imply the invalidity of a conviction, the action is to be dismissed unless the underlying conviction has been invalidated. . . . The rationale in *Heck* is similar to other limitations in our tort law. Malicious prosecution, of course, requires as an element a favorable outcome of the underlying prosecution. . . . A tort case is not ripe for adjudication if resolution of an unresolved underlying case is necessary for reliable adjudication. . . . Principles of issue preclusion bar collateral attack on a judgment." (Citations omitted.) Id., 51. This court also cited favorably to *Tierinni* v. *Coffin*, Superior Court, judicial district of Tolland, Docket No. CV-14-5005868-S (May 21, 2015) (60 Conn. L. Rptr. 450), a Superior Court decision that "reasoned

that an incarcerated prisoner's complaint alleging legal malpractice should be dismissed. The court observed that the extant claim of ineffective assistance of counsel in a habeas action and his claim of legal malpractice in the case sub judice arose from the same set of facts; the tort claim, then, was not ripe for adjudication. Id., 453. The court reasoned that if it were 'to adjudicate the plaintiff's claim during the pendency of the plaintiff's habeas petition, there is a risk that [the] court could determine the defendant's performance was insufficient while the habeas court determines it was sufficient, or vice versa.' Id. Further, '[b]ecause an invalidation of the underlying criminal matter through the plaintiff's pending [habeas] petition is a necessary precursor to this legal malpractice claim . . . the plaintiff's legal malpractice claim has not yet accrued . . . .' Id." *Taylor* v. *Wallace*, supra, 184 Conn. App. 51–52.

This court ultimately agreed with the defendant's ripeness argument, stating that "the plaintiff has been convicted and that conviction has withstood a number of attacks. For so long as the conviction stands, an action collaterally attacking the conviction may not be maintained." (Footnote omitted.) Id., 52. In reaching its decision, this court rejected the plaintiff's argument that he was "not attacking the conviction, but [was] merely seeking monetary damages," observing that "[o]ne difficulty with his position is that the injury, a necessary element in a tort action, is the conviction. To prove his malpractice action, he presumably would have to prove that he would not have sustained the injury had professional negligence not occurred. Thus, a successful result in this case would necessarily imply that the conviction was improper. Inconsistency of judgments is avoided by the requirement that the conviction first be vacated." Id., 52 n.5; see also id., 49 n.4 ("[w]e do not see any reasonable scenario of recovery . . . that does not necessarily undermine the validity of the conviction").

In the present case, relying on *Taylor*, the defendant argues that the plaintiff's legal malpractice and breach of fiduciary duty claims are not ripe for adjudication because (1) the injury complained of by the plaintiff is his conviction, (2) the plaintiff's conviction remains undisturbed, and (3) a successful result on the plaintiff's tort claims would necessarily undermine the validity of his conviction. We agree with the defendant's ripeness argument, with one caveat. The plaintiff's alleged injury with respect to his tort claims is not his *conviction*, but rather his *sentence*—more specifically, the restitution component of his sentence.[9] Although the purported injury at issue in *Taylor* was a conviction, we perceive no basis not to extend the reasoning in *Taylor* to cases in which the injury complained of by a plaintiff is his or her sentence. See *Heck* v. *Humphrey*, supra, 512 U.S. 487 (noting that "when a state prisoner seeks damages in a § 1983 suit, the [D]istrict [C]ourt must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction *or* sentence" (emphasis added)); see also *Kraklio* v. *Simmons*, 909 N.W.2d 427, 439 (Iowa 2018) (holding that "a criminal defendant suing his defense lawyer over a sentencing error must obtain postjudgment relief on the sentencing issue, but need not prove relief from the underlying conviction"); *Garcia* v. *Ball*, 303 Kan. 560, 573, 363 P.3d 399 (2015) (concluding that, to pursue legal malpractice claim related to illegal sentence, plaintiff had to "obtain [postsentencing] relief from the unlawful sentence"); *Johnson* v. *Babcock*, 206 Or. App. 217, 224, 136 P.3d 77 (stating that when "[a] plaintiff alleges that he received a legally impermissible sentence, not merely a 'bad deal,' that he served more of the sentence than was legally permissible, *and that he obtained* [*postjudgment*] *relief from the sentence*, we conclude that [such a] plaintiff properly alleged [the]

[9] "Without doubt, a restitution order is part of [a] sentence . . . ." *United States* v. *Oladimeji*, 463 F.3d 152, 156 (2d Cir. 2006).

harm [element of a legal malpractice claim]" (emphasis added)), review denied, 341 Or. 450, 143 P.3d 773 (2006).

Applying the rationale of *Taylor* to the present case, we conclude that the plaintiff's tort claims, as set forth in counts one and two, are not ripe for adjudication. To succeed on these claims, the plaintiff would have to demonstrate that the defendant's alleged conduct led to the imposition of an erroneous restitution order by the federal sentencing court, which would necessarily undermine the validity of his sentence. Such a collateral attack on the plaintiff's sentence is not permissible. In short, as long as the plaintiff's sentence stands, his tort claims are not ripe for review.

The plaintiff argues that *Taylor* is inapplicable to the facts of this case because the plaintiff in *Taylor* was able to pursue postconviction relief whereas in the present case the plaintiff cannot challenge the restitution component of his sentence because he is precluded from filing a motion pursuant to 28 U.S.C. § 2255 (2018).[10] See *United States* v. *Rutigliano*, 887 F.3d 98, 105–107 (2d Cir. 2018) (restitution orders cannot be challenged by motion filed under 28 U.S.C. § 2255, other than in " 'rare' " circumstances when restitution orders equate to custodial punishment). We are not persuaded. The crux of *Taylor* is that, so long as a plaintiff's conviction or sentence remains valid, it cannot be vitiated indirectly by a tort action commenced against counsel.[11] Whether the plaintiff was or is able to attack the restitu-

[10] Title 28 of the United States Code, § 2255, provides in relevant part: "(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence. . . ."

[11] We note at this juncture that we do not consider whether the rationale of *Taylor* extends beyond tort claims. That is, the ripeness analysis contained herein is not applicable to the plaintiff's CUTPA claim, which we addressed in part I of this opinion, because, as opposed to his legal malpractice and

tion order in another proceeding is of no moment.[12] In addition, although *Taylor* highlights the specter of multiple courts issuing conflicting decisions over the same subject matter, we construe that to be an *added* reason why a tort action against counsel predicated on an allegedly improper conviction or sentence cannot be pursued while the conviction or sentence is intact. The central point remains that a valid conviction or sentence cannot be undone collaterally by a tort action brought by a plaintiff against his or her counsel. See *Heck* v. *Humphrey*, supra, 512 U.S. 486 (noting "hoary

breach of fiduciary claims, the plaintiff failed to support his CUTPA claim with allegations that the defendant engaged in conduct that caused the plaintiff harm in the form of an erroneous restitution order. In other words, on the basis of the allegations underlying the CUTPA claim, recovery under the CUTPA claim would not necessarily undermine the validity of the plaintiff's sentence. Cf. *Taylor* v. *Wallace*, supra, 184 Conn. App. 49 n.4 ("[w]e do not see any reasonable scenario of recovery . . . that does not necessarily undermine the validity of the conviction"). Additionally, we observe that *Taylor* expressly addressed tort actions in its ripeness analysis. See id., 51 ("if success *in a tort action* would necessarily imply the invalidity of a conviction, the action is to be dismissed unless the underlying conviction has been invalidated" (emphasis added)). We express no opinion as to whether, under different circumstances, the rationale of *Taylor* would extend to a CUTPA claim.

[12] Although the plaintiff contends that a motion under 28 U.S.C. § 2255 is unavailable to him, we do not interpret his argument to be that there are *no* possible avenues to contest the restitution order. See, e.g., *United States* v. *Rutigliano*, supra, 887 F.3d 108–109 (leaving open question of whether writ of error coram nobis can be used to challenge restitution component of sentence and concluding that, even if coram nobis relief was available to defendant, she had failed to demonstrate entitlement to such relief). Indeed, in his amended complaint, the plaintiff alleged that the restitution order could not "be reopened *except under extraordinary circumstances*." (Emphasis added.)

We also observe that the plea agreement entered into by the plaintiff included a waiver term providing in relevant part that "[t]he [plaintiff] acknowledges that under certain circumstances he is entitled to challenge his conviction and sentence. The [plaintiff] agrees not to appeal or collaterally attack in any proceeding . . . the conviction or sentence imposed . . . if that sentence does not exceed [certain thresholds, including a $1.6 million order of restitution]. . . . Furthermore, the [plaintiff and the United States Attorney's Office for the District of Connecticut] agree that any challenge to the [plaintiff's] sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver." The plaintiff makes no reference to this waiver provision in addressing on appeal the defendant's ripeness argument.

principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments").

As a final matter, our conclusion that the plaintiff's tort claims are not ripe for review means that the trial court lacked subject matter jurisdiction to entertain them. A court must dismiss claims over which it lacks subject matter jurisdiction. See *Gershon* v. *Back*, 201 Conn. App. 225, 244, 242 A.3d 481 (2020) ("[w]henever a court finds that it has no jurisdiction, it must dismiss the case" (internal quotation marks omitted)). Accordingly, as to the summary judgment rendered in the defendant's favor on the plaintiff's tort claims, we conclude that the form of the judgment is improper because a judgment of dismissal must be rendered with respect to those claims.

The form of the judgment with respect to the summary judgment rendered in the defendant's favor on counts one and two of the plaintiff's amended complaint is improper, the judgment is reversed as to counts one and two, and the case is remanded with direction to render judgment dismissing those counts; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

MICHAEL DEVINE, ADMINISTRATOR (ESTATE OF TIMOTHY DEVINE) *v.* LOUIS FUSARO, JR., ET AL.*
(AC 42164)

Prescott, Cradle and DiPentima, Js.

Syllabus

The plaintiff administrator of the estate of the decedent, D, sought to recover damages from the defendants, four police officers who were members of a tactical unit of the state police, for the wrongful death of D following his suicide after a standoff with law enforcement on certain public

* This opinion supersedes the opinion of this court in *Devine* v. *Fusaro*, 197 Conn. App. 872, 232 A.3d 1178 (2020).

property in Groton. The plaintiff's complaint alleged that, in response to a Groton police captain's request for the assistance of the tactical unit, the defendants arrived at the scene of the standoff and, after several hours of unsuccessful negotiations with D, who was suicidal and armed with a handgun, they used less than lethal ammunition on him. D then shot himself in the head and died as a result of the gunshot. The trial court granted the defendants' motion to dismiss on the ground that the action was barred by the doctrine of sovereign immunity. In reaching its decision, the court determined that the wrongful death action, as alleged in the complaint, satisfied the four criteria of the test set forth in *Spring* v. *Constantino* (168 Conn. 563), and, therefore, it was brought against the defendants in their official, rather than their individual, capacities. On the plaintiff's appeal to this court, this court affirmed the trial court's judgment. This court thereafter granted the plaintiff's motion for reconsideration to address his claim that the panel misapplied the *Spring* test by giving too little weight to his express assertion in the complaint that he had elected to sue the defendants in their individual capacities. On reconsideration, *held* that the trial court improperly granted the defendants' motion to dismiss the plaintiff's action on the ground of sovereign immunity: the plaintiff unequivocally elected to sue the defendants in their individual capacities, as the operative complaint stated that the defendants were sued in their individual capacities and three of the four defendants were served with process at their usual place of abode, which was required to sue the defendants as individuals, rather than through the Office of the Attorney General, which would indicate that the defendants had been sued in their official capacities; moreover, in concluding that the state was the real party in interest, the court failed to give proper deference to the express allegation in the complaint that the plaintiff was suing the defendants in their individual capacities and improperly concluded that, because the challenged conduct occurred while the defendants were acting in their official capacities, the plaintiff was suing them in their official, rather than their individual, capacities.

Argued November 17, 2020—officially released July 6, 2021

Procedural History

Action to recover damages for the wrongful death of the plaintiff's decedent as a result of the defendants' alleged recklessness and gross negligence, brought to the Superior Court in the judicial district of New London, where the court, *Knox*, *J.*, granted the defendants' motion to dismiss and rendered judgment thereon, from which the plaintiff appealed to this court, *DiPentima*, *C. J.*, and *Keller* and *Norcott*, *Js.*, which affirmed the

trial court's judgment; thereafter, this court granted the plaintiff's motion for reconsideration. *Reversed; further proceedings*.

Trent A. LaLima, with whom, on the brief, was *Hubert J. Santos*, for the appellant (plaintiff).

Clare E. Kindall, solicitor general, with whom were *Matthew B. Beizer*, assistant attorney general, and, on the brief, *William Tong*, attorney general, and *Stephen R. Finucane*, assistant attorney general, for the appellees (defendants).

Opinion

PRESCOTT, J. This appeal requires us to determine whether the plaintiff in this wrongful death action seeking to recover money damages has sued four state police officers in their individual capacities or, conversely, whether the action is barred by sovereign immunity because the plaintiff has sued those officers only in their official capacities. We conclude that the plaintiff's complaint, properly construed, alleges a claim for money damages against the officers in their individual capacities.

The plaintiff, Michael Devine, as the administrator of the estate of the decedent, Timothy Devine (Devine), appeals from the judgment of the trial court dismissing on sovereign immunity grounds his wrongful death action against the defendant police officers, Louis Fusaro, Jr., Steven Reif, Michael Avery, and Kevin Cook.[1] On June 9, 2020, a panel of this court initially

[1] Prior to filing the underlying action, the plaintiff brought a federal civil rights action in federal court against the same officers in which he also raised his state law claims. See *Estate of Devine* v. *Fusaro*, Docket No. 3:14-cv-01019 (JAM), 2016 WL 183472 (D. Conn. January 14, 2016). On January 14, 2016, the District Court granted the defendants' motion for summary judgment on the federal claims on the basis of qualified immunity. Id., *1. The District Court also declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed them without prejudice. Id., *9. On January 23, 2017, the United States Court of Appeals for the Second Circuit affirmed the District Court's judgment. See *Estate of Devine* v. *Fusaro*, 676 Fed. Appx. 61, 64–65 (2d Cir. 2017).

affirmed the judgment of the trial court. *Devine* v. *Fusaro*, 197 Conn. App. 872, 232 A.3d 1178 (2020). The panel agreed with the trial court that the action was barred by sovereign immunity because, after applying the test set forth in *Spring* v. *Constantino*, 168 Conn. 563, 568, 362 A.2d 871 (1975) (*Spring* test), the complaint should be construed as an action brought against the defendants in their official capacities only and, thus, against the state itself. *Devine* v. *Fusaro*, supra, 883. The plaintiff subsequently filed a motion for reconsideration en banc, in which he asserted, among other things, that the panel misapplied the *Spring* test by giving far too little weight to his express assertion in the complaint that he had elected to sue the defendants in their individual capacities.

The motion for reconsideration was granted by the panel, which rendered action on the motion by the full court unnecessary.[2] Upon reconsideration, we now conclude, for the reasons that follow, that the trial court improperly dismissed the action on the ground that it was barred by sovereign immunity. Accordingly, we reverse the judgment of the trial court and remand for further proceedings.

The following facts and procedural history are relevant to the plaintiff's claim. On November 28, 2017,

Additionally, in July, 2013, the plaintiff filed a notice of claim with the state Office of the Claims Commissioner, in which he sought a waiver of the state's sovereign immunity to allow him to bring an action against the state for negligence. The plaintiff, however, in response to a motion to dismiss filed by the state, withdrew the notice of claim in December, 2014. The present action followed.

[2] Due to the unavailability of some members of the original panel, reargument was heard by the present panel with no objection by the parties. In addition to granting reconsideration, this court ordered the parties sua sponte to file supplemental briefs addressing whether "[f]or the purposes of deciding a motion to dismiss, does the test in *Spring* v. *Constantino*, [supra, 168 Conn. 563], for assessing whether a state employee has been sued in his individual or official capacity apply in light of *Martin* v. *Brady*, 261 Conn. 372, [802 A.2d 814] (2002)."

the plaintiff commenced the underlying wrongful death action.[3] The plaintiff filed the operative amended complaint on January 12, 2018. That complaint contains a single count directed against all of the defendants. In his complaint, the plaintiff alleged the following relevant facts: On the evening of July 23, 2012, Devine contacted the Groton Police Department to inform the police that he was contemplating suicide.[4] Thereafter, Devine went to the University of Connecticut's Avery Point campus in Groton armed with a handgun. Groton police officers located Devine between 10 and 11 p.m. near the water.

[3] With respect to Fusaro, Reif, and Avery, the marshal's return to court indicates that service of process was made by abode service. Service on Cook was made in hand to a state trooper at the Connecticut State Police Headquarters in Middletown, who, according to the return, was authorized to accept legal service for Cook. "Pursuant to [General Statutes] § 52-57 (a), a defendant in any civil action must be served in hand or at his usual place of abode. This requirement includes civil suits brought against state defendants who are sued in their individual capacities. . . . [By way of example], a plaintiff who serves a state defendant pursuant to [General Statutes] § 52-64 (a) by leaving a copy of the process at the Office of the Attorney General has properly served the defendant only in his or her official capacity and has failed to properly serve the defendant in his or her individual capacity." (Internal quotation marks omitted.) *Jan G.* v. *Semple*, 202 Conn. App. 202, 220, 244 A.3d 644, cert. denied, 336 Conn. 937, 249 A.3d 38 (2021). Although only three of the four defendants appear to have been served "at his usual place of abode," any claim that the court lacked personal jurisdiction over the defendants in their individual capacities on the basis of improper service of process or otherwise has been waived by the defendants as a result of their failure timely to file a motion to dismiss on that basis with the trial court. See Practice Book §§ 10-30 and 10-32; *Pitchell* v. *Hartford*, 247 Conn. 422, 433, 722 A.2d 797 (1999).

[4] In its decision in the federal court action brought pursuant to 42 U.S.C. § 1983, the District Court indicated that the record before it established that a detective from the Groton Police Department had contacted Devine earlier that day and "told him that she wished to discuss allegations of serious and scandalous criminal misconduct that had been made against Devine. At first, Devine agreed to come [to the police department] but [soon after] called [the detective] back to say that he would not meet with [her]. He told the detective that he had his [handgun] on his lap and was pulling the hammer back and that 'if a single person walks up on me, I will put a round through my head.' " *Estate of Devine* v. *Fusaro*, Docket No. 3:14-cv-01019 (JAM), 2016 WL 183472, *1 (D. Conn. January 14, 2016); see also footnote 1 of this opinion.

Members of the Groton Police Department attempted to negotiate with Devine. Negotiations were unsuccessful, and a Groton Police Department captain requested assistance from the state police tactical unit (tactical unit). "At approximately 11:45 p.m., the [tactical unit] including the defendants, arrived at the scene." Law enforcement officials continued to negotiate with Devine for several hours, without success.

"At 3:31 a.m. on July 24, 2012, [Fusaro] commanded members of the tactical [unit] to begin using [less than lethal] ammunition on Devine." Avery and Cook complied with Fusaro's orders and struck Devine with less than lethal ammunition. Rief subsequently ordered the tactical unit to fire less than lethal ammunition at Devine again. Avery and Cook complied with Rief's orders and struck Devine a second time. After the second round of less than lethal ammunition, Devine raised the handgun to his head and said to Rief, "Don't make me do this." Devine then lowered the handgun to his chest. Rief instructed the tactical unit to fire a third round of less than lethal ammunition at Devine. Devine was struck by less than lethal ammunition again. Devine then raised the handgun to his head and shot himself in the temple. Devine died as a result of the self-inflicted gunshot.

The plaintiff alleged in the complaint that "[t]he actions or omissions of the [d]efendants . . . were committed intentionally, and/or with reckless indifference to Devine's safety and health and/or with gross negligence . . . ."[5] The plaintiff further alleged that "[t]he intentional, reckless and grossly negligent actions

[5] The plaintiff alleged that the acts or omissions of the defendant that supported his claim of "wrongful death due to recklessness or gross negligence" consisted of but were not limited to (1) "[u]nnecessarily exacerbating tensions in the confrontation," (2) "[f]ailing to appropriately respond to an individual in a mental illness crisis," (3) "[u]nreasonably, excessively assaulting Devine with less-lethal ammunition," (4) "[c]ontinuing to exacerbate tensions and assault Devine, increasing the chances for violence," and (5) "fail[ing] to stand down after responding to the scene."

or omissions of the [d]efendants proximately caused" Devine's death and caused damages to the plaintiff. Finally, the plaintiff alleged that "[t]he defendants are not entitled to qualified immunity for their actions."

On February 13, 2018, the defendants filed a motion to dismiss and accompanying memorandum of law, claiming that the trial court lacked subject matter jurisdiction over the plaintiff's action because it was barred by the doctrine of sovereign immunity or, alternatively, that the defendants were statutorily immune from suit pursuant to General Statutes § 4-165.[6] On March 15, 2018, the plaintiff filed a memorandum of law opposing the defendants' motion to dismiss. The plaintiff also filed additional pleadings including a request for leave to amend the complaint to remove or amend certain language in the operative complaint.[7] The defendants objected to the plaintiff's attempts to amend or alterthe operative complaint, arguing that, because the motion to dismiss challenged the court's subject matter jurisdiction, the court was not permitted to entertain any amendments prior to an adjudication of the motion to dismiss. The court sustained the defendants' objections in its decision on the motion to dismiss.

[6] General Statutes § 4-165 (a) provides: "No state officer or employee shall be personally liable for damage or injury, *not wanton, reckless or malicious*, caused in the discharge of his duties or within the scope of his or her employment. Any person having a complaint for such damage or injury shall present it as a claim against the state under the provisions of this chapter." (Emphasis added.)

[7] Specifically, the plaintiff sought to correct addresses attributed to the defendants in the complaint which differed from the addresses at which process was served as reflected in the return of service. The plaintiff also sought to eliminate language that referred to the defendants as police officers who were acting "under color of law." The plaintiff also filed a partial withdrawal seeking to withdraw this language from the complaint. According to the plaintiff, the "under color of law" language mistakenly was transferred from the allegations in the defunct federal lawsuit, in which it was necessary to show that the officers had acted "under color of law" to establish their liability under 42 U.S.C. § 1983. See *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 150, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

On September 10, 2018, using the January 12, 2018 amended complaint as the operative complaint, the court, *Knox*, *J.*, issued an order granting the motion to dismiss. In its memorandum of decision, the court concluded that the factual allegations in the complaint established that all four criteria of the test set forth in *Spring* v. *Constantino*, supra, 168 Conn. 568, were satisfied, and, therefore, that the court could only construe the complaint as having been brought against the defendants in their official, rather than individual, capacities. In light of that conclusion, the court also concluded that sovereign immunity shielded the defendants from suit for money damages and deprived the court of subject matter jurisdiction. Accordingly, it dismissed the action. In its memorandum of decision, the court further stated that, "[b]ecause the court lacks subject matter jurisdiction due to sovereign immunity, the court does not reach the claim that the action is barred by statutory immunity." This appeal followed.

The plaintiff's sole claim on appeal is that the trial court improperly granted the defendants' motion to dismiss because it misapplied or misconstrued the *Spring* test, and, as a result, it improperly concluded that the plaintiff's action against the defendants was an action against the state and barred by the doctrine of sovereign immunity. In particular, the plaintiff argues that the court failed to give due consideration to the plaintiff's clearly expressed intent to sue the defendants in their individual capacities. The state argues in response that the court properly concluded that the facts as alleged in the complaint satisfied all four of the *Spring* test criteria and, because no exception to sovereign immunity applies, the court correctly dismissed the plaintiff's action for lack of jurisdiction. For the reasons that follow, we agree with the plaintiff and, accordingly, reverse the judgment of the trial court.

"A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . Moreover, [t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . As we must in reviewing a motion to dismiss, we take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, *construing them in a manner most favorable to the pleader*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Sullins* v. *Rodriguez*, 281 Conn. 128, 131–32, 913 A.2d 415 (2007).[8]

[8] This is, of course, the standard that applies when, as in the present case, "a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone . . . ." *Conboy* v. *State*, 292 Conn. 642, 651, 974 A.2d 669 (2009). If, however, "the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . [or] other types of undisputed evidence . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein. . . .

"Finally, where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts. . . . Likewise, if the question of jurisdiction is intertwined with the merits of the case, a court cannot resolve the jurisdictional question without a hearing to evaluate those merits. . . . An evidentiary hearing is necessary because a court cannot make a critical factual [jurisdictional] finding based on memoranda and documents submitted by the parties." (Citations omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) Id., 651–54.

Although "the general principles governing sovereign immunity are well established"; *Smith* v. *Rudolph*, 330 Conn. 138, 143, 191 A.3d 992 (2018); courts have struggled to apply those principles consistently and logically—particularly in cases in which the sovereign immunity determination implicates concepts such as individual versus official capacity liability and/or statutory immunity. Accordingly, it is appropriate to consider the broader legal landscape before turning to our discussion and application of the law to the facts of the underlying case. Ultimately, we conclude that a court's application of the so-called *Spring* test is unnecessary and ill-advised in a case such as the present one in which the plaintiff has expressed a clear and unambiguous choice in the operative complaint to sue a state official in his or her individual capacity. In such cases, the doctrine of sovereign immunity simply is not implicated. Any immunity to be afforded to a state official or employee sued in his or her individual capacity is limited to the statutory and personal immunity afforded under § 4-165. See *Martin* v. *Brady*, 261 Conn. 372, 374, 802 A.2d 814 (2002).[9]

[9] *Martin* was a certified appeal from a decision of this court; *Martin* v. *Brady*, 64 Conn. App. 433, 780 A.2d 961 (2001); in which we had affirmed the trial court's dismissal of an action brought against several state police officers on sovereign immunity grounds. *Martin* v. *Brady*, supra, 261 Conn. 374. The certified issues were "[w]hether the Appellate Court properly concluded that *Binette* v. *Sabo*, [244 Conn. 23, 710 A.2d 688 (1998)], does not permit the plaintiff's tort action because (1) the defendants are protected by the doctrine of sovereign immunity and (2) the facts are not sufficiently egregious?" *Martin* v. *Brady*, 258 Conn. 919, 782 A.2d 1244 (2001). Although the defendants fully briefed the certified questions, at oral argument they conceded that, construing the complaint properly, the plaintiff had sued them in their individual, rather than their official, capacities and, therefore, sovereign immunity was not really at issue. Rather, "the only jurisdictional question remaining was whether [the defendants] were protected by the statutory, personal immunity provided by § 4-165." *Martin* v. *Brady*, supra, 261 Conn. 374. The Supreme Court agreed that the defendants were statutorily immune from suit, and they affirmed this court's judgment on that alternative ground. Id. Although the Supreme Court in *Martin* did not discuss the *Spring* test or sovereign immunity, the procedural posture of that appeal helps illustrate the point we seek to make in the present case: namely, if a plaintiff elects to sue a state official in his or her individual capacity and

"[W]e have long recognized the validity of the common-law principle that the state cannot be sued without its consent . . . ." (Internal quotation marks omitted.) *Cox* v. *Aiken*, 278 Conn. 204, 211, 897 A.2d 71 (2006). The doctrine of sovereign immunity "protects the state, not only from ultimate liability for alleged wrongs, but also from being required to litigate whether it is so liable." *Shay* v. *Rossi*, 253 Conn. 134, 165, 749 A.2d 1147 (2000), overruled in part by *Miller* v. *Egan*, 265 Conn. 301, 325, 828 A.2d 549 (2003). "[T]he practical and logical basis of the doctrine [of sovereign immunity] is today recognized to rest . . . on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property. . . . Not only have we recognized the state's immunity as an entity, but [w]e have also recognized that because the state can act only through its officers and agents, a suit against a state officer concerning a matter in which the officer represents the state is, in effect, against the state. . . . Exceptions to this doctrine are few and narrowly construed under our jurisprudence." (Citation omitted; internal quotation marks omitted.) *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 65, 23 A.3d 668 (2011).

There are three recognized exceptions to the doctrine of sovereign immunity: "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory

makes that choice clear in the operative complaint, sovereign immunity cannot properly act as a bar to the action; rather, the issue becomes one of statutory immunity only.

or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citations omitted.) *DaimlerChrysler Corp.* v. *Law*, 284 Conn. 701, 720, 937 A.2d 675 (2007). By their terms, only the first of these three exceptions applies in an action seeking only monetary damages.[10]

Accordingly, if a plaintiff hopes to maintain an action for monetary damages against the state itself, he may do so only if such a suit is authorized pursuant to a clearly expressed statutory waiver of sovereign immunity or if the plaintiff first obtains a waiver from the Claims Commissioner. See General Statutes § 4-160;[11] *Miller* v. *Egan*, supra, 265 Conn. 317 ("[a] plaintiff who seeks to bring an action for monetary damages against the state must first obtain authorization from the [C]laims [C]ommissioner"); see also *Baker* v. *Ives*, 162 Conn. 295, 298, 294 A.2d 290 (1972) ("state is immune from suit unless the state, by appropriate legislation, consents to be sued" and "state's sovereign right not to be sued without its consent is not to be diminished by statute unless a clear intention to that effect on the part of the legislature

[10] The second and third exceptions, by their terms, are applicable only in those actions seeking declaratory or injunctive relief. In such an action, the complaint must contain sufficient factual allegations that, if proven, would support a finding that a state official or employee has acted unconstitutionally or in excess of statutory authority to avoid dismissal on sovereign immunity grounds. See *Markley* v. *Dept. of Public Utility Control*, supra, 301 Conn. 66. The rationale behind these exceptions is that, "[i]n those cases in which it is alleged that the defendant officer is proceeding under an unconstitutional statute or in excess of his statutory authority, the interest in the protection of the plaintiff's right to be free from the consequences of such action outweighs the interest served by the sovereign immunity doctrine. Moreover, the government cannot justifiably claim interference with its functions when the acts complained of are unconstitutional or unauthorized by statute." (Internal quotation marks omitted.) Id., 66 n.11.

[11] General Statutes § 4-160 (a) provides in relevant part: "Whenever the Claims Commissioner deems it just and equitable, the Claims Commissioner may authorize suit against the state on any claim which, in the opinion of the Claims Commissioner, presents an issue of law or fact under which the state, were it a private person, could be liable. . . ."

is disclosed, by the use of express terms or by force of a necessary implication" (internal quotation marks omitted)).

Rather than suing the state directly, a plaintiff instead may elect to sue a particular state official or employee. If, however, the plaintiff sues that person only in his or her official capacity as a representative of the state, that suit will be construed as the equivalent of a suit against the state itself and, without a valid waiver, the suit likewise will be barred by sovereign immunity. See *Miller* v. *Egan*, supra, 265 Conn. 313. To avoid a dismissal on sovereign immunity grounds, a plaintiff must elect to sue the state official in his or her individual capacity. By choosing to do so, however, the plaintiff takes on additional pleading and proof requirements needed to overcome a claim of statutory immunity afforded to state officials and employees pursuant to § 4-165, namely, that the plaintiff plead and establish some wanton, reckless, or malicious act. See footnote 6 of this opinion.

The policy interest underlying the legislature's grant of statutory immunity pursuant to § 4-165 is "the protection of state employees from liability for negligent acts that occur in the course of employment." *Hunte* v. *Blumenthal*, 238 Conn. 146, 153, 680 A.2d 1231 (1996); see also *Spring* v. *Constantino*, supra, 168 Conn. 571. In *Miller* v. *Egan*, supra, 265 Conn. 319, the court stated that § 4-165's grant of "statutory immunity to state employees has a twofold purpose. First, the legislature sought to avoid placing a burden upon state employment. Second, § 4-165 makes clear that the remedy available to plaintiffs who have suffered harm from the negligent actions of a state employee who acted in the scope of his or her employment must bring a claim against the state 'under the provisions of this chapter,' namely, chapter 53 of the General Statutes, which governs the [O]ffice of the [C]laims [C]ommissioner." (Footnote omitted.) The policy recognizes the reality

that people would be reluctant to take on the responsibilities inherent in many state positions if they could be held liable in the event that they acted negligently. The statute strikes a balance by immunizing state officials and employees for negligent acts only. It does not provide immunity for acts deemed wanton, reckless, or malicious, presumably in order to deter those individuals from engaging in such seriously wrongful conduct.

Our Supreme Court has described the relationship that exists between the common-law doctrine of sovereign immunity and the statutory immunity provided by § 4-165 in the following way: the former is "raise[d] as a shield from the claims against [defendants] in their official capacities" and the latter is "raise[d] as a shield from the claims against [defendants] in their individual capacities." *Shay* v. *Rossi*, supra, 253 Conn. 162; see also *Mercer* v. *Strange*, 96 Conn. App. 123, 128, 899 A.2d 683 (2006) (it is well settled that defense of sovereign immunity is applicable only to claims brought directly against state itself or against state employees acting in official capacities, whereas defense of statutory immunity is applicable to claims brought against state employees acting in individual capacities).

Accordingly, a plaintiff who claims to have suffered some compensable injury as a result of actions taken by a state official or employee is faced with difficult choices in electing to commence a legal action. Chief among those choices is the decision whether to sue a state official as an individual or in his or her official capacity, each of which presents its own advantages and disadvantages.[12] Courts should not disregard these

[12] For example, whereas the state ordinarily may represent a potential "deep pocket" for the payment of damages, it may be legally difficult, time consuming, and ultimately fruitless to seek a waiver of sovereign immunity from the Claims Commissioner if one is not clearly provided for by statute. Conversely, although the difficulties associated with overcoming the hurdle of sovereign immunity theoretically may be avoided by suing a state official or employee in his or her individual capacity, the trade-off requires the plaintiff to allege and ultimately prove far more than merely negligent con-

choices if they are clearly expressed in the pleadings. See *Reclaimant Corp.* v. *Deutsch*, 332 Conn. 590, 607 n.11, 211 A.3d 976 (2019) ("[a]s the master of the complaint, the plaintiff is free to decide what theory of recovery to pursue"); *Miller* v. *Egan*, supra, 265 Conn. 309 (agreeing that "the right of a plaintiff to recover is limited by the allegations of [his] complaint" and warning courts not to "countenance a variance [from the allegations of a complaint] which alters the basic nature of a complainant's cause of action" (internal quotation marks omitted)).

A problem arises, however, whenever the plaintiff names a state official or employee as a defendant in an action without clearly designating whether the plaintiff is suing that person in his or her individual or official capacity. Our Supreme Court has affirmed that the "test set forth in *Spring* and *Miller* [v. *Egan*, supra, 265 Conn. 301] is an appropriate mechanism . . . to determine the capacity in which the named defendants are sued in actions asserting violations of state law . . . ." *Sullins* v. *Rodriguez*, supra, 281 Conn. 136.

For the reasons that follow, we do not read the precedent of our Supreme Court to require a court to apply the *Spring* test if the complaint unequivocally states the capacity in which the defendant is sued. Indeed, closer examination of *Spring* and our Supreme Court's application of the *Spring* test in *Miller* reveals that the test is not well suited for and was never expressly intended to apply to instances in which a plaintiff has made a clearly expressed election in the complaint to sue a state official in his or her individual capacity. The utility of the *Spring* test, at least as it has been applied by our Supreme Court, is far narrower. Nevertheless, even a cursory review of decisions of our trial and appellate courts demonstrates that courts have construed

duct on the part of the official, but rather some wanton, reckless, or malicious act. Otherwise, the plaintiff risks dismissal of the action on statutory immunity grounds. See General Statutes § 4-165.

complaints as effectively having been brought against the state even in the face of clear and contrary indications in the complaint and elsewhere in the record that the plaintiff has chosen to sue the defendant in an individual capacity. Accordingly, we are concerned that, if courts continue to apply the *Spring* test in such an expansive manner, they risk misconstruing most complaints brought against a state official or employee for actions taken while in service of the state as an action against that person only in his or her official capacity and, thus, necessarily against the state.

We begin our analysis with a discussion of *Spring* and *Miller*. In *Spring*, the plaintiff brought an action for professional malpractice against a public defender who had been assigned to represent her in a criminal matter. *Spring* v. *Constantino*, supra, 168 Conn. 564. The attorney general filed a special appearance on behalf of the defendant and filed a motion to dismiss the action, in which he claimed that the defendant had immunity from suit. Id. The defendant advanced three grounds for immunity: judicial immunity, common-law sovereign immunity, and statutory immunity. Id., 564–65. The trial court dismissed the action and the plaintiff appealed.

In discussing sovereign immunity, our Supreme Court in *Spring* indicated that the underlying action had been brought against the defendant "in his personal capacity," but that it agreed with the attorney general's assertion, quoting from *Somers* v. *Hill*, 143 Conn. 476, 479, 123 A.2d 468 (1956), that "[t]he fact that the state is not named as a defendant does not conclusively establish that the action is not within the principle which prohibits actions against the sovereign without its consent. . . . The vital test is to be found in the essential nature and effect of the proceeding." (Internal quotation marks omitted.) *Spring* v. *Constantino*, supra, 168 Conn. 568. The *Spring* decision, however, omits the sentence immediately preceding the quoted passage from *Somers*. That sentence adds important context to the stated

rule: "Whether a particular action is one against the state *is not determined solely by referring to the parties of record*." (Emphasis added.) *Somers* v. *Hill*, supra, 479. Thus, the quoted passage from *Somers*, considered in its full context, simply recognizes that a plaintiff cannot avoid application of sovereign immunity simply by naming a state official as the defendant rather than the state directly. There is nothing in either the *Spring* or *Somers* decision that elucidates the extent to which this rule applies in suits expressly brought against a state official in his or her individual, rather than official, capacity.

The court in *Spring* set forth the following four criteria, also taken from its earlier decision in *Somers*, "for determining whether [an action] is, in effect, one against the state and cannot be maintained without its consent: (1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Internal quotation marks omitted.) *Spring* v. *Constantino*, supra, 168 Conn. 568. The court, however, provided no guidance on how the individual criteria should be interpreted or applied, indicating only that it was "questionable whether *any of these elements exist in the present action*, but this need not be decided because the first element—that a state official has been sued—is not satisfied. A public defender in representing an indigent [client] is not a public official as that term has been defined by this court." Id. The court concluded: "The public defender when he represents his client is not performing a sovereign function and is therefore not a public or state official to whom the doctrine of sovereign immunity applies." Id., 569.

The decision in *Spring*, thus, was decided only on the first criterion. The opinion is silent with respect to the fact that the plaintiff expressly had sued the public defender in his "personal capacity" or to what extent

that fact entered into the court's dicta that questioned whether any of the other criteria, including the third, was met. Ultimately, the court in *Spring* concluded that the public defender did not enjoy any of the immunities advanced by the attorney general, and it reversed the judgment of the court and remanded for further proceedings.[13] Id., 576.

We turn next to our Supreme Court's decision in *Miller* v. *Egan*, supra, 265 Conn. 301, the only case in which our Supreme Court has had occasion to apply the *Spring* test. In *Miller*, a former county sheriff's office employee brought an action against the state and against several sheriffs alleging defamation, false imprisonment, civil conspiracy, and violations of his civil rights. Id., 307. The complaint brought against the sheriffs asserted claims against them in their official capacities. Nevertheless, on appeal from the trial court's dismissal of his action on sovereign immunity grounds, the plaintiff claimed that his complaint sued the sheriffs "in their individual capacities, as well as in their official capacities." Id. In support of his argument that he had in fact sued the defendants in their individual capacities, the plaintiff pointed to the fact that he had named each of the sheriffs separately as a defendant in the complaint along with the state. Id.

In addressing that claim, the Supreme Court first stated: "*If the plaintiff's complaint reasonably may be construed to bring claims against the defendants in their individual capacities*, then sovereign immunity would not bar those claims." (Emphasis added.) Id., citing *Martin* v. *Brady*, supra, 261 Conn. 374. Next, the court indicated that resolution of whether a state official was sued in an individual or official capacity, how-

[13] We note that the legislature has since added public defenders to the definition of "state officers and employees" entitled to statutory immunity under § 4-165. See General Statutes § 4-141 (5) (B); *Gross* v. *Rell*, 304 Conn. 234, 248 n.7, 40 A.3d 240 (2012).

ever, did not turn on merely identifying a state official as a party in the complaint, agreeing with the defendants that the plaintiff had made repeated express allegations in the complaint that he was suing the sheriffs in their official capacities. *Miller* v. *Egan*, supra, 265 Conn. 307–308. Noting that construction of a pleading is a question of law, over which appellate courts exercise plenary review; see *Home Oil Co.* v. *Todd*, 195 Conn. 333, 340, 487 A.2d 1095 (1985); the court next stated that "[t]he determination of whether the plaintiff's complaint alleged claims against the defendants in their individual capacities is governed by the [*Spring* test]." *Miller* v. *Egan*, supra, 308. The court noted that the plaintiff conceded that the first two criteria of the *Spring* test were met, but argued that "*the third criterion is not met* because the complaint sought relief both from the state and from the individual defendants." (Emphasis added.) Id. Although the complaint before the court in *Miller* named specific state officials as parties, the complaint in *Miller*, unlike in the present case, contained no express allegation by the plaintiff that he sought to sue the state officials in their individual capacities at the time the action was commenced. Nor was that assertion made in response to the defendants' motion to dismiss.

To the contrary, as Justice Borden emphasized in *Miller*, "[*n*]*owhere in the plaintiff's complaint did he allege that he was bringing an action against the defendants in their individual capacities.* Instead . . . the complaint repeatedly alleged that the defendants acted in their official capacity. We agree with the defendants that the right of a plaintiff to recover is limited by the allegations of [his] complaint . . . . We do not countenance a variance [from the allegations of a complaint] which alters the basic nature of a complainant's cause of action . . . ." (Emphasis added; internal quotation marks omitted.) Id., 309.

In addition to the complaint, the court also considered other aspects of the record before it, stating: "The plaintiff's arguments to the trial court in opposition to the motion to dismiss further support the conclusion that the plaintiff had, until now, sought relief solely from the state. The defendants' motion to dismiss the entire complaint was based on the doctrine of sovereign immunity, which they argued deprived the court of subject matter jurisdiction and required the plaintiff to exhaust his administrative remedies by proceeding through the [O]ffice of the [C]laims [C]ommissioner. The plaintiff could have responded, in his objection to the motion to dismiss, that his complaint had brought claims against the individual defendants, not only in their official capacities, but also in their individual capacities, *and could have argued that sovereign immunity was inapplicable to any individual capacity claims*, but he did not do so. Instead, the plaintiff argued that the legislature had [statutorily] waived sovereign immunity . . . and that he was not required, [under] § 4-165, to exhaust his administrative remedies because he had alleged in the complaint that the defendants' actions were reckless and malicious. The trial court's memorandum of decision specifically referenced the latter argument and concluded that it was inapplicable to the present case because the plaintiff had asserted his claims against the defendants solely in their official capacities *and sought relief solely from the state*. The plaintiff did not seek clarification or articulation based on the trial court's determination. . . . [T]he plaintiff had multiple opportunities in the trial court to argue that his complaint sought relief from the defendants in their individual capacities, in addition to seeking relief from the state, but he failed to do so." (Citations omitted; emphasis altered.) Id., 309–10.

Finally, the court in *Miller* stated: "We decline to permit the plaintiff now, merely by making a conclusory

statement that he also sought relief against the individual defendants, to avoid dismissal of the complaint. Otherwise, it would simply be too easy for a plaintiff, who originally had alleged causes of action against a state officer only in his official capacity, thus seeking relief solely against the state, subsequently to claim that he also sought relief against the state officer in his individual capacity. By utilizing this tactic, a plaintiff could, at least partially, avoid dismissal of a complaint due to sovereign immunity and subject the unsuspecting state officer to personal liability." Id., 310.

Only after a thorough review of the complaint and finding it utterly lacking *any* indication that the plaintiff had attempted to sue the defendants in their individual capacities, did the court conclude that the third criterion of the *Spring* test had been met as to all counts. Id., 311. With respect to the fourth criterion, the court concluded that it was satisfied "because the complaint sought relief solely against the state [and therefore] a judgment against the state would subject it to liability." Id.[14]

At least one state trial court, relying on the analysis in *Miller*, persuasively has held that the four part *Spring* test has no applicability in the context of a case in which the plaintiff's complaint expressly provides that state officials have been sued in their individual capacities. In *Walsh* v. *State*, Docket No. X03-CV-05-4006939,

[14] The court also rejected the plaintiff's argument that, even if sued only in their official capacities, the defendants had acted "in excess of their statutory authority" and thus the matter fell within an exception to the sovereign immunity doctrine. *Miller* v. *Egan*, supra, 265 Conn. 312. The court determined that the exception was inapplicable because it was limited to actions seeking declaratory or injunctive relief and did not extend to actions that sought money damages, as did the plaintiff's action. Id., 312–13. In so holding, the court expressly overruled its prior decisions in *Shay* v. *Rossi*, supra, 253 Conn. 134, and *Antinerella* v. *Rioux*, 229 Conn. 479, 642 A.2d 699 (1994), to the extent that those decisions had held that sovereign immunity did not bar monetary damage actions against state officials in their official capacities if they allegedly had acted in excess of statutory authority.

2006 WL 391306 (Conn. Super. February 1, 2006), the administrators of the estate of a prisoner who had died in his cell by hanging filed an action against a number of state officials, expressly stating in the complaint that they did so in their individual capacities. Although the complaint primarily raised federal civil rights violations, the officials nevertheless filed a motion to dismiss claiming that all but one count was barred by common-law sovereign immunity and state statutory immunity. Id., *1–2. The defendants urged the court, despite clear indication in the complaint that the defendants were sued in their individual capacities, to apply the *Spring* test and "look beneath the pleadings and conclude that while the plaintiffs purport to sue [the] defendants in their individual capacities, [the] defendants are in actuality being sued in their capacities as state employees discharging their statutory duties." Id., *2. The plaintiff responded, among other things, that the *Spring* test was inapplicable, arguing in relevant part that the test "has only limited viability in light of the language used by Justice Borden in [*Miller*] [that] [i]f the plaintiffs' complaint reasonably may be construed to bring claims against the defendants in their individual capacities, then sovereign immunity would not bar these claims." (Emphasis omitted; internal quotation marks omitted.) Id., *3, citing *Miller* v. *Egan*, supra, 265 Conn. 307.[15]

Judge Lavine, at the time a Superior Court judge, agreed with the plaintiff's assertion. In discussing the applicability of the *Spring* test, the court stated: "Even if the state sovereign immunity defense were available, the court concludes that it would not require dismissal of the challenged counts in this case *given the nature*

[15] Federal trial courts have also recognized this same principle. See, e.g., *Longmoor* v. *Nilsen*, 285 F. Supp. 2d 132, 143 (D. Conn. 2003) (citing *Miller* for proposition that, if plaintiff sued state police officers only in their individual capacities, defendants are not protected by common-law doctrine of sovereign immunity).

of the allegations in the complaint. The court shares [the] plaintiffs' view that Justice Borden's above-quoted statement in *Miller* v. *Egan*, [supra, 265 Conn. 307] calls into question the continuing vitality of the four part test of *Spring* v. *Constantino*, [supra, 168 Conn. 563].[16] Having reviewed the complaint, the court concludes that it may reasonably be construed to bring claims against the defendants in their individual capacities. *In fact, it does so explicitly and repeatedly.* . . . In light of these allegations, *which the court must construe in a manner most favorable to the pleader* . . . the court declines to construe the complaint as [the] defendants suggest." (Citations omitted; emphasis added; footnote added; internal quotation marks omitted.) *Walsh* v. *State*, supra, 2006 WL 391306, *4. In short, like in *Miller*, Judge Lavine gave proper deference to the plaintiff's clear and unambiguous election, as expressed in the complaint, to sue the defendants in their individual capacities and refused to sanction the defendants' effort to undermine the plaintiff's choice of defendant by applying the *Spring* test, which the court determined was inapplicable in light of the guidance in *Miller*.

With the foregoing legal background and discussion in mind, we turn to the present case. The plaintiff, in his operative complaint, asserted in the opening paragraphs in which he identifies the parties to the action that "[t]he defendants are sued in their individual capacit[ies]." This statement represents an unequivocal election on the part of the plaintiff regarding the legal theory of liability that he intended to pursue.[17] Unlike in *Miller*, the

[16] We construe Judge Lavine's statement as questioning only the applicability of the *Spring* test with respect to cases in which the plaintiff clearly and unambiguously has expressed an intent to sue a state official in his or her individual capacity, not, more generally, cases in which it is unclear as to the plaintiff's election regarding the capacity in which the state official has been sued.

[17] We recognize that this court, on occasion, has stated that trial courts are not required to accept as wholly determinative a plaintiff's allegation that an individual rather than the state is the real party in interest. See *Cimmino* v. *Marcoccia*, 149 Conn. App. 350, 359, 89 A.3d 384 (2014); *Kenney*

plaintiff did not wait until his action was dismissed on the ground of sovereign immunity to clearly assert his intent to sue the defendants in their individual capacities. Because there is only one reasonable construction of the plaintiff's direct assertion that he sought to sue the defendants in their individual capacities, pursuant to *Miller*, "then sovereign immunity would not bar these claims." *Miller* v. *Egan*, supra, 265 Conn. 307. The trial court appears not to have considered properly this unequivocal statement in reaching its contradictory conclusion, after application of the *Spring* test, that the action had been brought against the defendants only in their official capacities and, thus, by implication, against the state.

Looking to other aspects of the record, as the court did in *Miller*, we note that the manner in which the action was commenced provides additional support for construing the complaint as one brought against the defendants in their individual capacities. Rather than having served the defendants through the Office of the Attorney General, which would have been expected in an action brought against the defendants in their official capacities, process was served on three of the four defendants at their "usual place of abode" as required to sue the defendants as individuals.[18] It was incumbent

v. *Weaving*, 123 Conn. App. 211, 215–16, 1 A.3d 1083 (2010). We are mindful, however, that we are bound to follow our Supreme Court's language in *Miller* requiring a court to defer to the plaintiff's election if the complaint reasonably can be construed to bring an action against a state official in an individual capacity. See *Max's Place, LLC* v. *DJS Realty, LLC*, 123 Conn. App. 408, 415, 1 A.3d 1199 (2010) ("[a]s an intermediate appellate court, we must follow the precedent of our Supreme Court along the path which our considered reading of that precedent lays out for us" (internal quotation marks omitted)).

[18] Service of process for the fourth defendant, Cook, was made by in hand service to an individual alleged to be authorized to accept legal service for Cook. The question of whether, if challenged, this would have been deemed insufficient to bring Cook within the jurisdiction of the court in his individual capacity has been waived. See footnote 3 of this opinion. Nonetheless, it is noteworthy that the plaintiff did not seek to serve Cook through the attorney general as he would have if he wished to sue Cook only in his official

upon the court to construe the complaint, if possible, in a manner consistent with the plaintiff's choices as the "master of the complaint"; *Reclaimant Corp.* v. *Deutsch*, supra, 332 Conn. 607 n.11; and in favor of jurisdiction over the action. Consistent with our Supreme Court's statement in *Miller*, we conclude that it was improper for the court to have treated the case like one in which a plaintiff had sued a state official or employee without designating whether he intended to sue that person in his official or individual capacity. It is only in the absence of an express designation by the plaintiff in the complaint regarding the capacity in which a state official or employee has been sued that the *Spring* test offers any real utility.

Even if our Supreme Court were to disagree with our construction of the true purpose of the *Spring* test, or were to conclude that it was appropriate under the circumstance for the trial court to have applied the *Spring* test in this matter, particularly in light of the fact that its application was advocated for by both sides, we would nevertheless still disagree with the trial court's ultimate application of the test, particularly with respect to the third criterion.

We agree with the court that the first two elements of the *Spring* test are satisfied. With respect to the first criterion, the plaintiff concedes, as he must, that at all

capacity. See General Statutes § 52-64 (a) ("Service of civil process in any civil action . . . against any officer, servant, agent or employee of the state . . . may be made by a proper officer (1) leaving a true and attested copy of the process, including the declaration or complaint, with the Attorney General at the office of the Attorney General in Hartford, or (2) sending a true and attested copy of the process, including the summons and complaint, by certified mail, return receipt requested, to the Attorney General at the office of the Attorney General in Hartford"); see also *Harnage* v. *Lightner*, 163 Conn. App. 337, 341, 137 A.3d 10 (2016) (it is "clearly established that § 52-64 (a) applies only if a state employee has been sued in his official capacity and that § 52-57 (a) applies when a state employee is sued in his individual capacity"), aff'd in part, vacated in part, 328 Conn. 248, 179 A.3d 212 (2018).

times relevant to this action, the defendant police officers held positions as state officials. By citing the officers as the defendants in his complaint, it is undisputed that "a state official has been sued" and, therefore, the first criterion of the *Spring* test is met. See *Spring* v. *Constantino*, supra, 168 Conn. 568.

With regard to the second criterion, namely, that "the suit concerns some matter in which that official represents the state"; id.; it is equally indisputable that the present action concerns a matter in which the defendants are alleged to have been acting while on duty as police officers and, thus, representing the state. Although the plaintiff argues that the defendants' use of less than lethal ammunition on Devine was conduct that went beyond the scope of their duties as police officers and, thus, should be characterized as an assault, the facts as alleged in the amended complaint in no way indicate that the defendants were acting other than in their capacities as police officers. Rather, the complaint alleges that the defendants all responded to the scene as members of the tactical unit and that Avery and Cook fired the less than lethal ammunition at Devine in response to direct orders given by Fusaro and Rief, acting in their command roles. The complaint contains no allegations suggesting that any of the defendants ever ceased to act pursuant to their roles as state employees, and, therefore, the second criterion of the *Spring* test is met.[19] See *Cimmino* v. *Marcoccia*, 149 Conn. App. 350,

[19] Although the plaintiff argues that the court, in determining that the second criterion of the *Spring* test was met, impermissibly relied entirely on the language in the complaint alleging that the defendants were "acting under color of law"—language the plaintiff had sought to remove or amend—the plaintiff misinterprets the court's analysis. The court did state that the allegations that the defendants were acting under the color of law "sufficiently show that the individual defendants represent the state." The court further stated, however, that, "[a]lthough this is sufficient to satisfy the second criterion, *there is a separate bas*[*is*] *to do so*." (Emphasis added.) The court explained: "The additional factual allegations all concern the defendants acting in their official police functions. The plaintiff alleges that the [Groton police captain] requested the presence of the [tactical unit] and

359, 89 A.3d 384 (2014) (second criterion of *Spring* test was met because defendants were allegedly "acting in furtherance of a joint investigation authorized by statute and initiated by the state agencies that employed them"); *Kenney* v. *Weaving*, 123 Conn. App. 211, 216, 1 A.3d 1083 (2010) (second criterion was met because "[t]he allegedly reckless actions of the defendant were related to his duties as commissioner").

We do not agree, however, with the trial court's application of the third criterion, which asks whether "the state is the real party against whom relief is sought." *Spring* v. *Constantino*, supra, 168 Conn. 568. As we have already discussed, the court failed to give proper deference to the express allegation in the plaintiff's complaint that he sought relief from the officers *in their individual capacities*. In concluding to the contrary that the state was the real party in interest, the trial court stated that "[t]he plaintiff's claims arise from the injuries allegedly caused by the defendants' conduct that occurred during and as part of their official duties as state employees" and thus it followed that "they acted in their official capacities, implicating the state." Given that the purpose of the *Spring* test is to determine whether the defendants were sued in their official or individual capacities, to conclude that the third prong of that test is met on the basis of a determination that the defendants acted in their official capacities is circular logic.

We acknowledge that courts, including this one, have, on occasion, concluded that the state is the real party in interest solely because the injuries alleged were the result of the actions by an individual taken during the performance of his or her official state duties. See, e.g., *Cimmino* v. *Marcoccia*, supra, 149 Conn. App. 359–60;

the four defendants responded to the scene as members of and a part of the [tactical unit]." (Emphasis omitted.) We, therefore, reject the plaintiff's argument that the court's analysis improperly was limited to the "color of law" allegations.

Macellaio v. *Newington Police Dept.*, 142 Conn. App. 177, 181, 64 A.3d 348 (2013). In so concluding, those courts have employed language similar to that used by the trial court in the present case. The use of such language, however, risks obscuring the true purpose of the *Spring* test—determining *in the absence of an expressed intent* whether a state official has been sued in his or her official or individual capacity—and conflating the second criterion of the *Spring* test with the third criterion thereby suggesting, through implication, that anytime a state employee or official is sued for actions conducted while carrying out official duties, the state itself, rather than the official, necessarily must be the real party in interest.

By way of example, in *Macellaio* v. *Newington Police Dept.*, supra, 142 Conn. App. 181, this court stated that "[t]he third criterion of [the *Spring* test] [was] met because damages [were] sought for injuries allegedly caused by the [employee] for performing acts that [were] a part of his official duties such that the state is the real party against whom relief is sought." In *Cimmino* v. *Marcoccia*, supra, 149 Conn. App. 359–60, this court similarly held that the third criterion of the *Spring* test was satisfied because the "damages sought by the plaintiff [were] premised entirely on injuries alleged to have been caused by the [employees] in performing acts that were part of their official duties." If the quoted language continues to be employed as supporting the conflated rationale that we have identified, a plaintiff seeking to sue a state official on a theory of individual liability would almost always be precluded from doing so because of sovereign immunity because the actions of the state official always would be attributed to the state, even if the actions were alleged to be reckless, wanton, or malicious in nature.[20]

[20] This opinion should not be read as overruling sub silencio any previous Appellate Court decisions because, as a matter of policy, one panel of this court will not overrule another panel's decision in the absence of en banc

Importantly, applying the *Spring* test so broadly also risks undermining the legislature's purpose for enacting § 4-165, which was to protect state officials and employees from liability for negligent acts while performing official duties. If all acts taken by a state official or employee while in service of the state are automatically construed as actions taken in his or her official capacity attributable to the state, liability for those acts would be barred by sovereign immunity, rendering the need for statutory immunity pursuant to § 4-165 superfluous and unnecessary. See, e.g., *Kenney* v. *Weaving*, supra, 123 Conn. App. 219 n.5 (determining on basis of *Spring* test that defendant was entitled to defense of sovereign immunity "and, therefore, the plaintiff cannot maintain her cause of action against him regardless of whether she could demonstrate recklessness pursuant to § 4-165"). If a suit seeking damages from state officials carrying out their duties as agents of the state *always* will be determined to be a suit against the state, thereby implicating sovereign immunity, there would never be a real need for § 4-165. It is axiomatic that "[n]o part of a legislative enactment is to be treated as insignificant or unnecessary, and there is a presumption of purpose behind every sentence, clause or phrase . . . [so that] no word [or phrase] in a statute is to be treated as superfluous." (Internal quotation marks omitted.) *State* v. *Peeler*, 271 Conn. 338, 434–35, 857 A.2d 808 (2004), cert. denied, 546 U.S. 845, 126 S. Ct. 94, 163 L. Ed. 2d 110 (2005).

Consequently, we agree with the plaintiff's argument that, in considering whom the action was brought against—i.e., the real party in interest—the court was required to give far greater weight to the fact that the

consideration. See *McCullough* v. *Rocky Hill*, 198 Conn. App. 703, 712 n.13, 234 A.3d 1049, cert. denied, 335 Conn. 985, 242 A.3d 480 (2020). We invite our Supreme Court, if provided an appropriate opportunity, to discuss more fully and definitively the proper application of the *Spring* test criteria or to reformulate the *Spring* test, something it has not yet had an opportunity to consider.

plaintiff specifically pleaded that he brought the action against the defendants in their individual capacities. This is not a case in which a state official has been named as a defendant without any indication of whether that person is being sued in an individual capacity or only in an official capacity as an agent of the state. As the plaintiff correctly points out, he specifically and clearly pleaded claims against the defendants in their individual capacities.[21] Although, as we have already noted, the complaint also states that the defendants "[were] employed as law . . . enforcement officer[s] by the state of Connecticut and *acting under the color of law*," nowhere in the complaint does the plaintiff indicate by express language that his intent was to sue the defendants in their official capacities, and therefore we are unconvinced that this language alone is sufficient to negate the express allegation to the contrary. See footnote 17 of this opinion. Having determined that the third criterion is not met, it is unnecessary to reach whether the fourth criterion of the *Spring* test would be satisfied under the facts alleged.[22]

[21] In *Visual Displays, Inc.* v. *Fields*, Docket No. Civ. 3:93-837 (JAC), 1993 WL 366532 (D. Conn. August 24, 1993), a federal District Court judge, applying the *Spring* test, held that the third prong of the test was not met because the plaintiffs had expressly stated in their complaint that "all the defendants are sued in their individual capacities"; id., *4 n.26; and, because the plaintiffs "have sued the defendants solely in their individual—not their official—capacities"; id., *5; it follows that "the state is not the real party in interest . . . ." Id.

[22] We nonetheless take this opportunity to caution courts to avoid construing the fourth criterion too expansively such that almost every suit nominally brought against a state employee, even if the relief sought is limited to money damages against the individual, will be deemed to "operate to control the activities of the state or subject it to liability." *Spring* v. *Constantino*, supra, 168 Conn. 568.

In considering the state's possible liability under the fourth criterion, courts routinely have looked to General Statutes § 5-141d (a) to determine whether the state is obligated to indemnify state officials or employees if judgment were rendered against them in favor of the plaintiff. "Section 5-141d . . . evinces the legislature's intent that the state indemnify and defend any officer or employee sued for negligent conduct occurring in the course of his or her employment." *Hunte* v. *Blumenthal*, supra, 238 Conn. 151. If,

To summarize, because we have determined that the plaintiff's wrongful death action was brought against the defendants in their individual capacities, we conclude that the trial court improperly granted the motion to dismiss on sovereign immunity grounds.[23] Accordingly, we reverse the judgment and remand the matter

however, a plaintiff alleges wanton, reckless, or malicious conduct by the state official or employee, the attorney general has discretion whether to defend that person and the state will not legally be required to indemnify him or her if those allegations are proven, meaning that any monetary relief sought by the plaintiff would not necessarily subject the state to liability. See, e.g., *David* v. *Bureau*, Docket No. CV-07-5001460-S, 2008 WL 4249406, *3 (Conn. Super. August 25, 2008); *Flanagan* v. *Blumenthal*, Docket No. 00-7307, 2000 WL 1508874, *1 (2d Cir. October 12, 2000) (§ 5-141d grants attorney general broad discretion to deny representation "if providing it would be 'inappropriate' "). Moreover, the fourth criterion of the *Spring* test, which is stated in the disjunctive, looks not only to whether a judgment against the defendant would "subject [the state] to liability" but also to whether a judgment would "operate to control the activities of the state . . . ." *Spring* v. *Constantino*, supra, 168 Conn. 568. This latter portion of the fourth criterion, if applied with too broad a brush, has the potential, like the third criterion, to render it established in almost every case. See, e.g., *Cimmino* v. *Marcoccia*, supra, 149 Conn. App. 360 (holding that "[a]ny [monetary] judgment against the defendants would impact the manner in which state officials conduct investigations" initiated by state child advocate and attorney general). We nevertheless leave a more detailed discussion of the fourth criterion for another day. See footnote 20 of this opinion.

[23] The state argues that, even if we determine that the court improperly granted the motion to dismiss on sovereign immunity grounds, we may affirm the trial court's decision to dismiss the action on the alternative theory, raised in the motion to dismiss but not decided by the trial court, that the action is barred by statutory immunity because the plaintiff failed to allege sufficient facts to demonstrate that the defendants' actions were "wanton, reckless or malicious." For the following reasons, we decline to exercise our discretion to consider the alternative ground advanced by the state.

Practice Book § 63-4 (a) (1) (A) provides in relevant part that, "[i]f any appellee wishes to . . . present for review alternative grounds upon which the judgment may be affirmed . . . that appellee shall file a preliminary statement of issues within twenty days from the filing of the appellant's preliminary statement of the issues." Certainly, "[t]his court is not *precluded* . . . from reviewing an [alternative] ground that was not raised in accordance with [our rules of practice] so long as the appellant will not be prejudiced by consideration of that ground for affirmance." (Emphasis added; internal quotation marks omitted.) *State* v. *Martin M.*, 143 Conn.

to the court with direction that it vacate its granting of the motion to dismiss and that it consider the remaining ground raised in the motion, namely, whether the plaintiff's complaint sufficiently alleges reckless, wanton, or malicious conduct such that, if proven, the defendants would not be entitled to statutory immunity under § 4-165.[24]

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

In this opinion the other judges concurred.

App. 140, 151, 70 A.3d 135, cert. denied, 309 Conn. 919, 70 A.3d 41 (2013). Nonetheless, we also may decline to do so under certain circumstances. See, e.g., *Vertex, Inc.* v. *Waterbury*, 278 Conn. 557, 563 n.7, 898 A.2d 178 (2006). In the present case, the defendants never filed a preliminary statement of issues raising statutory immunity as a potential alternative ground for affirmance. The defendants also failed to identify or brief statutory immunity as an alternative ground for affirmance in their appellees' brief, which would have alerted the plaintiff to that issue and provided him with an opportunity to address the defendants' arguments in a reply brief. The defendants raised the issue of statutory immunity as an alternative ground for affirmance for the first time during oral argument following the granting of reargument. Although the plaintiff—*and not the defendants*—addressed statutory immunity in the simultaneous supplemental briefs ordered by this court on reargument, he had no real notice or opportunity to respond to the arguments raised by the defendants, which were advanced for the first time at oral argument. Under these unique circumstances, and given that the trial court never had an opportunity to rule on the issue of statutory immunity, we decline to do so for the first time on appeal.

[24] Because we reverse the court's decision granting the motion to dismiss, we need not address the plaintiff's additional claim that, in granting the motion to dismiss, the court considered facts outside the complaint, namely, the Connecticut State Police Administration and Operations Manual.

STATE OF CONNECTICUT *v.* TRAVIS LANIER (AC 43671)

Bright, C. J., and Moll and Bear, Js.

Syllabus

Convicted of the crime of burglary in the second degree in connection with a confrontation in the victim's apartment, the defendant appealed to this court, claiming, inter alia, that his constitutional rights to confrontation and to present a defense were violated when the trial court precluded him from cross-examining the victim about matters pertaining to the victim's bias against him and motive to falsify his claims to the police. The victim, the defendant and M had been at a bar when the defendant asked the victim if he could borrow twenty dollars. The victim gave the defendant the money and stated that he had other money at home for his rent. When the bar closed, the defendant invited the victim to his apartment, where he and M punched the victim and asked him about a watch he allegedly had stolen from M. The men then went to the victim's apartment, where the defendant took $400 and threatened to shoot the victim if he talked to the police. The state charged the defendant with six crimes, including burglary in the second degree by entering or remaining unlawfully in the victim's apartment with the intent to commit any, some or all of the underlying crimes of robbery in the first degree, robbery in the second degree, threatening in the second degree in violation of statute (§ 53a-62 (a) (1)) and larceny in the sixth degree. Prior to trial, the defendant filed a motion in limine seeking to impeach the victim's credibility with evidence of his felony conviction of driving while under the influence of intoxicating liquor or drugs, which had occurred prior to the incident with the defendant and M, and for which the victim was serving a sentence of probation both at the time of the incident with the defendant and M and at the time of trial. The defendant claimed, inter alia, that there would likely be testimony that the victim's conduct during the incident with the defendant and M violated the terms of the victim's probation, and that such evidence was relevant to the victim's state of mind during the incident and motive to fabricate claims against the defendant. The defendant also sought to question the victim about a violation of the victim's probation that occurred prior to the pendency of this case, asserting that, because the victim had not been incarcerated as a result of that violation, he had an interest in staying in the state's good graces, which was relevant to his veracity and motive to falsify claims against the defendant. The defendant further contended that, because M claimed that the victim had stolen his watch, the victim would have a motive to fabricate his allegations against the defendant if he knew that a condition of his probation was that he not have any new arrests. The trial court denied

the defendant's motion but permitted him to question the victim regarding his felony conviction, the name of the crime of which he had been convicted and the fact that he was on probation as a result of that conviction at the time of the incident with the defendant and M and at the time of trial. *Held*:

1. The trial court did not impermissibly infringe on the defendant's constitutional rights to confrontation or to present a defense and did not abuse its discretion in limiting his cross-examination of the victim: although the court did not explicitly find that the defendant's proffered line of questioning was irrelevant, it determined that it was speculative and that its probative value was outweighed by its prejudicial effect, the issues related to the victim's probationary status, which the court excluded, were marginally related, at best, to the issues in the case, and the defendant failed to provide a sufficient foundation to support his claim that his proffered line of questioning related to the victim's motive to fabricate the allegations against him, as it strained credulity to believe that the victim would initiate contact with the police if he was worried that they would learn he had been drinking alcohol or that the defendant and M would accuse him of larceny as to M's watch; moreover, the defendant's attempt to characterize his proffered line of questioning as relating to the victim's state of mind was tenuous and did not change its speculative nature, this court having previously determined that speculative evidence is irrelevant; furthermore, defense counsel undertook an extensive and robust cross-examination of the victim that addressed many inconsistencies in his testimony, and the jury found the defendant not guilty of five of the six charges against him, which indicated that it did not credit all of the victim's testimony.

2. The defendant could not prevail on his unpreserved claim that the trial court's jury instruction on burglary in the second degree misled the jury because the court did not define the terms "physical threat" and "imminent" as elements of the underlying crime of threatening in the second degree:

   a. The defendant was not entitled to review of his claim pursuant to *State* v. *Golding* (213 Conn. 233), as it was clear from the record that, under *State* v. *Kitchens* (299 Conn. 447), he implicitly waived his right to challenge the trial court's instructions on appeal; defense counsel had a meaningful opportunity to review, comment on and suggest modifications to the court's proposed instructions, she affirmatively accepted the instructions as proposed by repeatedly telling the court that she had no other issues to raise concerning the instructions, the proposed instructions were provided to defense counsel six days prior to when the jury was charged, defense counsel had the opportunity, overnight, to review the final jury instructions as modified from the charging conference with the court, and at no time before or after the final charge did defense counsel raise any issue or objection concerning the instructions as they related to the underlying crime of threatening.

b. The defendant's assertion that the state failed to provide an adequate record to show that he waived his instructional claim was unavailing: although the record did not contain a copy of the trial court's proposed jury charge, which had not been made an exhibit at trial, and despite the defendant's contention that there was not enough evidence to determine what was in the draft of the court's proposed instructions, the record was adequate for this court to closely examine the particular facts and circumstances and to make a determination as to whether the defendant had implicitly waived his right to challenge the instructions on appeal, as the trial court had held an on-the-record charging conference in which it addressed each jury instruction the parties requested, and gave the parties multiple opportunities to comment on them and on the court's proposed instructions; moreover, the waiver rule in *Kitchens* did not require that a copy of the proposed instructions be marked as an exhibit but, rather, only evidence that the court gave the parties a copy of the proposed instructions, and that the reviewing court's determination of implied waiver be based on a close examination of the record and the particular facts and circumstances of the case.

c. Contrary to the defendant's alternative claim, the trial court did not commit plain error when it failed to include the definitions of "physical threat" and "imminent" in its jury charge relating to the underlying crime of threatening in the second degree, as this court previously has determined that a "threat," consistent with its dictionary definition, is an expression of intent to cause future harm, and the defendant did not demonstrate that "imminent," as used in § 53a-62, has anything other than its ordinary meaning: because the jury returned a general verdict on the burglary charge, it was unknown whether the verdict was based on the underlying crime of threatening or the underlying crime of larceny in the sixth degree, any error in the court's instructions on threatening was harmless beyond a reasonable doubt, as the evidence was sufficient to support the defendant's conviction of burglary on the basis of the underlying crime of larceny, which the defendant conceded in his appellate brief, the defendant did not raise any challenge to the jury instructions, and he did not show that the verdict was based on a legally inadequate underlying theory of conduct on his part or allege that the court misstated the law, that the state's theory of conviction was time barred or that his actions were constitutionally protected.

Argued March 9—officially released July 6, 2021

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of conspiracy to commit robbery in the first degree, conspiracy to commit robbery in the second degree, robbery in the first degree, robbery in the second degree, assault in the

second degree and burglary in the second degree, and, in the second part, with being a persistent felony offender, brought to the Superior Court in the judicial district of Middlesex, where the court, *Suarez*, *J.*, denied the defendant's motion to admit certain evidence; thereafter, the first part of the information was tried to the jury; verdict of guilty of burglary in the second degree; subsequently, the defendant was tried to the court on the second part of the information; finding of guilty; thereafter, the court rendered judgment in accordance with the verdict and the finding, from which the defendant appealed to this court. *Affirmed.*

Pamela S. Nagy, assistant public defender, for the appellant (defendant).

Melissa L. Streeto, senior assistant state's attorney, with whom, on the brief, were *Michael A. Gailor*, state's attorney, and *Russell C. Zentner*, senior assistant state's attorney, for the appellee (state).

Opinion

BEAR, J. The defendant, Travis Lanier, appeals from the judgment of conviction, rendered following a jury trial, of burglary in the second degree in violation of General Statutes § 53a-102 (a). He claims that (1) the trial court violated his constitutional rights to confrontation and to present a defense when it precluded him from cross-examining the victim regarding matters that allegedly concerned the victim's bias against the defendant and motive to falsify his claims to the police regarding the defendant, and (2) the court's jury instruction on burglary in the second degree misled the jury because it did not define the elements of threatening in the second degree, which was one of the alleged underlying crimes for the burglary charge.[1] We disagree and affirm the judgment of the trial court.

[1] The defendant also raised a claim on appeal concerning his conviction, after a trial to the court, of being a persistent felony offender in violation of General Statutes § 53a-40 (g) and the court's denial of his motion to dismiss the part B information, which charged him as such on the basis of

The jury reasonably could have found the following facts. On the evening of January 28, 2018, at about 11 p.m., after the victim, Alejandro Marrinan, had finished working, he went to a local bar in Middletown called the Corner Pocket. While at the bar, he encountered the defendant, whom he had met on previous occasions at the bar and who went by the name "Taz." The defendant was at the bar with two other individuals, a man named Mason Moniz and Moniz' mother. At some point, the defendant bought the victim a drink, and the two had a conversation. The defendant asked to borrow twenty dollars from the victim, who gave him the money and stated, "I have my other money at home for my rent."[2] The victim testified that he stayed at the bar with the defendant until the bar closed at 1 a.m., at which time the defendant invited the victim and Moniz to his apartment. Before they left the bar, they bought beer to bring to the apartment.

At the defendant's apartment, when the victim was taking off his jacket, he turned around and was punched

his two prior convictions in 2000 and 2006 of possession of narcotics in violation of General Statutes § 21a-279 (a). His motion to dismiss the part B information was based on the fact that, pursuant to Public Acts, Spec. Sess., June, 2015, No. 15-2 (P.A. 15-2), which became effective October 1, 2015, a conviction of possession of narcotics under § 21a-279 (a) is a misdemeanor and no longer is a felony. Therefore, according to the defendant, his prior convictions under that statute could not be the basis for a finding that he is a persistent *felony* offender. In denying the defendant's motion to dismiss, the trial court relied on this court's decision in *State* v. *Moore*, 180 Conn. App. 116, 124, 182 A.3d 696, cert. denied, 329 Conn. 905, 185 A.3d 595 (2018), in which we held that P.A. 15-2 does not apply retroactively and which this court followed in *State* v. *Bischoff*, 189 Conn. App. 119, 122–23, 206 A.3d 253 (2019), aff'd, Conn. , A.3d (2021). During the pendency of the appeal in the present case, our Supreme Court issued its decision in *State* v. *Bischoff*, Conn. , A.3d (2021), affirming this court's judgment that P.A. 15-2 does not apply retroactively. At oral argument before this court, the defendant's appellate counsel acknowledged that we are bound by our Supreme Court's decision in *Bischoff* and that the defendant's claim concerning his conviction as a persistent felony offender no longer is viable. Therefore, counsel withdrew the issue from consideration on appeal. Accordingly, we do not address this claim.

[2] The victim testified that, on the previous day, Saturday, January 27, 2018, he withdrew $800 from the bank to pay his rent. He explained that he withdrew the money in 100 and 50 dollar bills, so that he would not waste it.

in the face by the defendant and "knocked out." The victim testified that he was "out cold" or unconscious for about thirty seconds, and that he remembered the defendant picking him up and hitting him again, this time in the mouth. Thereafter, he also was hit by Moniz. At that time, the defendant and Moniz asked the victim about a watch,[3] and stated that they were going to go to the victim's apartment to get his money or they were going to hurt him.

While the three men walked to the victim's apartment, which was on Main Street in Middletown, the victim walked slowly because he had dialed 911 on his cell phone, which was in his pocket, and hoped that the call would alert the police to his location. The victim testified that, during that time, the defendant and Moniz walked behind him and pushed him. When they arrived at the victim's apartment, the defendant was very angry and demanded that the victim open the door. The victim testified that the defendant and Moniz forced him to go inside his apartment, and, once inside, the defendant said, "give me the money, where's the money?" The victim kept his money in a bank envelope in a bedroom closet, with $400 folded in the envelope and $400 the long way in the envelope. When the victim took the envelope out of the closet, the defendant grabbed the envelope, took the money and left the room, stating that he would

[3] Regarding the watch, the victim testified on direct examination that he "had no idea what [the defendant and Moniz] were talking about . . . ." Moniz testified regarding this issue, stating that, about two weeks prior to the incident at issue here, he had the victim over to his apartment, where they had been drinking. A watch and chain belonging to Moniz were on a living room table, and, according to Moniz, the victim was the only one at his house at the time. When Moniz had his back turned to the victim, the victim said he was leaving. After the victim left, Moniz noticed that the watch was not there anymore. At the defendant's apartment on January 29, 2018, Moniz confronted the victim about the watch, asking him where it was and if he took it. Moniz testified that the victim denied stealing the watch but, nevertheless, offered to give him money for it. Moniz testified further that the victim told him he would give him $300 for the watch, that the money was at the victim's apartment, and that they finished another drink before heading to the victim's apartment to get the money.

shoot or hurt the victim if the victim talked to the police. Although the envelope contained $800, the victim testified that the defendant took only $400. The defendant and Moniz then left the apartment, and the victim called 911 again. This time, the victim spoke to a 911 operator and stated that two people had just robbed him, that the two individuals were walking down the street, and that he was scared for his life because one of the robbers had threatened to shoot him if he talked to the police. During that call, the victim also stated that he had been hanging out with friends when the incident occurred and that, after the defendant took his money, the defendant asked if the victim wanted to go back to the defendant's apartment.

Officer Kyle Pixley of the Middletown Police Department was working a late shift on the evening of January 28, 2018, into the morning of January 29, 2018, when he received a call at 2:47 a.m. from police dispatch to go to the north end of Main Street to canvass the area for two suspects involved in an armed robbery. Once there, he saw two individuals who matched the descriptions of the suspects walking northbound on the sidewalk on the east side of Main Street, just south of Rapallo Avenue, and they were the only two people on Main Street at that time. He drove his police cruiser alongside the suspects, stopped, got out, and asked them to show him their hands. The men ignored the officer and continued to walk in a northbound direction, at which point the officer drew his pistol and asked several more times for them to comply. Moniz stopped, raised his hands, and "froze," while the defendant kept walking and rounded the corner onto Rapallo Avenue, out of Officer Pixley's sight. At that time, Officer Jeffrey Scoppetto of the Middletown Police Department had arrived at the corner of Main Street and Rapallo Avenue, stopped his police cruiser on Rapallo Avenue, got out of his vehicle, and approached the defendant, who was walking in an easterly direction on

Rapallo Avenue. Initially, the defendant did not comply with the requests of either officer to come back, but he eventually walked back toward Officer Pixley. After the defendant and Moniz were handcuffed, Officer Pixley walked around the corner onto Rapallo Avenue to see if the defendant had discarded a weapon or other evidence, and he found two 100 dollar bills lying on the sidewalk, which were taken and tagged as evidence. Two 50 dollar bills were taken from Moniz and also tagged as evidence.

In response to the victim's second 911 call concerning a robbery, Sergeant Nicholas Puorro and Officer Michael Pellegrini of the Middletown Police Department went to the victim's apartment, where they interviewed the victim. Sergeant Puorro observed that the victim was "shaken up," nervous, and scared, and had visible injuries about his face. Thereafter, Officer Pellegrini took the victim in his police cruiser to the area of Main Street and Rapallo Avenue, where the defendant and Moniz had been detained on the sidewalk. Officer Pellegrini asked the victim to identify the two suspects, and he did so "[i]mmediately" and "[w]ithout hesitation." After the identifications were made by the victim, which occurred at 3:20 a.m., he was taken back to his apartment, and he subsequently was transported by ambulance to a hospital after complaining to Officer Pellegrini about a head injury. The victim told staff at the emergency department of the hospital that he thought he might have been drugged. Matthew Dolan, an emergency medical doctor, saw the victim in the early morning of January 29, 2018, and ordered certain tests because the victim had signs of blunt trauma to his face. The results of those tests indicated that the victim's nose was broken.

The defendant was arrested and charged in a third substitute information with having committed the following crimes: in count one, conspiracy to commit rob-

bery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-134 (a) (1); in count two, conspiracy to commit robbery in the second degree in violation of General Statutes §§ 53a-48 (a) and 53a-135 (a) (1) (A); in count three, robbery in the first degree in violation of § 53a-134 (a) (1); in count four, robbery in the second degree in violation of § 53a-135 (a) (1) (A); in count five, assault in the second degree in violation of General Statutes § 53a-60 (a) (1); and in count six, burglary in the second degree in violation of § 53a-102 (a). Specifically, in count six, the state alleged that the defendant committed burglary in the second degree by entering or remaining unlawfully in the victim's apartment sometime between 1 and 2:50 a.m. on January 29, 2018, while the victim was present, with the intent to commit a crime therein, namely, robbery in the first degree as alleged in count three, and/or robbery in the second degree as alleged in count four, and/or threatening in the second degree in violation of General Statutes § 53a-62 (a) (1), and/or larceny in the sixth degree in violation of General Statutes § 53a-125b (a). The defendant also was charged in a part B information with being a persistent felony offender in violation of General Statutes § 53a-40 (g) as a result of his two prior convictions in 2006 and 2000 of possession of narcotics in violation of General Statutes § 21a-279 (a).

Following a jury trial, the jury found the defendant guilty of burglary in the second degree as alleged in count six and not guilty of the charges in counts one through five. Thereafter, on June 7, 2019, a trial was held before the court with respect to the part B information, and the defendant was found guilty and adjudicated to be a persistent felony offender. The court thereafter sentenced the defendant on count six to seven years of incarceration, followed by three years of special parole with special conditions. This appeal followed. Additional facts and procedural history will be set forth as necessary.

I

The defendant's first claim is that the court violated his constitutional rights to confrontation and to present a defense when it prevented him from cross-examining the victim about matters that he claimed were highly relevant to the victim's bias against the defendant and motive to falsify his claims to the police. We disagree.

The following additional facts are relevant to this claim. On April 26, 2019, prior to the commencement of trial, the defendant filed a motion in limine, requesting "that the court allow him to impeach the [victim's] credibility with evidence of the [victim's] felony conviction and to confront him with certain conduct, while on probation, which [was] probative of his lack of veracity." Specifically, the victim had been convicted in 2017 of the felony of operating a motor vehicle while under the influence of intoxicating liquor or drugs, and, at the time of the incident underlying the criminal charges against the defendant, the victim was serving a period of probation in connection with that conviction. In his motion, the defendant stated that he was seeking to cross-examine the victim, a key witness for the state, "on evidence of prior crimes, as well as the status, standard conditions, and special conditions of the probationary period that he is currently serving, in addition to the facts and circumstances surrounding his conviction, the original sentence and the sentence following a violation of probation.

"In this case, where there is suspended prison time hanging over the [victim], the fact that a jury might reasonably contemplate that a person in such a situation might have a tendency to wish to curry favor with the prosecuting authorities is a legitimate [ground] of cross-examination. Secondly, where there will likely be testimony from the [victim] and other witnesses that [the victim's] conduct at the time of the alleged incident

[violated] the terms and conditions of his probation, [such evidence], at [a] minimum, goes to the state of mind of the [victim], and certainly towards the [victim's] motive to fabricate. As such, these are matters properly considered by a jury. . . . These facts are different from mere impeachment as a result of prior criminal convictions and go directly towards the jury's ability to weigh the credibility of the [victim]." (Citation omitted.)

In his motion, the defendant acknowledged that the victim's felony conviction did not involve a crime that necessarily related to the victim's credibility but argued that the court should balance the probative value of the evidence against its prejudicial effect. According to the defendant, the fact that the victim previously had been convicted of a crime that did not directly reflect on his credibility did not bar admission of evidence of that conviction, as the jury could simply afford less weight to the evidence if it chose to do so.

On May 10, 2019, the court held a hearing on the defendant's motion in limine. At the hearing, defense counsel stated that she wanted to ask the victim about the fact that the victim previously had violated his probation, although that violation did not occur during the pendency of this case.[4] Specifically, defense counsel argued that, because the victim previously had violated his probation and was not incarcerated as a result of that violation, he had an interest in making sure that he stayed "in the state's good graces . . . ." Defense counsel stated: "That certainly goes to any motive to fabricate, also veracity. We do have the fact that he is being

[4] The record shows that the victim was found to be in violation of his probation on October 20, 2017, and that he admitted the violation and was resentenced on January 8, 2018, which was approximately three weeks prior to the incident at issue in this case. Defense counsel also sought to inquire about the fact that the victim had been arrested, twice, while on probation. The court declined the request, stating that "an arrest is not a conviction. Anybody can be arrested." The defendant does not challenge in this appeal the court's ruling prohibiting questions about the two arrests.

accused throughout these allegations of larceny. He has recently—again, he has experienced the effect of being arrested while on probation and having the risk of going back to jail three weeks before, and he did not. So, certainly he is on notice that, if it happens again, which could have happened if—if he had been reported for this larceny, that he could have violated again shortly—in very short succession, and my guess is, the state would not have looked quite as kindly on him for the second violation." The court responded, stating, "[t]hat's all too speculative. That's way too speculative. There are many reasons why somebody can get violated [on] probation. It's way too speculative."

In an oral decision, the court denied the defendant's motion in limine, stating: "So, first of all, our courts have held that the sixth amendment right to compulsory process is limited by controverting public interest and the rules of evidence. The constitution does not require that a defendant be permitted to present every piece of evidence he wishes. The trial court retains the power to rule on admissibility of evidence pursuant to traditional evidentiary standards.

"In Connecticut, we have a Code of Evidence, which specifically addresses the issue of prior convictions. Section 6-7 . . . states that '[f]or the purpose of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment of more than one year. In determining whether to admit evidence of a conviction, the court shall consider the extent of the prejudice likely to arise, the significance of the particular crime in indicating untruthfulness, and the remoteness in time of the conviction.'

"Before the court are requests to allow the defendant to cross-examine the [victim] on his [operating a motor vehicle while under the influence] conviction and a

violation of that probation. The violation of that probation arose as a result of an action prior to the incident here in question. The [victim] remains on probation.

"Of course, every cross-examination based on a conviction has, in itself, a degree of prejudice. To this court, the question really is what's the probative value? Having considered the prejudice and the probative value of what's being requested, the court will order as follows. The defendant may inquire of the [victim] of a prior felony conviction, and the defendant may inquire as to whether or not he is currently on probation. Any inquiry as to whether or not he violated that probation, [or the] basis of the violation of that probation, the court finds that its probative value is outweighed by its [prejudice]. Therefore, the court is going to limit the inquiry as to those two areas."

On direct examination by the state, the victim acknowledged that he had a prior felony conviction in 2017 for operating a motor vehicle while under the influence of intoxicating liquor or drugs. He also testified that he was on probation for that offense. Before the commencement of cross-examination, the state made an oral motion in limine to preclude the defendant from asking the victim about whether the victim thought that his consumption of alcohol on the night in question could result in a violation of a condition of his probation. In response, defense counsel asked the court that she be able to question the victim about his consumption of alcohol on the night in question. The following colloquy transpired:

"[Defense Counsel]: . . . It may not—based on the state's representation, even though [the victim's consumption of alcohol] may not be a technical violation [of his probation], it could change the conditions of his current probation. If he had finished substance abuse treatment and his probation officer learned that he was now consuming excess amounts of alcohol, then the

probation officer could potentially change those conditions, require him to go back into treatment. That may be something that the [victim] would wish to avoid and, because of that, he may not want the probation officer to get information about what had happened that night, the fact that he was consuming potentially excess amounts of alcohol, that he was intoxicated, as he represented in the emergency room. And for those reasons, the defense believes that probing into that line of questioning is relevant to his motive to fabricate, his veracity, and we believe that we should be able to have that opportunity to question him.

"The Court: Well, isn't that speculative, whether or not the probation officer may or may not use this to violate his probation? He hasn't done it yet.

"[Defense Counsel]: Well, it is in the mind of the [victim], whether he has those concerns, we should be able to ask him about, because that may lead him to have a motive to fabricate. So, he may speculate, but that is something that we should be able to question him about. Did he have those concerns?

"[The Court]: No. But isn't that speculation on your part? I mean, you're assuming that the probation officer may violate him if he—if he drank alcohol.

"[Defense Counsel]: I'm not—I'm not assuming that the probation officer would violate him if he drank alcohol. What we would want to question the witness about is whether or not he knew that one of the conditions of his probation was substance abuse treatment and whether he knew that, potentially, the knowledge of him being intoxicated on that night or drinking excessive amounts of alcohol while he's on probation for a felony [conviction of operating a motor vehicle while under the influence] could potentially change those conditions of his probation.

"I'm not speculating as to whether it would, but we believe that being able to question him about his thoughts on that, whether he knew those [conditions] of his probation is relevant and necessary in order to delve into his motive to fabricate and his veracity.

"The Court: Okay.

"[Defense Counsel]: And bias, for that matter. Thank you.

"[The Prosecutor]: Your Honor, I would direct the court's attention to § 6-6 of the Connecticut Code of Evidence, subsection (b), on specific instances of conduct where it says [the] general rule, where it's codified that a witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for truthfulness. The fact that he consumed alcohol is not something that would be probative of his truthfulness. . . .

"[Defense Counsel]: Your Honor, just in response, the defense filed a motion specifically delving into this area regarding the [victim's] state of mind. The court has made a ruling regarding our questioning of him on probation, the fact that he was on probation at the time, the fact that he's on probation now, the fact that he has that felony conviction for [operating a motor vehicle while under the influence]. This goes specifically to his state of mind at the time and is particularly relevant to show motive, bias, or interest, and there is case law in Connecticut that any evidence tending to show motive, bias, or interest of an important witness is never collateral or irrelevant.

"We should be able to question him about that, about his state of mind at the time and whether or not he may have had an interest at the time, knowing that he was on probation and that this event did happen. We should be able to question him about that in order to determine

what his state of mind was at the time and if he had any motive, bias, or interest at that time. . . .

"The Court: Are you familiar with § 6-7 of the [Connecticut Code of Evidence]? . . .

"[Defense Counsel]: Yes.

"The Court: And it talks, as a general rule, of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment for more than one year. In determining whether to admit evidence of a conviction, the court shall consider the extent of the prejudice likely to arise, the significance of the particular crime indicating untruthfulness, and the remoteness in time of the conviction.

"There are several cases that talk about what types of crimes may be admitted for untruthfulness, lack of veracity. And the [Connecticut] Code [of Evidence] still leaves it to the discretion of the court as to whether or not to admit it or not, and the court has to impose a balancing act, probative value versus prejudicial [effect].

"Now, I allowed you yesterday, or whenever we heard the motion, to ask questions as to his conviction of a felony [for operating a motor vehicle while under the influence]. I'm not sure that [such] a felony [conviction] goes toward veracity. It's not a crime of larceny. It's not a crime of fraud or things of that sort. It's a felony. So, I allowed you to question him on that basis, and I went beyond that and allow[ed] you to ask whether or not he's on probation for that.

"The [Connecticut] Code [of Evidence] limits the subject matter of proof to the introduction that the witness has been convicted of a crime. The court shall limit the crime by its name and when and where the conviction was rendered. Except that the court may exclude evidence of the name of the crime and, if the witness denies the conviction, the court may permit evidence of the pun-

ishment imposed. That's if the victim . . . denies the conviction.

"I think I—I think I've granted you extra latitude by allowing you to inquire as to whether or not he's on probation. But whether or not he's going to be violated for his probation, this incident occurred a year ago, a year and a half ago. Whether or not he's going to be violated or not I think goes beyond that scope.

"[Defense Counsel]: Your Honor, if I may just respond? The court did make a ruling regarding the defense being able to question the [victim] about being on probation at the time and also being on probation today.

"The Court: Right.

"[Defense Counsel]: That is a separate matter from whether or not he has a felony conviction that goes directly towards veracity. The court also ruled that we could discuss the fact that he has a felony conviction. In fact, the state already elicited that information from the [victim].

"The Court: Right.

"[Defense Counsel]: And the state also elicited the information regarding the [victim] being on probation. The questions that the defense is seeking or may seek to ask the [victim] [do] not go to whether or not he was on probation but whether his state of mind at the time could have been affected by the knowledge that being on probation and being intoxicated at the time could give him some motive, interest, or bias to fabricate. . . . Now, the defense should be able to cross-examine this [victim] regarding whether he had any motive, interest, bias, or prejudice based on the knowledge that, because he was being monitored and because this incident happened and if his probation officer found out about that, it could change the conditions of his probation. It could have a number of consequences and I'm not—

"The Court: But that's all speculative.

* * *

"The Court: Like I said to you when I issued the decision, the sixth amendment is not unlimited. It does still have to—there are rules of evidence that allow some and exclude other testimony. Anything else?

"[Defense Counsel]: Your Honor, just to conclude, the defense believes that [the defendant's] sixth amendment right to fully cross-examine this [victim] should allow him to fully delve into areas of motive, interest, bias, or prejudice as a matter of right in order to determine whether this [victim] did have any ulterior motives to fabricate, what his state of mind was at the time, and being able to cross-examine this witness against [the defendant] is a fundamental right in [the defendant's] trial. Any—we believe that any limit on that ability to cross-examine would affect his due process rights.

"The Court: Well, all right. Well, okay. Thank you for that. The court's decision is that you can inquire as to the crime, which is the [operating a motor vehicle while under the influence] felony conviction. By the way, I think the court is being even generous by allowing you to name the crime. And the fact that he's on probation. I think that the court's already gone beyond the—beyond that which is permitted by the [Connecticut] Code [of Evidence]. I'm going to find that asking questions with respect to any potential violation of his probation is so speculative that the probative value is outweighed by any—by the prejudicial value of it. . . .

"[Defense Counsel]: Just to clarify. Is the defense allowed to discuss the probation conditions of his probation?

"The Court: No. You can ask that he had a felony conviction. You can ask that it's for [operating a motor vehicle while under the influence]. You can ask that he's on probation for it."

When defense counsel also asked the court if it was permissible to ask the victim whether one of the standard conditions of his probation was not to be arrested, the state objected on the ground of relevance, and the court asked, "[h]ow is that relevant?" Defense counsel explained that it was relevant "to delve into the [victim's] state of mind and motive to fabricate," given the allegation against the victim that he stole Moniz' watch. See footnote 3 of this opinion. According to the defense, if the victim knew that one of the standard conditions of his probation was not to have any new arrests, and he was being accused of a larceny involving the theft of a watch, that might have given him a motive to fabricate his allegations against the defendant. The court did not agree and limited cross-examination to the victim's felony conviction and whether he was on probation at the time of the incident and at trial. The court explained: "Now, you can test his veracity pursuant to the [Connecticut] Code [of Evidence]. You can—you can certainly cross-examine him. But the limit of his felony conviction is limited to the fact that he has one for [operating a motor vehicle while under the influence] and that he's on probation for it."

On cross-examination of the victim, the defense brought out the fact that, at the time of the incident, the victim was on probation for a 2017 felony conviction for operating a motor vehicle while under the influence of intoxicating liquor or drugs and that he was still on probation at the time of trial. Defense counsel also addressed a number of inconsistencies in the victim's testimony. Some of those inconsistencies included the following: (1) although the victim testified on direct examination that he drank a Long Island iced tea while at the defendant's apartment after the bar had closed, he testified on cross-examination that he had the drink at the bar, not the defendant's apartment, and that he actually did not have any drinks at the defendant's apartment; (2) the fact that the victim told a victim's advocate that he had had only one drink at the bar, but, at

the emergency department of the hospital, told staff that he had one or two drinks with acquaintances and testified on direct examination that he had three drinks at the bar; (3) the victim testified on direct examination and told a 911 dispatcher that the defendant stole $300 from him, but the victim told a victim's advocate and testified on cross-examination that the defendant took $400 from him; and (4) the victim told staff at the emergency department that he might have been drugged but never mentioned that to the 911 dispatcher or to the police.

On appeal, the defendant claims that the trial court erred in determining that his proposed questions of the victim were speculative and more prejudicial than probative. According to the defendant, the proposed questions of the victim "went directly to establishing that [the victim] may have had his own reasons for fabricating his allegations," and that, "[w]ithout any evidence of [the victim's] motive to lie, the jury had no reason to disbelieve his claim that [the] defendant forcefully entered his apartment so that he and Moniz could take [the victim's] money." The defendant explains in his brief to this court that "[t]he mere fact that the jury learned that [the victim] had a felony conviction and was on probation did not matter because [the] defendant was unable to show how those things impacted [the victim's] claims." The defendant, thus, claims that the court's ruling, which deprived him of the opportunity to develop the victim's motive and bias, was harmful and warrants a new trial because it violated his constitutional rights to confrontation, to present a defense, and to a fair trial.

Before addressing the merits of the defendant's claim, we set forth our standard of review and the law that guides our analysis. "[T]he sixth amendment to the [United States] constitution guarantees the right of an accused in a criminal prosecution to confront the witnesses against him. . . . The primary interest secured by

confrontation is the right to cross-examination . . . . Compliance with the constitutionally guaranteed right to cross-examination requires that the defendant be allowed to present the jury with facts from which it could appropriately draw inferences relating to the witness' reliability. . . . However, [t]he [c]onfrontation [c]lause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, or to whatever extent, the defense might wish. . . . Thus, [t]he confrontation clause does not . . . suspend the rules of evidence to give the defendant the right to engage in unrestricted cross-examination. . . .

"Although [t]he general rule is that restrictions on the scope of cross-examination are within the sound discretion of the trial [court] . . . this discretion comes into play only after the defendant has been permitted cross-examination sufficient to satisfy the sixth amendment. . . . If that constitutional standard has been satisfied, then [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . [That is to say] [t]he court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law." (Citation omitted; internal quotation marks omitted.) *State* v. *Lopez*, 177 Conn. App. 651, 661–62, 173 A.3d 485, cert. denied, 327 Conn. 989, 175 A.3d 563 (2017). Thus, this court "must engage in a two step analysis. We must determine first whether the cross-examination permitted to defense counsel comported with sixth amendment standards . . . and second, whether the trial court abused its discretion in restricting the scope of that cross-examination. . . . Once it is established that the trial court's ruling on the scope of cross-examination is not constitutionally defective, this court will apply [e]very reasonable presumption . . . in favor of the correctness of

the court's ruling in determining whether there has been an abuse of discretion. . . . To establish an abuse of discretion, [the defendant] must show the restrictions imposed upon [the] cross-examination were clearly prejudicial." (Citations omitted; internal quotation marks omitted.) *State* v. *Errol J.*, 199 Conn. App. 800, 807–808, 237 A.3d 747, cert. denied, 335 Conn. 962, 239 A.3d 1213 (2020).

This court has stated that, "[a]lthough only relevant evidence may be elicited through cross-examination . . . [e]vidence tending to show motive, bias or interest of an important witness is never collateral or irrelevant. [Indeed, it] may be . . . the very key to an intelligent appraisal of the testimony of the [witness]. . . . Accordingly, cross-examination to elicit facts tending to show that a witness' testimony was motivated by bias may not be unduly restricted." (Internal quotation marks omitted.) *State* v. *Kehayias*, 162 Conn. App. 310, 323, 131 A.3d 1200 (2016). Therefore, "[a]lthough it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment." (Internal quotation marks omitted.) *State* v. *Jessie L. C.*, 148 Conn. App. 216, 224, 84 A.3d 936, cert. denied, 311 Conn. 937, 88 A.3d 551 (2014). "In determining whether a defendant's right of cross-examination has been unduly restricted, we consider the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) *State* v. *Rogelstad*, 73 Conn. App. 17, 22, 806 A.2d 1089 (2002). "In so inquiring, reviewing courts have declined to hold that a defendant's confrontation right was violated by limits on

cross-examination when the defendant was allowed to ask other questions about the same motive, bias, or interest." *State* v. *Kehayias*, supra, 327.

In *Kehayias*, this court found that the defendant's constitutional right to confrontation was not violated when the trial court "merely limited, and did not preclude, inquiry into a specific motive that already had been robustly developed on cross-examination . . . ." Id., 328. In contrast, in *State* v. *Milum*, 197 Conn. 602, 607–608, 500 A.2d 555 (1985), "our Supreme Court found error where the trial court refused to allow the defendant to ask the victim *at all* about either the victim's pending civil suit arising from the same events against the defendant, or about the victim's demand for $25,000 in exchange for her recommendation of a suspended sentence for the defendant." (Emphasis in original.) *State* v. *Kehayias*, supra, 162 Conn. App. 328.

In the present case, the trial court based its ruling on § 6-7 of the Connecticut Code of Evidence, which concerns evidence of a conviction of a crime and provides in relevant part: "For the purpose of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment for more than one year. . . ." See also *State* v. *Clark*, 137 Conn. App. 203, 207, 48 A.3d 135 (2012) (it is well established that "[t]he credibility of a witness may be attacked by introducing the witness' conviction of a crime if the maximum penalty for that conviction is imprisonment exceeding one year" (internal quotation marks omitted)), aff'd, 314 Conn. 511, 103 A.3d 507 (2014). The rule lists a number of factors that the court should consider in determining whether to admit evidence of a conviction, including "the extent of the prejudice likely to arise"; Conn. Code Evid. § 6-7 (a) (1); and "the significance of the particular crime in indicating untruthfulness . . . ." Conn. Code Evid. § 6-7 (a) (2). In determining the admissibility of

such evidence, the test is "whether the probative value of the evidence outweighs its prejudicial effect." *State* v. *Martin*, 201 Conn. 74, 88, 513 A.2d 116 (1986). "The trial court, because of its intimate familiarity with the case, is in the best position to weigh the relative merits and dangers of any proffered evidence. . . . This principle applies with equal force to the admissibility of prior convictions." (Internal quotation marks omitted.) *State* v. *Ciccio*, 77 Conn. App. 368, 386, 823 A.2d 1233, cert. denied, 265 Conn. 905, 831 A.2d 251 (2003); see also *State* v. *Harrell*, 199 Conn. 255, 262, 506 A.2d 1041 (1986) ("[the] balancing of intangibles—probative values against probative dangers—is so much a matter where wise judges in particular situations may differ that a [leeway] of discretion is generally recognized" (internal quotation marks omitted)). We also note that "conviction of a crime not directly reflecting on credibility clearly lacks the direct probative value of a criminal conviction indicating dishonesty or a tendency to make false statement. Thus, the balance used to measure admissibility of prior convictions is weighted less heavily toward admitting the prior conviction when it involves a crime related only indirectly to credibility." (Internal quotation marks omitted.) *State* v. *Swilling*, 180 Conn. App. 624, 658, 184 A.3d 773, cert. denied, 328 Conn. 937, 184 A.3d 268 (2018).

In the present case, we must examine whether the court's limitation on the defendant's cross-examination of the victim deprived the defendant of his constitutional right to confrontation and, if not, whether the court's ruling was an abuse of its discretion. Despite the fact that the victim's prior felony conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs did not involve a crime that reflected on the victim's credibility, the court permitted questioning regarding the victim's conviction of that crime, the name of the crime and the fact that the victim

was on probation for his conviction of that crime, both at the time of the incident underlying the charges and at the time of trial. Our Supreme Court has stated that the right to cross-examination under the sixth amendment is satisfied "when . . . the defendant is allowed to impeach the witness by [inquiring into the existence of] a prior, unspecified felony conviction." (Emphasis omitted.) *State* v. *Dobson*, 221 Conn. 128, 137, 602 A.2d 977 (1992). Here, the court went beyond that and permitted the name of the crime underlying the felony conviction, as well as questioning regarding the defendant's probationary status, even though the felony conviction did not involve a crime relating directly to the credibility of the victim. See *State* v. *Swilling*, supra, 180 Conn. App. 658–59 ("[t]o avoid unwarranted prejudice to the witness, when a party seeks to introduce evidence of a felony that does not directly bear on veracity, a trial court ordinarily should permit reference only to an unspecified crime carrying a penalty of greater than one year that occurred at a certain time and place" (internal quotation marks omitted)).

For this court to determine that the defendant's sixth amendment right to confrontation has been met, we must be satisfied that "defense counsel [was] permitted to expose to the jury the facts from which [the] jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." (Internal quotation marks omitted.) *State* v. *Fernando R.*, 103 Conn. App. 808, 819, 930 A.2d 78, cert. denied, 284 Conn. 936, 937 A.2d 695 (2007). In doing so, we must consider "the nature of the excluded inquiry, whether the field of inquiry was adequately covered by other questions that were allowed, and the overall quality of the cross-examination viewed in relation to the issues actually litigated at trial." (Internal quotation marks omitted.) Id.

First, it is important to note that the trial court did not completely exclude all inquiry regarding the victim's prior felony conviction; in fact, the court permitted

questions regarding the felony conviction, the name of the crime underlying the conviction, and the fact that the defendant was on probation for that conviction, and its ruling complied with the requirements of § 6-7 of the Connecticut Code of Evidence. On appeal, the defendant challenges the court's ruling precluding inquiry regarding (1) the conditions of the victim's probation, (2) the victim's consumption of alcohol on the night in question and whether the victim thought that might result in a violation or change in the conditions of his probation, and (3) whether the victim feared that the allegations of larceny against him for the theft of a watch would result in his arrest and a violation of his probation. The defendant claims that he was deprived of the opportunity to develop the victim's motive and bias because he could not delve further into how the victim's probationary status may have impacted and motivated the victim to fabricate the allegations against the defendant. We do not agree.

We agree with the trial court's determination that the proffered line of questioning was based on speculation and that its probative value was outweighed by its prejudicial effect. With respect to the conditions of the victim's probation and his consumption of alcohol on the night in question, defense counsel acknowledged that the victim's consumption of alcohol would not have been a technical violation of his probation, which required substance abuse treatment, and claimed that the victim might have been worried that the conditions of his probation could potentially change and require him to undergo more substance abuse treatment. The fact that the victim *might* have been worried about a *potential* change in a condition of his probation is clearly within the realm of speculation, and we conclude that the defendant has failed to provide a sufficient foundation to support his claim that the proffered evidence related to the victim's motive to fabricate the allegations against

him. This is particularly so given that the victim called the police, prompting his meeting with them. It strains credulity to believe that if the victim was worried about the police learning that he was drinking alcohol he would initiate contact with them so that they could observe him after he had just done so.

Moreover, the defendant's claim that he should have been allowed to question the victim about his motive to fabricate relating to the theft of Moniz' watch is equally unavailing. According to the defendant, the victim's alleged fear that a larceny charge might be brought gainst him for the theft of Moniz' watch, resulting in a violation of his probation, may have motivated the victim to fabricate the allegations against the defendant. Again, we agree with the court's determination that the proffered questioning was based on speculation. According to the victim's testimony, he "had no idea" what the defendant and Moniz were talking about when they had asked the victim about a watch after hitting him. It was a relatively short time period between when the victim was first confronted about the theft of the watch, and when he called 911 both on the walk to his apartment and immediately after the defendant and Moniz left his apartment after stealing his rent money. Although the defendant claimed at trial that the victim might have feared that an arrest for larceny would result in a violation of the victim's probation, the defendant never explained to the trial court or to this court how the victim's initiation of contact with the police on the night of the incident was consistent with the victim's desire to avoid police involvement. To the contrary, involving the police in his dispute with the defendant and Moniz only increased the possibility that the two men would accuse the victim of larceny when confronted by the accusation that they assaulted the victim. Under these circumstances, the court was justified in excluding the proffered line of questioning as speculative. Consequently, the court's

rulings restricting the defendant's cross-examination of the victim did not violate his sixth amendment right to confrontation. That being the case, "[t]he trial court has broad discretion . . . in determining the admissibility of evidence claimed to be remote, repetitious, or otherwise lacking in probative value." *State* v. *Bova*, 240 Conn. 210, 229, 690 A.2d 1370 (1997). We cannot say that the court abused its wide discretion in determining that the probative value of the evidence did not outweigh its prejudicial effect.

The defendant's attempt to characterize the proffered line of questioning as relating to the victim's state of mind is tenuous and does not change its speculative nature. "The trial court has the discretion to exclude speculative evidence, expert or otherwise." (Internal quotation marks omitted.) *Bridgeport Harbour Place I, LLC* v. *Ganim*, 131 Conn. App. 99, 123, 30 A.3d 703, cert. granted, 303 Conn. 904, 31 A.3d 1179 (2011) (appeal withdrawn January 27, 2012), and cert. granted, 303 Conn. 905, 31 A.3d 1180 (2011) (appeal withdrawn January 26, 2012). Although the trial court did not explicitly find that the proffered evidence was irrelevant, it did find the evidence to be speculative in nature, and this court has determined previously that speculative evidence is irrelevant. See *State* v. *Sulser*, 109 Conn. App. 852, 874, 953 A.2d 919, cert. denied, 289 Conn. 939, 959 A.2d 1006 (2008); see also *State* v. *Davis*, 298 Conn. 1, 23–24, 1 A.3d 76 (2010) (trial court did not abuse its discretion in excluding evidence when defendant's foundation for proffered evidence was "wholly speculative"). Moreover, "[a] defendant . . . may introduce only relevant evidence, and, if the proffered evidence is not relevant, its exclusion is proper and the defendant's right [to confrontation] is not violated." (Internal quotation marks omitted.) *State* v. *Lee-Riveras*, 130 Conn. App. 607, 622, 23 A.3d 1269, cert. denied, 302 Conn. 937, 28 A.3d 992 (2011).

Finally, we note that the defendant undertook an extensive and robust cross-examination of the victim. As the defendant pointed out in his appellate brief, there were many inconsistencies in the victim's testimony that he addressed on cross-examination, and the victim's "testimony was so riddled with inconsistencies that, on redirect examination, the prosecutor asked him if he was working nights during the trial, and later suggested to the jurors [that] he was sleep-deprived . . . [as a] reason for the inconsistencies." In fact, the jury found the defendant not guilty of five of the six charges against him, which was indicative that the jury did not credit all of the victim's testimony. The issues related to the victim's probationary status on which the court excluded questioning were marginally related, at best, to the issues in the case. "Every evidentiary ruling which denies a defendant a line of inquiry to which he thinks he is entitled is not constitutional error." (Internal quotation marks omitted.) *State* v. *Moye*, 214 Conn. 89, 95, 570 A.2d 209 (1990). In the present case, the defendant was afforded the opportunity on cross-examination "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the [victim's] reliability . . . ." (Internal quotation marks omitted.) Id.

We conclude that the court's ruling limiting the defendant's cross-examination of the victim did not impermissibly infringe on his constitutional right to confrontation.[5] Having found no constitutional violation, we

[5] In his appellate brief, the defendant also claims that the court's exclusion of the proffered line of questioning violated his constitutional right to present a defense. For the same reason we have rejected the defendant's claimed violation of his constitutional right to confrontation, we reject this claim as well. See *State* v. *Saucier*, 90 Conn. App. 132, 142–43, 876 A.2d 572 (2005) ("The defendant's constitutional claim that he was prohibited from presenting a defense by the court's exclusion of the proffered evidence first required him to show that the exclusion was improper. . . . Because we conclude that the court did not abuse its discretion in excluding the proffered evidence [as speculative and irrelevant], it follows that the defendant's constitutional right to present a defense was not violated." (Citation omitted.)), aff'd, 283 Conn. 207, 926 A.2d 633 (2007).

also conclude that the court's evidentiary ruling was not a clear abuse of the court's wide discretion. See *State* v. *Lopez*, supra, 177 Conn. App. 662.

II

The defendant next claims that the trial court's jury instruction on burglary in the second degree misled the jury because the court never instructed the jury on the definitions of two terms, "physical threat" and "imminent," set forth in the elements of threatening in the second degree, which was one of the alleged underlying crimes for the burglary charge. The state counters that the defendant waived his claim of instructional error. We agree with the state.

For this court to address the issue of waiver, it is necessary to provide a detailed account of what transpired between the court and the parties, and, thus, we set forth the following additional facts, as gleaned from the record. Count six of the third substitute information charged the defendant with burglary in the second degree, alleging that, on January 29, 2018, between 1 and 2:50 a.m., he entered or remained unlawfully in a dwelling, while the victim was present in such dwelling, with the intent to commit a crime therein, namely, robbery in the first degree, robbery in the second degree, threatening in the second degree, and/or larceny in the sixth degree.

The defendant's trial commenced on May 15, 2019. After the jury was excused and before the court adjourned for that day, the court stated: "Counsel, before we adjourn for today, I had to—I should let you know that I have a draft of the jury instructions ready. It is a draft. It is a rough draft. We will have a conference at the end of all the evidence, and I certainly will welcome any—any comments, suggestions, requests, or otherwise. If you want to have a copy of the draft instructions now, I'm happy to give it to you." The next day, May 16, 2019, the court stated: "[B]efore you get

started, I'd like to just put on the record that yesterday, at the close of evidence, the court gave both parties a draft of the jury instructions. It's a draft. Obviously, we're going to have a charging conference at the end of all the evidence. I just want everybody to have an ample opportunity to review it, to make comments or suggestions or additions or subtractions, and we'll take care of that at the right time. But I just want to put on the record that everybody has a copy of the draft instructions." Evidence and testimony continued on May 16 and Friday, May 17, 2019. At the close of the day on May 17, the prosecutor stated that he had a request to charge that he could file that day so that defense counsel and the court could review it over the weekend. In response, the court requested that both the state and the defendant submit proposed charges and stated that, if time allowed, they would have a charging conference on Monday. When defense counsel requested that the court permit her to submit a proposed charge on Monday, the court agreed to the request.

On Monday, May 20, 2019, defense counsel explained to the court that the one witness she had planned to call that day would not be testifying and that she needed time to discuss with the defendant whether he would testify. She also asked for additional time to look over the state's supplemental request to charge, which she had just received that morning, to which the court replied: "Well, you've had the court's version, right, for some time, right?" Defense counsel stated, "yes," in response to the question, and the court granted her request for additional time. At 11:30 a.m., when court resumed, defense counsel informed the court that the defendant would not be testifying. After the court canvassed the defendant, it addressed the issue of whether it would charge the jury that afternoon or wait until the next day. After a discussion with counsel, it was decided that the jury would be instructed the following

day. Subsequently, the defense made an oral motion for a judgment of acquittal, which the court denied. Thereafter, the court stated: "So, now we have the opportunity to have a jury charge conference. I've—the court has provided copies of the court's instruction on Wednesday, May 15. It's now Monday, May 20. The court received on Friday the state's request for charge. The court also received this morning a supplemental request to charge, and this morning the court received the defendant's request to charge."

The court then proceeded to address the state's request to charge, each time asking the defense for comment with respect to each issue addressed. As to each issue, after hearing comments from both sides, the court stated whether it adopted the request and, if so, the language of the instruction with the modification. The court followed the same procedure concerning the defendant's request to charge. After the court addressed all of the issues raised in the defendant's request to charge, it asked: "Anything else we should address in the instructions?" Defense counsel replied: "Nothing further, Your Honor." The court next addressed the state's supplemental request to charge, after which it, again, asked if there was anything else that needed to be addressed at that time. Defense counsel replied: "Nothing with regard to the jury charge, Your Honor." The written requests to charge filed by the state[6] and the defendant[7] did not raise any issues concerning either

[6] The state's written request to charge included jury instructions regarding the police investigation, assault in the second degree as it relates to the element of serious physical injury, consciousness of guilt and exhibits that contained partial redactions. The state's supplemental written request to charge included a charge on accessory liability.

[7] The defendant's written request to charge included jury instructions concerning reasonable doubt, the credibility of witnesses, impeachment evidence, the prior inconsistent statements of the victim and Moniz, and a specific unanimity charge. In his request to charge, the defendant also objected to the state's request to charge on assault in the second degree as it relates to the element of serious physical injury, as well as the state's requests to charge as to the police investigation and consciousness of guilt.

the court's proposed charge on burglary in the second degree or its charge on threatening in the second degree as a crime underlying the burglary charge. Nor did either party or the court address any issue relating to the court's proposed charge on threatening in the second degree as alleged in count six during the charging conference, despite the court's repeated requests of counsel as to whether anything further needed to be addressed.

At the charging conference, the state did raise a claim concerning the jury charge as to count six as it related to the underlying offense of larceny in the sixth degree. Specifically, the prosecutor asked whether the court was "going to instruct the jury on the elements . . . of larceny" in the sixth degree. The issue concerned whether the court would charge the jury regarding the element of the monetary amount needed for larceny in the sixth degree. The court then stated: "Counsel, hold on. The elements of count six are as follows. A person is guilty of burglary in the second degree when such person unlawfully enters and/or remains in a dwelling, while a person other than a participant in the crime is actually present in such dwelling, with intent to commit a crime therein. . . .

"For you to find the defendant guilty of this charge, the state must prove the following elements beyond a reasonable doubt. One, the first element is that the defendant knowingly and unlawfully entered and/or remained in a dwelling. A person acts knowingly with respect to conduct or circumstances when he is aware that his conduct is of such nature or that such circumstances exist. Dwelling means a building that is usually occupied by a person lodging therein at night. Therefore, a structure that cannot possibly be occupied as a lodging cannot be a dwelling.

"You must also determine whether the defendant unlawfully entered and/or remained in the dwelling. A

person unlawfully enters and/or remains in a dwelling when he is not licensed or privileged to do so. To be licensed or privileged, the defendant must either have consent from the person in possession of the dwelling or have some other right to be in the dwelling. To enter, etcetera, etcetera.

"Element two, to commit a crime therein. The second element is that the defendant intended to commit a crime in that dwelling. A person acts intentionally with respect to a result when his conscious objective is to cause such result.

"Even if the defendant never actually committed a crime in the dwelling, if the evidence establishes beyond a reasonable doubt that [he] was [there] with such [intent], that is sufficient to prove that the defendant unlawfully entered and/or remained in the dwelling with the intent to commit a crime therein. . . .

"In this case, the state claims that the defendant intended to commit the crimes of robbery in the first degree and/or robbery in the second degree and/or threatening in the second degree and/or a larceny in the sixth degree. I have previously defined the crimes of robbery in the first degree, robbery in the second degree, and larceny. I refer you to those definitions above.

"Threatening in the second degree is defined as, etcetera, etcetera, etcetera.

"If you unanimously find that the state has proved beyond a reasonable doubt each of the elements of the crime of burglary in the second degree, then you shall find the defendant guilty."

At no point during the discussion at the charging conference concerning count six and whether the charge needed to include the monetary element to support an allegation of larceny as an underlying crime, or when

the court specifically referenced the threatening charge, did the defendant raise any issue concerning the failure of the court's charge to address the elements of the crime of threatening in the second degree. At the end of the charging conference on May 20, 2019, the court again asked if there was anything else that needed to be addressed with respect to the jury instructions, to which defense counsel replied: "Nothing from the defense." Following a short break, the court provided counsel with a copy of the jury instructions, which included any changes from the charging conference, and stated that they could talk about anything further regarding the proposed charge at 9:30 a.m. the next morning.

After court convened on May 21, 2019, the court first addressed some minor spelling, punctuation, and grammatical changes it had made to the charge, and then it discussed another issue raised by the parties the previous day. When the court asked if there was anything else that should be addressed, defense counsel stated that she had one more concern regarding the jury instructions, which related to the definition of serious physical injury, and the court addressed the issue. When the court charged the jury regarding burglary in the second degree, it stated, in part: "[T]he state claims the defendant intended to commit the crimes of robbery in the first degree, and/or robbery in the second degree, and/or threatening in the second degree, and/or a larceny in the sixth degree. I have previously defined the crimes of robbery in the first degree, robbery in the second degree, and larceny. I refer you to those definitions above.

"Threatening in the second degree is defined in [§] 53a-62 (a) (1) of the Connecticut General Statutes as follows. A person is guilty of threatening in the second degree when that person, by physical threat, intentionally places or attempts to place another person in fear of imminent serious physical injury."

After the court completed its charge to the jury and the jury had exited the courtroom, the following colloquy occurred:

"The Court: Before we take the luncheon recess, does anybody have any comments on the instructions as read to the jury?

"[The Prosecutor]: None from the state, Your Honor.

"[Defense Counsel]: None from the defense."

On appeal, the defendant claims that the court's jury instructions on burglary in the second degree were inadequate and constitutionally defective in that the court, other than reading the statutory language for the crime of threatening in the second degree, failed to instruct the jury on the elements of threatening, as one of the crimes underlying the burglary charge. The record, however, belies this claim. Pursuant to § 53a-62, the statute governing threatening in the second degree, the state had to prove beyond a reasonable doubt that the defendant made a physical threat to the victim and that he specifically intended by his conduct to put the victim in fear of imminent serious physical injury. See, e.g., *State* v. *Ervin B.*, 202 Conn. App. 1, 7–8, 243 A.3d 799 (2020). In the present case, the court instructed the jury that "[a] person is guilty of threatening in the second degree when that person, by physical threat, intentionally places or attempts to place another person in fear of imminent serious physical injury." Just prior to that instruction, the court also had instructed the jury that "[a] person acts intentionally with respect to a result when his conscious objective is to cause such result." The court, thus, informed the jury of the essential elements of threatening in the second degree. The defendant's real claim, therefore, is that the court erred in failing to define in greater detail the elements of the crime of threatening in the second degree. Specifically,

he takes issue with the court's failure to define the terms "physical threat" and "imminent," as used in § 53a-62.

At no time during the proceedings relating to the jury charge did the defendant raise this claim to the trial court. The defendant concedes that he neither filed a request to charge on burglary in the second degree nor objected to the court's instructions, and requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[8] Alternatively, he seeks review of this claim pursuant to the plain error doctrine. See Practice Book § 60-5. The state, relying on *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), counters that the defendant's claim of instructional error is not reviewable under *Golding* because the defendant implicitly waived it. Moreover, with respect to the defendant's claim of plain error, the state argues that the defendant failed to show that any error in the court's instructions as to threatening in the second degree was so grievous that a failure to reverse the judgment would result in manifest injustice. We agree with the state.

A

We first address the issue of implied waiver under *Kitchens* and set forth our standard of review and the applicable law governing an implied waiver of a claim of instructional error. "Whether a defendant has

[8] Pursuant to *Golding*, as modified by *In re Yasiel R.*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail. . . . *State* v. *Golding*, supra, 213 Conn. 239–40." (Emphasis in original; internal quotation marks omitted.) *State* v. *Coleman*, 199 Conn. App. 172, 186 n.8, 235 A.3d 655, cert. denied, 335 Conn. 966, 240 A.3d 281 (2020).

waived the right to challenge the court's jury instructions involves a question of law, over which our review is plenary." *State* v. *Ramon A. G.*, 190 Conn. App. 483, 500, 211 A.3d 82 (2019), aff'd, 336 Conn. 386, 246 A.3d 481 (2020); see also *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 312–13, 112 A.3d 1 (2015) (even though inquiry regarding implied waiver of jury instruction is fact intensive, appellate court's determination of whether to draw inference of waiver must be based on close examination of record and particular facts and circumstances of case, and that decision involves question of law over which plenary review applies). "The doctrine of implied waiver is based on the idea that counsel had sufficient notice of . . . the jury instructions and was aware of their content . . . ." (Internal quotation marks omitted.) *State* v. *Davis*, 311 Conn. 468, 477–78, 88 A.3d 445 (2014).

In *State* v. *Kitchens*, supra, 299 Conn. 482–83, our Supreme Court provided a framework for review of whether a claim of instructional error has been waived, and our analysis begins with that seminal decision. In *Kitchens*, the defendant claimed that the trial court improperly instructed the jury on the intent element needed for a finding of guilty of charges of kidnapping in the second degree and unlawful restraint in the first degree. Id., 462. On appeal, the defendant conceded that his claim was unpreserved and sought review pursuant to *Golding*. Id., 462–63. In addressing this claim, our Supreme Court stated that "[i]t is well established in Connecticut that unpreserved claims of improper jury instructions are reviewable under *Golding* unless they have been induced or implicitly waived." Id., 468. Specifically, the court explained: "[I]n the usual *Golding* situation, the defendant raises a claim on appeal [that], while not preserved at trial, at least was not waived at trial. . . . [A] constitutional claim that has been waived does not satisfy the third prong of the *Golding* test

because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial . . . .'' (Internal quotation marks omitted.) Id., 467.

In *Kitchens*, our Supreme Court reexamined and clarified the law in Connecticut concerning implied waiver; id., 474; and concluded ''that, when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. Such a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case.'' Id., 482–83. In *Kitchens*, the court had reminded defense counsel two times of his right to file a request to charge, and each time, defense counsel declined to file such a request; two additional charge conferences were held by the court to discuss the instructions, at which defense counsel never raised an issue with the intent instructions concerning kidnapping and unlawful restraint, and stated that there was nothing further that he wanted to discuss; and defense counsel did not take an exception to the charge as given. Id., 498–99. Thus, our Supreme Court concluded that, under those circumstances, ''defense counsel's repeated statements indicating his affirmative acceptance of the proposed jury instructions after being given a meaningful opportunity to review them constituted an implicit waiver of the defendant's claim of instructional error.'' Id., 498.

In *State* v. *Davis*, supra, 311 Conn. 468, our Supreme Court ''noted that in every post-*Kitchens* case in which

defense counsel was given the opportunity to review the proposed jury instructions overnight, [it has] concluded that defense counsel had received a meaningful opportunity to review the proposed instructions under the *Kitchens* test . . . .'' (Citation omitted; internal quotation marks omitted.) Id., 480–81; see also *State* v. *Webster*, 308 Conn. 43, 63, 60 A.3d 259 (2013) (defense counsel had meaningful opportunity to review proposed instructions when counsel had opportunity to review instructions overnight).

For example, in *State* v. *Bellamy*, 323 Conn. 400, 410, 147 A.3d 655 (2016), our Supreme Court concluded that the defendant implicitly waived his claim of instructional error pursuant to *Kitchens*, stating: ''In the present case, all of the [*Kitchens*] criteria were satisfied. The trial court gave both defense counsel and the state a copy of its proposed jury instructions four days before the charging conference. Two of the four days fell on a weekend, thus providing counsel with even more time to review the instructions. The court also solicited comments from counsel regarding modifications to the instructions during the in-chambers charging conference, during the proceedings in open court directly after the charging conference and on the following day immediately before instructing the jury. In addition, when the court discussed portions of the identification instruction on the record, defense counsel expressed no dissatisfaction with the instruction, although he commented on several other instructions. Counsel thus indicated that he had read and understood the instructions in their entirety and took no issue with any part, including the instruction on identification. Finally, defense counsel explicitly conceded during the sentencing hearing that he had agreed with the substance of the jury instructions before they were given and that his only objection was to the speed with which they had been delivered by the court.''

The facts of the present case are squarely on point with *Bellamy* and *Kitchens*. Here, the court provided the state and defense counsel with a copy of its proposed jury instructions on the first day of trial, May 15, 2019, five days before the charging conference, two of which were weekend days. The court stated on the record that it wanted to give everyone "ample opportunity to review it, to make comments or suggestions or additions or subtractions . . . ." The court held an on-the-record charging conference on May 20, 2019, during which it addressed the instructions requested by the state and the defendant in their written requests to charge, giving each party the opportunity to address each requested instruction and any proposed modifications. During that conference, the court asked defense counsel multiple times if there were any other issues that needed to be addressed, and each time defense counsel replied in the negative. The defendant's request to charge did not raise any issue concerning either the court's proposed charge on burglary in the second degree, as alleged in count six of the third substitute information, or its charge on threatening in the second degree as a crime underlying the burglary charge. Even when the state raised an issue at the charging conference related to count six and the underlying larceny charge, which was discussed at length by the parties and the court, the defendant never alerted the court to his claim that the jury instructions related to count six and the underlying threatening charge improperly failed to include the elements of threatening in the second degree. The court again asked defense counsel at the end of the charging conference whether anything else needed to be addressed, to which defense counsel replied, "[n]othing from the defense." The parties were then provided with copies of the proposed charge, with any alterations included from the charging conference, to review overnight. The next day, before the court instructed the jury, defense counsel raised an issue regarding the jury

instruction on serious physical injury, which the court addressed. Finally, after the court instructed the jury, the court asked if counsel had any comments on the instructions as read to the jury, to which defense counsel replied, "[n]one from the defense."

The record in the present case more than demonstrates that the *Kitchens* waiver criteria have been met. On numerous occasions, the court solicited comments from counsel regarding any issues with the proposed instructions, and multiple times defense counsel explicitly stated that there was nothing from the defense. The instructions were provided to counsel for review six days prior to when the jury was charged, and, at a minimum, counsel had the opportunity to review, overnight, the instructions as modified from the charging conference. At no time before the final charge was given to the jury, or after the charge, did defense counsel raise any issue or objection concerning the jury instructions relating to the underlying threatening charge in count six, despite having had numerous opportunities and a great amount of time to do so. Because it is clear from the record that defense counsel had a meaningful opportunity to review the proposed instructions and to comment on them or suggest modifications, and counsel affirmatively accepted the instructions as proposed and given by repeatedly telling the court that the defense did not have any other issues to raise concerning the instructions, the defendant implicitly waived his right to challenge those instructions on appeal. Accordingly, he is not entitled to *Golding* review of his unpreserved claim of instructional error.

B

One day prior to oral argument before this court, defense counsel filed a notice with this court, pursuant to Practice Book § 67-10, of two cases, not mentioned in the one brief that was filed by the defendant, that

were asserted to be pertinent to the defendant's claim of instructional error. Specifically, defense counsel cited *State* v. *Brown*, 299 Conn. 640, 659, 11 A.3d 663 (2011), and *State* v. *Ruocco*, 151 Conn. App. 732, 742–43, 95 A.3d 573 (2014), aff'd, 322 Conn. 796, 144 A.3d 354 (2016), for the proposition that "the state bears the burden of proving the defendant waived a claim of instructional error."[9] At oral argument before this court, the defendant's appellate counsel referenced the point in the charging conference when the trial court, while reciting the proposed charge on burglary in the second degree as alleged in count six, stated: "Threatening in the second degree is defined as, etcetera, etcetera, etcetera." She claimed, for the first time, that, because there is no copy in the record of the trial court's proposed charge, a draft of the proposed charge was never made an exhibit, and there is not enough evidence to determine what was in the draft of the court's proposed charge, the state has failed to meet its burden of providing an adequate record to show that there was *Kitchens* waiver.

Before we discuss the merits of this claim, a brief discussion of the facts of *Brown* and *Ruocco* is necessary. In *Brown*, the defendant raised two unpreserved claims of instructional error on appeal. *State* v. *Brown*,

[9] We note that the state raised and briefed its *Kitchens* claim in its appellate brief. Although the defendant filed a motion for an extension of time to file a reply brief, which was granted, no reply brief was filed, nor did the defendant's principal brief address the *Kitchens* waiver issue. The defendant's appellate counsel, nevertheless, filed the letter of supplemental authority pursuant to Practice Book § 67-10 related to this issue, and the state never objected. At oral argument before this court, the defendant's appellate counsel and the state addressed the supplemental authority and the state's assertion that the defendant's claim of instructional error was waived. Accordingly, although claims must be adequately briefed and, normally, we do not address claims raised for the first time at oral argument; *Bridgeport* v. *Grace Building, LLC*, 181 Conn. App. 280, 294, 186 A.3d 754 (2018); given the defendant's letter pursuant to § 67-10 and the absence of an objection by the state, under the circumstances here, we will consider the defendant's claim concerning *Brown* and *Ruocco*.

supra, 299 Conn. 643. With respect to the first claim, our Supreme Court concluded that, pursuant to *Kitchens*, the defendant implicitly had waived his right to challenge the court's instructions on intent and was not entitled to *Golding* review of that unpreserved claim. Id., 658–59. With respect to the second claim, which related to the court's instructions concerning liability under the doctrine set forth in *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), the court found that the case was distinguishable from *Kitchens*. *State* v. *Brown*, supra, 659. Specifically, the court stated: "Because we have no record of the charging conference or copy of the court's intended charge, we do not know if the trial court expressly rejected the state's proper request to charge [which included an instruction on *Pinkerton* liability], or included the proper instruction in the copy of the charge that it provided to counsel, but inadvertently omitted it from the actual charge to the jury. The elements of *Pinkerton* liability are well established. . . . It is reasonable to assume, therefore, that the omission was inadvertent. Under these circumstances, we cannot determine from the record whether the copy of the final instructions given to defense counsel included the correct charge or the charge as actually given. Thus, unlike in *Kitchens*, we cannot infer that defense counsel had knowledge of any potential flaws in the court's *Pinkerton* instruction. . . . Because we cannot reasonably conclude that counsel was aware in advance of the instructional deficiency, we will not conclude that the defendant has waived his right to challenge the charge on direct appeal." (Citations omitted.) Id.

In *Ruocco*, the defendant claimed on appeal that the trial court erred in failing to instruct the jury that it may draw no unfavorable inferences from the failure of the defendant to testify, as mandated by General Statutes § 54-84 (b). *State* v. *Ruocco*, supra, 151 Conn.

App. 734. Although the state and the defendant conceded that the mandatory instruction had not been given to the jury; id., 738–39; the state claimed that the record was inadequate for review of the defendant's claim because "it [was] ambiguous as to whether the defendant waived the mandatory instruction . . . ." Id., 739. In *Ruocco*, "[a]fter the parties presented their closing arguments, and before adjourning for its lunch recess, the court stated: 'Counsel, I've given you each a copy of my proposed charge. . . . [I]f you have any questions, or concerns, or comments, I'll be available at 1:30 in my chambers. If I don't see you at 1:30, I'll just assume that you have no comments or questions. But we will be starting a little before 2 because I'd like to have as much time this afternoon for the jury and its deliberations.' After the recess, the jury entered the courtroom and the court gave the jury charge. The court did not put on the record whether any party had come to its chambers to discuss the charge. Furthermore, there is no reference to any charge conference and no copy of the proposed charge in the record." Id.

On appeal, the parties in *Ruocco* disagreed as to whether the record was adequate for review of the defendant's instructional error claim. Id., 740. According to the state, there was "a possibility that the defendant could have waived [the mandatory instruction] in an in-chambers conference during the lunch recess"; (internal quotation marks omitted) id.; and the defendant, as the appellant, had the burden of providing an adequate record. Id., 741. This court rejected the state's claim and concluded "that the record . . . [was] clear, unambiguous, and adequate for review with respect to the defendant's claim that the court improperly refrained from giving the no unfavorable inference instruction. Presuming that the trial court acted properly, as we must, the record leads to the conclusion that no off-the-record charge conference occurred. Had

an in-chambers charge conference occurred, as the state suggests, then a court acting properly would have summarized it on the record . . . . There is no record of either party taking exception to the charge and no record of the defendant waiving the mandatory instruction . . . .'' (Footnotes omitted.) Id. We explained further that, ''[i]f the state intends to argue that the defendant waived a mandatory instruction, the burden is on the state to secure an adequate record to support that argument''; id., 742; as it would have been ''manifestly unjust'' to place the burden on the defendant to secure an adequate record to review the state's claim. Id., 743.

We conclude that the present case is distinguishable from both *Brown* and *Ruocco*. First, unlike the situation in *Brown*, in which there was no record of a charging conference or a copy of the court's intended charge, the court in the present case held an on-the-record charging conference, in which it addressed each requested instruction from the state and the defendant, and gave the parties multiple opportunities to comment on those requests and the court's proposed charge. Although the record does not contain a copy of the court's proposed charge, our Supreme Court observed in *Bellamy* that ''the waiver rule in *Kitchens* does not require that a copy of the proposed jury instructions be marked as an exhibit. It only requires evidence that the trial court gave the parties a 'copy of the proposed jury instructions' and that the reviewing court's determination of implied waiver 'be based on a close examination of the record and the particular facts and circumstances of each case.' '' *State* v. *Bellamy*, supra, 323 Conn. 411.

It is also clear from the record in the present case that, when the court was reciting the language of the proposed instruction concerning the second degree burglary charge in count six, which was in response to an issue raised concerning a different underlying offense, larceny, the court used the words ''etcetera, etcetera,

etcetera," to skip over language in the proposed charge that was not relevant to the issue that had been raised. Neither party made a request to charge related to the instruction on threatening in count six, and no claim has been made that the court's final instruction to the jury regarding that offense differed in any way from the proposed charge that had been given to the parties on the first day of trial, except with respect to the few grammatical and spelling corrections the court had made on the morning of May 21, 2019. This is not a situation, as in *Brown*, involving on appeal an issue of whether the final charge to the jury differed from the proposed instructions the parties had been given for review, which required a review of the proposed instructions.

Likewise, we conclude that the defendant's reliance on *Ruocco* is misplaced. In that case, in which the state claimed that a mandatory jury instruction may have been waived by the defendant during an off-the-record charging conference that may have occurred, we concluded that it would have been unfair to place the burden on the defendant to provide an adequate record to review the state's claim. Thus, we concluded that the state had the burden of providing an adequate record for its claim of waiver, which was not made on the basis of *Kitchens*. The record in the present case is adequate for this court to closely examine the particular facts and circumstances and to make a determination of whether an implicit waiver has occurred. See *State* v. *Bellamy*, supra, 323 Conn. 411.

C

Having determined that the defendant is not entitled to *Golding* review of his unpreserved claim of instructional error, we next address his alternative claim that the court's instruction amounted to plain error. See Practice Book § 60-5. Our Supreme Court determined

in *State* v. *McClain*, 324 Conn. 802, 815, 155 A.3d 209 (2017), that a *Kitchens* waiver does not preclude plain error review, and, thus, we address this claim. Although the defendant attempts to couch his claim in constitutional terms by arguing that the court failed to instruct the jury on the essential elements of the underlying crime of threatening in the second degree; see *State* v. *Gooden*, 89 Conn. App. 307, 315, 873 A.2d 243 ("[t]he trial court is constitutionally required to instruct the jury properly on every essential element of the crime charged" (internal quotation marks omitted)), cert. denied, 275 Conn. 919, 883 A.2d 1249 (2005), and cert. denied, 275 Conn. 918, 883 A.2d 1249 (2005); as stated previously in this opinion, the court's charge to the jury did set forth the essential elements of threatening in the second degree under § 53a-62, and the defendant's claim essentially challenges the court's failure to define the terms "physical threat" and "imminent" as set forth in § 53a-62.

"It is well established that the plain error doctrine . . . is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved [and nonconstitutional in nature], are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice of the aggrieved party. . . . That is, it is a doctrine that this court invokes in order to rectify a trial court ruling that, although either not properly preserved or never raised at all in the trial court, nonetheless requires reversal of the trial court's judgment . . . for reasons of policy. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] the existence of the error is so obvious that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . .

"An appellate court addressing a claim of plain error first must determine if the error is indeed plain in the sense that it is patent [or] readily [discernable] on the face of a factually adequate record, [and] also . . . obvious in the sense of not debatable. . . . [A] complete record and an obvious error are prerequisites for plain error review . . . . [An appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice." (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Moon*, 192 Conn. App. 68, 97–99, 217 A.3d 668 (2019), cert. denied, 334 Conn. 918, 222 A.3d 513 (2020).

In the present case, we must determine whether the court's failure to define the elements of "physical threat" and "imminent" in its jury instructions relating to count six and the underlying charge of threatening in the second degree constituted plain error. First, the defendant has not demonstrated that the word "imminent" as used in the statute has " 'anything other than its ordinary meaning.' " *State* v. *Walker*, 9 Conn. App. 373, 378, 519 A.2d 83 (1986), cert. denied, 202 Conn. 805, 520 A.2d 1286 (1987); see also *State* v. *March*, 39 Conn. App. 267, 273, 664 A.2d 1157 (1995) (" '[w]hen a word contained in an essential element carries its ordinary meaning, failure to give the statutory definition will not constitute error' "), cert. denied, 235 Conn. 930, 667 A.2d 801 (1995). Second, this court recently addressed a sufficiency of the evidence challenge to the "physical threat" requirement of threatening in the second degree and stated "that a threat, by definition, is an expression of an intent to cause some future harm," and that that definition was "consistent with the dictionary definition of a threat as [a] communicated intent to inflict harm or loss on another . . . . Black's Law Dictionary (11th Ed. 2019) p. 1783; see also Merriam-Webster's Collegiate Dictionary (11th Ed. 2003) p.

1302 (defining threat as expression of intention to inflict evil, injury, or damage . . .).'' (Citation omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Ervin B.*, supra, 202 Conn. App. 8. The defendant, therefore, has not shown that the trial court's failure to include the definitions of ''imminent'' and ''physical threat'' in its jury charge constituted plain error. See *State* v. *Coltherst*, 87 Conn. App. 93, 109 n.11, 110, 864 A.2d 869 (concluding that any error was harmless when court's jury charge included essential elements of larceny but failed to define one of those elements), cert. denied, 273 Conn. 919, 871 A.2d 371 (2005).

We also note that count six of the third substitute information alleges that the defendant committed burglary in the second degree on the basis of his having entered or having remained unlawfully in the victim's apartment, while the victim was present, with the intent to commit any, some or all of the four different underlying crimes therein, namely, robbery in the first degree, robbery in the second degree, threatening in the second degree and larceny in the sixth degree. Because the defendant also had been charged in counts three and four with robbery in the first degree and robbery in the second degree, and was found not guilty of those charges, the guilty verdict of burglary in the second degree in count six could have been based on a finding either that the defendant intended to commit the crime of threatening in the second degree or that he intended to commit the crime of larceny in the sixth degree while in the dwelling. Because the jury returned a general verdict as to count six, we do not know on which underlying crime the jury based its verdict—threatening in the second degree or larceny in the sixth degree. Moreover, the defendant has not raised on appeal any challenge to the jury instructions or the sufficiency of the evidence relating to the underlying crime of larceny in the sixth degree as alleged in count six.

In charging the jury as to larceny, the court explained that "[a] person commits larceny when, with intent to deprive another of property or to appropriate the same to himself, he wrongfully takes, obtains, or withholds such property from an owner." The court further explained that "[l]arceny in the sixth degree is a larceny where the value of the property is less than $500."

The evidence in the record was sufficient for the jury to have found that the defendant committed burglary in the second degree by entering or remaining unlawfully in the victim's apartment, while the victim was present, with the intent to commit larceny in the sixth degree while therein. The victim testified that the defendant and Moniz forced the victim into his apartment, and that, once inside, the defendant took his money. Although there was a discrepancy as to how much money was stolen from the victim, either $300 or $400, either value was less than $500. There also was evidence in the record, including testimony, demonstrating that the defendant and Moniz matched the descriptions of the perpetrators given by the victim and had been apprehended a short distance from the victim's apartment within minutes of the larceny, that the defendant initially did not comply with requests of police officers to stop but eventually walked back toward the officers, that two 100 dollar bills were found on the sidewalk in the area where the defendant had attempted to walk away, and that two $50 bills were taken from Moniz and tagged as evidence.

The jury returned a general verdict finding the defendant guilty as to count six of the third substitute information, and the evidence supports the defendant's conviction of the burglary charge on the basis of larceny in the sixth degree as the underlying crime. The defendant conceded this in his brief when he stated: "In addition, the [instructional] error was not harmless, even though there was enough evidence (by [the victim's] account) that [the] defendant intended to commit a larceny."

We find the decision of the United States Supreme Court in *Griffin* v. *United States*, 502 U.S. 46, 47, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991), instructive on this issue. In that case, the United States Supreme Court addressed the issue of "whether, in a federal prosecution, a general guilty verdict on a multiple-object conspiracy charge must be set aside if the evidence is inadequate to support conviction as to one of the objects." The petitioner had been charged with conspiring to defraud the federal government, and the unlawful conspiracy was alleged to have had two objects. Id. The evidence introduced at trial implicated the petitioner in the first object but did not connect her to the second one. Id., 47–48. Nevertheless, the jury was instructed in a manner that permitted it to return a guilty verdict against the petitioner if it found that she had participated in either one of the two objects of the conspiracy. Id., 48. The United States Court of Appeals for the Seventh Circuit rejected the argument "that the general verdict could not stand because it left in doubt whether the jury had convicted her" as to the first or second object of the conspiracy. Id.

In affirming the judgment, the United States Supreme Court in *Griffin* explained: "It was settled law in England before the Declaration of Independence, and in this country long afterwards, that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds—even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action. . . . [I]n the United States, with but few exceptions, the courts have united in sustaining general judgments on an indictment in which there are several counts stating cognate offences, irrespective of the question whether one of these counts is bad. . . . In criminal cases, the general rule . . . is that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad. And it is settled law in this court,

and in this country generally, that in any criminal case a general verdict and judgment on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only." (Citation omitted; internal quotation marks omitted.) Id., 49–50. That common-law rule has been applied in a number of contexts, including within the context of "a general jury verdict under a *single* count charging the commission of an offense by two or more means." (Emphasis in original.) Id., 50.

The rule set forth in *Griffin* was first cited with approval by our Supreme Court in *State* v. *Chapman*, 229 Conn. 529, 540–41, 643 A.2d 1213 (1994). In *Chapman*, our Supreme Court held that, when "the state charges that a defendant has committed a crime in more than one way, and those ways are charged in the conjunctive, as they must be, and the trial court instructs, as it must, that the state need only prove one of its allegations, and not all, the verdict must be upheld so long as there is sufficient evidence under any of the allegations." Id., 543. The court further explained that, "[i]n effect, we assume that the jury found the defendant guilty under the supported allegation, rather than the unsupported allegation." Id., 543–44. Since *Chapman* was decided, our appellate courts have adhered to this general rule. See, e.g., *State* v. *Gaines*, 257 Conn. 695, 718 n.16, 778 A.2d 919 (2001); *State* v. *Dyson*, 238 Conn. 784, 795, 680 A.2d 1306 (1996); *State* v. *Wright*, 111 Conn. App. 389, 396, 958 A.2d 1249 (2008), cert. denied, 290 Conn. 907, 962 A.2d 795 (2009); *State* v. *Torres*, 82 Conn. App. 823, 833–34, 847 A.2d 1022, cert. denied, 270 Conn. 909, 853 A.2d 525 (2004); *State* v. *Tinsley*, 47 Conn. App. 716, 718–20, 706 A.2d 1008, cert. denied, 244 Conn. 915, 713 A.2d 833 (1998).

In the present case, the state cites to *Griffin* in its brief and argues: "Where, as here, the state alleges in

one count several alternative ways of committing a crime, and the 'trial court instructs, as it must, that the state need only prove one of its allegations, and not all, the verdict must be upheld so long as there is sufficient evidence under any of the allegations.' *State* v. *Wohler*, 231 Conn. 411, 415 [650 A.2d 168] (1994); see *Griffin* v. *United States*, [supra, 502 U.S. 56–57] (when jury returns guilty verdict on indictment charging several acts in the conjunctive, verdict must stand if evidence is sufficient with respect to any one of the acts). Because the evidence here was sufficient to support a finding by the jury that the defendant intended to commit, for example, the crime of sixth degree larceny . . . and because the trial court correctly instructed the jury on that crime . . . any error in its instructions on threatening was harmless beyond a reasonable doubt." (Citation omitted.) The defendant never responded to these arguments by filing a reply brief addressing the state's discussion of the relevance of *Wohler* and *Griffin*.

We also note that our Supreme Court and the United States Supreme Court have discussed and distinguished the situation involved in *Griffin*, in which one of the possible grounds for conviction was not supported by sufficient evidence, from those in which the basis for the conviction is legally insufficient or invalid, to which the rule in *Griffin* does not apply.[10] See *Griffin* v.

[10] In *Griffin*, for example, the United States Supreme Court explained: "[T]he term 'legal error' means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence. . . . Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the [c]onstitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence . . . . 'It is one thing to negate a verdict that, while supported by evidence, may have been based

United States, supra, 502 U.S. 54–60; *State* v. *Chapman*, supra, 229 Conn. 540–41. We do not glean from the record that the defendant has made any such claim of legal invalidity here. Although the defendant cites to *Chapman* in his brief for the proposition that a reversal of the judgment is required "if one theory charged is legally inadequate and cannot determine [the] basis for conviction," his brief is devoid of any analysis or argument asserting that the jury's verdict of guilty of burglary in the second degree was based on a legally inadequate theory of recovery. On the contrary, the defendant states in his brief that, "[w]hile there was evidence of threats made at Moniz' apartment, [the victim] did not testify about any threats, physical or otherwise, at the time [the] defendant entered or remained in his apartment before obtaining the money. Although he claimed that, as they were leaving, [the] defendant threatened to shoot him if he told anybody, those were mere words and did not amount to a physical threat. Even if it somehow did, it was not a threat of imminent physical injury." Those assertions sound more in the nature of a sufficiency of the evidence claim, rather than one of legal insufficiency.

Moreover, to the extent that the defendant's claim of instructional error can be construed as a claim that his conviction of burglary in the second degree was based on a legally insufficient ground, we rely on *Chapman* and its progeny, and the rule of law set forth therein, simply to demonstrate why this case does not present the type of extraordinary situation in which plain error can be found. If a factually supported verdict stands, even when there is no assurance that a valid ground,

on an erroneous view of the law; it is another to do so merely on the chance—remote, it seems to us—that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.' " (Citation omitted; emphasis in original.) *Griffin* v. *United States*, supra, 502 U.S. 59–60.

rather than an invalid one, was the basis for the jury's verdict, we are hard-pressed to find plain error under the circumstances here when (1) the defendant was charged in count six with having committed burglary in the second degree on the basis of more than one underlying crime, (2) one of those underlying crimes alleged—larceny in the sixth degree—was supported by sufficient evidence in the record, (3) the defendant's challenge to the jury charge on another underlying crime—threatening in the second degree—does not allege that the theory of conviction was contrary to the law in that it was time barred or that the defendant's actions at issue were protected by the constitution, and (4) the defendant's claim of instructional impropriety concerns the court's failure to define the terms "imminent" and "physical threat," as they relate to the underlying threatening charge, and does not allege any misstatement of law by the court, the defendant has not cited any authority that required the court specifically to charge the jury on those definitions other than the model criminal jury instructions on the Judicial Branch website; see Connecticut Criminal Jury Instructions, available at https://www.jud.ct.gov/JI/Criminal/Criminal.pdf (last visited June 23, 2021); which are meant as a guide for judges and attorneys and are discretionary; *State* v. *Reyes*, 325 Conn. 815, 822 n.3, 160 A.3d 323 (2017); and the defendant failed to show that those terms do not carry their ordinary meaning, which weighs against finding any constitutional error in the court's failure to define the terms.

The defendant, therefore, has not shown that a failure to reverse the judgment would result in manifest injustice; see *State* v. *Moon*, supra, 192 Conn. App. 99; and, thus, his claim of plain error fails.

The judgment is affirmed.

In this opinion the other judges concurred.

CALIBER HOME LOANS, INC. *v.* MICHAEL A. ZELLER ET AL.
(AC 43576)

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

Syllabus

The plaintiff sought to foreclose a mortgage on certain real property owned by the defendant C Co. The defendant Z had executed a note for a loan that was used to purchase the property that was secured by the mortgage, and that loan was now in default. Prior to the commencement of the foreclosure action, Z quitclaimed his interest in the property to C Co. The plaintiff alleged in its complaint that it was the holder of the note and mortgage. The plaintiff thereafter filed a motion to substitute S Co. as the plaintiff, explaining that, since the commencement of the action, it had assigned the mortgage and note to S Co. The trial court granted the motion to substitute and thereafter the matter was tried to the court. The court concluded that S Co. had been assigned the mortgage and was in possession of the note, endorsed in blank, that C Co. lacked standing to challenge the adequacy of the notice of acceleration and default under the note because it was not a party to the note and mortgage, and rejected C Co.'s special defenses. From the judgment of strict foreclosure, C Co. appealed to this court. *Held*:

1. The trial court's finding that S Co. was in possession of the note, endorsed in blank and, therefore, was the rightful owner of the debt entitled to foreclose on the mortgage was not clearly erroneous, as the record contained evidence that supported the court's finding; S Co. produced the original note, endorsed in blank, and mortgage at trial and presented testimony regarding the history of the documents and how they came to be in S Co.'s possession, testimony which the court was free to credit.
2. The trial court properly determined that C Co. lacked standing to challenge the adequacy of the notice of acceleration and default under the note: contrary to its claim, C Co. was not a foreseeable interested party, the transfer of interest in the property by quitclaim deed from Z to C Co. did not transfer any rights or obligations in the underlying note and mortgage to C Co., and C Co.'s contention that it made payments under the note was belied by the record, which established that payments were made on behalf of C Co. by another entity, and that C Co. made only one payment, and the check was not cashed; moreover, the court did not abuse its discretion in admitting the evidence of notice as a full exhibit, as C Co.'s arguments as to the sufficiency of this evidence had no bearing on the admissibility of the evidence.

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

3. The trial court did not err in determining that S Co. had proven the amount of the outstanding debt; the court was within its right to credit the evidence submitted by S Co., including witness testimony and an affidavit of debt, in determining the amount of the debt, and the court did not improperly reject the defendant's characterization of the evidence as confusing or conflicting; moreover, the court was free to find that C Co.'s claim that it was unaware that checks that it had submitted for payment had not been accepted was not credible.
4. The trial court properly rejected C Co.'s special defenses of payment, equitable estoppel and unclean hands; the court was free to reject the evidence C Co. submitted in support of its special defense of payment, and C Co. failed to prove that the court's findings of fact were clearly erroneous; moreover, C Co. failed to provide the court with any additional factual basis or legal argument in support of its special defenses of equitable estoppel and unclean hands, beyond what was asserted in its special defense of payment.
5. The trial court abused its discretion by ordering a judgment of strict foreclosure, rather than foreclosure by sale, because there was substantial equity in the property.

Argued November 18, 2020—officially released July 6, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendant Cambridge Holdings, Inc., and for other relief, brought to the Superior Court in the judicial district of Hartford, where the named defendant was defaulted for failure to appear; thereafter, Specialized Loan Servicing, LLC, was substituted as the plaintiff; subsequently, the matter was tried to the court, *Scholl, J.*; judgment of strict foreclosure, from which the defendant Cambridge Holdings, Inc., appealed to this court. *Reversed in part*; *judgment directed*; *further proceedings.*

Maria K. Tougas, for the appellant (defendant Cambridge Holdings, Inc.).

Victoria L. Forcella, for the appellee (substitute plaintiff).

Opinion

ALEXANDER, J. The defendant Cambridge Holdings, Inc. (Cambridge),[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the substitute plaintiff, Specialized Loan Servicing, LLC (SLS). On appeal, the defendant claims that (1) SLS presented insufficient evidence to prove it had standing to foreclose on the mortgage, (2) it had standing to challenge the adequacy of the notice of acceleration and default under the note, (3) SLS presented insufficient evidence to prove the amount of the outstanding debt, (4) it proved its special defenses, and (5) the court erred in rendering a judgment of strict foreclosure. We agree with the defendant only as to its final claim, and therefore we reverse the judgment of strict foreclosure and remand the case with direction to render a judgment of foreclosure by sale.

The following facts, as found by the trial court, and procedural history are relevant to our resolution of this appeal. On January 10, 1990, the defendant Michael A. Zeller executed a note in the amount of $85,000 in favor of The First National Bank of Boston, which was secured by a mortgage on real property known as 272 Alewife Lane in Suffield (property). The note and mortgage subsequently were assigned to BancBoston Mortgage Corporation and were endorsed in blank on February 20, 1990. On August 15, 2006, Zeller executed a quitclaim deed for his interest in the property in favor of the defendant. On June 24, 2013, the mortgage was assigned by JP Morgan Chase Bank, N.A., as attorney-in-fact for the Federal Deposit Insurance Corporation

[1] In its original complaint, the original plaintiff, Caliber Home Loans, Inc., named Michael A. Zeller, Waters Edge Condominium Association, and KMZ, Inc., as defendants. Zeller was defaulted for failing to appear and Waters Edge Condominium Association and KMZ, Inc., were defaulted for failing to plead. The amended complaint filed by SLS likewise named these defendants. We refer to Cambridge as the defendant in this opinion.

as Receiver of Washington Mutual Bank formerly known as Washington Mutual Bank, FA, successor in interest to HomeSide Lending, Inc., formerly known as BancBoston Mortgage Corporation, to the original plaintiff, Caliber Home Loans, Inc. (Caliber).

Caliber commenced the present foreclosure action on November 27, 2013. The defendant was named in the original complaint but was not served properly. A judgment of strict foreclosure was rendered on June 23, 2014. On May 20, 2015, Caliber filed a motion to open and vacate the judgment, which was granted on June 1, 2015. Thereafter, on June 9, 2015, Caliber filed a motion to cite in the defendant, which was granted on June 22, 2015. On July 13, 2015, Caliber filed an amended complaint and the defendant filed its answer on October 14, 2015. In its answer, the defendant asserted the special defenses of payment, improper notice of default, improper acceleration of the note and mortgage, equitable estoppel, unclean hands, and waiver.

On January 10, 2018, Caliber assigned the mortgage to SLS. On February 5, 2019, Caliber filed a motion pursuant to Practice Book § 9-16, to substitute SLS as the plaintiff, which the court granted on March 7, 2019. Thereafter, on May 16, 2019, SLS filed an amended complaint seeking, inter alia, to foreclose the mortgage.[2]

A trial was held before the court, *Scholl*, *J.*, on May 15, 29, and 30, 2019. On October 23, 2019, the court issued a memorandum of decision in which it rendered a judgment of strict foreclosure. In its decision, the court determined that the mortgage had been assigned by Caliber to SLS, that the note had been endorsed in blank, and that SLS was in possession of the note. The court further determined that the defendant lacked standing to challenge the adequacy of the notice of acceleration and default under the note, stating that

[2] The court granted SLS permission to file its amended complaint after the first day of trial.

the defendant "is not a party to the note and mortgage and therefore has no standing to argue noncompliance with their terms."

On the basis of the testimony and evidence, the court determined that SLS had proven the amount of debt to be $113,111.51 and that the fair market value of the property was $204,000. The court found that the defendant had failed to prove its special defenses of payment, equitable estoppel, unclean hands, and waiver. The court rendered a judgment of strict foreclosure. This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that SLS did not present sufficient evidence to prove it had standing to foreclose on the mortgage. The defendant argues that "[n]o document submitted by SLS at trial . . . established that SLS was given authority to foreclose this loan from the owner of this loan." We disagree.

"A determination regarding standing concerns a question of law over which we exercise plenary review." *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, 197 Conn. App. 269, 273, 231 A.3d 386 (2020). Additionally, "[i]n order to establish a prima facie case in a mortgage foreclosure action, the plaintiff must prove by a preponderance of the evidence that it is the owner of the note and mortgage, that the defendant mortgagor has defaulted on the note and that any conditions precedent to foreclosure, as established by the note and mortgage, have been satisfied." *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 176, 73 A.3d 742 (2013). "If the foreclosing party shows that it is a valid holder of the note and can produce the note, it is presumed that the foreclosing party is the rightful owner of the debt." *U.S. Bank, National Assn.* v. *Schaeffer*, 160 Conn. App. 138, 150, 125 A.3d 262 (2015). "The

note must be sufficiently endorsed so as to demonstrate that the foreclosing party is a holder, either by a specific endorsement to that party or by means of a blank endorsement to bearer." Id.

Furthermore, "[a] trial court's determination that a party is the owner and holder of a promissory note is reviewed pursuant to the clearly erroneous standard of review. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citations omitted; internal quotation marks omitted.) *AS Peleus, LLC* v. *Success, Inc.*, 162 Conn. App. 750, 753–54, 133 A.3d 503 (2016).

In the present case, the trial court determined, on the basis of the evidence before it, that the note was endorsed in blank and that SLS was in possession of the note and mortgage. The record confirms that SLS presented both the operative note and mortgage at trial, and its key witness, Laura Ollier, testified extensively as to the history of both documents and how the documents came to be in SLS's possession. Ollier testified that SLS took over the servicing of the loan in December, 2018, and, as part of that process, received records from the prior loan servicer, Caliber, and incorporated those records into its own business records. See footnote 3 of this opinion. "The plaintiff's possession of a note endorsed in blank is prima facie evidence that it

is a holder and is entitled to enforce the note, thereby conferring standing to commence a foreclosure action. . . . After the plaintiff has presented this prima facie evidence, the burden is on the defendant to impeach the validity of [the] evidence that [the plaintiff] possessed the note at the time that it commenced the . . . action or to rebut the presumption that [the plaintiff] owns the underlying debt. . . . The defendant [must] set up and prove the facts [that] limit or change the plaintiff's rights . . . ." (Internal quotation marks omitted.) *Bank of America, N.A.* v. *Kydes*, 183 Conn. App. 479, 487, 193 A.3d 110, cert. denied, 330 Conn. 925, 194 A.3d 291 (2018). We agree with the trial court that by producing the note and mortgage at trial, SLS established the presumption that it owned the underlying debt. Therefore, the burden was on the defendant to submit evidence and prove that a separate entity was the owner of the note and debt.

In order to rebut the presumption of ownership of the debt, the defendant must prove that someone else is the owner of the note and, therefore, the debt. As an example, the defendant may show that ownership of the note had passed to another party. In the absence of proof, the plaintiff may rest its standing to foreclose on its status as the holder of the note. See *U.S. Bank, National Assn.* v. *Schaeffer*, supra, 160 Conn. App. 150.

The defendant does not dispute the fact that SLS presented the original note and mortgage at trial. Instead, the defendant argues that "the evidence . . . established that SLS was not the owner of the debt." We are not persuaded. After a careful review of the evidence, the record establishes that the mortgage was assigned by Caliber to SLS on January 10, 2018. The testimony of Laura Ollier confirmed that, as part of the boarding procedure her office undertook when acquiring this debt, the original loan documents, including the note, were held in bailment with counsel because of

the present underlying action.[3] The defendant's counsel argued before the trial court that the testimony did not establish that the mortgage and the note pertained to the same underlying debt; however, the court determined that "the note is endorsed in blank and the evidence established that [SLS] is in possession of the note."

"[N]othing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony. . . . The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Shearn* v. *Shearn*, 50 Conn. App. 225, 231, 717 A.2d 793 (1998). Given the evidence before it, the court determined that SLS was in possession of the note. SLS produced the note endorsed in blank and, therefore, it is the rightful owner of the debt

[3] Specifically, the following colloquy took place:

"[The Court]: What's the boarding process?

"[The Witness]: Your Honor, the boarding process is a highly complicated process that a loan goes through when it's . . . transferred from one servicer to another. The point of that service—the boarding process is to take the documents received from the prior servicer, verify those documents, that they are the correct documents for that loan, and transfer them while verifying the information and the custody of them into the new servicer's records.

"[The Court]: Okay.

"[The Defendant's Counsel]: But I thought you said SLS didn't take custody of the original documents?

"[The Witness]: We didn't take custody of the original documents because they were being held in a bailment with our attorney.

"[The Defendant's Counsel]: Right. So during the boarding process nobody had the original note and mortgage in SLS.

"[The Witness]: We had copies of the originals.

"[The Defendant's Counsel]: The question is nobody had the original note and mortgage when they boarded the note—

"[The Witness]: No, because we were able to—

"[The Defendant's Counsel]: —and mortgage.

"[The Witness]: —verify they were with counsel.

"[The Defendant's Counsel]: Okay. But did anybody compare the note and mortgage copies with the originals that were in counsel's office in Connecticut when you boarded them?

"[The Witness]: Yes, that is part of the boarding procedures."

and entitled to foreclose on the mortgage. Although the defendant disagrees with the court's conclusion as to the facts, the record contains evidence that supports the court's finding. On the basis of our review of the record, we conclude that the court's factual determinations were not clearly erroneous. There is evidence to support its finding that SLS was in possession of both the note and mortgage and, therefore, the court properly concluded that SLS has standing to enforce the underlying debt and to foreclose on the mortgage.

II

The defendant next claims that the court improperly determined that it lacked standing to challenge the adequacy of the notice of acceleration and default under the note. The defendant further claims that the court improperly admitted into evidence documents that established notice. We are not persuaded by either of the defendant's claims.

"A determination regarding standing concerns a question of law over which we exercise plenary review." *World Business Lenders, LLC* v. *526-528 North Main Street, LLC*, supra, 197 Conn. App. 273.

In its decision, the trial court determined that the defendant "is not a party to the note and mortgage and therefore has no standing to argue noncompliance with their terms." The court relied on this court's decision in *Wells Fargo Bank, N.A.* v. *Strong*, 149 Conn. App. 384, 401, 89 A.3d 392, cert. denied, 312 Conn. 923, 94 A.3d 1202 (2014), for the proposition that "[c]ontract obligations are imposed because of conduct of parties manifesting consent, and are owed only to the specific individuals named in the contract. . . . It is well settled that one who [is] neither a party to a contract nor a contemplated beneficiary thereof cannot sue to enforce the promises of the contract." (Internal quotation marks

omitted.) The court reasoned that, because the defendant was not a party to the underlying note or mortgage, it had no standing to argue noncompliance with its terms.

We first consider the defendant's standing claim. The defendant does not contend that it was a party to the making of the note or mortgage. The defendant argues that it was a third-party transferee[4] of the subject property and, therefore, a "foreseeable interested party" under the note and mortgage. As a result of this alleged status, the defendant contends it had standing to challenge the adequacy of the notice of acceleration and default.

The defendant, however, obtained its interest in the property by quitclaim deed from Zeller. A quitclaim deed of title to property that secures a note and mortgage, by itself, does not transfer the rights and obligations in the underlying note or mortgage. See *GMAC Mortgage, LLC* v. *Ford*, supra, 144 Conn. App. 182 ("[The defendant's] act of quitclaiming . . . interest to a third party did not implicate the making, validity or enforcement of the note or mortgage . . . . The defendant remained liable for repayment of the note despite the quitclaim deed to a third party, who took title subject to the mortgage and any potential foreclosure.").

The defendant directs us to paragraph 10 of the note and paragraph 17 of the mortgage to support its argument that those documents contemplate consideration of the claimed legal interest of subsequent transferees of the underlying property. We disagree. Although both paragraphs begin with the phrase "[i]f all or any part of the Property or any interest in it is sold or transferred,"

[4] "An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." (Internal quotation marks omitted.) *Ulster Savings Bank* v. *28 Brynwood Lane, Ltd.*, 134 Conn. App. 699, 709, 41 A.3d 1077 (2012).

these paragraphs contemplate and set forth a procedure whereby, in such circumstance, the lender may accelerate and require immediate payment of the debt.[5] Contrary to the defendant's assertions, these paragraphs do not contemplate that any subsequent transferee of the property is entitled to any rights in the underlying note or mortgage. Instead, these paragraphs are meant to protect the *mortgagee's* interest if a transfer occurs.

The defendant further argues that it was a "foreseeable interested party" because it made payments under the note. This, however, is belied by the record before us. Richard Gleicher, the director of the defendant and vice president of Premier Capital, LLC (Premier Capital), testified that, although the defendant holds title to the property in this dispute, a separate entity, Premier Capital, "owns" the note and mortgage.[6] Premier Capital made payments on behalf of the defendant, but the

[5] Paragraph 10 of the note and paragraph 17 of the mortgage are identical and provide: "Transfer of the Property or a Beneficial Interest in Borrower. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is not a natural person) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if exercise is prohibited by federal law as of the date of this Security Instrument.

"If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is delivered or mailed within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower."

[6] Specifically, Gleicher testified that "[the defendant] took title to the property . . . . And then Premier Capital, Inc., continued to pay the Washington Mutual mortgage on the prop[erty] . . . ." He further testified that the payments are "paid out on behalf of [the defendant] . . . . The Premier Capital checks, paid by Premier Capital. Premier Capital is affiliated with [the defendant]. [The defendant] has—it owes money to Premier Capital, and it's properly reflected in everybody's books. . . . Premier Capital . . . owns notes and mortgages. When we foreclose on the notes and mortgages, those—the title to the real estate . . . vests in [the defendant]. Premier Capital continues to make the payments on the—on these—on the real estate, but [the defendant] has . . . title to the real estate."

defendant itself made only one payment under the note. The one payment by check from the defendant, however, was not cashed. This evidence does not establish that the defendant was a contemplated beneficiary of either the note or the mortgage. Accordingly, we agree with the trial court's conclusion that the defendant is not a "foreseeable interested party" to these documents and lacks standing to challenge SLS's compliance with their terms.

The defendant further argues, however, that, even if it does not have standing to challenge the notice of the acceleration and default under the note, the trial court nonetheless erred by admitting the evidence of notice as a full exhibit in contradiction to its statement that the exhibit would be admitted "based on the expressed condition that it would allow [the defendant] to challenge whether it constituted sufficient notice from the mortgage holder . . . and whether it was in compliance with the mortgage provisions." Specifically, the defendant challenges the trial court's admission as a full exhibit a letter from Vericrest Financial.[7] In support of its argument, the defendant points to the following two statements the trial court made in response to the defendant's objection to the admission of the letter into evidence:

"The Court: [W]hat I think I'll do is I'm going to allow the letter, but you can certainly argue that this is [not]—a sufficient notice, you know—absent any other evidence. But I'll allow the letter as their claim of notice."

"The Court: I'll allow it for the . . . limited purpose of their allegations of notice. You can certainly argue that it's not notice in compliance with the mortgage."

[7] The letter, dated May 4, 2013, and addressed to Zeller, stated that the January 10, 1990 mortgage was in default for failure to make payments. The letter stated, inter alia, that "[f]ailure to cure the default on or before July 3, 2013, may result in acceleration of the sums secured and result in the foreclosure and sale of the property."

The defendant argues that these statements by the court preconditioned the admission of the evidence "on the basis [that the court] would consider [the defendant's] arguments as to its sufficiency." We disagree.

"The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence . . . [and its] ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) *In re Harlow P.*, 146 Conn. App. 664, 681, 78 A.3d 281, cert. denied, 310 Conn. 957, 81 A.3d 1183 (2013).

In the present case, the record is clear that the trial court admitted the Vericrest Financial letter as a full exhibit for the purpose of establishing the plaintiff's notice. The trial court advised the defendant that it could make arguments against the weight of this evidence. However, the evidentiary ruling by the court did not preclude the evidence from its consideration nor did the court's ruling amount to a precondition as to the full admission of the letter into evidence. The defendant's claims against the *sufficiency* of the notice had no bearing on the *admissibility* of the evidence. We, therefore, are not persuaded by the defendant's claim that the court abused its discretion in admitting these exhibits into evidence.

III

The defendant next claims that the trial court erred in its determination that the plaintiff had proved the amount of the outstanding debt. We disagree.

"To the extent that the trial court has made findings of fact, our review is limited to deciding whether such

findings were clearly erroneous. . . . As the finder of fact, the court is responsible for weighing the evidence. It is the [fact finder's] right to accept some, none or all of the evidence presented. . . . Moreover, [e]vidence is not insufficient . . . because it is conflicting or inconsistent. [The court] is free to juxtapose conflicting versions of events and determine which is more credible. . . . It is the [finder of fact's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses." (Citation omitted; internal quotation marks omitted.) *Brown* v. *Hartford*, 160 Conn. App. 677, 702, 127 A.3d 278, cert. denied, 320 Conn. 911, 128 A.3d 954 (2015).

In determining the amount of the debt, the court relied both on the testimony of the plaintiff's witness and on an affidavit of debt admitted into evidence.[8] The court found that the amount of monthly principal and interest under the loan was $714.73 and that the evidence established that the payments made by, or on the behalf of, the defendant, were "insufficient to cover the amount of escrow required for taxes and insurance," thus resulting in the default of the loan. The court noted that no evidence was proffered regarding payments made after July 18, 2013. The defendant claimed to have been unaware that many of the checks it submitted for payment had not been accepted. The court found that the claim was not credible.

The defendant contends that the court erred in its determination because of "confusing" and "conflicting" evidence. In support, the defendant relies on *Cliffside Condominium Assn., Inc.* v. *Cushman*, 100 Conn. App.

[8] The defendant's suggestion in its principal brief that the court improperly relied on the affidavit because it constituted hearsay is without merit. The record shows that it was the defendant's counsel who offered the affidavit into evidence as a full exhibit during her cross-examination of the plaintiff's witness.

803, 921 A.2d 609 (2007), for the proposition that inconsistent and confusing evidence cannot establish the amount of the debt. We are not persuaded.

In *Cliffside Condominium Assn., Inc.*, the trial court determined that "there were numerous inconsistencies in the testimony and evidence regarding the amount of the debt, including conflicting affidavits offered by the plaintiff as to the amount of the debt and the application of payments made by the defendant." Id., 805. The court found that no debt was owed to the plaintiff and the plaintiff itself had characterized the evidence as " 'somewhat confusing.' " Id. On appeal, this court affirmed the trial court's determination that the plaintiff had failed to meet its burden to prove the amount of debt based on its factual findings that the evidence was conflicting and confusing. Id. The present case is readily distinguishable, however, because here the court found that SLS had proven the amount of debt on the basis of the evidence before it. The defendant has not persuaded us that the court improperly determined the debt from the evidence presented or that it improperly rejected the defendant's characterization of the evidence as confusing or conflicting. The court was fully within its right to credit the evidence before it and to rely on such evidence in its determination of the amount of the debt.

IV

The defendant next argues that the trial court erred in its determination that the defendant had not proven its remaining special defenses of payment, equitable estoppel, and unclean hands.[9] We disagree.

Central to the defendant's argument as to its special defenses is the claim that the court did not appropriately

[9] Although the defendant argued the additional special defense of waiver before the trial court, it abandoned this defense on appeal.

credit the defendant's proffered evidence and Gleicher's testimony. The defendant argues that, "[i]n weighing the credibility of [Gleicher's] testimony and evidence on payment, versus the lack of evidence as to the accuracy of the plaintiff's debt, the defendant's evidence should have been credited . . . ." The defendant points to exhibits showing payments made on the note between 2007 and 2013, and Gleicher's testimony that the payments were sufficient to clear the account. As discussed, however, the trial court noted that no evidence was proffered regarding any payments made after July 18, 2013, and that the defendant's claim that it was unaware that many of the checks submitted for payment had not been accepted/cashed was not credible. Furthermore, Gleicher testified at trial that he did not believe payments for property taxes had been made.

As previously stated, "[n]othing in our law is more elementary than that the trier is the final judge of the credibility of witnesses and of the weight to be accorded to their testimony. . . . The trier is free to accept or reject, in whole or in part, the testimony offered by either party." (Internal quotation marks omitted.) *Shearn* v. *Shearn*, supra, 50 Conn. App. 231. Our review of the record leads us to conclude that the trial court's findings of fact were not clearly erroneous. See *Brown* v. *Hartford*, supra, 160 Conn. App. 702. As discussed in part III of this opinion, the defendant failed to prove that the court erred in its determination of the defendant's debt. We therefore conclude that the court properly concluded that the defendant did not prove its special defense of payment.

As to its remaining special defenses of equitable estoppel and unclean hands, the defendant did not provide the trial court or this court with any additional factual basis or legal argument beyond what was asserted in its special defense of payment. "Whe[n] an issue is merely mentioned, but not briefed beyond a

bare assertion of the claim, it is deemed to have been waived. . . . In addition, mere conclusory assertions regarding a claim, with no mention of relevant authority and minimal or no citations from the record, will not suffice. . . . [F]or this court judiciously and efficiently to consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs. We do not reverse the judgment of a trial court on the basis of challenges to its rulings that have not been adequately briefed . . . .'' (Citation omitted; internal quotation marks omitted.) *Manere* v. *Collins*, 200 Conn. App. 356, 358–59 n.1, 241 A.3d 133 (2020). We therefore are not persuaded by the defendant's claim that the court improperly rejected its special defenses.

V

Lastly, the defendant claims that the court erred in rendering a judgment of strict foreclosure rather than a judgment of foreclosure by sale. We agree with the defendant.

"In a foreclosure proceeding the authority of the trial court to order either a strict foreclosure or a foreclosure by sale is clear. General Statutes § 49-24 provides: All liens and mortgages affecting real property may, on the written motion of any party to any suit relating thereto, be foreclosed by a decree of sale instead of a strict foreclosure at the discretion of the court before which the foreclosure proceedings are pending. In interpreting this statute, we have stated that [i]n Connecticut, the law is well settled that whether a mortgage is to be foreclosed by sale or by strict foreclosure is a matter within the sound discretion of the trial court. . . . The foreclosure of a mortgage by sale is not a matter of right, but rests in the discretion of the court before which the foreclosure proceedings are pending.'' (Citations omitted; internal quotation marks omitted.) *Fidelity Trust Co.* v. *Irick*, 206 Conn. 484, 488, 538 A.2d 1027 (1988).

"[C]ritical to the determination of whether the trial court has abused its discretion in rendering judgment of foreclosure by sale rather than strict foreclosure is whether there is substantial equity in the subject property, and whether the sale would generate enough cash to satisfy the junior creditors. . . . [I]f there is need of a sale to protect the just rights of the parties, we have little fear that the court will not order it. . . . In a foreclosure proceeding the trial court must exercise its discretion and equitable powers with fairness not only to the foreclosing mortgagee, but also to subsequent encumbrancers and the owner." (Citations omitted; internal quotation marks omitted.) *Brann* v. *Savides*, 48 Conn. App. 807, 811, 712 A.2d 963 (1998).

"[W]e have recognized that when the value of the property substantially exceeds the value of the lien being foreclosed, the trial court abuses its discretion when it refuses to order a foreclosure by sale." (Internal quotation marks omitted.) *US Bank National Assn.* v. *Christophersen*, 179 Conn. App. 378, 394, 180 A.3d 611, cert. denied, 328 Conn. 928, 182 A.3d 1192 (2018).

In the present case, the trial court found that the underlying debt was $113,111.51 and that the fair market value of the property was $204,000. This amounts to a difference of $90,888.49. See *Fidelity Trust Co.* v. *Irick*, supra, 206 Conn. 489–91 (difference of $17,150 between underlying debt and appraisal value determined to be "substantial excess equity" to require foreclosure by sale). In its decision, the trial court based its judgment of strict foreclosure on the plaintiff's request for a judgment of strict foreclosure made in its posttrial brief and the defendant's failure to object to that request. However, the record shows that the posttrial briefs were ordered to be filed simultaneously, thereby not affording the defendant an opportunity to reply. Further, at oral argument before this court, the plaintiff's counsel stated that the plaintiff would agree

to a reversal of the trial court's judgment for the limited purpose of ordering a foreclosure by sale. Accordingly, given the equity of the property and the record before us, we conclude that the court abused its discretion by ordering a judgment of strict foreclosure.[10]

The judgment is reversed with respect to the order of strict foreclosure and the case is remanded with direction to order foreclosure by sale and for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

AMMAR A. IDLIBI *v.* JEREMIAH NII AMAA OLLENNU (AC 42697)

Elgo, Alexander and Devlin, Js.

Syllabus

The plaintiff sought damages from the defendant attorney for abuse of process, legal malpractice, malicious prosecution, and negligent and intentional infliction of emotional distress, arising out of his conduct during his representation of the plaintiff's former spouse, C, in her marital dissolution action against the plaintiff. The plaintiff alleged that the defendant knowingly notarized a fraudulent interrogatory response by C, counseled C to provide false testimony to a police detective that the plaintiff had assaulted her, and failed at any time to correct C's false testimony under oath regarding the alleged assault. The trial court granted the defendant's motion to dismiss, finding that the plaintiff did not have an attorney-client relationship with the defendant and that the defendant's conduct was protected by the doctrine of litigation privilege. On the plaintiff's appeal to this court, *held*:

[10] Additionally, the record shows that the parties entered into a stipulation that issues of priority would be determined after a judgment of foreclosure was rendered. A foreclosure by sale is equitable in this matter to protect the rights of junior creditors and other parties with an interest in the underlying property. Following the trial court's decision, the defendant KMZ, Inc., filed a motion to open the judgment of strict foreclosure and convert the judgment to a foreclosure by sale, arguing that there is substantial equity above SLS's debt to partially or wholly satisfy KMZ, Inc.'s debt.

1. The trial court erred in dismissing the plaintiff's abuse of process claim on the ground of the litigation privilege, as the claim was not within the scope of the privilege.
2. The trial court properly found that, as the plaintiff at no time had an attorney-client relationship with the defendant, the plaintiff lacked standing to bring a legal malpractice claim against him.
3. The trial court erred in dismissing the plaintiff's malicious prosecution claim on the ground of the litigation privilege, as the claim was not within the scope of the privilege.
4. The trial court properly found that the plaintiff's claims of negligent and intentional infliction of emotional distress were barred by the litigation privilege, as the defendant's conduct was privileged pursuant to *Simms* v. *Seamen* (308 Conn. 523) and *Stone* v. *Pattis* (144 Conn. App. 79).

Submitted on briefs May 10—officially released July 6, 2021

Procedural History

Action to recover damages for, inter alia, abuse of process, and for other relief, brought to the Superior Court in the judicial district of New Britain, where the court, *Aurigemma, J.*, granted the defendant's motion to dismiss; thereafter, the court denied the plaintiff's motion to reargue, and the plaintiff appealed to this court. *Affirmed in part; reversed in part; further proceedings.*

Ammar A. Idlibi, the appellant, submitted a brief (plaintiff).

Opinion

DEVLIN, J. The self-represented plaintiff, Ammar A. Idlibi, appeals from the judgment of the trial court dismissing his complaint against the defendant, Jeremiah Nii Amaa Ollennu, in its entirety. On appeal, Idlibi claims that the court erred by granting Ollennu's motion to dismiss. We reverse, in part, the judgment of the trial court.

The present case is Idlibi's third appeal to this court arising from the dissolution of his marriage to his former wife, Katie N. Conroy. Conroy commenced a marital dissolution action on May 26, 2015. Ollenu represented

Conroy in the dissolution proceedings. On August 15, 2016, following a trial, the trial court, *Carbonneau*, *J.*, rendered judgment dissolving the parties' marriage and issuing financial orders. *Conroy* v. *Idlibi*, Superior Court, judicial district of New Britain, Docket No. FA-15-6029313-S (August 15, 2016), aff'd, 183 Conn. App. 460, 193 A.3d 663, cert. denied, 330 Conn. 921, 194 A.3d 289 (2018). Idlibi appealed from the dissolution judgment, claiming that "the court erred (1) by finding that neither party bore greater responsibility for the breakdown of the marriage and (2) in making financial awards that were favorable to [Conroy]." *Conroy* v. *Idlibi*, 183 Conn. App. 460, 461, 193 A.3d 663, cert. denied, 330 Conn. 921, 194 A.3d 289 (2018). This court affirmed the judgment of the trial court.[1] Id. Our Supreme Court then denied Idlibi's petition for certification to appeal. *Conroy* v. *Idlibi*, 330 Conn. 921, 194 A.3d 289 (2018). Thereafter, Idlibi moved to open the dissolution judgment, alleging that Conroy committed fraud in (1) denying, in an interrogatory, that during the marriage, she had sexual relations with someone other than her spouse, and (2) falsely testifying that Idlibi had assaulted her. *Conroy* v. *Idlibi*, 204 Conn. App. 265, 266, A.3d (2021). Idlibi alleged that Conroy had told Ollennu, her attorney, that she was having sexual relations with another man, and that, despite having this knowledge, Ollennu notarized the interrogatory response denying the same. Id., 291 n.2. (*Flynn*, *J.*, dissenting). The trial court denied the motion to open and, in a divided opinion, this court affirmed. Id., 266. Idlibi's petition for certification to appeal was granted in part by our Supreme Court. *Conroy* v. *Idlibi*, Conn. , A.3d (2021).

[1] This court dismissed as moot that portion of the appeal challenging the trial court's finding that if Idlibi obtained a monetary judgment against Conroy in a separate proceeding, that would be considered a significant change in circumstances warranting review of Idlibi's alimony obligation. *Conroy* v. *Idlibi*, supra, 183 Conn. App. 461 n.2.

On December 21, 2018, Idlibi instituted the present action against Ollennu, alleging various legal claims arising from his alleged role in Conroy's purportedly false interrogatory response and false testimony that Idlibi had assaulted her. Specifically, Idlibi alleges that Ollennu committed (1) abuse of process, (2) legal malpractice, (3) malicious prosecution, (4) negligent infliction of emotional distress, and (5) intentional infliction of emotional distress. On February 19, 2019, Ollennu, pursuant to Practice Book § 10-30, filed a motion to dismiss Idlibi's complaint.[2] On February 27, 2019, the court granted Ollennu's motion, dismissing the complaint in its entirety on the grounds that (1) Idlibi did not have an attorney-client relationship with Ollennu, and (2) the doctrine of absolute immunity applies to Ollennu's conduct. On March 7, 2019, Idlibi, pursuant to Practice Book § 11-12, filed a motion to reargue. That motion was denied by the court. Idlibi then appealed to this court, claiming that the trial court erred by granting Ollennu's motion to dismiss.[3] Additional facts will be set forth as necessary.

"[Our] review of the trial court's ultimate legal conclusion and resulting [decision to] grant [a] motion to dismiss will be de novo. . . . In any consideration of the trial court's dismissal, we take the facts as alleged in the complaint as true and [construe] them in a manner most favorable to the pleader." (Citation omitted; internal quotation marks omitted.) *Morgan* v. *Hartford Hospital*, 301 Conn. 388, 395, 21 A.3d 451 (2011). "As the doctrine of absolute immunity concerns a court's subject matter jurisdiction . . . we are mindful of the well established notion that, in determining whether a court has subject matter jurisdiction, every presumption

[2] Practice Book § 10-30 provides in relevant part that "lack of jurisdiction over the subject matter" is a ground for dismissal.

[3] Ollennu did not file an appellate brief. Therefore, this appeal will be considered on the basis of Idlibi's brief and the record only.

favoring jurisdiction should be indulged. . . . The question . . . is whether the facts as alleged in the pleadings, viewed in the light most favorable to the plaintiff, are sufficient to survive dismissal on the grounds of absolute immunity. . . . Our case law differentiates between actions based on alleged misconduct by an attorney in his role as advocate, such as defamation and fraud, and actions that challenge the underlying purpose of the litigation itself, such as vexatious litigation and abuse of process. . . . For the former category, the law protects attorneys from suit in order to encourage zealous advocacy on behalf of their clients, unrestrained by the fear of exposure to tort liability." (Citations omitted; internal quotation marks omitted.) *Perugini* v. *Giuliano*, 148 Conn. App. 861, 873, 89 A.3d 358 (2014). With these principles in mind, we review each count of Idlibi's complaint in turn.

I

ABUSE OF PROCESS

In the first count of his complaint, Idlibi alleges that Ollennu "misused the legal process . . . to accomplish the unlawful ulterior purpose of misleading the [trial] court and winning the [dissolution] case." Specifically, Idlibi claims that Ollennu "abus[ed] the legal process of sworn [i]nterrogatories . . . in an improper manner for the ulterior purpose of presenting false evidence [to] the court." The court dismissed this claim, finding that it was "barred by the doctrine of absolute immunity/litigation privilege."[4]

"Connecticut has long recognized the litigation privilege. . . . The general rule is that defamatory words spoken [on] an occasion absolutely privileged, though spoken falsely, knowingly, and with express malice, impose no liability for damages recoverable in an action

[4] We note that the terms "absolute immunity" and "litigation privilege" historically have been used interchangeably by the courts. See *Simms* v. *Seaman*, 308 Conn. 523, 525 n.1, 69 A.3d 880 (2013).

in slander . . . . [T]he privilege extends to judges, counsel and witnesses participating in judicial proceedings . . . and acts of [s]tate. . . . [T]he privilege was founded [on] the principle that in certain cases it is advantageous for the public interest that persons should not be in any way fettered in their statements, but should speak out the whole truth, freely and fearlessly. . . . [Our Supreme] [C]ourt described the privilege as being rooted in the public policy that a judge in dealing with the matter before him, a party in preparing or resisting a legal proceeding, [or] a witness in giving evidence in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel. . . . This jurisdiction also has recognized the importance of access to the courts and the existence of remedies other than lawsuits as reasons for granting absolute immunity to attorneys for making allegedly defamatory statements." (Citations omitted; internal quotation marks omitted.) *Simms* v. *Seaman*, 308 Conn. 523, 536–40, 69 A.3d 880 (2013).

The coverage afforded by the litigation privilege, however, is not without its limits. Our Supreme Court has held that in "an abuse of process case . . . attorneys are not protected by absolute immunity against claims alleging the pursuit of litigation for the unlawful, ulterior purpose of inflicting injury on the plaintiff and enriching themselves and their client, despite knowledge that their client's claim lacked merit, because such conduct constituted the use of legal process in an improper manner or primarily to accomplish a purpose for which it was not designed." Id., 540–41. In an abuse of process action, "the exigencies of the adversary system have not been deemed to require absolute immunity for attorneys." *Mozzochi* v. *Beck*, 204 Conn. 490, 495, 529 A.2d 171 (1987). Accordingly, "an attorney may be sued for misconduct by those who have sustained a

special injury because of an unauthorized use of legal process." Id.

In the present case, taking the facts as alleged in the first count of the complaint as true and construing them in a manner favorable to the pleader, we conclude that Idlibi alleges a claim of abuse of process against Ollennu.[5] Because such a claim is not within the scope of the litigation privilege, we conclude that the court erred in dismissing the claim on this ground. Accordingly, we reverse the judgment of the court as to the abuse of process claim in count one.

II

LEGAL MALPRACTICE

In the second count of his complaint, Idlibi alleges that Ollennu engaged in legal malpractice by "deviat[-ing] from the [requisite] standard of care by violating the Rules of Professional Conduct . . . ." In dismissing the claim of legal malpractice, the court found that Idlibi lacked standing because he never had an attorney-client relationship with Ollennu. Lack of standing implicates the court's subject matter jurisdiction. See *Deutsche Bank National Trust Co.* v. *Thompson*, 163 Conn. App. 827, 831–32, 136 A.3d 1277 (2016).

It is well established that a plaintiff lacks standing to bring a legal practice action unless he or she can "establish . . . the existence of an attorney-client relationship . . . ." *Mayer* v. *Biafore*, *Florek & O'Neill*, 245 Conn. 88, 92, 713 A.2d 1267 (1998). Because it is clear that an attorney-client relationship at no time existed between Idlibi and Ollennu, we conclude that the court properly found that Idlibi lacked standing to bring a legal malpractice claim against Ollennu. Accordingly, we affirm the judgment of the court dismissing Idlibi's claim of legal malpractice.

[5] We express no view as to the legal sufficiency of this allegation.

III

MALICIOUS PROSECUTION

In the third count of his complaint, Idlibi alleges that Ollennu engaged in malicious prosecution. Specifically, he claims that Ollennu "counseled his client to mislead [a] police detective for the purpose of procuring the institution of criminal proceedings against [Idlibi]," and that "[b]y counseling his client to continue asserting an accusation of assault against [Idlibi], Ollennu procured the institution of criminal proceedings against [him]." The court dismissed this claim after finding that it was barred by the doctrine of litigation privilege.

As discussed previously, the coverage afforded by the litigation privilege is not limitless. In addressing the limits of the litigation privilege, our Supreme Court has specifically held "that absolute immunity does not bar claims against attorneys for . . . malicious prosecution." *Simms* v. *Seaman*, supra, 308 Conn. 541. "Both [malicious prosecution and abuse of process] deal with the same problem—the perversion of the legal system." 1 F. Harper et al., Harper, James and Gray on Torts (3d Ed. 2006) § 4.9, p. 561. The policy considerations that counsel in favor of extending absolute immunity to attorneys for claims of defamation or fraud do not support extending such immunity to abuse of process or malicious prosecution.

In the present case, taking the alleged facts as true and construing them in favor of the pleader, we conclude that Idlibi has alleged a claim of malicious prosecution against Ollennu.[6] Because a claim of malicious prosecution is not within the scope of the litigation privilege, the court erred in dismissing the malicious prosecution claim in count three on this ground. Accordingly, we reverse the judgment of the court in this regard.

[6] Again, we express no view as to the legal sufficiency of this allegation.

IV

INFLICTION OF EMOTIONAL DISTRESS

In the fourth and fifth counts of his complaint, Idlibi alleges that Ollennu, through his conduct, either negligently or intentionally, inflicted emotional distress on him. Specifically, Idlibi claims that "[Ollennu's] conduct during [the meeting he and Conroy had with a police detective] not only procured the institution of criminal charges against [him], but also directly inflicted severe emotional distress and mental anguish on [him] . . . ." The court dismissed these claims after finding that they were barred by the doctrine of litigation privilege.

Our Supreme Court has held that claims alleging infliction of emotional distress that arise from the privileged conduct of an attorney are barred by the litigation privilege. See *Simms* v. *Seaman*, supra, 308 Conn. 569–70; see also *Petyan* v. *Ellis*, 200 Conn. 243, 246, 510 A.2d 1337 (1986) (holding that litigation privilege applies to claims of intentional infliction of emotional distress); *Stone* v. *Pattis*, 144 Conn. App. 79, 98, 72 A.3d 1138 (2013) (holding that litigation privilege applies to claims of negligent infliction of emotional distress).

In the present case, Ollennu's conduct on which Idlibi relies for these claims was privileged, as Ollennu was acting in his capacity as counsel for Conroy. Because Ollennu's conduct at issue here was privileged, we conclude that the court properly found that these claims were barred by the litigation privilege. Accordingly, we affirm the judgment of the court as to its dismissal of Idlibi's claims of negligent and intentional infliction of emotional distress.

The judgment is reversed only with respect to the dismissal of the abuse of process and malicious prosecution claims in counts one and three and the case is remanded for further proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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SUPREME COURT PENDING CASES

STATE *v.* JOEL ALEXANDER, SC 20316
Judicial District of New Haven

Criminal; Whether Trial Court Properly Concluded That Defendant Was Not Entitled to New Trial Because Improper Admission of His Statements to Police in Violation of *State* v. *Purcell* Was Not Harmful. The victim, Durell Law, was shot and killed during an attempted robbery in 2014. Thereafter, the defendant, who was a suspect in the shooting, was interviewed by detectives after signing a written waiver of his *Miranda* rights. During the interview, the defendant denied any involvement in the crime. He was subsequently arrested and charged with felony murder, attempt to commit robbery, and conspiracy to commit robbery in 2016. The defendant elected a court trial before a three-judge panel on the felony murder charge and a court trial before the presiding judge of the panel on the remaining charges. The defendant moved to suppress his interview statements, claiming that the statements were obtained in violation of *Davis* v. *United States*, 512 U.S. 452 (1994), because the detectives continued to interrogate him after he made an unambiguous request for the assistance of counsel. The trial court, however, denied the motion to suppress. After trial, the defendant was found guilty of all charges in 2019. The trial court reconsidered its decision on the defendant's motion to suppress, however, after the Supreme Court issued its opinion in *State* v. *Purcell*, 331 Conn. 318 (2019). In *Purcell*, the Supreme Court concluded that *Davis*' standard does not adequately safeguard *Miranda*'s right to the advice of counsel during a custodial interrogation and held that, under the state constitution, "if a suspect makes an equivocal statement that arguably can be construed as a request for counsel, interrogation must cease except for narrow questions designed to clarify the earlier statement and the suspect's desire for counsel." Here, the trial court found that the defendant had made a statement during his police interview that could arguably be construed as a request for counsel and that any additional statements should have been suppressed under *Purcell* because the detectives failed to clarify the defendant's ambiguous request for counsel before continuing with the interrogation. The court, however, determined that the defendant was not entitled to a new trial because the improper admission of his interview statements was harmless in light of the fact that (1) the court did not consider the statements in determining the defendant's guilt and (2) the statements were not inculpatory. The defendant appeals directly from his conviction to the Supreme Court

under General Statutes § 51-199 (b) (3) and claims that the trial court erred in determining that he was not entitled to a new trial. In support, the defendant argues that the trial court improperly applied *Purcell* to its own deliberations, that the improper admission of his interview statements permeated the entire trial proceedings and impacted the defense, and that, even if harmless error analysis is appropriate, the state cannot demonstrate beyond a reasonable doubt that the improper admission of his interview statements was harmless because (1) the testimony of its witnesses was weak and (2) the statements were generally inculpatory.

PETER BORIA *v.* COMMISSIONER OF CORRECTION, SC 20459
Judicial District of Tolland

Habeas; Whether Appellate Court Properly Upheld Habeas Court's Sua Sponte Dismissal of Habeas Petition under Practice Book § 23-29 Prior to Appointment of Counsel for Self-Represented Petitioner and Without Notice and Opportunity to Be Heard. The petitioner was convicted and sentenced to twenty years of incarceration after pleading guilty to charges of robbery in the first degree and being a persistent dangerous felony offender in 2009. On August 8, 2016, he filed his third petition for a writ of habeas corpus, as a self-represented litigant. He claimed that he had not voluntarily entered his guilty plea and that legislative amendments in 2013 and 2015 limiting the scope of the risk reduction earned credit (RREC) statutes, which provided that certain prisoners may be eligible to earn risk reduction credits to reduce their sentences and advance their parole eligibility dates, constituted a violation of the ex post facto clause of the federal constitution. The habeas petition was completed on a standard form on which the petitioner requested a fee waiver and the appointment of counsel; the trial court granted the request. On September 7, 2016, however, the habeas court rendered a judgment of dismissal without a hearing and notice to the parties. The habeas court dismissed the petitioner's RREC claim for lack of jurisdiction under Practice Book § 23-29 (1) because the petitioner had no cognizable liberty interest in parole eligibility. It further dismissed the petitioner's guilty plea claim under Practice Book § 23-29 (3) because the claim had been presented in a prior habeas petition that was denied and the petition before it did not state new facts or proof of new evidence that was not reasonably available at the time of the prior petition. The petitioner appealed upon the habeas court's grant of certification. He alleged in relevant part that the habeas court improp-

erly dismissed his RREC claim for lack of jurisdiction under Practice Book § 23-29 (1) because it did so without first holding a hearing at which he was present in violation of Practice Book § 23-40, which provides in relevant part that "[t]he petitioner . . . shall have the right to be present at any evidentiary hearing and at any hearing or oral argument on a question of law which may be dispositive of the case." The Appellate Court (186 Conn. App. 332) disagreed, noting its own precedent establishing that a hearing is not required under Practice Book § 23-40 where the habeas court is acting pursuant to its authority under Practice Book § 23-29 to dismiss a petition on its own motion. The court determined that the habeas court properly concluded that it lacked jurisdiction over the petitioner's RREC claim and therefore further determined that it properly dismissed the petition as to the claim without first holding a hearing at which the petitioner was present. The Appellate Court rejected the remainder of the petitioner's claims and affirmed the habeas court's judgment. The petitioner has been granted certification to appeal, and the Supreme Court will decide whether the Appellate Court properly upheld the habeas court's sua sponte dismissal of the petition for a writ of habeas corpus under Practice Book § 23-29 prior to the appointment of counsel for the self-represented petitioner and without providing the petitioner with notice and an opportunity to be heard.

JUDSON BROWN *v.* COMMISSIONER OF CORRECTION, SC 20474
Judicial District of Tolland

Habeas; Whether Appellate Court Properly Dismissed Appeal from Habeas Court's Sua Sponte Dismissal of Habeas Petition under Practice Book § 23-29 Prior to Appointment of Counsel and Without Notice and an Opportunity to Be Heard. This appeal arises from the petitioner's fourth state petition for a writ of habeas corpus, which he filed as a self-represented litigant on October 29, 2018. He claimed that he was not properly canvassed when he indicated to the trial court in his criminal trial that he wished to forgo a hearing to challenge its determination that he was ineligible for public defender services. The habeas petition was completed on a standard form on which the petitioner requested a fee waiver and the appointment of counsel. The fee waiver was granted, but counsel was not appointed before the habeas court sua sponte dismissed the petition without a hearing and notice to the parties on November 19, 2018. The habeas court entered an order stating that the petition was dismissed pursuant to Practice Book § 23-29 (3), which provides in

relevant part that "[t]he judicial authority may, at any time, upon its own motion . . . dismiss the petition . . . if it determines that . . . the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition." The habeas court determined that the petitioner's claim was precluded under the doctrine of res judicata because it had been previously litigated in two of the prior habeas actions. The habeas court further denied the petitioner's petition for certification to appeal its dismissal. The petitioner appealed, and the Appellate Court (196 Conn. App. 902) dismissed the appeal in a per curiam decision. In this certified appeal by the petitioner from the Appellate Court's decision, the Supreme Court will decide whether the Appellate Court properly dismissed the petitioner's appeal challenging the propriety of the habeas court's sua sponte dismissal of the petition for a writ of habeas corpus under Practice Book § 23-29 prior to the appointment of counsel for the self-represented petitioner and without providing the petitioner with notice and an opportunity to be heard.

THOMAS PRIORE *v.* STEPHANIE HAIG, SC 20511
Judicial District of Stamford-Norwalk at Stamford

Absolute Litigation Immunity; Defamation; Whether Defendant's Public Statements About Plaintiff at Town Planning and Zoning Commission Meeting Were Entitled to Absolute Litigation Immunity. The plaintiff brought the underlying defamation action based on allegedly defamatory statements made by the defendant at a public hearing before the Greenwich Planning and Zoning Commission (commission) on the plaintiff's application for a special permit to construct a new residence and new sewer line on his property. At the hearing, the defendant addressed the commission to share her concerns regarding the plaintiff's application. In addition to her concerns regarding the effects of the proposed construction, she stated that the plaintiff had not been "trustworthy," had a "serious criminal past," and had paid more than $40,000,000 in fines to the Securities and Exchange Commission. Parts of the defendant's statements were later published in a local newspaper. The defendant filed a motion to dismiss the action, claiming that the trial court lacked subject matter jurisdiction because her statements were entitled to absolute litigation immunity. The trial court agreed and granted the motion to dismiss. The plaintiff appealed, claiming that the defendant's statements were not entitled to absolute litigation immunity and arguing that, contrary

to the trial court's conclusion, the commission's proceeding was not quasi-judicial in nature. The Appellate Court (196 Conn. App. 675) disagreed, explaining that the commission's proceeding was quasi-judicial in nature because the commission, among other things, exercised its discretion, engaged in fact-finding, and heard witness testimony. Moreover, the court determined that public policy interests in encouraging citizen participation in local government decision-making supported a finding that the proceeding was quasi-judicial in nature. The plaintiff further argued that, even if the commission's proceeding was quasi-judicial in nature, the trial court erred in concluding that the defendant's statements about the plaintiff's criminal past and trustworthiness were pertinent to the subject matter of the commission's proceeding. The court rejected the claim and determined that the defendant's statements were pertinent on the subject of the plaintiff's credibility, which he put into issue by submitting a special permit application that contained representations on which the commission would rely in its review. Accordingly, the Appellate Court affirmed the trial court's judgment. The plaintiff was granted certification to appeal, and the Supreme Court will decide whether the Appellate Court correctly concluded that the defendant's public statements about the plaintiff at the meeting of the commission were entitled to absolute immunity, thereby depriving the trial court of subject matter jurisdiction over the plaintiff's defamation action.

RAY BOYD *v.* COMMISSIONER OF CORRECTION, SC 20515
Judicial District of Tolland at Rockville

Habeas; Statutory Interpretation; Whether the Language of General Statutes §§ 18-7a (c) and 54-125a (f) Supports the Petitioner's Claim that His Earned Statutory Good Time Credit Reduces the Sentence Used to Calculate His Parole Eligibility Date. In 1992, the petitioner was convicted of murder and sentenced to fifty years incarceration without the possibility of parole for a crime he committed when he was seventeen years old. Under Public Acts 2015, No. 15-84, now codified at General Statutes § 54-125a (f) (1), the petitioner will become parole eligible after serving 60 percent of his fifty year sentence on September 13, 2022. In calculating the petitioner's parole eligibility date, the respondent Commissioner of Correction subtracted sixty-seven days of presentence confinement credit from the fifty year sentence and multiplied the difference by 60 percent pursuant to § 54-125a (f). The petitioner subsequently brought a habeas action claiming that the respondent improperly calculated his parole eligibility

date by failing to apply the statutory good time credit he had earned under General Statutes § 18-7a (c) to reduce the sentence used to calculate his parole eligibility date under § 54-125a. The respondent moved to dismiss the action pursuant to Practice Book § 23-29 (2) for failure to state a claim upon which habeas relief could be granted. The habeas court granted the motion to dismiss, finding that the petitioner's statutory construction claim failed to state a claim upon which habeas relief could be granted because the language of §§ 18-7a and 54-125a (f) does not support his claim. On the granting of his petition for certification, the petitioner appealed and claimed that the court wrongly determined that the statutory language does not support his claim. He argued that, if the legislature had intended to exclude statutory good time credit from the juvenile parole procedures, it would have stated that intention expressly. The Appellate Court (199 Conn. App. 575) rejected his claim and affirmed the judgment of the habeas court. The court found no language in §§ 18-7a and 54-125a to indicate that the legislature intended that an inmate's sentence should be reduced by good time credit before calculating his parole eligibility date. The court reasoned that, because a person has no constitutional or inherent right to be conditionally released before the expiration of his sentence, the legislature would have stated explicitly its intention to apply statutory good time credit to reduce a person's parole eligibility date. The court also noted that, while the legislature expressly stated in General Statutes §§ 54-125a (a) and (d) and 54-125 whether good time credit applied to reduce a person's sentence before that sentence was used to calculate his parole eligibility date, it did not do so in §§ 18-7a and 54-125a (f). The Supreme Court granted the petitioner certification to appeal and will decide whether the language of §§ 18-7a (c) and 54-125a supports the petitioner's claim that his good time credit reduces the sentence used to calculate his parole eligibility date.

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

Jessie Opinion
Chief Staff Attorney

NOTICE OF CONNECTICUT STATE AGENCIES

CONNECTICUT RETIREMENT SECURITY AUTHORITY

Notice of Intent to Adopt Procedures

In accordance with Section 1-121(a) of the Connecticut General Statutes, notice is hereby given that the Connecticut Retirement Security Authority (the ''Authority'') is proposing to adopt the operating procedures outlined below for the purpose of operating the Authority pursuant to Section 31-418 of the Connecticut General Statutes. The procedures include: (a) Notice to Qualified Employers regarding Obligations under the Connecticut Retirement Security Exchange; (b) Providing Informational Materials to Employees Following Registration; (c) Initial Opt Out Period; (d) Investment Default; and (e) Identifying Exempt Employers through Form 5500 Filing.

The proposed procedures are available by sending an email to the Authority at Jessica.Muirhead@ct.gov (please include ''Operating Procedures'' in the subject line and specify which documents you wish to receive).

Interested persons wishing to present their views on these procedures are invited to do so in writing within thirty (30) days following publication of this notice. Comments can be submitted electronically to the Authority at Jessica.Muirhead@ct.gov (please include ''Operating Procedures'' in the subject line). Comments can also be mailed to Ms. Jessica Muirhead, Senior Program Administrator, Office of the State Comptroller, 165 Capitol Avenue, Hartford, CT 06106-1775.

NOTICE

Notice of Interim Suspension of Attorney and Appointment of Trustee

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on May 19, 2021, in Docket No. HHD-CV20-6125836-S, Jeffrey D. Cedarfield, Juris No. 417470 of Canton, Connecticut, was placed on interim suspension until further order of the court, effective immediately upon completion of his current suspension imposed by this Court on December 14, 2020 and which terminates on June 1, 2021.

Pursuant to Practice Book § 2-64, Attorney Patrick Rosenberger, Juris No. 309309 of Hartford, Connecticut, shall continue as Trustee to take such steps as are necessary to take control of the Respondent's clients' funds accounts. The Respondent shall cooperate with the Trustee in this regard. The Respondent shall not deposit to, or disburse any funds from his clients' funds account.

The Respondent shall comply with all terms and conditions of Practice Book § 2-47B (Restrictions on the Activities of Deactivated attorneys).

The Respondent shall apply for reinstatement pursuant to Practice Book § 2-53 if the Respondent remains suspended for one (1) year or more (including the period of suspension imposed on December 14, 2020).

David Sheridan
Presiding Judge