CONNECTICUT LAW JOURNAL

Published in Accordance with General Statutes Section 51-216a

VOL. LXXXIII No. 6 August 10, 2021 267 Pages

Table of Contents

CONNECTICUT REPORTS

State *v.* Carey, 337 C 463 37
Murder; self-defense; certification from Appellate Court; whether Appellate Court correctly concluded that any error relating to admission of witness' testimony, which was admitted to demonstrate that victim had been afraid of defendant, was harmless.

State *v.* Jones, 337 C 486 60
Murder; carrying pistol without permit; criminal possession of firearm; certification from Appellate Court; claim that Appellate Court incorrectly concluded that trial court improperly had declined to give jury special credibility instruction regarding jailhouse informants in light of benefits that witness expected to receive from state in exchange for his cooperation; claim that rule in State *v.* Patterson *(276 Conn. 452), requiring special credibility instruction with respect to testimony of jailhouse informants, should apply to any prison inmate who approaches police with information regarding inculpatory statements made by defendant, regardless of whether inculpatory statements were made in prison environment; whether trial court's failure to give special credibility instruction was harmful.*

State *v.* Manuel T., 337 C 429 3
Risk of injury to child; sexual assault first degree; sexual assault second degree; sexual assault fourth degree; certification from Appellate Court; claim that this court should overrule prior Appellate Court precedent and adopt standard under which statements made by minor child abuse victim during forensic interview can be admitted under medical treatment exception to hearsay rule only if victim's primary purpose in making statements was to obtain medical diagnosis or treatment; whether Appellate Court incorrectly determined that trial court had not abused its discretion in excluding, for lack of authentication, screenshots of certain text messages purportedly sent by victim to defendant's niece.

State *v.* Dawson (Order) (replacement page), 333 C 906. v
Volume 337 Cumulative Table of Cases 101

CONNECTICUT APPELLATE REPORTS

Bellerive *v.* Grotto, Inc., 206 CA 702 . . . . . 132A
Workers' compensation; whether Compensation Review Board properly reversed decision of Workers' Compensation Commissioner determining that certain insurance coverage was in effect on date of plaintiff's injury; claim that defendant insurer's notice of cancellation of policy pursuant to statute (§ 31-348) was ineffective because it was not made in accordance with requirements of statute (§ 31-321); whether certain common-law theories supported finding that insurance coverage was in place on date of loss under facts of case.

Capone *v.* Nizzardo, 206 CA 645. . . . . 75A
Partition of real property; claim that trial court committed plain error when it determined highest and best use of property without reviewing applicable zoning regulations; whether plaintiff met either prong of plain error doctrine; claim that trial court's determination of highest and best use of property was clearly erroneous.

(continued on next page)

Cocchia *v.* Testa, 206 CA 634 . . . . . 64A
Breach of contract; personal jurisdiction; motion to dismiss; motion to substitute; claim that trial court improperly denied postjudgment motion to dismiss for lack of personal jurisdiction because defendant was not properly cited in as defendant.
Guiliano *v.* Jefferson Radiology, P.C., 206 CA 603 . . . . . 33A
Medical malpractice; whether trial court abused its discretion by sustaining objections by defendant's counsel to certain questions posed to plaintiff's expert witness on direct examination; whether trial court abused its discretion by imposing time limitation on presentation of witness' testimony; whether time limitation imposed on witness' testimony constituted violation of plaintiff's constitutional rights.
Hasan *v.* Commissioner of Correction, 206 CA 695 . . . . . 125A
Habeas corpus; claim that habeas court improperly dismissed petitioner's third petition for writ of habeas corpus as untimely pursuant to applicable statute (§ 52-470 (d) and (e)); whether petitioner failed to overcome rebuttable presumption that he lacked good cause for filing petition beyond statutory deadline; whether petitioner's assertion of claim of actual innocence and reference to new evidence for first time at show cause hearing were sufficient to overcome presumption that delay was without good cause.
In re Annessa J., 206 CA 572. . . . . 2A
Termination of parental rights; motion for posttermination visitation; reviewability of respondent mother's unpreserved claims that trial court proceedings to terminate her parental rights held over remote platform violated her state and federal constitutional rights; reviewability of mother's claim that trial court violated her right to due process of law in denying her motion for permission to allow her expert witness to review certain information; reviewability of respondent father's claim that trial court erred in concluding that Department of Children and Families made reasonable efforts to reunify him with minor child; whether sufficient evidence in record supported trial court's conclusion that father failed to achieve personal degree of rehabilitation within a reasonable period of time pursuant to statute (§ 17a-112 (j) (3) (B) (i)); whether trial court erred in determining that termination of father's parental rights was in best interest of minor child pursuant to statutory (§ 17a-112 (k)) factors; whether trial court applied correct legal standard in denying respondent parents' motions for posttermination visitation with minor child, pursuant to statute (§ 46b-121 (b) (1)) and our Supreme Court's decision in In re Ava W. *(336 Conn. 545).*
KeyBank, N.A. *v.* Yazar, 206 CA 625 . . . . . 55A
Foreclosure; summary judgment; Emergency Mortgage Assistance Program statutory (§ 8-265ee (a)) notice; whether plaintiff's failure to comply with notice requirement of § 8-265ee (a) deprived trial court of subject matter jurisdiction; whether plaintiff may rely on notice that had been sent by original lender in prior foreclosure action that was later dismissed to satisfy its own notice requirements in separate foreclosure action.
State *v.* Morlo M., 206 CA 660 . . . . . 90A
Assault in first degree; risk of injury to child; unlawful restraint in first degree; whether state failed to prove that defendant caused victim serious physical injury,

(continued on next page)

CONNECTICUT LAW JOURNAL
(ISSN 87500973)

Published by the State of Connecticut in accordance with the provisions of General Statutes § 51-216a.

Commission on Official Legal Publications
Office of Production and Distribution
111 Phoenix Avenue, Enfield, Connecticut 06082-4453
Tel. (860) 741-3027, FAX (860) 745-2178
www.jud.ct.gov

RICHARD J. HEMENWAY, *Publications Director*

Published Weekly – Available at https://www.jud.ct.gov/lawjournal

Syllabuses and Indices of court opinions by
ERIC M. LEVINE, *Reporter of Judicial Decisions*
Tel. (860) 757-2250

The deadline for material to be published in the Connecticut Law Journal is Wednesday at noon for publication on the Tuesday six days later. When a holiday falls within the six day period, the deadline will be noon on Tuesday.

and, thus, that evidence was insufficient to support conviction of assault in first degree; whether evidence was insufficient to support conviction of risk of injury to child, where defendant was charged under portion of risk of injury statute (§ 53-21 (a) (1)) that required that he have general intent to perform act that created situation that put children's health and morals at risk of impairment; whether evidence was sufficient to support conviction of unlawful restraint in first degree; claim that defendant's intent to unlawfully restrain victim was not independent from defendant's intent to assault victim; whether trial court abused its discretion in admitting evidence of two incidents of prior misconduct in which defendant was alleged to have assaulted victim; claim that probative value of prior misconduct evidence was outweighed by prejudicial effect; claim that prior misconduct evidence was likely to arouse emotions of jurors and sympathy toward victim.

State *v.* Morlo M. (replacement pages), 198 CA 747–48 vii
Volume 206 Cumulative Table of Cases 143A

CONNECTICUT PRACTICE BOOK

Rules of Appellate Procedure 1PB

MISCELLANEOUS

Notices of Attorney Discipline 1B

ORDERS

CONNECTICUT REPORTS

VOL. 333

NOTE: This page (333 Conn. 906) is in replacement of the same numbered page that appears in the Connecticut Law Journal of 1 October 2019.

STATE OF CONNECTICUT *v.* ANDRE DAWSON

The defendant's petition for certification to appeal from the Appellate Court, 188 Conn. App. 532 (AC 40337), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the evidence was sufficient to support the defendant's conviction of criminal possession of a pistol or revolver?"

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

Erica A. Barber, assigned counsel, in support of the petition.

defense at issue was specifically provided for in the text of the statute that the defendant was charged with violating. *Ortiz* may not be relied on for the general, broad proposition that a trial court's failure to provide, sua sponte, a defense instruction constitutes plain error. See *State* v. *Martin*, 100 Conn. App. 742, 751 n.5, 919 A.2d 508, cert. denied, 282 Conn. 928, 926 A.2d 667 (2007). As our Supreme Court has aptly explained, "it would be inappropriate to place the onus on a trial court to discern, without any request from the parties, the specific defenses on which a jury should be instructed." *State* v. *Bonilla*, supra, 317 Conn. 772. Accordingly, the court was under no obligation to provide a defense of others instruction to the jury.[10]

The judgment is affirmed.

In this opinion the other judges concurred.

---

[10] We find it prudent to make the following observation on the defendant's attempted use of the defense of others defense.

As explained by our Supreme Court, "[t]he defense of others, like self-defense, is a justification defense. These defenses operate to exempt from punishment otherwise criminal conduct when the harm from such conduct is deemed to be outweighed by the need to avoid an even greater harm or to further a greater societal interest. . . . Thus, conduct that is found to be justified is, under the circumstances, not criminal. . . . All justification defenses share a similar internal structure: special triggering circumstances permit a necessary and proportional response." (Citation omitted; internal quotation marks omitted.) *State* v. *Bryan*, 307 Conn. 823, 832–33, 60 A.3d 246 (2013); see also General Statutes § 53a-19 (a). This court thoroughly explained the contours of the defense in *State* v. *Hall-Davis*, 177 Conn. App. 211, 226–27, 172 A.3d 222, cert. denied, 327 Conn. 987, 175 A.3d 43 (2017).

The defendant's theory of defense of others is that she proceeded toward the fight in order to protect Michael, not from the victim, but from Demetrius, and the victim inhibited her from doing so. The defendant cites no authority, nor are we aware of any, for the proposition that the defense of others defense is available when a defendant uses physical force on a person who interferes, i.e., the victim, with her effort to defend a party she reasonably believes is in need of defense from yet another party, who was *not* the victim for purposes of the criminal prosecution, i.e., Michael from Demetrius.

STATE OF CONNECTICUT *v.* MORLO M.* (AC 41474)

Alvord, Bright and Norcott, Js.

Syllabus

Convicted of the crimes of assault in the first degree, risk of injury to a child and unlawful restraint in the first degree in connection with the beating of the victim, who was the mother of his four minor children, the defendant appealed to this court, claiming that the evidence was insufficient to support his convictions. The defendant had dragged the victim by her hair down stairs into the basement of their home, where he kicked, punched and choked her on three consecutive nights while the children, who ranged in age from fifteen months to thirteen years, were alone on the upper floors of the home. After the defendant left the house on the third day, the victim was brought to a medical center, where staff members observed bruising on her scalp, face, chest, back, legs, arms and left side. The victim also was determined to have had a subconjunctival hemorrhage in her left eye, a broken rib and fluid in her pelvic region. *Held*:

1. The defendant could not prevail on his claim that the state failed to prove that he caused the victim serious physical injury and, thus, that the evidence was insufficient to support his conviction of assault in the first degree: the jury reasonably could have found that the defendant caused the victim to suffer either serious disfigurement or a serious loss or impairment of the function of any bodily organ and, thus, a serious physical injury, as the victim and C, a medical center staff member, testified consistently with one another as to the extensive bruising that covered much of the victim's body, the noticeable injuries to her head and face, and that the victim had lost consciousness during one of the defendant's beatings of her, which the jury was free to credit or disregard; moreover, C testified that the bruising was literally everywhere on the body of the victim, who had a subconjunctival hemorrhage in her left eye, and a police officer who took the victim's statement at the medical center saw that she was missing hair and had a swollen face and a bloodshot eye.
2. The defendant's claim that the evidence was insufficient to support his conviction of risk of injury to a child was unavailing; the jury reasonably could have inferred that the defendant put the children at risk of impairment of their health or morals, as the children had no access to parental

* The defendant's motion to open the judgment was granted on October 20, 2020. This opinion has been superseded by *State* v. *Morlo M.*, 206 Conn. App. 660, A.3d (2021).

In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

CONNECTICUT REPORTS

Vol. 337

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* MANUEL T.*
(SC 20250)

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

Syllabus

Convicted of risk of injury to a child, sexual assault in the first degree, sexual assault in the second degree, and sexual assault in the fourth degree in connection with his alleged sexual abuse of the victim, J, the defendant appealed to the Appellate Court, claiming that the trial court's admission of a video recording of a forensic interview of J and exclusion of screenshots depicting two text messages purportedly sent by J to the defendant's niece, V, constituted harmful error. The Appellate Court upheld the defendant's conviction, concluding that neither evidentiary ruling was an abuse of the trial court's discretion. The Appellate Court specifically concluded that the statements that J made during the interview were admissible under the medical treatment exception to the hearsay rule and that V's testimony was insufficient to authenticate the text messages and that there was not sufficient additional corroboration of V's testimony. On the granting of certification, the defendant appealed to this court. *Held*:

1. This court rejected the defendant's claim that it should overrule prior Appellate Court precedent and adopt a standard under which statements made by a minor child abuse victim during a forensic interview can be admitted under the medical treatment exception to the hearsay rule only if the victim's primary purpose in making those statements was to obtain a medical diagnosis or treatment.
2. The Appellate Court incorrectly determined that the trial court had not abused its discretion in excluding, for lack of authentication, the screenshots of the text messages purportedly sent by J to V: the defendant established a prima facie case of authentication through V's testimony, and any doubts as to V's credibility or as to the source of the messages went to the weight, rather than to the admissibility, of the text messages; moreover, the exclusion of the text messages was not harmless because the state's case was not particularly strong insofar as there was no physical evidence or contemporaneous observations of the alleged sexual abuse, the only evidence of the abuse came from J's delayed disclosure, and the testimony of J's younger sister called J's veracity and motives into question; furthermore, the text messages, if deemed authentic by the jury, could have been used to impeach one of J's statements

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

during her interview and could have been viewed by jurors as evidence of J's motivation to fabricate her allegations against the defendant; accordingly, the case was remanded for a new trial.

Argued June 3—officially released November 19, 2020**

Procedural History

Substitute information charging the defendant with four counts of the crime of risk of injury to a child, three counts of the crime of sexual assault in the first degree, and two counts of the crime of sexual assault in the second degree, and with one count each of the crimes of sexual assault in the fourth degree and tampering with a witness, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; verdict and judgment of guilty of four counts of risk of injury to a child, three counts of sexual assault in the first degree, two counts of sexual assault in the second degree, and one count of sexual assault in the fourth degree, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Alvord*, *Bright* and *Bear*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

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

Ronald G. Weller, senior assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Elizabeth Tanaka*, former assistant state's attorney, for the appellee (state).

Jennifer B. Smith filed a brief for the Connecticut Criminal Defense Lawyers Association as amicus curiae.

** November 19, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

ROBINSON, C. J. Following a jury trial, the defendant, Manuel T., was convicted of six counts of sexual assault and four counts of risk of injury to a child arising from the sexual abuse of his girlfriend's daughter, J.[1] The defendant now appeals, upon our grant of his petition for certification,[2] from the judgment of the Appellate Court affirming the judgment of conviction. See *State* v. *Manuel T.*, 186 Conn. App. 51, 53, 198 A.3d 648 (2018). On appeal, the defendant claims that the Appellate Court improperly upheld (1) the admission into evidence of a video recording of a forensic interview of J by a nonmedical professional under the medical diagnosis and treatment exception to the hearsay rule, § 8-3 (5) of the Connecticut Code of Evidence, because medical care was not the "primary purpose" of the interview, and (2) the exclusion of screenshot photographs of text messages purportedly sent by J to the defendant's niece on the ground that they had not been sufficiently authenticated. We disagree with the defendant's claim that a primary purpose standard applies to the medical

[1] The defendant was convicted of two counts of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1), one count of sexual assault in the first degree in violation of § 53a-70 (a) (2), two counts of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1), one count of sexual assault in the fourth degree in violation of General Statutes § 53a-73a (a) (1) (E), and four counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2). The defendant also was charged with one count of tampering with a witness in violation of General Statutes § 53a-151. After the jury was unable to reach a verdict on that count, the state entered a nolle prosequi as to that count.

[2] We granted the defendant's petition for certification to appeal to this court, limited to the following issues: (1) "Did the Appellate Court apply the proper standard in determining that, in a criminal prosecution for sexual abuse of a child, hearsay statements made during a forensic interview of the child complainant are admissible under § 8-3 (5) of the Connecticut Code of Evidence?" And (2) "Did the Appellate Court properly conclude that the trial court did not abuse its discretion by excluding from evidence certain screenshots of text messages?" *State* v. *Manuel T.*, 330 Conn. 968, 200 A.3d 189 (2019).

treatment exception. We agree, however, that the Appellate Court incorrectly concluded that the trial court had properly excluded the text messages, and we further conclude that this evidentiary error requires a new trial. Accordingly, we reverse the judgment of the Appellate Court.

The record reveals the following undisputed facts and procedural history. During all relevant times, J lived with the defendant, whom she considered her stepfather,[3] her mother, her younger sister, and her younger brother. J's biological father was mostly absent from her life, in part due to periods of incarceration.

On March 28, 2014, when J was seventeen years old, she reported to her boyfriend, and then her family, and then the police, that the defendant had sexually abused her over the course of many years. In accordance with police protocol, J was referred to the Greater Hartford Children's Advocacy Center (advocacy center) at Saint Francis Hospital and Medical Center for a forensic interview.[4] On April 1, 2014, J participated in that interview, which was conducted by Lisa Murphy-Cipolla, the clinical services coordinator at the advocacy center. Although Murphy-Cipolla interviewed J alone, their conversation was observed through a one-way mirror by Claire Hearn, a police detective, and Audrey Courtney, a pediatric nurse practitioner. Consistent with the standard practice of the advocacy center, the interview was video recorded.

[3] J referred to the defendant as her stepfather, but also as her mother's boyfriend. Because the defendant also refers to himself as her stepfather, and his legal relationship to J is not relevant to any legal issue in the case, for convenience, we treat his status as J's stepfather.

[4] Although the Appellate Court referred to the advocacy center's interview as a "diagnostic" interview; *State* v. *Manuel T.*, supra, 186 Conn. App. 54; as did the state and the advocacy center's interviewer in her testimony at trial, the statutory scheme designates it as a "forensic" interview. General Statutes § 17a-106a (e). Therefore, we use the statutory term, as we have done in other cases. See, e.g., *State* v. *Maguire*, 310 Conn. 535, 538, 78 A.3d 828 (2013).

During the interview, J reported that the defendant had sexually abused her over an approximate seven year period, after school and while her mother was at work. She told Murphy-Cipolla that, starting when she was eight or nine years old, the defendant had, on numerous occasions, touched her inappropriately underneath her clothes. J also disclosed that, when she turned fifteen years old, the defendant had forced her to have vaginal and anal intercourse with him. The defendant subsequently was arrested and charged with six counts of sexual assault and four counts of risk of injury to a child. See footnote 1 of this opinion.

The trial court held a pretrial hearing to determine whether the video recording of the forensic interview would be admissible at trial. As an offer of proof, the state presented the testimony of Murphy-Cipolla and played a partially redacted version[5] of the video recording. Murphy-Cipolla testified regarding her background, the purposes and process of conducting such interviews, and the circumstances of her interview of J. The state argued that the video recording was admissible pursuant to the medical diagnosis and treatment exception to the hearsay rule. See Conn. Code Evid. § 8-3 (5). It noted that, if necessary, it could establish through Hearn's testimony that J had been referred for a medical evaluation after the interview. The defendant objected to the admission of the video recording, arguing that, except for a couple of J's statements, the interview statements did not satisfy the medical treatment hearsay exception because J was not seeking medical diagnosis or treatment in the interview and her statements were not made to a medical professional.

At the conclusion of the hearing, the court rendered an oral decision overruling the defendant's objection.

[5] The state voluntarily redacted, with the approval of the defendant and the trial court, certain statements, including ones that implicated the rape shield law, General Statutes § 54-86f, and others that were deemed irrelevant.

The court concluded that the statements in the interview satisfied the standard for admission under the medical diagnosis and treatment exception, as recently interpreted by the Appellate Court in *State* v. *Griswold*, 160 Conn. App. 528, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015). That standard required that the purpose of the interview was "in part" to determine whether J needed medical treatment and that her statements were "reasonably pertinent" to achieving that end. See id., 552–53.

Thereafter, the defendant's case proceeded to a jury trial. The state presented J to testify about the abuse and then, over the defendant's renewed objection, also presented the video recording of the forensic interview.

The defendant's theory of the case was that J had fabricated the allegations of abuse. In support of this theory, the defendant sought to introduce two cell phone screenshots depicting text messages purportedly sent by J to V, the defendant's niece, a couple of months before J reported the abuse. On cross-examination, J denied sending any text messages to V.

The court held a hearing outside the presence of the jury to determine the admissibility of the screenshots. As an offer of proof, the defendant conducted a direct examination of V and produced both screenshots. At the conclusion of the hearing, the court issued an oral decision concluding that the screenshots had not been sufficiently authenticated to be admitted into evidence.

The jury subsequently found the defendant guilty on six counts of sexual assault and four counts of risk of injury to a child. See footnote 1 of this opinion. The court rendered judgment in accordance with the jury's verdict and imposed a total effective sentence of forty years incarceration, execution suspended after thirty years, and thirty-five years probation and lifetime sex offender registration.

The defendant appealed from the judgment of conviction to the Appellate Court, contending that the admission into evidence of the forensic interview and the exclusion of the text messages were harmful error.[6] See *State* v. *Manuel T.*, supra, 186 Conn. App. 53. The Appellate Court concluded that neither ruling was an abuse of the trial court's discretion. Id., 64–65, 72. With regard to the interview, the Appellate Court cited the standard it had articulated in *State* v. *Griswold*, supra, 160 Conn. App. 552–57, and other cases, under which "[s]tatements may be reasonably pertinent . . . to obtaining medical diagnosis or treatment *even when that was not the primary purpose of the inquiry that prompted them, or the principal motivation behind their expression.* . . . Although [t]he medical treatment exception to the hearsay rule requires that the statements be both pertinent to treatment and motivated by a desire for treatment . . . in cases involving juveniles, [we] have permitted this requirement to be satisfied inferentially." (Emphasis altered; internal quotation marks omitted.) *State* v. *Manuel T.*, supra, 61. Applying these principles to the present case, the Appellate Court concluded that the trial court had not abused its discretion in admitting the recording of the interview "because it reasonably can be inferred from the circumstances apparent to [J] that she understood the interview had a medical purpose." Id., 63.

With regard to the screenshots of the text messages, the Appellate Court concluded that the trial court had not abused its discretion in excluding them. Id., 65. The Appellate Court determined that V's testimony was insufficient authentication and that there was not sufficient additional corroboration for her testimony. Id., 70–72. Accordingly, the Appellate Court affirmed the

[6] The defendant initially appealed to this court, and we transferred the appeal to the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

judgment of conviction. Id., 72. This certified appeal followed. See footnote 2 of this opinion. Additional facts and procedural history will be set forth as necessary.

On appeal, the defendant contends that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion in admitting the video recorded interview and excluding the text messages. The defendant contends that both rulings rested on the application of improper standards, to the prejudice of the defendant, requiring a new trial. We agree with the defendant's claim with regard to the text messages and conclude that the trial court's exclusion of this evidence was harmful error.

I

We begin with the defendant's challenge to the admission of the recording of the forensic interview. The defendant, supported by the amicus curiae, the Connecticut Criminal Defense Lawyers Association, asks this court to adopt a standard under which a minor victim's statements in this type of interview are admissible under the medical treatment exception to the hearsay rule, § 8-3 (5) of the Connecticut Code of Evidence, only if the "primary purpose" in making and eliciting those statements is to obtain and/or provide such treatment. The defendant contends that, because a primary purpose standard applies to the admission of such interviews under the tender years exception to the hearsay rule; see Conn. Code Evid. § 8-10; it is both logical and sound policy to apply the same standard to the medical treatment exception. Specifically, the defendant argues that this court previously indicated that the two exceptions would yield the same result in *State* v. *Maguire*, 310 Conn. 535, 78 A.3d 828 (2013), and, therefore, the same standard should control. The defendant also asserts that the rationale for the medical treatment exception—that such statements are reliable because

a person has a strong motivation to be truthful when her health and well-being are at stake—does not apply to an interview involving the police and lacking the confidentiality of the physician-patient relationship. The defendant acknowledges that the Appellate Court squarely rejected this argument in *State* v. *Griswold*, supra, 160 Conn. App. 550, but asks this court to overrule *Griswold*.[7] We are not persuaded that it is necessary or appropriate to limit the medical treatment hearsay exception to statements made for the "primary" purpose of obtaining such treatment.[8]

A

The record reveals the following additional relevant facts. The forensic interview at issue in this case was conducted in accordance with a statutorily prescribed,

[7] Although the state argues that *Griswold* properly was applied by the courts below, its threshold position is that this court should not consider the defendant's claim that a "primary purpose" standard should have been applied because (1) he did not seek application of this standard in the trial court, and (2) as a consequence, the record lacks the necessary findings as to the primary purpose of the interview. The defendant disputes both contentions.

We conclude that it is proper to address the defendant's primary purpose claim, irrespective of any potential preservation concerns or deficiencies in the record. In light of our conclusion in part II of this opinion that the defendant is entitled to a new trial due to the improper exclusion of the text messages, we would address the proper standard for admission of this evidence even if the issue was unpreserved, as it would be likely to arise on remand. See, e.g., *State* v. *Lebrick*, 334 Conn. 492, 521 n.16, 223 A.3d 333 (2020); *In re Taijha H.-B.*, 333 Conn. 297, 312 n.9, 216 A.3d 601 (2019). The proper standard for admission of the evidence is purely a question of law, to which we apply plenary review. See *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007) (proper interpretation of rules of evidence is subject to plenary review); see also *State* v. *Mendez*, 148 N.M. 761, 766, 242 P.3d 328 (2010) (whether primary purpose of interview controls admissibility of all statements made during diagnostic interview under medical treatment hearsay exception is subject to de novo review).

[8] This court previously has held that it has the authority to modify the Connecticut Code of Evidence. See *State* v. *DeJesus*, 288 Conn. 418, 454–62, 953 A.2d 45 (2008) (holding that this court has authority to modify common-law rules of evidence codified in code).

multidisciplinary team approach.[9] See General Statutes § 17a-106a. Murphy-Cipolla, who conducted the interview, is not a medical professional; her professional training is in counseling and family therapy. At the commencement of the interview, she identified herself to J as "Lisa," "one of the interviewers" at the "Children's Center . . . ." Although the interview was observed remotely by a police officer and a pediatric nurse practitioner, Murphy-Cipolla informed J only that "a couple of ladies . . . I work with" could see them through a one-way mirror in the room. Murphy-Cipolla also informed J that the interview was being recorded, explaining that this procedure would avoid J having to repeat her account. Murphy-Cipolla took some background information and then asked J what she had come to talk about, to which J replied: "My stepdad . . . molested me when I was [eight years old] until last year, and I just never said anything, and I just said something [four days ago]." J thereafter described the defendant's sexual abuse. Murphy-Cipolla pressed for details when J's account regarding the abuse was vague and inquired about certain matters that J did not offer, which prompted J to disclose, among other things, the location where particular incidents took place, whether anyone else was present in the house when these incidents occurred, and which brand of condom the defendant had used. J mentioned experiencing physical pain during the incidents of anal intercourse, expressed concern that she could have contracted a sexually transmitted disease, and explained how the abuse and her reporting of it had affected her state of mind. Following

[9] Forensic interviews of child sexual assault victims are designed, by law, to serve dual functions: to investigate child abuse and to treat victims of such abuse. See General Statutes §§ 17a-101, 17a-101h and 17a-106a. By conducting and recording an interview that is available to a multidisciplinary team comprised of law enforcement, medical and mental health professionals, and the Department of Children and Families, the law aims to minimize further trauma to the victim. See General Statutes §§ 17a-101 and 17a-101h.

the interview, J was offered a medical examination,[10] which she declined, she was given a pregnancy test and a test for sexually transmitted diseases, both of which were negative, and she was referred for counseling.

B

Section 8-3 of the Connecticut Code of Evidence provides in relevant part: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . (5) A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment. . . ." This rule sets forth, in effect, a two-pronged test. The first addresses the declarant's purpose or motivation in the making of the statement, and the second addresses the pertinence of the statement to that end.[11] See *State* v. *Dollinger*, 20 Conn. App. 530, 535, 568 A.2d 1058 ("[t]he medical treatment exception to the hearsay rule requires that the statements be *both* pertinent to treatment and motivated by a desire for treatment" (emphasis added)), cert. denied, 215 Conn. 805, 574 A.2d 220 (1990).

[10] It is the advocacy center's standard practice to offer a medical examination following these interviews.

[11] In sexual assault cases, this court has held that "testimony pertaining to the identity of the defendant and the nature of the sexual assault [are] . . . pertinent to proper diagnosis and treatment of the resulting physical and psychological injuries of sexual assault." *State* v. *Kelly*, 256 Conn. 23, 45, 770 A.2d 908 (2001); see also *State* v. *Wood*, 208 Conn. 125, 133–34, 545 A.2d 1026 ("medical" encompasses psychological as well as somatic illnesses and conditions), cert. denied, 488 U.S. 895, 109 S. Ct. 235, 102 L. Ed. 2d 225 (1988). Statements made by a sexual assault complainant to someone other than a treating physician or mental health care provider may satisfy this exception if the person receiving that account is found to have been "acting within the chain of medical care" and the other requirements of the exception are met. *State* v. *Cruz*, 260 Conn. 1, 6, 792 A.2d 823 (2002); see id. (statements to social worker were admissible).

We emphasize at the outset that, although at oral argument before this court, the defendant's appellate counsel pointed to a few statements in the interview that he contends have no relevance to medical treatment (e.g., reporting the brand of condoms used by the defendant) and conceded that a few others would be pertinent to such treatment, the defendant's certified appeal does not challenge the admission of particular statements for lack of pertinence to medical treatment. The defendant's claim on appeal is that the entire interview should have been excluded under the purpose prong because we should construe this hearsay exception to require that the interview's primary purpose was to obtain and/or provide medical treatment or diagnosis.

Our analysis begins with the observation that, although many other jurisdictions have adopted a similarly phrased two-pronged medical treatment hearsay exception; see, e.g., Fed. R. Evid. 803 (4); Ind. R. Evid. 803 (4); Ky. R. Evid. 803 (4); Mich. R. Evid. 803 (4); N.M. R. Evid. 11-803 (4); N.C. R. Evid. 803 (4); Ohio R. Evid. 803 (4); neither the defendant nor the amicus has identified a single jurisdiction that has applied a primary medical purpose standard to this exception generally or to its application in this type of interview of minor victims specifically.[12] Our independent research has revealed none.

[12] The amicus brief cites cases from other jurisdictions in which courts have (a) characterized a victim's statements about the defendant's abuse as lacking a medical purpose or motive under the circumstances, (b) effectively determined that, if the child victim was too young to be unaware that his statements would enable a physician to make a diagnosis and provide treatment and thus would not understand the need to speak truthfully, the statements would be inadmissible under the medical treatment exception, and (c) deemed statements identifying the defendant as the abuser inadmissible under this exception.

Although some of this case law relates to the proper *application* of the medical purpose prong of the exception, none is relevant to the specific issue in this certified appeal, namely, whether the victim must have the *primary* purpose of obtaining medical treatment or diagnosis. In the cases falling under (a), the courts determined that there was *no* medical purpose.

One sister state jurisdiction has provided cogent reasons for rejecting the application of a primary purpose standard in a case that, like this one, involved a challenge to the admissibility of an interview of a minor sexual assault victim. The New Mexico Supreme Court first recognized that "[t]he 'primary purpose of the encounter' approach . . . is derived from the United States Supreme Court's [c]onfrontation [c]lause jurisprudence." *State* v. *Mendez*, 148 N.M. 761, 769, 242 P.3d 328 (2010). Under *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the hearsay statements of an unavailable witness that are "testimonial" in nature may be admitted under the sixth amendment's confrontation clause only if the defendant has had a prior opportunity to cross-examine the declarant. "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the *primary purpose* of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the *primary purpose* of the interrogation is to establish or prove past events

If the defendant in the present case, on remand, is able to establish that the victim was not motivated by such a purpose even in part, her statements would be inadmissible under our law as it currently exists.

The cases falling under (b) and (c) are no doubt in tension with our state's appellate case law, which has declined to take a strict view of the medical treatment exception. See, e.g., *State* v. *Kelly*, 256 Conn. 23, 45, 770 A.2d 908 (2001). Appellate Court case law has allowed the purpose prong to be satisfied inferentially in cases involving juveniles, even if the victim was too young to have the conscious purpose of obtaining medical treatment to advance her own health. See *State* v. *Dollinger*, supra, 20 Conn. App. 536. This court has held that the abuser's identity is pertinent to medical treatment and diagnosis. See *State* v. *Kelly*, supra, 45. Neither of the issues in (b) or (c) is relevant to the issue in this certified appeal. Moreover, the vitality of case law addressing children too young to form a conscious intent of obtaining medical treatment and to understand the need for truthfulness would have no application to the present case, in which J was seventeen years old at the time of her interview.

potentially relevant to later criminal prosecution." (Emphasis added.) *Davis* v. *Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

The New Mexico Supreme Court then explained: "The hearsay rule and the [c]onfrontation [c]lause are not [coextensive] and must remain distinct. The hearsay rule is intended to ensure that the jury is not exposed to unreliable evidence, even when the declarant testifies at trial and is subject to [cross-examination]. The [c]onfrontation [c]lause guarantees the accused in a criminal trial the right to be confronted with the witnesses against him, regardless of how trustworthy the out-of-court statement may appear to be. [See U.S. Const., amend. VI.] More important for present purposes, the unique dangers each seeks to avoid can be implicated under quite distinct circumstances. As the United States Supreme Court explained in *Crawford*, not all hearsay implicates the [s]ixth [a]mendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the [civil law] abuses the [c]onfrontation [c]lause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the [f]ramers certainly would not have condoned them." (Internal quotation marks omitted.) *State* v. *Mendez*, supra, 148 N.M. 769.

"In *Crawford*, the United States Supreme Court listed several examples of the core class of testimonial statements which trigger [c]onfrontation [c]lause concerns . . . ." (Internal quotation marks omitted.) Id. "What these examples have in common is that they lend themselves to an analysis that focuses largely on surrounding circumstances to separate testimonial from [nontestimonial] statements.

"For example, once an individual prepares an affidavit, the reliability of any single statement is largely irrel-

evant for constitutional purposes because it will *all* be testimonial and inadmissible under the [s]ixth [a]mendment without a prior opportunity for cross-examination. The act of preparing an affidavit evinces the preparer's awareness that each statement could be used at trial." (Footnote omitted.) Id., 770.

"Unlike the [c]onfrontation [c]lause context, in which the surrounding circumstances determine whether the declarant is bearing testimony, the medical or nonmedical purpose of a statement cannot be determined without closely examining the *substance* of the statement. Surrounding circumstances are certainly relevant, but the focus must center on the individual statement." (Emphasis in original; internal quotation marks omitted.) Id.

"The diversion created by [applying a primary medical purpose test to the medical treatment hearsay exception] is that it directs courts to determine the purpose of the encounter, *instead of considering the substance of, and circumstances surrounding, individual statements*. This approach is irreconcilable with previous hearsay opinions in which . . . courts have focused on particular statements, determining in each instance the purpose for which the statement was made." (Emphasis added.) Id., 772.

We agree with the reasoning of the New Mexico Supreme Court in *Mendez*. We disagree with the defendant's argument that our decision in *State* v. *Maguire*, supra, 310 Conn. 535, dictates otherwise. In *Maguire*, this court considered whether the trial court properly admitted the child sexual abuse victim's statements adduced in a forensic interview under the tender years exception to the hearsay rule without making certain findings mandated by law, including that the interview had not been conducted "in preparation of a legal proceeding." Id., 563, citing General Statutes § 54-86*l* (a)

and Conn. Code Evid. (2009) § 8-10 (a).[13] We rejected the state's contention that this court had previously determined that forensic interviews like the one at issue were admissible as a matter of law and, thus, that such a finding was unnecessary. *State* v. *Maguire*, supra, 563–64. We noted that the tender years hearsay exception must be applied "consistently with the sixth amendment bar against testimonial hearsay, as explained in *Crawford* [v. *Washington*, supra, 541 U.S. 68–69]. . . . The prohibition of the tender years exception against statements made in preparation of a legal proceeding is simply another way of saying that, to be admissible, the statement must be nontestimonial for purposes of *Crawford*." (Citation omitted.) *State* v. *Maguire*, supra,

[13] General Statutes § 54-86*l* provides: "(a) Notwithstanding any other rule of evidence or provision of law, a statement by a child twelve years of age or younger at the time of the statement relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by the child's parent or guardian or any other person exercising comparable authority over the child at the time of the offense, shall be admissible in a criminal or juvenile proceeding if: (1) The court finds, in a hearing conducted outside the presence of the jury, if any, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness, (2) the statement was not made in preparation for a legal proceeding, (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made and the circumstances surrounding the statement that indicate its trustworthiness, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and (4) either (A) the child testifies and is subject to cross-examination at the proceeding, or (B) the child is unavailable as a witness and (i) there is independent nontestimonial corroborative evidence of the alleged act, and (ii) the statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

"(b) Nothing in this section shall be construed to (1) prevent the admission of any statement under another hearsay exception, (2) allow broader definitions in other hearsay exceptions for statements made by children twelve years of age or younger at the time of the statement concerning any alleged act described in subsection (a) of this section than is done for other declarants, or (3) allow the admission pursuant to the residual hearsay exception of a statement described in subsection (a) of this section."

Section 8-10 of the Connecticut Code of Evidence codifies this provision.

564–65. We explained in *Maguire* that this court had determined in the prior case relied on by the state that the forensic interview of the child sexual assault victim had met "the fact intensive 'primary purpose' test articulated in *Davis* v. *Washington*, [supra, 547 U.S. 822]." *State* v. *Maguire*, supra, 566. We clarified that statements in such interviews are not per se nontestimonial, and, instead, "a victim's statements during a forensic interview may be deemed nontestimonial only if the *essential* purpose of the interview is to provide medical assistance to the victim." (Emphasis added.) Id., 569.

The court in *Maguire* then noted in dictum: "Indeed, statements made in the course of a forensic interview that satisfy the criteria for admission under the tender years exception *are similar to statements made to a physician in the course of medical treatment*, *which are admissible under the medical treatment and diagnosis exception to the hearsay rule*, including statements that reveal the identity of the abuser." (Emphasis added.) Id. This statement has spawned some confusion in our trial courts.

Our Appellate Court correctly recognized in *Griswold* that this statement in *Maguire* was not intended to suggest equivalence between the two hearsay exceptions when considering whether either exception supported the trial court's admission of statements made by child sex abuse victims in forensic interviews. In *Griswold*, the Appellate Court first concluded that the trial court improperly had admitted video recordings of forensic interviews under the tender years exception, as interpreted in *Maguire*, because "the circumstances surrounding the victims' forensic interviews objectively demonstrate[d] that their primary purpose was not to provide the victims with medical diagnosis or treatment, but to [establish] or prov[e] past events potentially relevant to later criminal prosecution." (Internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 547.

The Appellate Court rejected the defendant's claim, however, that *Maguire* necessarily compelled the conclusion that the trial court also improperly admitted the videos under the medical diagnosis and treatment exception. It began its analysis by underscoring that, "because the victims appeared at trial and were subject to cross-examination by the defendant, *Crawford* and its progeny [did] not apply *directly* to the . . . case." (Emphasis in original.) Id., 550–51. It then reasoned that, because "hearsay that does not fall into one exception to the hearsay rule may still be admissible if it falls within another exception . . . the question of whether the videos and their written summaries [were] admissible under the medical diagnosis and treatment exception require[d] its own analysis independent of the one undertaken pursuant to the tender years exception. Indeed, the Code of Evidence specifically states in the tender years exception that [n]othing in this section shall be construed to . . . prevent the admission of any statement under another hearsay exception. Conn. Code Evid. § 8-10 (b) (1)." (Citation omitted; internal quotation marks omitted.) *State* v. *Griswold*, supra, 160 Conn. App. 551–52. The Appellate Court further explained that, "[i]n the context of a forensic interview, [the medical diagnosis and treatment] standard is substantially less demanding than the one imposed by *Crawford* and incorporated into the tender years exception." Id., 552. In light of these factors, the Appellate Court "decline[d] to construe the court's observation [in *Maguire*] as suggesting that, because some statements *admissible* under both hearsay exceptions are similar in nature, other statements *inadmissible* under one exception are necessarily inadmissible under the other." (Emphasis in original.) Id., 554.

The Appellate Court in *Griswold* did note, however, the following concern: "[B]ecause the standard for admission of forensic interview evidence under the medical diagnosis and treatment exception is less strin-

gent than the standard for admission under the tender years exception, the state in future cases may rely solely on the medical diagnosis and treatment exception, thereby effectively rendering *Maguire* a nullity. This potential anomaly, however, is not for [the Appellate] [C]ourt to address but, instead, is best left for consideration by [the] Supreme Court, either in its adjudicative function or as overseer of the Code of Evidence." Id., 557–58.

We take this opportunity to clarify that, in the context of this type of interview of a minor sexual assault victim, the tender years hearsay exception and the medical treatment exception may substantially overlap in application but nevertheless may also occupy different fields of operation. The tender years exception is not limited to statements that reasonably pertain to "medical diagnosis or treatment" but includes any statement "relating to" a sexual offense committed against that child or an offense involving physical abuse committed against that child by certain persons. As the Appellate Court observed in the present case, the tender years exception considers the purpose of the interview, whereas the medical treatment exception focuses on the declarant's purpose in making individual statements. See *State* v. *Manuel T.*, supra, 186 Conn. App. 62 ("[b]ecause the focus of the medical treatment exception is the declarant's understanding of the purpose of the interview, the inquiry must be restricted to the circumstances that could be perceived by the declarant, as opposed to the motivations and intentions of the interviewer that were not apparent to the declarant"). The mere fact that the state may rely on the medical treatment exception rather than the tender years exception to avoid the more restrictive primary purpose test is not in itself a sound reason to engraft the latter's constitutionally derived primary purpose standard onto the former.

The defendant's concern, at bottom, appears to be one of reliability. See, e.g., *State* v. *Cruz*, 260 Conn. 1, 7, 792 A.2d 823 (2002) ("[t]he rationale underlying the medical treatment exception to the hearsay rule is that the patient's desire to recover his health . . . will restrain him from giving inaccurate statements to a [health care professional] employed to advise or treat him" (internal quotation marks omitted)). We are not persuaded that the proper application of the existing medical treatment hearsay exception does not ensure the reliability of the statements made at a forensic interview. There is a legitimate question as to J's motivation in participating in the interview in the present case and whether all of her statements were reasonably pertinent to medical treatment or diagnosis. The trial court plainly did not assess the admissibility of the statements in the forensic interview individually but in toto. This approach may have been a reflection of the position taken by the parties, both of whom seemed to take an "all or nothing" view of interviews of minor sexual assault victims. Because we conclude in part II of this opinion that the defendant is entitled to a new trial, he will have the opportunity to make specific objections to individual statements should he so choose.[14]

II

We next turn to the defendant's claim that the Appellate Court incorrectly concluded that the trial court did not abuse its discretion in excluding the screenshots of two text messages purportedly authored by J for lack of authentication. The defendant contends that, although the traditional authentication standard was met in the present case, the trial court and, in turn, the Appellate Court improperly applied a heightened

[14] We note that it is not uncommon in these types of cases for a defendant to attempt to impeach the victim through the use of statements made in the forensic interview. In such cases, the court could consider whether the defendant has opened the door to the admission of other parts of the forensic interview as nonhearsay or under another hearsay exception.

standard for the authentication of the electronic communication. He further contends that the exclusion of this evidence was harmful because it would have supported his defense that J fabricated the claims of abuse because she was upset with the defendant for, among other things, failing to buy her a car. We agree.

A

The record reveals the following additional undisputed facts and procedural history. When the defendant cross-examined J during the state's case-in-chief, she denied that she had ever sent text messages to V and specifically denied sending the messages reflected in the defendant's two exhibits. To authenticate the two screenshots taken of the messages, in his rebuttal case, the defendant made an offer of proof through direct examination of V and production of the screenshots.

Outside the presence of the jury, V offered the following testimony. V and J are approximately the same age. They had known each other since they were children and were close during their younger years, but had drifted apart more recently. Sometime in February or early March, 2014, V decided to reach out to J by way of text message. J had given her phone number to V at a previous family function, and V saved it in her telephone contacts under J's name.

In her initial message, V greeted J by name. V received replies, which she believed to be from J because the messages came from the number J had given V, they referred to J's family members by name, and the author of the reply messages expressed herself in a manner as J previously had.

Later, V took screenshots of two of the text messages she received in reply to that exchange. She attested that the screenshots accurately reflected the text messages on her telephone. V was unable to capture the

full exchange in her screenshots because the texts were too long. She attested, however, that the text messages in the two screenshots were part of the same conversation.

By the time of trial, V had replaced the cell phone on which she had received these text messages and could not produce that cell phone. V also had been unable to produce telephone records to demonstrate when the text conversation had occurred between these telephone numbers because her mobile service provider no longer retained records for the February–March, 2014 period.

The first screenshot, which did not fully capture the contact's name, contains a small portion of a message from one party and the following reply: "I didn't forget lol and yes he got himself a new car in a week [and] then sold it for another car in less than a day but when it comes to me he can't get one. Smh[15] his excuse is I don't deserve one cus of my attitude. He broke his promise to me about getting me [one] that's why I don't talk to him anymore he doesn't deserve my kindness I'm sick and tired of BROKEN promises!

"But it is what it is. I'll just buy my own damn car since I buy everything else myself. But what's new with you? Why you all of a sudden hit me up. Lol." (Footnote added.)

The second screenshot revealed the contact to be someone with the same first name as J. The screenshot cut off the top of the message, which continued:[16] "I turn 18 this year . . . I should be happy but I'm scared. And [m]y job is so stressful. This year hasn't been good for me at all it's always something everyday nothing

[15] V testified that "SMH" stands for "[s]haking my head." She stated that J previously had used this phrase, as well as an expression used later in the text about "hitting someone up." V acknowledged on cross-examination that both expressions were common to her generation.

[16] We have excluded emojis from the quoted passage.

good happens to me anymore the ONLY [thing] going good right now is my relationship with [T][17] and my bf.[18] That's it. And same my dad keeps breaking his promises along with my step dad well [M]anny.[19] We don't even talk anymore it's like neither of my fathers are there for me . . . so my mom is all I got. It really hurts to say it but it is what it is.

"And on top of this I've been looking for another job and saving up for a car cus [M]anny is selfish and won't buy me one." (Footnotes added.)

The trial court sustained the state's objection to the admission of the screenshots on the ground that they had not been sufficiently authenticated. The court determined that the defendant had failed to make a prima facie case that J authored the text messages exhibited by the screenshots because the messages were not the complete exchange between the parties, lacked temporal indicators of date and time, and were devoid of distinctive characteristics that would identify J as the author.

In its decision affirming the trial court's judgment, the Appellate Court relied on a recent line of its cases beginning with *State* v. *Eleck*, 130 Conn. App. 632, 23 A.3d 818 (2011), aff'd, 314 Conn. 123, 100 A.3d 817 (2014); *State* v. *Manuel T.*, supra, 186 Conn. App. 69–70; which it characterized as its "seminal decision on the authentication of electronic evidence." Id., 69. The court acknowledged that, "[a]mong the examples of methods

[17] The message used an abbreviated form of a name, consistent with that of J's sister.

[18] "Bf" reasonably could be interpreted to refer either to "boyfriend" or "best friend." The evidence established that J had a boyfriend during the time these messages purportedly were sent. In her interview, J indicated that she did not get along with girls generally, but she testified that she presently had a female best friend.

[19] In the interview, J said that she just called the defendant by his name and noted that he went by "Manny or Manuel."

of authenticating evidence set forth in the official commentary to § 9-1 (a) of the [Connecticut] Code of Evidence is that [a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be, and [t]he distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity." (Internal quotation marks omitted.) Id., 68. It suggested that, although the traditional methods of authentication applied to electronic communications, a more stringent standard of proof would apply because "an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender . . . ." (Internal quotation marks omitted.) Id. The Appellate Court concluded that the trial court did not abuse its discretion in determining that this standard had not been met in the present case because the screenshots did not capture the complete communication between the parties, there was no proof of the date on which the communication occurred, there were no distinguishing features in the text that would identify J as the author, and J had denied sending the messages. Id., 69–72.

B

The defendant advances two reasons why the Appellate Court incorrectly determined that the trial court did not abuse its discretion in excluding the screenshots: first, the Appellate Court and the trial court improperly applied a heightened standard of authentication and, second, the screenshots met the proper authentication standard. Although the parties analyze this question under the abuse of discretion standard, for the reasons set forth hereinafter, we conclude that it is more properly analyzed as a legal question subject

to plenary review.[20] See, e.g., *Hartford* v. *CBV Parking Hartford, LLC*, 330 Conn. 200, 214, 192 A.3d 406 (2018) ("[w]hether the trial court applied the proper legal standard is subject to plenary review on appeal"); *State* v. *Saucier*, 283 Conn. 207, 218, 926 A.2d 633 (2007) ("To the extent a trial court's admission of evidence is based on an interpretation of the [Connecticut] Code of Evidence, our standard of review is plenary. . . . We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion." (Citations omitted.)). Under the proper, universally applicable standard, the trial court incorrectly determined that the defendant had not met his burden of authenticating this evidence.

"Authentication . . . is viewed as a subset of relevancy, because evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims." (Internal quotation marks omitted.) *Lorraine* v. *Markel American Ins. Co.*, 241 F.R.D. 534, 539 (D. Md. 2007). Our Code of Evidence provides that "[t]he requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be." Conn. Code Evid. § 9-1 (a). "[A] writing may be authenticated by a number of methods, including direct testimony or circumstantial evidence." (Internal quotation marks omitted.) *State* v. *Garcia*, 299 Conn. 39, 57, 7 A.3d 355 (2010).

"Both courts and commentators have noted that the showing of authenticity is not on a par with the more technical evidentiary rules that govern admissibility, such as hearsay exceptions, competency and privilege.

[20] Even if we were to characterize the trial court's decision as too demanding an application of the correct standard and thus subject to review under the abuse of discretion standard, we would reach the same conclusion.

. . . Rather, there need only be a prima facie showing of authenticity to the court. . . . Once a prima facie showing of authorship is made to the court, the evidence, as long as it is otherwise admissible, goes to the jury, which will ultimately determine its authenticity." (Internal quotation marks omitted.) Id., 57–58. "[C]ompliance with [§] 9-1 (a) does not automatically guarantee that the fact finder will accept the proffered evidence as genuine." Conn. Code Evid. § 9-1, commentary.

It is widely recognized that a prima facie showing of authenticity is a low burden.[21] See *United States* v. *Barnes*, 803 F.3d 209, 217 (5th Cir. 2015) (standard "is not a burdensome one" (internal quotation marks omitted)), cert. denied sub nom. *Hall* v. *United States*, U.S. , 137 S. Ct. 691, 196 L. Ed. 2d 570 (2017); *United States* v. *Tin Yat Chin*, 371 F.3d 31, 38 (2d Cir. 2004) ("minimal standards for authentication"); *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 545 (recognizing "the proponent's light burden of proof in authenticating an exhibit" (internal quotation marks omitted)); *Gagliardi* v. *Commissioner of Children & Families*, 155 Conn. App. 610, 619, 110 A.3d 512 (bar for authentication of evidence is not particularly high), cert. denied, 316 Conn. 917, 113 A.3d 70 (2015); *State* v. *Mrza*, 302 Neb. 931, 938, 926 N.W.2d 79 (2019) ("[the] rule does not impose a high hurdle for authentication"). This is because "[a] proponent of evidence is not required to *conclusively prove the genuineness* of the evidence *or to rule out all possibilities inconsistent with authenticity*." (Emphasis added.) *State* v. *Mrza*,

[21] A similar rule of evidence applies in many other jurisdictions; see, e.g., Fed. R. Evid. 901; and we have considered such sources when determining the contours of our rule. See *State* v. *Swinton*, 268 Conn. 781, 811–12 and n.28, 847 A.2d 921 (2004) (adopting factors utilized under rule 901 of Federal Rules of Evidence for purposes of conducting foundational analysis of computer generated evidence). See generally *State* v. *Foreman*, 288 Conn. 684, 721, 954 A.2d 135 (2008) ("[w]here a state rule is similar to a federal rule we review the federal case law to assist our interpretation of our rule" (internal quotation marks omitted)).

supra, 938; accord *Campbell* v. *State*, 382 S.W.3d 545, 549 (Tex. App. 2012); see also *State* v. *Valentine*, 255 Conn. 61, 77, 762 A.2d 1278 (2000) ("[t]he proffering party must demonstrate to the trial court that there is substantial evidence from which the jury *could* infer that the telephone communication was authentic" (emphasis added)).

The commentary to our rule of evidence makes clear that electronic communications, such as text messages, are subject to the same standard of authentication and the same methods of authentication as other forms of evidence: "As with any other form of evidence, a party may use any appropriate method, or combination of methods, described in this commentary, or any other proof to demonstrate that the proffer is what its proponent claims it to be, to authenticate any particular item of electronically stored information." Conn. Code Evid. (2018) § 9-1, commentary; cf. *State* v. *Hannah*, 448 N.J. Super. 78, 88–89, 151 A.3d 99 (App. Div. 2016) ("Despite the seeming novelty of social [network generated] documents, courts have applied the existing concepts of authentication . . . . We need not create a new test for social media postings." (Citations omitted; internal quotation marks omitted.)).

One such appropriate method of authentication identified in the commentary to our rule, and broadly recognized in other jurisdictions, is that "[a] witness with personal knowledge may testify that the offered evidence is what its proponent claims it to be." Conn. Code Evid. § 9-1, commentary. This is precisely what V's testimony accomplished. V testified: she and J had been close while they were growing up; J provided her phone number to V at a family function; V entered the number in her phone contacts; a couple of months before J reported the abuse, V initiated a text message to that number in which she greeted J by name; V received replies; V believed the replies to be from J

because of their substance and manner of expression; and the screenshots accurately reflected the text messages V received.

The commentary to the code also provides that "[t]he distinctive characteristics of an object, writing or other communication, when considered in conjunction with the surrounding circumstances, may provide sufficient circumstantial evidence of authenticity." Conn. Code Evid. § 9-1, commentary. Although the contents of the text messages do not reveal facts known only to J, they are consistent with having been sent by her. They refer to her age, her job, her family members, her boyfriend, and her biological father's absence, and imply that she had not heard from V in some time, which was consistent with V's testimony. [22]

Although the Appellate Court recited the aforementioned legal principles, it is apparent that neither that court nor the trial court held the defendant to the low burden of establishing a prima facie case of authenticity and, instead, effectively required the defendant to establish that the text messages were in fact what they purported to be. Specifically, the trial court and the Appellate Court deemed the testimony of V insufficient authentication. They pointed to information missing from the screenshots or not provided through corroborative evidence, such as the date of the communication. This conclusion, however, is inconsistent with numerous federal and sister state decisions that have held that comparable testimony sufficiently authenticated text messages or similar electronic communication. See, e.g., *United States* v. *Arnold*, 696 Fed. Appx. 903, 907 (10th Cir. 2017) (rejecting argument that text messages copied into separate document were not sufficiently authenticated

[22] The inquiry in the text message, "[w]hy you all of a sudden hit me up," is consistent with V's account that she had not been in contact with J for some time before she sent J a text message in early 2014.

because they "contained insufficient distinctive identifiers—e.g., dates, phone numbers, and customary text message format"—when proffering party presented witness who testified that he had received original text messages from defendant and testified "as to the general time frame and the order of events that occurred when he received particular messages and groups of messages"); *United States* v. *Ramirez*, 658 Fed. Appx. 949, 952 (11th Cir. 2016) (screenshots of text messages were properly authenticated when party to exchange testified that photographs of messages were from her phone and identified text messages sent between her and purported author, there was testimony that screenshots fairly and accurately represented text messages, and there was evidence that purported author was user of other phone number); *United States* v. *Lanzon*, 639 F.3d 1293, 1300–1301 (11th Cir.) (instant messages transferred to Microsoft Word document were properly authenticated by witness who testified that he participated in online chats and that transcripts were accurate copies of those conversations), cert. denied, 565 U.S. 916, 132 S. Ct. 333, 181 L. Ed. 2d 208 (2011); *Pierce* v. *State*, 302 Ga. 389, 395–96, 807 S.E.2d 425 (2017) (screenshots of text messages on cell phone were properly authenticated, despite facts that proffering party did not introduce cell phone records, that purported author denied sending messages, and that no one testified that they observed him send them, when there was testimony that images were fair and accurate representation of what appeared on cell phone screen and cell phone owner testified that phone number shown for text messages he received was author's phone number and that he exchanged several text messages with author); *People* v. *Ziemba*, 100 N.E.3d 635, 648 (Ill. App. 2018) (finding that text messages were authenticated by "the undercover officer who personally sent and received the text messages"); *State* v. *Tieman*, 207 A.3d

618, 622 (Me. 2019) (Facebook Messenger conversation was authenticated through testimony of person with whom victim was communicating); *State* v. *Roseberry*, 197 Ohio App. 3d 256, 270, 967 N.E.2d 233 (2011) ("in most cases involving . . . texts, instant messaging, and e-mails, the photographs taken of the print media or the printouts of those conversations are authenticated, introduced, and received into evidence through the testimony of the recipient of the messages"); *Commonwealth* v. *Davis*, Docket No. 1055 MDA 2018, 2019 WL 2323815, *5 (Pa. Super. May 31, 2019) (deeming text message authenticated because "there was first-hand corroborating testimony from . . . [the] recipient" (internal quotation marks omitted)), appeal denied, 222 A.3d 1125 (Pa. 2020); *Commonwealth* v. *Danzey*, 210 A.3d 333, 338 (Pa. Super.) ("the proponent of social media evidence must present direct or circumstantial evidence that tends to corroborate the identity of the author of the communication in question, such as testimony from the person who sent or received the communication, or contextual clues in the communication tending to reveal the identity of the sender" (internal quotation marks omitted)), appeal denied, 219 A.3d 597 (Pa. 2019); *Hasan* v. *Board of Medicine*, 242 W. Va. 283, 295, 835 S.E.2d 147 (2019) (concluding that testimony from recipient of text messages that they accurately reflected ones that she had received from purported author was "sufficient to authenticate the text messages" but noting "that there was additional evidence showing distinctive characteristics that link [the parties] to the text messages").

The trial court and the Appellate Court also mistakenly relied on the fact that the screenshots did not capture the complete communication. The rule of completeness is a different rule of evidence; see Conn. Code Evid. § 1-5; that serves different concerns from those of authentication. See *United States* v. *Arnold*, supra,

696 Fed. Appx. 906–907 (rejecting argument that government failed to properly authenticate exhibit reflecting screenshots of text messages because recipient testified that he was not sure whether printed exhibit included all messages exchanged between parties when government never represented at trial that exhibit contained all text messages between parties, and, accordingly, government properly authenticated exhibit "as a document that displayed . . . [screenshots] of the text messages" saved on cell phone); *State* v. *Mrza*, supra, 302 Neb. 939 (noting that defendant's argument improperly "attempts to invoke the rule of completeness under the rubric of authenticity" and that "[t]he rule of authentication did not require the [s]tate to offer all of the Snapchat messages in evidence" (footnote omitted)); *Commonwealth* v. *Hart*, Docket No. 3284 EDA 2016, 2018 WL 2307381, *9 (Pa. Super. May 22, 2018) (resolving authentication issue before turning to completeness claim). Moreover, the present case does not implicate the concern underlying the rule of completeness, because there is no contention that other relevant parts of the text messages exist that would provide a different context for the portion of the messages offered. See, e.g., *State* v. *Jackson*, 257 Conn. 198, 213, 777 A.2d 591 (2001) ("[W]hen one party to a litigation or prosecution seeks to introduce admissions that constitute only a portion of a conversation, the opposing party may introduce other relevant portions of the conversation, irrespective of whether they are self-serving or hearsay. . . . The purpose of this rule is to ensure that statements placed in evidence are not taken out of context." (Citations omitted; internal quotation marks omitted.)). Rather, J simply asserted that she had not sent the messages at issue.

It appears that the trial court and the Appellate Court held the defendant to a higher standard than a prima facie case because the evidence was an electronic com-

munication. The Appellate Court cited its prior cases in expressing the concern that "an electronic communication, such as a Facebook message, an e-mail or a cell phone text message, could be generated by someone other than the named sender . . . ." (Internal quotation marks omitted.) *State* v. *Manuel T.*, supra, 186 Conn. App. 68. Similar concerns, however, may arise even with more traditional forms of communication. In a federal case cited favorably in the commentary to our rule, the court addressed this issue: "The argument is that e-mails or text messages are inherently unreliable because of their relative anonymity and the fact that while an electronic message can be traced to a particular computer, it can rarely be connected to a specific author with any certainty. Unless the purported author is actually witnessed sending the e-mail, there is always the possibility it is not from whom it claims. . . . [A]nybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead station[ery] can be copied or stolen. . . . We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether . . . there has been an adequate foundational showing of their relevance and authenticity."[23] (Internal quotation marks omitted.) *Lorraine* v. *Markel American Ins. Co.*, supra, 241 F.R.D. 543; see Conn. Code Evid.

[23] See also *Pierce* v. *State*, supra, 302 Ga. 395–96 ("Although there may exist evidence that a specific phone sent a certain text message, that does not prove who used the phone . . . . Every form of electronic communication can be spoofed, hacked, or forged. But this does not and can not mean that courts should reject any and all such communications. Indeed the vast majority of these communications are just as they appear to be—quite authentic. The goal is to supply sufficient, nonhearsay evidence as the identity of the source such that a reasonable [fact finder] could conclude that the evidence is what it is claimed to be." (Internal quotation marks omitted.)).

(2018) § 9-1, commentary. As another court correctly observed, "[q]uestions about the integrity of electronic data generally go to the *weight* of electronically based evidence, *not its admissibility*."[24] (Emphasis added; internal quotation marks omitted.) *State* v. *Tieman*, supra, 207 A.3d 622.

In the present case, the defendant clearly established a prima face case of authentication through V's testimony. Whatever doubts might exist as to V's credibility or as to the reliability of the source of the messages go to the weight, not the admissibility, of the text messages. Therefore, the Appellate Court incorrectly determined that the trial court properly excluded the text messages.

C

The question that remains is whether the improper exclusion of the text messages requires reversal of the judgment and a new trial. The state argues that the exclusion of this evidence was harmless error. We conclude, however, that the defendant has met his burden of proving harmful error, which requires reversal of the judgment.

"[A] nonconstitutional [evidentiary] error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Sinclair*, 332 Conn. 204, 233, 210 A.3d 509 (2019). "[W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the [defendant's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the

[24] Insofar as *State* v. *Eleck*, supra, 130 Conn. App. 632, indicates otherwise, it is overruled.

overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial." (Internal quotation marks omitted.) Id.

The following factors deprive us of this assurance. The state does not contend that it had a particularly strong case, and it is clear that it did not. The only evidence of the sexual abuse came from J's delayed disclosure. There was no physical evidence of the abuse or contemporaneous observations of other witnesses that would tend to corroborate J's account. Testimony from J's younger sister, the defendant's biological daughter, called J's veracity and motives into question.

The defendant's theory of the case was that J had fabricated the claims of abuse because she wanted to move in with her boyfriend—something that she admitted the defendant would not have allowed and that occurred not long after the defendant was removed from the home following J's disclosure—and because she was angry with him for, among other things, not having bought her a car. The text messages, if deemed authentic by the jury, could have been seen by a juror as powerful evidence of one of those motivations. The evidence also could have been used to impeach J's statement in her interview that, in December, 2013, a few months before she disclosed the abuse, the defendant offered to buy her a car if she agreed to have sex with him. J said in the interview that she had refused the defendant's offer and told him that she would prefer to buy her own car.

Although J's younger sister testified that J had complained on more than one occasion about the defendant's failure to buy her a car, we are not persuaded that this fact renders the excluded evidence cumulative. The text messages, if authentic, were J's own words. Those words could be understood to express hurt feelings and anger that are not equally conveyed by her sister's secondhand account of J's complaints.

We are not persuaded by the state's arguments that the exclusion of this evidence did not affect the verdict. In addition to the sister's testimony, the state points to the fact that defense counsel's closing argument referred to J's anger at the defendant for failing to purchase a car for her. But counsel's argument is not evidence, and the trial court informed the jury of this well settled principle before closing arguments commenced. See, e.g., *State* v. *Ancona*, 270 Conn. 568, 609, 854 A.2d 718 (2004), cert. denied, 543 U.S. 1055, 125 S. Ct. 921, 160 L. Ed. 2d 780 (2005). The state also points to the fact that J stated unequivocally in her forensic interview that she did not like the defendant. In the absence of the text messages, however, the jury was more likely to conclude that her dislike was a natural consequence of the abuse that the defendant had inflicted on her.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court for a new trial.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* ALANNA R. CAREY
(SC 20273)

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

Syllabus

Convicted of the crime of murder in connection with the shooting death of the victim, the defendant appealed. The defendant and the victim were in a relationship, which had deteriorated in the weeks preceding the victim's death. On the day of the shooting, the defendant drove to a motel at which the victim had been staying and, several hours later, shot the victim in his motel room. At trial, the defendant asserted a theory of self-defense, claiming that she and the victim had argued in the motel room, that the victim had a knife, and that she feared for her life and had no time to flee. The state called a witness, M, during its case on rebuttal in an attempt to show that the victim had been afraid

of the defendant. Over defense counsel's objection, M testified that, a few weeks before the victim's death, he told M that he had crawled into the defendant's home through a window to retrieve some personal possessions, that the defendant put a gun to his head and threatened him, and that her threats frightened him. On appeal, the Appellate Court affirmed the judgment of conviction, concluding, inter alia, that, even if the trial court had improperly admitted M's testimony, its admission was harmless in light of the overwhelming evidence of the defendant's consciousness of guilt. Thereafter, the defendant, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly concluded that any error relating to the admission of M's testimony was harmless, as the defendant failed to satisfy her burden of demonstrating that M's testimony substantially affected the jury's verdict: the incident that M recounted to the jury in her testimony was not the primary, or even a significant, basis for the case against the defendant, as the state introduced physical evidence that was inconsistent with the defendant's account of the shooting, evidence undercutting the defendant's claim that the victim had been the aggressor in their relationship, evidence of the defendant's conduct before the shooting that demonstrated her intent to use her gun, and evidence of the defendant's conduct after the shooting that demonstrated her consciousness of guilt; moreover, there was testimony from other witnesses that the defendant had previously displayed aggression toward the victim and that he was fearful of the defendant, and certain aspects of M's testimony supported the defendant's primary theory of the case.

Argued June 3—officially released November 23, 2020*

Procedural History

Substitute information charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of New Britain and tried to the jury before *Keegan*, *J.*; thereafter, the court, *Keegan*, *J.*, denied in part the defendant's motion to preclude certain evidence and denied the defendant's motion for a mistrial; subsequently, verdict and judgment of guilty, from which the defendant appealed to this court; thereafter, the case was transferred to the Appellate Court, *Alvord*, *Sheldon* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

* November 23, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Jennifer B. Smith, for the appellant (defendant).

Rocco A. Chiarenza, assistant state's attorney, with whom, on the brief, were *Brian Preleski*, state's attorney, *John H. Malone*, former supervisory assistant state's attorney, and *David Clifton*, assistant state's attorney, for the appellee (state).

Opinion

KAHN, J. The defendant, Alanna R. Carey, appeals from the judgment of the Appellate Court affirming the trial court's judgment of conviction, rendered after a jury trial, of murder in violation of General Statutes § 53a-54a (a). On appeal, the defendant claims that the Appellate Court incorrectly concluded that any error relating to the admission of testimony from a witness called during the state's case on rebuttal, Mark Manganello, was harmless. Specifically, the defendant claims that Manganello's testimony fatally undermined her theory of self-defense and that, as a result, it likely had a substantial effect on the jury's verdict. We disagree and, accordingly, affirm the judgment of the Appellate Court.

The jury could have reasonably found the following facts. The defendant began dating the victim in 1999. In 2008, the victim and his children from a previous marriage began living at the defendant's home in Glastonbury. The relationship between the defendant and the victim was deeply troubled; they often fought, called each other names, and exchanged threats of violence. The two were once engaged but never married. Although the defendant testified that the victim often became agitated, and even physically abusive, their neighbors also testified that the defendant appeared to be the aggressor during arguments and that the victim "most often" would just leave the house when those fights occurred.

The jury heard various pieces of evidence about the victim's activities and character. He was a member of

the James Gang Motorcycle Club, carried multiple knives, used cocaine, drank to excess, and often stayed out late.[1] Testimony offered at trial indicated that the victim wore a "1 percenter" patch on his leather club vest, which signified that he was part of the 1 percent of motorcycle riders who do not obey the law. The defendant sought to show her own subjective fear of the victim by calling a particular witness, David Hillman, who testified that the victim had threatened him at a bar in South Glastonbury, that several men had physically assaulted him, and that the victim had injured him twice with a knife. Other testimony presented to the jury, however, indicated that the James Gang Motorcycle Club included individuals with "regular every day jobs" and that, although the police had some suspicions about their activities, it never led to any arrests.

The relationship between the defendant and the victim deteriorated over the weeks preceding the victim's death. On December 12, 2011, the defendant's sister, Johanna Carey-Lang, discovered the victim with another woman, Jodi D'Onofrio, inside of the defendant's own home. This discovery led the victim to call the defendant and admit his infidelity.[2] This incident did not, however, immediately end their relationship; later that same day, the defendant was cuddling with the victim on the couch and asked Carey-Lang to leave so that they could spend time together.[3] Two days later, the victim moved out of the home, gave his keys to the defendant, and rented room 145 at the Carrier Motor Lodge (motel) in Newing-

[1] Documents and testimony offered during the course of trial indicate that the defendant began, but subsequently abandoned, efforts to evict the victim from her home in both 2009 and the spring of 2011.

[2] According to the defendant, the victim had cheated on her with at least four other women during the course of their relationship.

[3] Carey-Lang testified that this conduct troubled her: "I was disappointed in seeing her with [the victim] cuddling and acting like nothing ever happened. That he was, you know, he was cheating on her and she just accepted it and loved him and wanted to be with him."

ton, the location where the victim later died. At one point, the defendant described this separation to the jury as "a timeout for repeated bad behavior . . . ."

Approximately two weeks prior to the victim's death, there was an incident between the defendant and the victim at the same motel. On December 18, 2011, the defendant brought her gun, but not her cell phone, to the motel, checked into a room, and then called Carey-Lang using the telephone inside of that room in order to ask her to place a three-way call to the victim.[4] The victim answered that call from his own room and, during the course of that conversation, told the defendant that he loved D'Onofrio. D'Onofrio, who was lying in bed with the victim at the time, looked out of the window and saw the defendant's car parked outside. The defendant left a short time later, and the victim then escorted D'Onofrio to her car. The defendant testified that she returned to the motel later that same evening, had sex with the victim, and checked out of her own room the following morning. One of the victim's friends, Jessica Montano, testified that the victim had told her that he was scared by the defendant's actions that day. Specifically, Montano testified that the victim had described the defendant as "more upset than he had ever seen her" and indicated that the defendant "would do anything to get him to stay."

Manganello's testimony, the admission of which is the subject of the present appeal, relates to the victim's out-of-court description of an altercation that allegedly occurred on December 24, 2011. That testimony, which will be reviewed in greater detail subsequently in this opinion, indicated that the victim had entered the defendant's home through a window to retrieve some belongings on that date and was confronted by the defendant,

[4] As a result of this fact, the victim's cell phone showed that the call was coming from the defendant's home.

who allegedly pointed a gun at his head, told him to get out, and threatened to "blow his f'ing brains out" if he ever returned.

Notwithstanding these events, the defendant and the victim continued to interact with one another over the days that followed. On a few occasions, the defendant asked Carey-Lang to leave the home in Glastonbury so that she could spend "alone time" with the victim. The defendant testified, more specifically, that she had sex with the victim on at least three occasions from December 25, 2011, to January 1, 2012.[5] The defendant also recounted various other interactions with the victim during this time relating to his children, laundry, and diabetes.[6]

By January, the defendant believed their relationship was ending. On January 1, 2012, the defendant sent a text message to a friend, stating, "I think he is afraid to have to explain to his friends if he were to come back home. I think that this split is permanent. I asked about therapy, he said it used to be an option. I don't think it is an option any more." The following morning, the defendant asked to accompany Carey-Lang and her boyfriend, Leon Brazalovich, to an indoor shooting range located inside of Hoffman's gun store in Newington. Although Carey-Lang testified that she had planned the trip for Brazalovich's entertainment, only the defendant and Carey-Lang brought their guns and signed into

[5] At 1:47 a.m. on December 31, 2011, the defendant sent a text message to the victim stating, "[s]o sorry. [You] work it fantastically. Please call about product." The following afternoon, the victim replied, "[s]orry about my attitude last [night] . . . ." The defendant then replied, "[i]t's ok. Thank you for apologizing. Can you get what we talked about?" The victim responded, "[h]ow much." The defendant then replied, "2 8s." At trial, the defendant explicitly testified that she had been referring to two size eight boots. This testimony was, however, undercut by the fact that the defendant, on cross-examination by the state the following day, admitted to using cocaine with the victim on January 1, 2012. See footnote 17 of this opinion.

[6] Testimony offered at trial indicated that the victim was a type 2 diabetic.

the range that day.[7] The range safety officer, Steven Wawruck, testified that both of the sisters appeared to be amateurs and that both required assistance when their guns jammed. Wawruck also recalled that the defendant did most of the shooting that day.

Shortly after leaving the shooting range, the defendant spoke with the victim over the phone. The defendant testified that the victim had asked her to bring him lunch because he had run out of money and needed food to regulate his insulin levels. The defendant then drove Carey-Lang and Brazalovich to a nearby restaurant and, along the way, asked Brazalovich to reload the magazines to her gun. When Brazalovich finished, he placed the loaded magazines inside of a zippered case containing the defendant's gun. The defendant then drove to the motel and exited the vehicle with a bag of food, her purse, and that zippered case. Brazalovich and Carey-Lang then took the vehicle and left to go get their own lunch shortly after 2 p.m. It is undisputed that the defendant shot the victim three times around 7:30 p.m. that evening in his motel room and that, as a result, the victim died.

The defendant provided the jury with her own account of the events inside of the victim's motel room that led to his death. She testified that, after lunch on the day of the shooting, the victim began blaming Carey-Lang for catching him with D'Onofrio and became very angry that Carey-Lang and Brazalovich had just been in the motel parking lot.[8] The defendant stated that she eventually succeeded in calming the victim down and

[7] Carey-Lang and the defendant had previously discussed the possibility of such an outing after visiting the store in search of a paintball gun for Brazalovich's nephew. Testimony offered at trial indicated that the defendant was not a frequent visitor to the shooting range.

[8] At 2:46 p.m., Carey-Lang sent a text message to the defendant stating that she was done with lunch. The defendant responded that she needed another hour with the victim. Carey-Lang told the defendant to call when she was done.

that she went into the bathroom with her purse around 3:15 p.m.[9] The defendant testified that, at that time, she took her gun out of her purse, put a magazine into it, chambered a round, and then returned the gun to her purse.[10]

The defendant stated that the conversations with the victim were "up and down" after that. According to the defendant, the victim told her that he wanted to move back in with her, but she told him that it would not be possible without counseling. The defendant stated that this caused the victim's anger to "flare up" again.[11] Starting around 4:20 p.m., the defendant began sending a series of text messages to Carey-Lang asking when she could be picked up. These messages stated, among other things, that the victim was mad, yelling at her, and making threats.[12] Carey-Lang, who had been at a gymnastics class with her daughter, eventually left to pick up the defendant around 6:50 p.m. The defendant testified that, around that time, she had succeeded in calming the victim down a second time and had then, once again, excused herself to use the bathroom. The defendant stated that, while she was out of the room, the victim received a call from D'Onofrio and that, when she returned, the victim was "agitated" and "looking to pick a fight . . . ." The defendant told the jury that a loud argument ensued[13] and that she eventually succeeded in calming the victim down for a third time.

[9] At 3:17 p.m., the victim sent a text message to D'Onofrio, stating "I love the pictures of us you are beautiful and every time I think I couldn't possibly be more in love with you I see you and realize I love [you] more . . . ."

[10] The defendant told the jury that it was her habit to carry her gun with a bullet in the chamber so that she could defend herself quickly in the event of an attack.

[11] At 4:05 p.m., the victim received the following text message from D'Onofrio: "My Monday nights are far more entertaining when you're here with me. Miss you baby."

[12] Specifically, the defendant testified that the victim had said, "I'd like to knock your teeth out" and other things "along those lines . . . ."

[13] An individual who had been staying in the room next door; see footnote 15 of this opinion; testified at trial that he heard gunshots between 7:16 and

The defendant testified that, at this point, the victim was reclined against the headboard of one of the beds with his left leg bent up near his body and his right leg dangling off the side. The defendant indicated that she sat on the same side of the same bed, "practically touching knee to knee" with the victim. The defendant then exchanged another series of text messages with Carey-Lang who, at the time, was waiting in a vehicle with her daughter in the parking lot of a nearby grocery store. The defendant testified that she texted Carey-Lang, "[I'm] [c]oming" at 7:22 p.m., put her phone back inside of her purse, and that everything then "just hit the fan."

The defendant stated that she told the victim that she knew one of his children had recently moved into D'Onofrio's home, and that the victim responded by becoming intensely angry and calling her a "sneaky f'ing cunt." The defendant testified that she then told the victim that she had "met somebody else" and that she "felt it was best" that he pursue his relationship with D'Onofrio. According to the defendant, the victim then said that she would not be leaving him, that "he had already put a hit out on [her] family through his club brothers," and that he "would be taking [her] out personally." The defendant stated that the victim already had a fixed blade knife with a wooden handle in his left hand and that he used his other hand to reach for a second knife located on a nightstand to his right. The defendant testified that she then pulled the gun from her purse, backed up past the end of the bed, pleaded with the victim to let her go, and, moments later, shot

7:38 p.m., but that he did not hear anything else from the room that day. A substantial amount of evidence was adduced by both the state and the defendant in an attempt to show whether arguments such as those described by the defendant would have been heard through the motel room walls. The jury was, of course, free to weigh that evidence as it saw fit and reach its own conclusions. See, e.g., *State* v. *Meehan*, 260 Conn. 372, 381, 796 A.2d 1191 (2002) ("[i]t is axiomatic that evidentiary inconsistencies are for the jury to resolve, and it is within the province of the jury to believe all or only part of a witness' testimony").

him three times. The defendant testified that the victim was going to attack her, that she feared for her life, and that she had no time to flee.

After shooting the victim, the defendant remained in the room, called Carey-Lang, and asked her to come inside without her daughter.[14] The defendant testified that she moved the knife away from the victim's hand and that, once Carey-Lang arrived, they discovered that the victim no longer had a pulse. Carey-Lang then began yelling at the defendant and told her to call 911. The defendant testified that, at that point in time, she felt compelled to leave the room because of her continued fear of the victim. When she left the room, however, the defendant took her phone, her purse, her gun, the shell casings from the floor, the bag that had previously contained their lunch, and a key to the room.[15]

The defendant and Carey-Lang then drove to a house owned by their brother, Joseph Carey, in the nearby town of Wethersfield. Joseph Carey also told the defendant that she needed to go back to the motel and to call 911, and advised her to place everything "back exactly the way it was" in the room.[16] Although the defendant initially agreed to return to the motel during the conversations that followed, Carey-Lang testified that she eventually had to push the defendant out of the car when they approached the motel. The defendant admitted that she went back into the room, placed the knife under the victim's hand, put the bullet casings

[14] Although the defendant testified that she wanted to seek medical attention for the victim, she did not do so.

[15] An individual staying in the room next door; see footnote 13 of this opinion; testified that he had been outside at the time and that he saw the defendant make sure that the door to room 145 was locked before leaving with Carey-Lang.

[16] At trial, Joseph Carey testified that this particular remark was prompted by the bag of food that the defendant had taken from the motel. That bag, however, was not with the defendant when she was arrested. Joseph Carey speculated that it "might have ended up in the back of [his] truck."

back on the floor, and set down her gun. She then called 911 shortly after 10 p.m.

During that call, the defendant stated the following: "My boyfriend and I were, you know, talking and all of a sudden he got real angry, he came at me with a knife, and I was scared, I shot him." Although the defendant never expressly told the 911 dispatcher when the shooting had occurred, some of her language was discordant with the reality that nearly three hours had, in fact, passed since the victim's death. Specifically, the defendant told the dispatcher that she did not know whether the victim was still moving or whether she had been injured. After the police arrived and arrested the defendant, she became nonresponsive and was transported to a nearby hospital for evaluation.[17]

Several pieces of physical evidence relating to the crime scene are particularly noteworthy. The victim was found lying on his right side with his head in between the nightstand and the bed. An autopsy revealed that three bullets had entered his upper body, one of which had damaged his heart. Although the medical examiner was unable to determine the relative positions of the defendant and the victim from the nature of these wounds, a former deputy director of the state forensic science laboratory, Robert O'Brien, testified that the

[17] A physician, Hamid Ehsani, subsequently diagnosed the defendant with "conversion disorder," which he described as "a change in the neurologic status of a patient which cannot be explained easily by any obvious medical condition." Ehsani indicated, however, that he could not rule out "malingering," which he described as "when one acts in a certain way . . . for secondary gain . . . because it suits their purposes at the time." A toxicologist, Mitchell Sauerhoff, testified that, although the defendant tested positive for cocaine, he was unable to determine precisely how much of that drug the defendant had used, when she had taken it, or whether she had been under the influence of that drug at the time of the shooting. See footnote 5 of this opinion. Although the defendant admitted to using cocaine with the defendant in the motel room the day before the shooting, she denied using any cocaine the following day.

absence of gunpowder from the victim's shirt indicated that the muzzle of the defendant's gun was greater than three feet away from the victim at the time of the shooting. The defendant's use-of-force expert, Massad Ayoob, estimated that the victim was initially positioned six feet, seven inches away from the location near the foot of the bed where the defendant had discharged her weapon. Ayoob's research indicated that an individual armed with a knife, sitting in the same position as the victim on the bed, could close that distance and inflict injuries in less than a second and that it would have taken a person in the defendant's position a comparatively greater amount of time to escape. Photographs taken by the police show a large, sheathed knife atop the nightstand near an upright beer bottle. Finally, a detective from the Newington Police Department, Leroy Feeney, testified that the front pocket of the defendant's purse contained a pair of clear, disposable gloves.[18]

The jury deliberated for four days. During that time, the jury asked for the court to play back the defendant's testimony related to the day of the shooting and, more specifically, her account of the events that occurred inside of the motel room. No other testimony was requested. On October 7, 2015, the jury returned a verdict finding the defendant guilty of the crime of murder. The trial court subsequently rendered a judgment of conviction in accordance with that verdict and sentenced the defendant to fifty years of incarceration.

The defendant then appealed, claiming, inter alia, that the trial court improperly had admitted Manganello's testimony.[19] In that appeal before the Appellate Court,

[18] The defendant's DNA was found only on the exterior of those gloves. The defendant testified that she carried them to pump gas. Carey-Lang testified that the defendant used such gloves mostly for cleaning.

[19] The defendant initially appealed to this court, and we then transferred that appeal to the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

the state conceded that the trial court had erred by admitting that testimony under the state of mind exception to the hearsay rule. The state argued, instead, that Manganello's testimony could have been admitted under the residual exception to the hearsay rule and, in the alternative, that any error was harmless. The Appellate Court agreed with the state's latter argument and held that, even if the trial court had erred in admitting Manganello's testimony, that error would have been harmless "in light of the overwhelming evidence of the defendant's consciousness of guilt." *State* v. *Carey*, 187 Conn. App. 438, 450, 202 A.3d 1067 (2019). The Appellate Court focused its analysis of this issue exclusively on events that occurred after the shooting, including the defendant's initial refusal to call the police, her flight from the scene with various pieces of physical evidence, her reluctance to return, and the misleading nature of her statements to the 911 dispatcher. Id., 449–51. The Appellate Court rejected the defendant's remaining claims and, accordingly, affirmed the trial court's judgment of conviction. Id., 466. This appeal followed.[20]

Like the Appellate Court, we assume, without deciding, that the trial court's evidentiary ruling pertaining to Manganello's testimony was in error and focus our analysis on the question of whether the defendant was harmed by its admission.[21] The defendant argues that

[20] We granted the defendant's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the allegedly improper admission of . . . Manganello's hearsay testimony was harmless?" *State* v. *Carey*, 331 Conn. 913, 203 A.3d 1246 (2019).

[21] In its brief to this court, the state argues that Manganello's testimony was admissible under (1) the residual exception set forth in § 8-9 of the Connecticut Code of Evidence, and (2) the state of mind exception set forth in § 8-3 (4) of the Connecticut Code of Evidence. The defendant, in reply, posits that the state is procedurally barred from arguing the former for various reasons and, in the alternative, that both of those claims fail on their merits. Because we agree with the Appellate Court's conclusion that any error in relating to the admission of the challenged testimony was harmless, we need not address these arguments. See, e.g., *State* v. *Jamison*, 320 Conn. 589, 595, 134 A.3d 560 (2016).

the incident on December 24, 2011, carried unique force and was crucial to the state's theory of the case, particularly because the state's overall case against her was weak. In response, the state argues, among other things, that it had a strong case against the defendant and that Manganello's testimony was cumulative in several respects. For the reasons that follow, we are unable to conclude that the defendant has satisfied her burden of demonstrating that the challenged testimony substantially affected the jury's verdict and, accordingly, affirm the judgment of the Appellate Court.

The following additional facts are necessary to place Manganello's testimony into context with the other evidence presented at trial. The state called Manganello during its case on rebuttal in an attempt to show that the victim had been afraid of the defendant. The state proffered a sworn statement from Manganello indicating that the victim had told him about a particular confrontation during which the defendant had allegedly drawn a gun. The purpose of his testimony, the state argued, was to show that the victim had "a healthy fear" of the defendant and her gun and, therefore, that it was unlikely that he would have chosen to attack her with a knife.

The defendant had filed a motion in limine seeking to suppress parts of Manganello's testimony. At trial, although defense counsel conceded that Manganello permissibly could have testified that the victim was generally afraid of the defendant, he objected to any testimony relating to the victim's account of the specific events giving rise to that fear. The state argued in response that the proffered testimony was relevant to show motive, intent, and the absence of an accident. The state also argued that Manganello's testimony showed the victim's state of mind on the date of his death and that, in any event, his testimony would be admissible under the residual exception to the rule

against hearsay. The trial court agreed with the state and concluded that Manganello's testimony was both relevant and admissible under the state of mind exception to the hearsay rule.

Manganello testified at trial that, on December 27, 2011, the victim told him that he had crawled into the defendant's home through a window to retrieve some personal possessions on December 24, 2011. Manganello stated that the victim did not know that the defendant was home and that, according to the victim's account, she had "put a gun to his head and . . . told him to get the F out of here and if he ever came back, she would blow his f'ing brains out." Manganello testified that, on December 31, 2011, the victim once again stated, "can you believe that bitch said she'd blow my f'ing brains out?" Manganello then testified, generally, that the defendant's threat frightened the victim. On cross-examination, defense counsel attempted to discredit Manganello's testimony by emphasizing the fact that he did not personally witness the confrontation recounted by the victim and by drawing the jury's attention to a series of benign text messages[22] exchanged between the defendant and the victim shortly after the alleged confrontation would have occurred.[23]

In closing, the state pointed to several pieces of evidence in an attempt to demonstrate that the defendant possessed an intent to kill the victim on January 2, 2012. The state argued, among other things, that (1) the defendant's trip to the shooting range[24] and her possession

[22] Those text messages, which related to the exchange of a fruit basket, were sent between 1:08 and 1:21 a.m. on December 25, 2011.

[23] The transcript of Manganello testimony spans thirteen pages. The presentation of evidence in this case, by comparison, took more than three weeks.

[24] The state argued that, because Brazalovich did not bring his gun that day, it would be reasonable to infer that the trip was not planned for his entertainment.

of disposable gloves[25] showed preparation, (2) the shooting did not occur until Carey-Lang was outside waiting for her, (3) the defendant had moved the knife and fled the scene, (4) the absence of gunshot residue on the victim's shirt showed that he was not within three feet of the defendant at the time of the shooting, (5) the defendant's 911 call made it sound as if the shooting had just happened, (6) the defendant had the presence of mind to take her personal belongings, the food bag, and the shell casings with her when she left, and (7) the defendant had staged the scene before calling 911. The state then argued that the defendant had concocted a "story" of self-defense because the victim's call with D'Onofrio could have connected her to the room and a .380 caliber gun was registered in her name.[26] The state argued that the text messages exchanged between the victim and D'Onofrio on the day of the shooting; see footnotes 9 and 11 of this opinion; were inconsistent with the defendant's testimony that the call that the victim received shortly before 7 p.m. had enraged him. Finally, the state asked the jury to infer that the defendant had asked Carey-Lang to place a three way call to the victim on December 18, 2011, so that he would not know that she was at the motel.

The state's most direct response to the defendant's theory of self-defense was derived from the location of the various pieces of physical evidence discovered at

[25] The state highlighted the fact that the defendant and Carey-Lang explained these gloves in a slightly different manner. See footnote 18 of this opinion.

[26] The state buttressed this argument by positing, generally, that the defendant lacked credibility. The state suggested that the defendant seemed rehearsed and confrontational. It then reminded the jury that the defendant had explained that her request for "2 8s" of "product" was a reference to size eight boots. See footnote 5 of this opinion. The state also noted several inconsistencies and ambiguities in the record relating to, among other things, whether the defendant's eyes were closed during the shooting, how long she remained at the gun range that morning, and whether she asked Carey-Lang to leave her home on December 12, 2011.

the crime scene. The following passage from the state's closing argument reflects the importance of this evidence to the state's theory of the case: "[The defendant] says she doesn't move until [the victim] makes that threat and moves. . . . [H]e's pivoting to get this knife and he's lunging toward her and that causes her to move. . . . [S]he's able to stand up. . . . She's able to back up six feet. . . . She's pleading for her life . . . . She draws her gun. . . . She aims at his torso . . . and she fires. . . . We know that [knife on the nightstand] never got taken, right? He never touched it. It's still in its sheath. . . . It's not on the ground with him. . . . She's able to get up, stumble back, get over six feet away . . . draw, aim and fire before his hand can touch that knife right next to him. Does that make any sense? Now let's look at the body position. . . . [The victim's] between the bed and the nightstand. If he is standing and lunging like the defendant claims, she shoots him, why isn't he facedown between the bed and her? . . . You heard . . . Ayoob testify that [someone in the victim's] position could get to someone in the defendant's position in under a second . . . . [The] timing does not match."

The state's closing argument contains, by contrast, only passing references to the substance of Manganello's testimony. The defendant has drawn our attention to only a few instances in which the state argued, summarily, that the incident on December 24, 2011, was credible evidence of the defendant's intent. For example, toward the end of his rebuttal argument, the prosecutor stated: "Maybe [the victim] didn't pick it up, maybe he dismissed it too soon, but . . . when she said if you ever come around here I'm going to blow your head off, he should have been tipped off. That's what her intent was. She brought the gun in there to finish this off the way she wanted."[27]

[27] At the state's request, the trial court included the following instruction relating to Manganello's testimony in its final charge to the jury: "The state

The defendant concedes that the claim raised in the present appeal is evidentiary, rather than constitutional, in nature. The standard of review applicable to such a claim is well established. "When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the . . . testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *Ayala*, 333 Conn.

has offered evidence of an act of misconduct of the defendant. This is not being admitted to prove the bad character, propensity or criminal tendencies of the defendant. Such evidence is being admitted solely to show or establish the defendant's intent, malice on the part of the defendant against the decedent, a motive for the commission of the crime alleged, absence of mistake or accident on the part of the defendant. You may not consider such evidence as establishing a predisposition on the part of the defendant to commit the crime charged or to demonstrate a criminal propensity.

"You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issues for which it is being offered by the state, but only as it may bear on the issues delineated herein. On the other hand, if you do not believe such evidence, or even if you do, if you find that it does not logically, rationally and conclusively support the issues for which it is being offered by the state, as previously delineated, then you may not consider that testimony for any purpose.

"You may not consider evidence of other misconduct of the defendant for any purpose other than the ones I've just told you, because it may predispose your mind uncritically to believe that the defendant may be guilty of the offense here charged merely because of the alleged other misconduct. For this reason, you may consider the evidence only on the issues as delineated and for no other purpose."

225, 231–32, 215 A.3d 116 (2019); see also, e.g., *State* v. *Jackson*, 334 Conn. 793, 818, 224 A.3d 886 (2020).

The state presented four categories of evidence in support of its case and in response to the defendant's theory of self-defense, all of which were largely unrelated to Manganello's testimony. First, the state introduced physical evidence that was inconsistent with the defendant's account of the shooting. Second, the state introduced evidence undercutting the defendant's claim that the victim had been the aggressor in their relationship and that she had decided to leave him. Third, the state relied on the defendant's conduct before the shooting as evidence of her intent to use her gun. Finally, the state argued that the defendant's conduct after the shooting demonstrated consciousness of guilt. A review of these points illustrates the strength of the state's case.

The physical evidence at the scene was inconsistent with the defendant's description of the events preceding the shooting. The defendant testified that she had been sitting on the same side of the same bed as the victim and that he was already armed with a fixed blade knife at the time he started to attack her. The defendant stated that the victim reached for a second knife on the nightstand with his other hand while simultaneously lunging toward her. The physical evidence discovered at the scene, however, suggested that the victim succeeded in doing neither. The victim's body was discovered near the head of the bed where he had been sitting, not near the end of the bed where the defendant had been standing. The absence of gunshot residue on the victim's shirt likewise indicates that the barrel of the defendant's gun was greater than three feet away from the victim at the time of the shooting. Although the victim had been sitting right next to the nightstand, the sheathed knife he had

allegedly reached for remained resting there alongside an upright bottle of beer.[28]

Various witnesses other than Manganello testified that the defendant had acted aggressively toward the victim in the past. The defendant's neighbors testified that she appeared to be the aggressor during their arguments and would often yell loudly. They indicated that the victim, on the other hand, would "most often" just leave the house. Likewise, both Montano and D'Onofrio testified that the victim was scared by the defendant's decision to rent her own room at the motel on the day of the prior incident of December 18, 2011. The record also contained evidence to support the conclusion that the victim, and not the defendant, had sought to end the relationship. Carey-Lang testified that, even though the victim was caught cheating, the defendant "just accepted it and loved him and wanted to be with him." See footnote 3 of this opinion. D'Onofrio testified that, on December 18, 2011, the victim told the defendant directly that he loved D'Onofrio. Lastly, both the defendant's description of their separation as a "timeout for bad behavior" and the text message that she sent to her friend on January 1, 2012, indicated that, contrary to her testimony, it was the defendant that wanted to continue their relationship.

The defendant's conduct before the shooting also provided circumstantial evidence relevant to her intent. First, the defendant went to a shooting range that day to practice using her gun and asked someone else to load ammunition into the empty magazine after she was done. Second, the front pocket of the defendant's purse contained a pair of disposable gloves. Third, during the middle of her visit with the victim, the defendant took

[28] In light of this physical evidence, we cannot agree with the defendant's assertion that there was "no evidence that contradicted her testimony," or that the present case was entirely based on her credibility as a witness. Cf. *State* v. *Favoccia*, 306 Conn. 770, 809, 51 A.3d 1002 (2012).

her gun to the bathroom, loaded a full magazine into it, and chambered a round of ammunition. At the same time, the victim was sending a text message to D'Onofrio professing his continued love.

As the Appellate Court's decision noted, the defendant's actions after the shooting provided yet further evidence from which the jury could have inferred the defendant's guilt. See *State* v. *Carey*, supra, 186 Conn. App. 450. Although the defendant testified that she fled the room that evening in a state of abject fear, notwithstanding the fact that the victim no longer had a pulse, she initially chose to remain inside until her sister arrived and then took pains to gather various items from around the room before she left. These items included her purse, the gun, the shell casings from the floor, the bag of food that she brought with her, and a key to the door that she subsequently locked behind her. The defendant also admitted to manipulating the single piece of physical evidence that would have shown the victim had acted in aggression—the knife—not once, but twice. Finally, when she eventually called 911, she chose not to tell the dispatcher that the shooting had, in fact, occurred hours before. Apart from Manganello's testimony, the jury had ample evidence from which it could have determined the defendant's guilt.

In light of this broad range of evidence, we cannot conclude that Manganello's testimony was either crucial to the state's theory of intent or that its overall case against the defendant was particularly weak. The incident recounted to the jury through Manganello's testimony was not the primary, or even a significant, basis for the case against the defendant. The state's closing argument referenced it on a few, brief occasions, and it was not an important point of emphasis. Moreover, although the jury's deliberations took four days, its members sent a note to the court stating that "[w]e are only concerned with the parts of the defen-

dant's testimony [that] directly pertain to what happened in the room." Cf. *State* v. *Moody*, 214 Conn. 616, 629, 573 A.2d 716 (1990) ("a jury's request that testimony be reread indicated that the jury regarded the evidence as important").

We agree with the defendant that the substance of Manganello's testimony was not corroborated by other witnesses and that it was "unique" in that sense, but there was nothing unique about the underlying point of the testimony—the defendant had displayed aggression toward the victim in the past, and he was fearful of her. The defendant herself testified that she had previously threatened the victim with physical violence. As stated previously in this opinion, Montano testified that the victim was generally afraid of the defendant. This evidence was echoed by D'Onofrio, who informed the jury that the victim had specifically expressed fears that the defendant was going to kill him over the weeks preceding his death. Testimony at trial also indicated that the victim knew that the defendant owned a gun and that she would have been carrying it with her for protection. Nor was the incident described by Manganello the only evidence that the jury heard about the defendant's access to a gun. The jury heard that a mere two weeks prior to the shooting, the defendant had taken a gun to, and booked a room at, the same motel where the shooting occurred.

Finally, we note that certain aspects of the incident described by Manganello actually supported the defendant's primary theory of the case. The defendant spent a significant amount of time at trial attempting to demonstrate that the victim was a member of an "outlaw motorcycle gang" and that, as a "1 percenter" patch holder, he was not generally concerned with obeying the law. Manganello's testimony demonstrated, by the victim's own words, that he was an individual who was willing to break into someone's home. Manganello's

testimony cast the victim as a lawbreaker and the defendant as the target of that unlawful conduct. We note, in particular, that the defendant would have been legally justified to draw her gun in response to such an intrusion. See General Statutes § 53a-20. Put differently, this is not a case in which the trial court admitted hearsay evidence that the defendant had previously engaged in unprovoked, gratuitous violence,[29] or that she was prone to threatening others with her gun in the absence of just cause. The specific incident at issue in this appeal would tend to support the defendant's position that she had good reason to be fearful of the victim. Manganello's testimony showed the jury little more than what the defendant herself asserted: that she was willing to draw her gun on the victim in an act of self-defense. As such, the challenged testimony was consistent in certain important respects with the defendant's own theory of the case.

In order to prevail on the evidentiary claim before us, the defendant bears the burden of demonstrating that Manganello's testimony substantially swayed the jury's verdict. For the reasons explained, we are simply unable to conclude that she has satisfied that burden. We therefore agree with the Appellate Court's assessment that any evidentiary error committed by the trial court with respect to the admission of that testimony was necessarily harmless.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

[29] Even if we were to agree with the defendant that Manganello's testimony could have painted her as a "hot tempered" or "violent" individual, the trial court explicitly instructed the jury that it could not use that evidence to "[establish] a predisposition on the part of the defendant to commit the crime charged or to demonstrate a criminal propensity." See footnote 27 of this opinion. In the absence of any indication to the contrary, we assume that the jury followed that instruction. See, e.g., *State* v. *Ramos*, 261 Conn. 156, 167, 801 A.2d 788 (2002), overruled in part on other grounds by *State* v. *Elson*, 311 Conn. 726, 91 A.3d 862 (2014).

STATE OF CONNECTICUT *v.* BILLY RAY JONES (SC 20261)

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

Syllabus

In accordance with *State* v. *Patterson* (276 Conn. 452), a trial court in a criminal case must issue a special credibility instruction to the jury when a jailhouse informant testifies about inculpatory statements made by a fellow inmate to the informant while they were incarcerated together.

Convicted, after a jury trial, of the crimes of murder, carrying a pistol without a permit, and criminal possession of a firearm in connection with the shooting death of the victim, the defendant appealed to the Appellate Court, claiming, inter alia, that the trial court improperly denied his request for a special credibility instruction concerning the testimony of jailhouse informants as it related to one of the state's key witnesses, S. At trial, the state presented no physical evidence linking the defendant to the victim's murder or to the firearm used, instead relying on the testimony of S, among other witnesses. S had approached the police more than two years after the shooting while he was in pretrial detention on two felony charges, hoping for a favorable disposition on his pending charges in exchange for information about the victim's murder. S told the police that he had seen the defendant when he was visiting the housing complex where the victim was murdered on the night in question and that, shortly thereafter, had heard gunshots. S also told the police that he and the defendant were watching television together the day after the shooting when S, who was holding a handgun, confessed to shooting the victim. The defendant requested that the trial court give a special credibility instruction concerning S's testimony in accordance with this court's decision in *Patterson*. The trial court denied the defendant's request and, instead, issued a general credibility instruction. On appeal, the Appellate Court affirmed the judgment of conviction, concluding, inter alia, that the defendant was not entitled to the special credibility instruction that he had sought because S did not testify about a confession the defendant made to him while they were fellow inmates but, rather, about events he had witnessed and a confession that had been made outside of the prison environment. On the granting of certification, the defendant appealed to this court. *Held* that the Appellate Court incorrectly determined that the trial court had properly denied the defendant's request for a jailhouse informant instruction: a defendant is entitled to a special credibility instruction regarding jailhouse infor-

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

mants when the informant was incarcerated at the time he approached the police with information regarding a defendant's inculpatory statements and testifies at trial about those statements, regardless of where the statements were made, and, because S was incarcerated when he approached the police about the defendant's confession in exchange for leniency in his own pending criminal matters, he was a jailhouse informant for whom a special credibility instruction was required; moreover, the trial court's denial of the defendant's request to give such an instruction was not harmless, as the state presented no physical evidence linking the defendant to the victim's murder or the firearm used in the commission of that offense, the trial court's general credibility instruction did not fully inform the jury of the factors it could consider in evaluating S's credibility, and the only evidence corroborating S's testimony regarding the defendant's confession was the testimony of another witness who suffered from credibility problems; accordingly, this court reversed the judgment of the Appellate Court and remanded the case for a new trial.

(*One justice concurring separately*; *three justices dissenting in one opinion*)

Argued December 17, 2019—officially released December 1, 2020**

Procedural History

Two part substitute information charging the defendant, in the first part, with the crimes of murder and carrying a pistol without a permit, and, in the second part, with criminal possession of a firearm, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Kavanewsky, J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Alvord* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Mark Rademacher, assistant public defender, for the appellant (defendant).

Timothy J. Sugrue, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *Michael A. DeJoseph, Jr.*, senior assistant state's attorney, for the appellee (state).

** December 1, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ECKER, J. In *State* v. *Patterson*, 276 Conn. 452, 886 A.2d 777 (2005), we held that a trial court must issue a special credibility instruction when a jailhouse informant testifies because such informants have "a powerful incentive, fueled by self-interest, to implicate falsely the accused," and, "[c]onsequently, [their] testimony . . . is inevitably suspect." Id., 469. A "classic jailhouse informant is a witness who has testified that the defendant has confessed to him or had made inculpatory statements to him while they were incarcerated together." *State* v. *Diaz*, 302 Conn. 93, 99 n.4, 25 A.3d 594 (2011). The question presented in this certified appeal is whether the Appellate Court correctly held "that the special credibility instruction required in *State* v. *Patterson*, [supra, 452], was not applicable to an incarcerated informant who offered his testimony that the defendant confessed to him when they socialized *outside of prison* in exchange for favorable treatment of the informant by the state . . . ." (Emphasis added.) *State* v. *Jones*, 331 Conn. 909, 202 A.3d 1023 (2019). We answer the certified question in the negative and reverse the judgment of the Appellate Court.

The jury reasonably could have found the following facts. On the evening of June 21, 2010, the victim, Michael Williams, was shot to death with a nine millimeter pistol outside of the Charles F. Greene Homes housing complex (Greene Homes housing complex) in Bridgeport. When the police arrived to investigate the shooting, they found twenty to thirty people in the area where the victim's body was found, but these potential witnesses were unwilling to cooperate with the police investigation.[1]

[1] Martin Vincze, a police officer employed by the city of Bridgeport, testified that only one of the witnesses was willing to talk to the police about the shooting. Vincze explained that he was not surprised by the lack of cooperation because "[i]t's a common thing in housing complexes." Angela Teele, a resident of the housing complex at the time of the shooting, con-

Four days after the victim's murder, Bridgeport police detective John Tenn interviewed the defendant, Billy Ray Jones. During the video-recorded interview, the defendant informed Tenn that he had not known the victim and was not in Bridgeport on the night of the victim's murder. The defendant stated that he was in Norwalk on June 21, 2010, visiting his childhood friend, Benjamin Beau. Tenn later questioned Beau, who denied that he was with the defendant on the night in question. Tenn also interviewed the defendant's ex-girlfriend, Chanel Lawson, who informed Tenn that the defendant knew the victim.

There were no further developments in the investigation until years later, when two cooperating witnesses approached the state with information regarding the victim's murder. The first witness, Angela Teele, gave the police information in September, 2012, after she was "picked . . . up" on drug charges. Teele told the police that she had been a resident of the Greene Homes housing complex at the time, a friend of the victim, and an eyewitness to his murder. On the night of June 21, 2010, Teele saw the defendant approach the victim on the playground outside of the Greene Homes housing complex dressed in blue shorts and a black hoodie. The defendant "threw his hood on," walked up to the victim, and shot him once in the back of the head with a pistol. The defendant then "[r]an out [of] the playground."

The second witness, Larry Shannon, approached the police with information regarding the victim's murder in February, 2013, when he was in pretrial detention on two felony charges. Shannon told the police that he was visiting the Greene Homes housing complex on the night of the victim's murder when he saw the defendant, whom he had known for about two or three months,

firmed that, "for the residents in and around the Greene Homes housing project," there is a "general culture of not helping the police" or being a "snitch."

dressed in jeans and a black hoodie. The defendant was "hooded up," which Shannon found to be suspicious because "[i]t was nice outside." Soon afterward, Shannon heard gunshots. He tried to run away, but he fell down due to a recent surgery on his Achilles tendon. Shannon met up with his stepbrother, who was a resident of the Greene Homes housing complex, and they "walked around the corner, and [the victim] was . . . slumped on the . . . playground."

The next day, on June 22, 2010, Shannon encountered the defendant at the Marina Village housing complex in Bridgeport. A "news clip came on the [television] about [the victim's] murder," and the defendant admitted to Shannon that he "did it." According to Shannon, the defendant was holding a silver, nine millimeter Ruger handgun when he confessed to Shannon that he "walked up to [the victim] and said, what's poppin' now," and then fired. No one else was present at the time of this conversation.

The defendant subsequently was arrested and charged with murder in violation of General Statutes § 53a-54a (a), carrying a pistol without a permit in violation of General Statutes § 29-35 (a), and criminal possession of a firearm in violation of General Statutes § 53a-217 (a). At the defendant's jury trial, the state relied primarily on the testimony of Teele and Shannon, as described in the preceding paragraphs, to establish the defendant's commission of the crimes charged. Additionally, the state presented the testimony of Beau and Lawson,[2] as well as portions of the defendant's video-recorded

[2] At trial, Lawson testified that the defendant and the victim knew "of each other, but [did] not know each other like they were friends . . . ." Lawson's prior video-recorded statement to the police, in which she stated that the defendant and the victim knew each other, was admitted into evidence at trial as a prior inconsistent statement under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). See, e.g., *State* v. *Simpson*, 286 Conn. 634, 641–42, 945 A.2d 449 (2008).

interview with Tenn, to contradict the defendant's statements that he was in Norwalk on the night of the murder and that he did not know the victim. The state did not present any physical evidence linking the defendant to the victim's murder or the firearm used in the commission of the offense, which the police never recovered.

Defense counsel argued to the jury "that this is a case that really comes down to the reliability and believability, or the lack thereof, of two witnesses: Angela Teele and Larry Shannon." In light of the importance of Shannon's testimony, defense counsel cross-examined Shannon extensively regarding his motive for coming forward with information about the victim's murder. Shannon admitted that he had contacted the police in the hope of trading information for "favorable treatment on [his] jail situation . . . ." Shannon further admitted that he received the favorable treatment for which he bargained. Although he was in pretrial detention on two felony offenses, he was released without having to pay a bond shortly after contacting the police. Additionally, Shannon was not sentenced to any jail time in connection with the two felony charges, even though he was on probation when he committed those offenses and someone with Shannon's criminal background typically would receive a more severe sentence.

At the conclusion of the trial, defense counsel requested a special credibility instruction with respect to Shannon's testimony in accordance with *State* v. *Patterson*, supra, 276 Conn. 469–70.[3] The defendant contended that a jailhouse informant instruction was

[3] Defense counsel requested the following special credibility instruction: "A witness who testified in this case, [Shannon], was incarcerated and was awaiting trial for some crimes other than the crime involved in this case at the time he first provided information to [the] police. You should look with particular care at the testimony of this witness and scrutinize it very carefully before you accept it. You should consider the credibility of this witness in the light of any motive for testifying falsely and inculpating the accused.

"In considering the testimony of . . . Shannon, you may consider such things as: [1] [t]he extent to which his testimony is confirmed by other

warranted because Shannon "was incarcerated and awaiting trial for felony charges when he first provided information to the police," testified that he "provided such information to the police because he wanted to get out of jail and because he hoped to receive a favorable disposition [on] his pending criminal charges," and, "in fact, received . . . these benefits as a result of the information he provided to the police in February, 2013." The state did not object to the requested instruction, but the trial court declined to issue it. Instead, the trial court issued a general credibility instruction[4] and

evidence; [2] [t]he specificity of the testimony; [3] [t]he extent to which the testimony contains details known only by the perpetrator; [4] [t]he extent to which the details of the testimony could be obtained from a source other than the defendant; [5] [t]he informant's criminal record; [6] [a]ny benefits received in exchange for the testimony or providing information to the police or [the] prosecutor; [7] [w]hether the witness expects to receive a benefit in exchange for the testimony or providing information to the police or prosecutor, regardless of whether such an agreement actually exists; [8] [w]hether the witness previously provided reliable or unreliable information; [and] [9] [t]he circumstances under which the witness initially provided the information to the police or the prosecutor, including whether the witness was responding to leading questions."

[4] The trial court instructed the jury in relevant part: "I now want to discuss the matter of credibility, by which I mean the believability of [the] witnesses. You have observed the witnesses. The credibility, the believability, of the witnesses and the weight to be given to their testimony are matters entirely within your hands. It is for you alone to determine their credibility. Whether or not you find the fact proven is not to be determined by the number of witnesses testifying for or against it. Again, it is the quality, not the quantity, of testimony [that] should be controlling. Nor is it necessarily so that you have to accept a fact as true because a witness has testified to it and no one contradicts it. The credibility of the witness and the truth of the fact are for you to determine.

"In weighing the credibility of the witnesses, you should consider the probability or improbability of their testimony. You should consider their appearance, conduct and demeanor while testifying and in court, and any interest, bias, prejudice or sympathy [that] a witness may apparently have for or against the state, or the accused or in the outcome of the trial. With each witness, you should consider his ability to observe facts correctly, recall them and relate them to you truly and accurately. You should consider whether and to what extent witnesses needed their memories refreshed while testifying. You should, in short, size up the witnesses and make your own judgment as to their credibility and decide what portion—all, some or none—of any particular witness' testimony you will believe based on these principles. You should harmonize the evidence as far as it can reasonably be done. You should use all of your experience, your knowledge of human

singled out Shannon's testimony for special consideration because he previously had been convicted of felony offenses.[5]

After the case was submitted to the jury for deliberation, the jury asked to review the testimony of Teele and Shannon. The jury also asked the trial court to replay the defendant's June 25, 2010 video-recorded interview with Tenn, as well as Lawson's testimony. After reviewing the requested information and deliberating further, the jury found the defendant guilty of the charged offenses. The trial court rendered judgment in accordance with the jury's verdict and sentenced the defendant to a total effective sentence of fifty years of imprisonment.

nature and of the motives that influence and control human conduct, and you should test the evidence against that knowledge. You should bring to bear upon the testimony of the witnesses the same considerations and use the same sound judgment you apply to questions of truth and veracity, as they present themselves to you in everyday life.

"You are entitled to accept any testimony which you believe to be true and to reject either wholly or in part the testimony of any witness you believe has testified untruthfully or erroneously. The credit that you will give to any testimony offered is something [that] you alone must determine. If you find that a witness has intentionally testified falsely, you should keep that in mind and scrutinize the whole testimony of the witness. But it still remains up to you to accept or reject all or any part of the testimony. If you find that a witness has been inaccurate in some way, and you do not think that the inaccuracy was consciously dishonest, you can consider that inaccuracy in evaluating the rest of [the witness'] testimony. You know that persons sometimes forget things or they get something wrong. The significance you attach to a mistake may vary more or less with the particular fact as to which the inaccuracy existed or with the surrounding circumstances. Give to it that weight which your own mind leads you to think it ought to have, in which you would attach to it in the ordinary affairs of life [when] someone came to you in a matter and you found in some particular, he was inaccurate."

[5] The trial court instructed the jury in relevant part: "There was evidence that one witness, [Shannon], was previously convicted of certain felonies. This evidence is . . . admissible [only] on the question of the witness' credibility, that is, the weight that you will give his testimony. So a felony conviction bears only on [the witness'] credibility. It is your duty to determine whether any witness is to be believed wholly or partly or not at all. You may consider a witness' prior convictions in weighing his credibility, but it is still your duty to decide what weight to give to the convictions as you decide is fair and reasonable in determining the matter of credibility."

The Appellate Court affirmed the defendant's judgment of conviction. *State* v. *Jones*, 187 Conn. App. 752, 754, 770, 203 A.3d 700 (2019). The Appellate Court determined that the defendant was not entitled to a jailhouse informant instruction pursuant to *State* v. *Diaz*, supra, 302 Conn. 101–102, and *State* v. *Salmond*, 179 Conn. App. 605, 627–28, 180 A.3d 979, cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018), on the ground that Shannon "did not testify as to a confession that the defendant made while they were fellow inmates." *State* v. *Jones*, supra, 761. Because "Shannon testified about events that he had witnessed and a confession that took place while both of them were socializing outside of the prison environment"; id., 762; the Appellate Court determined that the trial court's "general credibility instruction [was] sufficient."[6] Id., 764.

On appeal, the defendant contends that he was entitled to a jailhouse informant instruction because Shannon was an incarcerated witness who had a strong incentive to fabricate false testimony regarding the defendant's confession to the commission of the crimes charged.[7] The defendant points out that Shannon was in pretrial detention at the time he approached the police with information and that Shannon expected to—

[6] The Appellate Court also rejected the defendant's claim that "[a] specific instruction on the dangers of eyewitness identification was required in this case"; (internal quotation marks omitted) *State* v. *Jones*, supra, 187 Conn. App. 765; reasoning that, because "both Teele and Shannon had known the defendant prior to seeing him on the night of June 21, 2010," their "identifications of the defendant did not give rise to the risk of misidentification that the defendant's requested instructions were specifically designed to address." (Footnote omitted.) Id., 770. The Appellate Court's holding on this point is not at issue in the present appeal.

[7] Alternatively, the defendant urges this court to "extend the rule of *State* v. *Patterson*, [supra, 276 Conn. 452], to *all* jailed informants who received a benefit for their testimony." (Emphasis added.) Because we agree with the defendant that a jailhouse informant instruction was required in the present case, even though Shannon testified about a confession that occurred outside of the prison context, we need not address the defendant's alternative request for an expansion of the *Patterson* rule.

and, in fact, received—special favor from the state in exchange for his testimony. The state responds that Shannon was not a jailhouse informant for whom a special credibility instruction was required because, unlike "a jailhouse confession, which easily can be fabricated and is difficult to meaningfully cross-examine," testimony about a confession that occurred outside of prison is "not easily fabricated," may be "meaningfully tested by cross-examination, and [is] subject to comparison with other evidence in the case." We agree with the defendant and, therefore, reverse the judgment of the Appellate Court.

The general rule is that "a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." (Internal quotation marks omitted.) *State* v. *Diaz*, supra, 302 Conn. 101. "This court has held, however, that a special credibility instruction is required for three types of witnesses, namely, complaining witnesses,[8] accomplices[9] and jailhouse informants." (Footnotes altered.) Id., 101–102. With respect to jailhouse informants, we have explained that a special credibility instruction is required because "an informant

[8] "'Under the complaining witness exception, when the complaining witness [himself] could . . . have been subject to prosecution depending only upon the veracity of his account of [the] particular criminal transaction, the court should . . . [instruct] the jury in substantial compliance with the defendant's request to charge to determine the credibility of that witness in the light of any motive for testifying falsely and inculpating the accused. . . . In order for [such a] request to be applicable to the issues in the case, there must be evidence . . . to support the defendant's assertion that the complaining witness was the culpable party.' " *State* v. *Diaz*, supra, 302 Conn. 102 n.6, quoting *State* v. *Patterson*, supra, 276 Conn. 467–68.

[9] "'[T]he inherent unreliability of accomplice testimony ordinarily requires a particular caution to the jury [because] . . . [t]he conditions of character and interest most inconsistent with a credible witness, very frequently, but not always, attend an accomplice when he testifies. When those conditions exist, it is the duty of the [court] to specially caution the jury.' " *State* v. *Diaz*, supra, 302 Conn. 102 n.7, quoting *State* v. *Patterson*, supra, 276 Conn. 468.

who has been promised a benefit by the state in return for his or her testimony has a powerful incentive, fueled by self-interest, to implicate falsely the accused. Consequently, the testimony of such an informant . . . is inevitably suspect." *State* v. *Patterson*, supra, 276 Conn. 469. "As the United States Supreme Court observed [almost seventy] years ago, '[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility.' " Id., quoting *On Lee* v. *United States*, 343 U.S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270 (1952). Accordingly, courts have allowed criminal defendants "broad latitude to probe [informants'] credibility by cross-examination" and to have "the credibility issue [submitted] to the jury *with careful instructions*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Patterson*, supra, 469. These careful instructions include an advisement that the testimony of a jailhouse informant should "be reviewed with particular scrutiny and weighed . . . with greater care than the testimony of an ordinary witness." (Internal quotation marks omitted.) Id., 465.

In *State* v. *Arroyo*, 292 Conn. 558, 567, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), we held that "*Patterson*'s requirement for a special credibility instruction . . . should be extended to apply to the testimony of all jailhouse informants," regardless of whether the informant has "received a promise of a benefit" from the state. We reasoned that "there have been a number of high profile cases involving wrongful convictions based on the false testimony of jailhouse informants" and that "the expectation of a [r]eward for testifying is a systemic reality . . . even [when] the informant has not received an explicit promise of a reward. In addition, several commentators have pointed out that jailhouse informants frequently have motives to testify falsely that may have nothing to do with the expectation of receiving benefits

from the government." (Citation omitted; footnote omitted; internal quotation marks omitted.) Id., 567–69. "In light of [the] growing recognition of the inherent unreliability of jailhouse informant testimony, we [were] persuaded that the trial court should give a special credibility instruction to the jury whenever such testimony is given, regardless of whether the informant has received an express promise of a benefit." Id., 569. In guiding the jury's assessment of witness credibility in this particular context, we indicated that "the trial court may ask the jury to consider: the extent to which the informant's testimony is confirmed by other evidence; the specificity of the testimony; the extent to which the testimony contains details known only by the perpetrator; the extent to which the details of the testimony could be obtained from a source other than the defendant; the informant's criminal record; any benefits received in exchange for the testimony; whether the informant previously has provided reliable or unreliable information; and the circumstances under which the informant initially provided the information to the police or the prosecutor, including whether the informant was responding to leading questions." Id., 570–71.

Nonetheless, a criminal defendant does not have an automatic or absolute right to the issuance of a jailhouse informant instruction. Although the trial court is required to give such an instruction when a proper request to charge has been submitted, the trial court does not commit plain error if it fails to give the instruction sua sponte, so long as "the court has instructed the jury generally on the credibility of witnesses" and the jury is aware of the witness' motivation for testifying. *State* v. *Ebron*, 292 Conn. 656, 675–76, 975 A.2d 17 (2009), overruled in part on other grounds by *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011); see also *State* v. *Diaz*, supra, 302 Conn. 95 (holding that trial court did not commit plain error when it failed to issue, sua sponte, jailhouse informant instruction regarding

the testimony of three witnesses "who were involved in the criminal justice system and, therefore, may have had a personal interest in testifying for the state").

With these principles in mind, we consider the issue presented by this case, which is whether a trial court properly rejects a criminal defendant's request to charge the jury regarding the special credibility principles governing jailhouse informant testimony when an informant, who was incarcerated at the time he or she approached the police with information regarding the defendant's commission of the crimes charged, testifies at trial as to an alleged confession that the defendant made outside of the prison environment. Although we have not previously addressed this question, we discussed when a jailhouse informant instruction is required in *State* v. *Diaz*, supra, 302 Conn. 99–114, as part of our plain error review and analysis of whether to exercise our supervisory authority. In that case, the defendant, Luis Diaz, was convicted of fatally shooting a man outside of a bar in Bridgeport. Id., 95. Three witnesses offered inculpatory information about the defendant's commission of the crime in exchange for beneficial treatment in their own pending criminal matters. Id., 95–96. Two of the witnesses were eyewitnesses to the shooting. Id., 96–97. The third witness, Eddie Ortiz, testified that he had witnessed the shooting and that Diaz had made inculpatory statements to him while the two men were "placed in the same holding cell . . . ." Id., 96; see id. (Ortiz testified that Diaz "said to him, '[y]ou know what I did' and 'I know where you live at' " and "offered him $5000 not to testify"). With respect to the first two witnesses, we noted that "*Patterson* has not been applied to require a special credibility instruction when an incarcerated witness has testified concerning events surrounding the crime that he or she witnessed outside of prison, as distinct from confidences that the defendant made to the witness while they were incarcerated

together." Id., 102. Accordingly, we observed that it "would be an expansion of *Patterson*" to require a jailhouse informant instruction and opined that the failure to give the special credibility instruction concerning these two eyewitnesses could not have been plain error because it "would not have been improper even if [Diaz] had requested such an instruction." Id., 104. As for Ortiz, who testified both as to events that he observed outside of prison as well as inculpatory statements that Diaz made while the two men were fellow inmates incarcerated together, we explained that, even if we "assume[d] that the trial court's failure to give a special credibility instruction for Ortiz would have been improper under *Arroyo* if [Diaz] had requested such an instruction, the court's failure to do so sua sponte did not rise to the level of reversible plain error under *Ebron* because the trial court gave a general credibility instruction and the jury was made aware of Ortiz' motivation for testifying." Id., 104–105.

We also rejected Diaz' alternative claim "that this court [should] exercise its supervisory power to instruct the trial courts that they must give a special credibility instruction whenever a witness in a criminal case is incarcerated or is serving out a sentence, or otherwise is in a position to receive a benefit from the state in exchange for testifying, as long as there is some additional evidence indicating that the witness is not wholly reliable or that he expects some benefit from this testimony." Id., 106. We acknowledged "that some of the same concerns that gave rise to our decision in *Arroyo* are present whenever a witness is in a position to receive a benefit from the government" but disagreed that "these concerns are as weighty in cases [in which] the witness is not testifying about a jailhouse confession, but is testifying about events concerning the crime that the witness observed. Testimony by a jailhouse informant about a jailhouse confession is inherently

suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence." Id., 109. "In contrast, when a witness testifies about events surrounding the crime that the witness observed, the testimony can be compared with the testimony of other witnesses about those events, and the ability of the witness to observe and remember the events can be tested." Id., 110. This reasoning led us to "decline [Diaz'] request that we exercise our supervisory powers to instruct the trial courts that they must give a special credibility instruction in every such case." Id., 111. We emphasized, however, that "the trial courts . . . have the discretion to give a special credibility instruction" whenever they reasonably believe "that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel." Id., 113. "In determining whether to give such an instruction, the trial court may consider the circumstances under which the witness came forward; the seriousness of the charges with which the witness has been charged or convicted; the extent to which the state is in a position to provide a benefit to the witness and the potential magnitude of any such benefit; the extent to which the witness' testimony is corroborated by other evidence; the importance of the witness' testimony to the state's case; and any other relevant factor." Id.

Diaz delineates a clear distinction between a "classic jailhouse informant," who testifies regarding inculpatory statements that the defendant made while the informant and the defendant were "incarcerated together"; id., 99 n.4; and an incarcerated witness who offers testimony "about events concerning the crime that the wit-

ness observed" outside of prison. Id., 109. For the former category of witnesses, the trial court is required to give a jailhouse informant instruction pursuant to *Patterson* and *Arroyo*, whereas "cross-examination and argument by counsel are far more likely to be adequate tools for exposing the truth" with respect to the latter type of witness, and, consequently, a jailhouse informant instruction is not required. Id., 110.

The witness in the present case, Shannon, fits neither category of witness described in *Diaz* because he is neither the "classic jailhouse informant" nor an incarcerated witness whose testimony is solely about events he observed outside of prison. Whether the holdings in *Patterson* and *Arroyo* apply to Shannon, an incarcerated witness who testified about inculpatory statements that the defendant made outside of prison, is a question of law, over which we exercise plenary review. See, e.g., *MacDermid, Inc.* v. *Leonetti*, 328 Conn. 726, 738–39, 183 A.3d 611 (2018). We conclude that the logic and policy driving our precedent compel the conclusion that *Patterson* and *Arroyo* apply to witnesses, like Shannon, who were incarcerated at the time they offered or provided testimony regarding a defendant's inculpatory statements, regardless of the location where those statements were made.

As the foregoing discussion of *Patterson*, *Arroyo*, and *Diaz* makes clear, a special credibility instruction is required for jailhouse informants because (1) they "have an unusually strong motive to implicate the accused falsely"; *State* v. *Patterson*, supra, 276 Conn. 470 n.11; (2) confession evidence "may be the most damaging evidence of all"; (internal quotation marks omitted) id.; and (3) false confessions are easy to fabricate, but difficult to subject to "meaningful cross-examination . . . ." *State* v. *Diaz*, supra, 302 Conn. 109. These factors coalesce to create an impermissible risk of "wrongful convictions based on the false testimony

of jailhouse informants." *State* v. *Arroyo*, supra, 292 Conn. 567. Indeed, false confession evidence from informants "is *the* leading factor associated with wrongful convictions in capital cases" and "a major factor contributing to wrongful convictions in noncapital cases." (Emphasis in original.) J. Roth, "Informant Witnesses and the Risk of Wrongful Convictions," 53 Am. Crim. L. Rev. 737, 744 (2016). Incarcerated witnesses who trade information regarding a defendant's confession for favorable treatment from the state not only have "deep conflicts of interest" that result in "the least credible type of evidence," but they also offer testimony that is "among the most persuasive to jurors because [they] typically allege to have personally heard defendants confess their guilt to the crimes charged. Introduction of a defendant's confession, from any source, radically changes the complexion of a case, particularly one lacking other evidence that directly implicates the defendant in the crime." R. Covey, "Abolishing Jailhouse Snitch Testimony," 49 Wake Forest L. Rev. 1375, 1375 (2014).

The grave risks posed by false confession testimony from incarcerated informants, and the difficulty of mitigating those risks through meaningful cross-examination, do not depend on the location where the alleged false confession occurs.[10] Regardless of whether a crim-

[10] The dissent points out that some states limit the definition of a jailhouse informant to "those individuals testifying to statements made by the defendant while the witness and the defendant were incarcerated together." See also footnote 2 of the dissenting opinion. This fact is unpersuasive, however, for three reasons. First, the practice of other states in this context varies widely, and there is no consensus; some states have adopted a limited definition of a "jailhouse informant," but many other states and scholarly commentators take a broader view. See, e.g., *Turner* v. *State*, 515 P.2d 384, 386 (Alaska 1973) (special credibility instruction is appropriate for "an interested witness," who "is usually either paid, or hoping for lenient treatment of his own crimes, or both" (internal quotation marks omitted)); *State* v. *Barksdale*, 266 Kan. 498, 513, 973 P.2d 165 (1999) (special credibility instruction is appropriate for "informant," which is statutorily defined as someone "who, in exchange for benefits from the [s]tate, acts as an agent

inal defendant's alleged confession takes place inside or outside of prison, the incarcerated informant offering such testimony has a strong personal motive to fabricate a false confession, which by its nature would be difficult, if not impossible, to undermine effectively through cross-examination. As one scholarly commentator has observed, such false confession evidence is "difficult to impeach effectively because it is invariably of the 'he said-she said' variety. As long as the [incarcerated informant] can plausibly testify that he had an opportunity—no matter how fleeting—to speak with the defendant, the [informant's] claim that the defendant confessed to him is practically unverifiable. Defense counsel can impugn the credibility of the [informant], but many criminal defendants—especially defendants

for the [s]tate in obtaining evidence against a defendant" (internal quotation marks omitted)); A. Burnett, "The Potential for Injustice in the Use of Informants in the Criminal Justice System," 37 Sw. U. L. Rev. 1079, 1079 (2008) (jailhouse informants are "persons in custody or facing criminal prosecution who have an expectation of some reward in the form of reduction of charges, eligibility for bail, leniency in sentencing or better conditions of confinement" (internal quotation marks omitted)). Second, the dissent overlooks the fact that *federal* courts have determined that a special credibility instruction is appropriate for any cooperating witness who "provide[s] evidence against a defendant for some personal advantage or vindication, as well as for pay or immunity." *People* v. *Dela Rosa*, 644 F.2d 1257, 1259 (9th Cir. 1980); see also *United States* v. *Garcia*, 528 F.2d 580, 587–88 (5th Cir.) ("a defendant is entitled to a special cautionary instruction on the credibility of an accomplice or a government informer if he requests it" in order "to [e]nsure that no verdict based solely on the uncorroborated testimony of a witness who may have good reason to lie is too lightly reached"), cert. denied, 429 U.S. 898, 97 S. Ct. 262, 50 L. Ed. 2d 182 (1976), and cert. denied sub nom. *Sandoval* v. *United States*, 426 U.S. 952, 96 S. Ct. 3177, 49 L. Ed. 2d 1190 (1976). See generally 2A C. Wright & P. Henning, Federal Practice and Procedure (4th Ed. 2009) § 490, pp. 478–79 (special credibility instruction should be issued for "[a]n accomplice or informer, including one testifying under a grant of immunity"). Third, we are particularly disinclined to take guidance from the more restrictive practices adopted by a handful of other states when our own legislature has chosen a broader definition, which includes a witness who testifies as to a confession made outside of the prison environment. See Public Acts 2019, No. 19-132, § 6, codified at General Statutes (Supp. 2020) § 54-86o (d).

with a criminal history—go into a jury trial with their own credibility highly suspect and will often be unlikely to come out on top in any swearing contest."[11] Id., 1401–1402.

As the dissent notes, the United States Supreme Court observed, in *United States* v. *Henry*, 447 U.S. 264, 274, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), that there are " 'powerful psychological inducements to reach for aid when a person is in confinement.' " The dissent focuses too narrowly on how these inducements may prompt an incarcerated defendant "to speak to another inmate about his crimes" when the correct analysis examines the manner in which the self-serving inducements may incentivize an incarcerated witness to fabricate false confession evidence. The dissent's erroneous focus misapprehends the fundamental purpose and function of the special credibility instruction, reflected in our own precedents, which is not to alert the jury to the possibility of an involuntary or coerced confession but, instead, to caution the jury that a jailhouse informant's testimony must "be reviewed with particular scrutiny and weighed . . . with [great] care" in light of the witness' "powerful motive to falsify his or her testimony . . . ." (Internal quotation marks omitted.) *State* v. *Patterson*, supra, 276 Conn. 465, 469; see also *State* v. *Diaz*, supra, 302 Conn. 102–103 ("[t]he rationale for requiring a special credibility instruction . . . is that . . . the testimony of [a jailhouse] informant, like that of an accomplice, is inevitably suspect" (internal quotation marks omitted)); *State* v. *Arroyo*, supra, 292 Conn. 569 (recog-

[11] We disagree with the dissent that a defendant's ability to cross-examine an incarcerated witness regarding "the circumstances surrounding the alleged confession" depends in any significant respect on *where* the alleged confession is heard. Regardless of where the alleged confession occurred, such testimony is "inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence." *State* v. *Diaz*, supra, 302 Conn. 109.

nizing "the inherent unreliability of jailhouse informant testimony").

The inherent unreliability of jailhouse informant testimony, combined with the endemic problems of proof, has prompted "at least eighteen states" to require "some corroboration of jailhouse informant testimony to support a conviction . . . ." *State* v. *Marshall*, 882 N.W.2d 68, 83 (Iowa 2016), cert. denied, U.S. , 137 S. Ct. 829, 197 L. Ed. 2d 68 (2017). Connecticut has now joined many of its sister states by enacting legislation, specifically, No. 19-131 of the 2019 Public Acts (P.A. 19-131), governing the admission of "jailhouse witness" testimony in criminal trials. Justice Palmer's recent concurring and dissenting opinion in *State* v. *Leniart*, 333 Conn. 88, 215 A.3d 1104 (2019), thoroughly describes that legislation and the critical safeguards that it implements: "That legislation, among other things, requires that prosecutors who intend to introduce the testimony of a jailhouse witness disclose certain information to defense counsel, including the complete criminal history of the jailhouse witness, any pending charges, any cooperation agreement between the state and the witness, any benefits offered or provided by the state to the witness, the substance, time and place of any statement allegedly given by the defendant to the witness, the substance, time and place of any statement given by the witness implicating the defendant in the charged offense, whether, at any time, the witness recanted any testimony subject to disclosure, and information concerning any other criminal prosecution in which the jailhouse witness previously testified or offered to testify. See P.A. 19-131, § 1. In addition, the legislation establishes a statewide system for recording and tracking information on the use of jailhouse witnesses. See P.A. 19-131, § 3." *State* v. *Leniart*, supra, 164–65 (*Palmer*, *J.*, concurring in part and dissenting in part).

The legislature's concern regarding reliability in this particular context was great enough to prompt the enactment of heightened procedural safeguards to ensure judicial scrutiny of such testimony as a condition of evidentiary admissibility, as Justice Palmer's concurring and dissenting opinion describes: "[P]erhaps most significantly, under P.A. 19-131, in cases involving murder, murder with special circumstances, felony murder, arson murder, sexual assault in the first degree, aggravated sexual assault in the first degree, and aggravated sexual assault of a minor, and, upon motion of the defendant, the trial court must conduct a hearing to decide whether a jailhouse witness' testimony is sufficiently reliable to be admissible. See P.A. 19-131, § 2. The legislation further provides that, unless the prosecutor can establish by a preponderance of the evidence that the witness' testimony is reliable, the court shall not allow the testimony to be admitted. See P.A. 19-131, § 2. Finally, in making its determination concerning the reliability of the witness' testimony, the court is required to consider the factors enumerated in P.A. 19-131, § 1, as well as the following factors: '(1) [t]he extent to which the jailhouse [witness'] testimony is confirmed by other evidence; (2) [t]he specificity of the testimony; (3) [t]he extent to which the testimony contains details known only by the perpetrator of the alleged offense; (4) [t]he extent to which the details of the testimony could be obtained from a source other than the defendant; and (5) [t]he circumstances under which the jailhouse witness initially provided information supporting such testimony to [the police] or a prosecutorial official, including whether the jailhouse witness was responding to a leading question.' P.A. 19-131, § 2." *State* v. *Leniart*, supra, 333 Conn. 165–66 (*Palmer*, *J.*, concurring in part and dissenting in part).

Of particular importance here is that P.A. 19-131, as amended by No. 19-132 of the 2019 Public Acts (P.A. 19-132), defines a "jailhouse witness" as "a person who

offers or provides testimony concerning statements made to such person by another person with whom he or she was incarcerated, *or an incarcerated person who offers or provides testimony concerning statements made to such person by another person who is suspected of or charged with committing a criminal offense*." (Emphasis added.) P.A. 19-132, § 6, codified at General Statutes (Supp. 2020) § 54-86o (d). Consistent with our holding today, the procedural protections embodied in P.A. 19-131 are not dependent on the location where the defendant's alleged statements occurred; instead, they are applicable regardless of whether an incarcerated witness testifies as to statements the defendant made inside or outside of prison. See id. By concluding that a "jailhouse informant" under *Patterson* and its progeny is the same as a "jailhouse witness" under P.A. 19-131 and P.A. 19-132, we create a harmonious body of law relating to the same subject matter, consistent with the intent of the legislature.[12]

In the present case, Shannon was incarcerated at the time he offered the state information regarding the defendant's confession to the victim's murder in exchange

[12] The dissent believes that it is "unnecessary to harmonize" the legislative definition of a "jailhouse witness" with our understanding of a "jailhouse informant" because the legislature was not "invalidating our case law's definition as to jury instructions." This observation misses the mark. Though it is not *necessary* to harmonize the definitions, it certainly seems preferable to do so unless there is a good reason for us to reject the legislature's underlying policy determination. To be sure, P.A. 19-131 and P.A. 19-132 were not intended to prescribe rules regarding the issuance of special credibility instructions, but it is entirely appropriate that our views of proper instructional language should be informed by the choice made by the legislature to adopt a definition of "jailhouse witness" that is not dependent on the location of the defendant's alleged confession. We can think of no reason to employ a more restrictive definition than the one adopted by the legislature to address precisely the same policy concern, namely, the potential unreliability of a jailhouse witness' testimony concerning statements purportedly made by a criminal defendant. Pursuant to our decision today, the pretrial protections embodied in P.A. 19-131 for the testimony of a "jailhouse witness" will be coextensive with the trial protections afforded by the special credibility instruction for the testimony of a "jailhouse informant."

for leniency in his own criminal case.[13] Because Shannon was an incarcerated informant who offered and provided testimony about a criminal defendant's inculpatory statements, we conclude that he was a jailhouse informant for whom a special credibility instruction was required.[14] The trial court therefore improperly denied the defendant's unopposed request for a jailhouse informant instruction.

This does not end our inquiry, however, because we must determine whether the trial court's failure to charge the jury in accordance with the defendant's

[13] Consistent with the legislative definition of a "jailhouse witness," we conclude that a special credibility instruction is required when a witness is incarcerated at the time he or she either "offers or provides" testimony regarding a defendant's inculpatory statements. P.A. 19-132, § 6. In either circumstance, there is a "need for caution" because the witness is in "the power of the state, is looking to better his or her situation in a jailhouse environment where bargaining power is otherwise hard to come by, and will often have a history of criminality." (Internal quotation marks omitted.) *State* v. *Arroyo*, supra, 292 Conn. 568–69 n.9. We disagree with the dissent that the expectation of "a *future* benefit" is the defining characteristic of a jailhouse informant. (Emphasis in original.) The *timing* of the sought after benefit is not critical because what matters is the witness' incentive to provide false testimony regarding a defendant's inculpatory statements. Indeed, we stated in *Arroyo* that a special credibility instruction is required regardless of whether the defendant has received, or expects to receive, a benefit. *State* v. *Arroyo*, supra, 569. We also disagree with the dissent that "the number of witnesses that would qualify as a jailhouse informant are endless . . . ." To the contrary, we hold today that a special credibility instruction is required only for those limited number of witnesses who are incarcerated at the time they offer or provide testimony regarding a defendant's confession to criminal wrongdoing.

[14] The state points out that Shannon was not only a jailhouse informant, but also an eyewitness who testified about events he personally observed. We agree with the state that Shannon's eyewitness testimony concerning the defendant's presence at the Greene Homes housing complex on the night of the victim's murder "can be compared with the testimony of other witnesses" and tested through cross-examination. *State* v. *Diaz*, supra, 302 Conn. 110. But Shannon did not provide only eyewitness testimony; he also provided jailhouse informant testimony regarding the defendant's confession to the murder of the victim. For the reasons explained in the text of this opinion, Shannon's jailhouse informant testimony does not share the same guarantees of trustworthiness as his eyewitness testimony, and, therefore, a special credibility instruction was required. See id., 96, 104–05 (assuming, without deciding, that "the trial court's failure to give a special credibility instruction for Ortiz," who testified as both eyewitness and jailhouse informant, "would have been improper under *Arroyo* if [Diaz] had requested such an instruction").

request was harmful. "As we previously have recognized, an instructional error relating to general principles of witness credibility is not constitutional in nature. . . . Consequently, the defendant bears the burden of establishing that the error deprived him of his due process right to a fair trial." (Citation omitted.) *State* v. *Patterson*, supra, 276 Conn. 471–72. "[A] nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict. . . . Several factors guide our determination of whether the trial court's failure to give the requested instruction was harmful. These considerations include: (1) the extent to which [the jailhouse informant's] apparent motive for falsifying his testimony was brought to the attention of the jury, by cross-examination or otherwise; (2) the nature of the court's instructions on witness credibility; (3) whether [the informant's] testimony was corroborated by substantial independent evidence; and (4) the relative importance of [the informant's] testimony to the state's case." (Citation omitted; internal quotation marks omitted.) *State* v. *Arroyo*, supra, 292 Conn. 571–72.

The first factor favors the state here because, as the state points out, "the jury was well aware of Shannon's admitted motivational self-interest, the two and one-half year delay in Shannon coming forward, the fact of his incarceration, the pending charges that admittedly drove him to provide the police with information, and the benefits that he admittedly received from the police and the state before he testified, all of which were elicited during his examination and highlighted in the closing arguments of counsel." See *State* v. *Arroyo*, supra, 292 Conn. 572 (concluding that first factor favored state when "defense counsel cross-examined both [jailhouse informants] extensively as to their motive for testifying and addressed their incentive to lie in closing argument"); *State* v. *Slater*, 285 Conn. 162, 190, 939 A.2d 1105 ("the informant's potentially

improper motive for testifying . . . amply was brought to the attention of the jury" because two witnesses testified about informant's deal with state and informant's motive to lie was emphasized by defense counsel during oral argument), cert. denied, 553 U.S. 1085, 128 S. Ct. 2885, 171 L. Ed. 2d 822 (2008); *State* v. *Patterson*, supra, 276 Conn. 472 ("the jury was well aware of the fact that [the jailhouse informant] had been promised certain benefits by the state in return for his cooperation against the defendant" because testimony was elicited on direct examination and cross-examination).

Turning to the second factor, we note that the trial court issued a general credibility instruction, which advised the jury that, when evaluating the credibility of a witness, it should consider, among other things, "any interest, bias, prejudice or sympathy [that] a witness may apparently have for or against the state, or the accused or in the outcome of the trial." Footnote 4 of this opinion. Although the trial court singled out Shannon's testimony for special consideration because he previously had been convicted of certain felonies; see footnote 5 of this opinion; the trial court failed to inform the jury of the other factors that it properly may consider when evaluating Shannon's credibility, namely, "[1] [t]he extent to which his testimony is confirmed by other evidence; [2] [t]he specificity of the testimony; [3] [t]he extent to which the testimony contains details known only by the perpetrator; [4] [t]he extent to which the details of the testimony could be obtained from a source other than the defendant; [5] [t]he informant's criminal record; [6] [a]ny benefits received in exchange for the testimony or providing information to the police or [the] prosecutor; [7] [w]hether the witness expects to receive a benefit in exchange for the testimony or providing information to the police or prosecutor, regardless of whether such an agreement actually exists; [8] [w]hether the witness previously provided reliable or unreliable information; [and] [9] [t]he circumstances under which the witness

initially provided the information to the police or the prosecutor, including whether the witness was responding to leading questions." See also Connecticut Criminal Jury Instructions § 2.5-3, available at https://jud.ct.gov/JI/Criminal/Criminal.pdf (last visited November 27, 2020). The second factor therefore stands in equipoise.

The third and fourth factors, which we consider conjunctively, militate in favor of the conclusion that the trial court's instructional error substantially affected the jury's verdict and deprived the defendant of his right to a fair trial. There was no physical evidence linking the defendant to the victim's murder, and the defendant's confession to Shannon was brief, nonspecific, and did not contain any details known only to the perpetrator. The sole evidence corroborating the defendant's confession was Teele's eyewitness testimony, but Teele suffered from credibility problems of her own in light of her self-interested motives arising from her involvement in the criminal justice system. Teele waited more than two years to inform the police that she had witnessed the victim's murder, and she came forward only after she had been "picked . . . up" on drug charges. Although there is no evidence in the record that the state dropped the charges against Teele in exchange for her testimony against the defendant, we previously have recognized that "there is frequently an implicit understanding that [an informant involved in the criminal justice system] will receive some consideration in exchange for testifying." *State* v. *Diaz*, supra, 302 Conn. 109; see also *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 603, 198 A.3d 562 (2019) (recognizing state's "practice of [entering into] informal, off-the-record leniency understandings with cooperating witnesses"). Teele was not a jailhouse informant, but her involvement in the criminal justice system raises "some of the same concerns that gave rise to our decision in *Arroyo* . . . ." *State* v. *Diaz*, supra, 109. The only per-

son who corroborated Teele's testimony was Shannon, and the only person who corroborated Shannon's testimony was Teele. Given the interdependence of Teele's and Shannon's testimony, the critical importance of their testimony to the state's case, the long delay precipitating their decision to come forward with information, and the powerful, personal self-interest that both witnesses had to testify against the defendant in light of their own involvement in the criminal justice system, the jury might have viewed both witnesses' testimony differently if it had received proper instructions on evaluating Shannon's credibility. We therefore cannot conclude that the trial court's improper refusal to issue the jailhouse informant instruction requested by the defendant was harmless.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court for a new trial.

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

PALMER, J., concurring. I fully agree with the majority opinion. I write separately only to note my belief that, for the reasons previously expressed in *State* v. *Diaz*, 302 Conn. 93, 115, 25 A.3d 594 (2011) (*Palmer*, *J.*, concurring), a special credibility instruction should be given whenever a government informer seeks a benefit from the state in return for his or her testimony. See id., 121–22 (*Palmer*, *J.*, concurring) ("Because informers seeking a benefit from the state have a strong motive to falsely inculpate the accused . . . I agree with those courts that require a special credibility instruction whenever a government informer hopes or expects to receive a benefit from the prosecution. As the Second Circuit Court of Appeals has stated, 'a defendant who makes [a request for a special credibility instruction]

is entitled to a charge that identifies the circumstances that may make one or another of the government's witnesses particularly vulnerable to the prosecution's power and influence . . . and that specifies the ways (by catalog or example) that a person so situated might be particularly advantaged by promoting the prosecution's case.' *United States* v. *Prawl*, 168 F.3d 622, 628 (2d Cir. 1999). In other words, the defendant is entitled to a charge that 'invite[s] focus on individual predicaments of the witnesses' and contains 'mention [of] the incentives that follow from certain transactions with the government.' Id., 628–29 . . . ." (Citations omitted; footnote omitted.)). The defendant in the present case, Billy Ray Jones, however, has made no such claim, and, consequently, the majority has no reason to address it. Because, in my view, the majority correctly analyzes and resolves the claim that the defendant has raised, I join the majority opinion.

ROBINSON, C. J., with whom MULLINS and KAHN, Js., join, dissenting. In *State* v. *Diaz*, 302 Conn. 93, 109–11, 25 A.3d 594 (2011), this court declined to exercise its supervisory authority over the administration of justice to extend its earlier decision in *State* v. *Patterson*, 276 Conn. 452, 470, 886 A.2d 777 (2005), which required a special credibility instruction for jailhouse informants, to all witnesses who are in a position to receive a benefit from the state. In distinguishing jailhouse confessions from testimony about the witness' observations, the court stated that "to require a special credibility instruction for all witnesses who may be in a position to receive a benefit from the state because they are involved in some way with the criminal justice system . . . would [create] an exception that would swallow the rule that the trial court generally is not required to give such an instruction for the state's witnesses." *State* v. *Diaz*, supra, 110. Primarily for this reason, I respectfully disagree with the majority's extension of the meaning of "jailhouse informant" for pur-

poses of the *Patterson* instruction to include incarcerated individuals who cooperate with law enforcement by providing information regarding inculpatory statements made by a defendant who was not incarcerated at the time. Because I would affirm the judgment of the Appellate Court upholding the murder conviction of the defendant, Billy Ray Jones; see *State* v. *Jones*, 187 Conn. App. 752, 754, 770, 203 A.3d 700 (2019); I respectfully dissent.

I agree with the majority's recitation of the facts, procedural history, and background legal principles. "It is a well established principle that a defendant is entitled to have the jury correctly and adequately instructed on the pertinent principles of substantive law. . . . The charge must be correct in the law, adapted to the issues and sufficient to guide the jury. . . . The primary purpose of the charge to the jury is to assist [it] in applying the law correctly to the facts which [it] find[s] to be established. . . . [A] charge to the jury is to be considered in its entirety, read as a whole, and judged by its total effect rather than by its individual component parts. . . . [T]he test of a court's charge is not whether it is as accurate upon legal principles as the opinions of a court of last resort but whether it fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law." (Citation omitted; internal quotation marks omitted.) *State* v. *Patterson*, supra, 276 Conn. 466–67.

"Generally, a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." (Internal quotation marks omitted.) Id., 467. In *State* v. *Patterson*, supra, 276 Conn. 470, this court first held that special credibility instructions were required for jailhouse informant witnesses. The court in *Patterson* considered the similar motives of jailhouse informants and other exceptions to the general rule against

special credibility instructions[1] and concluded that, "[b]ecause the testimony of an informant who expects to receive a benefit from the state in exchange for his or her cooperation is no less suspect than the testimony of an accomplice who expects leniency from the state," defendants are entitled to a special credibility instruction in cases involving jailhouse informants. Id. Although *Patterson* did not define which witnesses qualify as jailhouse informants, the witness at issue in that case had been incarcerated with the defendant and testified to statements made by the defendant while they were incarcerated together. Id., 459. Later, in *State* v. *Arroyo*, 292 Conn. 558, 564, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010), this court expanded the *Patterson* rule to include jailhouse informants who have not yet received a benefit from the state. As in *Patterson*, the witnesses at issue in *Arroyo* were individuals incarcerated with the defendant who testified to confessions made by the defendant in a courthouse lockup. Id., 564–65.

Subsequently, in *State* v. *Diaz*, supra, 302 Conn. 93, this court provided a more precise definition of the term "jailhouse informant." In *Diaz*, three witnesses "who had criminal matters pending" testified against the defendant at trial. Id., 95. Two of the witnesses, Corey McIntosh and James Jefferson, testified about events they observed outside of prison that connected the defendant to the crime. Id., 96–97. A third witness, Eddie Ortiz, testified regarding events observed outside of prison as well as the defendant's confession to him while they were in lockup together. Id., 96. The defendant in *Diaz* first argued that it was plain error for the court not to provide a *Patterson* instruction "in light

[1] "This court has held . . . that a special credibility instruction is required for three types of witnesses, namely, complaining witnesses, accomplices and jailhouse informants." (Footnotes omitted.) *State* v. *Diaz*, supra, 302 Conn. 101–102.

of [the witnesses'] involvement in the criminal justice system and the possibility that they would receive some benefit from the government in exchange for their testimony." Id., 99. In rejecting the plain error claim, this court observed: "Typically, a jailhouse informant is a prison inmate who has testified about confessions or inculpatory statements made to him by a fellow inmate. Indeed, this court's decision in *Patterson* was based on that premise. . . . *Patterson* has not been applied to require a special credibility instruction when an incarcerated witness has testified concerning events surrounding the crime that he or she witnessed outside of prison, as distinct from confidences that the defendant made to the witness while they were incarcerated together." (Citation omitted.) Id., 102. Accordingly, the court determined that McIntosh and Jefferson were not jailhouse informants under *Patterson* and *Arroyo*, as they "testified only about the events surrounding the shooting" that they had observed outside of prison. Id., 104. The court then concluded that, although the trial court failed to give a special credibility instruction with regard to the testimony of Ortiz, who qualified as a jailhouse informant, this omission was not plain error requiring a new trial because the court "gave a general credibility instruction and the jury was made aware of Ortiz' motivation for testifying." Id., 105.

The defendant in *Diaz* also requested that we exercise our supervisory authority "to instruct the trial courts that they must give a special credibility instruction whenever a witness in a criminal case is incarcerated or is serving out a sentence, *or otherwise is in a position to receive a benefit from the state in exchange for testifying* . . . ." (Emphasis added.) Id., 106. The court noted the concern, as expressed in *Arroyo*, that a jury may be unaware of the motivations behind a witness' testimony. Id., 109. The court nevertheless disagreed with the defendant's argument "that these concerns

are as weighty in cases [*in which*] *the witness is not testifying about a jailhouse confession*, but is testifying about events concerning the crime that the witness observed. Testimony by a jailhouse informant about a *jailhouse confession* is inherently suspect because of the ease with which such testimony can be fabricated, the difficulty in subjecting witnesses who give such testimony to meaningful cross-examination and the great weight that juries tend to give to confession evidence. . . . In contrast, when a witness testifies about events surrounding the crime that the witness observed, the testimony can be compared with the testimony of other witnesses about those events, and the ability of the witness to observe and remember the events can be tested. Accordingly, cross-examination and argument by counsel are far more likely to be adequate tools for exposing the truth in these cases than in cases involving jailhouse confessions." (Citations omitted; emphasis added.) Id., 109–10. After declining to exercise its supervisory authority, the court emphasized that it remains in the discretion of the trial court "to give a cautionary instruction to the jury whenever the court reasonably believes that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel." Id., 113.

The reasons supporting this court's refusal to exercise its supervisory authority in *Diaz* apply with equal force to the present case. The witness at issue, Larry Shannon, was not testifying about a jailhouse confession made while he was incarcerated with the defendant and, therefore, does not qualify as a jailhouse informant. Connecticut courts have routinely limited the definition of a jailhouse informant to only those individuals testifying to statements made by the defendant while the

witness and the defendant were incarcerated together.[2] See *State* v. *Salmond*, 179 Conn. App. 605, 630, 180 A.3d 979 (concluding that *Patterson* held that "a special credibility instruction is required in situations [in which] a prison inmate has been promised a benefit by the state in return for his or her testimony regarding incriminating statements made by a fellow inmate" while both were incarcerated (internal quotation marks omitted)), cert. denied, 328 Conn. 936, 183 A.3d 1175 (2018); *State* v. *Franklin*, 175 Conn. App. 22, 35 n.14, 166 A.3d 24 ("[the witness] met the definition of a jailhouse informant because he was incarcerated at the time of his testimony at the defendant's trial and his testimony was about a crime that he had not witnessed personally, but a con-

[2] Other states limit the definition of a jailhouse informant in a similar manner, whether by statute or case law. See Cal. Penal Code § 1127a (a) (Deering 2008) (defining "in-custody informant" as "a person, other than a codefendant, percipient witness, accomplice, or coconspirator whose testimony is based upon statements made by the defendant while both the defendant and the informant are held within a correctional institution"); *Wright* v. *State*, 30 P.3d 1148, 1152 (Okla. Crim. App. 2001) (concluding that defendant's "statements to [the witness] were not made while he was incarcerated" and, thus, did not qualify witness as jailhouse informant, even though witness was "in jail on unrelated charges at the time he gave his statement to [the] police" (internal quotation marks omitted)); *Hardesty* v. *State*, Docket No. 03-18-00546-CR, 2019 WL 4068564, *3 (Tex. App. August 29, 2019, pet. ref'd) (concluding that witness, who testified to defendant's confession, was not jailhouse informant because they were not incarcerated together as required under Texas statute); see also R. Bloom, "Jailhouse Informants," 18 Crim. Just. 20, 20 (Spring, 2003) ("[u]nlike 'street' informants, jailhouse informants are witnesses who testify as to statements made by a fellow inmate while both are in custody"); J. Roth, "Informant Witnesses and the Risk of Wrongful Convictions," 53 Am. Crim. L. Rev. 737, 748 (2016) ("[T]he typical jailhouse informant claims to have overheard a defendant's inculpatory statement while both are in custody pending trial; it is this statement that is of value to prosecutors and agents. But the jailhouse informant usually does not assert any personal, or prior, knowledge of the offense the defendant is charged with having committed. *By contrast, non-jailhouse informants—even those who already are in custody when they begin to work with law enforcement—typically offer information about crimes they observed, participated in, or otherwise learned about prior to their custody.*" (Emphasis added.)).

fession or inculpatory statements made by the defendant during their incarceration"), cert. denied, 327 Conn. 961, 172 A.3d 801 (2017); *State* v. *Carattini*, 142 Conn. App. 516, 523–24, 73 A.3d 733 (witness testified as to defendant's statements regarding victim's death made outside of prison, so "he did not meet [the] Supreme Court's definition of a jailhouse informant"), cert. denied, 309 Conn. 912, 69 A.3d 308 (2013).

I disagree with the majority's conclusion that the location of the confession does not matter to the jailhouse informant analysis. The United States Supreme Court has noted that the circumstance of incarceration presents an important factor in cases involving inmates working as paid informants who elicit statements for the government: "[The] [c]ourt [in *Miranda* v. *Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)] noted the powerful psychological inducements to reach for aid when a person is in confinement. . . . [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover [g]overnment agents." (Citation omitted.) *United States* v. *Henry*, 447 U.S. 264, 274, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). Any pressures that accompany incarceration that could lead a defendant to speak to another inmate about his crimes were not at play in the present case. See *State* v. *Smith*, 289 Conn. 598, 633, 960 A.2d 993 (2008) (confession to jailhouse informant was made "in light of the camaraderie that arises under such shared circumstances").

Indeed, "[i]n-custody confessions are often easy to allege and difficult, if not impossible, to disprove. To generate a credible confession, a snitch need only learn some basic details about a fellow inmate's case. A lying jailhouse snitch might gather information about a high profile case simply by reading newspaper stories or watching television broadcasts about the case. Snitches

can also obtain details about fellow prisoners' cases by speaking with complicit friends and relatives who can monitor preliminary hearings and other case proceedings and feed details to the aspiring snitch. In some cases, informants share knowledge about case facts with each other, permitting multiple informants to corroborate each other's testimony. Investigators have documented cases in which prison inmates purchased information from others outside of prison in an attempt to trade it for reduced sentences." (Footnotes omitted; internal quotation marks omitted.) R. Covey, "Abolishing Jailhouse Snitch Testimony," 49 Wake Forest L. Rev. 1375, 1380–81 (2014); see *State* v. *Leniart*, 333 Conn. 88, 167, 215 A.3d 1104 (2019) (*Palmer*, *J.*, concurring in part and dissenting in part) (distinguishing "traditional cooperating witnesses," such as coconspirators, from use of jailhouse informant testimony insofar as "the testimony of jailhouse informants is readily fabricated and otherwise particularly suspect for a number of reasons not generally apparent to jurors," particularly because "more traditional cooperating witnesses . . . have not come forward as part of a prison culture that is largely hidden from public view and whose testimony is not so easily concocted"); *State* v. *Diaz*, supra, 302 Conn. 109 (noting that "jailhouse confessions" are challenging to confirm and to successfully cross-examine).

These concerns about jailhouse informants are inapplicable in this case, as Shannon's testimony could be meaningfully validated in ways that a jailhouse confession could not. Shannon testified that (1) he was in Marina Village, a Bridgeport housing complex, the day after the shooting, (2) he saw the defendant there, (3) there was a news clip about the murder on the television, (4) the defendant told Shannon he walked up to the victim, asked "what's poppin' now," and shot the victim, and (5) the defendant showed Shannon a silver, nine millimeter Ruger handgun. Unlike a jailhouse con-

fession, which is difficult to verify, Shannon's testimony could be validated and meaningfully cross-examined by questioning the circumstances surrounding the alleged confession. For example, other witnesses could confirm or disprove elements of the confession, like whether the defendant and Shannon were present at Marina Village the day after the shooting.

For these reasons, I would limit the definition of jailhouse informant testimony to those statements made by the defendant to another inmate while both were incarcerated in order to afford the phrase its customary meaning. Individuals testifying to statements made outside of the incarceration setting are simply informants or cooperating witnesses, as they are not testifying to statements made in a "jailhouse." Shannon is not a jailhouse informant, as jailhouse informants are connected to the defendant only by virtue of their status as an inmate, unlike Shannon, who knew the defendant outside of jail and was present at the scene of the crime to which the defendant confessed to committing. If the definition of jailhouse informant is no longer afforded its customary meaning, the number of witnesses who would qualify as a jailhouse informant are endless, and "we would be creating an exception that would swallow the rule that the trial court generally is not required to give such an instruction for the state's witnesses. It is an unfortunate reality that the government cannot be expected to depend exclusively upon the virtuous in enforcing the law. . . . Rather, the government must often rely on witnesses with a less than impeccable history in order to prosecute criminal activity." (Citation omitted; internal quotation marks omitted.) *State* v. *Diaz*, supra, 302 Conn. 110–11.

Not only was the defendant in the present case not incarcerated at the time he allegedly made the inculpatory statements to Shannon, Shannon also was not incarcerated at the time he testified about those state-

ments. I therefore disagree with the majority's categorization of Shannon as "an incarcerated witness who testified about inculpatory statements that the defendant made outside of prison . . . ." See *State* v. *Diaz*, supra, 302 Conn. 110 ("when a witness is not incarcerated, but is merely on parole or subject to pending charges, the special concerns relating to incarcerated witnesses do not come into play"); *State* v. *Carattini*, supra, 142 Conn. App. 523 (distinguishing witness from jailhouse informant definition in *Diaz* because witness was not incarcerated when he testified). After Shannon reached out to the police in 2013, he testified that the state assisted him by getting his bond lowered. He then pleaded guilty to two felonies in 2014 and did not have to return to jail. Instead, Shannon was on probation when he testified for the state. Although Shannon cooperated with the police while he was incarcerated, this does not transform him into an incarcerated informant at the time of his testimony. This distinction is important because Shannon's testimony is even more credible than the testimony at issue in *Diaz*, in which the witnesses "had criminal matters pending"; *State* v. *Diaz*, supra, 302 Conn. 95; as Shannon had *already* received assistance with his case before testifying and, therefore, had less incentive to testify falsely in order to secure a future benefit from the state. Accordingly, the majority's reliance on the motivations of the "incarcerated informant" are largely inapplicable to Shannon with respect to the motivation to lie in exchange for a *future* benefit that characterizes typical jailhouse informant testimony.[3]

[3] I acknowledge that an informant who is not incarcerated at the time of testimony, but has pending criminal matters or is otherwise facing incarceration, may have a greater incentive to testify falsely than an informant like Shannon, who has no pending criminal matters. For this reason, an individual's custodial status at the time they testify or provide the information to the police should not determine whether they are considered a jailhouse informant. If the custodial status of the witness at those times were the sole determinative factor, then the jury instruction would not be given when an actual jailhouse informant—testifying about communications made while incarcerated—happens to be released prior to testifying or cooperating. Put

Finally, I note my disagreement with the majority's reliance on the definition provided by the legislature in No. 19-131 of the 2019 Public Acts (P.A. 19-131), which sought to address the "problems inherent in the state's use of jailhouse informant testimony" by enhancing the state's disclosure obligations and providing for an evidentiary hearing to establish the reliability of proffered jailhouse informant testimony in the most serious felony cases. *State* v. *Leniart*, supra, 333 Conn. 164–66 (*Palmer*, *J.*, concurring in part and dissenting in part). In my view, the majority's reliance on P.A. 19-131, as amended by No. 19-132 of the 2019 Public Acts (P.A. 19-132), is misplaced. The statutory definition provides: " '[J]ailhouse witness' *means a person who offers or provides testimony concerning statements made to such person by another person with whom he or she was incarcerated*, or an incarcerated person who offers or provides testimony concerning statements made to such person by another person who is suspected of or charged with committing a criminal offense." (Emphasis added.) P.A. 19-132, § 6, codified at General Statutes (Supp. 2020) § 54-86o (d).

Although the first of these definitions in P.A. 19-132 is entirely consistent with our definition in *Diaz*, the second definition is broader, as it does not specifically require the offered statement to be made while both individuals are incarcerated and, therefore, is inconsistent with our existing definition of a jailhouse informant. Yet, this is not an irreconcilable conflict, as one of the included definitions is found in our case law. Also, P.A. 19-131 does not discuss jury instructions and, instead, requires trial courts to conduct hearings to determine the reliability and admissibility of jailhouse informant testimony. See P.A. 19-131, § 2, codified as

differently, the determination of who qualifies to be a jailhouse informant depends on the timing and circumstances of how that individual obtained the information and, specifically, on whether the defendant made the statements at issue to the informant while *both* were incarcerated.

amended at General Statutes (Supp. 2020) § 54-86p. Although Shannon may fall under the second definition provided by the legislature, I do not believe that we should assume that the legislature is invalidating our case law's definition as to jury instructions. See, e.g., *State* v. *Fernando A.*, 294 Conn. 1, 19, 981 A.2d 427 (2009) ("the legislature is presumed . . . to be cognizant of judicial decisions relevant to the subject matter of a statute . . . and to know the state of existing relevant law when it enacts a statute" (internal quotation marks omitted)). Indeed, I am particularly hesitant to act in this area, given this very recent activity by our legislature, which has the " 'primary responsibility' " for the public policy of this state; *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 438, 119 A.3d 462 (2015); and is better equipped to "balanc[e] the various interests and articulat[e] a coherent policy on this matter . . . ." *Commissioner of Public Safety* v. *Freedom of Information Commission*, 312 Conn. 513, 550, 93 A.3d 1142 (2014). Because the legislature was presumed to be aware of our case law's instructional requirements and left them untouched in P.A. 19-131, it is unnecessary to harmonize all of our definitions. In fact, now that the legislature has provided a screening mechanism for jailhouse informant testimony, and only the most reliable evidence will be put before the jury, P.A. 19-131 weighs against the requirement of a special credibility instruction in every instance.

In the present case, I conclude that the trial court appropriately exercised its discretion when it declined to issue a special credibility instruction as to Shannon's testimony.[4] See *State* v. *Diaz*, supra, 302 Conn. 113 (emphasizing "the well established common-law rule

[4] In the present case, twenty to thirty people were present when the officers arrived at the scene of the crime, yet none of these potential witnesses was willing to cooperate with the police. Both Shannon and Angela Teele, another cooperating witness, testified that, in their experience, they are not supposed to cooperate with the police. In fact, Teele testified that she feared for her safety and was putting herself at risk by testifying because

that it is within the discretion of a trial court to give a cautionary instruction to the jury whenever the court reasonably believes that a witness' testimony may be particularly unreliable because the witness has a special interest in testifying for the state and the witness' motivations may not be adequately exposed through cross-examination or argument by counsel"). The jury was well aware of Shannon's motives for testifying, as both the state's attorney and defense counsel had questioned Shannon about the benefits he received for reaching out to the police and his past felony convictions.[5] Defense

"I was told if I said something that things was gonna happen." Shannon also testified that he feared cooperating due to possible retaliation. Incentives from the state encourage witnesses to testify, despite the dangers of providing such testimony. Prosecutors may be required to utilize witnesses, such as Shannon, who are testifying only because they have been assisted by the state, and requiring a special credibility instruction in all such instances may cast significant doubt on an otherwise reliable witness. See *State* v. *Diaz*, supra, 302 Conn. 111 ("the government must often rely on witnesses with a less than impeccable history in order to prosecute criminal activity" (internal quotation marks omitted)). Additionally, as such witnesses are used with some regularity; see G. Harris, "Testimony for Sale: The Law and Ethics of Snitches and Experts," 28 Pepp. L. Rev. 1, 1 (2000) ("[a]ccording to [United States] Sentencing Commission studies, one of every five federal defendants receives a sentencing reduction for 'substantial assistance' to the government"); the special credibility instruction will become less powerful as it will be used more frequently.

[5] Defense counsel rigorously cross-examined Shannon regarding the circumstances that led him to reach out to the police:

"[Defense Counsel]: And now you indicated earlier, you . . . didn't contact the police on the night of [the] shooting, right?

"[Shannon]: Yes.

"[Defense Counsel]: Okay. And, in fact, you didn't contact the police until about two and [one-half] years later, right?

"[Shannon]: Yes.

"[Defense Counsel]: Okay. And, at that time, you were in jail, right?

"[Shannon]: Yes.

"[Defense Counsel]: You were being held at Bridgeport Correctional Center?

"[Shannon]: Yes.

"[Defense Counsel]: Okay. Jail is not a place that you like to be, right?

"[Shannon]: Yes.

"[Defense Counsel]: And you wanted to get out of jail, right?

"[Shannon]: Yes.

counsel also devoted significant portions of his closing argument to Shannon's credibility. As Shannon did not qualify as a jailhouse informant and the jury was well aware of his motivations for testifying, I cannot conclude that the trial court abused its discretion by issuing only a general credibility instruction. Accordingly, I would conclude that the Appellate Court properly upheld the defendant's conviction.

Because I would affirm the judgment of the Appellate Court, I respectfully dissent.

"[Defense Counsel]: Okay. And so it's at that point that you reached out to detectives and said that you have some information about this homicide that occurred on June 21, 2010, right?

"[Shannon]: Yes.

"[Defense Counsel]: And you reached out to them because you were hoping that they could give you some favorable treatment on your jail situation or your . . . criminal charge, right?

"[Shannon]: Yes.

"[Defense Counsel]: In fact, at the time you were . . . charged with a felony, right?

"[Shannon]: Yes.

"[Defense Counsel]: And it carried a maximum penalty of five years in jail, right?

"[Shannon]: Yes."

* * *

"[Defense Counsel]: And, shortly after that, you were released from jail without having to pay a bond, right?

"[Shannon]: Yes.

"[Defense Counsel]: And a bond is money that you have to pay to get out of jail, if you're facing pending charges?

"[Shannon]: Yes.

"[Defense Counsel]: You didn't have the money . . . to get out of jail, right?

"[Shannon]: No.

"[Defense Counsel]: Okay. So you were hoping to trade the information that you ha[d] in order . . . to accomplish that, right?

"[Shannon]: Yes.

"[Defense Counsel]: And, in fact, you were also looking for some favorable treatment on your case, right?

"[Shannon]: Yes."

Cumulative Table of Cases
Connecticut Reports
Volume 337

(Replaces Prior Cumulative Table)

Asnat Realty, LLC *v.* United Illuminating Co. (Order) . . . 906
Bayview Loan Servicing, LLC *v.* Macrae-Gray (Order) . . . 905
Berka *v.* Middletown (Order) . . . 910
Blondeau *v.* Baltierra . . . 127
Dissolution of marriage; arbitration; whether final judgment existed for purposes of appellate jurisdiction when arbitration award included issues related to child support in violation of statutory provision (§ 46b-66 (c)) governing agreements to arbitrate in dissolution proceedings; claim that motion to vacate arbitration award was untimely pursuant to statute (§ 52-420 (b)), and that trial court therefore lacked jurisdiction, because it failed to set forth factual basis for vacating award within limitation period specified in § 52-420 (b); claim that trial court lacked jurisdiction to consider arguments in motion to vacate pertaining to child support because plaintiff was not aggrieved by that portion of award and because issue of child support had been rendered moot by parties' pendente lite stipulations; whether trial court incorrectly concluded that arbitrator's award exceeded scope of parties' submission; whether trial court incorrectly concluded that arbitrator manifestly disregarded law by ignoring choice of law provision in premarital agreement and distributing equity in marital home in accordance with Connecticut law; whether party to dissolution matter can waive statutory (§§ 46b-66 (c) and 52-408) prohibition against arbitration of issues related to child support; whether portion of arbitration award ordering payment of certain expenses related to children was severable from remainder of award.
Boccanfuso *v.* Daghoghi . . . 228
Summary process; doctrine of equitable nonforfeiture; certification from Appellate Court; whether Appellate Court properly affirmed judgment of possession in favor of plaintiff landlords; claim that trial court abused its discretion by rejecting defendant tenants' special defense of equitable nonforfeiture; whether defendants' intentional nonpayment of rent was necessarily wilful for purposes of equitable nonforfeiture doctrine, when rent was not withheld because of good faith intent to comply with lease or good faith dispute over terms of lease.
Britton *v.* Commissioner of Correction (Order) . . . 901
Caires *v.* JPMorgan Chase Bank, N.A. (Orders) . . . 901, 904
Cole *v.* New Haven . . . 326
Negligence; governmental immunity; summary judgment; claim that trial court improperly granted defendants' motion for summary judgment on ground that defendant city and its police officer were entitled to governmental immunity; whether trial court correctly concluded that city's police pursuit policy and statewide police pursuit policy impose discretionary, rather than ministerial, duty on police officers not to execute roadblock while pursuing dirt bikes or all-terrain vehicles on public road.
Conroy *v.* Idlibi (Order) . . . 905
Cookish *v.* Commissioner of Correction . . . 348
Habeas corpus; appeal from habeas court's denial of certification to appeal; claim that habeas court improperly dismissed petition for writ of habeas corpus pursuant to rules of practice (§ 23-29) without first appointing petitioner counsel and providing him with notice and opportunity to be heard; whether habeas court can dismiss petition pursuant to § 23-29 before issuing writ of habeas corpus under rules of practice (§ 23-24); claim that habeas court's judgment should be reversed on basis of plain error; claim that habeas court improperly failed to construe petitioner's habeas petition as petition for writ of error coram nobis.
Donald G. *v.* Commissioner of Correction (Order) . . . 907
Dougan *v.* Sikorsky Aircraft Corp. . . . 27
Negligence; workplace asbestos exposure; summary judgment; claim that trial court improperly granted defendants' motion for summary judgment on ground that claim for medical monitoring in absence of manifestation of physical injury was

not cognizable under Connecticut law; medical monitoring, discussed; whether plaintiffs had established genuine issue of material fact as to whether medical monitoring was reasonably necessary for each individual plaintiff.

Fisk *v.* Redding 361
Public nuisance; motion to set aside verdict; certification from Appellate Court; whether Appellate Court incorrectly concluded that trial court had abused its discretion in denying plaintiff's motion to set aside verdict; whether jury's responses to special interrogatories could be harmonized in light of this court's established public nuisance jurisprudence.

Gershon *v.* Back (Order) 901

Harvey *v.* Dept. of Correction 291
Wrongful death; sovereign immunity; statute of limitations; motion to dismiss for lack of subject matter jurisdiction; whether action was time barred pursuant to statute (§ 4-160 (d)) that requires plaintiff who has been granted authorization to sue state by Claims Commissioner to bring action within one year from date that authorization was granted; claim that action was not untimely because one year time limitation in § 4-160 (d) was inoperative and two year time limitation in wrongful death statute (§ 52-555 (a)) controlled plaintiff's wrongful death claim.

In re Angela V. (Order) 907

In re Jacob M. (Order) 909

In re Kiara Liz V. (Order) 904

In re Natasha T. (Order) 909

Lance W. *v.* Commissioner of Correction (Order) 902

Nash *v.* Commissioner of Correction (Order) 908

Nash Street, LLC *v.* Main Street America Assurance Co. 1
Action seeking to recover proceeds allegedly due under commercial general liability insurance policy issued by defendant insurer; summary judgment; whether defendant had duty to defend in action brought by plaintiff against insured and alleging property damage resulting from collapse of house that had been lifted off foundation; whether trial court improperly granted defendant's motion for summary judgment; whether there existed possibility that plaintiff's complaint in action against insured alleged liability for property damage that was not excluded under insurance policy; whether trial court incorrectly determined that certain exclusions in insurance policy relieved defendant of its duty to defend.

Ortiz *v.* Torres-Rodriguez (Order) 910

Property Tax Management, LLC *v.* Worldwide Properties, LLC (Order) 903

Redding *v.* Georgetown Land Development Co., LLC 75
Strict foreclosure; summary judgment; whether trial court correctly concluded that, under 2007 public act (P.A. 07-196, § 4 (b) (3)), liens that defendant company had acquired from special taxing district were subordinate to those of plaintiff town and fire district.

Rice *v.* Commissioner of Correction (Order) 906

Robinson *v.* Commissioner of Correction (Order) 903

Rodriguez *v.* Kaiaffa, LLC 248
Class action; motion for class certification; interlocutory appeal pursuant to statute (§ 52-265a) involving matter of substantial public interest; standards that govern trial court's class certification decision, discussed; whether trial court should have inquired into merits of plaintiff's legal theory in determining whether prerequisites to class action set forth in applicable rules of practice (§§ 9-7 and 9-8) were satisfied; whether trial court abused its discretion in concluding that commonality, typicality, and adequacy of representation requirements for class certification had been satisfied; whether trial court abused its discretion in concluding that common issues of law and fact predominated and that class action was superior to other methods of adjudication; claim that trial court improperly defined class.

Solon *v.* Slater (Order) 908

State *v.* Best 312
Murder; attempt to commit murder; assault first degree; claim that trial court abused its discretion in admitting into evidence certain photographs depicting bloody interior of car used by victims to flee shooting; whether photographs were relevant to crimes with which defendant was charged; whether probative value of photographs outweighed their prejudicial effect.

State *v.* Carey 463
Murder; self-defense; certification from Appellate Court; whether Appellate Court correctly concluded that any error relating to admission of witness' testimony, which was admitted to demonstrate that victim had been afraid of defendant, was harmless.

State *v.* Cicarella (Order) 902

State *v.* Chester J. (Order) 910

State *v.* Cody M. 92
Violation of standing criminal protective order; threatening second degree; double jeopardy; certification from Appellate Court; claim that defendant's conviction of two counts of violating standing criminal protective order violated constitutional prohibition against double jeopardy; whether legislature intended to punish individual acts separately or to punish course of action that they constitute under violation of standing criminal protective order statute (§ 53a-223a); whether Appellate Court improperly upheld trial court's jury instruction on charge of criminal violation of standing criminal protective order.

State *v.* Coleman (Order) 907

State *v.* Espino 425
Possession of controlled substance with intent to sell; motion to suppress; conditional plea of nolo contendere; whether trial court improperly denied defendant's motion to suppress; claim that defendant's constitutional right to be free from unreasonable searches and seizures was violated when police detained her, without warrant, in parking lot of apartment building while executing unrelated search warrant on apartment of another individual suspected of drug trafficking; whether defendant was in immediate vicinity of premises being searched while she was detained; decision in companion case, State *v.* Rolon *(337 Conn. 397), dispositive of issue on appeal.*

State *v.* Foster (Order) 904

State *v.* Jones 486
Murder; carrying pistol without permit; criminal possession of firearm; certification from Appellate Court; claim that Appellate Court incorrectly concluded that trial court improperly had declined to give jury special credibility instruction regarding jailhouse informants in light of benefits that witness expected to receive from state in exchange for his cooperation; claim that rule in State *v.* Patterson *(276 Conn. 452), requiring special credibility instruction with respect to testimony of jailhouse informants, should apply to any prison inmate who approaches police with information regarding inculpatory statements made by defendant, regardless of whether inculpatory statements were made in prison environment; whether trial court's failure to give special credibility instruction was harmful.*

State *v.* Kerlyn T. 382
Aggravated sexual assault first degree, home invasion, risk of injury to child; assault second degree with firearm; certification from Appellate Court; claim that trial court incorrectly determined that defendant's jury trial waiver was knowing, intelligent and voluntary; adoption of Appellate Court's opinion as proper statement of issues and applicable law concerning those issues.

State *v.* Luciano (Order) 903

State *v.* Manuel T. 429
Risk of injury to child; sexual assault first degree; sexual assault second degree; sexual assault fourth degree; certification from Appellate Court; claim that this court should overrule prior Appellate Court precedent and adopt standard under which statements made by minor child abuse victim during forensic interview can be admitted under medical treatment exception to hearsay rule only if victim's primary purpose in making statements was to obtain medical diagnosis or treatment; whether Appellate Court incorrectly determined that trial court had not abused its discretion in excluding, for lack of authentication, screenshots of certain text messages purportedly sent by victim to defendant's niece.

State *v.* Marsala 55
Criminal trespass first degree; defendant's request that jury be instructed on infraction of simple trespass as lesser included offense; whether Appellate Court correctly concluded that trial court properly declined to instruct jury on simple trespass as lesser included offense; whether prerequisites set forth in State *v.* Whistnant *(179 Conn. 576) for obtaining jury instruction on lesser included offense were satisfied.*

State *v.* Rodriguez 175
Sexual assault first degree; criminal attempt to commit sexual assault first degree; unpreserved claim that trial court violated defendant's right to confrontation by allowing forensic science examiner to testify about results of DNA identification analysis without requiring testimony from individual who generated DNA profiles; unpreserved claim that defendant's due process right was violated by introduction of DNA identification evidence that was unreliable; claim that evidence of random match probability of 1 in 230,000 in Hispanic population, by itself, was insufficient to establish that defendant was guilty of crimes charged beyond reasonable doubt.
State *v.* Rolon 397
Possession of controlled substance with intent to sell; motion to suppress; conditional plea of nolo contendere; whether trial court improperly denied defendant's motion to suppress; claim that defendant's constitutional right to be free from unreasonable searches and seizures was violated when police detained him, without warrant, in parking lot of apartment building while executing unrelated search warrant on apartment of another individual suspected of drug trafficking; whether defendant was in immediate vicinity of premises being searched while he was detained.
Turner *v.* Commissioner of Correction (Order) 909
Wells Fargo Bank, N.A. *v.* Robertson (Order) 905

CONNECTICUT APPELLATE REPORTS

Vol. 206

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

IN RE ANNESSA J.*
(AC 44405)
(AC 44497)

Bright, C. J., and Alexander and Norcott, Js.

Syllabus

The respondent parents filed separate appeals to this court from the judgment of the trial court terminating their parental rights with respect to their minor child, A, and denying their motions for posttermination visitation with A. *Held*:

1. The respondent mother could not prevail on her unpreserved claims that the trial court violated her state and federal constitutional rights during the termination proceedings.

   a. The respondent mother could not prevail on her claims that that the trial court violated her rights under article fifth, § 1, and article first, § 10, of the Connecticut constitution by conducting the proceedings to terminate her parental rights over the Microsoft Teams platform, a collaborative computer meeting program, and her right to due process of law by denying her motion for permission to allow her expert witness to review certain information and conduct an independent evaluation, her claims being unpreserved and evidentiary, not of constitutional magnitude: she failed to establish that there exists a fundamental right under our state constitution to an in person, in court termination of parental rights trial; moreover, the court did not deny her the use of an expert but merely denied her late motion for release of confidential records and for permission to conduct an independent evaluation on the eve of trial; accordingly, the claims were not reviewable under the second prong of *State* v. *Golding* (213 Conn. 233).

   b. The respondent mother could not prevail on her unpreserved claim that the trial court violated her right to due process of law under the fourteenth amendment to the United States constitution by precluding her from confronting witnesses in person by conducting the termination of parental rights proceedings over the Microsoft Teams platform; although the mother requested an in person, in court trial, she did not argue on appeal that she had an absolute right to an in person, in court trial where she could physically confront witnesses, even if there was evidence of a need for a remote trial, rather, she contended that there was no evidence as to the need for a remote trial, and, because she did not ask the court to hold an evidentiary hearing on the need for such

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

a trial, the record was not adequate to review the claim, and the claim failed under the first prong of *Golding*.

2. The trial court did not err in terminating the respondent father's parental rights with respect to A.

a. This court declined to review the respondent father's claim that the trial court erred in concluding that the Department of Children and Families made reasonable efforts to reunite him with A as that claim was moot; the court also found that he was unable or unwilling to benefit from reunification efforts and, as the father failed to challenge that independent basis for the court's finding that the department made reasonable efforts to reunite him with A, this court could not afford him any practical relief.

b. The trial court's finding that the respondent father had failed to achieve a sufficient degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of A, he could assume a responsible position in her life, as required by statute (§ 17a-112 (j) (3) (B) (i)), was supported by clear and convincing evidence in the record; although the father had made some progress in his rehabilitation, there was evidence showing that he was reluctant to cooperate with the department and that he had taken more than two years to begin addressing his problematic sexual behavior toward A, which was still a problem, thus, the record supported the conclusion that the father could not assume a role as a safe and responsible parent for A within a reasonable period of time.

c. The trial court's determination that the termination of the respondent father's parental rights was in the best interest of A was not clearly erroneous, as it was supported by the court's findings and conclusions with respect to the seven applicable statutory (§ 17a-112 (k)) factors, as well as the court's conclusion regarding A's need for permanency and stability; although A expressed a desire to stay in contact with her father, she also wanted to remain in the care of her foster mother, with whom she had been living for more than two years, and the father had failed to address the problem sexual behavior that was a significant factor in A's removal and had failed to make sufficient efforts to adjust his circumstances, conduct and conditions such that he could assume the role of the caregiver.

3. The trial court erred in denying the motions of the respondent mother and the respondent father for posttermination visitation with A, the court having failed to consider the appropriate standard under the applicable statute (§ 46b-121 (b) (1)) and our Supreme Court's holding in *In re Ava W.* (336 Conn. 545): in deciding the motions, the court was required to take a broad view of the best interest of A, including considering the factors set forth in *In re Ava W.*, such as the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and the birth parent prior to termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, and any impact on adoption prospects for the

child, to determine whether posttermination visitation was necessary or appropriate to secure the welfare, protection, proper care and suitable support of A; accordingly, the case was remanded for further proceedings on the respondents' posttermination motions for visitation.

Argued May 17—officially released August 3, 2021**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor child, brought to the Superior Court in the judicial district of Hartford, Juvenile Matters, and tried to the court, *Olear, J.*; judgment terminating the respondents' parental rights; thereafter, the court denied the respondents' motions for posttermination visitation, and the respondents filed separate appeals to this court. *Affirmed in part*; *reversed in part*; *further proceedings*.

Albert J. Oneto IV, assigned counsel, for the appellant in Docket No. AC 44405 (respondent mother).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Clare E. Kindall*, solicitor general, and *Evan O'Roark*, assistant attorney general, for the appellee in Docket No. AC 44405 (petitioner).

Joshua Michtom, assistant public defender, for the appellant in Docket No. AC 44497 (respondent father).

Sara Nadim, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Evan O'Roark*, assistant attorney general, for the appellee in Docket No. 44497 (petitioner).

Opinion

BRIGHT, C. J. In Docket No. AC 44405, the respondent mother (mother) appeals from the judgment of the trial court terminating her parental rights to, and

** August 3, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

denying her motion for posttermination visitation with, her minor child, Annessa J. On appeal, the mother claims that the trial court (1) violated her right to a "public civil trial at common law" by conducting proceedings over the Microsoft Teams platform,[1] rather than in court and in person, in violation of article fifth, § 1, and article first, § 10, of the Connecticut constitution, (2) violated her right to due process of law by precluding her from confronting witnesses in court and in person when it conducted proceedings over the Microsoft Teams platform, and (3) violated her right to due process of law when it denied her motion for permission to allow her expert witness to review certain information. We are not persuaded.

In Docket No. AC 44497, the respondent father (father) appeals from the judgment of the trial court terminating his parental rights to, and denying his motion for posttermination visitation with, his minor child, Annessa. On appeal, the father claims that the trial court improperly concluded that (1) the Department of Children and Families (department) had made reasonable efforts to reunify him with his daughter, (2) there was sufficient evidence to conclude that he was unable or unwilling to rehabilitate, and (3) termination of his parental rights was in the best interest of Annessa. We are not persuaded.

In addition, in Docket Nos. AC 44405 and AC 44497, the mother and the father, respectively, claim that the trial court applied an incorrect legal standard when it considered their posttermination motions for visitation

[1] Due to the COVID-19 pandemic, the Judicial Branch began holding remote hearings using the Microsoft Teams platform. For more information, see State of Connecticut, Judicial Branch, Connecticut Guide to Remote Hearings for Attorneys and Self-Represented Parties (November 13, 2020), available at https://jud.ct.gov/HomePDFs/ConnecticutGuideRemoteHearings.pdf (last visited July 29, 2021) ("Microsoft Teams is a collaborative meeting app with video, audio, and screen sharing features").

with Annessa. We are persuaded that the court employed an improper standard, and, accordingly, we reverse the judgment of the trial court as to the denial of the post-termination motions for visitation, and we remand the case to the trial court for further proceedings on those motions.

The following facts, as found by the trial court by clear and convincing evidence, and procedural history inform our review of both appeals.

On February 10, 2001, due to physical abuse at the hands of her mother, the mother was committed to the care and custody of the petitioner, the Commissioner of Children and Families, where she remained until reaching the age of eighteen. The mother also elected to receive additional voluntary services from the department until she reached the age of twenty-three. She has become a licensed professional nurse.

At the time of the trial in this matter, the mother and the father had been married for six to seven years but had been in a relationship for approximately twelve years. Their only child, Annessa, was born in 2006. In 2009, the department became involved with the mother and the father because they had failed to provide adequate supervision and care for Annessa. The department also had concerns about intimate partner violence. Annessa subsequently was committed to the care and custody of the petitioner, and the court ordered specific steps for the mother and the father. The mother and the father completed a parenting program through the Village for Families and Children, although the mother failed to comply with many of the specific steps that had been ordered. In July, 2010, Annessa was reunified with the father under protective supervision, which expired in December, 2010. By approximately December, 2010, the mother and the father had reunited and begun to cohabitate again; intimate partner violence also resumed.

"On November 17, 2017, the department's Careline received a report alleging sexual abuse by the father of Annessa and physical neglect of Annessa by the mother. The mother had reported that sometime in late fall/early winter of 2016, or as late as March, 2017, the father [had] disclosed to her that Annessa's foot touched his penis and he woke up with an erection. This matter was never addressed further by the mother or the father. Then, sometime in July, 2017, the father admitted to the mother that he had touched Annessa's genitals over her underpants in order to teach her a lesson. According to the mother, she asked the father to leave the house in August, 2017. The father has reported that he was not asked to leave until October, 2017. After the department was alerted to the incident, efforts were made to connect with the mother and specifically to have her place Annessa in therapy. The mother [however] would not commit to doing so."

On December 8, 2017, after the father left the home, he was arrested after he kicked in the door to the mother's apartment. Shortly thereafter, the first of four protective orders was issued against him in favor of the mother. The father pleaded guilty to numerous charges as a result of his December 8, 2017 arrest, and he received a sentence of one year of incarceration, execution suspended, with two years of probation.[2]

Annessa later reported that the mother would leave her alone for days at a time, that she would not know the whereabouts of the mother at those times, and that the apartment would have no heat or electricity. On December 4, 2017, during a forensic interview at Klingberg Children's Advocacy Center, Annessa reported that the father had touched her "bikini area" over her underwear.

"On January 16, 2018, the [petitioner] filed a petition of neglect. On April 5, 2018, the [petitioner] invoked a

[2] The father successfully completed his probation on May 3, 2020.

[ninety-six] hour administrative hold on [Annessa]. On April 9, 2018, the [petitioner] filed an ex parte motion for an order of temporary custody (OTC). The court issued the OTC on the same date, and it was sustained on May 7, 2018. On July 31, 2018, [Annessa] was adjudicated neglected and committed to the custody of the [petitioner] until further order of the court. She has remained committed to date." Annessa was placed in foster care with the woman who had been the foster mother to the mother. The mother and Annessa also had lived on the second floor of the foster mother's apartment house until shortly before Annessa was removed from the mother's care and custody. Annessa is bonded to the foster mother and has been clear in her desire to remain in the custody of the foster mother. Academically, she is excelling.

The mother and the father were given specific steps to facilitate reunification with Annessa, including addressing mental health issues, parenting deficiencies, and intimate partner violence; the father also was ordered to address the sexual abuse of his daughter. The mother neither kept appointments set by the department nor cooperated with the department. The father missed several administrative case review appointments, but he participated in counseling and made some progress. However, he falsely reported to the department that he had discussed with his therapist the sexual abuse of his daughter.

"On March 28, 2019, and February 6, 2020, the court approved a permanency plan of termination of parental rights and adoption. The trial on the [termination of parental rights] petition was conducted on September 2, 3, and 17, and October 6, 2020. The mother and the father appeared and were zealously represented by counsel."[3]

[3] "Due to the COVID-19 . . . pandemic, the trial was conducted virtually. The court made every reasonable effort to allow counsel and the parties to confer with each other during the proceedings and to address technical

In its October 23, 2020 memorandum of decision, the court found, in accordance with General Statutes §17a-112 (j) (1), that the department had made reasonable efforts to locate and identify the mother and the father, that the department had made reasonable efforts to reunify each of them with Annessa, and that neither the mother nor the father was able or willing to benefit from reunification efforts. The court also determined that such efforts at reunification no longer were appropriate. Additionally, in accordance with § 17a-112 (j) (3) (B), the court found that the petitioner had proven by clear and convincing evidence the "failure to rehabilitate" ground for termination of the respondents' parental rights. Next, in accordance with § 17a-112 (k),[4] the court considered each of the seven statutory factors

issues that arose from time to time. Using the virtual technology, the court was able to assess the demeanor and credibility of the witnesses."

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

and concluded that termination of the parental rights of both the mother and the father was in the best interest of Annessa.

In its memorandum of decision, the court also considered the motions for posttermination visitation that the mother and the father each had filed, finding that "neither the mother nor the father have met their burden to prove posttermination visitation for such parent is necessary or appropriate to secure the welfare, protection, proper care and suitable support of [Annessa]." The court further concluded that the best interest of the child is not the proper standard for resolving motions for posttermination visitation. Finally, although noting that the father and Annessa have a good visiting relationship, the court found that posttermination visitation with the mother or the father was not *required* for Annessa's "well-being, welfare, protection, proper care or suitable support." Accordingly, the court denied each party's motion. These appeals followed.[5] Additional facts and procedural history will be set forth as appropriate.

We begin by setting forth the general legal principles relevant to the respondents' claims. "Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase." (Internal quotation marks omitted.) *In re November H.*, 202 Conn. App. 106, 116, 243 A.3d 839 (2020). Section 17a-112 (j) provides in relevant part: "The Superior Court . . . may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the Department of Children and Families has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of

[5] In both Docket Nos. AC 44405 and AC 44497, the attorney for Annessa has adopted the brief of the petitioner.

section 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to section 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .''

Additionally, our Supreme Court has determined that ''the trial court . . . [has] the authority to grant posttermination visitation'' when, during the proceedings to terminate parental rights, a respondent files a motion requesting such visitation. *In re Ava W.*, 336 Conn. 545, 577, 590 n.18, 248 A.3d 675 (2020). ''[T]he standard for evaluating posttermination visitation [derives] from the authority granted to [the trial court] under [General Statutes] § 46b-121 (b) (1)[6]—'the Superior Court shall

[6] General Statutes § 46b-121 (b) (1) provides in relevant part: ''In juvenile matters, the Superior Court shall have authority to make and enforce such orders directed to parents, including any person who acknowledges before the court paternity of a child born out of wedlock, guardians, custodians or other adult persons owing some legal duty to a child therein, as the court deems necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child subject to the court's jurisdiction or otherwise committed to or in the custody of the Commissioner of Children and Families. . . . In addition, with respect to proceedings concerning delinquent children, the Superior Court shall have authority to make and enforce such orders as the court deems necessary or appropriate to provide individualized supervision, care, accountability and treatment to such child in a manner consistent with public safety, deter the child from the commission of further delinquent acts, ensure that the child is responsive to the

have authority to make and enforce such orders . . . necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child . . . .' Even though . . . courts have broad authority in juvenile matters, that broad authority has been codified in § 46b-121 (b) (1), which defines the contours of the courts' authority to issue orders 'necessary or appropriate to secure the welfare, protection, proper care and suitable support of a child . . . .' General Statutes § 46b-121 (b) (1). . . . [W]hen evaluating whether posttermination visitation should be ordered . . . [the court should] adhere to the standard that the legislature expressly adopted—'necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child . . . .' General Statutes § 46b-121 (b) (1) . . . .

"Whether [it is appropriate] to order posttermination visitation is, of course, a question of fact for the trial court, 'which has the parties before it and is in the best position to analyze all of the factors [that] go into the ultimate conclusion that [posttermination visitation is in the best interest of the child].' . . . Our dedicated trial court judges, who adjudicate juvenile matters on a daily basis and must make decisions that concern children's welfare, protection, care and support, are best equipped to determine the factors worthy of consideration in making this finding. As examples—which are neither exclusive nor all-inclusive—a trial court may want to consider the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, any interference with present custodial arrangements, and any impact on the adoption prospects for

court process, ensure that the safety of any other person will not be endangered and provide restitution to any victim. The Superior Court shall also have authority to grant and enforce temporary and permanent injunctive relief in all proceedings concerning juvenile matters."

the child. . . . [The trial court] should, of course, evaluate those considerations independently from the termination of parental rights considerations."[7] (Citations omitted; footnote added.) *In re Ava W.*, supra, 336 Conn. 588–90. We now consider separately the appeals from the judgment terminating parental rights in AC 44405 and in AC 44497, followed by our consideration of the court's denial of the motions for posttermination visitation.

I

AC 44405

The mother claims that the trial court (1) violated her right to a "public civil trial at common law" by conducting proceedings over the Microsoft Teams platform, rather than in court and in person, in violation of article fifth, § 1, and article first, § 10, of the Connecticut constitution, (2) violated her right to due process of law by precluding her from confronting witnesses in court and in person when it conducted proceedings

[7] "To be clear, our holding and analysis in the present case are limited to the procedural posture by which the respondent sought posttermination visitation. Specifically, she requested posttermination visitation during a proceeding in which she was the respondent and the petitioner sought to terminate her parental rights. At that time, the trial court had the appropriate parties and evidence before it to consider her request as 'necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child . . . .' General Statutes § 46b-121 (b) (1). We do not opine upon whether a trial court has authority to consider a request for posttermination visitation made after parental rights have been terminated. In that kind of case, we might be required to examine a variety of constitutional rights and statutory authority not implicated in the present case, namely, but not exclusively, whether the parent whose rights have been terminated has the right to pursue posttermination visitation and whether the trial court's authority to grant posttermination visitation has been abrogated by the visitation statute. See General Statutes § 46b-59 (b); see also *In re Andrew C.*, Docket No. H-12-CP11013647-A, 2011 WL 1886493, *11 (Conn. Super. April 19, 2011) (explaining that permitting parents whose rights have been terminated to file applications for visitation pursuant to § 46b-59 'could significantly impede what the law requires be an expeditious progress toward achieving permanency for a child')." (Emphasis omitted.) *In re Ava W.*, supra, 336 Conn. 590 n.18.

over the Microsoft Teams platform, and (3) violated her right to due process of law when it denied her motion for permission to allow her expert witness to review certain information.[8] We will consider each claim in turn.

A

The mother first claims that the court violated article fifth, § 1, and article first, § 10, of the Connecticut constitution[9] by conducting proceedings over the Microsoft Teams platform, rather than in court and in person. She argues that "[a]rticle [f]ifth, § 1, creates a duty on the part of the Superior Court to find facts by observing firsthand the parties and witnesses in physical proximity to each other [and] [a]rticle [f]irst, § [10], creates a right of the citizenry to a public civil trial of the kind that existed at common law in 1818." The mother concedes that she did not raise a constitutional claim before the trial court, although she did object to holding the hearing via Microsoft Teams, and, therefore, she requests review under *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[10] The

[8] The mother also claims that the court employed an improper legal standard when it considered her motion for posttermination visitation. We will consider this claim in part III of this opinion.

[9] Article fifth, § 1, of the Connecticut constitution, as amended by article twenty, § 1, provides: "The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law."

Article first, § 10, of the Connecticut constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[10] "Pursuant to the *Golding* doctrine, 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 [respondent] of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness

petitioner argues that the mother's claim is not reviewable because the claim fails the second prong of *Golding* and that, even if the claim can be viewed as constitutional, it also fails under the third and fourth *Golding* prongs. We conclude that the mother has failed to establish that there exists a fundamental right under article fifth, § 1, or article fifth, §10, of our state constitution to an in court, in person trial, as opposed to a trial conducted over a virtual platform such as Microsoft Teams, during a termination of parental rights proceeding.[11] See *State* v. *Fuller*, 178 Conn. App. 575, 582, 177 A.3d 578 (2017) (procedural right does not "give rise in and of itself to a constitutional right" (internal quotation marks omitted)), cert. denied, 327 Conn. 1001, 176 A.3d 1194 (2018). Accordingly, her claim is not reviewable because it fails under *Golding*'s second prong. See footnote 10 of this opinion.

"With respect to the second prong of *Golding*, [t]he [respondent] . . . bears the responsibility of demonstrating that [her] claim is indeed a violation of a fundamental constitutional right. Patently nonconstitutional claims that are unpreserved at trial do not warrant special consideration simply because they bear a constitutional label." (Internal quotation marks omitted.) *State* v. *Gonzalez*, 106 Conn. App. 238, 257, 941 A.2d 989, cert. denied, 287 Conn. 903, 947 A.2d 343 (2008).

of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the [respondent's] claim will fail. . . . The first two steps in the *Golding* analysis address the reviewability of the claim, while the last two steps involve the merits of the claim. . . . The appellate tribunal is free, therefore, to respond to the [respondent's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *State* v. *Turner*, 181 Conn. App. 535, 549–50, 187 A.3d 454 (2018), aff'd, 334 Conn. 660, 224 A.3d 129 (2020). In *In re Yasiel R.*, supra, 317 Conn. 781, our Supreme Court modified the third prong of *Golding* by eliminating the word "clearly" before the words "exists" and "deprived."

[11] The mother does not allege a violation of her right to due process of law under the fourteenth amendment to the United States constitution with regard to this claim.

In the present case, the mother contends that, at common law, there was a right to an in person, in court public trial in all civil cases. She argues that this right was codified in our state constitution. Although the mother agreed during oral argument before this court that a public trial is not constitutionally required in juvenile matters, she, nevertheless, contends that our state constitution requires that termination of parental rights proceedings be conducted in a physical courtroom with both the judge and the parents physically present. She contends that this is constitutionally required under our state constitution because the credibility and fact-finding determinations of the judge could be impacted by the judge's ability or inability to see the whole courtroom and the litigants in person.[12]

After reviewing the mother's arguments and considering the provisions of article fifth, § 1, and article first, § 10, and the common law she cites, we are not persuaded that she has established that there exists a fundamental right under our state constitution to an in person, in court termination of parental rights trial.

B

The mother next claims that the trial court violated her right to due process of law under the fourteenth

[12] Accepting the mother's argument essentially would mean that a sight impaired judge could not constitutionally preside over *any* bench trial because his or her inability to see the witnesses would violate the litigants' rights under the Connecticut constitution. Although we have been unable to locate any cases in Connecticut in which such an argument has been made, courts in other states have repeatedly rejected similar claims. See *People* v. *Hayes*, 923 P.2d 221, 225–26 (Colo. App. 1995) (hearing before blind judge does not deny due process); *Galloway* v. *Superior Court*, 816 F. Supp. 12, 17 (D.D.C. 1993) ("[I]n the United States, there are several active judges who are blind. Indeed, it is highly persuasive that . . . a blind person . . . served as a judge on the Superior Court of the District of Columbia and presided over numerous trials where he was the sole trier of fact and had to assess the credibility of the witnesses before him and evaluate the documentation and physical evidence."). Similarly, there is no question that a sight impaired individual may serve as a juror in Connecticut. See, e.g., *State* v. *Mejia*, 233 Conn. 215, 227–28, 658 A.2d 571 (1995).

amendment to the United States constitution by precluding her from confronting witnesses in court and in person when it conducted proceedings virtually over the Microsoft Teams platform. She argues that, "[a]lthough the trial court referenced the COVID-19 public emergency as the reason for conducting the trial virtually, there was no actual evidence before the court that the COVID-19 virus threatened the health or safety of any of the persons involved in this particular case. Under such circumstances, the risk of an erroneous deprivation of parental rights created by virtual fact-finding outweighed the court's concern for the health and safety of the participants in this matter under the applicable due process balancing test." Because this claim is unpreserved, the mother requests review under *State* v. *Golding*, supra, 213 Conn. 239–40. See footnote 10 of this opinion.

The petitioner argues that this claim is not reviewable for two reasons: first, because there is no evidentiary record regarding the health and safety procedures necessary for the participants in the proceedings and, second, because the mother has only a statutory right to confront witnesses in a termination of parental rights proceeding, not a constitutional right. The petitioner also argues, "[t]o the extent that [the mother] claims she has a general procedural due process right to confront and cross-examine witnesses in-person, it is subject to an analysis pursuant to *Mathews* v. *Eldridge*, 424 U.S. 319, [96 S. Ct. 893, 47 L. Ed. 2d 18] (1976) . . . [and] [s]he is unable to meet her burden [under that analysis]." We agree with the petitioner that the record is inadequate to review this unpreserved claim.

Although the mother requested an in person, in court trial, she did not ask the court to hold an evidentiary hearing on the need for a remote trial. It is important to note that the mother *does not argue* on appeal that she had the absolute right to an in person, in court trial

where she could physically confront witnesses, even if there was evidence of the need for a remote trial. Rather, she contends that she had such a right *because* there was no evidence as to the need for a remote hearing. Accordingly, we agree with the petitioner that the record is not adequate to review the claim made on appeal, and, accordingly, this claim fails under *Golding*'s first prong.

C

The mother next claims that the trial court violated her right to the due process of law when it denied her motion for permission to allow her expert witness to review certain information. Specifically, she argues that "she was without the adequate assistance of an expert in preparing her defense when the court denied her pretrial motion for permission to allow her expert to review documents in the court's file and to speak with the child's individual therapist. . . . Where the court precluded [the mother's] expert from reviewing the petitioner's documents filed with the court, or from talking with the child's therapist, it denied [the mother] a fundamentally fair proceeding by impeding her ability to have her expert effectively assess her defense, to include probing the state's case for weaknesses and identifying questions to ask the witnesses on cross-examination." (Citations omitted.) Because this claim was not preserved, the mother requests review pursuant to *Golding*. The petitioner responds that this claim is evidentiary in nature and that "the trial court properly exercised its discretion in denying [the mother's] untimely motion to release records to her private evaluator." We agree with the petitioner and, accordingly, conclude that review of the mother's unpreserved claim is inappropriate under *Golding*'s second prong. See footnote 10 of this opinion.

The following procedural history is informative. On August 4, 2020, the mother filed an ex parte motion

for the release of confidential court documents to her evaluator and for permission for the evaluator to conduct an independent evaluation of the child. In her motion, she contended that the information was "necessary in order for [her] to receive a fair trial . . . ." The petitioner objected to the mother's untimely motion on several grounds, including the lateness of the motion and that an independent evaluation, at this late date, would "unnecessarily delay the proceedings . . . ." The court denied the mother's motion on August 10, 2020.

Pursuant to General Statutes § 46b-124 (b), "[a]ll records of cases of juvenile matters . . . except delinquency proceedings . . . shall be confidential and for the use of the court in juvenile matters, and open to inspection or disclosure to any third party . . . only upon order of the Superior Court . . . ." The trial court's denial of a motion to release such confidential records rests squarely within the discretion of the court. See *In re Sheldon G.*, 216 Conn. 563, 577, 584, 583 A.2d 112 (1990).

"*In re Sheldon G.* involved a delinquency proceeding, but the principles of confidentiality embodied in § 46b-124 and discussed in *In re Sheldon G.* are analogous and applicable to confidential material in termination of parental rights cases. *In re Amy H.*, 56 Conn. App. 55, 62, 742 A.2d 372 (1999). Juvenile Court records pertaining to neglect proceedings and encompassing information from [the department] are confidential and subject to disclosure to third parties only upon court order. *State* v. *Howard*, 221 Conn. 447, 459 n.10, 604 A.2d 1294 (1992); *State* v. *Whitfield*, 75 Conn. App. 201, 210–13, 815 A.2d 233, cert. denied, 263 Conn. 910, 819 A.2d 842 (2003)." (Internal quotation marks omitted.) *State* v. *William B.*, 76 Conn. App. 730, 756–57, 822 A.2d 265, cert. denied, 264 Conn. 918, 828 A.2d 618 (2003). "Procedurally, our courts have devised a method for determining whether disclosure should be made by first requiring

counsel to lay a sufficient foundation." *State* v. *Whitfield*, supra, 212. "[O]nly a showing of compelling need can justify the disclosure of the confidential materials in a parental termination proceeding." *In re Amy H.*, supra, 62.

The mother attempts to avoid application of these principles to this case by trying to equate her situation to the situation presented to the Court of Appeals of Michigan in *In re Yarbrough Minors*, 314 Mich. App. 111, 885 N.W.2d 878, cert. denied, 499 Mich. 898, 876 N.W.2d 818 (2016), in which the court held that the trial court had employed an improper standard when it denied the respondents' motion for funding of an expert witness. Id., 114. Such a case is inapposite to the present situation. Here, the mother was not denied the use of an expert. Rather, her late motion for release of confidential records and for permission to conduct an independent evaluation, on the eve of trial, was denied. The mother's expert witness, in fact, did testify during the trial, and the mother was able to ask questions about the records that were in evidence. Although the mother now attempts to frame the denial of her motion as a constitutional due process claim under *Golding*, we conclude that her claim is evidentiary in nature. See *In re Sheldon G.*, supra, 216 Conn. 577, 584; *State* v. *William B.*, supra, 76 Conn. App. 756–57; *In re Amy H.*, supra, 56 Conn. App. 62; see also *In re Miyuki M.*, 202 Conn. App. 851, 860, 246 A.3d 1113 (2021) ("[t]he fact that this is a termination of parental rights case does not transform an evidentiary matter into a constitutional matter"). Accordingly, the claim fails under *Golding*'s second prong.

II

AC 44497

In AC 44497, the father appeals from the judgment of the trial court terminating his parental rights to, and denying his motion for posttermination visitation with,

Annessa. On appeal, the father claims that the trial court erred when it concluded that (1) the department had made reasonable efforts to reunify him with his daughter, (2) he was unlikely to be able to reunify with his daughter within a reasonable period of time or that he was unable or unwilling to rehabilitate, and (3) termination of his parental rights was in the best interest of Annessa.[13] We consider each of the father's claims in turn.

A

The father claims that the trial court erred in concluding, pursuant to § 17a-112 (j) (1), that the department had made reasonable efforts to reunify him with Annessa. The father states specifically that he does not challenge the factual findings of the trial court but challenges only the legal conclusions of the court. We conclude that this claim is moot.

The following additional facts and procedural history are relevant to this claim. In its memorandum of decision, the court found that the department had made reasonable efforts to locate the father and to reunify him with his daughter. The court further found that the father is "unable or unwilling *to benefit from reunification efforts* . . . [and] that it is no longer appropriate for the department to make further efforts to reunify the father with [Annessa]." (Emphasis added.) On appeal, the father claims that the court improperly concluded that the department had made reasonable efforts to reunify him with his daughter. The father does not claim, however, that the court's conclusion that he was "unable or unwilling *to benefit from reunification efforts*" was improper.[14] (Emphasis added.) Because the

[13] The father also claims that the court employed an improper legal standard when it considered his motion for posttermination visitation. We will consider this claim in part III of this opinion.

[14] Although the father challenges the court's finding under § 17a-112 (j) (3) (B) that he "has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering

father fails to challenge a separate independent basis for upholding the court's decision, we conclude that this claim is moot.

"Mootness raises the issue of a court's subject matter jurisdiction and is therefore appropriately considered even when not raised by one of the parties. . . . Mootness is a question of justiciability that must be determined as a threshold matter because it implicates [a] court's subject matter jurisdiction. . . . [I]t is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . In determining mootness, the dispositive question is whether a successful appeal would benefit the [petitioner] or [the respondent] in any way." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *In re Jorden R.*, 293 Conn. 539, 555–56, 979 A.2d 469 (2009).

"[Section] 17a-112 (j) (1) requires a trial court to find by clear and convincing evidence that the department made reasonable efforts to reunify a parent and child *unless* it finds instead that the parent is unable or unwilling to benefit from such efforts. In other words, *either finding*, standing alone, provides an independent basis for satisfying § 17a-112 (j) (1)." (Emphasis in original; internal quotation marks omitted.) *In re Angela V.*, 204 Conn. App. 746, 753, A.3d , cert. denied, 337 Conn. 907, 252 A.3d 365 (2021).

In *In re Angela V.*, this court explained that "in [*In re*] *Jorden R.*, our Supreme Court, sua sponte, vacated the judgment of this court after concluding that this court had lacked jurisdiction to review the merits of the respondent's appellate claim that the trial court had

the age and needs of the child, [he] could assume a responsible position in the life of the child," he has not challenged the court's finding under § 17a-112 (j) (1) that he is unwilling or unable to benefit from reunification efforts.

erred in concluding that she was unable or unwilling to benefit from reunification efforts. . . . Our Supreme Court determined that the respondent's claim was moot because she had failed to challenge on appeal a second alternative basis of the trial court's decision. . . . [T]he [trial] court found that the department had made reasonable efforts to reunify the respondent and [the child] *and* that the respondent was unwilling and unable to benefit from reunification services. . . . In light of the trial court's finding that the department had made reasonable efforts to reunify the respondent with [the child] and the respondent's failure to challenge that finding, the [decision of this court], which disturbed only the trial court's finding that reunification efforts were not required, [could not] benefit the respondent meaningfully [because there remained an undisturbed independent basis that supported the trial court's decision]. . . . Accordingly, our Supreme Court concluded that the respondent's claim was moot because the Appellate Court could not have afforded her practical relief." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 752–53.

In the present case, the father does not claim that the court erred in concluding that he was "unable or unwilling *to benefit from reunification efforts*." (Emphasis added.) Because the father fails to challenge a separate independent basis for upholding the court's decision, we conclude that this claim is moot.

B

The father next claims that that there was insufficient evidence for the trial court to conclude that he could not rehabilitate within a reasonable period of time given Annessa's needs.[15] We disagree.

[15] In footnote 4 of the father's appellate brief, he argues that "he was not fully rehabilitated at the time of trial, but . . . the evidence suggested he would likely rehabilitate within a reasonably foreseeable period. As such, the arguments concerning the trial court's ruling that he failed to rehabilitate and its ruling that he was unwilling or unable to do so are the same."

"Although the trial court's subordinate factual findings are reviewable only for clear error, the court's ultimate conclusion that a ground for termination of parental rights has been proven presents a question of evidentiary sufficiency. . . . That conclusion is drawn from both the court's factual findings and its weighing of the facts in considering whether the statutory ground has been satisfied. . . . On review, we must determine whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . To the extent we are required to construe the terms of § 17a-112 (j) (3) . . . or its applicability to the facts of this case, however, our review is plenary." (Citations omitted; internal quotation marks omitted.) *In re Egypt E.*, 327 Conn. 506, 525–26, 175 A.3d 21, cert. denied sub nom. *Morsy E.* v. *Commissioner, Dept. of Children & Families*, U.S. , 139 S. Ct. 88, 202 L. Ed. 2d 27 (2018).

One of the factors for termination for the court to consider is set forth in § 17a-112 (j) (3) (B) (i), which provides that the court may grant a petition for termination of parental rights if it finds by clear and convincing evidence that "the child . . . has been found by the Superior Court . . . to have been neglected, abused or uncared for in a prior proceeding . . . and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to section 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . ."

In this case, the court found that the father had "failed to achieve such a degree of rehabilitation as to encourage the belief that, within a reasonable period of time, [he] could assume a role as a safe and responsible parent for this child." The court cited the following evidence in support of its conclusion: the father's compliance with several of his specific steps was belated, he failed to have stable housing until very recently, he has gained only some insight into his sexual abuse of his daughter and how to control his urges, and he has "a long way to go" regarding the sexual abuse. The record demonstrates that, although the neglect petition in this matter was filed on January 18, 2018, and the petition for termination of parental rights was filed on November 15, 2019, the father did not begin to engage in therapy to address his inappropriate sexual behavior until December, 2019. The father argues that he knows he has not fully rehabilitated at this time, but, nonetheless, if given more time, perhaps six months, he could further resolve the issues related to his inappropriate sexual behavior and gain more understanding of its effect on Annessa. We are not persuaded.

Although we acknowledge, as did the trial court, that the father has made progress, that progress was a long time in the making. The father was reluctant to cooperate with the department, and he initially lied to the department about whether he was getting therapy for his sexual behavior. After the petitioner filed the neglect petition, it took more than two years for the father to begin addressing this very serious problem, which he readily admits is still a problem. Accordingly, we conclude that the evidence in the record supports the court's conclusion that the father failed to achieve the required degree of rehabilitation that would encourage the belief that, *within a reasonable period of time*, he could assume a role as a safe and responsible parent for his child.

C

The father next claims that the trial court erred in concluding that termination of his parental rights was in the best interest of Annessa. The father contends that he has a strong bond with Annessa and that his visits with her have been positive. In his appellate brief, the father has not examined each of the seven statutory factors delineated in § 17a-112 (k). Rather, his argument is that "there was absolutely no evidence adduced suggesting that continuing contact with her father while she remains in her relative foster placement was having any negative effect on her . . . [or that] the continuation of the father's legal rights would affect Annessa's well-being in any way." We are not persuaded.

"In the dispositional phase of a termination of parental rights hearing, the emphasis appropriately shifts from the conduct of the parent to the best interest of the child. . . . It is well settled that we will overturn the trial court's decision that the termination of parental rights is in the best interest of the [child] only if the court's findings are clearly erroneous. . . . The best interests of the child include the child's interests in sustained growth, development, well-being, and continuity and stability of [his or her] environment. . . . In the dispositional phase of a termination of parental rights hearing, the trial court must determine whether it is established by clear and convincing evidence that the continuation of the respondent's parental rights is not in the best interest of the child. In arriving at this decision, the court is mandated to consider and make written findings regarding seven statutory factors delineated in [§ 17a-112 (k)]. . . . There is no requirement that each factor be proven by clear and convincing evidence. . . .

"On appeal, our function is to determine whether the trial court's conclusion was factually supported and

legally correct. . . . In doing so, however, [g]reat weight is given to the judgment of the trial court because of [the court's] opportunity to observe the parties and the evidence. . . . We do not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . . [Rather] every reasonable presumption is made in favor of the trial court's ruling. . . .

"[T]he balancing of interests in a case involving termination of parental rights is a delicate task and, when supporting evidence is not lacking, the trial court's ultimate determination as to a child's best interest is entitled to the utmost deference." (Citation omitted; internal quotation marks omitted.) *In re Omar I.*, 197 Conn. App. 499, 583–84, 231 A.3d 1196, cert. denied, 335 Conn. 924, 233 A.3d 1091, cert. denied sub nom. *Ammar I.* v. *Connecticut*, U.S. , 141 S. Ct. 956, 208 L. Ed. 2d 494 (2020).

In the present case, the court considered each of the seven statutory factors delineated in § 17a-112 (k), and it concluded that termination of the father's parental rights was in Annessa's best interest. The court stated that it had considered the bond between the father and Annessa and the fact that Annessa had voiced an interest in remaining in contact with him. The court found, however, that the father had failed to address "the problem sexual behavior that was a significant factor in the removal of Annessa," and that he had failed to make "sufficient efforts to adjust his circumstances, conduct and conditions" such that he could "assume the role of the caregiver . . . ." Furthermore, the court stated that, "[i]n addition to considering the evidence presented in [the] case, [it had] also considered the totality of the circumstances surrounding [Annessa], including [her] interest in sustained growth, development, well-being, stability, continuity of her environment, length of stay in foster care, the nature of [her] relationship with the foster and biological parents and

the degree of contact maintained with the biological parents." Finally, in reaching its conclusion that termination of the father's parental rights was in Annessa's best interest, the court stated that it also had "balanced [her] intrinsic need for stability and permanency against the benefits of maintaining a connection with the father."

The record reveals that, although Annessa wanted to remain in contact with the father, she also stated that she wanted to continue to remain in the care of her foster mother, the person with whom she had a strong bond and with whom she had been living for more than two years. We conclude that there is evidence in the record to support the court's conclusion and that it is legally sound.

III

POSTTERMINATION MOTIONS FOR VISITATION IN AC 44405 AND AC 44497

In AC 44405 and AC 44497, the mother and the father, respectively, claim that the trial court applied the incorrect legal standard when it considered their posttermination motions for visitation with Annessa. The mother argues that "the trial court mistakenly believed that it could not consider the child's 'best interests' when deciding her motion for posttermination visitation brought pursuant to . . . § 46b-121 (b) (1). . . . Where the trial court erred . . . was in its belief that the standard involved a finding more exacting than whether the visitation was in the child's best interests—in the trial court's words, that the visitation was 'not required for [the child's] well-being.' " Similarly, the father argues in relevant part that "[i]n ruling on [his] motion for posttermination visitation, the trial court held that [although] he and Annessa did have a good visiting relationship, '[p]osttermination visitation by

[the] father with Annessa is not required for her well-being, welfare, protection, proper care or suitable support. . . .' The distinction between 'necessary or appropriate' and 'required' is crucial. . . . In articulating the standard as 'required,' the trial court elided the second part of the statutory definition of its powers: 'appropriate.' This was error." (Citations omitted; emphasis omitted.) We are persuaded by the respondents' arguments in each appeal.

The following additional facts and procedural history are relevant to our consideration of the claims. Both the mother and the father filed a motion for posttermination visitation with Annessa. In its October 23, 2020 memorandum of decision, the court ruled in relevant part that "neither the mother nor the father have met their burden to prove posttermination visitation for such parent *is necessary or appropriate* to secure the welfare, protection, proper care and suitable support of [Annessa]. The mother avers that it is in the best interest of Annessa for visitation to continue. That is not the standard under . . . § 46b-121 (b) (1). . . . Posttermination visitation by the mother with Annessa *is not required* for her well-being, welfare, protection, proper care or suitable support. The mother's motion is denied. . . . [T]he father likewise avers it is in the best interest of Annessa for visitation to continue. The father and Annessa do have a good visiting relationship. However, that does not equate to a finding that posttermination contact *is required* for Annessa. . . . Posttermination visitation by the father with Annessa *is not required* for her well-being, welfare, protection, proper care or suitable support. The father's motion is denied." (Emphasis added.) The mother and the father now claim that the court employed an improper standard because it specifically required them to prove that posttermination visitation *was necessary* to ensure Annessa's "well-being, welfare, protection, proper care or suitable support," which is not the standard set forth by

our Supreme Court in *In re Ava W.*, supra, 336 Conn. 588–90. We agree.

"The question of whether a trial court has held a party to a less exacting [or more exacting] standard of proof than the law requires is a legal one. . . . Accordingly, our review is plenary. . . . *Kaczynski* v. *Kaczynski*, 294 Conn. 121, 126, 981 A.2d 1068 (2009). Similarly, plenary review applies to a question of misallocation of a burden of proof. See *New Haven* v. *State Board of Education*, 228 Conn. 699, 714–20, 638 A.2d 589 (1994) (applying plenary review to challenge to allocation of burden of proof between parties in administrative appeal); *Zabaneh* v. *Dan Beard Associates, LLC*, 105 Conn. App. 134, 140, 937 A.2d 706 (applying plenary review to plaintiff's claim that the [trial] court improperly required that it, rather than the defendant, bear the burden of proof regarding the existence of permission), cert. denied, 286 Conn. 916, 945 A.2d 979 (2008); *Wieselman* v. *Hoeniger*, 103 Conn. App. 591, 596–97, 930 A.2d 768 (applying plenary review to claim that although the court applied the clear and convincing standard of proof required to establish a fraudulent transfer, it did so to the wrong party), cert. denied, 284 Conn. 930, 934 A.2d 245 (2007). *Braffman* v. *Bank of America Corp.*, 297 Conn. 501, 516, 998 A.2d 1169 (2010). Furthermore, if it is not otherwise clear from the record that an improper standard was applied, the appellant's claim will fail on the basis of inadequate support in the record. *Kaczynski* v. *Kaczynski*, supra, 131." (Internal quotation marks omitted.) *In re Jason R.*, 306 Conn. 438, 452–53, 51 A.3d 334 (2012).

The recent decision of our Supreme Court in *In re Ava W.*, supra, 336 Conn. 545, informs and controls our review of these claims. In *In re Ava W.*, our Supreme Court discussed the trial court's authority to order post-termination visitation in a termination of parental rights case. Id., 585–86, 588–89. The court expressly held that,

pursuant to § 46b-121 (b) (1),[16] the trial court has the broad authority to order posttermination visitation "within the context of a termination proceeding . . . [if it determines that] such visitation [is] necessary or appropriate to secure the welfare, protection, proper care and suitable support of the child." Id., 548–49. The court explained that it "was setting forth, for the first time, the standard and potential considerations for [the trial court] to consider when evaluating whether posttermination visitation should be ordered within the context of a termination proceeding." Id., 588.

The petitioner in the present case contends that the trial court correctly stated that our Supreme Court explicitly rejected the best interest standard in *In re Ava W.* We disagree. Our reading of *In re Ava W.* leads us to conclude that our Supreme Court, instead, held that, when considering a motion for posttermination visitation during a termination of parental rights case, the trial court's consideration of the traditional best interest of the child is only part of the consideration of whether such visitation is "necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child." (Internal quotation marks omitted.) Id., 589. Our conclusion is supported by the court's explanation that, "[w]hether to order posttermination visitation is, of course, a question of fact for the trial court, which has the parties before it and is in the best position to analyze all of the factors which go into the ultimate conclusion that [*posttermination visitation is in the best interest of the child*]. . . . Our dedicated trial court judges, who adjudicate juvenile matters on a daily basis and must make decisions that concern children's welfare, protection, care and support, are best equipped to determine the factors worthy of consideration in making this finding. As examples—which are neither exclusive nor all-inclusive—a trial court may

[16] See footnote 6 of this opinion.

want to consider the child's wishes, the birth parent's expressed interest, the frequency and quality of visitation between the child and birth parent prior to the termination of the parent's parental rights, the strength of the emotional bond between the child and the birth parent, any interference with present custodial arrangements, and any impact on the adoption prospects for the child. . . . Trial courts should, of course, evaluate those considerations independently from the termination of parental rights considerations." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 589–90. Thus, in deciding whether to grant a parent's motion for posttermination visitation a court should consider the best interest of the child, but it should not limit its inquiry to the same analysis of best interest made during the dispositional phase of the termination of parental rights hearing. Instead, the court should take a broader view of best interest, including consideration of the factors set forth in *In re Ava W.*, to determine whether posttermination visitation is "necessary or appropriate to secure the welfare, protection, proper care and suitable support of [the] child." Id., 589.

The mother claims that the court expressly rejected any reliance on the best interest of Annessa in ruling on her motion for posttermination visitation. In addition, the mother and the father claim that the court in the present case improperly required each of them to establish that posttermination visitation *was required* for Annessa's well-being. On the basis of the clear language employed by the court in this case, we agree. Although the court cited to § 46b-121 (b) (1) and stated in relevant part that the mother and the father had not met their burden to prove that posttermination visitation was "necessary or appropriate to secure the welfare, protection, proper care and suitable support of the child," the court went on to explain that the best interest standard was "not the standard under . . .

§ 46b-121 (b) (1)" and that posttermination visitation was "*not required* for the child's well-being, welfare, protection, proper care or suitable support." (Emphasis added.)

On the basis of these statements by the court, we are persuaded that the court failed to consider the appropriate standard under § 46b-121 (b) (1) and *In re Ava W.*, namely, whether posttermination visitation is "*necessary or appropriate* to secure the welfare, protection, proper care and suitable support of [the] child," taking into account the traditional best interest analysis and the type of additional factors identified in *In re Ava W. In re Ava W.*, supra, 336 Conn. 589.

The orders of the trial court denying the motions for posttermination visitation by the mother and the father are reversed and the case is remanded for further proceedings on the respondents' motions; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

RONNA-MARIE GUILIANO *v.* JEFFERSON RADIOLOGY, P.C., ET AL.
(AC 42835)

Bright, C. J., and Alvord and Devlin, Js.

Syllabus

The plaintiff sought to recover damages for the alleged medical malpractice of the defendants, a radiology practice and a physician, claiming that they were negligent in failing to timely diagnose a malignancy in her left breast, resulting in a delay in the diagnosis and treatment of her cancer. At trial, the plaintiff sought to offer the testimony of G, a radiologist, regarding the proper standard of care, and the testimony of L, a radiology oncologist who treated the plaintiff. The defendants' counsel objected to the form of certain questions posed to G by the plaintiff's counsel, many of which the trial court sustained, and the trial court imposed a time limitation on the length of the plaintiff's direct examination of L. The jury returned a verdict in favor of the defendants and the

court rendered judgment for the defendants, from which the plaintiff appealed to this court. *Held*:

1. The plaintiff could not prevail on her claim that the trial court abused its discretion by sustaining the objections of the defendants' counsel to the form of certain questions that were posed by her counsel to G because the court's evidentiary rulings were harmless; although the court did sustain objections to certain questions asked by the plaintiff's counsel concerning the standard of care and whether the defendants had breached that standard, the trial transcripts reflected that G testified to those matters later in the proceedings.
2. This court declined to review the plaintiff's claim that the trial court abused its discretion by placing a time limit on the presentation of L's testimony, the plaintiff having failed to preserve her claim; the plaintiff raised no objection to the court over the time limit imposed and did not identify any evidence that she was unable to elicit from L due to the time limit.
3. This court declined to review the plaintiff's claim that the time limit constituted a denial of her right of access to the courts and violated article first, § 10, of the Connecticut constitution, the plaintiff having failed to adequately brief her unpreserved claim; the plaintiff's brief contained no analysis as to why her unpreserved claim should be reviewed pursuant to *State* v. *Golding* (213 Conn. 233) or any substantive analysis as to why the time limit constituted a constitutional violation.

Argued April 14—officially released August 10, 2021

Procedural History

Action to recover damages for alleged medical malpractice, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the plaintiff withdrew the claims against the defendant Julie S. Gershon et al.; thereafter, the matter was tried to the jury before *Cobb, J.*; verdict and judgment for the named defendant et al., from which the plaintiff appealed to this court. *Affirmed.*

John R. Williams, for the appellant (plaintiff).

Kristin Connors, with whom was *Rebecca N. Brindley*, for the appellees (named defendant et al.).

Opinion

BRIGHT, C. J. The plaintiff, Ronna-Marie Guiliano, appeals from the judgment of the trial court, rendered after a jury trial, in favor of the defendants William S.

Poole, a physician, and Jefferson Radiology, P.C. (Jefferson Radiology).[1] On appeal, the plaintiff claims that the trial court abused its discretion by sustaining the objections of the defendants' counsel to the form of certain questions her counsel had posed to one of her expert witnesses. Additionally, the plaintiff claims that the trial court abused its discretion and violated her constitutional right of access to the courts by placing a time limit on her direct examination of a second expert witness. We disagree and affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of the plaintiff's appeal. The plaintiff commenced the present action on April 21, 2014. In her operative complaint, the plaintiff alleged that she had a mammogram conducted by Jefferson Radiology in August, 2010. In December, 2010, the plaintiff complained to a physician of a lump in her left breast. In January, 2011, the plaintiff attended an appointment with her primary care physician, who ordered an ultrasound on her left breast. A few days after the appointment, Jefferson Radiology performed an ultrasound on the plaintiff's left breast. The reviewing physician noted that a "small, benign appearing intramammary lymph node is seen," and a routine mammographic follow-up was recommended for the plaintiff. In August, 2011, the plaintiff again complained of a lump in her left breast to a health-care provider. A bilateral mammogram was conducted and a routine follow-up was recommended.

In September, 2012, the plaintiff again reported to her primary care physician that she had a lump in her left

[1] The complaint was withdrawn as to the defendants Jinnah A. Philips, Julie S. Gershon, Mandell & Blau, P.C., and Physicians for Women's Health, LLC, and they are not parties to this appeal. Stephen Reich, who was a fact witness before the trial court, filed an appearance for purposes of seeking a protective order regarding a notice of deposition. He is a named defendant, but is not involved in this appeal. Accordingly, for purposes of this opinion, we refer to Jefferson Radiology, P.C., and William S. Poole, collectively, as the defendants.

breast. Jefferson Radiology performed a bilateral mammogram and an ultrasound on her right breast.[2] Poole reviewed the mammograms and ultrasound. Poole noted that the "[n]odular density in the left breast is benign," the "palpable abnormality felt by the provider in the right breast at 12 o'clock is not seen on ultrasound," and "there is no sonographic evidence of malignancy." Poole recommended that the plaintiff return in one year for a screening.

In March, 2013, the plaintiff again complained of a lump or thickening of her left breast, and Jefferson Radiology conducted a mammogram and ultrasound on the plaintiff's left breast. Jefferson Radiology identified calcification, a mass, and an abnormal lymph node in the plaintiff's left breast. On March 8, 2013, the plaintiff underwent a biopsy of the lump and the abnormal lymph node. The tissue from the biopsy demonstrated that the plaintiff was suffering from infiltrating mammary carcinoma, and the left axillary lymph node biopsy showed a metastatic mammary carcinoma. In July, 2013, the plaintiff underwent bilateral mastectomies as well as removal of multiple lymph nodes.

In her operative complaint, the plaintiff set forth claims of negligence and vicarious liability. The plaintiff alleged, inter alia, that the defendants' negligence in failing to timely diagnose a malignancy in her left breast resulted in a delay in the diagnosis and treatment of her cancer. A jury trial commenced on March 19, 2019. During the trial, the plaintiff presented the testimony of two expert witnesses, Linda Griska and Kenneth Leopold. The testimony of both of these witnesses is at issue in this appeal. Griska, a diagnostic radiologist specializing in breast imaging, testified that Poole violated the relevant standard of care for a radiologist in

[2] The record contains conflicting evidence as to why an ultrasound was performed on the right breast and not the left breast.

2012 when he reviewed the results of the plaintiff's September, 2012 mammogram and ultrasound. In particular, she testified that Poole failed to take additional views of the left breast based on the results of the mammogram. She also testified that Poole should have conducted an ultrasound on the left breast at that time.

Leopold, the plaintiff's treating radiology oncologist, testified to the radiation treatment the plaintiff received and the effects that the defendants' delayed diagnosis of the plaintiff's breast cancer had on her treatment.

Despite the testimony of Griska and Leopold, on April 4, 2019, the jury returned a verdict in favor of the defendants. The court accepted the jury's verdict and rendered judgment for the defendants. This appeal followed. Additional facts will be set forth as necessary.

I

The plaintiff first claims that the trial court abused its discretion by sustaining the objections of the defendants' counsel to the form of certain questions that her counsel had posed to Griska. The plaintiff argues that the defendants' counsel engaged in a deliberate strategy to confuse the plaintiff's counsel and that the court "consciously participated in that strategy by prohibiting [the] plaintiff's attorney from consulting with anyone other than cocounsel in her attempt to comprehend the reasons why the court was excluding her proposed evidence and explicitly refusing to explain in what respects the court considered the questions to be objectionable." The plaintiff argues that it was clear to the court that the plaintiff's counsel did not comprehend the basis of the court's rulings sustaining the objections to her questions to Griska. The plaintiff further argues that she was precluded from presenting "critical expert evidence" in support of her claim as a consequence of the court's rulings and that she can only speculate as

to the court's grounds for sustaining the repeated objections to the plaintiff's questions.

The defendants argue that the plaintiff failed to preserve her claims concerning the court's evidentiary rulings as to Griska, the court's rulings were proper, and any errors in the court's rulings were harmless. We agree with the defendants that the court's rulings were harmless because they did not prevent the plaintiff from eliciting relevant expert testimony from Griska. Consequently, we do not address whether the plaintiff properly preserved her claim or the propriety of the court's rulings.

The following additional facts and procedural history inform our conclusion. In the section of the plaintiff's appellate brief titled "statement of the case," the plaintiff states that the trial court imposed unexplained limits on the presentation of her case and references the following colloquy that occurred during the direct examination of Griska on the afternoon of March 19, 2019:

"[The Plaintiff's Counsel]: Okay. And in a patient that presents with—with a nodular density, is taking one spot view the standard of care to explore that?

"[The Defendants' Counsel]: Objection to the form.

"The Court: Sustained.

"[The Plaintiff's Counsel]: Do you have an opinion as to whether Dr. Poole's imaging breached the standard of care?

"[The Defendants' Counsel]: Objection as to the form.

"The Court: Sustained.

"[The Plaintiff's Counsel]: When a radiologist observes a nodular density, how should they explore that?

"[The Defendants' Counsel]: Objection to the form.

"The Court: Okay. I'm going to allow that question. Go ahead.

"[The Witness]: Could you repeat the question?

"[The Plaintiff's Counsel]: Yes. If a—if a radiologist observes a nodular density, how—what steps should they take to explore that?

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"The Court: All right.

"[The Defendants' Counsel]: May we approach?

"The Court: Yes.

(Sidebar)

"The Court: All right. The court's going to sustain the objection. All right. Counsel.

"[The Plaintiff's Counsel]: One moment, Your Honor.

"[The Plaintiff's Counsel]: Dr. Griska, do you have an opinion based on medical certainty as to whether Dr. Poole breached the standard of care?

"[The Defendants' Counsel]: Objection to the form. If we could be heard, Your Honor.

"The Court: Yeah. You want to be heard outside—can we hear this outside the presence of the jury?

"[The Defendants' Counsel]: Yes, please.

"The Court: All right. I'm going to ask the jury to step into the jury room for a moment.

(Jury exits the courtroom)

"The Court: Okay.

"[The Defendants' Counsel]: Your Honor, if Dr. Griska could be excused while we have this argument outside the presence of her.

"The Court: Okay. Where is she? All right. Oh, there you are. If you just step in the hallway for me, please.

(Witness exits the courtroom)

"The Court: Okay. So, the objection has to do with now because you're getting into the critical part of your examination, asking questions related to the expert opinions—the expert's opinion on the very topic. And there's a series of questions that have to be asked in the proper way, in the proper format for you to get that in. So, do you need a break to figure that—I mean, I'm not going to tell you what to do.

"[The Plaintiff's Counsel]: Yes, Your Honor.

"[The Defendants' Counsel]: Well, I would object to a break, Your Honor. This is the essence of the case.

"The Court: Okay.

"[The Defendants' Counsel]: I—that—I think that—

"The Court: Well.

"[The Defendants' Counsel]: This is a serious matter to both of the parties.

"The Court: I know it is. I know it is.

"[The Defendants' Counsel]: And so, there should not be a break for [the plaintiff's counsel] to figure out what should have been known before the lawsuit was filed.

"The Court: Well, and also before the case was brought, you know, what questions you're going to ask in what precise order at the key time in the examination. So, are you ready to go forward?

"[The Plaintiff's Counsel]: Your Honor, if I could have a ten minute break, I would appreciate it.

"The Court: But the problem is that with I think counsel is going to say is that—and I don't have any problem if you consult with [cocounsel], but I do have a problem

if you consult with the witness. So, if I give you a few minutes to talk to Mr.—to have your conversation with [cocounsel], that's fine, but I really think it would be best if the conversation occurs in the courtroom without the expert present. Would that be okay?

"[The Defendants' Counsel]: No, I would object to that, Your Honor, in that she did consult with [cocounsel] before asking that question. The witness is on. It's twenty of three.

"The Court: Hm-hm.

"[The Defendants' Counsel]: The witness should—also needs to be cross-examined today.

"The Court: Yes, I know.

"[The Defendants' Counsel]: So, the witness should be brought back out. The questioning should be continued. We should not take a break. We should not assist any party. We should not assist any party in doing what is an essential part of the case.

"The Court: Yes. I understand that's your position. We'll take a five minute break. [The plaintiff's counsel and cocounsel], please stay in the courtroom. Christie, I mean, Chelsea, is going to stay here to make sure that the expert stays in the hallway.

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: Okay? Thank you. All right.

"The Clerk: All rise. Court is now in recess.

(Recess/Resume)

* * *

"[The Plaintiff's Counsel]: Dr. Griska, when we refer to the term of standard of care, what does that refer to?

"[The Witness]: Standard of care is that care that a similar radiologist who is competent would provide in

a similar circumstance as the one we're having under discussion.

"[The Plaintiff's Counsel]: Okay. And when a radiologist observes a nodular density upon mammography what is the steps that a reasonable radiologist would take?

"[The Defendants' Counsel]: Objection to the form.

"The Court: Okay. Is your—are you asking for an expert opinion right now, or are you asking for generalized factual—

"[The Plaintiff's Counsel]: I was, at this point, I was asking generalized factual information.

"The Court: And is—is that because you are trying to have her explain what the standard of care is?

"[The Plaintiff's Counsel]: It's on the road to explaining that. Yes, Your Honor.

"The Court: Okay. So, I guess my concern here is that, you know, you had previously been asking questions that were foundational. Is that what you're doing?

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: I'm going to let you ask a few foundational questions, but you need to be very, very careful about whether this turns to the specific opinions in this case. Do you understand?

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: So, I'll give you a little bit of leeway.

"[The Plaintiff's Counsel]: Thank you, Your Honor.

"The Court: And I would ask the witness to please try very carefully to just answer the question that is asked and not to expound on your answer because counsel will ask you the next question.

"[The Witness]: Yes, Your Honor.

"The Court: Do you understand? Okay.

"[The Witness]: Please repeat.

"[The Plaintiff's Counsel]: Yes.

"Court Monitor: Would you like me to repeat it?

"[The Plaintiff's Counsel]: Yes, please.

(Question read by court monitor)

"[The Court Monitor]: And when a radiologist observes a nodular density upon mammography what is the steps that a reasonable radiologist would take?

"[The Witness]: When we see a nodular density, we need to—a radiologist needs to determine if there is something underlying that is potentially malignant . . . . So, additional views would need to be done to—to further evaluate that area.

"[The Plaintiff's Counsel]: Okay. And when you say additional views, can you explain that?

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"The Court: Overruled. Go ahead.

"[The Witness]: The additional views are some of those that we discussed this morning and they could be compression spot views or views from a different direction or angle.

"[The Plaintiff's Counsel]: And in this case, what did Dr. Poole do?

"[The Witness]: He did one additional view.

"[The Plaintiff's Counsel]: Okay. And in your expert opinion was that one additional view sufficient to diagnose the nodular density?

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"The Court: Sustained.

* * *

"[The Plaintiff's Counsel]: So, from this view can you determine where in the breast the calcifications are?

"[The Witness]: I can just say that they're in the top of the breast.

"[The Plaintiff's Counsel]: And how would—how would a radiologist determine a better location in the breast?

"[The Witness]: They need to—

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"[The Plaintiff's Counsel]: I'll—I'll rephrase that.

"The Court: Okay. Thank you.

"[The Plaintiff's Counsel]: What would a radiologist have to do to better identify where in the breast the calcification was?

"[The Defendants' Counsel]: Objection to the form, Your Honor.

"The Court: Okay. Sustained.

"[The Plaintiff's Counsel]: If a patient presented to you with these calcifications, what steps would you take to determine where the calcifications were?

"[The Defendants' Counsel]: Objection to the form.

"The Court: Sustained."

The plaintiff's argument ignores the following additional direct testimony of Griska that took place after the portions of the examination on which the plaintiff relies. First, later in the afternoon of March 19, 2019, the following colloquy took place:

"[The Plaintiff's Counsel]: What is the standard of care in—in diagnosing micro calcifications?

"[The Defendant's Counsel]: Objection to the form.

"The Court: All right. I'll allow that one.

* * *

"[The Plaintiff's Counsel]: How is it that you are familiar with the prevailing standard of care?

"[The Witness]: Through my training and experience.

* * *

"[The Plaintiff's Counsel]: What is a standard of care for the physician confronting—confronted with—a similar area of concern?

"[The Defendant's Counsel]: Objection to the form.

"The Court: I'll allow it.

* * *

"[The Witness]: The standard of care would be first to identify the finding, and secondly, to locate the finding in two planes so that precise location could be identified. So, additional views would need to be performed, magnification views, and potentially other views with the breast and the machine, in a different location.

"[The Plaintiff's Counsel]: And when you say the machine at a different location you mean the mammography machine?

"[The Witness]: Yes.

"[The Plaintiff's Counsel]: Okay. And in this case, did Dr. Poole take additional films?

"[The Witness]: No.

* * *

"[The Plaintiff's Counsel]: Okay. And do you have an opinion within a reasonable medical certainty whether

his fail—Dr. Poole's failure to take additional views fell below the standard of care?

"[The Defendant's Counsel]: Objection to the form.

"The Court: All right. Overruled.

"[The Witness]: Yes.

"[The Plaintiff's Counsel]: In what way?

"[The Witness]: The failure to take additional views, well first, he didn't identify the micro calcifications, and secondly, the failure to take additional views precluded the ability to establish the diagnosis and the location of the micro calcifications."

Similarly, on the following day, March 20, 2019, during the continued direct examination of Griska,[3] the following colloquy occurred:

"[The Plaintiff's Counsel]: Okay. Now, in September of [2012, was] there a generally accepted—accepted procedure for radiologists to follow when a patient presents with micro calcifications?

* * *

"[The Witness]: The principles and documentation of the how to evaluate and—and the basics of micro calcification analysis are in—were standard in 2012.

"[The Plaintiff's Counsel]: Okay. And when you say that they're standard in 2012, what do you mean by that?

[3] As previously noted in this opinion, the plaintiff argues that during her March 19, 2019 direct examination of Griska the court improperly precluded the plaintiff's counsel from discussing the court's rulings on the objections of the defendants' counsel to her questions with anyone other than her cocounsel. In making this argument, the plaintiff ignores the fact that Griska was still on direct examination when court adjourned for the day on March 19, 2019. Thus, her counsel had the opportunity before Griska resumed her direct testimony on March 20, 2019, to discuss the court's prior evidentiary rulings and Griska's continued testimony with anyone she liked, including Griska.

"[The Witness]: I mean that the—the principles of how to evaluate the calcifications have not changed or what the possibility of [the calcifications are] representing has not changed.

"[The Plaintiff's Counsel]: Okay. And what is the accepted procedure for radiologists to follow when a patient presents with micro calcifications?

"[The Witness]: To do the magnification views and to view the calcifications in more than one direction.

"[The Plaintiff's Counsel]: And in 2012, did Dr. Poole follow that accepted procedure?

* * *

"[The Witness]: No he did not.

* * *

"[The Plaintiff's Counsel]: Okay. And did he meet the standard of care on September 21st, 2012, when he read the mammogram?

* * *

"[The Witness]: No.

"[The Plaintiff's Counsel]: In what way?

"[The Witness]: The findings needed additional imaging evaluation, which were not performed. He did not do the magnification spot views, and he did not evaluate the calcifications to locate them in more than one projection."

With this record in mind, we turn to the applicable standard of review. "[B]efore a party is entitled to a new trial because of an erroneous evidentiary ruling, he or she has the burden of demonstrating that the error was harmful. . . . In other words, an evidentiary ruling will result in a new trial only if the ruling was both wrong and harmful. . . . Moreover, an evidentiary impropriety in a civil case is harmless only if we

have a fair assurance that it did not affect the jury's verdict. . . . A determination of harm requires us to evaluate the effect of the evidentiary impropriety in the context of the totality of the evidence adduced at trial." (Citation omitted; internal quotation marks omitted.) *Klein* v. *Norwalk Hospital*, 299 Conn. 241, 254–55, 9 A.3d 364 (2010).

As noted previously in this opinion, we need not address whether the evidentiary rulings of which the plaintiff complains were improper, because the plaintiff has failed to demonstrate that those rulings were harmful to the presentation of her case at trial. Significantly, the plaintiff has not identified any relevant evidence that the court precluded the plaintiff from presenting during Griska's testimony. During Griska's testimony, the court did sustain the objections of the defendants' counsel to the form of certain questions asked by the plaintiff's counsel concerning the applicable standard of care and whether the defendants breached that standard of care. As the trial transcripts reflect, however, Griska did testify on two occasions later in the proceedings, over the objections of the defendants' counsel, which objections the court overruled, to the applicable standard of care and that Poole breached the relevant standard of care. Simply put, the plaintiff's unsubstantiated claim that she "was precluded from presenting critical expert evidence in support of her claim" is contradicted by the record. Because the plaintiff has not shown any harm from the court's evidentiary rulings that are the subject of this appeal, her claim necessarily fails.

II

The plaintiff's second claim arises from the trial court's order limiting the time for direct examination and cross-examination of the plaintiff's expert witness, Leopold. The plaintiff's claim on appeal is twofold. First, the plaintiff claims that the trial court abused its discretion by placing a time limit on the presentation of Leo-

pold's testimony. Second, the plaintiff claims that the court's action constituted a denial of the right of access to the courts and, thus, violated article first, § 10, of the Connecticut constitution.[4] For the reasons that follow, we decline to review the plaintiff's claims.

The following additional facts and procedural history are relevant. During the trial proceedings on March 27, 2019, the following colloquy occurred:

"[The Defendants' Counsel]: So, it's [the plaintiff's] intention that he's a—a treating physician witness only?

"The Court: That's what I hear.

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: Okay. All right. So, with respect to Dr. Leopold, he was disclosed by the plaintiff on June 12th, 2017 as a 'subpoena-only expert' to testify as to the facts and opinions set forth in his reports and records. The disclosure also states that Dr. Leopold will discuss the radiation treatment the plaintiff received, and I quote, 'as well as the result of the delayed diagnosis of the breast cancer on treatment for [the plaintiff].' This testimony is I quote, 'expected to be based on review of [the plaintiff's] records and his treatment of [the plaintiff].' Because Dr. Leopold was disclosed as a treating fact witness expert only, he will only be allowed to testify as to an opinion or facts to which fair notice is given to the—in the disclosed medical records, pursuant to Practice Book § 13-4 (b) (2). To the extent [that the plaintiff] seeks to ask Dr. Leopold opinion questions concerning opinions that are not in the medical records, the defendants are not on fair notice, and, therefore,

[4] The constitution of Connecticut, article first, § 10, provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

such questions should not be asked or elicited by counsel. Do you understand?

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: Okay. So, anything on Dr. Leopold? Okay. All right. So, now, with respect to the remainder of the day, what is going to happen this morning, [the plaintiff's counsel]?

"[The Plaintiff's Counsel]: Your Honor, I plan on calling Alisa Houldcroft, who is I believe in the hallway. She was parking when we started this argument.

"The Court: Okay. So, you have one family witness today?

"[The Plaintiff's Counsel]: Yes.

"The Court: Only one?

"[The Plaintiff's Counsel]: Yes. And then—

"The Court: And that's it, and then Dr. Leopold?

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: And Dr. Leopold isn't coming until two, correct?

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: All right. So, here's what I want to say about Dr. Leopold. So, we only have Dr. Leopold for three hours today with a fifteen minute break, so it's really two hours and forty-five minutes.

"[The Plaintiff's Counsel]: Yes, Your Honor.

"The Court: That time will be split evenly between the plaintiff and the defendants because Dr. Leopold isn't coming back because you have to rest so we can turn to the defendants' case, as has been our plan all along, and as I have repeatedly told you. So, I would recommend that both parties think carefully about their

direct and their cross-examination, and make sure that they don't waste any time on unnecessary questions. Like, do we have to spend a half an hour on his curriculum vitae, for example?

"[The Plaintiff's Counsel]: No, Your Honor.

"The Court: Okay. But if you do that, that will be on you because I will give you a deadline, and when that deadline comes, you will be done. We will take a break and I will turn to [the defendants' counsel], and I will say you get the rest of the time. And if she doesn't use the rest of the time, and there's time for rebuttal, then you'll have rebuttal. If not, we're done.

"[The Defendants' Counsel]: I—if I could, Your Honor. I think we need to shorten the amount of time that we're each given. Are you still having the show cause hearing at two?

"The Court: Oh, yeah, that's right.

"[The Defendants' Counsel]: And also we have a motion for directed verdict. So, I filed just a preliminary yesterday, because I don't want to give a roadmap to the plaintiff's counsel as to what they could possibly have done on their last day. So, we also need time for—

"The Court: Oh, I forgot about that.

"[The Defendants' Counsel]: —me to provide to you the motion for a directed verdict.

"The Court: Okay."

We now address each of the plaintiff's claims in turn.

A

The plaintiff first claims that the trial court abused its discretion by placing a time limit on the presentation of Leopold's testimony. The plaintiff makes this claim despite never raising to the trial court any objection to the time limit it imposed or identifying to the court any evidence she was unable to elicit from Leopold due to the time limit.

"As this court repeatedly has stated, we will not review an issue on appeal that was never properly raised in or decided by the trial court." *Billboards Divinity, LLC* v. *Commissioner of Transportation*, 133 Conn. App. 405, 411, 35 A.3d 395, cert. denied, 304 Conn. 916, 40 A.3d 783 (2012). "Practice Book § 60-5 provides in relevant part that [t]he court shall not be bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. . . . Indeed, it is the appellant's responsibility to present such a claim clearly to the trial court so that the trial court may consider it and, if it is meritorious, take appropriate action. That is the basis for the requirement that ordinarily [the appellant] must raise in the trial court the issues that he intends to raise on appeal. . . . For us [t]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge. . . . We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal." (Internal quotation marks omitted.) *Sturgeon* v. *Sturgeon*, 114 Conn. App. 682, 693, 971 A.2d 691, cert. denied, 293 Conn. 903, 975 A.2d 1278 (2009).

As previously noted, in the present case, the record shows that the plaintiff did not object to the court's imposition of a time limit before she started her examination of Leopold. Furthermore, at no time during or after Leopold's testimony did the plaintiff claim that the court's time limit prevented her from eliciting any evidence from Leopold. In fact, after Leopold concluded his testimony, the court inquired as to whether the plaintiff had any other evidence or testimony to present. In response, the plaintiff's counsel answered in the negative and did not claim that the court's imposition of

a time limit on Leopold's testimony in any way impacted the presentation of her case. Thus, because we conclude that the plaintiff failed to preserve her claim that the court abused its discretion by placing a time limit on the presentation of Leopold's testimony, we decline to review the plaintiff's claim.[5]

B

The plaintiff next claims that the court's imposition of the time limit constituted a denial of her right of access to the courts and, thus, violated article first, § 10, of the Connecticut constitution. We decline to review the plaintiff's claim because it has been inadequately briefed.

We begin by setting forth the plaintiff's entire argument in her appellate brief regarding the constitutionality of the time limit imposed by the court: "But the court's draconian limitation of the time allowed for presentation of the plaintiff's case went beyond a mere abuse of discretion. It amounted to denying the plaintiff the right to present her case in any meaningful way. As such it constituted a denial of the right of access to the courts guaranteed by [article first, § 10], of the Connecticut constitution. This is so because lawsuits seeking damages for personal injuries caused by negligence were recognized at the time the constitution was adopted in 1818 and have been recognized ever since that time, and neither the legislature nor the court has provided an alternative to the judicial remedy in such cases. See *Gentile* v. *Altermatt*, 169 Conn. 267, 284–86, 363 A.2d 1 (1975); *Daily* v. *New Britain Machine Co.*, 200 Conn. 562, 585, 512 A.2d 893 (1986); *Zapata* v. *Burns*, 207 Conn. 496, 514–16, 542 A.2d 700 (1988);

[5] Even if we were to assume that the court abused its discretion in imposing a time limit on the presentation of Leopold's testimony, we note that the plaintiff has failed to demonstrate any harm by failing to identify on appeal the relevant evidence that she would have sought to elicit during Leopold's testimony if additional time had been provided.

Ruben & Williams, *The Constitutionality of Basic Protection*, 1 Conn. L. Rev. 44, 46 n. 13 (1986). See generally, *Limiting the Length of Civil Trials?*, 2 No. 3 ABA J. E-Report 2 (2003)." (Footnote omitted.)

Initially, we note that the plaintiff raises this constitutional claim for the first time on appeal. It therefore was not properly preserved in the trial court. "We consider unpreserved claims of constitutional magnitude according to the requirements of [*State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 780–81, 120 A.3d 1188 (2015)] . . . ."[6] *Stacy B.* v. *Robert S.*, 165 Conn. App. 374, 381, 140 A.3d 1004 (2016). Nevertheless, the plaintiff's brief neither includes a *Golding* analysis nor requests extraordinary review of her claim under any other exception to the preservation rule. For this reason alone, the plaintiff has failed to adequately brief her constitutional claim and the claim is deemed abandoned. See, e.g., *State* v. *Tierinni*, 144 Conn. App. 232, 238, 71 A.3d 675 ("[A party's] failure to address the four prongs of *Golding* amounts to an inadequate briefing of the issue and results in the unpreserved claim being abandoned. . . . We will not engage in *Golding* . . . review on the basis of . . . an inadequate brief." (Internal quotation marks omitted.)), cert. denied, 310 Conn. 911, 76 A.3d 627 (2013).[7]

[6] "Under *Golding*, a [party] can prevail on a claim of constitutional error not preserved at trial only if 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 [party] 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 [party's] claim will fail. The appellate tribunal is free, therefore, to respond to the [party's] claim by focusing on whichever condition is most relevant in the particular circumstances." (Internal quotation marks omitted.) *In re Riley B.*, 203 Conn. App. 627, 636, 248 A.3d 756, cert. denied, 336 Conn. 943, 250 A.3d 40 (2021).

[7] We further note that the plaintiff did not affirmatively request in her brief that her claim concerning the court's imposition of a time limit be

In addition, the plaintiff's appellate brief also does not provide any substantive analysis of why the court's action constituted a constitutional violation. Certainly, none of the cases on which she relies discusses time limits imposed by a trial court, let alone considers whether such limits violate our state constitution. In the end, the plaintiff's argument consists of little more than a bare assertion that the court's time limit deprived her of her "right to present her case in any meaningful way."

"Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . Where a claim receives only cursory attention in the brief without substantive discussion, it is deemed to be abandoned." (Internal quotation marks omitted.) *Billboards Divinity, LLC* v. *Commissioner of Transportation*, supra, 133 Conn. App. 412. Applying this principle, we conclude that the plaintiff has abandoned her unpreserved constitutional claim.

The judgment is affirmed.

In this opinion the other judges concurred.

KEYBANK, N.A. *v.* EMRE YAZAR ET AL.
(AC 42829)

Moll, Alexander and DiPentima, Js.

Syllabus

The plaintiff bank sought to foreclose a mortgage on certain real property owned by the defendants. The plaintiff moved for summary judgment to which the defendant O objected, claiming that the plaintiff had failed to comply with the statutory (§ 8-265ee (a)) notice requirement of the

reviewed under the plain error doctrine. "[I]t is well established that this court [is not obligated to] apply the plain error doctrine when it has not been requested affirmatively by a party . . . ." (Internal quotation marks omitted.) *Gartrell* v. *Hartford*, 182 Conn. App. 526, 540 n.12, 190 A.3d 904 (2018).

Emergency Mortgage Assistance Program, which requires a mortgagee to provide certain specific notice to the mortgagor before it can commence a foreclosure of a qualifying mortgage. O claimed that this failure deprived the trial court of subject matter jurisdiction. The plaintiff claimed that this requirement was satisfied, relying on notice that had been sent prior to the commencement of a previous foreclosure action involving the defendants brought by the original lender. That previous foreclosure action was dismissed. The trial court concluded that the plaintiff had complied with its obligations to send notices of default and satisfied its EMAP obligations pursuant to § 8-265ee. The trial court granted the motion for summary judgment and rendered judgment of strict foreclosure, from which O appealed to this court. *Held* that the trial court lacked subject matter jurisdiction because the plaintiff, as the original plaintiff in the present action, failed to comply with the jurisdictional condition precedent of the notice requirements of § 8-265ee (a), and there was no dispute that the plaintiff did not mail the defendants EMAP notice in connection with the present action; moreover, a foreclosure action in which the EMAP notice requirement applies must stand on its own EMAP notice, and, when a mortgagee's initial in-court attempt to foreclose results in a dismissal of that foreclosure action, such that it must commence a foreclosure anew, § 8-265ee (a) requires the mailing of a new EMAP notice in order to commence the subsequent foreclosure action.

Submitted on briefs December 1, 2020—officially released August 10, 2021

Procedural History

Action to foreclose a mortgage on certain real property owned by the defendants, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendants were defaulted for failure to plead; thereafter, the court, *Genuario*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; subsequently, the court, *Genuario*, *J.*, granted the plaintiff's motion for a judgment of strict foreclosure and rendered judgment thereon, from which the defendant Ozlem Yazar appealed to this court. *Reversed*; *judgment directed.*

Ozlem Yazar, self-represented, the appellant (defendant).

Christopher J. Picard, for the appellee (plaintiff).

Opinion

MOLL, J. The defendant Ozlem Yazar,[1] a self-represented party, appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, KeyBank, N.A. On appeal, the defendant claims, inter alia, that the plaintiff failed to comply with General Statutes § 8-265ee (a), the notice provision of the Emergency Mortgage Assistance Program (EMAP), General Statutes § 8-265cc et seq., and that such noncompliance left the court without subject matter jurisdiction to entertain the foreclosure action. We agree and conclude that the failure of the plaintiff (as the original plaintiff in the present action) to mail an EMAP notice to the defendant (as the mortgagor) in connection with the present action deprived the court of subject matter jurisdiction. Accordingly, we reverse the judgment of the trial court and remand the case with direction to dismiss the action.

The record reveals the following facts and procedural history relevant to the defendant's claims on appeal. On June 19, 2014, Emre Yazar executed and delivered a promissory note in the original principal amount of $580,000 to First Niagara Bank, N.A. (First Niagara). To secure the note, Emre Yazar and the defendant executed a mortgage on real property located at 25 Fresh Meadow Road in Weston (property), which mortgage deed was recorded on the Weston land records. Beginning in March, 2016, and each and every month thereafter, Emre Yazar failed to make payments on the note.

[1] The plaintiff also brought this action against Emre Yazar, who was defaulted for failure to plead and is not participating in this appeal. Therefore, our references to the defendant are only to Ozlem Yazar.

In addition, the record suggests that the defendants Emre Yazar and Ozlem Yazar are former spouses, having divorced pursuant to a Turkish divorce decree. The terms of any such decree and any postdissolution proceedings in Turkey or Connecticut relating to the Yazars' divorce are not relevant to our resolution of this appeal.

On August 22, 2016, First Niagara sent separate notices of default and the notices prescribed by EMAP to Emre Yazar and to the defendant, individually, to the property address. On or about October 8, 2016, the plaintiff acquired First Niagara. The plaintiff, through an agent, has possession of the note and is the mortgagee of record.

On January 16, 2017, the plaintiff commenced, in the judicial district of Fairfield, a foreclosure action against Emre Yazar and the defendant. See *KeyBank N.A.* v. *Yazar*, Superior Court, judicial district of Fairfield, Docket No. CV-17-6061930-S (prior foreclosure action). On April 26, 2017, however, the trial court dismissed the action on the basis of the plaintiff's failure to provide the foreclosure mediator with the forms and information required by General Statutes § 49-31*l* (c) (4), as well as its failure to comply with the court's order requiring the submission of same by a date certain.[2]

On August 22, 2017, the plaintiff commenced, in the judicial district of Stamford-Norwalk, the present foreclosure action against Emre Yazar and the defendant, bearing Docket No. CV-17-6033139-S, alleging that the note was in default and that the default had not been cured. The plaintiff sought, among other things, foreclosure of the mortgage and possession of the property. On April 25, 2018, the plaintiff filed a motion for default for failure to plead as to Emre Yazar and the defendant, which was granted on May 2, 2018.[3] Thereafter, the defendant filed an answer and special defenses. On September 13, 2018, the plaintiff filed a motion for summary judgment as to liability only (motion for summary judgment), arguing that it had established a prima facie case for foreclosure and that it had complied with the EMAP notice

[2] On May 4, 2017, the plaintiff filed a motion to open the judgment of dismissal. The trial court denied that motion.

[3] After being defaulted, Emre Yazar submitted no other filing in this action.

requirement set forth in § 8-265ee (a). For the latter proposition, the plaintiff exclusively relied on the August 22, 2016 EMAP notices sent by First Niagara in advance of the commencement of the prior foreclosure action.[4] In her memorandum in opposition to the plaintiff's motion for summary judgment, the defendant argued, in part, that she had not received any EMAP notices and that the plaintiff had not complied with the EMAP notice requirement with respect to the present action.

On November 21, 2018, having heard oral argument, the trial court granted the plaintiff's motion for summary judgment. The court determined that there was no genuine issue of material fact that the note was in default and that the plaintiff had complied with its obligations to send notices of default and acceleration to the mortgagors; the court further concluded that the plaintiff had satisfied its EMAP obligations under § 8-265ee. On April 1, 2019, the court rendered a judgment of strict foreclosure. This appeal followed.

On September 28, 2020, during the pendency of this appeal, this court ordered, sua sponte, the parties to submit supplemental briefs to address the impact of *MTGLQ Investors, L.P.* v. *Hammons*, 196 Conn. App. 636, 230 A.3d 882, cert. denied, 335 Conn. 950, 238 A.3d 21 (2020), on this appeal. The parties thereafter filed supplemental briefs in accordance with this court's order.

As a threshold matter, the defendant claims that the trial court lacked subject matter jurisdiction because the plaintiff failed to comply with the EMAP notice requirement of § 8-265ee (a). The plaintiff counters that § 8-265ee (a) was satisfied by virtue of the EMAP notices that were sent on August 22, 2016, by First Niagara before

[4] In addition, on January 24, 2019, the plaintiff filed in the present action an affidavit of compliance with EMAP, which also exclusively relied on the August 22, 2016 EMAP notices.

the commencement of the prior foreclosure action. We agree with the defendant.[5]

We begin by setting forth the language of the statute. Section 8-265ee (a) provides: "On and after July 1, 2008, a mortgagee who desires to foreclose upon a mortgage which satisfies the standards contained in subdivisions (1), (9), (10) and (11) of subsection (e) of section 8-265ff, shall give notice to the mortgagor by registered, or certified mail, postage prepaid at the address of the property which is secured by the mortgage. *No such mortgagee may commence a foreclosure of a mortgage prior to mailing such notice.* Such notice shall advise the mortgagor of his delinquency or other default under the mortgage and shall state that the mortgagor has sixty days from the date of such notice in which to (1) have a face-to-face meeting, telephone or other conference acceptable to the [Connecticut Housing Finance Authority (authority)] with the mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise, and (2) contact the authority, at an address and phone number contained in the notice, to obtain information and apply for emergency mortgage assistance payments if the mortgagor and mortgagee are unable to resolve the delinquency or default." (Emphasis added.) Pursuant to § 8-265cc, the term mortgagee is defined, for purposes of General Statutes §§ 8-265cc through 8-265kk, as follows: "(4) 'Mortgagee' means the original lender under a mortgage, or its agents, successors, or assigns . . . ."

[5] The parties do not dispute that the EMAP notice requirement applies in the present action. Cf. *Washington Mutual Bank* v. *Coughlin*, 168 Conn. App. 278, 290, 145 A.3d 408 (under factual circumstances of case, i.e., secured property not principal residence, defendants were not entitled to notice pursuant to § 8-265ee), cert. denied, 323 Conn. 939, 151 A.3d 387 (2016). Rather, the issue is whether the plaintiff complied with that requirement. See *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 644 n.9.

We next provide a review of this court's decision in *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 636. In *Hammons*, the plaintiff mortgagee, MTGLQ Investors, L.P., brought a foreclosure action against the defendant, against whom a judgment of strict foreclosure ultimately was rendered. Id., 638. On appeal, the defendant argued that the plaintiff failed to comply with the EMAP notice requirement of § 8-265ee (a), leaving the trial court without subject matter jurisdiction over the foreclosure action. Id., 640–41. In response, the plaintiff contended that § 8-265ee (a) was satisfied by virtue of an EMAP notice sent in advance of a prior foreclosure action against the defendant, which had been commenced by a prior mortgagee (specifically, Federal National Mortgage Association (Fannie Mae), which assigned the mortgage to MTGLQ Investors, L.P., during the pendency of that prior action). Id., 639, 641. After examining the relevant statutory language, we agreed with the defendant, concluding, as a matter of first impression, that the EMAP notice requirement of § 8-265ee (a), when applicable, is subject matter jurisdictional and that the mailing of an EMAP notice in advance of a prior foreclosure action by a prior mortgagee does not satisfy that requirement with respect to a subsequent foreclosure action. Id., 638.

In *Hammons*, we reasoned: "The first sentence of § 8-265ee (a) creates a notice requirement applicable to any 'mortgagee who desires to foreclose upon a mortgage' that satisfies the standards in [General Statutes] § 8-265ff (e) (1), (9), (10), and (11). The second sentence then provides that '[*n*]*o such mortgagee* may commence a foreclosure of a mortgage prior to mailing such notice.' . . . General Statutes § 8-265ee (a). By its use of the phrase 'such mortgagee,' the second sentence necessarily refers to the particular mortgagee in the preceding sentence, i.e., the one that desires to foreclose upon a mortgage. Stated differently, the second

sentence makes clear that it is directed—not to *any* mortgagee in the chain of assignment but—to *the mortgagee* that wishes to 'commence a foreclosure' of an applicable mortgage. In other words, the second sentence is directed to the original plaintiff in a foreclosure action. Such statutory provision then provides that such mortgagee may not commence a foreclosure 'prior to mailing such notice,' namely, the notice described in the first sentence. In this regard, the second sentence makes clear that it is *the mortgagee* that wishes to commence a foreclosure that has the obligation of mailing an EMAP notice. These provisions are clear and unambiguous. Their plain terms indicate that, in applicable cases, a mortgagee may not commence a foreclosure action without first mailing the mortgagor the prescribed notice. In the absence of such notice, a foreclosure action may not be commenced." (Emphasis in original.) Id., 644–45. We went on to conclude that "the EMAP notice requirement set forth in § 8-265ee (a), when applicable, is a condition precedent to the commencement of a foreclosure action. As such, the failure to comply with the notice requirement deprives the trial court of subject matter jurisdiction. See *Lampasona* v. *Jacobs*, [209 Conn. 724, 729–30, 553 A.2d 175] (collecting cases for proposition that certain statutory notice requirements constitute jurisdictional conditions precedent to commencement of actions) [cert. denied, 492 U.S. 919, 109 S. Ct. 3244, 106 L. Ed. 2d 590 (1989)]." (Footnote omitted.) *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 645.

We rejected the plaintiff's argument in *Hammons* that it had satisfied the EMAP notice requirement, stating: "There is nothing in the plain language of § 8-265ee (a) to support the plaintiff's argument that it may satisfy the statute by relying on a prior mortgagee's EMAP notice sent prior to [the commencement of] a previously dismissed foreclosure action. Moreover, in suggesting that it may rely on an EMAP notice sent by a prior mortgagee in connection with a separate foreclosure action,

the plaintiff's reliance on the definition of '[m]ortgagee,' which includes an original mortgage lender's 'agents, successors, or assigns'; General Statutes § 8-265cc (4); is misplaced, for it ignores the plain meaning of the text of § 8-265ee (a), which is carefully directed to a particular mortgagee in time." Id., 645–46.

The present case gives us occasion to hold explicitly what we recognized implicitly in *Hammons*, namely, that, a foreclosure action in which the EMAP notice requirement applies; see footnote 5 of this opinion; must stand on its own EMAP notice. Such a rule is implicit in the statutory provision that no mortgagee intending to foreclose on an eligible mortgage "may commence a foreclosure of [such] mortgage prior to mailing such notice." General Statutes § 8-265ee (a). Such a statutory condition aligns with the purpose of § 8-265ee (a), which is to provide a mortgagor with notice of the mortgagee's intent to foreclose and of certain mortgage relief that might assist him or her, in a prelitigation forum, in resolving the alleged delinquency or other default. In short, in the context of a case in which the EMAP notice requirement applies, when a mortgagee's initial in-court attempt to foreclose results in a dismissal of a foreclosure action, such that it must commence a foreclosure anew, § 8-265ee (a) requires the mailing of a new EMAP notice in order to commence a subsequent foreclosure action.[6]

Mindful of the foregoing principles, we turn to the relevant facts of the present case. According to the affidavit in support of the plaintiff's motion for summary

[6] We note that our articulation of this rule is consistent with footnote 11 of the *Hammons* decision, in which we stated: "It would be a wholly different matter had the plaintiff been substituted in the Fannie Mae action, in which case it would not have had to mail the defendant a new EMAP notice." *MTGLQ Investors, L.P.* v. *Hammons*, supra, 196 Conn. App. 646 n.11. This is because the Fannie Mae action, as the prior foreclosure action, would have remained standing on its own EMAP notice. That is, only the original plaintiff was required to mail an EMAP notice, which it did.

judgment, the original lender, First Niagara, had mailed an EMAP notice to the defendant prior to the commencement of an initial, separate foreclosure action that was subsequently dismissed.[7] Several months after the dismissal, the plaintiff commenced a *new* foreclosure action against the defendant, i.e., the present action. There is no dispute that the plaintiff—as the original plaintiff in the present action—did not mail the defendant an EMAP notice in connection with the present action. Because the plaintiff, as the original plaintiff in the present action, failed to comply with this jurisdictional condition precedent, the trial court lacked subject matter jurisdiction.[8]

The judgment is reversed and the case is remanded with direction to render judgment dismissing the action for lack of subject matter jurisdiction.

In this opinion the other judges concurred.

FRANCIS A. COCCHIA *v.* ROBERT TESTA
(AC 44026)

Moll, Cradle and Clark, Js.

Syllabus

The plaintiff sought to recover damages from the defendant T, who had agreed to indemnify the plaintiff from certain liability, following T's alleged default on that indemnification agreement. After T's death, the trial court granted the plaintiff's motion to substitute R, the trustee of a trust to which T had transferred certain real property, as a defendant. The plaintiff then filed an amended two count complaint, alleging in one count that T had breached the indemnification contract with the

[7] As to this specific point, the plaintiff did not submit any countervailing, admissible evidence.

[8] The plaintiff contends that *Hammons* is distinguishable because it is relying, not on an EMAP notice sent by a prior mortgagee but rather, on the EMAP notice sent by First Niagara, to which it is the successor by merger. This argument is unavailing in light of the rule expressly articulated herein, namely, that a foreclosure action in which the EMAP notice requirement applies must stand on its own EMAP notice.

plaintiff and, in the second count, that R, as trustee, had fraudulently accepted the conveyance of the real property to the trust, knowing that T was indebted to the plaintiff. The court defaulted R for failure to appear and rendered judgment in favor of the plaintiff, awarding him damages. The court thereafter denied R's motion to dismiss the action on the basis that the court lacked personal jurisdiction over him, and R appealed to this court. *Held* that the trial court properly denied R's motion to dismiss, as it had personal jurisdiction over R; although the court cited R into the case pursuant to the plaintiff's motion to substitute the defendant, that motion was effectively a motion to add R as a new and separate party under the theory of liability that R was a fraudulent transferee of T's assets, as the motion identified R by name and in his capacity as trustee and alleged that the trust received assets from T in order to place those assets beyond the plaintiff's reach, and the operative complaint, with which R was served, did not seek to recover from R for breach of the underlying indemnification agreement but alleged only that R was liable as a fraudulent transferee.

Argued April 7—officially released August 10, 2021

Procedural History

Action to recover damages for breach of contract, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Kavanewsky, J.*, granted the plaintiff's motion to substitute Robert J. Testa, Jr., trustee of the Karen M. Testa Separate Property Trust, as a defendant; thereafter, the plaintiff filed an amended complaint; subsequently, the defendant Robert J. Testa, Jr., trustee, was defaulted for failure to appear, and the court, *Genuario, J.*, after a hearing in damages, rendered judgment for the plaintiff; thereafter, the court, *Hon. Taggart D. Adams*, judge trial referee, denied the motion to dismiss filed by the defendant Robert J. Testa, Jr., trustee, and the defendant Robert J. Testa, Jr., trustee, appealed to this court. *Affirmed.*

Christopher D. Hite, for the appellant (defendant Robert J. Testa, Jr., trustee).

Todd R. Michaelis, with whom was *Stephen J. Conover*, for the appellee (plaintiff).

Opinion

CLARK, J. The defendant Robert J. Testa, Jr., trustee (trustee) of the Karen M. Testa Separate Property Trust (trust), appeals from the trial court's denial of his post-judgment motion to dismiss the action in which a default judgment had been rendered against him. On appeal, the defendant claims that the trial court lacked personal jurisdiction over him and, therefore, improperly denied his motion to dismiss. We affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our disposition of this appeal. In April, 2016, the plaintiff, Francis A. Cocchia, commenced the present action against the now deceased defendant Robert Testa (Testa) to enforce an agreement between them. The plaintiff alleged that on June 30, 2009, Testa had agreed to indemnify him from liability on a mortgage and note the plaintiff had signed in favor of a bank. Testa allegedly owed the plaintiff $196,500 under that agreement, payable in monthly installments of $1444.76. The plaintiff alleged in a single count complaint that Testa failed to make payments in accordance with the agreement, and that when the plaintiff commenced the present action, Testa owed $165,298.67, plus interest, the costs of collection, and attorney's fees.

In April, 2017, while the case was pending, Testa and his wife, Karen Testa, were killed in a car accident in Arizona. Following Testa's death, no activity occurred in the case until February 6, 2018, when the plaintiff filed a request for leave to amend his complaint, seeking to add a count against the trust. The first count of the proposed amended complaint incorporated by reference the sole count in the original complaint. The newly added second count alleged a fraudulent transfer of assets between Testa and the trust. Specifically, in the second count, the plaintiff incorporated the allegations

of the first count and alleged that Testa had transferred real property he owned in Arizona to the trust in 2015, while indebted to the plaintiff, in a knowing effort to defraud the plaintiff and to deprive him of assets in the event he obtained a judgment against Testa. The plaintiff sought monetary damages and to set aside the conveyance of the real property to the trust.

One year later, on February 6, 2019, the plaintiff filed a motion titled "Motion to Substitute Defendant" in which he moved, pursuant to Practice Book § 9-18,[1] to "substitute [the trustee] of the [trust] as the [d]efendant." In his motion, the plaintiff claimed that Testa had fraudulently conveyed property to the trust in order to place it outside the plaintiff's reach, and further contended that (1) "[n]o estate has been opened in Connecticut,"[2] (2) the plaintiff had a pending action against "the various [d]efendants, including the [trustee]" in Arizona, and (3) "[t]he [d]efendants therein are attempting to avoid the [p]laintiff's debt by claiming the instant action in Connecticut is the controlling case or venue." The court, *Kavanewsky, J.*, granted the motion to substitute on February 19, 2019. The clerk's office removed

[1] Practice Book § 9-18 provides in relevant part: "The judicial authority may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the judicial authority may direct that they be brought in. If a person not a party has an interest or title which the judgment will affect, the judicial authority, on its motion, shall direct that person to be made a party. . . ."

[2] The record does not reflect that the plaintiff petitioned the Probate Court to open an estate pursuant to General Statutes § 45a-316. Section 45a-316 provides in relevant part: "Whenever, upon the application of a creditor or other person interested in the estate of a deceased person, it is found by the court of probate having jurisdiction of the estate that the granting of administration on the estate . . . will be delayed, or that it is necessary for the protection of the estate of the deceased, the court may, with or without notice, appoint a temporary administrator to hold and preserve the estate until the appointment of an administrator or the probating of the will. . . ."

Testa as a party from the court's docket sheet on February 25, 2019. After the motion to substitute was granted, the plaintiff filed an amended complaint on April 12, 2019, which became the operative complaint. The operative complaint incorporated by reference to the original complaint a breach of contract claim against Testa in count one. In addition, the operative complaint alleged a fraudulent transfer claim in count two, this time against the trustee rather than the trust.[3] Specifically, it alleged that the trustee, rather than the trust, was aware of Testa's debt and knowingly aided, abetted, and conspired with Testa in accepting the conveyance of the Arizona property for a fraudulent purpose. The return date for the operative complaint was April 23, 2019.

The plaintiff subsequently filed with the court a return of service indicating that the summons and operative complaint were served on the trustee in Arizona on March 27, 2019, by way of in hand personal service.[4] When the trustee did not file a timely appearance, the plaintiff filed a motion for default against him for failure to appear on April 26, 2019. The clerk granted the motion for default on May 14, 2019. Thereafter, the pleadings were closed, and the court, *Genuario*, *J.*, held a hearing in damages on July 18, 2019. On August 28, 2019, the court issued a memorandum of decision.

In its decision, the court found that the plaintiff had testified credibly that Testa was indebted to him in the total amount of $206,348 pursuant to the indemnification agreement. The court recognized that the trustee

[3] "[A]s a general rule, the trustee is a proper person to sue or be sued on behalf of a trust." (Internal quotation marks omitted.) *Day* v. *Seblatnigg*, 186 Conn. App. 482, 499, 199 A.3d 1103 (2018), cert. granted, 331 Conn. 913, 204 A.3d 702 (2019).

[4] Although the trustee challenged the sufficiency of service of process in the trial court, on appeal he does not challenge the trial court's finding that there was "little evidentiary support for the argument that the return of service was not accurate . . . ."

was not a party to that agreement but found that, because the trustee had been defaulted, he had admitted the allegations of the operative complaint's second count, namely, that Testa had conveyed property to the trust for the purpose of placing assets out of the plaintiff's reach while indebted to the plaintiff, and that the trustee, knowing of the debt, accepted the conveyance on behalf of the trust for that fraudulent purpose. The court thus found that the Arizona property transfer was fraudulent and made for the purpose of concealing assets from the plaintiff. The court rendered judgment in favor of the plaintiff in the amount of $206,348 on the first count and in favor of the plaintiff and against the trustee on the second count.

On December 27, 2019, the trustee moved to dismiss the action.[5] In the motion to dismiss, the trustee claimed that the court lacked personal jurisdiction over him because he was not properly cited into the case pursuant to General Statutes §§ 52-107 and 52-108 and Practice Book § 9-22.[6] He contended that the motion to substitute was not a proper vehicle for making him a party

[5] The trustee also filed a motion to open, vacate, and set aside the judgment, in which he raised several procedural claims. The plaintiff objected on the merits of the trustee's procedural claims and on the ground that the motion to open was untimely under Practice Book § 17-4. The court, *Hon. Taggart D. Adams*, judge trial referee, summarily sustained the plaintiff's objection to the motion to open on January 22, 2020. The trustee has not appealed from that order, and it is not relevant to the present appeal.

[6] General Statutes § 52-107 provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party."

General Statutes § 52-108 provides: "An action shall not be defeated by the nonjoinder or misjoinder of parties. New parties may be added and summoned in, and parties misjoined may be dropped, by order of the court, at any stage of the action, as the court deems the interests of justice require."

Practice Book § 9-22 provides: "Any motion to cite in or admit new parties must comply with Section 11-1 and state briefly the grounds upon which it is made."

because he was not, and was not alleged to have been, a fiduciary for Testa, who was deceased at the time the motion was filed. He further argued that "attempting to add a new party by means of an [a]mended [c]omplaint and [s]ummons is simply insufficient and [Connecticut courts have] dismissed cases for failure to properly cite in an additional party defendant." Lastly, the trustee claimed that (1) the court had never granted the plaintiff leave to amend his complaint prior to filing the motion to substitute, (2) the summons and operative complaint that were served on him did not match the one attached to the plaintiff's request to amend, (3) the plaintiff had selected "a completely arbitrary return date," and (4) Testa's counsel did not receive notices from the court because he had been removed from the docket sheet by the clerk's office following Testa's death.[7]

The plaintiff objected to the motion to dismiss on the merits of the trustee's procedural claims but did not argue that the motion was untimely. The court, *Hon. Taggart D. Adams*, judge trial referee, summarily sustained the plaintiff's objection to the motion to dismiss on February 21, 2020. The trustee subsequently moved for an articulation. In response, the court explained: "[T]he court . . . sustained the objection of the plaintiff to the defendant's motion to dismiss after reading and considering the motion and objection and hearing oral argument on the subject on [February 10, 2020], because it found the order of Judge Kavanewsky granting the motion to substitute [the trustee] as [the] defendant to be appropriate as well as the order of default as to [the trustee] to be appropriate. The decision of Judge Genuario was also appropriate in implicitly finding the service of process on [the trustee] to be valid,

[7] Though the same lawyer represented both Testa and the trustee in the trial court, the trustee does not explain how he was prejudiced by the removal of Testa from the case prior to the time his lawyer appeared in the case on his behalf. The trustee is a separate party, was served in hand and had an independent responsibility to appear and defend.

and there is little evidentiary support for the argument that the return of service was not accurate . . . .'' This appeal followed.

On appeal, the trustee makes just one claim: the trial court improperly denied his postjudgment motion to dismiss for lack of personal jurisdiction because he was not properly cited in as a defendant.[8] Specifically, he claims that the court improperly added him to the case

[8] We note that the trustee has not appealed from the denial of the motion to open the judgment. See footnote 5 of this opinion. As a general matter, we cannot afford an appellant practical relief when the judgment has not been opened. The present case, however, is analogous to *Weinstein & Wisser, P.C.* v. *Cornelius*, 151 Conn. App. 174, 177–79, 94 A.3d 700 (2014), in which this court allowed an appeal to proceed under similar factual circumstances.

In that case, the defendant filed simultaneous postjudgment motions to dismiss and to open a default judgment. Id., 177. The trial court denied the motion to open and then denied the motion to dismiss on the ground that the case would have to be opened before that motion could be considered. Id., 177–78. The defendant appealed only from the denial of the motion to dismiss, to which the plaintiff raised a mootness challenge. Id., 178. The defendant argued that the appeal was not moot because the challenge he raised in the motion to dismiss would have rendered the judgment void and obviated the need for a motion to open. Id.

This court decided that the failure to appeal from the denial of the motion to open was not fatal, stating that ''[i]n this case . . . the issue of mootness is inextricably intertwined . . . with the issue raised by the defendant on appeal . . . . The motions asserted the same grounds and sought very similar relief. In order to avoid a mootness challenge, the defendant properly should have appealed from the denial of the motion to open. But in the unusual circumstances of this case, where the two grounds of decision are by no means independent . . . it would doubtlessly exalt form over substance to avoid considering the merits of the appeal because the defendant appealed from the wrong ruling.'' (Citations omitted; internal quotation marks omitted.) Id., 179; see also *Josephine Towers, L.P.* v. *Kelly*, 199 Conn. App. 829, 835, 238 A.3d 732 (''[a]lthough technically the court should have ruled on the motion to open before any other motion was entertained, the nearly simultaneous filing and consideration of the two motions in this case, together with the identity of issues presented . . . compel the conclusion that declining to address the merits of the motions would be a hypertechnical elevation of form over substance,'' citing *Weinstein*), cert. denied, 335 Conn. 966, 240 A.3d 281 (2020). On the basis of this precedent, we conclude that the trustee's failure to appeal from the denial of his motion to open is not fatal to his appeal in this case.

pursuant to the plaintiff's motion to substitute, rather than by way of a motion to cite in an additional party, and that the motion to substitute was effectively a nullity. As a result, he argues that the court never had personal jurisdiction over him.[9] For the reasons that follow, we disagree.

We begin by setting forth the applicable standard of review. "The standard of review for a court's decision on a motion to dismiss . . . is well settled. . . . A motion to dismiss tests . . . whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and

[9] The trustee also suggests in his brief that the plaintiff's failure to substitute Testa's estate at any point following his death "arguably" deprived the court of subject matter jurisdiction to enter any subsequent orders in the case. Following oral argument in this appeal, this court, sua sponte, ordered supplemental briefing on the issue of whether the trial court had subject matter jurisdiction to act on the plaintiff's motion to substitute the trustee in light of *Barton* v. *New Haven*, 74 Conn. 729, 730, 52 A. 403 (1902), and its progeny. Those cases hold that "[d]uring the interval . . . between the death and the revival of the action by the appearance of the executor or administrator, the cause has no vitality. The surviving party and the court alike are powerless to proceed with it." Id., 730–31; see also, e.g., *Burton* v. *Browd*, 258 Conn. 566, 571, 783 A.2d 457 (2001); *Worden* v. *Francis*, 170 Conn. 186, 188, 365 A.2d 1205 (1976); *Boucher Agency, Inc.* v. *Zimmer*, 160 Conn. 404, 407–408, 279 A.2d 540 (1971); *Negro* v. *Metas*, 110 Conn. App. 485, 498, 955 A.2d 599, cert. denied, 289 Conn. 949, 960 A.2d 1037 (2008); *Schoolhouse Corp.* v. *Wood*, 43 Conn. App. 586, 590, 684 A.2d 1191 (1996), cert. denied, 240 Conn. 913, 691 A.2d 1079 (1997); *Bomstein* v. *Boucher Agency, Inc.*, 5 Conn. Cir. 121, 122, 245 A.2d 296 (1968). Having received and considered the supplemental briefs, we conclude that the court had subject matter jurisdiction at the time it acted on the plaintiff's motion to substitute. *Barton* and the decisions that have followed hold that a "cause" by or against a single, deceased party is abated until such time as a proper fiduciary is substituted for the deceased party. They do not stand for the proposition that a court loses subject matter jurisdiction over an entire case for all purposes, including separate causes against parties other than the deceased, until a fiduciary is substituted for a deceased party. Such a rule would be wholly inconsistent, for example, with General Statutes § 52-600, which provides in relevant part: "If there are two or more plaintiffs or defendants in any action, one or more of whom die before final judgment, and the cause of action survives to or against the others, the action shall not abate by reason of the death. . . ."

resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Izzo* v. *Quinn*, 170 Conn. App. 631, 636, 155 A.3d 315 (2017). "A challenge to the personal jurisdiction of the trial court is a question of law, requiring that we employ a plenary standard of review." *Thompson Gardens West Condominium Assn., Inc.* v. *Masto*, 140 Conn. App. 271, 278, 59 A.3d 276 (2013).

On appeal, the trustee argues the trial court lacked personal jurisdiction over him because he was never properly cited into the case as a party. He points out that he was added pursuant to the plaintiff's "motion to substitute" and that he did not meet the criteria for a substituted party under General Statutes § 52-599.[10] The plaintiff counters that the motion to substitute was "inaptly titled" and was, in effect, a request to add the trustee as a new and distinct party defendant on the newly added second count of the operative complaint alleging a fraudulent transfer against the trustee. He urges us to look at the context and substance, not the name, of the motion. We agree with the plaintiff.

"In certain circumstances, this court previously has looked beyond the label of a motion to reclassify it when its substance did not reflect the label applied by the moving party." *Santorso* v. *Bristol Hospital*, 308 Conn. 338, 351, 63 A.3d 940 (2013); see also *Whalen* v.

[10] General Statutes § 52-599 provides in relevant part: "(a) A cause or right of action shall not be lost or destroyed by the death of any person, but shall survive in favor of or against the executor or administrator of the deceased person.

"(b) A civil action or proceeding shall not abate by reason of the death of any party thereto, but may be continued by or against the executor or administrator of the decedent. . . . If a party defendant dies, the plaintiff, within one year after receiving written notification of the defendant's death, may apply to the court in which the action is pending for an order to substitute the decedent's executor or administrator in the place of the decedent, and, upon due service and return of the order, the action may proceed. . . ."

Ives, 37 Conn. App. 7, 17, 654 A.2d 798 (functional effect of motion was determinative), cert. denied, 233 Conn. 905, 657 A.2d 645 (1995). In the present case, it is plain from the content and substance of the "motion to substitute" that the plaintiff was asking the court to add the trustee as a defendant in this matter solely on the basis of his alleged liability as a fraudulent transferee of Testa's assets. The inaptly titled "motion to substitute" identified the trustee by name and in his capacity as trustee of the trust. It went on to allege that the trust had received assets from Testa "in order to place these assets beyond the reach of the plaintiff." The motion did not allege that the trustee was a party to the underlying indemnification agreement between the plaintiff and Testa or seek to "substitute" the trustee for Testa as the party liable to the plaintiff under the terms of that agreement. After the court granted the motion, the plaintiff filed and served the operative complaint on the trustee. Consistent with the substantive allegations in the inaptly titled "motion to substitute," the operative complaint did not seek to recover from the trustee for breach of the underlying indemnification agreement between the plaintiff and Testa. It alleged only that the trustee is liable to the plaintiff in count two as a fraudulent transferee.[11]

The trustee cites various cases in which parties improperly sought to add a party by simply amending a complaint. Those cases are inapposite because in each of those cases, and unlike the present case, a party failed to seek and to obtain from the court permission to

[11] Judge Genuario clearly recognized the nature of the trustee's involvement. The plaintiff filed a motion for reconsideration on September 6, 2019, contesting the monetary value of the judgment. In denying relief, the court stated in relevant part that "[*t*]*he defendant is not the maker of the note or the estate of the maker of the note.* To the extent the plaintiff is seeking payment from a fraudulent transferee of property, he is seeking payment from a tortfeasor and *not a contracting party*." (Emphasis added.)

add a new party prior to serving an amended complaint naming that party as a new defendant.

We conclude that the inaptly titled "motion to substitute" was, in effect, a motion to add the trustee as a new and separate party under a different theory of liability. Because the court granted that motion and the trustee was subsequently served with the operative complaint, the court had personal jurisdiction over him.

The judgment is affirmed.

In this opinion the other judges concurred.

BRIDJAY CAPONE ET AL. *v.* MICHELE NIZZARDO ET AL.
(AC 42867)

Alexander, Suarez and DiPentima, Js.

Syllabus

The plaintiff sought equitable distribution of certain real property containing residential and equestrian buildings that she and the defendant owned as tenants in common and payment of just compensation for her undivided 25 percent minimal interest in the property. The parties entered into an oral stipulation before the trial court but were unable to agree on the fair market value of the property. Both parties presented expert testimony to the court from real estate appraisers. The court agreed with the defendant's expert appraiser, determined the fair market value to be $1,110,000 and issued certain orders regarding payment to the plaintiff for her undivided minimal interest. Thereafter, the plaintiff appealed to this court, claiming that the trial court committed plain error and made clearly erroneous findings of fact in regard to the highest and best use of the property. *Held*:

1. The plaintiff could not prevail on her claim that the trial court committed plain error when it determined the highest and best use of the property without reviewing applicable zoning regulations because she did not meet either prong of the plain error doctrine: the plaintiff failed to demonstrate that the trial court made a plain and obvious error that affected the fairness and integrity of and public confidence in the judicial proceedings, as the parties stipulated that the plaintiff had only a minimal interest in the property and that a partition in kind or by sale would not better serve their interests, the hearing before the court was for the

sole purpose of having it determine the fair market value of the property, no evidence was submitted to the court regarding the possibility of obtaining any zoning variance and the court did not conclude that the current use of the property would not be permitted to continue, such that the court's determination of the highest and best use and fair market value of the property did not require the review of applicable zoning regulations; moreover, the plaintiff did not establish that the failure to grant relief would have resulted in a manifest injustice.

2. The trial court's determination that the highest and best use of the property, a residential use augmented by a supporting equestrian facility that had limited commercial viability, was not clearly erroneous: the court considered the testimony and written reports of both the plaintiff's and the defendant's appraisers, and concluded that the comparable sales offered by the defendant's appraiser were more similar to the subject property in size and location than those offered by the plaintiff's appraiser; moreover, the value determined by the plaintiff's appraiser was based in part on a price per horse stall method that included twenty-three stalls, but the evidence at trial supported the court's finding that only thirteen or fourteen stalls on the property were potentially functional; furthermore, the only evidence of income generated from the property was from residential rent and rent for two horse stalls, and the court considered the testimony from a witness offered by the defendant that the marketing of the property as a commercial equestrian facility was not successful.

Argued April 13—officially released August 10, 2021

Procedural History

Action, inter alia, seeking the equitable distribution of property, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the defendant Bongiorno Children Red Barn, LLC, was cited in as an additional party; thereafter, the matter was withdrawn as to the named defendant et al.; subsequently, the matter was tried to the court, *Hon. Kevin Tierney*, judge trial referee; judgment for the defendant Bongiorno Children Red Barn, LLC, from which the plaintiff appealed to this court. *Affirmed.*

Danielle J. B. Edwards, with whom, on the brief, was *Peter V. Lathouris*, for the appellant (plaintiff).

Mark F. Katz, for the appellee (defendant Bongiorno Children Red Barn, LLC).

Opinion

ALEXANDER, J. The plaintiff Bridjay Capone appeals from the judgment of the trial court ordering the defendant Bongiorno Children Red Barn, LLC, to pay her $277,500 in just compensation for her 25 percent interest in the property owned by the parties.[1] Specifically, the plaintiff challenges the court's determination that the fair market value of the property is $1,110,000. On appeal, the plaintiff claims that the court (1) committed plain error when it determined the highest and best use of the property without considering the applicable zoning regulations, (2) made clearly erroneous factual findings in determining the highest and best use of the property, and (3) due to these errors, the court abused its discretion in determining the value of the property. We disagree with the plaintiff's claims[2] and, accordingly, affirm the judgment of the trial court.

[1] The original plaintiffs, Bridjay Capone and Red Barn Stables, LLC, filed their initial complaint against three defendants, Michele Nizzardo, John Bongiorno, and Frank Bongiorno (original three defendants). On February 2, 2018, the original three defendants transferred, by quitclaim deed, their combined 75 percent interest in the property to Bongiorno Children Red Barn, LLC. On February 9, 2018, the original three defendants moved to cite in Bongiorno Children Red Barn, LLC. The court granted this motion on February 28, 2018. On August 8, 2018, the plaintiff withdrew the action as to the original three defendants. The court was asked to disregard the status of the plaintiff Red Barn Stables, LLC. The third amended complaint contained one count with one plaintiff, Bridjay Capone, and one defendant, Bongiorno Children Red Barn, LLC. All references herein to the plaintiff are to Capone, and references to the defendant are to Bongiorno Children Red Barn, LLC.

[2] We do not address separately the plaintiff's third claim because it is premised on her first two claims. The plaintiff contends that the court's plain error in failing to consider applicable zoning regulations, coupled with its clearly erroneous factual findings in determining the highest and best use of the property, constituted an abuse of discretion. Because we conclude that the trial court did not commit plain error and that its determination of the highest and best use of the property was not clearly erroneous, we also conclude that the court did not abuse its discretion in determining the value of the property.

The following facts and procedural history are relevant to the disposition of this appeal. On January 17, 2017, the plaintiff filed a two count complaint seeking, inter alia, partition of real property located on Bangall Road in Stamford (property), owned by the plaintiff and the defendant as tenants in common. On August 7, 2018, the parties entered into an oral stipulation before the court. In that stipulation, the parties agreed, inter alia, that (1) the plaintiff is the owner of a 25 percent minimal interest in the property,[3] (2) a partition by sale or in kind would not promote the best interests of the parties, and (3) if the parties were unable to agree on the fair market value of the property, the court would decide the fair market value of the property and thereby determine the purchase price that the defendant would pay to the plaintiff in consideration for her delivery of a quitclaim deed. Thereafter, the plaintiff filed her third amended complaint, comprised of one count seeking equitable distribution of the property and payment of just compensation for her undivided 25 percent minimal interest in the property. A trial was held on February 20 and 21, 2019.

As a result of the parties' stipulation, the plaintiff and the defendant presented evidence to the court for it to make a determination of the fair market value of the property. It is undisputed that the property is comprised of two parcels. Parcel one is 3.32 acres and parcel two is 1.04 acres. On the basis of the evidence before it, the court found that parcel one contains a single-family

[3] General Statutes § 52-500 (a), pertaining to the sale or equitable distribution of real property owned by two or more persons, provides in relevant part that "[i]f the court determines that one or more of the persons owning such real . . . property have only a minimal interest in such property and a sale would not promote the interests of the owners, the court may order such equitable distribution of such property, with payment of just compensation to the owners of such minimal interest, as will better promote the interests of the owners."

house, an indoor arena/riding ring, a two-story apartment/office building that includes two three room apartments, a thirteen or fourteen stall horse barn, and an eight or nine stall horse barn. The single-family house and two apartments are rented to tenants. Two stalls in the thirteen or fourteen stall horse barn are rented to tenants. None of the horse stalls in the eight or nine stall barn is in use. The court further found that parcel two is located directly across from parcel one on the other side of Bangall Road, and that it contains two equestrian riding rings, an outdoor storage facility, and a parking lot.

Each party presented expert testimony from a real estate appraiser. The plaintiff's expert, Eric Michel, opined in his appraisal report that the highest and best use of the property is as "an equestrian facility as it is currently improved."[4] Michel appraised the value of parcels one and two together, and testified that the fair market value of the property was $3,000,000. In arriving at this value, Michel utilized both the cost approach[5] and the sales comparison approach[6] to determine the

[4] We note that, in its decision, the court stated that Michel determined "that the highest and best use is as a vacant residential lot . . . ." However, the court also stated that Michel characterized the property as a "commercial equestrian center," and in its articulation, stated that it did not give weight to the "site as though vacant" method used by Michel. (Internal quotation marks omitted.) In his appraisal report, Michel determined the highest and best use of the property "as though vacant" prior to determining the highest and best use "as improved." His report states that the highest and best use of the property as improved is "an equestrian facility as it is currently improved." In addition, Michel testified that the highest and best use of the property is "to continue its use for an equestrian facility."

[5] "Under the cost approach, the appraiser estimates the current cost of replacing the subject property with adjustments for depreciation, the value of the underlying land and entrepreneurial profit." *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, 94 Conn. App. 696, 702 n.10, 894 A.2d 349 (2006).

[6] "The comparable sales approach is also known as the market data approach or sales comparison approach. . . . It is a process of analyzing sales of similar recently sold properties in order to derive an indication of the most probable sales price of the property being appraised. The reliability of this technique is dependent upon (a) the availability of comparable sales

value of the property, and then reconciled those two figures. Using the cost approach, he determined that the value of the land unimproved was $1,525,000 and the value of the improvements less depreciation was $1,099,296, for a total rounded value of $2,625,000. Using the sales comparison approach, Michel compared the property to five other recently sold properties and made adjustments to determine the value of the property. Only one of his comparable properties was located in Fairfield County, where the property is located, and the remaining four were located in the state of New York. The properties ranged from 15.82 acres to 286.23 acres in size and each of the properties had equestrian facilities. The nature of some of the improvements differed from those on the property, such that one of the comparable properties had a twenty stall barn with a veterinary room, viewing room, tack room, indoor and outdoor riding areas, breeding stalls, and wash stalls, and another had direct riding trail access and bordered a large preservation area. Michel used a price per stall figure in comparing the property and the comparable properties, determining that the property had twenty-three stalls and the adjusted price per stall was $139,130, for a total rounded value of $3,200,000. He testified that the property is commercial because "historically it had been operated as a commercial operation and its physical characteristics show that it still has the ability to operate that way." When asked how much research he had done into the historical operation of a commercial equestrian facility at the property, he replied, "[n]one." Further, Michel's report described the property's condition and quality as "average" and "poor to average."

data, (b) the verification of the sales data, (c) the degree of comparability or extent of adjustment necessary for time differences, and (d) the absence of [nontypical] conditions affecting the sales price. . . . After identifying comparable sales, the appraiser makes adjustments to the sales prices based on elements of comparison." (Citations omitted; internal quotation marks omitted.) *Sun Valley Camping Cooperative, Inc.* v. *Stafford*, 94 Conn. App. 696, 702 n.8, 894 A.2d 349 (2006).

The defendant's expert, Adam Hardej, opined that the highest and best use of the property is continuation of its current use as "residential/office/equestrian" property. Hardej appraised the value of the parcels separately, and testified that the fair market value of parcel one was $865,000 and parcel two was $245,000, for a total fair market value of $1,110,000. Like Michel, Hardej used both the cost approach and the sales comparison approach. Under the cost approach, he determined the value of the land on parcel one to be $370,000, and the value of improvements less depreciation to be $491,902, for a total rounded value for parcel one of $860,000. Under the sales comparison approach, Hardej compared the property to six recent land sales. Each comparable property was located in Fairfield County and the size of the properties ranged from 1.12 acres to 10.89 acres. Four of Hardej's comparable properties were rated residential/equestrian, and two had no equestrian component. Under the sales comparison approach, he determined that after adjustments the value of parcel one was $870,000. Hardej testified that "there hasn't been any viable equestrian facility, going concern operation on the subject property, for as long as anybody can remember. And when I say that, I've heard people say ten plus years . . . ." In his appraisal report, he described the improvements on the property as in "average" condition. Further, Hardej testified that the small barn on the property containing nine horse stalls was "in a dilapidated condition" and was "beyond its economic life" and therefore had no contributory value to the property. He stated that these nine stalls are "absolutely nonoperational . . . ."

The defendant also presented testimony from Frank Bongiorno, who is a manager and member of the defendant. He testified that there are thirteen stalls in the big barn and nine stalls in the small barn. Bongiorno explained that the stalls in the small barn are not usable

because they are "crumbling and falling apart. The roof itself is shot. The stalls–in between–the partitions in between are shot." Further, he testified that his sister has advertisements out to attract boarders but that they "haven't been very successful, no one will come in" due to the "dilapidated condition, the size of the stalls."

The court issued a memorandum of decision on April 17, 2019. The court determined that the highest and best use of the property is "continuation as a residential use augmented by a supporting equestrian facility that has limited commercial viability." The court further described the property as a "residential use with some older equestrian facilities as additional improvements to the residential status." Although each appraiser used both the cost method and the sales comparison method, the court ultimately credited the sales comparison approach used by Hardej. It found that Michel's comparable properties involved much larger parcels of land than the property, and that these land sales did not support Michel's opinion of value. The court found Hardej's sales comparables to be closer in location and size to the property, and the sale price of these lots revealed that the immediate neighborhood of the property was not likely to support Michel's opinion of value. The court determined the value of parcels one and two together, not as separate lots, and concluded that the fair market value of the property was $1,110,000. The court ordered the defendant to pay the plaintiff $277,500, representing the plaintiff's 25 percent interest. The plaintiff filed an appeal from that decision.

Thereafter, the plaintiff filed a motion for articulation of the court's decision. In its articulation dated February 4, 2020, the court stated that it had considered both appraisers' reports in determining the fair market value of the property, gave greater weight to the sales comparison method used by both appraisers, and did not give weight to the " 'site as though vacant' " method used

by the plaintiff's real estate appraiser. Further, the court considered the relevant comparable sales used by the parties' appraisers and the testimony from Bongiorno regarding the marketing of the property.

I

The plaintiff first claims that the court committed plain error when it determined the highest and best use, and ultimately the fair market value of the property, without reviewing applicable zoning regulations. We disagree.

The following additional information is relevant to our resolution of this issue. The court found, and each appraiser's report stated, that both parcels of land are in the RA-2 zone, which is Stamford's two acre residential zone. No expert testimony was presented to the court concerning the possibility of obtaining a variance or zoning permission for the use of a one acre parcel in a two acre zone, so the court did not consider parcel two to be a separate buildable lot. Further, the court determined that the use of the property as an equestrian facility appeared to comply with the zoning regulations as a nonconforming use, and no additional evidence of the Stamford zoning regulations concerning horses and equestrian facilities was presented to the court.

The plaintiff did not argue before the court that a review of zoning regulations was necessary to determine the highest and best use or fair market value of the property, and neither party introduced any zoning regulations at trial. In her brief, the plaintiff admits that "the trial court did not receive, review, or rely upon any of the applicable zoning regulations. Neither of the appraisal reports submitted by the parties' experts include the applicable zoning regulations . . . ." (Emphasis omitted.) However, on appeal, the plaintiff

asserts that the trial court's failure to consider the zoning regulations, sua sponte, should be reviewed under the plain error doctrine.

"[The plain error] doctrine, codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that, although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. [T]he plain error doctrine . . . is not . . . a rule of reviewability. It is a rule of reversibility. 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. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless [she] demonstrates that the claimed error is both so clear and so harmful that a failure to reverse the judgment would result in manifest injustice. . . .

"[Our Supreme Court has] clarified the two step framework under which we review claims of plain error. First, we must determine whether the trial court in fact committed an error and, if it did, whether that error was 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. . . . [T]his inquiry entails a relatively high standard,

under which it is not enough for the [plaintiff] simply to demonstrate that [her] position is correct. Rather, [to prevail] the party [claiming] plain error [reversal] must demonstrate that the claimed impropriety was so clear, obvious and indisputable as to warrant the extraordinary remedy of reversal. . . .

"In addition, although a clear and obvious mistake on the part of the trial court is a prerequisite for reversal under the plain error doctrine, such a finding is not, without more, sufficient to warrant the application of the doctrine. Because [a] party cannot prevail under plain error unless it has demonstrated that the failure to grant relief will result in manifest injustice . . . under the second prong of the analysis we must determine whether the consequences of the error are so grievous as to be fundamentally unfair or manifestly unjust. . . . Only if both prongs of the analysis are satisfied can the appealing party obtain relief." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, 190 Conn. App. 853, 864–66, 213 A.3d 1, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019).

In the present case, the plaintiff has failed to demonstrate that the court made a plain and obvious error by determining the highest and best use or fair market value of the property without consulting the zoning regulations. The plaintiff has cited no authority that places a duty on the trial court to consult zoning regulations prior to determining the highest and best use of real property when zoning regulations are not provided to the court by the parties and are not required for the court's findings. Instead, she argues that "[i]t was incumbent upon the court to require their submission by counsel or obtain them independently." In support thereof, the plaintiff cites to *Delfino* v. *Vealencis*, 181 Conn. 533, 436 A.2d 27 (1980).

The plaintiff's reliance on *Delfino* is misplaced. In that case, the trial court granted the plaintiffs a partition by sale of property owned by the plaintiffs and the

defendant as tenants in common. Id., 534. In *Delfino*, the defendant claimed that the trial court had improperly determined that a partition by sale, as opposed to a partition in kind, best promoted the rights of the parties. Id., 538. The court's conclusion that a partition in kind was not in the best interests of the parties was based, in part, on its findings that operation of the defendant's garbage removal business on the property would make it difficult for the plaintiffs to obtain approval for a subdivision on their part of the property and that the defendant's use of the property for such a business violated existing zoning regulations, making it unlikely that the defendant would be able to continue her business in the future. Id., 539–40. On appeal, our Supreme Court determined that the trial court's inferences were unfounded, as neither party had submitted the applicable zoning regulations to the court. Id., 541–42. The present case is readily distinguishable from *Delfino*. Here, the parties stipulated that the plaintiff had only a minimal interest in the property and that a partition in kind or by sale would not better serve the interests of the parties. The hearing before the court was for the sole purpose of having it determine the fair market value of the property. No evidence was submitted to the court regarding the possibility of obtaining any zoning variance and the court did not conclude that the current use of the property would not be permitted to continue.

We conclude that the plaintiff has not met either prong of the plain error doctrine. The plaintiff has failed to demonstrate that the court made a plain and obvious error that affected "the fairness and integrity of and public confidence in the judicial proceedings." (Internal quotation marks omitted.) *DeChellis* v. *DeChellis*, supra, 190 Conn. App. 865. Because of the parties' stipulation, the court's determination of the highest and best use and fair market value of the property did not require the review of applicable zoning regulations. Further,

the plaintiff has not established that the failure to grant relief will result in a manifest injustice. Therefore, we are not persuaded that plain error exists.

II

The plaintiff next argues that the court made clearly erroneous findings of fact when it determined that the highest and best use of the property was residential, rather than as a commercial equestrian center.[7] The defendant counters that the evidence presented at trial supported the court's determination that the highest and best use of the property is "the continuation as a residential use augmented by a supporting equestrian facility that has limited commercial viability." We agree with the defendant.

We first set forth the relevant legal principles and standard of review. "A property's highest and best use is commonly accepted by real estate appraisers as the starting point for the analysis of its true and actual value. . . . [U]nder the general rule of property valuation, fair [market] value, of necessity, regardless of the method of valuation, takes into account the highest and best value of the land. . . . A property's highest and best use is commonly defined as the use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 25, 807 A.2d 955 (2002).

[7] In her reply brief, the plaintiff argues that the defendant failed to respond adequately to the issues raised in her claims, and therefore the defendant has abandoned its defense. We disagree. "There is no rule . . . that an appellee's failure to reply in its brief to an issue raised by the appellant is an implicit concession that the appellant's claim is meritorious and that the claim should be decided in the appellant's favor. Abandonment of a claim for failure of a party to brief that claim typically occurs when the *appellant* fails to brief properly the claim that is raised on appeal." (Emphasis in original.) *Harris* v. *Commissioner of Correction*, 271 Conn. 808, 842 n.24, 860 A.2d 715 (2004).

"The highest and best use determination is inextricably intertwined with the marketplace because fair market value is defined as the price that a willing buyer would pay a willing seller based on the highest and best possible use of the land assuming, of course, that a market exists for such optimum use. . . . The highest and best use conclusion necessarily affects the rest of the valuation process because, as the major factor in determining the scope of the market for the property, it dictates which methods of valuation are applicable. Finally, a trier's determination of a property's highest and best use is a question of fact that we will not disturb unless it is clearly erroneous." (Internal quotation marks omitted.) *Sakon* v. *Glastonbury*, 111 Conn. App. 242, 253–54, 958 A.2d 801 (2008), cert. denied, 290 Conn. 916, 965 A.2d 554 (2009). "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." (Internal quotation marks omitted.) *United Technologies Corp.* v. *East Windsor*, supra, 262 Conn. 23. "It is well established that [i]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . On appeal, we do not retry the facts or pass on the credibility of witnesses." (Internal quotation marks omitted.) Id., 26.

In the present case, the court considered the testimony and written reports of both the plaintiff's and the defendant's expert appraisers, and determined that the highest and best use of the property "is the continuation

as a residential use augmented by a supporting equestrian facility . . . .” The court found that the major difference in the appraiser’s values was a result of their choice of comparable sales, which was in turn affected by their different classifications of the highest and best use of the property. After examining the evidence, the court concluded that Hardej’s comparable sales were more similar to the property in size and location than were Michel’s. In addition, Michel determined the value based, in part, on a price per stall method that included twenty-three horse stalls, but the evidence at trial supported the court’s finding that only thirteen or fourteen horse stalls on the property were potentially functional. The only evidence of income generated from the property was rent for the single-family home and two apartments, as well as rent for two horse stalls in the larger barn. In reaching its decision, the court considered the testimony from Bongiorno that “the marketing of the property as a commercial equestrian facility was not successful.” After a thorough review of the record, we conclude that the court’s determination that the highest and best use of the property, a residential use augmented by a supporting equestrian facility that has limited commercial viability, was not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* MORLO M.*
(AC 41474)

Bright, C. J., and Alvord and Norcott, Js.

Syllabus

Convicted of the crimes of assault in the first degree, risk of injury to a child and unlawful restraint in the first degree in connection with the beating of the victim, who was the mother of his four minor children, the defendant appealed to this court, claiming that the evidence was insufficient to support his conviction. The defendant had dragged the victim by her hair down stairs into the basement of their home, where he kicked, punched and choked her on three consecutive nights while the children, who ranged in age from fifteen months to thirteen years, were alone on the upper floors of the home. After the defendant left the house on the third day, the victim was brought to a medical center, where staff members observed bruising on her scalp, face, chest, back, legs, arms and left side. The victim also was determined to have had a subconjunctival hemorrhage in her left eye, a broken rib and fluid in her pelvic region. *Held*:

1. The defendant could not prevail on his claim that the state failed to prove that he caused the victim serious physical injury and, thus, that the evidence was insufficient to support his conviction of assault in the first degree: the jury reasonably could have found that the defendant caused the victim to suffer either serious disfigurement or a serious loss or impairment of the function of any bodily organ and, thus, a serious physical injury, as the victim and C, a medical center staff member, testified consistently with one another as to the extensive bruising that covered much of the victim's body, the noticeable injuries to her head and face, and that the victim had lost consciousness during one of the defendant's beatings of her, which the jury was free to credit or to disregard; moreover, C testified that the bruising was literally everywhere on the body of the victim, who had a subconjunctival hemorrhage in her left eye, and a police officer who took the victim's statement at the medical center saw that she was missing hair and had a swollen face and a bloodshot eye.

* This opinion supersedes the opinion of this court in *State* v. *Morlo M.*, 198 Conn. App. 748, 234 A.3d 1137 (2020), which was officially released on July 7, 2020. See footnote 2 of this opinion.

In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to use the defendant's full name or to identify the victims or others through whom the victims' identities may be ascertained. See General Statutes § 54-86e.

2. The defendant's claim that the evidence was insufficient to support his conviction of risk of injury to a child was unavailing; the jury reasonably could have inferred that the defendant put the children at risk of impairment of their health or morals, as the children had no access to parental care during the three nights when he beat the victim in the basement and did not permit her to leave the basement until the morning, the jury was free to credit a psychologist's testimony that the children may have been traumatized as a result of having observed the extensive physical injuries to the victim, and the state did not have to prove actual harm to the children, as the defendant was charged under the portion of the risk of injury statute (§ 53-21 (a) (1)) that required that he have the general intent to perform an act that created a situation that put the children's health and morals at risk of impairment.
3. The evidence was sufficient to support the defendant's conviction of unlawful restraint in the first degree, as the defendant's intent to unlawfully restrain the victim was independent from his intent to assault her: the jury reasonably could have found that the defendant evinced an intent to restrict the victim's liberty to move freely within the house when he seized her by her hair and dragged her into the basement and separately could have reasonably found that he evinced an extreme indifference to human life on the basis of his independent acts of kicking, punching and choking the victim in the basement for three consecutive nights; moreover, the jury reasonably could have found that the defendant's act of dragging the victim down a full flight of stairs by her hair subjected her to a substantial risk of injury, as it presented a real or considerable opportunity for her to have suffered an impairment to her physical condition or to have suffered pain.
4. The trial court did not abuse its discretion in admitting prior misconduct evidence pertaining to two other incidents in which the defendant was alleged to have assaulted the victim, as that evidence was relevant to the charges of unlawful restraint and tampering with a witness, and its probative value was not outweighed by its prejudicial impact: the prior misconduct evidence was relevant to and probative of the defendant's intent to restrain the victim and to tamper with a statement she had given to the police, as both unlawful restraint in the first degree and tampering with a witness are specific intent crimes, and the prior misconduct evidence was not likely to arouse the jurors' emotions and sympathy toward the victim, and was not distracting in terms of its severity and the amount of time and focus that it involved; moreover, the two incidents of prior misconduct did not involve gruesome details, facts or photographs, whereas the crimes of which the defendant was convicted involved conduct and injuries that were substantially more gruesome in nature, and the court provided a limiting instruction to the jury on the first day of evidence, coincident with the admission of the prior misconduct evidence, which restricted the parameters of the state's use of the evidence to limit its prejudicial effect.

Considered April 1—officially released August 10, 2021

Procedural History

Two substitute informations charging the defendant, in the first case, with five counts of the crime of risk of injury to a child and with one count of the crime of tampering with a witness, and, in the second case, with the crimes of assault in the first degree, unlawful restraint in the first degree and strangulation in the first degree, brought to the Superior Court in the judicial district of Fairfield, where the court, *Kavanewsky, J.*, granted the state's motion for joinder; thereafter, the matter was tried to the jury before *Pavia, J.*; subsequently, the court denied the defendant's motion to preclude certain evidence; verdicts and judgments of guilty of five counts of risk of injury to a child, tampering with a witness, assault in the first degree and unlawful restraint in the first degree, from which the defendant appealed to this court. *Affirmed.*

Judie Marshall, assigned counsel, with whom, on the brief, was *David J. Reich*, assigned counsel, for the appellant (defendant).

Linda F. Currie-Zeffiro, assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Colleen Zingaro*, supervisory assistant state's attorney, for the appellee (state).

Opinion

ALVORD, J. The defendant, Morlo M., appeals from the judgments of conviction, rendered following a jury trial, of one count of assault in the first degree in violation of General Statutes § 53a-59 (a) (3), five counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (1), one count of unlawful restraint in the first degree in violation of General Statutes § 53a-95 (a), and one count of tampering with a witness in violation of General Statutes § 53a-151.[1] On appeal, the

[1] The defendant was found not guilty of one count of strangulation in the first degree in violation of General Statutes § 53a-64aa (a) (1) (B).

defendant claims that the evidence was insufficient to support his conviction of (1) assault in the first degree, (2) risk of injury to a child (3) and unlawful restraint in the first degree, and that (4) the trial court abused its discretion in admitting evidence of his prior misconduct.[2] We affirm the judgments of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to this appeal. In the early morning hours of November 28, 2016, the victim, who is the mother of the defendant's four minor children, called the defendant from a gas station to ask that he pick her up and drive her back to the house where they both resided. The victim had been out drinking with someone other than the defendant. Soon after the victim and the defendant arrived at the house, the defendant seized the victim by her hair, dragged her down to the basement of the house, and proceeded to beat her. The defendant kicked, punched, and choked the victim. During this time, the victim's seven children were asleep on upper floors of

[2] On October 13, 2020, following briefing, oral argument, and decision in this appeal; see *State* v. *Morlo M.*, 198 Conn. App. 748, 234 A.3d 1137 (2020); the defendant filed a motion to open the judgments, and companion motions to file an additional transcript and for supplemental briefing. He claimed that "[t]he transcripts that were received, reviewed, filed, and upon which briefing and argument were based, were incomplete." Specifically, the basis for the defendant's motions was his discovery of "a portion of [his] trial transcript, recording a hearing held on the afternoon of September 20, 2017, [which] had never been transcribed or delivered" to this court (September transcript). The defendant characterized the September transcript as "the record of a motion in limine hearing that had not previously been provided to counsel, relating to admission of prior misconduct evidence." In his motions, the defendant argued that he "is entitled to have the transcript reviewed by this court and have an additional issue raised and briefed on appeal: whether the probative value of prior misconduct evidence outweighed its prejudicial tendencies," because the newly discovered transcript "memorializes trial counsel's arguments and objections to the introduction of prior misconduct evidence and the basis for the court's ruling on the motion." On October 20, 2020, this court granted the defendant's motions to open the judgments, to file an additional transcript and for supplemental briefing. Thereafter, the parties submitted supplemental briefs addressing the admission of prior misconduct evidence.

the house[3] and, thus, did not witness the victim being dragged down into the basement by the defendant. The victim could not leave the basement until the defendant ceased beating her. Subsequently, in the morning of November 28, the victim and the defendant emerged from the basement and sat on their living room couch. The victim remained on the couch throughout the daytime hours of November 28 because of the injuries she sustained from the defendant's beating of her. While the victim remained on the couch, her older children were at school, and her sixteen year old nephew assisted her by caring for her young children. Following the older children's return from school, all of the children were fed and went upstairs.

At nighttime on November 28, 2016, the defendant commanded the victim to return down into the basement. The victim obeyed the defendant's command because she was already hurt and did not want to defy him. The children were upstairs and in their beds when the victim and the defendant went down into the basement. Once they were in the basement, the victim again was beaten by the defendant. The defendant hit and choked the victim, and ripped out parts of her hair.

In the early morning of November 29, 2016, the victim emerged from the basement after a second night of being beaten. The victim's children were still asleep when the victim came up from the basement. The victim spent that day as she spent the day before, resting on the couch. Although she did not know the extent of her injuries, the victim was in pain and thought that she might have broken ribs. Following the return of the older children from school, all of the children were fed

[3] On November 28, 2016, the age of the victim's seven children ranged from approximately fifteen months to thirteen years. The defendant is the father of the victim's four youngest children. Each of the five counts of risk of injury to a child with which the defendant was charged alleged risk of injury as to a different minor child.

and then went upstairs. The victim again was beaten on November 29 for a third night in a row. On one of the three nights during which she was beaten, the victim lost consciousness. Following the beatings, the victim's side and head in particular were hurting her.

When the defendant left the house on the third day, the victim contacted a friend, F, who picked up the victim, her seven children, and her nephew, and took them all to a hotel. The victim left the house in a rush, fearing that if she remained there any longer, she would die. The victim's injuries were visible and seen by her children. While at the hotel, the victim, a veteran of the armed forces, called her peer counselor at the United States Veterans Administration Hospital. The victim informed her counselor that she was in pain, had a limited amount of money, and needed to travel to her foster mother in Georgia. The victim's counselor first encouraged the victim to seek treatment at the Veterans Affairs Medical Center in West Haven (medical center). On December 2, 2016, after encouragement from her counselor and because she remained in pain, wanted to know the extent of her injuries, and desired treatment, the victim went to the medical center with her children and nephew. At the medical center, the victim had her injuries photographed, vitals measured, and body imaged. A blood test also was performed. Staff at the medical center observed that the defendant had bruising on her scalp, face, chest, back, legs, arms, and left side. Some of the bruises were more recent than others. The victim also had a subconjunctival hemorrhage in her left eye, parts of her hair torn out, and tenderness in sections of her body, particularly her left chest and left abdomen.

The victim told medical center staff that over the last few days she had been kicked, punched, dragged by her hair, choked, and that she lost consciousness. Initially, the victim did not disclose who caused her injuries to medical center staff. Eventually, however, the

victim did tell the staff that the defendant caused her injuries. The police and the Department of Children and Families (department) were summoned to the medical center and, upon their arrival, took sworn, written statements from the victim. Officer Jonathan Simmons, of the Bridgeport Police Department, who took the victim's statement at the medical center, observed the victim as having parts of her hair missing, a swollen face, and a bloodshot eye.

The victim was evaluated by Julia Chen, a resident at the medical center who specialized in vascular and general surgery. Imaging revealed that one of the victim's ribs on her left side was fractured and that there was indeterminate fluid in her pelvic region. On the basis of the location of the victim's bruising and the fluid in her pelvic region, Chen and other staff at the medical center were concerned that the victim might have had an injury to her spleen. There also was concern that the victim might be bleeding internally. It was recommended to the victim that she be evaluated at Yale-New Haven Hospital (hospital) because the hospital had a trauma center and the medical center did not. Although Chen was not concerned that the victim faced an immediate risk of death, she recommended further evaluation because she was concerned that the victim had very serious internal injuries. Moreover, although Chen could not conclusively determine that the victim's spleen was injured, her concern prompted a recommendation that the victim pursue further evaluation because "a splenic hemorrhage could be very bad."

Contrary to the medical advice given to her, the victim did not seek further evaluation at the hospital and discharged herself from the medical center. The victim did not seek further evaluation at the hospital because she could not take her children with her. Following her discharge from the medical center, the victim received assistance from a battered women's shelter that enabled

her, her children, and her nephew to stay at a hotel. On December 5, 2016, they all checked out of the hotel and rode a bus to the home of the victim's foster mother in Georgia.

While in Georgia, F contacted the victim and urged her to speak with the defendant. F told the victim that the defendant wanted to speak with their twin children because it was their birthday. The victim spoke with the defendant several times while she was in Georgia. During one of their conversations, the victim told the defendant that she had made a statement to the police that identified him as the cause of her injuries. The defendant told the victim that she had to return to Connecticut to "fix" her statement so that he would not get into any trouble.

Following this conversation, the defendant drove to Georgia. After arriving at the home of the victim's foster mother in Georgia, the defendant picked up the victim and five children and proceeded to drive back to Connecticut.[4] They arrived in Connecticut on December 20, 2016, and stayed at the apartment of the defendant's sister. On December 21, the defendant drove the victim to the police station, where she changed her statement to the police at the defendant's behest. The victim changed her statement to allege that another male was the cause of her injuries. The victim and the defendant then returned to the apartment.

Thereafter, on December 21, 2016, police officers travelled to the apartment. The police officers were met by an adult male and female, who provided no information regarding the whereabouts of the defendant, the victim, or the victim's children. As the police officers were leaving, they observed a child in the living

[4] The victim's oldest child and her four youngest children accompanied her and the defendant back to Connecticut. The victim's two other children and her nephew were left in Georgia.

room area of the apartment through a window. At approximately 4:30 p.m. on December 22, the police officers returned to the apartment with a warrant for the defendant's arrest. The victim, who was outside as the police arrived, ran into the apartment, gathered her children, and brought them down into the basement. The police officers located the defendant outside the apartment, in the process of moving a television, and executed the arrest warrant. The police officers then entered the house and found the victim and her children in the basement.

Subsequently, the defendant was charged in two consolidated informations with assault in the first degree, unlawful restraint in the first degree, strangulation in the first degree, five counts of risk of injury to a child, and tampering with a witness. The jury found the defendant guilty of all counts with the exception of strangulation in the first degree, of which he was found not guilty. The defendant received a total effective sentence of fifteen years of incarceration, execution suspended after ten years, followed by five years of probation.[5] This appeal followed. Additional facts will be set forth as necessary.

I

The defendant first claims that there was insufficient evidence to convict him of assault in the first degree because the state failed to prove that he caused serious physical injury to the victim. We disagree.

At the outset, we set forth the following established review principles relevant to each of the defendant's insufficiency of the evidence claims raised in this

[5] The defendant received the following concurrent sentences: fifteen years of incarceration, execution suspended after ten years, followed by five years of probation for assault in first degree; five years of incarceration for unlawful restraint in the first degree; five years of incarceration for each of the five counts of risk of injury to a child; and five years of incarceration for tampering with a witness.

appeal. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a [two part] test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . .

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

"Additionally, [a]s we have often noted, proof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible by the [jury], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is reasonable view of the evidence that supports the [jury's] verdict of guilty." (Internal quotation marks omitted.) *State* v. *Taupier*, 330 Conn. 149, 186–87, 193 A.3d 1 (2018), cert. denied, U.S. , 139 S. Ct. 1188, 203 L. Ed. 2d 202 (2019).

Section 53a-59 (a) provides in relevant part that "[a] person is guilty of assault in the first degree when . . .

(3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person . . . .”[6] General Statutes § 53a-3 (4) defines “serious physical injury” as “physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ . . . .” “Whether an injury constitutes a ‘serious physical injury’ . . . is a fact intensive inquiry and, therefore, is a question for the jury to determine.” *State* v. *Irizarry*, 190 Conn. App. 40, 45, 209 A.3d 679, cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019). “[Despite] the difficulty of drawing a precise line as to where physical injury leaves off and serious physical injury begins . . . we remain mindful that [w]e do not sit as a [seventh] juror who may cast a vote against the verdict based upon our feeling that some doubt of guilt is shown by the cold printed record . . . and that we must construe the evidence in the light most favorable to sustaining the verdict.” (Internal quotation marks omitted.) Id., 45 n.6.

[6] Although the defendant argues that the victim’s injuries did not expose her to a risk of death, his argument in this regard appears to be directed to whether the victim suffered a serious physical injury and not to the other elements of § 53a-59 (a) (3). In fact, he specifically states in his principal brief: “It is the appellant’s contention that the state failed to prove that the defendant caused serious physical injury to [the victim].” To the extent that the defendant’s reference to the victim not having faced a risk of death is a challenge to the statutory requirement that the defendant must have created a risk of death, we are not persuaded. It is the defendant’s *actions*, not the results of those actions, which must create a risk of death. See *State* v. *James E.*, 154 Conn. App. 795, 807, 112 A.3d 791 (2015) (“[t]he risk of death element of the [assault in first degree] statute focuses on the conduct of the defendant, not the resulting injury to the victim” (internal quotation marks omitted)), aff’d, 327 Conn. 212, 173 A.3d 380 (2017). The jury reasonably could have concluded that the defendant’s *actions* of dragging the victim down the basement stairs and beating her on three consecutive nights was reckless conduct that evinced an extreme indifference to human life and created a risk of death. That his actions may not have resulted in a risk of death is irrelevant.

We conclude that there was sufficient evidence to support the jury's finding that the defendant caused serious physical injury to the victim. The jury reasonably could have concluded that the defendant caused the victim either serious disfigurement or serious loss or impairment of the function of any bodily organ.

" 'Serious disfigurement' is an impairment of or injury to the beauty, symmetry or appearance of a person of a magnitude that substantially detracts from the person's appearance from the perspective of an objective observer. In assessing whether an impairment or injury constitutes serious disfigurement, factors that may be considered include the duration of the disfigurement, as well as its location, size, and overall appearance. Serious disfigurement does not necessarily have to be permanent or in a location that is readily visible to others." *State* v. *Petion*, 332 Conn. 472, 491, 211 A.3d 991 (2019).

In *State* v. *Barretta*, 82 Conn. App. 684, 846 A.2d 946, cert. denied, 270 Conn. 905, 853 A.2d 522 (2004), the following evidence was presented concerning the victim's injuries: "[T]he victim sustained numerous severe bruises, abrasions and contusions across the trunk of his body. He also had an imprint and welts on his back that caused his skin to be a varied color of purple and blue, with additional visible injuries to his upper left shoulder and neckline. Further abrasions were visible on his collarbone, and there were bruises on his breastbone. Additionally, the medical testimony, given by an attending physician's assistant, described extensive and severe bruising that covered more of the victim's body than the photographs reflected and caused the victim to be tender to pressure across his back and left side." Id., 690. This court noted that "the term 'serious physical injury' does not require that the injury be permanent," "a victim's complete recovery is of no consequence," and "the fact that the skin was not penetrated [is not]

dispositive." Id., 689–90. On the basis of the evidence in the *Barretta* record, this court could not conclude that the jury unreasonably found that the victim suffered serious physical injury, namely, serious disfigurement. Id., 690.

In this case, the victim and Chen testified consistently with one another as to the extensive bruising that covered the victim's body. The victim's scalp, face, chest, back, legs, arms, and left side were all bruised. Chen testified that the victim's bruising was "literally everywhere . . . ." Moreover, the victim had a subconjunctival hemorrhage in her left eye, had portions of her hair torn out, and experienced tenderness in various parts of her body. Simmons corroborated the visibility of the victim's injuries, noting that when he met with her at the medical center, he observed her as having missing hair, a swollen face, and a bloodshot eye. In addition, photographs of the victim's injuries were admitted into evidence for the jury to view during its deliberations. Although there was no evidence that the victim's injuries left permanent scarring, there was ample evidence as to the visibility of the bruising that covered much of the victim's body and of the noticeable injuries to her head and face. Under the factors set forth in *Petion*, and in light of the guidance of *Barretta*, we cannot conclude that there was insufficient evidence from which the jury could find that the victim suffered serious disfigurement and, thus, serious physical injury.[7]

[7] We note that *Barretta* was decided prior to *Petion*, and that in *Petion*, our Supreme Court remarked that, in *Barretta*, this court did not consider how the dictionary definition of "disfigurement" was modified by the term "serious." *State* v. *Petion*, supra, 332 Conn. 480 n.7. The court in *Petion* declined to express a view as to whether *Barretta* was correctly decided. Id.

Thereafter, the court in *Petion* concluded that the scar from a knife wound on the victim's left arm was insufficient to constitute serious disfigurement. Id., 477, 494–95. Nevertheless, the court stated that it "agree[d] that, in assessing the seriousness of the disfigurement, the jury was not limited to considering the injury in its final, fully healed state. See, e.g., *State* v. *Barretta*, supra, 82 Conn. App. [690] (contusions and severe bruising all over body from beating with baseball bat established serious disfigurement)."

We now turn to whether the jury reasonably could have concluded that the defendant caused the victim serious loss or impairment of the function of any bodily organ.[8] In *State* v. *Rumore*, 28 Conn. App. 402, 613 A.2d 1328, cert. denied, 224 Conn. 906, 615 A.2d 1049 (1992), this court held that the jury reasonably could have concluded that the victim suffered serious impairment of the function of any bodily organ on the basis of evidence that the victim became unconscious after the defendant grabbed her by her ankles, causing her to fall to the ground. Id., 405, 415. More specifically, the court stated that § 53a-3 (4) "does not require that the impairment of the organ be permanent. The jury could properly interpret the evidence to prove that the victim's brain was not functioning at a cognitive level when she was unconscious and thus was impaired." Id., 415. In this case, the victim testified that, during one of the three nights when she was beaten by the defendant in the basement, she lost consciousness. The victim's testimony was corroborated by Chen, who testified that the victim informed medical center staff that she lost consciousness at some point during the defendant's repeated beating of her. The jury was free to credit or disregard this testimony.[9] See id. ("[i]t is axiomatic that

State v. *Petion*, supra, 322 Conn. 497. The court was not convinced, however, that the appearance of the victim's injury prior to its healing was sufficient to constitute serious disfigurement. Id.

Although *Barretta*'s viability in the wake of *Petion* has not been examined, we conclude that there was sufficient evidence in this case from which the jury reasonably could find that the victim's injuries persisted throughout her head and body and, thus, were sufficient to constitute serious disfigurement under the *Petion* factors.

[8] Although it is not necessary, we discuss an additional type of serious physical injury to the victim that reasonably could have been found by the jury.

[9] The defendant argues that because the victim self-reported her loss of consciousness, without any details as to its timing, and did not receive any treatment, there is insufficient evidence of an impairment of the function of a bodily organ. We disagree because the defendant's arguments correspond to the weight of the evidence that was presented to the jury regarding the victim's loss of consciousness, not its sufficiency.

it is the function of the jury to consider the evidence, draw reasonable inferences from the facts proven and to assess the credibility of witnesses"). On the basis of this testimony, we conclude that there was sufficient evidence from which the jury reasonably could have found that the victim suffered a serious loss or impairment of the function of any bodily organ and, thus, a serious physical injury.[10] See id.

II

The defendant next claims that there was insufficient evidence to convict him of five counts of risk of injury to a child. The defendant argues that his conviction of those counts was predicated on the children having been found by the police in the basement of the apartment and that he "did nothing to encourage or orchestrate the children being placed in the basement." (Emphasis omitted.) The state responds that "the cumulative force of the evidence established that the defendant's conduct—beating the children's mother—led to a series of situations inimical to the children's psychological or mental health." We agree with the state and, accordingly, reject the defendant's claim.

Section 53-21 (a) provides in relevant part that "[a]ny person who (1) wilfully or unlawfully causes or permits any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired, or does any act likely to impair the health or morals of any such child . . . shall be guilty of (A) a

[10] The defendant argues that the victim's decision not to go to the hospital for further evaluation and, instead, to travel to Georgia with her children, who she was actively caring for, supports a conclusion that the victim did not have a serious physical injury. We reject this argument because the testimony relied on by the defendant does not displace the evidence from which the jury reasonably could have concluded that the victim suffered a serious physical injury.

class C felony for a violation of subdivision (1) . . . .'' ''The general purpose of § 53-21 is to protect the physical and psychological well-being of children from the potentially harmful conduct of adults. . . . Our case law has interpreted § 53-21 [a] (1) as comprising two distinct parts and criminalizing two general types of behavior likely to injure physically or to impair the morals of a minor under sixteen years of age: (1) deliberate indifference to, acquiescence in, or the creation of situations inimical to the minor's moral or physical welfare . . . and (2) acts directly perpetrated on the person of the minor and injurious to his moral or physical well-being. . . . Thus, the first part of § 53-21 [a] (1) prohibits the creation of *situations* detrimental to a child's welfare, while the second part proscribes injurious *acts* directly perpetrated on the child. . . .

''Under the situation portion of § 53-21 [a] (1), the state need not prove actual injury to the child. Instead, it must prove that the defendant wilfully created a situation that posed a risk to the child's health or morals. . . . The situation portion of § 53-21 [a] (1) encompasses the protection of the body as well as the safety and security of the environment in which the child exists, and for which the adult is responsible.'' (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 147–48, 869 A.2d 192 (2005). ''Because risk of injury to a child is a general intent crime, proof of [s]pecific intent is not a necessary requirement . . . . Rather, the intent to do some act coupled with a reckless disregard of the consequences . . . of that act is sufficient to [establish] a violation of the statute. . . . As a general intent crime, it is unnecessary for the [defendant to] be aware that his conduct is likely to impact a child [under age sixteen].'' (Citations omitted; internal quotation marks omitted.) *State* v. *James E.*, 327 Conn. 212, 223, 173 A.3d 380 (2017).

In a substitute information, the state charged the defendant with five counts of risk of injury to a child in connection with conduct "beginning on or about November 27, 2016 through December 22, 2016," that "wilfully and unlawfully cause[d] a child under sixteen (16) years of age . . . to be placed in a situation that his health and morals were likely to be impaired."[11] The information thus reflects that the state charged the defendant under the "situation" portion of § 53-21 (a) (1). Accordingly, the state did not have to prove actual harm to the children but, rather, that the defendant had the general intent to perform an act that created a situation putting the children's health and morals at risk of impairment. We conclude that there was sufficient evidence from which the jury reasonably could have found the defendant guilty of five counts of risk of injury to a child.

On three consecutive nights, the defendant, by forcing the victim down into the basement, beating her, and not permitting her to leave the basement until morning when they went up together, rendered the victim incapable of caring for her children, who ranged in age from fifteen months to thirteen years and were located alone on the upper floors of their home. In so doing, the defendant risked the health of the minor children, as they had no access to parental care during these three nights. See *State* v. *Branham*, 56 Conn. App. 395, 398–99, 743 A.2d 635 (evidence that defendant left three young children unattended in apartment for approximately one hour deemed sufficient for jury to find that physical well-being of children was put at risk), cert. denied, 252 Conn. 937, 747 A.2d 3 (2000); *State* v. *George*, 37 Conn. App. 388, 389–90, 656 A.2d 232 (1995) (affirming

[11] Contrary to the defendant's argument that his conviction of five counts of risk of injury to a child were based on the children having been found by the police in the basement of the apartment, the state's charging document, the evidence presented at trial, and the state's closing arguments reveal that the basis of the state's charges was the defendant's continuing course of conduct from November 27, 2016, through December 22, 2016.

defendant's conviction of risk of injury to child for leaving seventeen month old infant unattended in car between 8 and 9 p.m.).[12]

Moreover, the defendant's beating of the victim left her with numerous, visible physical injuries that were observed by the children. At trial, Wendy Levy, a clinical psychologist, testified that children witnessing a caregiver with physical injuries caused by abuse can be traumatized because they could develop a fear that they, too, will be subjected to abuse. The jury was free to credit Levy's testimony and to infer that, because the children in this case observed the extensive physical injuries to the victim, their mother and caregiver, they may have been traumatized. See, e.g., *State* v. *Thomas W.*, 115 Conn. App. 467, 475, 974 A.2d 19 (2009), aff'd, 301 Conn. 724, 22 A.3d 1242 (2011); see id., 475–76 ("[I]t is within the province of the jury to draw reasonable and logical inferences from the facts proven. . . . The jury may draw reasonable inferences based on other inferences drawn from the evidence presented." (Internal quotation marks omitted.)). Because the defendant's beating of the victim established this potential sequence, the jury reasonably could have inferred that he put the children at risk of impairment of their health and morals.

III

The defendant's next claim is that there was insufficient evidence to convict him of unlawful restraint in the first degree because there was no evidence presented to the jury of (1) a substantial risk of injury to the victim or (2) an intent to unlawfully restrain that was independent from his intent to commit assault under § 53a-59 (a) (3). We disagree.

[12] During oral argument before this court, the defendant's appellate counsel argued that the thirteen year old child could care for the six younger children. Counsel provided no support for this argument and we find it imprudent and unavailing.

Under § 53a-95 (a), "[a] person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury." " 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent." General Statutes § 53a-91 (1). "Physical injury" is defined as "impairment of physical condition or pain . . . ." General Statutes § 53a-3 (3). "Merriam-Webster's Collegiate Dictionary (10th Ed. 1999) defines 'substantial' as 'real' and 'considerable,' and courts often have defined the word 'substantial' in that way." *State* v. *Dubose*, 75 Conn. App. 163, 174–75, 815 A.2d 213, cert. denied, 263 Conn. 909, 819 A.2d 841 (2003).

"Unlawful restraint in the first degree is a specific intent crime. . . . A jury cannot find a defendant guilty of unlawful restraint unless it first [finds] that he . . . restricted the victim's movements with the intent to interfere substantially with her liberty. . . . [A] restraint is unlawful if, and only if, a defendant's conscious objective in . . . confining the victim is to achieve that prohibited result, namely, to restrict the victim's movements in such a manner as to interfere substantially with his or her liberty." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *State* v. *Jackson*, 184 Conn. App. 419, 433–34, 194 A.3d 1251, cert. denied, 330 Conn. 937, 195 A.3d 386 (2018). "To convict a defendant of unlawful restraint in the first degree, no actual physical harm must be demonstrated; the state need only prove that the defendant exposed the victim to a substantial risk of physical injury." (Internal quotation marks omitted.) *State* v. *Cotton*, 77 Conn. App. 749, 776, 825 A.2d 189, cert. denied, 265 Conn. 911, 831 A.2d 251 (2003).

We reject the defendant's argument that, under the circumstances of this case, the intent to commit unlawful restraint under § 53a-95 (a) was one and the same with the intent to commit the assault in the first degree under § 53a-59 (a) (3). Our appellate guidance reflects that the requisite mental states for each crime are distinct from one another. Compare *State* v. *Colon*, 71 Conn. App. 217, 226, 800 A.2d 1268 (concluding that § 53a-59 (a) (3) requires that the defendant "must be shown to have had *the general intent to engage in conduct evincing an extreme indifference to human life*" (emphasis added)), cert. denied, 261 Conn. 934, 806 A.2d 1067 (2002), with *State* v. *Jackson*, supra, 184 Conn. App. 433 ("[a] jury cannot find a defendant guilty of unlawful restraint unless it first [finds] that he . . . restricted the victim's movements with *the intent to interfere substantially with her liberty*" (emphasis added; internal quotation marks omitted)). The victim testified that, in the early morning hours of November 28, 2016, the defendant seized her by her hair and dragged her down into the basement, where he proceeded to beat her. On the basis of this evidence, the jury reasonably could have found that the defendant evinced an intent to restrict the victim's liberty, namely, her liberty to move freely within the house. Separately, the jury reasonably could have found that the defendant evinced an extreme indifference to human life on the basis of his independent acts of kicking, punching, and choking the victim in the basement for three consecutive nights after dragging her down the stairs.[13]

We further reject the defendant's argument that there was insufficient evidence of a substantial risk of injury

[13] The defendant did not contest the sufficiency of the evidence as to the intent element of the charge of assault in the first degree under § 53a-59 (a) (3). See part I of this opinion. We discuss the evidence presented to the jury that supports the defendant's intent to commit an assault to illustrate the severability of that evidence from the evidence supporting the defendant's intent to unlawfully restrain the victim.

to the victim. On the basis of the evidence presented at trial, the jury reasonably could have found that the defendant's act of dragging the victim down a full flight of stairs by her hair subjected her to a substantial risk of injury because it presented a "real" or "considerable" opportunity for her to have suffered an impairment to her physical condition or to have suffered pain. See General Statutes § 53a-3 (3); *State* v. *Dubose*, supra, 75 Conn. App. 174–75.

IV

The defendant's final claim is that the trial court abused its discretion in admitting evidence of his prior misconduct on the ground that it was relevant and that its probative value outweighed its prejudicial tendencies. In response, the state maintains that the trial court acted well within its discretion in admitting the prior misconduct evidence after finding it relevant and not unduly prejudicial. We agree with the state.

The following additional facts and procedural history are relevant to the defendant's claim. On September 20, 2017, pursuant to § 4-5 of the Connecticut Code of Evidence, the state filed a notice of misconduct evidence regarding its intent to offer evidence of other crimes, wrongs or acts involving the defendant and the victim.[14] In its September 20, 2017 notice of misconduct evidence, the state set forth specific incidents of prior misconduct involving the defendant and the victim, as well as its intent to offer additional evidence with respect to the "violent and abusive nature of [their] relationship . . . ." The specific incidents of prior misconduct included (1) "[a]n assault by the defendant,

[14] The state filed an initial notice of misconduct evidence on September 11, 2017. On September 19, 2017, the defendant filed a "motion in limine for an evidentiary hearing to determine whether the misconduct evidence described in the state's notice filed on September 11, 2017 is admissible in the trial of this case."

which caused injuries to [the victim] as well as her sister . . . [that] included a broken neck in December of 2011" (first assault),[15] and (2) "[a]n assault by the defendant on [the victim] wherein he hit [her] in the head with a dog chain, causing [an] injury to [her] head" (second assault).[16] The state argued that the prior misconduct evidence was admissible because it was "relevant to each of the offenses charged"—assault in the first degree, unlawful restraint in the first degree,[17] strangulation in the first degree, five counts of risk of injury to a child, and tampering with a witness.[18]

Thereafter, on September 20, 2017, the court heard arguments on the defendant's motion in limine. See footnote 14 of this opinion. In support of his argument that the prior misconduct evidence is inadmissible, defense counsel contended that, when the prior misconduct is extrinsic, namely, separate and distinct from the crime charged, the use of uncharged misconduct

[15] In its September 20, 2017 notice of misconduct evidence, the state disclosed that "[t]hese [injuries] [pertaining to the first assault] were the subject matter of the defendant's conviction for assault in the second and third degree in 2013."

[16] In its notice, the state also stated its intent to offer evidence of "[a]n assault in the street in Bridgeport sometime in the course of the defendant's relationship with [the victim]" (third assault), and "[a]n assault wherein the defendant hit [the victim] in the mouth, causing bleeding" (fourth assault).

[17] With respect to the charge of unlawful restraint in the first degree, the state argued that "[t]he evidence is relevant to the defendant's intent, identity, malice, motive, absence of mistake, element of the crime and completing the prosecution story." Specifically pertaining to the elements of the crime of unlawful restraint in the first degree, the state argued that the evidence demonstrates the victim's "fear of the defendant," which is relevant to its proof "that [the victim] did not consent to the restraint."

[18] With respect to the charge of tampering with a witness, the state argued that "[t]he evidence is relevant to the defendant's intent, identity, malice, motive, absence of mistake, element of the crime and completing the prosecution story. Specifically with respect to the elements of the crime of tampering with a witness, the state argued that the evidence is relevant to its proof "that the defendant induced or attempted to induce the witness to testify falsely/withhold testimony/elude legal process."

to prove intent is practically indistinguishable from prohibited propensity evidence. Defense counsel further maintained that the state offered the prior misconduct evidence as being relevant to its proof of the defendant's intent with respect to "all but one of the charges," and that the other grounds of relevance posited by the state do not apply. Given the alleged "problems with the probative value" and "the inflammatory nature of this type of evidence," defense counsel argued, each incident of prior misconduct should be excluded from evidence because "the probative value . . . is far outweighed by [its] prejudicial tendency . . . ."

In response to the defendant's arguments, the prosecutor maintained that the prior misconduct evidence demonstrates the defendant's "ongoing abusive relationship" with the victim, which is "threaded through all of these particular charges" at issue in this case and tends to demonstrate "the reasons for [the victim's] actions." Specifically, the prosecutor argued that the prior misconduct evidence is relevant to "the coercive nature" of the defendant's relationship with the victim, "[the victim's] fear of whether or not she was consenting to going down in the basement and being restrained by the defendant," "whether or not [the victim is going] to try and recant her statement," as well as other "significant and essential elements that the state needs to prove," such as the "fear of [the defendant] and [his] coercive nature that this victim was suffering from" and the defendant's "malice, motive [and] intent."

Citing § 4-5 of the Connecticut Code of Evidence, the court stated that, "for evidence of prior misconduct to fall within the exception of the general rule prohibiting the admission—so again, I do acknowledge that the general rule is to prohibit such admission—the evidence must first be relevant and material to at least one of

the circumstances encompassed by the exceptions.[19] And second, the probative value of such evidence must outweigh its prejudicial effect. And so we have a two part test that needs to be addressed." (Footnote added.) Moreover, the court "agree[d] with the defen[dant] that certainly evidence of wrongful acts or uncharged misconduct [is] not relevant to try to suggest that because a defendant has done something in the past that . . . therefore, he has done [it] in this case as well. And, therefore, it is necessary to find this nexus in terms of the intent, identity, malice, motive aspect with regard to the admission of [the] misconduct."

The court first concluded that the prior misconduct evidence was not relevant to the charges of risk of injury to a child or assault in the first degree. Next, the court concluded that the prior misconduct evidence was relevant to the charges of unlawful restraint in the first degree, tampering with a witness and strangulation in the first degree. Specifically, the court stated that, "the tampering, the unlawful restraint and the strangulation all involve different levels of intent. They . . . are specific intent crimes. And the intents go to different things. And those intents, in this court's opinion, do make the misconduct [evidence] relevant and probative." The court further indicated that, with respect to each of these counts, the state could offer the prior misconduct evidence for "multiple purposes from going to intent, identity, malice, motive, absence of mistake or accident and certainly knowledge and a system of criminal activity." Moreover, the court noted that the prior misconduct evidence "also corroborates evidence

[19] Previously in its decision, the court noted the exceptions to the general rule prohibiting misconduct evidence as follows: "[The prior misconduct evidence] has to go to prove intent. Again, any malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity or an element to the crime or, finally, to corroborate prosecution testimony."

that's going to be coming in throughout the course of the trial."

Finally, the court concluded that "the probative value [of the prior misconduct evidence] does outweigh any prejudicial impact." In making this determination, the court stated: "I will give an instruction to the jury talking about the [para]meters that they may use as misconduct and talking about the fact that it does not apply to certain counts. And I will ask the defense to let [the court] know if [he] want[s] that done at the time that the testimony is given specifically. And again, it's probably going to be multiple times. Or to save it for the end of the day or to save it for the jury charge in total."[20]

[20] After the court admitted evidence of the defendant's prior misconduct, it instructed the jury as follows: "I know you heard in my initial instructions this morning that there might be times when evidence is admitted for what is known as a limited purpose. And so my instruction specifically relates to that because there's evidence that was admitted through the course of [the victim's] testimony which was admitted for a limited purpose and so I'm going to instruct you on that right now.

"The state has offered evidence of what is known as other acts of misconduct of the defendant. And I'm going to specifically reference you . . . to the testimony and the questioning that related to prior acts of assaultive behavior and conduct by the defendant upon [the victim], specifically the chain that was referenced and the broken neck, all right. This is not being admitted to prove the bad character, the propensity or the criminal tendencies of the defendant.

"Such evidence is being admitted solely to establish an element of the crime such as the intent, the identity, motive or commission of the crime, absence of mistake or accident and or to complete the story that is being presented by the prosecution. So it specifically goes to those items; intent, identity, motive, absence of mistake or knowledge. You may not consider such evidence as establishing a predisposition on the part of the defendant to commit any of the crimes charged or to demonstrate a criminal propensity.

"You may consider such evidence if you believe it and further find that it logically, rationally and conclusively supports the issues for which it is being offered by the state, but only as it may bear upon those issues; so to establish an element of the crime, to go towards intent, identity, motive, absence of mistake or accident or to complete the story that the prosecution is providing.

"You may consider such evidence if you believe it and further again if you find that it is logically and rationally conclusive of those aspects. On the other hand, if you do not believe that such evidence or even if you do

Moreover, in support of this determination, the court stated that "there's nothing that is coming in right now that I'm necessarily finding to be so prejudicial in and of itself that it outweighs the probative value [of the prior misconduct evidence]. Again, I'm not hearing that it involves a knife, that it's gruesome, that it involves facts or pictures that are going to be so prejudicial to this jury that they will not be able to properly evaluate it and properly adhere to the instructions that I give to them, which is to limit it to the [para]meters of the specific charges and the specific purpose of its admission." Accordingly, the court concluded that "the misconduct [evidence] is relevant and probative, and that the probative value outweighs the prejudicial impact as to the counts relating to the unlawful restraint in the first degree, strangulation in the first degree and tampering" with a witness.

At trial, the state offered, and the court admitted, prior misconduct evidence pertaining to the first assault and the second assault.[21] During the prosecutor's direct

believe it but you find that it does not logically, rationally and conclusively support those issues for which it is being offered by the state you may not consider that testimony for any other purpose.

"You again may not consider evidence of other misconduct of the defendant for any purpose other than the ones that I have just told you, because it may predispose your mind critically to believe that the defendant may be guilty of the offense here charged merely because of the alleged other misconduct. For this reason you may consider this evidence only on the issues again that I told you—motive, intent, malice, to complete the story, to prove an element of the crime to show an absence of mistake and only for those purposes and for no other.

"Now I'm going to add to that by telling you this. This evidence of misconduct does not apply to some of the counts, but does apply to others. It does not apply to count one, assault in the first degree, and it does not apply to any of the risk of injury counts, okay. But it does apply to the unlawful restraint in the first degree, strangulation in the first degree and the count of tampering with a witness, okay.

"So that is again a limiting instruction with regard to how you can use certain pieces of evidence."

[21] In its supplemental brief, the state notes that, "[a]lthough [its] notice of misconduct evidence . . . indicated its intent to offer evidence of other prior misconduct, the record demonstrates that [it] only elicited testimony

examination of the victim, the victim testified specifically with respect to the first assault that her "neck was broken" by the defendant, and, with respect to the second assault, that the defendant "beat [her] with a dog chain . . . ." In her closing arguments, the prosecutor referenced specifically the prior misconduct evidence, and referenced generally the history of domestic violence between the victim and the defendant. Of the counts for which the prior misconduct evidence was admitted, the jury found the defendant guilty of unlawful restraint in the first degree in violation of § 53a-95 (a) and tampering with a witness in violation of § 53a-151,[22] and not guilty of strangulation in the first degree.[23]

We begin by setting forth the applicable standard of review and principles of law that guide our analysis. "We review the trial court's decision to admit evidence, if premised on a correct view of the law . . . for an abuse of discretion. . . .

"As a general rule, evidence of prior misconduct is inadmissible to prove that a defendant is guilty of the crime of which he is accused. . . . Nor can such evidence be used to suggest that the defendant has a bad character or a propensity for criminal behavior. . . . In order to determine whether such evidence is admissible, we use a two part test. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions. Second, the

concerning [the first assault] and [the second assault]." See footnote 16 of this opinion.

[22] General Statutes § 53a-151 (a) provides: "A person is guilty of tampering with a witness if, believing that an official proceeding is pending or about to be instituted, he induces or attempts to induce a witness to testify falsely, withhold testimony, elude legal process summoning him to testify or absent himself from any official proceeding."

[23] In light of the defendant's acquittal of the charge of strangulation in the first degree, the propriety of the court's admission of evidence of the defendant's prior misconduct with respect to that charge is not at issue in this appeal.

probative value of [the prior misconduct] evidence must outweigh [its] prejudicial effect . . . . The primary responsibility for making these determinations rests with the trial court. 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. . . .

"Under the first prong of the test, the evidence must be relevant for a purpose other than showing the defendant's bad character or criminal tendencies. . . . Recognized exceptions to this rule have permitted the introduction of prior misconduct evidence to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony. Conn. Code Evid. § 4-5 [c]. . . .

"The official commentary to § 4-5 (c) states in relevant part: Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered, and that its probative value outweighs its prejudicial effect. . . . The purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person's bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors. . . . Conn. Code Evid. § 4-5 (c), commentary." (Citations omitted;

emphasis omitted; footnote omitted; internal quotation marks omitted.) *State* v. *Gerald A.*, 183 Conn. App. 82, 106–107, 191 A.3d 1003, cert. denied, 330 Conn. 914, 193 A.3d 1210 (2018).

On appeal, the defendant claims that the trial court abused its discretion in admitting evidence of his prior misconduct for the state's proof of unlawful restraint in the first degree and tampering with a witness because "[t]he probative value of the prior misconduct evidence on the unlawful restraint and tampering with a witness charges is at best tenuous, if not nonexistent, and is not sufficient to survive the balancing test with its prejudicial tendencies." Specifically, with respect to the probative value of the prior misconduct evidence, the defendant contends that the evidence was not probative of intent, identity, absence of mistake or motive because the prior misconduct and the charges of unlawful restraint in the first degree and tampering with a witness were not factually similar enough in nature. We are not persuaded.

We first consider the probative value of the prior misconduct evidence with respect to the count of unlawful restraint in the first degree. The court found that the prior misconduct evidence was relevant to, inter alia, the defendant's intent to restrain the victim. In admitting the prior misconduct evidence for this purpose, the court relied on *State* v. *Franko*, 142 Conn. App. 451, 64 A.3d 807, cert. denied, 310 Conn. 901, 75 A.3d 30 (2013).

In *Franko*, the defendant appealed from his conviction of one count of kidnapping in the second degree in violation of General Statutes § 53a-94 (a), claiming that "the trial court abused its discretion in denying his motion in limine to exclude certain evidence of prior uncharged misconduct." Id., 453. On appeal, this court determined that prior misconduct evidence of the

defendant's "verbal and physical abuse [of the victim] starting three months into their relationship"; id., 455–56; was relevant to the defendant's "intent to abduct the victim, and thereby restrain the victim's movement on the date of the kidnapping." Id., 461. Specifically, this court determined that, "[a]lthough there is no element in the kidnapping statutes that explicitly requires proof of the victim's state of mind, [our Supreme Court] has stated that evidence that is probative of the victim's state of mind may be admissible . . . when that state of mind is independently relevant to other material issues in the case. . . . Thus, when a defendant . . . is charged with [second] degree kidnapping and the jury is instructed on the meaning of abduct, which requires a finding that the defendant restrained the victim with intent to prevent his liberation by . . . using or threatening to use physical force or intimidation . . . the trial court may allow the jury to consider evidence that the victim reasonably believed that force would be used if he or she tried to escape as proof that the defendant intended to prevent the victim's liberation by threats or intimidation. . . . Because intent is almost always proved, if at all, by circumstantial evidence, prior misconduct evidence, where available, is often relied upon." (Citations omitted; internal quotation marks omitted.) Id., 461.

In the present case, the court correctly noted that unlawful restraint in the first degree is a specific intent crime. In accordance with the state's burden to prove the essential element of unlawful restraint in the first degree that the defendant restrained the victim, the state was required to prove that the defendant "restrict[ed] [the victim's] movements *intentionally and unlawfully* in such a manner as to interfere substantially with [the victim's] liberty . . . *without consent*." (Emphasis added.) General Statutes § 53a-91 (1). As in *Franko*, the

court in the present case found that the prior misconduct evidence, which tended to demonstrate that the victim reasonably believed that the defendant would use force if she tried to escape, was probative of whether the defendant intended to restrict the victim's movements in such a manner as to interfere substantially with the victim's liberty. In relying on *Franko*, the court properly determined that the prior misconduct evidence was probative of the defendant's intent to restrain the victim and, thus, was relevant to the count of unlawful restraint in the first degree.

Next, we consider the probative value of the prior misconduct evidence with respect to the count of tampering with a witness. The court found that the prior misconduct evidence was relevant to, inter alia, the defendant's intent to tamper with the victim's statement to the police. In admitting the prior misconduct evidence for this purpose, the court relied on *State* v. *Kantorowski*, 144 Conn. App. 477, 72 A.3d 1228, cert. denied, 310 Conn. 924, 77 A.3d 141 (2013).

In *Kantorowski*, this court determined that prior misconduct evidence of the defendant's two prior assaults of the victim was relevant to the defendant's intent in making subsequent harassing and threatening phone calls. Id., 483, 487. Specifically, this court determined that, "[t]o obtain a conviction for [harassment in the second degree in violation of General Statutes § 53a-183 (a) (3)], the state had the burden to prove, beyond a reasonable doubt, the defendant's intent to harass, annoy or alarm the victim; as to the latter offense [of threatening in the second degree in violation of General Statutes § 53a-62 (a) (2)], the state had to prove the defendant's intent to terrorize the victim . . . [which] means to scare or to cause intense fear or apprehension. . . . Because intent is almost always proved, if at all, by circumstantial evidence, prior misconduct evidence, where available, is often relied upon. . . . When

instances of a criminal defendant's prior misconduct involve the same victim as the crimes for which the defendant presently is being tried, those acts are especially illuminative of the defendant's motivation and attitude toward that victim, and, thus, of his intent as to the incident in question. . . . [T]he defendant's . . . telephone calls need to be understood in [the] context of [the defendant's and the victim's] entire relationship. The uncharged misconduct evidence that the defendant previously had choked the victim and had broken her nose by slamming her face into the floor provided context as to whether he actually intended to cause her to be harassed, annoyed, alarmed or terrorized by his verbal threat." (Citations omitted; internal quotation marks omitted.) Id., 488–89.

In the present case, the court correctly noted that tampering with a witness is a specific intent crime. As our Supreme Court has stated, "[§] 53a-151 (a) applies to any conduct that is *intended* to prompt a witness to testify falsely or refrain from testifying in an official proceeding that the perpetrator believes to be pending or imminent. . . . It is important to note that [i]ntent may be, and usually is, inferred from the defendant's verbal or physical conduct. . . . Intent may also be inferred from the surrounding circumstances. . . . The use of inferences based on circumstantial evidence is necessary because direct evidence of the accused's state of mind is rarely available. . . . Furthermore, it is a permissible, albeit not a necessary or mandatory, inference that a defendant intended the natural consequences of his voluntary conduct." (Citations omitted; emphasis altered; internal quotation marks omitted.) *State* v. *Lamantia*, 336 Conn. 747, 756–57, 250 A.3d 648 (2020). As in *Kantorowski*, the court in the present case found that the prior misconduct evidence, which contextualized the defendant's instruction that the victim "fix" her statement to the police and tended to

demonstrate that the victim reasonably believed that the defendant would use force if she did not comply, was probative of the defendant's intent with respect to his actions. In relying on *Kantorowski*, the court properly determined that the prior misconduct evidence was probative of the defendant's intent to tamper with the victim's testimony. Thus, the court properly determined that the prior misconduct evidence was relevant to the count of tampering with a witness.

Finally, we consider the trial court's determination that the probative value of this evidence outweighed its prejudicial effect. "Section 4-3 of the Connecticut Code of Evidence . . . provides that [r]elevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. [T]he determination of whether the prejudicial impact of evidence outweighs its probative value is left to the sound discretion of the trial court judge and is subject to reversal only where an abuse of discretion is manifest or injustice appears to have been done. . . . [Our Supreme Court] has previously enumerated situations in which the potential prejudicial effect of relevant evidence would counsel its exclusion. Evidence should be excluded as unduly prejudicial: (1) where it may unnecessarily arouse the [jurors'] emotions, hostility or sympathy; (2) where it may create distracting side issues; (3) where the evidence and counterproof will consume an inordinate amount of time; and (4) where one party is unfairly surprised and unprepared to meet it." (Internal quotation marks omitted.) *State* v. *Gerald A.*, supra, 183 Conn. App. 108–109.

The defendant contends that "[t]he probative value of the prior misconduct evidence was not so strong as to outweigh the significant prejudicial tendencies and

their effects on the jury." In support of this argument, the defendant maintains that the misconduct evidence was "unduly prejudicial because the history [of domestic violence] noted by the state on numerous occasions was likely to arouse the jurors' emotions and sympathy towards [the victim]." Furthermore, the defendant argues that the misconduct evidence "was distracting in the severity and the amount of time and focus it took in the case," and that "it did not apply to over half the counts . . . ." The defendant's arguments are unavailing.

In the present case, the court admitted evidence of two incidents of prior misconduct. With respect to the evidence of the defendant's first assault of the victim, the victim testified specifically that her "neck was broken" by the defendant. With respect to the evidence of the defendant's second assault of the victim, the victim testified specifically that the defendant "beat [her] with a dog chain . . . ." Our review of the record indicates that no additional evidence was adduced that further elaborated on the details of the first assault and the second assault. As the court correctly noted, the two incidents of prior misconduct did not involve gruesome details, facts or photographs.

In contrast, the crimes of which the defendant was convicted in the present case, although similar to the incidents of prior misconduct, involved conduct and injuries that were substantially more gruesome in nature. Specifically, in light of the evidence presented at trial, the prosecutor described in her closing argument the nature of the defendant's conduct and the victim's injuries as follows: "[B]eginning in November of 2016, [the victim] described to you a series of days where she indicated that [the defendant] beat her. He brought her down the basement where he repeatedly beat her. . . . She described how she was restrained by her hair, dragged down there for a period of three

consecutive evenings. . . . In the course of the beating, [the defendant] ripped out large portions of her hair . . . kicked her in the head, choked her to the point of loss of consciousness, beat her by her legs, her back. And as you saw in the photographs that the [s]tate showed and that were taken at the [veterans administration] [h]ospital of her injuries, she had quite a few as described by the doctor. . . . Dark bruises the doctor indicated from head to toe." The prosecutor further argued that "you'll see these photos again of the external injuries that are going on, there's also internal injuries that she's describing; a broken rib, this hemorrhage that you can see in the photograph to her eye. She also described some blurriness and loss of vision and problems with her eye."

Given the limited scope of the prior misconduct evidence and the particularly violent nature of the crimes at issue in the present case, we cannot conclude that the prior misconduct evidence was likely to arouse the jurors' emotions and sympathy toward the victim or that it was distracting in the severity, amount of time and focus that it involved.

Furthermore, the court provided a limiting instruction to the jury on the first day of evidence, coincident with the admission of prior misconduct evidence. The instruction restricted the parameters of the state's use of the prior misconduct evidence to limit its prejudicial effect. See footnote 20 of this opinion. In his principal appellate brief, the defendant acknowledges the court's limiting instruction to the jury and that "the jurors are presumed to have followed such instruction."

For the aforementioned reasons, the court properly determined that the probative value of the prior misconduct evidence is not outweighed by its prejudicial impact. Accordingly, the court did not abuse its discretion in admitting the prior misconduct evidence pertaining to the first assault and the second assault for

the state's proof of unlawful restraint in the first degree and tampering with a witness.

The judgments are affirmed.

In this opinion the other judges concurred.

WENDALL HASAN *v.* COMMISSIONER OF CORRECTION (AC 43433)

Bright, C. J., and Alvord and Pellegrino, Js.

Syllabus

The petitioner, who had been convicted of the crimes of felony murder and burglary in the first degree, sought a third petition for a writ of habeas corpus. The respondent Commissioner of Correction filed a request for an order to show cause why the petition should be permitted to proceed. Following a hearing, at which the petitioner raised for the first time a claim of actual innocence based on purported newly discovered DNA evidence, the habeas court dismissed the third habeas petition as untimely pursuant to the applicable statute (§ 52-470 (d) and (e)), concluding that the petitioner failed to establish good cause for the delay in filing the petition three years after the October 1, 2014 deadline. Thereafter, the petitioner, on the granting of certification, appealed to this court. *Held* that the habeas court properly dismissed the petitioner's third habeas petition pursuant to § 52-470 (d) and (e), the petitioner having failed to overcome the rebuttable presumption that he lacked good cause for filing his petition beyond the statutory deadline; contrary to the petitioner's contention, the petitioner's assertion of a claim of actual innocence and reference to new evidence for the first time at the show cause hearing were not sufficient to overcome the presumption that the delay in filing the petition was without good cause, as they were irrelevant to the habeas court's determination of good cause, the petition having contained only a claim of ineffective assistance of counsel.

Argued May 25—officially released August 10, 2021

Procedural History

Petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the court, *Newson*, *J.*, rendered judgment dismissing

the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Naomi T. Fetterman, for the appellant (petitioner).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *Paul J. Ferencek*, state's attorney, and *Jo Anne Sulik*, senior assistant state's attorney, for the appellee (respondent).

Opinion

PELLEGRINO, J. Following the granting of his petition for certification to appeal, the petitioner, Wendall Hasan, appeals from the judgment of the habeas court dismissing his third petition for a writ of habeas corpus. The petitioner claims that the court improperly dismissed his petition as untimely under General Statutes § 52-470 (d) and (e). We disagree and affirm the judgment of the habeas court.

After being convicted of felony murder and burglary in the first degree, on August 1, 1986, the petitioner filed his first petition for a writ of habeas corpus as a self-represented party, claiming ineffective assistance of trial counsel. The petitioner thereafter was appointed counsel and amended his petition on March 6, 1990. After holding an evidentiary hearing, the habeas court denied the petitioner's first habeas petition. Following the granting of certification to appeal, the petitioner appealed from the denial of his first habeas petition, and this court affirmed the judgment of the habeas court. *Hasan* v. *Warden*, 27 Conn. App. 794, 799, 609 A.2d 1031, cert. denied, 223 Conn. 917, 614 A.2d 821 (1992). On June 29, 2005, the petitioner filed his second petition for a writ of habeas corpus, claiming ineffective assistance of habeas counsel. The petitioner again was appointed counsel, and the habeas court denied the petitioner's second habeas petition. The petitioner then appealed, and this court dismissed the petitioner's

appeal. *Hasan* v. *Commissioner of Correction*, 124 Conn. App. 906, 4 A.3d 1282, cert. denied, 299 Conn. 917, 10 A.3d 1051 (2010).

On October 2, 2017, the self-represented petitioner filed his third petition for a writ of habeas corpus, which is the subject of this appeal.[1] In that petition, he claimed that his counsel in his first habeas proceeding provided ineffective assistance. The petitioner was assigned counsel. On December 21, 2018, the respondent, the Commissioner of Correction, filed a request for an order to show cause pursuant to General Statutes § 52-470 (d) and (e),[2] arguing that the petitioner's third habeas petition was untimely and should therefore be dismissed. Specifically, the respondent claimed that the petitioner was required to file any challenge to his 1986 conviction on or before October 1, 2014, and that his

[1] We note that the petitioner also filed a petition for a writ of habeas corpus in federal court on April 5, 2011. The petitioner's federal habeas petition was dismissed by the District Court; *Hasan* v. *Alves*, United States District Court, Docket No. 3:11-CV-524 (GWC) (D. Conn. May 27, 2016); and the petitioner's motion for the issuance of a certificate of appealability was denied. *Hasan* v. *Alves*, United States District Court, Docket No. 3:11-CV-524 (GWC) (D. Conn. August 9, 2016), appeal dismissed, United States Court of Appeals, Docket No. 16-2961 (2d Cir. January 10, 2017). In this opinion, we refer to the petitioner's October 2, 2017 petition as the third habeas petition because it was the third state petition filed by the petitioner.

[2] General Statutes § 52-470 provides in relevant part: "(d) In the case of a petition filed subsequent to a judgment on a prior petition challenging the same conviction, there shall be a rebuttable presumption that the filing of the subsequent petition has been delayed without good cause if such petition is filed after the later of the following: (1) Two years after the date on which the judgment in the prior petition is deemed to be a final judgment due to the conclusion of appellate review or the expiration of the time for seeking such review; [or] (2) October 1, 2014 . . . .

"(e) In a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon request of the respondent, shall issue an order to show cause why the petition should be permitted to proceed. The petitioner or, if applicable, the petitioner's counsel, shall have a meaningful opportunity to investigate the basis for the delay and respond to the order. If, after such opportunity, the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss the petition. . . ."

third habeas petition, which was filed nearly seven years after the judgment in his second habeas petition became final and three years after October 1, 2014, was not timely filed and, thus, had to be presumed to be delayed without good cause under § 52-470 (d). After a show cause hearing for the petitioner to present evidence of good cause for his untimely filing, during which the petitioner raised for the first time a claim of actual innocence, the habeas court determined that the petitioner had failed to establish good cause and dismissed the petition.[3] The habeas court made the following findings in dismissing the petitioner's third habeas petition pursuant to § 52-470 (d) and (e): "The petitioner has presented no reason why he failed to file this petition by the October 1, 2014 deadline. Even if the court were to accept counsel's argument that the Connecticut Innocence Project has discovered information through the reexamination of DNA . . . that would support an actual innocence claim, the petitioner has failed to provide any 'good cause' for a delay of three years before filing the present petition, which, for the record, is notably absent of any mention of DNA or actual innocence."

The petitioner filed a motion for reconsideration, which was denied by the habeas court. The petitioner then filed a petition for certification to appeal, which the habeas court granted, and this appeal followed.

On appeal, the petitioner claims that the habeas court erroneously dismissed his third habeas petition pursuant to § 52-470 (d) and (e).[4] In support of this claim,

[3] As an alternative ground for dismissal, the habeas court also determined that the petitioner's third habeas petition was barred by the doctrine of res judicata pursuant to Practice Book § 23-29 (3).

[4] The petitioner also claims that the habeas court erroneously dismissed the third habeas petition pursuant to Practice Book § 23-29. See footnote 3 of this opinion. Because we conclude that the habeas court properly dismissed the petitioner's third habeas petition pursuant to § 52-470 (d) and (e), we need not address the petitioner's claim that the court erred in dismissing the petition pursuant to Practice Book § 23-29.

the petitioner argues that § 52-470 (f)[5] permits him to pursue his habeas claim, "regardless of the time limitations delineated in . . . § 52-570 (d)," because he asserted a claim of actual innocence at the show cause hearing.

We begin by setting forth the applicable standard of review. The petitioner's argument that the court should not have dismissed his third habeas petition pursuant to § 52-470 (d) and (e) because he had raised a claim of actual innocence "presents an issue of statutory interpretation over which we exercise plenary review in accordance with the plain meaning rule codified in General Statutes § 1-2z."[6] (Internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, 205 Conn. App. 46, 63, A.3d (2021).

The petitioner claims that, because he asserted a claim of actual innocence before the habeas court in the show cause hearing, "the rebuttable presumption of untimeliness does not apply and [he] should be permitted to pursue his claims." More specifically, the petitioner argues that, "[i]nstead of dismissing [his] petition based on an erroneous statutory interpretation, the habeas court should [have been] concerned that evidence . . . that [may] lead to . . . [an] overturned . . . [conviction] . . . was . . . presented . . . ." We disagree.

The circumstances of the present case are remarkably similar to those of *Antonio A.*, in which the petitioner argued that, "because of the representation of

[5] General Statutes § 52-470 (f) provides in relevant part: "Subsections (b) to (e), inclusive, of this section shall not apply to (1) a claim asserting actual innocence . . . ."

[6] General Statutes § 1-2z provides: "The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered."

his counsel that it was possible that she would pursue an actual innocence claim in an amended petition in the future, the court was obligated to delay the timing of the [good cause] hearing and to afford counsel sufficient time to determine whether they have a good faith basis to present such a weapon to survive possible dismissal." (Internal quotation marks omitted.) *Antonio A.* v. *Commissioner of Correction*, supra, 205 Conn. App. 63. In addressing the petitioner's argument in *Antonio A.*, this court held: "By its terms, § 52-470 (d) applies [i]n the case of *a petition filed* subsequent to a judgment on a prior petition challenging the same conviction, and it gives rise to a rebuttable presumption that the filing of *the subsequent petition* has been delayed without good cause if *such petition* is filed after the occurrences specified therein. . . . Pursuant to § 52-470 (e), [i]n a case in which the rebuttable presumption of delay under subsection . . . (d) of this section applies, the court, upon the request of the respondent, shall issue an order to show cause why *the petition* should be permitted to proceed. . . . Moreover, the statute provides that, [i]f . . . the court finds that the petitioner has not demonstrated good cause for the delay, the court shall dismiss *the petition*. . . .

"As the emphasized language reflects, once the respondent relies on the rebuttable presumption in § 52-470, the court's good cause inquiry is properly focused not on a hypothetical petition that the petitioner may file in the future but on the petition that has been filed by the petitioner." (Citation omitted; emphasis in original; internal quotation marks omitted.) Id., 64.

In the present case, it is undisputed that the petitioner's third habeas petition alleging ineffective assistance of counsel was not timely filed. For this reason, the respondent requested, and the habeas court held, a hearing to determine whether the petitioner had good cause for filing his petition beyond the October 1, 2014 statutory deadline. At this hearing, the petitioner, for

the first time, asserted a claim of actual innocence and argued that his assertion of this claim and the discovery of new evidence was enough to overcome the presumption that he lacked good cause for filing his third habeas petition beyond the deadline. The petitioner's third habeas petition, however, does not contain a claim of actual innocence, nor does it contain any reference to such a claim or to new evidence. As this court held in *Antonio A.*, the habeas court's "inquiry is properly focused not on a hypothetical petition that the petitioner may file in the future but on the petition that *has been filed* by the petitioner." (Emphasis added.) Id. Accordingly, the petitioner's assertion of a claim of actual innocence and reference to new evidence for the first time at the show cause hearing were irrelevant to the habeas court's determination of good cause in the present case because the third habeas petition contained only a claim of ineffective assistance of counsel.[7] Therefore, we conclude that the petitioner failed to overcome the rebuttable presumption that he lacked good cause for filing his petition beyond the statutory deadline and that the court properly dismissed the petitioner's third habeas petition pursuant to § 52-470 (d) and (e).

The judgment is affirmed.

In this opinion the other judges concurred.

---

[7] We acknowledge, and the respondent agrees, that the petitioner is not precluded from filing an additional habeas petition to pursue a claim of actual innocence. See *Kelsey* v. *Commissioner of Correction*, 329 Conn. 711, 720 n.4, 189 A.3d 578 (2018) (holding that "§ 52-470 (f) . . . creates an exception to subsections (c) through (e) for petitioners asserting [claims of] actual innocence" (internal quotation marks omitted)).

LAUREL B. BELLERIVE *v.* THE GROTTO, INC., ET AL.
(AC 44138)

Cradle, Suarez and Bear, Js.

Syllabus

The defendant employer G Co. appealed to this court from the decision of the Compensation Review Board, which reversed the decision of the Workers' Compensation Commissioner concluding that G Co.'s workers' compensation insurance policy, issued by the defendant L Co., was still in effect on March 1, 2016, the date on which the plaintiff sustained a compensable injury while at work. In September, 2015, L Co. issued G Co. a workers' compensation insurance policy. In October, 2015, L Co. issued a cancellation notice with an effective cancellation date of November 3, 2015, and filed the cancellation notice with the National Council on Compensation Insurance. In February, 2016, L Co. sent G Co. an endorsement to the insurance policy. In April, 2016, G Co. was sent a prorated portion of its previously paid premium. The plaintiff filed a workers' compensation claim against G Co. in May, 2016, and L Co. denied coverage. After a hearing, the commissioner found that coverage was in place on the date of the plaintiff's injury and that the cancellation notice did not comply with certain statutory (§ 31-321) requirements. L Co. appealed to the board, which reversed the commissioner's decision. *Held* that the board properly determined that the insurance policy was cancelled effectively on November 3, 2015, and that there was no insurance coverage on the date of the plaintiff's injury: L Co.'s electronic notice of the cancellation to NCCI was sufficient to comply with the requirements that insurance companies notify the chairman of the Workers' Compensation Commission of cancellations pursuant to statute (§ 31-248), as § 31-248 authorized the commission to utilize NCCI to collect notices electronically of policy cancellations and was what the legislature intended when it amended § 31-248; moreover, the fact that G Co. may have believed that it still had insurance because L Co. did not refund the premium until after the date of the plaintiff's injury and sent inconsistent letters stating that the policy may be cancelled if it did not receive certain information, did not support a conclusion that the coverage under the policy continued notwithstanding the cancellation notice, as an employer's belief or understanding as to when coverage is terminated is irrelevant, and the fact that an endorsement was issued in February, 2016, was not inherently inconsistent with the termination of coverage as of November 3, 2015, because coverage remained in effect for any claims that may arise for injuries occurring prior to November 3, 2015.

Argued April 19—officially released August 10, 2021

Procedural History

Appeal from the decision of the Workers' Compensation Commissioner for the Fifth District finding that a certain insurance policy issued by the defendant Liberty Mutual Insurance Company provided coverage for the plaintiff's compensable injury, brought to the Compensation Review Board, which reversed the commissioner's decision, and the named defendant appealed to this court. *Affirmed.*

James P. Brennan, for the appellant (named defendant).

Christopher J. Powderly, for the appellee (defendant Liberty Mutual Insurance Company).

Opinion

BEAR, J. In this workers' compensation matter, the defendant employer, The Grotto, Inc. (Grotto), appeals from the finding and decision of the Compensation Review Board (board), reversing the decision of the Workers' Compensation Commissioner (commissioner), who had determined that Grotto's workers' compensation insurance policy, which was issued by the defendant Liberty Mutual Insurance Company (Liberty), was still in effect on March 1, 2016 (date of loss), the date on which the plaintiff, Laurel B. Bellerive, an employee of Grotto, sustained a compensable injury while at work. On appeal, Grotto claims that (1) Liberty's notice of cancellation of the policy pursuant to General Statutes § 31-348[1] was ineffective because it did not meet

[1] General Statutes § 31-348 provides in relevant part: "Every insurance company writing compensation insurance or its duly appointed agent shall report in writing or by other means to the chairman of the Workers' Compensation Commission, in accordance with rules prescribed by the chairman, the name of the person or corporation insured, including the state, the day on which the policy becomes effective and the date of its expiration, which report shall be made within fifteen days from the date of the policy. The cancellation of any policy so written and reported shall not become effective until fifteen days after notice of such cancellation has been filed with the chairman."

the requirements of General Statutes § 31-321,[2] (2) the board erred in its narrow reading of *Yelunin* v. *Royal Ride Transportation*, 121 Conn. App. 144, 994 A.2d 305 (2010), by adopting the rule that, "after the expiration of the fifteen day period following notice of cancellation only unequivocal evidence of an intent to continue or reinstate coverage would be sufficient to support the commissioner's conclusion that [Liberty's] coverage remained in force on March 1, 2016," (3) the commissioner concluded properly that he had the authority to determine common-law issues when they were incidentally necessary to the resolution of a claim arising under the Workers' Compensation Act (act), General Statutes § 31-275 et seq.,[3] and (4) common-law principles including negligence, misrepresentation, waiver, and estoppel, support the commissioner's finding that coverage was in place on the date of loss. We conclude that the policy was effectively cancelled on November 3, 2015, and, accordingly, we affirm the decision of the board.

The following undisputed facts are relevant to our resolution of this matter. On or about September 15, 2015, Grotto and Liberty entered into a contract for workers' compensation insurance (policy 045), which was scheduled to expire on August 20, 2016. Grotto paid an estimated premium when the policy was issued. On October 13, 2015, Liberty issued a cancellation notice with an effective cancellation date of November 3, 2015, accounting for the fifteen day waiting period required by § 31-348. Liberty's stated reason for the cancellation

[2] General Statutes § 31-321 provides in relevant part: "Unless otherwise specifically provided, or unless the circumstances of the case or the rules of the commission direct otherwise, any notice required under this chapter to be served upon an employer, employee or commissioner shall be by written or printed notice, service personally or by registered or certified mail addressed to the person upon whom it is to be served at the person's last-known residence or place of business."

[3] For the reasons set forth in part II of this opinion, we do not reach this issue.

was Grotto's failure to provide certain self-audit materials. That cancellation notice was filed electronically with the National Council on Compensation Insurance (NCCI).[4] After the November 3, 2015 cancellation date had passed, Liberty continued to send Grotto letters requesting the audit materials that had been the basis of the policy cancellation. Some of those letters indicated that policy 045 "may" be cancelled if the audit material was not promptly received, but others indicated that policy 045 had been cancelled on November 3, 2015. Additionally, on February 18, 2016, Liberty issued an endorsement to policy 045, noting that other than the endorsement changes to policy 045, all other terms and conditions of the policy remained unchanged.

On the March 1, 2016 date of loss, the plaintiff suffered a traumatic injury to her right hand that resulted in the amputation of her index, middle, and ring fingers. That injury was compensable and arose out of and in the course of her employment with Grotto. Subsequent to the claimant's injury, Grotto forwarded incomplete audit material to Liberty, which notified Grotto on March 15, 2016, that the audit materials remained incomplete. Thereafter, Grotto sent Liberty the rest of the necessary audit documentation. Grotto was ultimately sent a prorated portion of its previously paid premium on April 5, 2016.

The plaintiff filed a workers' compensation claim against Grotto on May 6, 2016. Liberty denied coverage for the March 1, 2016 date of loss on the basis of its NCCI cancellation dated November 3, 2015. Grotto had no other workers' compensation insurance. The Second Injury Fund (fund) was made a party to the claim pursuant to General Statutes § 31-355. The commissioner held

[4] The NCCI acts as the insurer's "duly appointed agent" pursuant to § 31-348 for the purpose of notice to the chairman of the Workers' Compensation Commission of policy cancellations.

a formal hearing and, by way of a finding and decision dated May 24, 2019, found that Liberty had coverage in place on the date of loss. The commissioner subsequently granted Grotto's motion to correct, making an additional finding that the cancellation notice to NCCI had not been made in accordance with § 31-321, and denied Liberty's motion to correct.

Liberty appealed to the board, which, by way of a June 10, 2020 decision, reversed the commissioner's decision, finding that there was no coverage in place on the date of loss. Grotto filed a motion for articulation. The board thereafter issued an articulation of its decision with an accompanying memorandum of law dated August 26, 2020. Grotto appealed to this court, but the fund did not appeal the board's decision. Additional facts will be set forth as necessary.

I

Grotto argues that Liberty's notice of cancellation to the NCCI pursuant to § 31-348 was ineffective because it did not meet the requirements of § 31-321. Specifically, Grotto argues that, although the board, in its memorandum of law in support of its ruling on the motion for articulation, "notes lengthy discussions by [the] Workers' Compensation Commission [commission] about § 31-348 . . . it does not state that any 'rules prescribed by the chairman' were adopted. Since the chairman prescribed no rule to overrule the § 31-321 service requirements . . . the [board] erred in failing to hold that the failure to send the notice of cancellation by certified mail rendered the cancellation ineffective." We disagree.

"As a threshold matter, we set forth the standard of review applicable to workers' compensation appeals. The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from

the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . It is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation statutes by the commissioner and [the] board. . . . A state agency is not entitled, however, to special deference when its determination of a question of law has not previously been subject to judicial scrutiny." (Internal quotation marks omitted.) *Yelunin* v. *Royal Ride Transportation*, supra, 121 Conn. App. 148.

In *Yelunin*, this court stated that "[c]ancellation of a workers' compensation insurance policy occurs in accordance with § 31-348. *Dengler* v. *Special Attention Health Services, Inc.*, 62 Conn. App. 440, 459, 774 A.2d 992 (2001). Section 31-348 provides in relevant part that '[t]he cancellation of any [workers' compensation insurance policy] shall not become effective until fifteen days after notice of such cancellation has been filed with the chairman [of the commission].' The only precondition to effective cancellation contained in § 31-348 is that an insurer provide notification to the chairman of the . . . commission. Although notification to the chairman is surely governed by the mandate of § 31-321, there is no independent requirement within the workers' compensation statutory scheme that a workers' compensation insurer provide notification directly to an insured that would serve to trigger the mandate of § 31-321. Indeed, § 31-348 has been interpreted as protecting employees or anyone examining coverage records in the commissioner's office. In that regard, an employer's understanding as to when coverage terminated is largely irrelevant . . . . *Dengler* v. *Special Attention Health Services, Inc.*, supra, 461." (Emphasis omitted; internal quotation marks omitted.) *Yelunin* v. *Royal Ride Transportation*, supra, 121 Conn. App. 149.

Because Liberty was not required to notify Grotto before cancelling its workers' compensation policy, the only pertinent issue with respect to the effectiveness of Liberty's cancellation is whether Liberty's electronic notice to the NCCI pursuant to § 31-348 was sufficient in light of the requirements of § 31-321. We conclude that Liberty's electronic notice to the NCCI was sufficient.

In its memorandum of law in support of its ruling on Grotto's motion for articulation, the board provided a detailed history of No. 90-116 of the 1990 Public Acts (P.A. 90-116), which amended § 31-348 to address the possibility of electronic reporting of policy initiation and cancellation. The board found that it is clear from the legislative history of P.A. 90-116, which was adopted unanimously, that the commission may receive "certain information from the companies and/or their duly appointed agents by writing or other means which technically could mean electronic means, computer or otherwise," and that our legislature had the NCCI in mind when it referenced "duly appointed agents" in § 31-348. Indeed, the board noted that "[a] contract between the commission and NCCI to 'facilitate the exercise of its responsibilities under [§] 31-348' went into effect September 10, 1990," that "[s]ection [two], subsection [four] of this contract directed all insurers to provide notice of policy coverage and termination required under § 31-348 to NCCI, effective January 1, 1991, and that such notice requirements could be met by submission of a computer tape."[5]

We agree with the board that "the commission's longstanding policy of utilization of NCCI to collect notices electronically of compensation policy coverage and

[5] The board further noted that "[i]t is our understanding that NCCI has subsequently modified the manner in which it receives electronic data to conform with the advances in technology."

cancellations is entirely authorized by statute and, indeed, what the General Assembly voted unanimously to have th[e] commission implement." Grotto contends that the policy cancellation in this case was ineffective because there is no "rule prescribed by the chairman," pursuant to § 31-348, that expressly authorizes electronic submission of policy coverage and termination notices. We conclude that Grotto's argument is inconsistent with the intended meaning of § 31-348 as demonstrated by the legislative history set forth by the board. Accordingly, the board properly determined that policy 045 was cancelled effectively on November 3, 2015, and that there was no coverage in place on the date of loss.

II

Grotto argues both that the commissioner has "authority to determine a common-law issue when incidentally necessary to the resolution of a claim arising under the act," and that common-law principles, including negligence, misrepresentation, waiver, and estoppel, "support the commissioner's finding that policy 045 was in effect on March 1, 2016."[6] We conclude that because policy 045 was cancelled effectively prior to the date of loss, and because "an employer's understanding as to when coverage terminated is largely irrelevant"; (emphasis omitted; internal quotation marks omitted) *Yelunin* v. *Royal Ride Transportation*, supra, 121 Conn. App. 149; common-law theories cannot support a finding that coverage was in place on the date of loss under the facts of this case.[7]

[6] Additionally, Grotto argues that the commissioner had jurisdiction to consider evidence outside the records kept pursuant to § 31-348 when determining whether policy 045 was still in effect on the date of loss. That argument responds to one made by Liberty during the proceedings before the commissioner, but the board rejected Liberty's argument, and Liberty does not challenge that aspect of the board's decision in this appeal. Accordingly, we need not consider that claim.

[7] With that conclusion in mind, we need not determine whether the commissioner had jurisdiction to determine common-law issues under the facts of this case.

The board noted in its memorandum of decision that "[t]he commissioner did not specifically articulate the basis for his conclusion that the policy remained in force. He did, however, cite several factors which we must assume formed the factual basis for his conclusion: (1) that [Liberty] did not return any of the premium until after the work injury; (2) that [Liberty] issued an endorsement in February, 2016; and (3) that [Liberty] sent letters saying the policy 'may' be cancelled if [Grotto] did not provide certain information." We conclude that the board determined correctly that none of those facts supports a finding that coverage remained in place on the date of loss.

With respect to Liberty's return of the premium after the date of loss, the board stated that "for the failure to refund the premium to be evidence that Liberty intended its coverage to continue after November 3, 2015, the delay in making the refund would have to be inherently inconsistent with the claimed cancellation. We can find no evidence in the record to suggest that [Liberty] had an obligation to return the unused portion of the premium prior to completion of the various audits." We agree with the board and note that, although the finding that Liberty did not return any portion of the premium until after the date of loss could be relevant to Grotto's claim that it *believed* it still had insurance, "an employer's understanding as to when coverage terminated is largely irrelevant . . . ." (Emphasis omitted; internal quotation marks omitted.) *Yelunin* v. *Royal Ride Transportation*, supra, 121 Conn. App. 149.

With respect to the endorsement to the policy issued on February 28, 2016, we likewise agree with the board that, "[w]hile the receipt of an endorsement from [Liberty] may well have supported the employer's subjective belief that the policy was still in force, it could only be evidence that the policy actually was still in place if the issuance of such an endorsement was logically or

legally inconsistent with the notion that the policy had previously been cancelled. Since the cancellation of this policy did not render it void ab initio, [Liberty's] coverage remains in force and effect for any claims that might arise for injuries occurring prior to November 3, 2015. For the time prior to November 3, 2015, [Liberty] and [Grotto] still have a contractual relationship, with ongoing mutual obligations. As such, the mere fact an endorsement was issued in February, 2016, is not inherently inconsistent with termination of coverage as of November 3, 2015."

Finally, we are not persuaded that the allegedly inconsistent letters sent by Liberty in the months following the notice of cancellation could support a conclusion that the coverage under the policy actually did continue, notwithstanding the November cancellation notice. *Yelunin* is clear that the employer's subjective belief is immaterial, and the record lacks sufficient evidence that Liberty intended to continue or reinstate coverage after November 3, 2015.[8]

The decision of the Compensation Review Board is affirmed.

In this opinion the other judges concurred.

---

[8] Grotto argues that the board erred by "adopting the rule" that "after the expiration of the fifteen day period following notice of cancellation only unequivocal evidence of an intent to continue or reinstate coverage would be sufficient to support the commissioner's conclusion that [Liberty's] coverage remained in force on March 1, 2016." Grotto argues that "[t]he burden of proof in workers' compensation cases is a preponderance of the evidence, not unequivocal evidence of intent." We conclude that, in light of *Yelunin*, Liberty's conduct would not support a finding that coverage remained in place on the date of loss even under the preponderance of the evidence standard.

Cumulative Table of Cases
Connecticut Appellate Reports
Volume 206

(Replaces Prior Cumulative Table)

Allen *v.* Shoppes at Buckland Hills, LLC 284
Negligence; doctrine of superseding cause; claim that trial court improperly instructed jury on superseding cause; claim that trial court improperly instructed jury on statutory (§ 54-1f) duties of off duty police officers; claim that trial court failed to instruct jury on duties owed by possessor of land to invitees.

Bellerive *v.* Grotto, Inc. 702
Workers' compensation; whether Compensation Review Board properly reversed decision of Workers' Compensation Commissioner determining that certain insurance coverage was in effect on date of plaintiff's injury; claim that defendant insurer's notice of cancellation of policy pursuant to statute (§ 31-348) was ineffective because it was not made in accordance with requirements of statute (§ 31-321); whether certain common-law theories supported finding that insurance coverage was in place on date of loss under facts of case.

Boyajian *v.* Planning & Zoning Commission 118
Zoning; whether plaintiffs' failure to appeal from decision of zoning board of appeals that granted application for variance rendered their opposition to planning and zoning commission's decision to grant special permit to same individual based on variance impermissible collateral attack on validity of variance.

Bray *v.* Bray 46
Dissolution of marriage; postjudgment motion for contempt; claim that trial court incorrectly determined that meaning of term "net," as used in parties' separation agreement, was clear and unambiguous; claim that trial court incorrectly determined that separation agreement did not contemplate consideration of defendant's net income to calculate amount of his bonus and stock income that was subject to distribution to plaintiff.

Buehler *v.* Newtown 472
Negligence; motion for summary judgment; claim that trial court improperly determined that no genuine issue of material fact existed as to whether plaintiff was identifiable victim who fell within identifiable person-imminent harm exception to governmental immunity doctrine; whether plaintiff's presence on premises was voluntary.

Capone *v.* Nizzardo 645
Partition of real property; claim that trial court committed plain error when it determined highest and best use of property without reviewing applicable zoning regulations; whether plaintiff met either prong of plain error doctrine; claim that trial court's determination of highest and best use of property was clearly erroneous.

Carrasquillo *v.* Commissioner of Correction 195
Habeas corpus; whether habeas court properly concluded that petitioner was not denied right to effective assistance of counsel; whether trial counsel adequately advised petitioner regarding plea offer.

Charles *v.* Commissioner of Correction 341
Habeas corpus; ineffective assistance of trial counsel; whether habeas court properly determined that petitioner failed to demonstrate that it was objectively unreasonable for trial counsel to pursue defense of third-party culpability instead of self-defense; whether habeas court's factual findings were clearly erroneous; whether habeas court's factual findings amounted to harmless error.

Chief Disciplinary Counsel *v.* Elder 515
Attorney presentment; appeal from judgment of trial court reprimanding defendant attorney; claim that trial court erred in denying defendant's motion to dismiss presentment complaint because reviewing committee took more than ninety days to render its final written decision in contravention of statute (§ 51-90g (c)) and applicable rule of practice (§ 2-35 (i)); claim that trial court erred in denying motion to dismiss presentment complaint because reviewing committee considered allegations outside scope of probable cause determination.

Clark *v.* Waterford 223
Workers' compensation; whether Compensation Review Board properly affirmed decision of Workers' Compensation Commissioner that plaintiff employee's claim for benefits under Heart and Hypertension Act (§ 7-433c) was compensable; whether plaintiff was member of paid municipal fire department eligible for benefits pursuant to § 7-433c while he was employed as part-time firefighter; claim that term "member" in § 7-433c is defined by statute (§ 7-425 (5)).

Cocchia *v.* Testa 634
Breach of contract; personal jurisdiction; motion to dismiss; motion to substitute; claim that trial court improperly denied postjudgment motion to dismiss for lack of personal jurisdiction because defendant was not properly cited in as defendant.

Cooke *v.* Williams 151
Legal malpractice; fraud; ripeness; subject matter jurisdiction; whether claim that defendants provided deficient representation with respect to plaintiff's prior habeas corpus action was ripe for adjudication when plaintiff remained validly incarcerated and his conviction has never been invalidated; whether claim alleging fraudulent and improper fee practices by defendants was ripe for adjudication.

Cruz *v.* Commissioner of Correction 17
Habeas corpus; whether habeas court erred in concluding that counsel's allegedly deficient representation during plea negotiations was not prejudicial; whether habeas court erred in determining that petitioner failed to prove his claim of ineffective assistance with respect to his counsel's representation during his sentencing proceedings; claim that petitioner was entitled to presumption of prejudice pursuant to United States *v.* Cronic *(466 U.S. 648) and* Davis *v.* Commissioner *of Correction (319 Conn. 548) with respect to his ineffective assistance of counsel claim.*

Dunn *v.* Northeast Helicopters Flight Services, L.L.C. 412
Wrongful termination of employment; whether trial court properly granted defendant employer's motion for summary judgment and denied plaintiff's motion for summary judgment; whether undisputed facts raised genuine issue of material fact that defendant violated statute (§ 31-73 (b)) and its underlying public policy that prohibits employers from demanding money from employees as condition of continued employment; whether employer's onetime proposal for potential fee sharing relationship in connection with business that its employee sought to establish separate from his employment with defendant fell within type of coercive behavior § 31-73 forbids.

Fenner *v.* Commissioner of Correction 488
Habeas corpus; dismissal of habeas petition as untimely pursuant to applicable statute (§ 52-470 (c) and (e)); claim that habeas court abused its discretion in denying petition for certification to appeal; whether petitioner satisfied his burden of demonstrating good cause for delay in filing habeas petition.

Frantzen *v.* Davenport Electric 359
Workers' compensation; attorney's fees; claim that Compensation Review Board improperly vacated ruling of Workers' Compensation Commissioner and remanded case for new evidentiary hearing on ground that there was insufficient evidence in record to support commissioner's distribution of attorney's fees; whether board correctly applied appropriate legal standard to its review of commissioner's decision.

Gibson *v.* Jefferson Woods Community, Inc. 303
Foreclosure; motion to dismiss; standing; subject matter jurisdiction; claim that trial court improperly determined that plaintiff lacked standing to seek foreclosure of mortgage and to pursue claim of unjust enrichment; claim that mortgage that plaintiff sought to foreclose had not been extinguished in prior foreclosure action because trial court in that action lacked jurisdiction.

Graham *v.* Commissioner of Transportation 497
State defective highway statute (§ 13a-144); motion to set aside verdict; claim that trial court abused its discretion by refusing to accept jury's initial verdict for plaintiff and by returning jury to continue its deliberations to rectify inconsistency in its verdict; reviewability of claim that interrogatory submitted to jury was confusing and suffered from inartful wording; reviewability of claim that trial court erred with respect to supplemental instruction that it gave to jury before returning jury to continue its deliberations.

Guiliano *v.* Jefferson Radiology, P.C. 603
Medical malpractice; whether trial court abused its discretion by sustaining objections by defendant's counsel to certain questions posed to plaintiff's expert witness on direct examination; whether trial court abused its discretion by imposing time limitation on presentation of witness' testimony; whether time limitation imposed on witness' testimony constituted violation of plaintiff's constitutional rights.

Hasan *v.* Commissioner of Correction 695
Habeas corpus; claim that habeas court improperly dismissed petitioner's third petition for writ of habeas corpus as untimely pursuant to applicable statute (§ 52-470 (d) and (e)); whether petitioner failed to overcome rebuttable presumption that he lacked good cause for filing petition beyond statutory deadline; whether petitioner's assertion of claim of actual innocence and reference to new evidence for first time at show cause hearing were sufficient to overcome presumption that delay was without good cause.

Holloway *v.* Carvalho 371
Probate appeal; appeal to trial court from decree of Probate Court admitting decedent's will; claim that trial court improperly concluded that decedent had testamentary capacity to execute will; claim that trial court improperly concluded that defendant had not exercised undue influence over decedent in securing execution of decedent's will because it failed to assign burden of disproving claim of undue influence to defendant.

In re Annessa J. 572
Termination of parental rights; motion for posttermination visitation; reviewability of respondent mother's unpreserved claims that trial court proceedings to terminate her parental rights held over remote platform violated her state and federal constitutional rights; reviewability of mother's claim that trial court violated her right to due process of law in denying her motion for permission to allow her expert witness to review certain information; reviewability of respondent father's claim that trial court erred in concluding that Department of Children and Families made reasonable efforts to reunify him with minor child; whether sufficient evidence in record supported trial court's conclusion that father failed to achieve personal degree of rehabilitation within a reasonable period of time pursuant to statute (§ 17a-112 (j) (3) (B) (i)); whether trial court erred in determining that termination of father's parental rights was in best interest of minor child pursuant to statutory (§ 17a-112 (k)) factors; whether trial court applied correct legal standard in denying respondent parents' motions for posttermination visitation with minor child, pursuant to statute (§ 46b-121 (b) (1)) and our Supreme Court's decision in In re Ava W. *(336 Conn. 545).*

In re Naomi W.. 138
Child neglect; whether respondent mother's constitutional right to direct health care decisions and religious upbringing of minor child was violated by order of trial court that permitted child to undergo nonemergency surgical procedure despite mother's objection on religious grounds; whether appeal was rendered moot when, during pendency of appeal, child underwent surgical procedure; whether mother's moot claim qualified for review under capable of repetition yet evading review exception to mootness doctrine.

KeyBank, N.A. *v.* Yazar 625
Foreclosure; summary judgment; Emergency Mortgage Assistance Program statutory (§ 8-265ee (a)) notice; whether plaintiff's failure to comply with notice requirement of § 8-265ee (a) deprived trial court of subject matter jurisdiction; whether plaintiff may rely on notice that had been sent by original lender in prior foreclosure action that was later dismissed to satisfy its own notice requirements in separate foreclosure action.

Marshall *v.* Commissioner of Correction 461
Habeas corpus; whether habeas court abused its discretion in denying petition for certification to appeal; whether habeas court improperly dismissed petition for writ of habeas corpus; claim that imposition of term of incarceration and period of special parole constituted two distinct sentences for same offense, violating petitioner's federal and state constitutional rights to be free from double jeopardy.

Mecartney *v.* Mecartney 243
Dissolution of marriage; postjudgment motion for contempt; whether trial court erred in its interpretation of its previous order; whether trial court exceeded its equitable authority in imposing certain conditions in subsequent order to protect integrity of its earlier judgment.

Monts *v.* Board of Education 106
Disability discrimination; claim that trial court erred by failing to charge jury on plaintiff's claim of interference with Family and Medical Leave Act of 1993 (29 U.S.C § 2601 et seq.); claim that trial court erred by admitting letter prepared by plaintiff's coworker into evidence under business records exception to hearsay rule; claim that trial court erred by refusing to admit into evidence certain medical records of plaintiff.

Nikola *v.* 2938 Fairfield, LLC 178
Foreclosure; motion for deficiency judgment; claim that trial court incorrectly concluded that it was not barred by doctrine of res judicata from determining amount of deficiency judgment; claim that certain findings from Probate Court as to amount of deficiency barred further litigation; whether trial court properly included in deficiency judgment certain tax liens paid by plaintiff.

Onthank *v.* Onthank 54
Breach of contract; whether trial court properly concluded that plaintiff substantially complied with notice of default provision of promissory note; claim that trial court erred in its calculation of damages awarded to plaintiff.

Regional School District 8 *v.* M & S Paving & Sealing, Inc. 523
Breach of contract; damages; whether trial court erred in concluding that defendant's unworkmanlike performance proximately caused plaintiff's damages; claim that expert testimony was required to prove defendant's defective work caused damages; whether trial court improperly calculated damages.

Saunders *v.* KDFBS, LLC 92
Foreclosure; judgment of foreclosure by sale; whether trial court erred in determining plaintiff's mortgage had priority over defendant's mortgage; claim that plaintiff had constructive notice of defendant's mortgage; constructive notice doctrine, discussed.

State *v.* Collins 438
Possession of narcotics with intent to sell; motion for mistrial; motion to suppress; whether trial court abused its discretion when it denied motion for mistrial based on claim that police officer gave testimony on ultimate issue of intent; whether, pursuant to State *v.* Nash *(278 Conn. 620), police officer's expert opinion regarding hypothetical suspect's intent to sell drugs based on amount of drugs in suspect's possession constituted testimony on ultimate issue of defendant's intent; whether trial court abused its discretion when it denied motion for mistrial based on claim that police officer gave testimony that contained reference to defendant's prior misconduct; whether trial court properly denied defendant's motion to suppress evidence; claim that police affidavit in support of application for search warrant did not establish probable cause.*

State *v.* Gordon 70
Larceny of elderly person by embezzlement in second degree; claim that trial court improperly admitted into evidence testimonial hearsay statement of victim in violation of defendant's constitutional right to confrontation; claim that defendant was deprived of due process rights when prosecutor engaged in prosecutorial impropriety by making substantive use of testimonial hearsay statement in closing rebuttal argument; whether witness' testimony regarding victim's statement constituted hearsay; whether defendant was harmed by admission of witness' testimony regarding victim's statement; whether this court needed to reach merits of defendant's prosecutorial impropriety claim.

State *v.* Green 253
Assault in first degree; whether this court had subject matter jurisdiction to review merits of trial court's dismissal of defendant's postsentencing motion to withdraw his guilty plea; whether defendant's appeal of dismissal of postsentencing motion to withdraw his guilty plea was justiciable; whether this court should have invoked its supervisory authority pursuant to applicable rule of practice (§ 60-2) to treat appeal of dismissal of postsentencing motion to withdraw defendant's guilty plea as authorized late appeal of his judgment of conviction.

State *v.* Lane 1
Assault in first degree; whether trial court abused its discretion in denying motion to disqualify trial judge; claim that this court should revisit precedent set by State *v.* Milner *(325 Conn. 1) and require recusal of judicial authority when there is appearance of partiality, in absence of actual partiality; whether trial court abused its discretion in admitting photographs of victim's injuries into evidence; claim that photographs of victim's injuries were irrelevant and unduly prejudicial.*

State *v.* Marshall 209
Motion to correct illegal sentence; claim that trial court erred in concluding that defendant was properly sentenced as persistent serious felony offender pursuant to (Rev. to 2007 § 53a-40 (j)); claim that trial court erred in concluding that defendant waived right to jury trial on public interest determination and that he was not required to admit that extended incarceration would best serve public interest; whether trial court properly rejected claims regarding defendant's right to probable cause hearing and revocation of parole because they did not attack defendant's sentence.

State *v.* Morlo M. 660
Assault in first degree; risk of injury to child; unlawful restraint in first degree; whether state failed to prove that defendant caused victim serious physical injury, and, thus, that evidence was insufficient to support conviction of assault in first degree; whether evidence was insufficient to support conviction of risk of injury to child, where defendant was charged under portion of risk of injury statute (§ 53-21 (a) (1)) that required that he have general intent to perform act that created situation that put children's health and morals at risk of impairment; whether evidence was sufficient to support conviction of unlawful restraint in first degree; claim that defendant's intent to unlawfully restrain victim was not independent from defendant's intent to assault victim; whether trial court abused its discretion in admitting evidence of two incidents of prior misconduct in which defendant was alleged to have assaulted victim; claim that probative value of prior misconduct evidence was outweighed by prejudicial effect; claim that prior misconduct evidence was likely to arouse emotions of jurors and sympathy toward victim.

Stevenson *v.* Commissioner of Correction 275
Habeas corpus; whether habeas court properly dismissed petition for writ of habeas corpus pursuant to rule of practice (§ 23-29 (2)); whether habeas court failed to follow procedure outlined in Gilchrist *v.* Commissioner of Correction *(334 Conn. 548); whether it was appropriate for this court to remand case to habeas court with direction to decline to issue writ of habeas corpus; whether habeas petition was amenable to declination under relevant rule of practice (§ 23-24 (a)); claim that petitioner's state constitutional claim was procedurally defaulted because habeas petition was not proper procedural mechanism to pursue that claim.*

State *v.* Santiago 390
Attempt to commit assault in first degree; attempt to commit assault of peace officer; engaging officer in pursuit; whether evidence was sufficient to support defendant's conviction of attempt to commit assault in first degree; whether trial court erred in accepting jury's verdict of guilty of attempt to commit assault of peace officer; claim that this court should overrule its holding in State *v.* Jones *(96 Conn. App. 634) and find that crime of attempt to commit assault of peace officer was not legally cognizable; claim that unpreserved claim was reviewable under principles set forth in* State *v.* Golding *(213 Conn. 233); claim that evidence was insufficient to support defendant's conviction of attempt to commit assault of peace officer.*

State *v.* Williams 539
Sexual assault in second degree; whether trial court deprived defendant of constitutional right to assistance of counsel by allowing him to represent himself; claim that trial court abused its discretion in determining that defendant was competent to represent himself and had made knowing, voluntary and intelligent waiver of right to counsel; claim that trial court was required to advise defendant that he would need to register as sex offender if he were convicted and to ask him or his counsel if he had any mental health issues; unpreserved claim that, because defendant's postcanvass conduct constituted substantial evidence of mental impairment, trial court abused its discretion by failing to order competency hearing or to appoint counsel for defendant after it granted his request to represent himself.

Swanson *v.* Perez-Swanson 266
*Dissolution of marriage; motion to dismiss postjudgment motion for modification of custody; whether trial court erred in determining that it lacked jurisdiction to enter additional orders regarding child custody and visitation pursuant to applicable statute (§ 46b-115*l*).*

U.S. Bank, National Assn. *v.* Fitzpatrick 509
Foreclosure; judgment of foreclosure by sale; whether trial court erred in granting motion to approve sale without newspaper advertisements; motion to terminate stay; mootness; right of redemption.
Villanueva *v.* Villanueva. 36
Breach of contract; implied in fact contract; damages; statute of limitations; whether trial court erred in finding implied partnership agreement between parties; whether trial court erred in concluding that plaintiff provided credible evidence of his damages; whether trial court improperly rejected defendant's special defense that plaintiff's action was barred by three year statute of limitations (§ 52-577).
Warzecha *v.* USAA Casualty Ins. Co. 188
Breach of insurance contract; declaratory judgment; whether defendant had duty to defend and to indemnify plaintiff pursuant to homeowners insurance policy in action alleging negligent infliction of emotional distress; whether trial court erred in rendering summary judgment for defendant.
Your Mansion Real Estate, LLC *v.* RCN Capital Funding, LLC 316
Mortgage release statute (§ 49-8); claim that trial court erred in not dismissing complaint on ground that plaintiff was not aggrieved pursuant to § 49-8 because it did not suffer any damages and, therefore, did not have standing; whether trial court erred in sustaining plaintiff's objection to certain questions asked of defendant's corporate witness concerning whether there existed common practice whereby borrowers recontact defendant if they have not timely received requested mortgage release; claim that trial court improperly rejected special defense that plaintiff had duty to mitigate, but failed to mitigate its statutory damages; claim that § 49-8 (c) was unconstitutional as applied to case in violation of eighth and fourteenth amendments to federal constitution.

RULES OF APPELLATE PROCEDURE

NOTICE

Notice is hereby given that the following amendments to the Rules of Appellate Procedure were adopted on an interim basis to take effect October 1, 2021. The amendments to Section 67-3 were approved on an interim basis by the Supreme Court and Appellate Court on July 28, 2021. The courts have waived the provision of Section 86-1 requiring publication of rules sixty days prior to their effective date.

Attest:

Carl D. Cicchetti
Chief Clerk Appellate

INTRODUCTION

Contained herein are amendments to the Rules of Appellate Procedure. These amendments are indicated by underlined text for added language.

This material should be used as a supplement to the Connecticut Practice Book until the 2022 edition of the Practice Book becomes available.

CHAPTER AND SECTION HEADINGS OF THE RULES

RULES OF APPELLATE PROCEDURE

CHAPTER 67
BRIEFS

Sec.
67-3. Page Limitations; Time for Filing Paper Briefs and Appendices

AMENDMENTS TO THE RULES OF APPELLATE PROCEDURE

CHAPTER 67
BRIEFS

Sec. 67-3. Page Limitations; Time for Filing Paper Briefs and Appendices

(Applicable to appeals filed on or after October 1, 2021.)

Except as otherwise ordered, the brief of the appellant shall not exceed thirty-five pages and shall be filed with the party appendix, if any, within forty-five days after the delivery date of the transcript ordered by the appellant or forty-five days after the clerk appendix is sent to the parties, whichever is later. In cases where no transcript is required or the transcript has been received by the appellant prior to the filing of the appeal, the appellant's brief and party appendix, if any, shall be filed within forty-five days of the filing of the appeal or forty-five days after the clerk appendix is sent to the parties, whichever is later.

The delivery date of the paper—not electronic—transcript shall be used, where applicable, in determining the filing date of briefs.

Any party whose interest in the judgment will not be affected by the appeal and who intends not to file a brief shall inform the appellate clerk of this intent prior to the deadline for the filing of the appellee's brief. In the case of multiple appellees, an appellee who supports the position of the appellant shall meet the appellant's time schedule for filing a brief.

Except as otherwise ordered, the brief of the appellee shall not exceed thirty-five pages, and shall be filed with any party appendix

within thirty days after the filing of the appellant's brief or the delivery date of the portions of the transcript ordered only by that appellee, whichever is later.

The appellant may file a reply brief in accordance with Section 67-5A.

Where there is a cross appeal, the brief and party appendix, if any, of the cross appellant shall be combined with the brief and party appendix, if any, of the appellee. The brief shall not exceed fifty pages and shall be filed with any party appendix at the time the appellee's brief is due. The brief and party appendix, if any, of the cross appellee shall be combined with the appellant's reply brief, if any. This brief shall not exceed forty pages and shall be filed within thirty days after the filing of the original appellee's brief. The cross appellant may file a cross appellant's reply brief in accordance with Section 67-5A.

Where cases are consolidated or a joint appeal has been filed, the brief of the appellants and that of the appellees shall not exceed the page limitations specified above.

All page limitations shall be exclusive of party appendices, if any, the cover page, the table of contents, the table of authorities, the statement of issues, the signature block of counsel of record, certifications and, in the case of an amicus brief, the statement of the interest of the amicus curiae required by Section 67-7.

Briefs shall not exceed the page limitations set forth herein except by permission of the chief justice or chief judge. Requests for permission to exceed the page limitations shall be filed with the appellate clerk, stating both the compelling reason for the request and the number of additional pages sought.

Where a claim relies on the state constitution as an independent ground for relief, the clerk shall, upon request, grant an additional five pages for the appellant and appellee briefs, which pages are to be used for the state constitutional argument only.

COMMENTARY: The purpose of these amendments is to clarify and update the requirements for filers excluded or exempt from electronic filing in light of the new rules regarding electronic briefs and party appendices. This section, as printed, incorporates the amendments that were approved by the Supreme Court on June 15, 2021, and by the Appellate Court on June 16, 2021, which are to take effect October 1, 2021. Only the amendments as marked in this notice are adopted on an interim basis.

NOTICES

Notice of Suspension of Attorney

Pursuant to Practice Book § 2-54, notice is hereby given that on July 14. 2021, in Docket Number HHD-CV21-6141851-S, Francis J. O'Reilly, Juris No. 309909, was suspended from the practice of law for a period of eighteen (18) months, retroactive to October 28, 2020.

The Respondent shall comply with Practice Book § 2-47B (Restrictions on the Activities of Deactivated Attorneys) during the period of suspension.

The court will not appoint a trustee.

Any application for reinstatement shall be made pursuant to the provisions of Practice Book § 2-53.

David Sheridan
Presiding Judge

Notice of Reprimand of Attorney

Pursuant to § 2-54 of the Connecticut Practice Book, notice is hereby given that on July 14, 2021 in Docket Number HHD-CV21-6141301-S, Attorney Lamya A. Forghany, Juris No. 428479, is reprimanded.

David Sheridan
Presiding Judge